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In the Court of Errors and Appeals.

In the Supreme Court.

PLAINTIFF'S WITNESSES.

DEFENDANT'S WITNESSES.

EXHIBITS.

Notice of Appeal.

Filed January 2, 1917.

New Jersey Supreme Court.

ELANOR BURNETT, by next friend, and FRANKLIN P. BURNETT, *Plaintiffs-Respondents,* *vs.* SUPERIOR REALTY COMPANY, a corporation, *Defendant-Appellant.*	*Notice of Appeal.*

To Peter Steinsitz, Esq., Attorney of Plaintiffs-Respondents:

TAKE NOTICE that the defendant appeals to the Court of Errors & Appeals in the Last Resort in all Causes in New Jersey from the whole of the judgment entered in the New Jersey Supreme Court, in this cause.

DANTE RIVETTI,
Attorney of Defendant-Appellant.

JAMES P. MYLOD,
Of Counsel for Defendant-Appellant.

Dated December 26, 1916.

Admission of Service.

Due and legal service of a copy of the within Notice of Appeal is hereby acknowledged this 29th day of December, 1916.

PETER STEINSITZ,
Attorney of Plaintiffs-Respondents.

Grounds of Appeal.

Filed January 31, 1917.

New Jersey Court of Errors and Appeals

ELANOR BURNETT, by next friend, and FRANKLIN P. BURNETT,
Plaintiffs-Appellee,
vs.
SUPERIOR REALTY COMPANY, a corporation,
Defendant-Appellants.

To Peter Steinsitz, Esq., Attorney for Plaintiffs-Appellee:

SIR:

PLEASE TAKE NOTICE that the following are the grounds set forth by the defendant-appellant as the Grounds of Appeal in the above entitled cause:

1. Because the Supreme Court affirmed the refusal of the Essex Circuit Court to grant a nonsuit at the close of the plaintiff's case, although it was error so to do.

2. Because the Supreme Court affirmed the refusal of the Essex Circuit Court to grant a direction of a verdict in favor of the defendant.

3. Because the Supreme Court affirmed the judgment of the Essex Circuit Court, although there was no evidence to support the verdict on which said judgment was based.

4. Because the Supreme Court affirmed the judgment of the Essex Circuit Court, although there was no evidence of any negligence on the part

of this appellant, and no proof of any facts from which negligence might reasonably be inferred.

5. Because the Supreme Court affirmed the judgment of the Essex Circuit Court, although there was no evidence of any breach of duty on the part of this defendant.

JAMES P. MYLOD,
Attorney for and of Counsel with Appellant.

Dated January 29, 1917.

Admission of Service.

Due and legal service of a copy of the within Grounds of Appeal admitted this 29th day of January, 1917.

PETER STEINSITZ,
Attorney for Plaintiffs-Appellee.

Notice of Appeal.

(Filed March 3rd, 1916.)

Essex County Circuit Court

ELANOR BURNETT, by next friend, and FRANKLIN P. BURNETT, *Plaintiffs,* *vs.* SUPERIOR REALTY COMPANY, a Corporation, *Defendant.*	*Action at Law.* *Notice of Appeal.*

To Peter Steinsitz, Esq.,

Attorney of Plaintiffs:

TAKE NOTICE that the defendant appeals to the New Jersey Supreme Court of Judicature of New Jersey from the whole of the judgment entered in this cause.

Dated Newark, N. J., March 3rd, 1916.

DANTE RIVETTI,
Attorney of Appellant.

JAMES P. MYLOD,
Counsel.

Admission of Service.

Endorsed:

ESSEX COUNTY CIRCUIT COURT.

ELANOR BURNETT, by next friend, and FRANKLIN P. BURNETT, *Plaintiffs,* *vs.* SUPERIOR REALTY COMPANY, a Corporation, *Defendant.*	*Action at Law.* *Notice of Appeal.*

JAMES P. MYLOD,
Attorney for Appellant,
738 Broad Street, Newark, N. J.

Service of a copy of the within notice is hereby acknowledged this day of , 1916.
Attorney for Plaintiffs.

Summons.

(Filed Jan. 29th, 1915.)

State of New Jersey, to Superior Realty Company, a corporation.

You are summoned to answer the annexed complaint of Elanor Burnett by next friend and Franklin P. Burnett, in an action at law in the Essex County Circuit Court, and take notice that unless you file your answer to said complaint with the clerk of the said court at Newark, within twenty days after service upon you of this writ and the annexed complaint, the plaintiffs may proceed in the suit and judgment may be entered against you.

Witness, Frederic Adams, Judge of the Essex County Circuit Court at Newark, this day of January, nineteen hundred and fifteen.

JOSEPH McDONOUGH,
Clerk.

PETER STEINSITZ,
Attorney for Plaintiffs.

Complaint.

ESSEX COUNTY CIRCUIT COURT.

ELANOR BURNETT, by next friend, and FRANKLIN P. BURNETT, *Plaintiffs,* *vs.* SUPERIOR REALTY COMPANY, a Corporation, *Defendant.*	*Action at Law.* *Complaint.*

Plaintiff Elanor Burnett, an infant under the age of twenty-one years, by Franklin P. Burnett, admitted to prosecute this cause as next friend of said Elanor Burnett, and plaintiff Franklin P. Burnett, both residing in Newark, New Jersey, say:

FIRST COUNT.

1. Defendant is a corporation organized under the laws of the State of New Jersey and is the owner of premises known as 153 Peshine avenue, Newark, New Jersey.

2. As owner of said premises it was the duty of said defendant to keep the yard and curtilage belonging to premises aforesaid free and unoccupied by any lumber, boxes, or any other obstruction in order to insure the safe use of said yard and curtilage by the tenant occupying said premises.

3. On November twenty-sixth, nineteen hundred and thirteen, plaintiffs were tenants occupying a flat in said premises.

4. The defendant by its agents and employes on November twenty-sixth, nineteen hundred and thirteen, negligently and wrongfully left and permitted to remain a certain mortar box in said yard and curtilage of said premises so as to unlawfully obstruct said yard and curtilage and by making the same unsafe and dangerous to the tenants and persons using said yard and curtilage.

New Jersey Court of Errors and Appeals

ELEANOR BURNETT, by next friend, and FRANKLIN P. BURNETT, *Plaintiffs-Respondents,* *vs.* SUPERIOR REALTY COMPANY, a corporation, *Defendants-Appellants.*	*Action at Law.* *On Appeal from Supreme Court.*

Brief for the Respondents

This appeal brings up a judgment of the Supreme Court affirming a judgment of the Essex Circuit Court recovered by the plaintiff, an infant of tender years, rendered upon the verdict of a jury for damages sustained from an accident.

Statement of the Facts

The plaintiff, at the time of the accident, was a little over two years old. She was injured in the back yard of the tenement house where she lived with her parents on the ground floor, by a mortar box, about six feet long and four feet wide, weighing about four hundred pounds, falling over upon her. No one saw the accident, or saw the box fall, but the child was heard to scream and she was found lying flat on the ground, upon her face with the box lying over her.

(A photograph of the mortar box, will be found at page 134, State of Case, Plaintiffs' Exhibit, No. 1.)

The defendant, appellant, is the owner of the premises upon which the accident happened. The property was managed by a corporation known as

the Progressive Investment Co., engaged in the real estate business. This second corporation, as agent for the appellant, managed and controlled the house and apartments, collected the rents and generally attended to the details. It had an agent, Rashkober, who looked after the premises for it, collected rents, rented the apartments, etc. He lived next door to this tenement house. There was also a janitress living in the building, Mrs. Liese, who seems to have had authority in and about the renting, showing the rooms and making the preliminary negotiations, even if she did not actually make the leases.

Argument

The appellant sets forth five grounds of appeal, State of Case, page a2.

But they are all included in the two principal grounds and are covered by them, viz:

The refusal to grant a non-suit and the refusal to direct a verdict for defendant-appellant.

Ground 3, that there was no evidence to support the verdict, ground 4, that there was no evidence of negligence on the part of appellant, ground 5, that there was no evidence of breach of duty on the part of appellant, are clearly covered by grounds 1 and 2.

These points are fully considered and completely answered in the opinion of Mr. Justice Parker, Supreme Court (State of Case, pp. 139-144).

The two important questions in the case, as is pointed out in the opinion, are:

1st. *Was there evidence upon which the jury could find that the infant plaintiff was invited by appellant, the owner, to use the yard in which the accident happened, to play in, or was there evidence from which the jury could find that the rooms were rented with a specific privilege of the yard for the children?*

2nd. *Was the fall of the box and the consequent injury of plaintiff-respondent due to negligence that could be brought home to the appellant company, for which it was responsible?*

There was evidence from which the jury might properly infer that the box had been stored in the yard upon its edge, so that it might easily fall in the manner it did fall upon its side.

The box was nearly in the center of the yard. There was nothing near it by which it might have been supported in an upright position. The jury had a right to infer that the box was not flat upon the ground immediately before the child was injured. The child, two years old, could not have raised the mortar box, weighing 400 pounds, and have gotten under it. No one else was in the yard at the time of the accident. The box must have been standing upon its narrow edge, in such a position that it fell over itself. The child was found under the box, only its hair sticking out. The box was too large and heavy for the child to lift. May Liese testifies, "I was in the alley and heard a crash. I looked over the fence and all I could see was Eleanor's hair sticking from under the box" (Case, p. 20). The child was bruised all around its left side and its leg was broken.

From these facts, is it not the reasonable—nay the irresistible—inference, that the box was standing on its side, its narrow edge, and fell over on the child. If it was so standing it was in a dangerous position, and the leaving it in such a position in a yard where children were as tenants, or by invitation, was gross negligence.

THERE WAS EVIDENCE THAT THE BOX WAS IN THE YARD THE DAY BEFORE THE ACCIDENT.

Mr. Burnett (Case, p. 22, l. 8), testifies that he saw it there Tuesday afternoon about a quarter to five. The accident happened Wednesday after-

noon, the day before Thanksgiving (testimony of Mrs. Eleanor Burnett, Case, p. 9, top), at 4.30 (Case, p. 19, l. 8). Isadore Weissman testifies that he directed his man to put the box in the yard, the day of the accident (Case, p. 100, l. 27).

From this evidence, the jury, if they believed Burnett, as they had a right to do, could properly have found, as they must have found, that the box was placed in the yard Tuesday afternoon.

There was proper evidence on this point for the jury.

THERE IS EVIDENCE TO JUSTIFY THE JURY IN FINDING, EITHER THAT PLAINTIFF WAS INVITED TO USE THE YARD, OR THAT THE ROOMS WERE RENTED WITH A SPECIFIC PRIVILEGE OF THE YARD FOR THE CHILDREN.

1st. *As to the lease of the yard.*

The Supreme Court held that it sufficiently appeared as a jury question that the rooms were rented to the Burnetts with a specific privilege of the yard for the children.

Opinion, Case, p. 14, bottom.

This conclusion is abundantly supported by the evidence.

Mr. Burnett testifies (Case, p. 30, l. 24), that he went with his wife to rent the apartment, in the evening, that Mrs. Liese (the janitress), took a lighted lamp or candle out in the yard and showed the yard to him and his wife. At p. 22, l. 26, he testifies that before the accident he said to Rashkober, the agent, "When I hired the house, I had Mrs. Liese (the janitress), take a lamp and show us the yard. A little boy was hurt when we lived on the second floor and that is what I hired this yard for." It does not appear that Rashkober in any way denied or objected to this assertion of the nature of the tenancy.

Mrs. Burnett testifies (Case, p. 13, l. 30), "I rented the first floor on purpose to have the yard for the children. I told the janitress that I wanted the first floor; she told me I could have the second. I told her that I wanted the first on account of the children; that I was just moving from a second floor." She testifies, p. 14, top, that she rented the house from Mrs. Liese.

This evidence is uncontradicted; the jury was justified in finding (as the Supreme Court says), that the lease of the apartment was with the specific right to use the yard.

2nd. *As to the invitation to use the yard for the children.*

There was evidence to justify the jury in finding such invitation.

Rashkober, the agent of appellant, testifies (Case, p. 95, l. 10), that the children can play in the yard, that while he did not give Mr. Burnett express permission, he saw his children playing in the yard, and on page 96 he testifies in answer to the express question, "But the children can play in the yard with your permission?" "A Yes, sir." The Court, "He said that before." Mr. Mylod, "We admitted, too."

Here is an express statement on the part of the agent and an express admission on the record by counsel for the appellant, that the children were permitted to play in the yard.

This statement carries with it more than a mere license. The children had the permission of the agent to use the yard. It was not a mere acquiescence without remonstrance. They were expressly permitted.

Mrs. Liese, the janitress, seems to have had power to rent the apartments. All the evidence is that the Burnetts in renting dealt directly with her. There is no evidence that they dealt with Rashkober, until it came to paying the rent.

RASHKOBER WAS THE AGENT OF THE SUPERIOR REALTY COMPANY, THE APPELLANT, AND NOTICE TO HIM WAS NOTICE TO THE OWNER.

The evidence is that Rashkober was the agent of the Superior Realty Company, the appellant, for collecting rents, making repairs, whatever was necessary to take care of the property.

See testimony of Myer Krasner, president of appellant company (Case, p. 23, bottom).

Burnett was told at the office of the Progressive Investment Company, that Rashkober was the agent (Case, p. 28, l. 30).

Where the scope of authority of a servant or agent depends upon disputed matters of fact, the extent of such authority is ordinarily a question for the jury.

Dierkes vs. *Hauxhurst Land Company,* 80 N. J. L., 369.

The facts in that case from which authority was inferred are of the same general character as the facts in this case, and authority and agency could properly be from the proven and uncontradicted facts in this case.

THERE WAS EVIDENCE FROM WHICH THE JURY WERE JUSTIFIED IN FINDING THAT THE AGENT, RASHKOBER, WAS NOTIFIED OF THE PRESENCE OF THE BOX IN THE YARD AND OF ITS DANGEROUS NATURE, THE DAY BEFORE THE ACCIDENT HAPPENED.

Burnett, the father of the child, testifies (Case, p. 22), that he first saw the box Tuesday afternoon about a quarter to five. That he then spoke to Mr. Rashkober, the agent of the apartment, about it. He said to him, "Here is a box weighs about 400 pounds lies in the yard now." "I want this

stopped." He further says that Rashkober said, "I will go up and see Weissman." It further appears that Rashkober did go up and speak to Weissman about the box. This was twenty-four hours before the accident and gave to the agent of the company ample time to remove the box or to make it safe. Mr. Rashkober testifies that this occurred immediately after the accident, that Mr. Burnett told him about the accident and he then saw Mr. Weissman.

Here was conflicting testimony as to a particular fact, it was particularly a question for the jury to pass upon this evidence, and their finding, as they must have found, that notice was given as Burnett testifies, is final on this appeal.

The jury were entitled to find that the box came into the yard on Tuesday afternoon, twenty-four hours before the accident, that Burnett, the father, saw the box, and complained almost immediately to Rashkober, the agent, who lived next door. That Burnett then said to Rashkober, "Here is a box weighs about 400 pounds lies in the yard now, I want this stopped. When I hired the house, I had Mrs. Liese, the janitress, take a lamp and show us the yard. A little boy was hurt when we lived on the second floor, and that is what I hired this yard for." That Rashkober said, "I will go up and see Weissman." That he came back and said that he had told Weissman that he wanted this stopped.

There was also evidence that Burnett had complained to Rashkober some time before, when Weissman first began to put lumber and implements in the yard, but the conversation relative to the box was when the box came in.

From all this evidence the jury was certainly entitled to find, as they did find; and the evidence was such that the trial judge properly at the close of the evidence left to the jury to pass upon the facts. Upon this evidence a verdict could not have been directed for the defendant.

THE ONLY REMAINING QUESTION IS AS TO THE REASONABLENESS OF THE NOTICE.

Rashkober, the agent of the appellant, present on the ground, had twenty-four hours' notice of the dangerous condition and position of this box before the accident happened. He could readily have removed the danger at once, by either removing the box or placing it in a safe condition, where it would not fall. It could not be doubted that the jury were justified in finding that there was an unreasonable delay in removing the box or rendering the yard safe.

The only questions raised by this appeal are as to the action of the trial judge in refusing the nonsuit, and the direction of a verdict for the defendant.

Even if we consider that the motion for a nonsuit might have been granted for failure of proof, the defect was supplied in the evidence afterwards adduced, and the error in refusing to grant the nonsuit, if error there was, should not lead to reversal.

Esler vs. *Camden Ry. Co.*, 71 N. J. L., 180.
Clitch vs. *Betts*, 98 Atl., 427.

Under the evidence adduced, all of these questions, viz.; the right of the plaintiff-respondent in the yard, the dangerous position and nature of the box, the agency of Rashkober and Mrs. Liese, the notice to Rashkober, his agency and the liability of the appellant for his negligence in failing to remove or make safe the yard, were jury questions. The motion for the non-suit and the motion to direct were properly denied.

The judgment of the Supreme Court should be affirmed with costs.

Respectfully submitted,

HERBERT BOGGS,

Counsel for Respondent.

5. In consequence of the negligence and improper conduct in permitting the said mortar box to obstruct said yard and curtilage and while the said plaintiff, Elanor Burnett was lawfully using said yard and curtilage on said November twenty-sixth, nineteen hundred and thirteen, the said mortar box without any fault or cause on her part fell upon her, thereby causing her great injuries by breaking her left leg in two places between the knee and ankle.

6. By reason of which the said plaintiff Elanor Burnett became sick, sore, lame and disordered and so remained from thence hitherto and will in the future so continue to undergo and suffer great pain.

Plaintiff Elanor Burnett, by said Franklin P. Burnett, her next friend, demands three thousand dollars ($3,000.00) damages.

SECOND COUNT.

1. Plaintiff Franklin P. Burnett is the father of said plaintiff Elanor Burnett.

2. The plaintiff Franklin P. Burnett claims damages in his own right arising out of the negligence and wrongful and improper conduct of the defendant herein mentioned and set forth, whereby the said Elanor Burnett, his infant daughter, was greatly bruised, hurt and disfigured and permanently injured and became sick, sore, lame and disordered; and by reason thereof said Franklin P. Burnett lost and was deprived of the services of his said daughter and that he will be deprived of the same in the future.

3. The plaintiff Franklin P. Burnett was and will be compelled to lay out and expend a large sum of money for medicine and medical aid in endeavoring to cure said Elanor Burnett of injuries received aforesaid.

The plaintiff Franklin P. Burnett demands two thousand dollars ($2,000.00) damages.

PETER STEINSITZ,
Attorney of Plaintiffs.

Answer.

Filed February 16, 1915.

ESSEX COUNTY CIRCUIT COURT.

ELANOR BURNETT, by next friend, and FRANKLIN P. BURNETT, *Plaintiffs,* *vs.* SUPERIOR REALTY COMPANY, a corporation, *Defendant.*	*Action at Law.* *Answer.*

Defendant residing in the City of Newark, Essex County, New Jersey, says:

1. Defendant denies the truth of the allegations contained in the second, fourth, fifth and sixth paragraphs of the first count set forth in the plaintiffs' complaint herein.

2. Defendant denies the truth of the allegations contained in the second and third paragraphs of the second count set forth in the plaintiffs' complaint herein.

FOR A SEPARATE DEFENSE TO EACH OF THE COUNTS CONTAINED IN PLAINTIFFS' COMPLAINT.

1. Defendant alleges that any injury sustained or suffered by said plaintiff, Eleanor Burnett, at the time or on the occasion in the complaint referred to were caused or contributed to by the negligence and want of care of said plaintiffs and each of them, and not by any negligence, default or want of care on the part of the defendant or on the part of its agents, servants and employees.

DANTE RIVETTI,
Defendant's Attorney.

Judgment.

ESSEX COUNTY CIRCUIT COURT.

26204
No. 419

ELEANOR BURNETT, by next friend, FRANKLIN P. BURNETT, *Plaintiff,* *vs.* SUPERIOR REALTY CO., *Defendant.*	*Action at Law.* *Judgment Entered February 18th, A. D. 1916.*

Damage	$600.00
"	200.00
Costs	82.25
Total	$882.25

Peter Steinsitz, attorney of plaintiff.

Judgment after verdict in the above entitled action at law was rendered on the eighteenth day of February, A. D. nineteen hundred and sixteen, in favor of the said plaintiff, Eleanor Burnett, and against the said defendant, Superior Realty Co., for the sum of six hundred dollars damage and also find in favor of the said plaintiff, Franklin P. Burnett and against the defendant, Superior Realty Company, for the sum of two hundred dollars damage and the sum of eighty-two dollars and twenty-five cents cost of suit.

Judgment entered and signed February 18th, A. D. 1916.

WM. S. GUMMERE,
Judge.

(Book 93, page 347.)

ESSEX CIRCUIT COURT.

ELEANOR BURNETT, by friend, *et al.*,
vs.
SUPERIOR REALTY COMPANY.

Transcript of shorthand notes of testimony taken in the above stated cause, upon the trial thereof, at the Court House, Newark, N. J., February 17, 1916.

Before Hon. Nelson Y. Dungan, Judge, and a jury.

Peter Steinsitz for plaintiff.

Dante Rivetti and James P. Mylod for defendant.

Mr. Steinsitz opened for the plaintiff.

Mr. Mylod. On the opening of counsel, and the pleadings, I ask for a non-suit, on the ground that the pleadings do not state a cause of action, and that the opening of counsel does not state a cause of action.

The Court. The opening was not taken down, and evidently counsel has misapprehended the purpose of an opening. I will decline to grant the non-suit on the opening.

Mr. Mylod opened for the defendant.

ELEANOR BURNETT, sworn for the plaintiffs.

Direct examination by Mr. Steinsitz.

Q Mrs. Burnett, you are the mother of Eleanor Burnett?

A Yes, sir.

Q And where did you live in November, 1913?

A No. 153 Peshine avenue.

Q Do you remember an accident happening to the child in November of that year?

A Yes, sir.

Q Do you remember the date?

A I don't remember the date.
Q About when was it?
A It was the day before Thanksgiving.
Q If you know, how did this accident happen?

Objected to.

The Court. You had better ask her that question first.

Q Did you see this accident?
A No, sir.
Q How was your attention directed to it?
A By the cries of the girl next door, calling for her mother.
Q What did you do?
A I ran out, probably I thought she had got over the fence, and got—
Q Not what you thought, what did you do?
A I ran out, and she said, "Look at the baby."
Q Where did you go?
A I went out to the mortar box.
Q Where was the mortar box?
A In the middle of the yard.
Q Where did you find the baby?
A Underneath the mortar box.
Q In what position?
A Lying on her back, and only the hair sticking out from under the mortar box.
Q What did you do?
A I and the witness raised the box up, and drawed her out with my other hand.
Q Then what did you do?
A I came on the porch.
Q Did you send for the doctor?
A I screamed, and the lady upstairs called the doctor.
Q Did you see this mortar box before?
A No, sir.

Cross examination by Mr. Mylod.

Q What is the name of the lady upstairs that called the doctor?

A Mrs. Fannie Weisman.

Q You say you never saw that box before?

A No, sir.

Q What floor do you live on in that house?

A First floor, on the outside.

Q Then you have a window looking out into the back yard?

A Yes, sir.

Q Did you ever see any box similar to that in the back yard, on that day, or any other day?

A I didn't catch that.

Q I say did you ever see a box similar to that in the back yard?

A No, sir.

Q Never did?

A No, sir.

Q The yard was always kept clean up to that day, wasn't it?

A No, sir.

Q But you never saw any box in there before that?

A No, sir.

Q Single box. Do you recall talking to Mr. Rashkober the day of this accident?

A No, sir.

Q Do you recall talking to Mrs. Liese on the day this accident happened?

A Only when the child was hurt she asked me to look at the head.

Q Now, did you say anything to Mrs. Liese with reference to the box which was in the back yard?

A No, sir.

Q You said nothing at all with reference to the box?

A No, sir.

Q Did a man call at your house from the landlord

about a month after this accident happened, and talk with you about the accident?

A I did not get that.

Q I say did a man from the landlord call at your home and talk with you regarding the accident?

A The indemnity company called, yes, sir.

Q And what did you tell him about seeing that box before?

A I didn't tell him anything about seeing the box before.

Q He didn't ask you whether you had seen it before or not, did he?

A No, sir.

Q And you said nothing about the box to Mr. Rashkober?

A No, sir.

Q Now, did you talk to Mr. Weissman about this box?

A No, sir.

Q Do you know Isadore Weissman?

A Yes, sir.

Q He lived in the same house with you, didn't he?

A Yes, sir.

Q And he was a tenant in that house?

A Yes, sir.

Q And you saw him the same day of the accident, didn't you?

A No, sir.

Q Have you seen him, or talked to him about this accident, since the accident?

A No, sir.

Q Now, as a matter of fact, you know he brought that box in there, or had one of his men bring it in, don't you?

A He said the day after the accident that two men brought the box in, but he wasn't on the premises.

Q Where were you when he said that?

A I was in the kitchen holding the baby.

Q What did you say to him then?

A I didn't say anything. He asked me if I seen it brought in, and I said no.

Q And then he told you that his men brought it in five minutes before the accident happened, didn't he?

A Yes, sir.

Q Now, you did talk with Mr. Weissman about this box, didn't you?

A The day after the accident.

Q Now, will you try and refresh your memory, and see if you talked with this man about the box. (Directing a man in the court room to stand up.)

A I remember seeing the gentleman.

Q Do you remember whether you told him when you first saw that box?

A No, sir.

Q Now, will you try again and recall whether or not you mentioned anything about the box to Mrs. Liese?

A No, sir, I don't remember.

Q You may have. You may have told Mrs. Liese that the box was put in the yard by Mr. Weissman's men about five minutes before the accident happened?

A I don't remember.

Q It is possible that you did tell her that, is it?

A I don't remember.

Q Well, that is what Mr. Weissman told you, that his men just brought the box in, and the accident happened; isn't that what Mr. Weissman told you?

A What he said.

Q He also told you he was going to chop the box up for firewood, didn't he?

A No, sir; he didn't.

Q I say he told you he was going to chop it up for firewood?

A I don't remember.

Q What is the name of the girl next door?

A May Liese.

Q Was there anything near the box when you went out and saw the box lying on the ground, and the child under the box?

A No, sir.

Q Was there any shovel, or picks or tools of any kind?

A No, sir.

Q Were there any posts, poles?

A No, sir.

Q Right out in the center of the yard?

A Yes.

Q About an equal distance from the fence, from either of the fences, from the back of the house?

A Between the middle of the yard.

Q Right in the middle of the yard, and nothing near it?

A Nothing near it.

Q No clothes poles, or anything?

A No, sir.

Q And it was lying down flat?

A Yes, sir.

Q And there were no sticks near it?

A Nothing at all.

Q What is the name of the lady who called the doctor?

A Fannie Weisman.

Q You simply used this yard; you were never told to use it, were you?

A Well, I never was told, but I rented the first floor on purpose to have the yard for the children.

Q But you said nothing about having the yard for the children when you rented the floor, did you?

A I took the first floor for the children. I told the janitress that I wanted the first floor. She told me I could have the second. I told her I wanted the first on account of the children; that I was just moving from a second floor.

Q From whom did you rent this house? Mrs. Liese, Mr. Rashkober, or the company direct?

A I rented it from Mrs. Liese.

Q How long did you live there?

A Going on three years.

Q How long had you lived there prior to this accident?

A About a year.

Q The yard was kept clean?

A No, sir.

Q Did you have only one talk with Mr. Weisman about placing this box in the yard?

A Yes, sir.

Q And that is the talk you have just told us about?

A Yes, sir.

Re-direct examination.

Q Were there any other obstructions in the yard?

Mr. Mylod. Objected to. It makes no difference about the other instructions. The negligence alleged is leaving a certain mortar box on a certain day.

The Court. It is quite immaterial whether there were other obstructions in the yard at other times. I sustain the objection. You may have an exception noted, if you desire it.

Q Mrs. Burnett, how long was Eleanor sick?

A From the day before Thanksgiving until the 7th day of March before she walked.

Q And the doctor called there all this time?

A Yes, sir.

Mr. Mylod. Objected to as not re-direct.

The Court. You should have exhausted your witness upon direct examination. Is this re-direct examination.

Mr. Steinsitz. Yes, sir.

Eleanor Burnett, re-cross.

Recross examination.

Q What was the name of your doctor?

A Dr. Stearns.

Q How many calls did Dr. Stearns make?

A I don't remember. He called from the time of the accident. He put the shoe on I had made for the baby the 7th day of March.

Q Did he put the shoe on—

The Court. If you are going into that upon cross examination, I shall permit this direct examination. He only asked one question. If you are going into a general cross examination on what doctor was called, and the nature of her injuries, then I will permit the other side to ask the general questions. The court will permit you to put other questions which you had in mind, if you desire to do so. You are not required to do it if your proof can be as well put in by other witnesses.

By Mr. Steinsitz.

Q Now, Mrs. Burnett, does the child still complain to you of any pain at the present time?

A Yes, sir.

Q Particularly where?

A From the hip down to the ankle.

Q And the doctor has perscribed a lift to you, a lift on the shoe?

A Yes, sir.

Q And the child uses that lift?

A Yes, sir.

Q And has it on now?

A Yes, sir.

By Mr. Mylod.

Q Now, will you please tell me the number of times Dr. Stearn called to treat this child?

A I don't remember how many times.

Q Have you any idea?

A No, sir. He used to run in two times a day, sometimes three, just according how the child was. The fore part of the accident he used to come in three times a day.

Q And that three times a day continued how many weeks after the accident?

A I don't remember.

Q Was he coming three times a day around Christmas time?

A I don't remember.

Q Well, can't you recall for about how long after the accident he continued to call two or three times a day?

A I don't.

Q You know that he did call three times a day?

A Yes, sir.

Q Have you received his bill?

A Yes, sir.

Q Have you paid the bill?

A No, sir.

Q What is the amount of the bill?

A $100.

Q Have you got the bill with you?

A The lawyer has it.

Q Now, all that was the matter with the child was the broken leg, isn't that true?

A She was bruised on the shoulder and neck, and also on her back.

Q Has not the doctor told you that the child suffers no ill effects from the accident at the present time?

Mr. Steinsitz. Objected to as to what the doctor tells her.

The Court. I sustain the objection.

Q Now, you also had another doctor beside Dr. Stearn, hadn't you?

A Yes, sir.

Q And what is that doctor's name?

A Dr. McBride.

Q Have you received Dr. McBrides' bill?

A No, sir.

Q When did Dr. McBride first treat the child after the accident?

A About four weeks ago; three weeks ago I called him in.

Q That is the first time that you called Dr. McBride since the accident occurred, three weeks ago?

A Yes, sir.

Q And you called him in to treat the child for what purpose, for what complaint?

A A heavy cold.

Q Did Dr. McBride treat the child on account of this accident at all?

A No, sir.

Q Now, what doctor prescribed the lift that you say the child is supposed to wear?

A Dr. McBride.

Q Then did not the doctor treat the child on account of this accident?

A No, sir.

Q How did he happen to prescribe the lift for the child?

A Because I showed him that the child's leg was not right; told him to make an examination to see what was the matter, that she was walking with a limp, complained of her leg.

Q Then you were not satisfied with Dr. Stearn's treatment, were you?

A Well, he was treating her for the broken leg, but this is the after.

Q The other leg?

A No, I said the after.

Q (*By the Court.*) After effect, I suppose?

A After effect.

Q (*By Mr. Mylod.*) Now, this child was bow-legged before the accident, isn't that correct?

A I don't know; I never noticed; I thought she was a perfect child.

Q Dr. Stearn lived right nearby, didn't he, down on Peshine avenue, at the time?

A Yes, sir.

Q What number did he live at?

A I don't remember his number.

Q He used to walk from his office to your house, didn't he?

A Yes, sir.

Q When did Dr. Stearn last see the little girl for the purpose of treating her?

A I don't remember.

Q You say you sent for Dr. Stearns to treat the child?

A Yes, sir. He is the doctor I had when she was born.

Q When she was born?

A The 8th day of November, 1911.

Q Just about two years old when this accident happened, eh?

A Two years and a few days.

Q How long had the child been out in the yard alone that afternoon?

Objected to.

Objection overruled.

Exception to plaintiff.

A Only a few minutes.

Q Did you take her out and put her in the yard?

A No, sir.

Q Who brought her out?

A I sat her on the porch and went in the kitchen.

Q Was she able to toddle down the steps?

A There is only one step in the yard; she could get down the step.

Q Did you stand on the back porch while she walked out in the yard?

A No, sir, I didn't; I was in the kitchen.

Q You opened the kitchen door?
A The kitchen door was open.
Q And the child walked out of its own accord?
A She was.
Q Wasn't it dark?
A It was not, it was half-past four in the afternoon.
Q Late in November?
A It wasn't dark, because I had been down in the cellar for coal.
Q And it was light when you opened the back door?
A Yes, sir. I had no light in the kitchen.
Q Could you look all the way down to the fence?
A Yes, sir.
Q There was no box there?
A No, sir.
Q (*By the Court.*) How far from your kitchen door was the box?
A I should judge about 5 feet.
Q (*By Mr. Mylod.*) When you put the little girl out there do you mean to say there was no box there?
A I didn't notice the box.
Q That is what you mean, you didn't notice it?
A Yes, sir, I didn't notice the box.
Q You don't know whether it was there or not?
A I don't remember. I know it wasn't.
Q This box was directly in the rear of the porch?
A Yes, sir. I said I didn't see the box out there.
Q Well, do you know whether the box was there or not?
A I don't know whether the box was out there or not.

By Mr. Steinsitz.

Q When you went out and saw Eleanor and the box, how near the fence was the box?

Mr. Mylod. Objected to. That has been gone over in direct and cross. She said the box was in

the center of the yard, equally distant from the fence and the rear of the house.

The Court. You may ask the question.

A It was in the middle of the yard, I judge about 3 feet from the fence.

Q About 3 feet from the fence. That is all.

MAY LIESE, sworn for the plaintiffs.

Direct examination by Mr. Steinsitz.

Q Miss Liese, do you remember this accident?

A Yes, sir.

Q How was your attention called to it?

A No, sir.

Q How, I say? How did it come to your attention?

A In the alley I heard a crash, I looked over the fence, and all I could see was Eleanor's hair sticking from underneath the mortar box.

Q How near the fence was the mortar box?

A About in the center of the yard; it wasn't very near the fence; it was about in the center.

Q How near the fence is that, about, in feet?

A I could not say.

Q Where do you live?

A No. 155.

Q That is right next door?

A Right next door.

Q Did you see this mortar box the day before the accident?

A No, sir; I didn't see it the day before the accident.

Q You didn't see it?

A No, sir.

Q Did you go in this very yard the day before?

A No, sir.

Q You don't know whether it was there the day before?

A No.

May Liese, cross.

Q I show you a picture and ask you whether you recognize the mortar box. Is this the box?

A Yes, sir.

Mr. Mylod. Objected to. I don't think that is the proper way to prove the photograph.

Mr. Steinsitz. I am not offering it in evidence; just mark it for identification at present.

The Court. It may be marked for identification.

Said picture marked P-1 for identification.

Cross examination by Mr. Mylod.

Q What floor do you live on next door?

A First floor.

Q Can you see across the fence in the next yard from where you live?

A Not exactly across, I am not as tall as the fence, I can't see over the fence.

Q You had never seen the box in the yard before, had you?

A No, sir.

FRANKLIN W. BURNETT, sworn for the plaintiffs.

Direct examination by Mr. Steinsitz.

Q Mr. Burnett, you are the father of Eleanor Burnett?

A Yes, sir.

A And also one of the plaintiffs in this suit?

A Yes, sir.

Q Did you see this accident?

A No, sir, I did not.

Q Do you know when—did you ever see this—I will show you the picture and ask you whether you recognize this mortar box?

A Yes, sir.

Q What is that?

A Mortar box.

Q Is that the box that caused the injury?

A That is the box which stood—my wife told me she took the baby from under it.

Q Never mind that. When did you first see that box?

A Tuesday afternoon.

Q Tuesday afternoon?

A About quarter to five.

Q And when you saw it, after you saw it, what did you do?

A I went to the end of the porch and asked Mr. Rashkober's daughter if her father was in.

Q Who is Mr. Rashkober?

A The agent of the property.

Q Did you speak to him?

A I did. I called him; he came.

Q And what did you say to him?

A I said to him, "Here is a pile of lumber in the yard, about three loads of lumber, nine wheelbarrows, a harrow, a plow, a cultivator, and some kind of piece of machinery"; and I says, "Now, they have taken the whole yard," I says, "Here is a box weighs about 400 pounds lies in the yard now," I says, "I want this stopped. When I hired the house I had Mrs. Liese, the janitress, take a lamp and show us the yard." I said, "A little boy was hurt when we lived on the second floor, and that is what I hired this yard for." He said, "I will go up and see Weissman." And he came back and said, "Well, I have been up and told Weissman I wanted this stopped, and Weissman said, 'My boy, put the box in the yard.' "

Q He said Mr. Weissman had the box in the yard?

A That is what he said. I saw him on Sunday and told him I would make a complaint to the Board of Health on Monday, and I did.

Q When was the first time you saw Mr. Rashkober about moving the obstructions?

A About the time Mr. Weissman began putting his implements. He was a landscape gardener.

Q How long before the accident?

A It might have been nine days, two weeks.

Q And what did you say to him?

Mr. Mylod. I object to this talk with Weissman. He wants him to relate a talk he had with a tenant.

(Question read.)

Mr. Mylod. I object. He has not shown agency. Unless they can show that Mr. Rashkober is the proper party to complain to. If they simply show he collects the rents, that does not show he is the agent for the landlord for all purposes. I think they should lay the foundation.

The Court. You had better precede this witness' testimony by proving the agency.

(The witness is withdrawn.)

MEYER KRASNER, sworn for the plaintiffs.

Direct examination by Mr. Steinsitz.

Q Mr. Krasner, are you the Krasner of the Superior Realty Company, a corporation?

A Yes, sir.

Q And in November, 1913, was Mr. Jacob Rashkober the agent of the company for the purpose of collecting, having general supervision over the property 153 Peshine avenue, occupied in part by Mr. Burnett?

A He was the agent collecting the rents.

Q He also had charge of the property, didn't he?

A Why, he made repairing, whatever was necessary to take care of the property.

Cross examined by Mr. Mylod.

Q By whom was Mr. Rashkober employed?

A By the Progressive Investment Company.

Mr. Steinsitz. I object to that question. This witness has already testified that this man is the agent of this company. What difference does it make by whom he is employed?

The Court. I will overrule the objection.

Exception noted for plaintiff.

Q He had charge of the property for the Progressive Investment Company, didn't he?

A Yes, sir.

Q I show you a rent book in which there are a number of receipts written, and on which is printed "Progressive Investment Company, Globe Building, Broad and Mechanic Streets," I ask you if that is one of the books used on those premises?

A I presume it was; I don't remember, though.

Q And the moneys collected by Mr. Rashkober would be turned over to you, and deposited to the credit of the Progressive Investment Company?

Objected to.

Objection sustained.

Q The Progressive Investment Company paid Mr. Rashkober?

A Yes, sir.

Objected to.

Objection overruled.

Q The Progressive Investment Company controlled the premises?

Objected to.

The Court. That is rather a conclusion, I suppose?

Re-direct examination.

Q I also show you one of these books—

Mr. Mylod. Objected to as not re-direct examination.

The Court. The book may be shown to the witness.

Q And I ask you whether you instructed your agent to give these books to the tenants of that property?

A Why, I don't think I did.

Q Do you know whether he did?

A I don't know if he did it, or not.

Re-cross examination.

Q This book which counsel shows you is a book of what corporation?

A Of the Progressive Investment Company.

FRANKLIN P. BURNETT resumes the stand.

Direct examination (continued) by Mr. Steinsitz.

Q Now, Mr. Burnett, when was the first conversation you held with Mr. Rashkober with reference to the condition of the yard?

Mr. Mylod. I desire to object, because counsel has just now proven that Mr. Rashkober is employed by the Progressive Investment Company, and the property is controlled by the Progressive Investment Company.

The Court. The objection is overruled.

An objection to this ruling is noted by the defendant as ground of appeal.

A Why, the yard had always been kept clean until Weissman commenced to bring his farming utensils and put them in the yard.

Q When did you first talk to Mr. Rashkober about it?

A When?

Q When; how long before the accident?

A Perhaps two weeks.

Q What did you say then?

A I told him the yard was for the children, there was five families in the house, and the yard was small anyway, and I told him "You made me take a table off my back porch, you told me there was no obstructions to be put anywhere in the building; and you made me take a table off my back porch and put it in the cellar; I will saw the table up, if that will satisfy you." He said, "I am the agent, you have got to do as I tell you to."

Q What did you hear, if anything, about the removal?

A He said he would insist on Weissman keeping the yard clean. I told him I was going to the office; he said I had no business to go "and get me out of a position; I am the agent here, you attend to your business, and I will attend to mine."

Q Did you speak to Mr. Rashkober after the accident happened?

A On Thanksgiving day I went down to the stationhouse, and was going to make a criminal charge.

Q Did you see Mr. Rashkober?

A I did.

Q That day?

A Yes, sir.

Q What did he say to you?

A He said he felt just as bad over my child being hurt as he would be over one of his own, and he said, "It was all my fault; if I insisted on Weissman keeping his yard clean it would not have happened; but," he says, "I will see that you get paid for every cent."

Q I show you a bill of Dr. Stearn, did you receive that bill from the doctor?

A Yes, sir.

Q You have not paid it yet?

A No, sir.

Q I also show you a bill for an extra pair of high-cut laced counters pair of shoes?

A Yes, sir, Felter & Co.

Q $10?

A Yes, sir.

Q You paid that?

A Yes, sir.

Said bills offered in evidence and marked Exhibits P. 2 and P. 3.

Q How long was Eleanor confined to the home?

A Why, from the day before Thanksgiving until that shoe came home. I brought the shoe home, whatever date that bill is, I brought the shoe home, and Dr. Stearns took the cast off and put the shoe on her foot.

Q And that was some time in March?

A In March.

The Court. The bill is dated February 3d.

Witness. That was when the shoe was ordered, I think; I think it was in March I brought the shoe home.

Q It was ordered in February, the date of that bill, but did not furnish it until March?

A Until March, I brought the shoe home.

By the Court.

Q When did you pay for it?

A I paid $5 down to have the shoe made, and the other $5 when I got the shoe.

Q It was receipted the day you got the shoes?

A It was receipted the day I brought the shoes home.

The Court. It is receipted March 7th.

By Mr. Steinsitz.

Q After this time did you employ any domestic help?

A Yes, sir; I had to employ a girl to do the work.

Q When did you do that?

A Why, my wife, the first week or so, she could not do anything but faint away, and she had to take to her bed, she was in bed two or three weeks.

Q When did the girl leave? A The girl left in April, I think, if I am not mistaken.

Q From November to April?

A Yes, sir.

Q And how much did you pay her?

A $15 a month.

Q Did you spend anything for medicine?

A Yes, sir.

Q Can you tell how much?

A Well, I didn't keep any account of it, but I should think, medicines and liniments, I think $20 to $25 would be a fair estimate. She had a terrible leg before the cast was put on.

Q I show you a green rent book?

A Yes, sir.

Q And ask you whether Mr. Rashkober ever offered to give you any of those books?

A Why, he showed me the book when the quarrel about the table was, he showed me a book. He said, "You read those rules and regulations, and I will get you a book so you will know what to do."

Q Did he ever give you a book?

A No. I went down to the Progressive, and asked them for the book, went down to the office, and they told me Mr. Rashkober was the agent, "If he hasn't any books we will furnish him with books."

Q When he called your attention to the terms mentioned in the book did you read them?

A I did.

Q And just glance through here. I ask you whether these are the same terms which you found in that book?

A He pointed to this one, "Furniture of any kind

will not be permitted to occupy any part of the premises."

Q Are those the same terms?

A Those are the terms, yes, sir; he showed it to me in the book.

Q You said something about Mr. Rashkober ordering you to remove a table?

A Yes, sir, from the back porch.

Q Well, when did this occur?

The Court. He has already gone over this.

A Why, when we first moved in, I think, about three weeks after we moved in.

Cross examination by Mr. Mylod.

Q Rashkober said that he would insist on having the yard kept clean, didn't he?

A He said it was his business.

Q He said he would do so, didn't he?

A He told me he would do so. He said, "That is my business," he says, "Don't you go to the office."

Q When did you first receive a bill from the doctor for $100?

A Why, after the doctor ceased coming.

Q Did you ever keep any record of his calls?

A Well, now, will you allow me to explain?

Q No, I simply ask you if you ever kept a memorandum of the number of visits the doctor made to treat your daughter as the result of this accident?

The Court. Did you keep a record?

Witness. No, sir, I didn't.

Q All the bill you ever got was this little memorandum "For surgical services rendered $100"?

A That is right.

Q That is all on account of the broken leg?

A Yes. Well, I wouldn't say that, for he was attending my wife, she was in bed a couple of weeks.

Q And your wife fainted away after that accident?

A She fainted three times that night.
Q How many times did she faint the next day?
A I think a couple of times.
Q Were you home that day?
A Yes, sir.
Q Where were you employed?
A I have an engraving room of my own.
Q Where had you been the day of the accident?
A 26 Beecher street.
Q What time did you return home that day?
A It was the day before a holiday, and we always closed at four o'clock the day preceding a holiday, and I saw the work put in the safe, and I left, perhaps, five minutes after four.
Q And when you got home this accident had happened?
A The baby lay on the couch insensible.
Q What time did you get home?
A I should think not later than half-past four, twenty-five minutes to five.
Q When you went to the premises to rent this apartment did your wife go with you?
A Yes, sir.
Q You did not go alone?
A No, sir.
Q Went in the nighttime, didn't you?
A Went in the evening.
Q And you say Mrs. Liese took a lighted lamp out in the yard and showed the yard to you and your wife?
A Yes, sir; she brought a lamp, or candle.
Q You are sure your wife was with you when you inspected the yard at nighttime?
A Yes, sir.
Q You say the yard was always kept clean?
A The yard was always kept clean prior to the time Weissman commenced to put his implements there.

Q Weissman lived there before you?

A I know he did; he was in the house when I moved in.

Q You moved out owing the landlord how much rent?

Objected to.

The Court. I will sustain the objection.

Q Didn't you tell the landlord that as soon as you collected from the insurance company you would pay your rent?

Objected to.

The Court. I will sustain the objection.

Q Now, this pair of shoes that you purchased for the little girl are an ordinary pair, aren't they?

A No, sir. An ordinary pair of shoes you can buy for the baby for $2.

Q And you say Dr. Stearn told you to order these shoes?

A He told me to go to a certain place on Halsey street; I went there, and they wanted $25 to make the shoes.

Q Did Dr. Stearns tell you that, or Dr. McBride?

A Dr. Stearns.

Q Did Dr. McBride have anything to do with ordering the shoes?

A Nothing at all.

Q What night was it, with reference to this accident, what night, either before or after, was it, that Rashkober, the man that collected your rent, went up to Weissman and had a fight with him as you testified?

A It was Tuesday night he went up and had the fight about the mortar-box; when he came down he said Weissman said his wife put it there.

Q Were you upstairs with Weissman?

A I was on my porch; I can't understand their language; I was on my porch, and I heard them quarrel about twenty minutes, or so.

Q Did you receive receipts for the rent which you did pay, Mr. Burnett?

A My wife paid the rent; she attended to all that.

Q You have never seen the receipts?

A I have seen the receipts.

Q Did you see books like this?

A Yes, sir.

Q And all your receipts were signed "Progressive Investment Co.," weren't they?

Objected to.

The Court. The receipts speak for themselves.

Q Have you any of those receipts with you?

A No, sir.

Q The book which you saw similar to this book was also marked the same as this book, "Progressive Investment Co."?

A I suppose it was.

Q Don't you know?

A Why, no, I don't know.

Q Now, you said, in answer to one of Mr. Steinsitz's questions, that you insisted on getting a book like this book?

A I said to Mr. Weissman "If you have your regulations why don't you give me a book so I will know."

Q When you did not get a book you went up to the office, you said, of the Progressive Investment Company, is that correct?

A I think I asked them there for a book. I didn't go on purpose to get it. I went to make a complaint about the yard, the way things were going there.

Q You went to the office of the Progressive Investment Company to make the complaint?

A I certainly did.

Q What day of the month was it that this accident occurred, do you know?

A The day before Thanksgiving, that is the best.

Q Thanksgiving fell on what date?

A The last Thursday of the month.

Q Do you know the date?

A No, I do not.

Q You complained to Mr. Rashkober about this mortar-box, number of wheelbarrows, and harrow, rake, and other implements you have described?

A Why, even the neighbors on the back streets were on their stoops listening. There was a regular fight there. I told him I paid the rent as well as the rest of them, and he allowed one man to occupy the whole yard. After the accident he fenced off the yard, every bit of it.

Q What is the size of that yard?

A About three feet left of the yard; Mr. Weissman has the whole business.

Q When was that fenced off?

A After the accident; I don't remember the date. When we wanted to use the yard again he fenced it off.

Q What is in the part of the yard which was fenced off?

A I haven't been there since we moved. He had rakes, shovels and spades, whatever he could get through the gate.

Q Don't you know there was nothing in the back yard except plants and flowers and grass?

Objected to.

The Court. Not what is there now.

Q While you were living there don't you know that when the back yard was fenced off, it was fenced off as a flower garden—

Objected to as immaterial.

A I saw shovels, and spades—

The Court. I will sustain the objection.

Q About what is the size of that yard?

A Well, it is wide; it is a six-family house.

Q No, no; the size of the yard?

A I couldn't tell you, I never measured it off; it is not deep; it is a very small yard.

Q You have some idea of feet and inches, haven't you?

A Sure, I have some idea of feet and inches.

Q How large was this yard?

A It may have been thirty feet deep.

Q And how many feet wide?

A I think about 50, I should judge.

Q About 30 by 50?

A I should think so; I didn't measure it.

Q And you saw this mortar box lying in the center of the yard Tuesday?

A On Tuesday the whole yard was taken in, yes.

Q The box lay in the center of the yard?

A About in the center, a little back of the center; I should think it was very nearly in the center.

Q Was it set apart by itself from the other things?

A No, it was in amongst—the whole yard was taken up with the stuff in the yard.

Q You don't know what became of all the wheelbarrows, the harrows, and rakes, and so on, that were in the yard prior to the accident, do you?

A Why, shortly after the accident he carried out, on Thursday, Thanksgiving.

Q Are you sure you saw the box in the yard the night before?

A Sure; I called Mr. Rashkober's attention to it.

Q And you made quite a fuss about it?

A I certainly did.

Q And your wife heard you make a fuss about it?

A She heard the talk about the yard.

Q Did you tell her you were going to complain?

A She came out and told me to come in and stop the racket.

Q And you told her the yard was in no condition to play in?

A No, I didn't. I said, "Now, your children can go out in the street, you have got no yard."

Q Did you point out the mortar box to her particularly?

A No, I didn't; the yard was full; about four loads of lumber in the yard, and from the smell of it I telephoned to the Board of Health.

Q When did you telephone to the Board of Health?

A Monday, I telephoned.

Q On account of the smell of the lumber in the yard?

A On account of the smell of the lumber, that lumber had no business; it was a stable floor, about 50 feet from my dining-room table where I was eating.

Q Do you know who brought that into the yard?

A I don't; I wasn't home at the time. Weissman fathered it, said it was his.

Q What did he do with it?

A I don't know; he had three men working all day Thanksgiving; I think they sawed it up in lengths and put it down cellar.

Q How much of the doctor's bill was for your wife, and how much for treatment of the child?

A I don't know.

Q You know it is mingled together?

A I don't know.

Q You know he treated your wife, and you haven't paid him any money.

A I know.

Q And you haven't paid him any money since the date of this accident?

A No, sir.

Q How recently did Dr. Stearns treat your wife?

Objected to.

A Every day, I think it was, for two weeks.

The Court. What are the grounds of the objection?

Mr. Steinsitz. It is immaterial.

The Court. I will overrule the objection.

Q You also went to Dr. Stearns for treatment occasionally, didn't you?

A No, sir, never did.

Q Dr. Stearns never treated you?

A Long after the accident.

Q How long after, a year?

A A year and a half, perhaps. My wife telephoned Dr. Stearns; I had trouble, kidney trouble; he came and attended me once.

Q Now, did you send for Dr. McBride to take care of the child at any time?

A Let me explain—

Q Well, you can tell whether you ever—

A Thanksgiving Day Dr. Stearns came in, and he asked me who the family doctor was; I told him Dr. McBride; he asked me if I wanted—if he should resign from the case in favor of Dr. McBride, and I asked him not to. I said, "You only live a couple of doors above, three or four doors above, and I want you to stop in every day and give the baby every attention."

Q Did you send for Dr. McBride to take care of this child on account of the injury?

A Not on account of the injury, no; he had nothing at all to do with the broken leg.

Q And Dr. Stearn told you all that was the matter with the child was the broken leg?

A I don't think he ever told me all the injury was a broken leg.

Q You know that is all the child ever complained of?

A Well, the child has complained ever since, to get on her foot to walk, and we have lifts on that shoe to raise her up.

Q You have a little leather lift on one shoe?

A Yes, sir.

Q And that is all?

A After the special shoes was taken away. She wore the special shoes for at least a year.

Q You know the child don't limp?

A I know it does.

Q And you know the child's health is just as good as it was before the accident?

A I know the child limps, because I can see it.

Q You don't know what makes the child limp, do you?

A One leg is shorter than the other.

Q Do you know what caused that condition?

A Well, that is up to the doctors; I am not a doctor. Caused by the mortar box falling on her.

Q Now, you have no bills for medicine, or liniment, have you?

A No, sir. What I spent for medicine I went to the drug store and purchased.

Q (*By Mr. Steinsitz.*) You asked Mr. Ginsberg to take this photograph?

A Yes, sir.

HENRY GINSBERG, sworn for the plaintiffs.

Direct examination by Mr. Steinsitz.

Q I show you a photograph and ask you whether you recognize it?

A Yes.

Q It was taken by you?

A Yes.

Q When?

A Taken about two years ago, the early part, I believe, of December, I think, or November.

Q There is a date marked on the back, does that refresh your memory?

A Yes, sir, I put that date on myself.

Q December 11, 1913?

A Yes, sir.

Said paper offered in evidence.

Henry Ginsberg, cross.

Cross examination by Mr. Mylod.

Q Have you the original plate from which this was made?

A Why, yes, I have the plates.

Q Where are they?

A At my studio.

Q You say this photograph was taken the day indicated on the back, December 11th?

A Yes.

Q 1913?

A Yes, that is the date it was taken.

Q Is that the day it was taken, or the day it was developed and finished?

A The day it was taken.

Q Who went with you to help take this picture?

A I took it myself.

Q All alone?

A Yes, sir.

Q Who showed you the object which you should photograph?

A Mrs. Burnett.

Q And where was the box at the time you went to take it?

A On Peshine avenue, 153.

Q Well, in what part of 153 Peshine avenue?

A In the yard, leaning against the fence.

Q Did you move it at all before you took the picture?

A No, I didn't move it.

Q And when you walked in the yard this mortar box was in the position shown on that photograph?

A No, sir, it was placed that way for photographing purposes.

Q Did you place it there?

A I did not.

Q Where was it when you first went into the yard?

A It was already leaning against the fence.

Q Then, when you walked into the yard with your

machine, you saw that mortar box, or mortar board, leaning against the fence in the position in which it appears in this photograph, didn't you?

A No, sir.

Q Who fixed it to put it into the position?

A There were a number of young men helping in the yard that put it in the position so I could photograph it, to show the box in the best view.

Q When you went in where was the box?

A It was in the yard; I didn't pay any particular attention.

Q You don't know what fell on her?

A I could not tell.

Q It was still in the yard?

A Oh, yes, it was in the yard.

Q On what day of the week was it you took this photograph, do you recall that?

A I cannot recall that.

Q Do you know the hour of the day?

A I cannot remember.

Q Now, you don't know whether it is the same box that figured in the accident or not, do you?

A I do not. Of course, I heard that something happened to this box.

Q All you know you were sent to 153 Peshine avenue on December 11th to take photographs of the box?

A Yes, sir.

Q And this is the photograph you took?

A Yes, sir.

Mr. Mylod. I shall object to the introduction, unless it is shown that is the same box.

Q (*By the Court.*) Who did you say pointed out the box to you?

A Mrs. Burnett.

Mr. Steinsitz. I do not recall now whether I had Mrs. Burnett testify as to the box. I will ask permission to recall her for that purpose.

The Court. You may recall her.

Fannie Weissman, direct.
Eleanor Burnett, recalled, direct.

FANNIE WEISSMAN, sworn for the plaintiffs.

Direct examination by Mr. Steinsitz.

Q Mrs. Weissman, I show you this book, and ask you whether this book was given to you by Mr. Rashkober?

A Yes, sir; it was given to me the first day I moved in.

Q You were a tenant in the premises, weren't you?

A Yes, sir.

Not cross examined.

ELEANOR BURNETT, recalled for the plaintiffs.

Direct examination by Mr. Steinsitz.

Q Mrs. Burnett, do you recognize the mortar box in this photograph?

A Yes, sir.

Q And is that the mortar box that caused the accident?

A Yes, sir.

Q Did you point out this mortar box to Mr. Ginsberg, the photographer?

A Yes, sir.

Q (*By the Court.*) What mortar box was it that you pointed out to Mr. Ginsberg?

A The mortar box that was in the yard that hurt the baby.

Cross examination by Mr. Mylod.

Q Where had this mortar box been from November 24th to December 11th, do you know?

A November 24th?

Q Well, the day of the accident, November 26th, perhaps.

A Why, they put it in back of the shrubs, in the back part of the yard.

Q Then this mortar box was in the back yard from the day of the accident until December 11th?

A Until the day after the picture was taken.

Q Then what happened to it?

A They broke it up.

Q Who broke it up?

A Mr. Weissman.

Q And Mr. Weissman saved the box until the photograph was taken?

A He didn't know the photograph was taken.

Q And you saw it in the yard every day until the day it was broken up?

A Yes, sir.

Q And you didn't see it in the yard when you opened the back door to let the little girl out to play, about five o'clock on the afternoon on which the accident happened?

A The accident happened at half-past four.

Q Well, at 4.30.

A I didn't see the box before.

Q You never saw the box?

A I never saw the box until I took her from underneath.

Q Now, are you sure that this is the same box?

A Yes, sir, positive.

The Court. As you go to your seat just walk in front of the jury with the little girl, will you?

(The witness does as directed.)

Mr. Mylod. The court will observe and the jury, that the left leg was injured, and not the right leg; there is one leg has a bend in it; the jury, I think, should be informed that that was not the leg which was broken.

The Court. If you desire to ask the mother any questions—your comment is not proper—you may ask the mother any questions, and get upon the record what you want.

Mr. Mylod. No, that is all.

Said photograph marked Ex. P-2.

JACOB RASHKOBER, sworn for the plaintiffs.

Direct examination by Mr. Steinsitz.

Q You are the agent of the Superior Realty Company having charge of this property, weren't you?

Objected to.

A No, sir.

The Court. I sustain the objection.

Objection withdrawn.

Q You have charge of this property?

A I have charge of the property.

Q Collect the rents?

A Yes, sir, I collect the rents.

Q And you have charge of the property?

A Yes, sir.

Q For the repairs, and so forth?

A Yes, sir.

Q I show you this rent book, and ask you if this is the book you gave to Weissman?

A Yes, sir.

Q One of the tenants?

A Yes, sir.

Q And did you get permission to give a similar book to Mr. Burnett?

A No, sir; I don't think so.

Q Didn't you say you would get a book for him?

A There was no more books in the office.

Q There were no more, but you told him you would get one for him, didn't you?

A Yes.

Cross examination by Mr. Mylod.

Q For whom did you collect the rents of 153 Peshine avenue?

Objected to.

The Court. I overrule the objection.

Exception noted.

Q For what company did you collect the rents?

A The Progressive Investment Company.

Q And by whom were you employed?

Objected to as immaterial and irrelevant.

Objection overruled.

A The Progressive Investment Company.

Q The book which counsel showed you is the book of what company?

A The Progressive Investment Company, the same as these receipts.

Q And when you gave receipts to the tenants for their rent, they were given in behalf of what company? You signed the receipt in behalf of what company?

A Progressive Investment Company, which is the form of the receipt.

Q Marked "Progressive Investment Company, per?"

A Yes, sir.

Q And you would sign your name under the name of the company?

A Yes, sir.

Q And mark on the margin "Progressive Investment Company?"

A Yes, sir.

Said book marked for identification D-1.

By a Juror.

Q What time was the fence built in this yard? Was it previous to this accident?

The Court. You mean the dividing fence?

The Juror. Yes, the dividing fence.

Q There was a fence put there after this accident, or before?

A After this accident.

By Mr. Steinsitz.

Q And did you remove any of the obstructions after this accident?

Mr. Mylod. Objected to. There has been no proof on the part of the witness that there were any obstructions there.

The Court. I will sustain the objection upon the ground that what happened afterwards can make no difference.

Q Do you know whether there were any obstructions before this accident?

Mr. Mylod. Objected to. We are not dealing with general obstructions; it is simply a question of the mortar box in the yard.

The Court. That was my view of it.

Re-cross examination.

Q Now, Mr. Rashkober, do you recall how the fence came to be built in this particular yard? What caused that fence to be built?

A A fence was built, yes, in the yard.

Q What is in behind that fence, and what is kept there?

A Keep flowers.

Q Flowers, and what else?

A And trees.

Q It is a garden, isn't it?

A It is a garden, my garden.

Q Flower garden?

A Flower garden.

Q And there is no lumber, no box, and no tools in there?

A Not now.

Q And there never was any lumber or tools kept in that back yard?

A I don't remember about that.

Q I am asking you now if you ever allowed them to store any lumber or tools in the back yard?

Mr. Steinsitz. Objected to.

The Court. I think that is improper cross examination; he has not been questioned about that.

Mr. Steinsitz. I wish to offer this rent book in evidence.

Mr. Mylod. I have no objection.

MEYER KRASNER, recalled for the plaintiffs.

Direct examination by Mr. Steinsitz.

Q What interest does the Superior Realty Company have in this property?

A They are the owners of the property.

Q You, as officer of the Superior Realty Company, engaged Mr. Rashkober as the agent; you said so before, and that was right, wasn't it?

Mr. Mylod. Objected to; no such question was asked him; and the contract is in evidence.

The Court. The objection will be sustained because it includes asking the witness what he previously testified to. The record speaks for that.

Q You said on direct examination, Mr. Krasner—

Mr. Mylod. Objected to.

The Court. The objection will be sustained.

Not cross examined.

DR. DAVID A. STEARN, sworn for the plaintiffs.

Direct examination by Mr. Steinsitz.

Q Doctor, you are a practicing physician in this city?

A I am.

Q And were you called on November 26th to treat Eleanor Burnett?

A I was.

Q And what did you find was the matter with the child?

A I found the child had sustained a series of bruises from the left side of her neck right down to the left foot, including a broken leg, both bones of the left leg.

Q Just where?

A The left leg was broken right at the center, between the ankle and knee.

Q (*By the Court.*) Middle third?

A Middle third, yes, sir.

Q (*By Mr. Steinsitz.*) How long did you treat the child?

A I treated the child until the time we put a high shoe on, I should judge in March some time; and then I saw her occasionally after that; that is, I just watched her to see how she was getting along.

Q Now, doctor, I show you two X-ray plates, and ask you whether you took these photographs?

A Yes.

Q And these are the X-ray plates of the injured leg?

A Yes.

Mr. Steinsitz. I wish to offer them in evidence.

By the Court.

Q When were they taken?

A They were taken a day or two days after the leg was set, after the accident.

Q Did you take them?

A Yes, sir.

The Court. They will be admitted in evidence; they need not be marked.

By Mr. Steinsitz.

Q Now, you live in the neighborhood of 153 Peshine avenue?

A I live at 143, yes.

Q And you had frequent occasions to see this child?

A Yes. They lived about five doors from where I did, and on my way in and out I would step in to see the baby.

Q What is the present condition of that leg?

A The leg, as far as the fracture is concerned, I think is in very good condition, the leg itself.

Q Do you find any discrepancy in length?

A There seems to be an apparent difference in the length of the leg, yes.

Q And that difference is about how much?

A I should judge at least between one-quarter and one-half inch, apparent difference.

Q (*By the Court.*) The broken leg shorter, do you mean?

A Longer.

Q (*By Mr. Steinsitz.*) How do you explain this lengthening?

A I have had great difficulty in explaining the lengthening. It is possible that some of it may be due to the fact that the right leg, the unbroken leg, was a bit bowed, and in straightening out the left leg we got a longer leg; or it may be possible the trouble is up in the pelvis; in the pelvis itself.

Q You saw the leg prior to the accident, or do you know was this leg also bowed-legged before the accident.

A I presume it was the same as the other.

Q You saw the child; you knew the child?

A I knew the child, saw the child; it walked around; I never treated it before.

Q So at the present time, I understand you to say, there is a possibility that the lengthening is due to the fact, because of the straightening of the leg after it was broken?

Mr. Mylod. Objected to.

The Court. Of course, it must be probability, rather than possibility.

Q Doctor, will you show the jury, look at the child, by using the child, the position of the foot at the present time. Before calling the child I will ask you this question: Did you find any defect in the feet, the position of the feet?

A The child originally toed in, what we commonly call pigeon-toed, and since the fracture, since this leg has been broken, as a result of the treatment the result now is that the child points straight forward. In other words, the left foot points straight ahead in walking, to some extent, and the right foot the toes point in.

Q Doctor, you know the child was injured by a heavy object?

A They said so.

Q A mortar-box falling upon it?

A They told me it was.

Q And assume, Doctor, that the child was a perfectly normal child prior to this accident, and that a heavy object, such as a mortar box, fell upon it, breaking the leg in two places, would you say that this lengthening is due as a result of this accident?

Mr. Mylod. I object, your honor. There is nothing upon which to base such a hypothetical question. The assumption is that the child was a normal child, and so on, whereas the doctor has already testified that the child was pigeon-toed and bowed-legged at the same time.

The Court. I think that is so. I think the testimony is not that the child was a normal child before. I don't recollect any such testimony upon the subject.

Mr. Steinsitz. I will bring out that fact afterwards, that the child was a normal child.

The Court. Then you may proceed.

Mr. Mylod. I will admit that both the father and mother will testify that the child was a perfect child.

Q Now, will you answer that question, Doctor?

A Well, if I knew—

Mr. Mylod. May I ask the Court to have the question read?

The Court. The question may be read.

(Question read as follows: "And assume, Doctor, that the child was a perfectly normal child prior to this accident, and that a heavy object, such as a mortar box, fell upon it, breaking the leg in two places, would you say that this lengthening is due as a result of this accident?")

A If that child was absolutely perfect before the accident, the accident could probably have been the cause of the lengthening.

Q Now, Doctor, will you show the jury, show the Court and jury, just which leg was fractured, and which one is longer than the other. Which leg was the broken leg?

A (Indicating on the plaintiff.) This left leg was the broken leg; it was broken here, and it is at the present time in very good condition, that is, perfectly straight; it is straighter than the other leg, the normal leg, or right leg.

Q Now, Doctor, which leg is the longer leg?

A The broken leg.

Q The one that was broken?

A The one that was broken; apparently longer.

Q Now, Doctor, what is the condition of the child's feet at the present time, in respect to the angle at which she walks?

A When she walks this foot points perfectly straight ahead. This foot, on the other hand, on walking, toes in somewhat, I should judge about like that (illustrating). In other words, it has a pigeon-toed effect. That is the good leg. The injured leg is perfectly straight.

Q Now, Doctor, is that condition respecting the foot a permanent condition?

A Yes, I believe that is permanent.

Q And is that due as a result of this accident?

A As the result, yes, of the fracture.

Q And how do you account, Doctor, that this one foot points straight ahead, and this other foot is turned inward, pigeon-toed?

A Well, that pigeon-toed foot is the normal condition for that baby, while the straight ahead direction is not the normal in this particular child; that is the result of the treatment; result of the fracture.

Q Then you mean by that, that prior to the accident the foot, instead of pointing straight, pointed also inwardly?

A Yes, sir, must have; I believe it did, because I think I remember the child.

Q What effect, in your opinion, would that have with respect to the symmetry of both legs?

A I guess it would only be apparent, that is about all.

Q In other words, when this baby grows to womanhood, in your opinion do you think that that condition will be apparent to the eye?

A Well, if you looked I suppose you would notice it.

Q It is noticeable at the present time, isn't it?

A When the baby is barefooted it is very noticeable; that is, I noticed it differs, while she didn't do much walking; but it is very noticeable when she is barefooted.

Q And you say it is a permanent condition?

A That is permanent.

Q And what I want to know is whether this condition, in your opinion, will be more pronounced as the child grows older?

A It will be there; I don't know as I would say it will be more pronounced; it will be there.

Q In your opinion, the casual observer, walking along the street, happening to look down at the foot

of this baby after she grows to womanhood in your opinion do you think it will be easily observable?

Mr. Mylod. Objected to. That is a conclusion the jury is to draw.

The Court. The question is whether the difference in these feet and legs will probably be exaggerated with increased age, or whether it will show less with increased age.

A It will be about the same shape, and still differ a particle.

Q In other words, it would be discernable then?

Objected to as leading.

The Court. I will sustain the objection.

Q Your bill was how much?

A $100.

Q You have not been paid yet?

A No.

Q That included all the services you rendered, including the X-ray photographs?

A I did not include services to Mrs. Burnett or her husband in that.

Q I didn't ask you that.

A That is just the baby.

Cross examination by Mr. Mylod.

Q Now you say the lengthening is apparent; what do you mean by apparent lengthening?

A I mean by an apparent lengthening, that both of those legs have been measured, and as we have measured them, at one time we would get a lengthening, and at other times we could not find it.

Q If you measured the legs of nine people out of ten you would not find any two alike, would you?

A Never.

Q They differ slightly?

A Yes, sir.

Q You cannot say whether there is any lengthening in that leg or not, can you?

A I don't say there is lengthening; I don't say there was actual lengthening.

Q You know you measured that leg, and found no lengthening?

A No, I can't say I did. We measured that leg repeatedly, and at times did find lengthening, and at times did not.

Q You measured that leg yesterday?

A Yesterday.

Q And did you find any lengthening?

A I did find lengthening. Dr. Sutphen and I measured the leg, and found lengthening in the left leg, and then we measured at different points, and did not find lengthening.

Q Will you tell me whether, when you measured that leg yesterday, you did find lengthening, or did not?

A We did find lengthening, and then we changed our points from where we measured, and found no lengthening.

Q From what point did you measure when you did find lengthening?

A I think those marks are still on the baby; I don't remember. We found, on two occasions, Dr. Sutphen measured and found there was a lengthening; then we selected other points of measurement, and found there was not a lengthening.

Q As a matter of fact did you tell Dr. Sutphen there was not a lengthening?

Objected to.

The Court. The objection is overruled.

A Oh, no.

Q As a matter of fact, when you made your measurements yesterday, and when you met Dr. Sutphen, didn't you tell the doctor there was a lengthening in that leg?

A I said there was a lengthening.

Q And didn't you and Dr. Sutphen measure the child's leg together, and found there was no lengthening?

A By measurement, yes. By measurement I said there was none, and I say so now.

Q There was perfect union in the bone?

A Absolutely.

Q And there is no scar there?

A None.

Q And you could not tell the injured leg from the uninjured, could you?

A No.

Q Even when the child was stripped?

A You could not.

Q You saw the child walk across the floor here?

A Yes, sir.

Q The child does not limp, does she?

A I don't think so.

Q What is the condition of the broken leg as the result of this accident?

A You mean in the area of a fracture?

Q Yes.

A I think it is perfect.

Q Then the child does not suffer any ill effects to-day from that fractured leg?

A Do you mean at the fractured area?

Q Yes.

A I don't think she suffers any trouble at the fractured area.

Q The injury did not extend beyond the fractured area?

A That whole left side was hurt.

Q When did you first render a bill, Doctor, to the plaintiff in this suit?

A I don't remember.

Q Did you ever give him an itemized statement?

A I never did.

Q How do you put this bill at $100?

A I did so much work on that case I thought they could not afford to pay more, and I sent a bill for just $100.

Q You did not send a bill at that time, did you?

A I sent them several bills, I think.

Q Were they bills for a smaller amount than $100?

A Never.

Q Now, you never observed whether this child was pigeon-toed prior to this accident, did you?

A Yes; I knew the baby; I never treated her, but I was around the street, and I knew she was pigeon-toed.

Q It is very common for a child to be pigeon-toed in one foot, and the other foot all right?

A I don't know that that is so. I know pigeon-toed in both feet is very common.

Q You know that it is very common where a child has one foot turned in, and the other perfectly straight?

A I don't know that that is so.

Q You never saw that?

A You mean a perfectly normal child?

Q Yes.

A It would not be normal if it was that way.

Q How long have you been a doctor?

A Since 1910.

Q You graduated from what school?

A New York University.

Q Did you do any other work for the Burnetts aside from medical attention?

A No.

Q They never asked you to do anything else?

A Never treated them only for this one particular thing.

Q I mean they never asked you to do anything else?

A No.

Q Never asked you to try and get some money for them on the case, did they?

Mr. Steinsitz. Objected to.

The Court. I will overrule the objection.

A I think before this case was begun one of the men from one of the companies came to me and wanted a statement from me.

Q No, I don't ask what a man from the company said to you, I am asking you what the Burnetts said to you in reference to this case?

Mr. Steinsitz. Objected to.

A No, I don't think they did.

The Court. He can show the interest of this witness, if he has any.

Q As a matter of fact you told them to make complaint, didn't you?

A Told who?

Q The Burnetts.

A No, I did not.

Q Never did?

A No, no.

Q As a matter of fact you made a claim for them, didn't you?

A No, I did not.

Q Never did. Now, did you tell them that the landlord had landlord's insurance?

A No.

Q And they would not be taking the money away from the landlord, but from an insurance company?

A Oh, no, no, that is not so.

Q Did you know who owned the property at that time?

A Yes, I knew who owned the property.

Q Who?

A Mr. Krasner. I knew he was interested in the property; I believe he owned it.

Q You say you never made a claim for them?

A I did not make a claim, but the question of settlement did come up.

Q Suppose I show you this letter and ask you if that is your handwriting?

A Yes, that is my handwriting.

Q Did you write this letter: "Lowey, Berger & Finger. Globe Building, Newark, N. J. Dear Sirs: Permit me to advise you that I have been authorized by Mr. Burnett of Peshine avenue, whose child sustained a fracture of its left leg, to effect a settlement of the case, if possible. I am also the physician in charge, and have advised him against placing this case in the hands of an attorney. I would request that you refer this to your insurance company, and that they take this matter up at an early date. Trusting you will attend to this, I am, Respectfully yours, David A. Stearn, M. D., 143 Peshine avenue, Newark, N. J. Feb. 6, 1914." Now you made a claim, didn't you?

A Yes, sir, I did.

Q And you knew there was an insurance company?

A Lowey, Berger & Finger told me that there was.

Q You knew there was, no matter how you knew?

A Oh, yes, I knew.

Q And you were expecting the insurance company to pay your bill, weren't you?

A No. That was after the man from the insurance company had called on me that that was done.

Q Do you know just when the man called on you from the insurance company?

A I don't remember when that was.

Q Have you got any visiting cards, or physician's book, on the Burnetts, running up to $100?

A No, I have not.

RECESS.

Q I understood you to say that there is really no difference between the length of the left leg, and the length of the right leg?

A In measurement, no.

Q You say you took measurements at different times, and they showed different results?

A Yes.

Q Isn't it possible the child might twist its hip a little bit, and that makes a difference?

A No, that would not make a difference. The reason the measurements differ is because our points from which we measure are very indefinite, we cannot fix them accurately.

Q But, as an actual fact, there is no difference in the length of the bone?

A I don't think so, no.

Q As far as you know there is no pain in the leg as a result of the accident?

A I don't know. I haven't seen this baby for nine months, or maybe more than a year.

Q You examined the leg the day before yesterday?

A Yesterday. I didn't go into that at all.

Q There were no symptoms of pain then?

A No.

Q This bill has not been paid, this $100 bill?

A No, it has not.

Q Do you recall when you were paid for treating Mrs. Burnett?

A I don't believe I ever was paid for treating Mrs. Burnett.

Q Do you remember whether you ever sent a bill for treating Mrs. Burnett?

A No, I did not.

Q Don't you think you put your charge for treating Mrs. Burnett on this bill?

A No, I am positive of that.

Q Do you recall whether you sent the bill of $100 before you wrote to the owners of the property to refer

the matter to their insurance company, or did you write the letter to the company after you rendered your bill?

A I don't know; I don't know the dates of either one of those.

Q (*By the Court.*) The dates would tell you, would they?

A I presume they ought to.

Q (*By Mr. Mylod.*) But you have no recollection whether your bill was $100 at the time, or not?

A I know it was $100.

Q Do you know it was $100 at the time you wrote to the company?

A I don't know. I didn't remember writing that until you showed it to me. I treated that baby for about three months, or more.

Q That is December, January and February?

A Yes.

Q And at that time there was $100 due you, is that correct?

A Yes.

Q Now, had you treated Mrs. Burnett during that time?

A I guess I had.

Q Had you treated any other members of the Burnett household during that time?

A No.

Q Did you treat Mrs. Burnett any time after the three months had expired from the date of the accident?

A No, I don't think so.

Q And you have never been paid for treating Mrs. Burnett?

A No. I never treated anybody in that family until this accident.

Q A broken leg like that usually yields within three weeks' time, doesn't it?

A It would yield, but we don't let the child use the leg within that time.

Q How long do you keep a person in bed for a broken leg?

A We kept her for that leg, I think, for three months or more.

Q Was that the average time?

A It was in this case.

Q Did the abnormal condition, the fact the child was bow-legged and pigeon-toed, have anything to do with the time?

A No. You see we could not do much with this baby until some time after we had set the leg, because the leg was very badly smashed.

Q That was a clean break?

A It was.

Q It was not a splintered break?

A No.

Q You got perfect union?

A Yes.

Q If it had been a splintered break, or green-stick fracture, something like that, there would be indications of that now?

A I think we had a perfect result as it is now.

Q And that result was rendered possible because it was a clean break?

A I don't think you could call it that. I think that result was perfect because we went to the trouble to get a perfect result.

Q You have already testified the child does not limp?

A As I see her now she does not limp.

Q How did you come to recommend a boot for this child?

A The skin over that leg was very badly broken and lacerated at the time of the injury, and it did not heal well; we put a plaster cast on, and under the cast the skin continued to dry and crack, so we kept the

baby off that leg, and when we decided we were going to let the baby walk around we were afraid the baby would knock the leg, or hurt it in some way, so we put a tall leather, somewhat rigid, support on that leg over the area of the break.

Q So you recommended putting the lift in the shoe?

A I did not, no, sir.

Q You did not recommend that at all?

A No, I did not do that.

Q Did you recommend the shoes be ordered from a certain shoe dealer?

A Yes, but they had no lift on. They were an ordinary pair of shoes that they call boots.

Q They were not prescribed because the child limped at all?

A That was not the purpose of the boot; it was supposed to protect the broken area, that is all.

Mr. Mylod. I ask that the doctor's letter be marked for identification.

Same marked D-2 for identification.

Re-direct examination.

Q In your opinion you think that that child, in the course of time, as the result of those two breaks in the leg, do you think she might suffer pain?

Mr. Mylod. Objected to as not proper re-direct.

The Court. What are the probabilities? Not whether she may, or may not. The doctor can answer the probability.

Q Is it probable that the child will suffer pain at the present time?

A In the area of the break?

Q Yes.

A I don't think it is in the area of the break she suffers pain; not there; nor at the point of the fracture, I don't think she has pain.

Q Do you think perhaps, doctor, that it is probable that the child can easily grow tired, more so than a normal leg?

A There is something wrong in the left side now, I am positive—

Mr. Mylod. I ask that the answer be stricken out as not responsive.

Witness. I am referring to the hip, as far as the hip, or pelvis.

The Court. The answer may remain.

Witness. In the area where the break has been I don't think there is pain. The result of the break is perfect; but further up that leg—

Mr. Mylod. I object to anything further up, unless it is connected with the break of the leg. We should not be called upon to defend something we don't know anything about.

Q (*By the Court.*) Unless the condition of which you speak, doctor, is probably traceable to the break, then it should not be spoken of here.

A It may be traceable to the original injury, but not to the injury to that exact point.

Q (*By Mr. Steinsitz.*) You say, then, it is traceable to the injury. Just what injury are you referring to?

A I am referring to the entire injury; to the entire left side of that child's body, when that was all bruised, and black and blue. That is what I am referring to. Her back was contused, and hip was contused. We paid particular attention to the break, and the others were just contusions; we just passed those things over.

Q (*By the Court.*) By that you mean bruises?

A Bruises, yes, sir.

Q (*By Mr. Steinsitz.*) You think, as the result of those contusions and bruises, that other parts of the body other than the area of the leg broken, was affected?

A If there is an injury on that side it is in the pelvis or the hip, because there is an apparent lengthening of that leg; may be a twist in the pelvis.

Mr. Mylod. I do not think that is connected with the accident.

The Court. It may be connected with the accident, but it seems to be so problematical in the doctor's mind, it may not be within the range of probability.

Q (*By the Court.*) Do you know what is the matter, doctor?

A Dr. Sutphen and I went over the baby yesterday, and the only place we could find where there was anything, in fact, was the pelvis, a tilting in the pelvis, an apparent lengthening.

Q (*By Mr. Steinsitz.*) Assuming this child was a perfectly normal child prior to the accident, would you say that, as a result of this accident by a mortar box falling upon the child, causing severe bruises and contusions on the entire left side of the body, would you say that it is possible, if there is a tilting of the pelvis, that it is due to this accident?

Mr. Mylod. That is objected to.

The Court. The objection is sustained.

Q Would you say that the area around the leg, about the broken area, there is pain at the present time in inclement weather?

Mr. Mylod. That is objected to as having been gone over.

The Court. At the same time, Judge Mylod, he has limited it to the point of the break. This question is directed as to whether or not around that locality there was pain.

Q Will you answer that question?

A Well, it is our experience in treating fractures

that after they are better a great many of them do complain of pain in bad weather. I don't know whether there is in this case. It is very possible.

Q You say that you did not observe a limp in the child; isn't that due to the fact that the child had this lift in the heel?

Mr. Mylod. That is objected to.

The Court. The objection is sustained. The question is very leading.

Q Doctor, when you say that you did not observe a limp, did you observe the child walking without any shoes on?

A The baby limped when I was still treating her, when I finished my cast, at that time, after the break, the baby limped, continued to limp at that time. I did not see the baby until yesterday, for the first time, and barefooted I think there is a little limp in her bare feet; I think there is a little limp there.

Q The wearing and lift in the heel, would that eliminate that limp?

Mr. Mylod. Objected to as leading.

The Court. I sustain the objection.

Q Now, doctor, what was the nature of the treatment that you gave to Mrs. Burnett?

A Why, Mrs. Burnett just was worn out, just had a little cold, I believe, at the time, if I remember correctly, and I suppose, not getting any sleep for four or five nights, taking care of this baby, which was very sick, she was just broke down.

Q How many calls did you actually make for the purpose of examining, or attending, Mrs. Burnett?

A I did not make any calls for the purpose of treating Mrs. Burnett. When I would come in to see the baby I would just take a look at Mrs. Burnett.

Re-cross examination.

Q You say as soon as your treatment was finished with the child that the child limped a little. Now isn't that the most natural thing in the world for the child to do?

A Yes, sir.

Q The foot had been inactive for a long time, and you expected a limp?

A Yes, sir.

Q And that did not indicate any shortening, or further injury?

A That is why I did not pay any further attention to the limp.

Q When you examined this child yesterday you made special examination of the pelvis, didn't you, and you found the pelvis was not tilted positively, didn't you?

A No, I can't say that. We assumed that the trouble was there.

Q Let me reverse the question. Let me ask it in this way. Did you find the pelvis tilted?

A No.

Q Did you find the spine normal?

A Yes.

MEYER KRASNER, recalled for the plaintiffs.

Direct examination by Mr. Steinsitz.

Q Mr. Krasner, you testified on examination that you were president of the Superior Realty Company?

A Yes, sir.

Q And you are also the president of the Progressive Investment Company?

A Yes, sir.

Q On cross examination you testified that the Progressive Investment Company collected the rents of this property?

A Yes, sir.

Q Then was the Progressive Investment Company the agent of the Superior Realty Company?

Mr. Mylod. Objected to as irrelevant and immaterial.

The Court. The objection will be overruled.

(Question read.)

Mr. Mylod. Objected to on the ground that agency is for the court to determine, not for the witness to say whether they were agents or not.

The Court. You may answer.

A The Progressive Investment Company were the agents for the Superior Realty Company.

Q And the Superior Realty Company, at the time of this accident, were the owners of the property?

A Yes.

Q They still are, to-day?

A Yes, sir.

Q And they had at that time, and have to-day, control of the property?

Mr. Mylod. Objected to as leading.

The Court. There is no doubt about that.

(Question withdrawn.)

Q In November, 1913, at the time this accident happened, did the Superior Realty Company have control over this property?

A They were the owners of the property.

Q They had general control over it then as owners, didn't they?

Mr. Mylod. Objected to as leading, and as cross examining his own witness.

By the Court.

Q Mr. Krasner, just what is the relation of the Progressive Investment Company to this property?

A Merely agents.

Q What?

A The Progressive Investment Company are merely agents for the Superior Realty Company.

Q And what do they do for the Superior Realty Company in connection with this property?

A Collect the rents.

Q What else?

A Pay what is necessary, taxes, and so forth.

Q They are not the lessee?

A No, no lessees.

By Mr. Steinsitz.

Q Then, if the Superior Realty Company desired to oust a tenant for any reason who would do it?

A Why, the agent for the Superior Realty Company.

Q Then you mean the Progressive Investment Company, as agent for the Superior Realty Company, would do it; is that what you mean?

A Either the Progressive, or any of our employees there.

By the Court.

Q Who do you refer to by that?

A The man collecting the rents.

Q What is his name?

A Rashkober; he may send as agent for the Superior—or Progressive Investment Company—he may send as agent, or the young lady, one of them, whoever has rented the premises to that tenant.

Cross examination by Mr. Mylod.

Q What do you mean when you put books out with the name "Progressive Investment Company" on? How does it happen that you give the tenants books printed with the name "Progressive Investment Company?"

A The agents had no authority to give any of those books out. I said that before.

Q Then the books were given out without authority?

A Simply as memorandums.

Q Then this book if given to the tenant at 153 Peshine avenue by Mr. Rashkober, or Mrs. Liese, the janitress, was given without knowledge, consent or permission of you, or the Superior Realty Company?

A Exactly.

Q Do you know whether it was given without permission of the Progressive Investment Company?

A I certainly do; I have charge of the Progressive Investment Company.

Q And if it was given out, it was given without authority of anybody in the office of the Progressive Investment Company?

A They done that on their own accord, simply for memorandum.

Q Didn't you have them printed?

A We did.

Q For what purpose were they printed?

A We printed them, but we never used them, because we didn't like the form of them. They were simply lying around the office for memorandum books.

Q You know Mr. Rashkober had at least five hundred of these books, don't you?

A He may have had; he may have taken them in the office without my knowledge or consent.

Q Did you furnish blank receipts?

A We did.

Q Have them printed in the name of the Progressive Investment Company?

A Exactly.

Q And not the Superior Realty Company?

A No, sir.

Q And that is one of the receipts, isn't it?

A Yes, sir.

Q Now, have you any books down at your office showing the terms under which the Progressive Investment Company had charge of those premises?

A Certainly have.

Q All right. In what name are the rents listed in your office? Under the name of the Progressive Investment, or Superior Realty?

Mr. Steinsitz. That is objected to.

The Court. The objection is overruled.

Q Under what name?

A The Progressive Investment Company collecting the rents, and they had one ledger, and the Superior have another ledger; and those rents are collected by—

Q I understand, they are entered in a book under the name of the Progressive Investment Company, aren't they?

A As agent for the Superior.

Q And can you get that book and show us where it says "Agents for the Superior Realty Company"?

A I don't know what the book says, but I know that is the—

Q I am asking you how the book reads, not what you think. How does the book read?

A I cannot say just now; my bookkeeper keeps the books.

Q You know, as a matter of fact, that the Progressive Investment controlled those premises, didn't they?

A The Progressive Investment Company is in control of all the Superior property.

Q And they were in control in 1913?

A As agents, yes, sir.

Q And they took the money and deposited it to the credit of the Progressive Investment Company; yes, or no. Did they put it in the bank in the name of the Progressive Investment Company, or of the Superior Realty Company?

A They put it in the name of the company that collected the rents.

Q (*By the Court.*) What company is that?

A Progressive Investment Company. They keep

all the money, and they pay it as necessary, and the end of the year it is divided, your honor. Just the same officers of the Progressive and the Superior; it is the same officers; it is a close corporation; the same officers; and it doesn't make any difference where the money goes to, it goes to the same party.

Q (*By Mr. Mylod.*) But it is a different corporation?

A Two distinct corporations, but at the end of the year it is divided. The Superior has properties, and the Progressive has different properties. The Progressive Investment has control of all the different properties of the Superior, and at the end of the year it is divided in the different corporations.

Q But the control is in the Progressive Investment Company?

A For the Superior Realty Company.

Q You had a talk with Mr. Burnett after the accident?

A Yes, sir.

Q And he told you as soon as he collected from the insurance company he would pay you the $150 rent he owed you, didn't he?

A He asked me to pay damages. I told him I didn't think I was liable for any damages until he heard from the court.

Q Didn't you say "until he heard from the insurance company"?

A I may have used the word "insurance company."

Q And what did he say about paying you the rent when he got the money from the insurance company?

A He found out we were insured in different companies, and he came and said he was going to sue a different company. He refused to pay rent, and I put him out of the house. I sent him a dispossess, and he moved out.

Q And you sent him a dispossess in the name of the Progressive Investment Company?

A As agent.

Q Not as agent; the name of the Superior Realty Company did not appear on it?

A I beg your pardon. The Progressive Investment Company appears on the complaint there as agent.

Q Don't you know as a matter of fact this man was dispossessed by your so-called agent, Jacob Rashkober, as your agent, and not by you?

A He may have, yes.

Q How do you know he dispossessed him in the name of the Progressive Investment Company as agent for the Superior Realty Company?

A That is my orders; it is written out that way by whoever takes the affidavit; if it is the Progressive Company, the Progressive, or one of the agents, signs for the Progressive Company; if it is the Superior Realty Company they—

Q You don't know whether this man was dispossessed by notice from the Progressive, or as agent for the Superior Realty Company?

A I could not swear what the name was on the affidavit; I would not swear to that.

Q Did you receive a letter from the doctor? I show you this letter marked D. 2 for identification, and ask you if you can identify that?

A No, sir.

Q You never saw it before?

A No, sir.

Q Now, can you tell me whether—

A That is not addressed to us, neither.

Q I simply ask you if you saw that letter before to-day?

A No, sir, I never did.

Q Is the Progressive Investment Company insured, or was the Progressive Investment Company

insured, in any liability company during November, 1913, at the time this accident occurred?

Mr. Steinsitz. That is objected to.

The Court. The question may be answered.

A I don't quite understand the question.

By the Court.

Q The question is whether the Progressive Investment Company was insured against liability at this time?

A Against what? We have a whole lot of property; I don't know whether they mean—

Q Against liability.

A Of this property?

By Mr. Mylod.

Q Yes, 153.

A No, sir, they didn't own it; it wasn't necessary to be insured, they were not the owners of this property.

Q You have already told us that when Mr. Burnett called at your office you asked him about the rent that was due, didn't you?

A I certainly did. I sent him a letter to come and see me, when I saw the agents did not turn in any money for Mr. Burnett I sent him a letter to come and see me; and he says he hasn't got any money, and the child was sick, and cost him a lot of money, and he couldn't pay the rent. I told him he has got to pay rent; one thing has nothing to do with the other. And he finally didn't pay any rent for several months. I sympathized with the man, but I had to send him a notice. That is, I told my man to send him a notice.

Q But he told you as soon as he collected from the insurance company he would pay the rent?

A He said if he collect from me. I don't think at that time he knew we were insured. He said, "If you pay me for the accident I will pay you back the rent."

He might have, the second time, when he found out we were insured, he might have used those words.

Q When did he call first, when you say you first wrote to him to come in and pay his rent?

A I cannot recollect. We wrote him several letters to come and pay the rent.

Q Did you write him letters to come and pay the rent prior to this accident?

A Why, I think he paid prior to that accident; I can't recollect that.

Q You never wrote him a letter to come in this office until after the accident?

A I didn't know Mr. Burnett before the accident.

Q The first time he came to the office after the accident was in response to a letter for him to come in and pay his rent, is that correct?

A I think so; I think that was the time.

Q And you think he was two or three months in arrears then, do you?

A He might have been a year in arrears; I can't recollect those things; we have hundreds of tenants, I can't keep track of them.

Q Was he in arrears for rent on that date, February 6, 1914?

A I couldn't tell you without the book; couldn't recall without the book.

Q Have you talked to Mr. Steinsitz since the noon recess?

A Mr. Steinsitz has called me up on the telephone, wanted to know if I would be in court.

Re-direct examination.

Q You say the Progressive Investment Company did not carry any liability insurance?

The Court. On this property, he said.

Q On this property. Did the Superior Realty Company carry insurance on this property?

A They did.

Q And why did the Superior Realty Company carry insurance, and not the Progressive?

A Because they were the owners of this property.

DR. HASSER G. McBRIDE, sworn for the plaintiffs.

Direct examination by Mr. Steinsitz.

Q Doctor, you are the family physician of Mr. Burnett?

A I have been.

Q When did you examine Eleanor Burnett the first time after the accident?

A February 3d, this month.

Q February?

A 3d.

Q Of this year?

A This year.

Q And did you find anything wrong with the left leg?

A It appeared to be a little longer.

Q How much longer?

Mr. Mylod. Objected to. It is only appearance. We want to know whether it was longer or not; we don't want guesswork.

The Court. I overrule the objection.

A I measured about half an inch.

Q And, Doctor, did you prescribe the use of a lift?

A Not specifically, no.

Q Didn't you suggest it?

A They spoke about it, and I said they might procure one, but I gave no definite prescription for one, because Dr. Stearn had been treating the case for this condition. I was called to see her for something else.

Q You suggested they might use it, is that the idea?

A Yes.

Q What made you suggest that?

A The fact that the child had a slight limp; and I said if she did not improve they might have a little lift built on the other shoe so as to give it a symmetrical appearance in walking.

Q So, when you examined the child, you did observe a slight limp?

Mr. Mylod. Objected to.

The Court. The objection is sustained.

Q When you examined the child what did you observe?

A That one limb appeared longer than the other.

Q Now, Doctor, with respect to the position of the foot, what did you find there?

A Well, one toe seemed to be slightly turned in.

Q Which foot was turned in?

A The right foot.

Q And what was the position of the left one?

A Apparently straight.

Q Assuming, Doctor, that the child received injuries by a heavy object, such as a mortar-box falling upon it, and the left leg being broken in two parts, would you say that the position of the left foot is due as the result of this accident?

Mr. Mylod. Objected to. I think the question is very indefinite; purely a speculative question.

The Court. I don't suppose he means the leg was broken in two parts; I suppose he means the bone was broken in two places. You may answer the question with that suggestion.

A I think, probably, as a result of the accident, and the treatment.

Q And, Doctor, would you say that this condition is a permanent condition?

A A permanent condition, yes, the foot, the straightening.

Q That is what I mean, the position of that left foot, that is permanent?

A That is permanent.

Cross examination by Mr. Mylod.

Q Well, that is the proper way for that foot to be, isn't it? The way the left foot points, directly forward, is that the idea now?

A Yes.

Q And that is the correct, normal way for the foot to point, isn't it?

A Yes, sir.

Q And that is the way it is going to remain?

A Yes, sir.

Q And if it pointed in toward the body it would have been abnormal, wouldn't it?

A Abnormal, yes.

Q What did you call on this family for when you went there on February 3, 1915?

A Pardon me?

Q What brought you there?

A They sent me word that the child had a cold.

Q And while you were treating the child for the cold you told them they might put a lift in the shoes?

A No; they asked me to look at the child as the result of this accident, and see what I thought of it.

Q Did you take any measurements then?

A Yes.

Q Do you think it is possible, Doctor, for that child to have this left leg one-half inch shorter than its right leg on February 3d, and to have both legs of the same length yesterday?

A No.

Q Then, if there was a shortening on February 3d in one of the legs, that shortening would appear by measurement if it was measured yesterday, wouldn't it?

A Yes.

Q Who was with you when you made your measurements?

A Myself.

Q All alone?

A Well, I think Mr. Burnett and Mrs. Burnett were in the room.

Q They told you they had a lawsuit coming up very shortly, didn't they?

A Yes, sir.

Q They wanted you to examine the child for the purpose of testifying?

A Yes.

Q From what point of the child's body did you examine when you found one leg was half an inch shorter than the other?

A I measured from the point known as the anterior superior spine to the internal malleolous, a point on the inner side of the leg.

Q You imagine that is where you started your measurements from, but you are not sure, is that the idea?

A That is the point I used.

Q (*By the Court.*) Did you start from exactly the same point when you measured both legs?

A Yes, sir, both sides.

Q (*By Mr. Mylod.*) What other point did you measure from, beside that one point?

A Measured from the knee on each side.

Q What was the result of the measurement from the knee?

A They seemed to be pretty much the same.

Q You measured from the knee to the ankle, didn't you?

A Yes, on each side.

Q How much difference did you notice, Doctor, in the two feet?

A Didn't notice any.

Q There was no difference at all between the knee and ankle?

A I noticed none.

Q And that is where the break was, between the knee and ankle?

A Yes, sir.

Q How do you account for this shortening of half an inch, then? If it is not between the knee and ankle, where is it?

A Apparently from the knee upward to the pelvis.

Q That can be caused in a hundred different ways, couldn't it, that shortening?

A Well, several different ways.

Q And there is nothing in your mind to lead you to believe it is caused by the break of both bones in the leg between the knee and ankle, is there?

A Not the shortening, no.

Q In fact, your opinion is to the contrary, that is it is not from that break at all?

A Yes.

Q You are quite sure there is a difference of half an inch?

A I am not sure. I measured it twice, and one time I measured half an inch, and the other time I wasn't sure it was half an inch.

Q And you measured when you could not discover any difference, didn't you?

A I only measured two times.

Q And you measured hastily, is that the idea?

A No, I didn't measure hastily.

Q That is the only time you had anything to do with the child; I mean as a result of this accident?

A Yes.

Q And you simply made an examination for the purpose of testifying to-day?

A Yes.

Q And while you were making the examination

on February 3, 1916, you told them the child might wear a lift?

A That she might, if there was no improvement.

Q And the child had never worn a lift prior to February 3rd, this month, as far as you know?

A Not as far as I know.

Q Do you know whether the child wears a lift today in the shoe?

A No, sir.

PLAITIFF RESTS.

Mr. Mylod. I desire to ask for a non-suit on the ground that there was nothing shown which would connect the Superior Realty Company, the defendant sued in this case, with the control of the property on the day on which the accident occurred. There has been nothing shown which would indicate that there was any knowledge on the part of the defendant, the Superior Realty Company, of the existence of any mortar box in the back yard on the day that the accident occurred, and there is no proof which can sustain the theory of constructive knowledge. I do not think they have shown in the slightest degree that the defendant in this suit, the Superior Realty Company, neglected any duty. The child was play-in the yard merely as a licensee; we are simply to refrain from any act which is wilfully injurious. There is no allegation in the complaint that any knowledge was brought home to the landlord of any dangerous condition existing; not a word in the complaint about it.

(Argued.)

The Court. The court dislikes very much to grant a non-suit in a case like this, and, as has been suggested by the argument, it may be that the jury would have a right to infer that the mor-

tar box was in a position other than flat upon the ground immediately before the child was injured, because the little child, two years old, could not have raised the mortar box itself and gotten under it; and I am going to hold this motion for nonsuit until the close of the defendants' case. It may be that if nothing else should appear in the case I will have to direct a verdict; I do not want to decide that just now.

Mr. Mylod. Your Honor will permit me to take an exception?

The Court. Yes.

An exception to this ruling is noted by the defendant as ground of appeal.

Mr. Mylod. Will your honor permit me to call a doctor out of town?

The Court. Yes.

Mr. Mylod. Before taking up the defense might I ask the court to consider the proposition of granting a non-suit as to the second count in the complaint, that is, as to the father, on the ground that there is contributory negligence on the part of the father in allowing the child to go out in the yard unattended?

The Court. The motion will be denied.

DR. CARROLL E. SUTPHEN, sworn for the defendant.

Direct examination by Mr. Mylod.

Q You made an examination of this little girl, Eleanor Burnett?

A I did.

Q And when did you make that examination?

A Yesterday.

Q And who was with you when that examination was made?

A The mother and Dr. Stearn.

Q And that is the same little child that has been here this morning and this afternoon?

A Yes, sir.

Q Did you examine the child's leg?

A Yes, sir.

Q Did you find any evidence of having been a fracture there?

A I did not.

Q If there had been a fracture there was the recovery perfect?

A It was perfect.

Q Did you measure the child's leg?

A I did measure them four different ways.

Q Name the points from which you made your measurement.

A From the upper edge of the kneecap to the internal malleolous from the tuberosity of the tibia to the internal malleolous, from the internal condyle of the femur to the internal malleolous, from the anterior superior spine to the internal malleolous, the internal malleolous being the lowest part of the internal bone of the leg, and from the umbilicus to the internal melleolous.

Q Was Dr. Stearn present when you made these measurements?

A He was.

Q Did he assist?

A He did, and we agreed.

Q You agreed there was no lengthening?

A Yes, sir.

Q Did you notice whether the child walked with a limp?

A Did not walk with a limp.

Q And you took particular notice to find that out?

A I did.

Q How long have you been practicing medicine?

A Twenty years.

Q With what hospital have you been connected?

A Roseville Hospital, Newark; St. James Presbyterian Hospital, Newark; Orange Memorial Hospital.

Q You say the mother was present when the child was examined?

A She was.

Q Did she say anything about the child running around after the accident?

A The mother told me that the child was incapable of walking with that leg for about three to four months after the accident.

Q And after that?

A But that from March until October the child ran around perfectly normal, as far as she could see.

Q Would you say that is a well nourished child, doctor?

A Only fairly so.

Q Was the child wearing a lift in the sole of one of the shoes when you made the examination?

A I did not see the shoes.

Q Did the mother say anything about the child having had to wear a lift?

A The mother said the child had one; I didn't see the lift.

Q As far as your examination went was there any necessity for the child wearing a lift?

A I saw no necessity of it.

Q (*By the Court.*) Your examination was made with the foot bare?

A Foot bare, yes, sir.

Q (*By Mr. Mylod.*) Would you say a child pigeon-toed and bow-legged was normal? Would you call that a normal condition of the feet?

A Not absolutely, no.

Q Have you seen cases where a child has one foot turned in, was pigeon-toed on one foot and straight on the other?

A Practically so; it varies.

Q There are a number of such people?

A There are some.

Q And you have seen some of them?

A I have.

Q Do you think it is possible that this child was pigeon-toed and bow-legged in both legs prior to this accident?

A Perfectly possible.

Q And do you think that when the fracture was treated that then the child's leg was straightened, and the growth which resulted in the bow leg taken out?

A It could have been so.

Q And the foot be pointed straight forward, instead of being turned in, is that probable?

A I didn't notice these things myself; I noticed a mild turning in of the right foot.

Q The condition of that child with the right foot turned in, does that give the appearance of a limp, whereas, as a matter of fact, there isn't any limp, or doesn't it indicate any limp, or any deformity?

A I should not think it would give a limp.

Q Did Dr. Stearn agree with you as to whether or not the child limped?

Mr. Steinsitz. I object.

The Court. I will sustain the objection.

Q Well, did the child limp when you made your examination with Dr. Stearn?

A No, sir.

Q Do you think, as this child grows older, that her right leg, which is now curved so as to be practically bow-legged, and the right foot, which is turned in so as to be pigeon-toed, that that condition will clear up as the child grows older?

A Remain about the same.

Q Do you think the left leg, the injured leg, the broken leg, will grow normally, grow strong as the child grows older?

A It will.

Q What, if any, ill effects will this child suffer as the result of having a box fall on her and break her leg some two or three years ago, or in November, 1913?

A I should say no ill effects, from my examination.

Cross examination by Mr. Steinsitz.

Q Doctor, you say that the left leg pointing straight, and the right leg which is naturally pigeon-toed, that condition will remain?

A I think the bow leg will improve somewhat as the child grows older; the straight leg will stay straight.

Q And the left foot will point straight, will it not?

A The left foot will point straight, and the right foot will point straighter.

Q That condition, you said, is permanent?

A That the left foot will be straight is permanent.

Q And you say, doctor, that you know of some cases where the left foot, or one of the feet, will point straight, and the other foot will be pigeon-toed?

A I have seen it.

Q How many of those cases come within your own knowledge?

A I cannot tell the exact number. I recall one very distinctly, examining at the City Hospital for other purposes, taking a general examination of the child, I noticed that one leg was fairly well bowed, and the other was practically normal.

Q But that is not a normal condition, is it?

A Not a normal condition; no bow leg is a normal condition.

Q Would you say, doctor, that, assuming that this child was a perfectly normal child, will you say, as a result of this accident, that the break in this bone —would you say—

A I didn't find any break in the bone.

Q You didn't find any break?

A No, sir.

Q Didn't you look for it?

A Yes, sir.

Q Found no traces of it?

A No traces of it.

Q I will show you here two X-ray photographs that were taken showing the exact location of the breaks of those bones.

Mr. Mylod. I think the counsel should fix when they were taken.

A Well, those bones are broken; I don't know whether they were this child, or not.

Q (*By the Court.*) The testimony is those X-rays were taken two days after the accident?

A They were broken, undoubtedly, but there is no trace of it now.

Q (*By Mr. Steinsitz.*) There is no doubt but what these bones were broken?

A There is no doubt of it from the X-ray plates.

Q You saw no trace of it at the present time?

A No trace of it from external measurements, or appearance.

Q (*By the Court.*) The callous has disappeared?

A The callous has disappeared.

Q (*By Mr. Steinsitz.*) Assuming the bones of that foot were broken at the place shown by the X-ray photograph, isn't it as a result directly of those breaks that this foot is pointing out straight?

A It might be.

Q Well, now, isn't it, doctor?

A Assuming that she was pigeon-toed before, and she is not pigeon-toed now, I should think it was due to the direction in attempting to cure the fracture.

Re-direct examination.

Q If you had been called upon in the first instance to cure that fracture, would you have turned the child's toe in so as to make her pigeon-toed, or turned it out straight?

A I would have tried to make it normal, straight.

Q And the child is in better physical condition with her foot straight, in normal condition, than with it pigeon-toed?

A Yes, sir.

Re-cross examination.

Q You do not mean that, do you, that the child is better with one foot pointing out straight, and the other foot pigeon-toed? Is that a normal condition?

A She has one normal leg now, and one bow leg.

Q At the present time, do you say that is beneficial to the child?

A I should certainly rather have it on my chlid than two bow legs.

Q You would rather have one straight one than one bow-legged?

A Yes, sir. It was not a marked bow leg; it was a very moderate bow leg.

Q It is perceptible, isn't it?

A It is perceptible, yes, sir.

Q And you would rather have your child in that condition?

A I would rather have it that way than have two bow legs.

By the Court.

Q The breaks shown in these X-ray photographs show one break in each bone?

A Yes, sir.

Q That is nothing more than that?

A No; straight break across each bone.

Q Straight?

A Well, in one place.

Q You do not mean a transverse break?

A Not exactly transverse.

JENNIE LIESE, sworn for the defendant.

Direct examination by Mr. Mylod.

Q Where did you live during the month of November, 1913?

A 155 Peshine avenue.

Q Where do you live now?

A 155.

Q The same place?

A Yes, sir.

Q At that time, during November, 1913, did you have any position at 155? Did you hold any office, or do any work for the landlord?

A I was janitress.

Q What floor did you reside on?

A First floor.

Q What floor did Mrs. Burnett reside on?

A First floor, 153.

Q Did Mrs. Burnett tell you that her little girl met with an accident?

A I seen the child right after the accident.

Q Yes, you saw her in the house?

A I saw her in the yard.

Q And did you have a talk with Mrs. Burnett?

A I did.

Q And did she talk about that box that fell on the child?

A Why, yes; we all talked about the box.

Q What did Mrs. Burnett have to say with reference to the time that box came into the yard?

Mr. Steinsitz. Objected to.

The Court. What foundation was laid for this question?

Mr. Mylod. Mrs. Burnett said she never saw that box until she was called out into the yard and saw the child under the box.

The Court. You must lay the foundation in the exact words, or substantially so, that you desire to contradict.

Mr. Mylod. I asked her who she talked to afterwards, if she talked to Mrs. Liese, using her name, and making one man stand up to be identified, and asked her if she said a certain thing to Mr. Rashkober, which she denied.

The Court. You can ask her in regard to the express things about which you asked Mrs. Burnett, one of which was, she said she did not tell Mrs. Liese that the man brought the box in five minutes after the accident happened; that, of course, may be rebutted.

Q Do you remember Mrs. Burnett telling you that she saw the man bringing the box into the yard about five minutes before the accident happened?

A I remember Mrs. Burnett telling me that Mr. Weissman's men brought the box into the yard; whether she said she saw it or not, I don't remember; she said they brought it in the yard.

Q You always were friendly with Mrs. Burnett?

A Same as with any of the other tenants, yes.

Q You, at the time the accident happened, signed a statement?

A Yes.

Q (Showing witness paper.) Is that your signature?

A Yes, sir.

Q Now, will you look at that and see if that statement which you made at the time of the accident refreshes your memory with reference to what Mrs. Burnett told you?

Mr. Steinsitz. That is objected to. I do not think it is proper. It certainly is very improper to have this witness refer to some statement she signed.

The Court. The objection is overruled.

Q Now, can you tell us after looking at that paper,

what Mrs. Burnett told you about seeing the men bringing the box in the yard?

A Well, that I don't remember now; but whatever statement I made at that time is true.

Q (*By the Court.*) You are asked to look at that statement—

A I did look at it.

Q (*By Mr. Mylod.*) Suppose I just read it to you, Mrs. Burnett; tell me—

Mr. Steinsitz. I object.

The Court. That is improper.

Q Read it yourself and then testify; read it to yourself. Now, can you tell us what Mrs. Burnett told you about seeing the men bring the box into the yard?

A Well, if I told that man that Mrs. Burnett saw the men bring it into the yard, she must have told me.

Q Cannot you tell, after reading this statement made and signed by you at the time of the accident, what Mrs. Burnett told you about seeing the men bring the box into the yard, and not looking at the statement?

A No, I can't remember just exactly what she did say to me, but I know she said the men brought the box into the yard. If I told that man that, why that is what was right. It is over two years ago, and gone out of memory.

Q Are you janitress of this house at the present time?

A No, sir, I am not.

Q You are now a tenant in the premises?

A Yes, sir, that is all.

Q Did you observe the condition of the back yard of this property during the time that you were janitress?

A Yes, sir; I did.

Q Did you ever see wheelbarrows and harrows and tools and boxes stored there?

A I didn't see wheelbarrows; I saw one wheelbarrow at a time, and one of these rollers, and a pile of lumber, old flooring, that was there.

Q And what would happen to the pile of lumber?

A Why, the children were always jumping on it.

Q Was it ever used for any purpose?

A No, sir; it was old flooring, stable flooring.

Q Was it brought there for any purpose, for firewood?

A I couldn't tell you; Mr. Weissman put it there.

Q You always told him he should remove it, didn't you?

A I never told Mr. Weissman.

Q Did you ever tell Mr. Rashkober, the man who rented the premises?

A No, sir, but I heard Mr. Rashkober tell Mr. Weissman to take it out of the yard.

Q Did Mr. Weissman take it out when he was told?

A No, sir.

Q He finally chopped it up for firewood, didn't he?

A After the accident he chopped it up.

Q Did you go over into the yard of 153 after the little girl was injured?

A No, sir; I was on the other side of the fence.

Q Did you go over into the yard?

A Yes, sir; I did.

Q Did you see a large box there that had been used for mixing mortar and cement?

A Yes, sir, I did.

Q Had you ever seen that box before?

A No, sir.

Q You had occasion to look at that yard as janitress of the apartment how often?

A Every day.

Q And you know positively that that box was not in the yard up to the day of the accident?

A I never see it until that time.

Cross examination by Mr. Steinsitz.

Q Did not Mrs. Burnett tell you about the mortar box the day before the accident happened?

A No, sir.

Q It was not then?

A No, sir.

Q You rented these premises to Mrs. Burnett?

A Yes, sir.

Q And at the time you rented these premises to Mrs. Burnett did you also rent to Mrs. Burnett the use of the alleyway?

A Why, everybody had to use the alleyway.

Q And did you rent also the use of the stairways?

A Why, yes.

Mr. Mylod. That is objected to. It has not been shown that she has any right to waive any conditions of the rules of the landlord.

The Court. It is certainly improper cross examination. There has been no testimony as to anything that took place prior to the accident, except the mere fact that she was janitress.

Q You did see piles of lumber there?

A Yes, sir.

Q Before the accident?

A Yes, sir.

Q And wheelbarrows from time to time?

A A wheelbarrow.

Q Any other obstructions?

A Just a roller, I don't know what you call it, to flatten the ground; a big iron roller.

Q After the accident were these obstructions removed?

Mr. Mylod. I object.

The Court. I sustain the objection.

Q Was there a fence put up there after the accident?

Mr. Mylod. I object.

The Court. I sustain the objection.

Exception to plaintiff.

Mr. Steinsitz. I will make this witness my own, now, for this purpose, if necessary.

The Court. Why didn't you call her on your own case; this is not your case.

Mr. Steinsitz. It is rather surprising at the present time.

The Court. What is the surprising thing.

Mr. Steinsitz. To prove the condition of the rental. I certainly think the rental included all the premises and appurtenances.

Q In renting a flat do you usually include in that rental the use of the yard?

Mr. Mylod. I object.

The Court. I sustain the objection.

Q Did you include, when you rented this flat to Mrs. Burnett, did you include the use of the yard?

Mr. Mylod. I object.

The Court. I sustain the objection.

JACOB RASHKOBER, sworn for the defendant.

Direct examination by Mr. Mylod.

Q Where do you reside?

A 155 Peshine avenue, Newark.

Q And you resided there during November, 1913?

A Yes, sir.

Q You lived there. Do you recall the day on which the little Burnett girl was injured?

A I was not home at this time.

Q What time did you reach the premises on that day?

A I came home about half-past four, quarter to five, I came home. I met Mr. Burnett outside, by the house; he told me he got an accident, Mr. Weissman put a box in the yard, and the child went in the yard and broke its leg.

Q You collect the rent there, don't you?

A Yes, sir.

Q What is the name of the corporation that employs you?

A The Progressive Investment Company.

Q Will you look at that book and tell me if these books were circulated among the tenants by you?

A Yes, I found the books in the office.

Q In what office?

A The Progressive Investment Company.

Q Stamped with the name of the Progressive Investment Company, isn't it?

A Yes, sir.

Q Did you ever see the mortar-box prior to the evening of the accident? Before that did you ever see it?

A No.

Q Do you know what became of that mortar-box after the accident?

A After the accident Mr. Weissman took it away and chopped it up for wood.

Q Did you see Mr. Weissman—first, what time did you get home?

A I came home quarter to five and report me about the accident, and I called at Mr. Weissman's on the way down, and I tell him "Mr. Weissman, what for you put box in the yard?" He said, "He no was home, the Italian man put the box in the yard."

Q What did Weissman say after that?

Mr. Steinsitz. I object to anything said by Mr. Weissman.

The Court. It will be stricken out.

Q Well, did you go out in the yard after you talked with Weissman? Did you go in the back yard?

A Yes, I was in the back yard.

Q And you saw the box out there?

A The box was flat.

Q Did you ever see that box before?

A No, sir.

Q (*By the Court.*) How was the box, upside down?

A She was flat.

Q What?

A She was upside down, yes.

Q (*By Mr. Mylod.*) Did you see the box there the next morning?

A I saw it before he chopped it up for wood.

Q Who started chopping it up for wood?

A Mr. Weissman in the morning.

Q When was that?

A About eight o'clock the next day.

Q That is the day after the accident you saw Weissman chopping up the box?

A Yes, sir.

Q And that is the same box?

A That is the same box.

Q That you saw there the night before lying flat on the ground?

A Yes, sir.

Q How long did you watch him chop this box up? How long did you stay there and observe him chop the box?

A About five, ten minutes.

Q Did he have it all split apart before you left?

A He split it apart before I left.

Q What did he do with it when he split it apart?

A Put it in the cellar.

Q Were there any wheelbarrows in the yard that night?

A I didn't see any wheelbarrows.

Q I show you what is marked as Exhibit P. 1, and I ask you if that looks like the box that you saw Weissman chopping up?

A Yes, it looks like the box, but it was flat.

Q Now, if I should tell you that this photograph was taken two weeks after you saw Weissman chopping up the box, would you say that that is the same box?

A No, there was no box in the yard; we don't keep nothing in the yard this time.

Q If I should tell you this photograph was taken two weeks after you saw Weisman chopping the box up, would you say that is a picture of the box?

A No, sir.

Q Did you have supervision over those premises to see that they were kept in order, and so on?

A Yes, sir.

Q And did you see that?

A I see that, sure.

Q Did you see any box out in the yard two weeks after the accident happened?

A Saw none.

Q Did you see any mortar-box leaning against the fence?

A No, sir.

Q The only time you saw a mortar-box was when you went out in the yard the night of the accident, and saw it lying flat, and the next morning when he was chopping it up?

A Yes, sir, chopping it up.

Cross examination by Mr. Steinsitz.

Q You are sure of that, Mr. Rashkober; you are sure you saw Mr. Weissman chop up that same box the next day after the accident?

A Yes, sir, because there was cement.

Q Didn't Mr. Burnett see you before this accident about removing the obstructions in the yard?

A He say the wood was in the yard, and I tell Mr. Weissman "Don't keep nothing more in the yard." I gave him strict orders to clean out the yard, because the orders was not to keep something in the yard.

Q Who gave you those orders?

A I got the orders from the building department; they came there and gave me order don't keep nothing in the porches, so long as you got charge, and don't keep nothing in the yard.

Q And you have charge over this very property,

you had charge of it, didn't you? You had charge of this house?

A Yes, sir.

Q Didn't you permit the children to use that yard?

A What?

Q The children; you permitted the children to play in the yard, didn't you?

A Yes, sir, can play in the yard.

Q You permitted Mrs. Burnett to have her children play in the yard, didn't you?

A No, sir, I don't say nothing to him, he don't ask me no questions about it.

Q You saw his children play in the yard, didn't you?

A Sometimes.

Q You didn't say "Keep the children out of the yard," did you?

A No, sir.

Q You always collected the rents, too, didn't you?

A Yes, sir.

Q And do you remember, also, Mr. Burnett coming to you the day before the accident, in the evening, and telling you to take the mortar-box away?

A No, sir.

Q Didn't he see you the day before the accident?

A No, sir.

Q In the evening?

A No box was in the yard this time.

Q You didn't see him that day?

A No, sir.

Q The accident occurred on Wednesday, didn't it?

A Yes, sir, but the accident was this same day Weissman put the box in the yard, the same day.

Q Didn't Mr. Burnett see you the day before?

A No, sir. Mr. Burnett see me two weeks before, when Mr. Weissman bring home one load wood and put him in the yard; it was two weeks before the accident, and he came over and make complaint against

Weissman. He say, "You are the agent, and he put wood in the yard." And I came over and told Mr. Weissman put him in the cellar, I don't want complaints here; and he put him in the cellar the next day.

Q Didn't Mr. Weissman see you Tuesday, the day before the accident?

A No, sir.

Q You are as sure of that as you are that Mr. Weissman chopped up this box the next day?

A Yes, sir.

Q Just as sure of that?

A I am sure of that.

Q When you collected the rent the first time for Mr. Burnett didn't you say to him that he might use that yard for his children?

A Mr. Burnett don't tell me nothing, and I don't ask him nothing, but the children come playing in the yard, but Mr. Burnett don't talk to me about it.

Q But the children can play in the yard with your permission?

A Yes, sir.

The Court. He said that before.

Mr. Mylod. We admit it, too.

Q What do you mean by saying this mortar box was upside down?

A When Mr. Burnett tell me about the accident, and I come in and tell Weissman about the mortar-box, who gave him the privilege to put the box inside, because, before, kick about the wood, I said "Look here, I told you about the wood—

The Court. Now commence over again.

A (Continuing.) "I told you about the wood, don't put in the yard nothing, and now is a box in the yard."

Q You said that to Mr. Weissman, then, on Tuesday, didn't you?

A I told him the same in the evening when the

accident was. I called him down, he came home, and I came quarter after five.

Q Didn't you say that to him the evening before the accident?

A No, sir; I tell him the same evening the accident was.

Q Did you give Mr. Weissman permission to put anything else in the yard?

A No, sir.

Q All this other lumber, and all this other stuff?

A Nothing.

Q Now, what do you mean when you say the box was upside down?

A After the accident, when I come over, the box was—

Q Before the accident?

A I don't see before the accident the box.

Q Now, when you saw it—

A When I saw it she was upside down, she was flat.

Q You mean it was up on edge?

A No, sir, she was on the floor in the yard, on the ground, when I see it.

Q (*By a Juror.*) Can this witness describe the situation of this box by the picture? By looking at this picture here can you describe to the Court and jury the way this box was when you saw it?

A This box was this way (indicating).

Q (*By Mr. Steinsitz.*) I will ask that question. Can you show from this picture how that box was when you saw it after the accident?

A This box was this way, on this side, she was this side; this part of the bax she was on top.

The Court. The bottom of the box.

Q (*By the Juror.*) Who moved the box after the child was taken from underneath it?

The Court. The mother has said already that

she lifted up the box with one hand, and drew the child out with the other. Is that what you mean?

The Juror. What I want to find out is whether they found anything around underneath the box beside the child, any lumber?

Q (*By the Court.*) Did you raise up the box?

A No, sir, Judge.

Q You don't know whether there was anything else under the box or not?

A No, I don't know.

Q (*By Mr. Steinsitz.*) You say you saw Mr. Weissman chop the wood?

A The next day.

Q Didn't you see anything under the box the next day?

A Saw nothing but the box; that is all there is of it.

Q You know the back part of that yard is higher than the front part; you know that, don't you? The back part of the yard is higher than the front part; it slopes?

A The yard is level.

Q Isn't the back part of that yard—doesn't it slope slightly, like this, somewhat (illustrating)?

A I don't know; maybe by inches; some place may be more than an inch, because the yard is level.

Q You are sure of that?

A Certainly, I am sure.

Q Isn't this the same mortar box you saw Mr. Weissman chop up the next morning, that picture?

A That picture, I don't know, it is the box he chopped, the box was covered with cement.

The Court. He has already said it looked like like the box.

Adjourned to February 18, 1916.

SECOND DAY.

Newark, N. J., February 18, 1916.

Continued pursuant to adjournment.

Appearances as before.

ISIDORE WEISSMAN, sworn for the defendant.

Direct examination by Mr. Mylod.

Q Where do you reside, Mr. Weissman?

A 153 Peshine avenue.

Q Where did you reside during the month of November, 1913?

A 153 Peshine avenue.

Q What business are you engaged in at the present time?

A At the present time I am a hatter.

Q That is your trade, hatter?

A Yes, sir.

Q What was your employment during November, 1913?

A Landscaper.

Q Landscape gardener?

A Yes, sir.

Q Do you recall the day on which the little Burnett girl was injured in the yard of 153 Peshine avenue?

A Yes, sir.

Q Where had you been working that day?

A I was working the corner of Madison avenue and Clinton avenue.

Q For whom were you working?

A For Eisele.

Q Eisele, the shoe man?

A The shoe man.

Q What were you doing?

A He was building a house there, and I was sodding and grading that time.

Q Did you finish the job that day?

A Yes, sir.

Q Did you take anything down to your premises, 153 Peshine avenue?

A Yes, sir.

Q Tell us what you took down?

A Took down the tools.

Q And what else?

A And they asked me to take away a box between the curb and the sidewalk.

Q Was that a mortar box you took away from Mr. Eisele's?

A Yes, sir.

Q What did you do with that box?

A I came home. I left the job there, and I came home, 153 Peshine avenue.

Q Now you left the corner of Belmont avenue and Madison avenue, Mr. Eisele's house, what did you do?

A Went home to 153 Peshine avenue.

Q What did you do with the box, and what did you do with the tools?

A I took the pickaxes and shovels, two pickaxes, two shovels and one rake, and threw them through the window of Peshine avenue, into the cellar, and I had a wheelbarrow with me at the time, and I threw it down in the cellar; the same thing with the box, I threw down from the wagon, after I took down the tools I took it down from the wagon, and I told my men to take the box in the yard.

Mr. Steinsitz. I object to what he told his men.

The Court. Yes; not what you told your men.

Q What was done with it?

A The box was taken down in the yard.

Q Did you see the box in the yard at all?

A Well, I saw—

Q No, I mean at this time.

A No, sir.

Q When the men took the box into the yard what did you do?

A I went down to the stable and unhitched my horse.

Q And after you unhitched your horse what did you do?

A I came back to my supper.

Q How long had you been away from the time that the men took the box in the back yard, and you went down to the stable and unhitched your horse, and came back to your supper, how long a time elapsed, about?

A I should judge from ten to fifteen minutes, no more.

Q What did you do after you had your supper?

A I went home, and I stepped out the first on the second floor.

Q No, no, after you had your supper?

A Yes, sir.

Q What did you do?

A I went down to Mrs. Burnett.

Q Now, did Mrs. Burnett say anything to you with reference to the time, or with reference to seeing that box come into the yard?

A No, sir.

Q She didn't say anything about it?

A No, sir.

Q Did you say anything to her—she told you about the accident, didn't she?

A Yes, sir; she told me about the accident, and that is what I went down to Mrs. Burnett, to see what the accident was, and I told her "I feel very sorry, Mrs. Burnett."

Cross examination by Mr. Steinsitz.

Q Mr. Weissman, when did you rent this flat, 153 Peshine avenue, that you occupied?

A When I rent it?

Q Yes.

The Court. When did you move there?

A I don't remember.
Q How long before the accident?
A I don't remember.
Q A year before the accident?
A I couldn't say.
Q Two years?
A I couldn't say.
Q Who did you rent it from?
A Mr. Jake Rashkober.
Q And what was your business at the time you rented the flat? You were a hatter, then, weren't you?
A Yes, sir.
Q You said nothing to him that you were a landscape gardener, did you?

Mr. Mylod. Objected to as immaterial.
The Court. I can't quite see how it is.
(Question withdrawn.)

Q You say you did work for Mr. Eisele, when was that, what day?
A Why, the 26th of November I finished the work up there.
Q The 26th of November?
A Yes, sir.
Q What year?
A 1913.
Q What day was that?
A What do you mean by day?
Q What day of the week?
A On Wednesday I finished it.
Q And then what did you do, after you finished the work at Mr. Eisele's, what did you do?
A I didn't do nothing, because it was too cold to do.
Q What did you do with your tools and mortar box?
A My mortar box?
Q Yes.
A Why, the mortar box I took it home to chop it

for wood, because it isn't my trade to have the mortar box; chop it for wood.

Q But you did have a mortar box that day, didn't you?

A I did.

Q And you say you took it into the rear of the yard?

A I did.

Q Who helped you?

A One man—wait a moment. You tell me who helped me? Nobody helped me. The two men took it in, and I went to the stable.

Q You were with them, though, weren't you?

A No, sir.

Q Didn't you see them take the box into the yard?

A No, sir.

Q Was this wagon yours?

A Yes, sir.

Q Were you on the wagon?

A Yes, sir.

Q Where did you go?

A I went to the stable to unhitch my horse.

Q When did you go into the yard afterwards that same day?

A I didn't go down in the yard.

Q You say you put some of these tools in the cellar?

A I did.

Q Didn't you assist in doing that?

A I did.

Q Then you did go into the yard, didn't you?

A The tools I had to put down I put down through the front window into the cellar, but not in the yard, the pickaxes and shovels I threw down into the front window into the cellar.

Q How big was this mortar box?

A About three feet long, I think, maybe more than that, because I really didn't take no notice how big,

because the box didn't belong to me, just to clean it up around the house.

Q It took two men to carry it from the wagon into the yard?

A I had two men working that day for me; I had more than two men, I had five men, and I put three men off the job; I didn't have money with me to pay the men, and I took them home to the house and got the money to pay the men.

Q You saw these two men take the box off the wagon, didn't you?

A I did not.

Q I show you this picture and ask you whether this resembles the mortar box that you had that day?

A My glasses, please, in the coat there (glasses handed to the witness).

Q That is the mortar box, isn't it?

A I just want you to explain now, which one is the mortar box. This one here is more square here than here (indicating), and I don't think the mortar box was one side wider and the other side narrower; I think the box was right square, and four squares, and this pictures to me that this side here is wider, and this side is narrower, I don't know which one of the box is in here.

Q (*By the Court.*) The question is whether you think that is the box?

A I couldn't say, only the box was square; the one side is narrower, and the other side is wider, and I couldn't say whether this is the box.

Q (*By Mr. Steinsitz.*) You are not sure that that is the box?

A Why, I tell you I can't recognize the box.

Q You would not say it is not the box?

A I could not say it is the box, or couldn't say it isn't the box.

Q How long did it take you to go to the stable and return home to your supper?

A Ten or fifteen minutes; not more.

Q How far is your stable from this house?

A Four blocks.

Q Took you fifteen minutes to walk four blocks, unhitch your horse and return to your house for supper, ten or fifteen minutes?

A No more.

Q After you had your supper then what happened?

A After I had my supper I went down to Mrs. Burnett's house.

Q Sure it was the same day? Now, Mr. Weissman, as a matter of fact, wasn't it the next morning that you went in to see Mrs. Burnett? Isn't it a fact that you didn't know anything about the accident until the next day?

A No, sir, as I prove it to you. Please, your honor, can I prove—

The Court. Answer the question.

A All right, sir. No, sir.

Q When did you see Mrs. Burnett? It was the next day, wasn't it?

A Will you believe me that I not remember the next morning or the same night, but I am more sure—

Q You were sure on your direct examination it was the same night, right after you had your supper?

A I think so.

Q Now you are not sure?

A As I am telling you that I am more sure that I was the same night, not the next morning.

Q When you did see Mrs. Burnett what did you say to her?

A I said to her how the accident happened; she says, "Well, the accident happened"; I say, "Mrs. Burnett, I am father of children, and I am awful sorry for that child," and I left the house at that time.

Q You tried to appease her also by offering her six dollars, didn't you?

A No, sir. Eh?

Q Did you work the next day? It was Thanksgiving Day, you know, the day after the accident happened was Thanksgiving Day, you remember that, don't you?

A I do.

Q Did you work that day?

A No, sir.

Q Now, Mr. Weissman, isn't it an actual fact that that mortar box was not brought into the rear yard on Wednesday, but was brought there on Tuesday afternoon?

A Probably on your knowledge, counsellor, but not my knowledge, because I am sure I finished my job on Mr. Eisele on that day, on Wednesday, the 26th of November, and I took home the tools and pay off the men, and I tell them I not got no more work until spring again.

Q You are absolutely sure it was November 26, 1913; that you do know?

A That I know.

By the Court.

Q I understand you now to say that you did not see this box taken off the wagon, is that so?

A Yes, sir.

Q You didn't see it taken off; you didn't see it taken into the yard?

A No, sir.

Q And from your own knowledge you don't know that it was taken into the yard?

A I told them to take it into the yard, your honor, I told them to take it in the yard and put it away by the fence in the yard.

Q Now, then, when did you next see the box?

A The box I saw the next morning, and a plain-clothes officer—

Q Where was it then?

A Was it right by the fence.

Q What position was it in then?

A Lying flat, the box.

Q Upside down?

A With the open part down, and the bottom up.

Q What did you do with the box?

A Lift the box, I chopped it for wood.

Q When?

A Why, now, this is a question, your honor, please, and the time when the accident happened, and the next day Jake Rashkober came up to my house—

Q No.

A I chop the same day only two sides off the box, the box is there in condition, because, you see, this is the long side of the box, I chop one side of it, and this side I begin to chop it, but come up to my house a man and called me away; but the two sides of the box was right there; the two narrow parts was right there by the box.

Q Well, how long?

A I should say right, that was between seven and probably eight days after the accident was there.

By Mr. Steinsitz.

Q You say you commenced chopping up this box the next day?

A Yes, sir.

Q You mean Thanksgiving Day, isn't it?

A Yes, sir.

Q Mr. Rashkober testified this box was chopped up at eight o'clock the next day, was that the time you commenced chopping it?

A No, sir, because eight and half-past eight was a plainclothes man in my house, and I was yet in my house, and I had a cold, too, and I went down maybe nine o'clock to chop that box, between nine and half-past nine; wasn't eight o'clock in the morning.

Q Will you show the jury from that photograph just which part—

Objected to.

The Court. I would rather hear the question.

Q Can you point out on this photograph the parts of the box you chopped that morning?

Mr. Mylod. No objection.

Q Will you point out to the jury?

A I can't point on the picture nothing at all, because the picture isn't right; but I could point as you want it, just point it in this way, this is the biggest side, and this is the narrower side (illustrating).

Q I am telling you to point it out on this photograph.

A I can't.

Q You say this mortar box was about in this shape, wasn't it (illustrating)?

A Yes, sir.

Q Two long sides and two short sides?

A Two long sides and two short sides.

Q Which side did you commence to chop up?

A This side here and here, and them two sides was left.

Q So you commenced to chop off the sides of the two long ends?

A Yes, sir.

Q And you left the sides of the two short ends, is that the idea?

A That is the idea.

EDWARD W. LESTER, sworn for the defendant.

Direct examination by Mr. Mylod.

Q By whom were you employed in November, 1913?

A By the Superior people.

Q Well, the casualty company?

A The casualty company.

Q And did you meet Mrs. Burnett at that time?

A I did.

Q Did Mrs. Burnett say to you that she saw the box brought into the yard by two men—

Mr. Steinsitz. Objected to as leading.

Mr. Mylod. Simply for the purpose of rebutting the statement of Mrs. Burnett.

The Court. The difficulty is, I noticed when you asked her about the conversation with this witness, she said either that she did or did not, have the conversation with him, and then you left it there, you didn't ask her the conversation she had with him. You see she is a mere witness in the case, she is not a party, and consequently there is no foundation laid for a denial of what she said as to this witness.

Mr. Mylod. If I overlooked that, then I should not ask him to rebut it.

The Court. I noticed it particularly at the time, and took down a memorandum of the ones she did speak with; Mrs. Liese; you asked her particularly about the conversation with Mr. Weissman and the conversation with Mrs. Liese, but when you asked her about the conversation with this witness you left it as to whether or not she had a conversation with him.

Mr. Mylod. It was my oversight, and I will be bound by it.

Q You did have a conversation with Mrs. Burnett shortly after the accident?

A I did, yes.

Q Did you have any conversation at which Mr. and Mrs. Burnett were present?

A Why, shortly after that—

Q Yes, or no, did you have a conversation?

A Yes, I did.

Q Where was that conversation held?

A That was at the attorney's office, McDermit & McDermitt, 800 Broad street, Globe building.

Q What, if anything, was said by you to Mr. Burnett, with reference to the time that the box was brought into the yard, and with reference to knowledge on the part of Mrs. Burnett, the mother of the child?

Mr. Steinsitz. That is objected to.

Mr. Mylod. In the presence of the plaintiff this is, Franklin T. Burnett.

The Court. The objection will be overruled.

Q What was said with reference to the time the box was brought in, and with reference to the fact that the Burnetts knew the time when the box was brought in?

A I told Mrs. Burnett and Mr. Burnett that they knew the box had been brought in about ten or fifteen minutes before the accident had occurred.

Cross examination by Mr. Steinsitz.

Q And what did Mr. Burnett answer?

A I don't recall what he did answer, if he answered at all.

Q Don't you remember that he said to you that box was brought in on Tuesday, the day before the accident?

A No, he did not.

Q You are sure of that?

A Positive.

Q (*By the Court.*) In what capacity were you employed by the Superior Realty Company?

A We were insurers of the Superior Realty Company.

Q (*By Mr. Mylod.*) Are you employed by the same people at the present time?

A No, I am not.

DEFENDANT RESTS.

FANNIE LIESE, re-called in behalf of plaintiffs in rebuttal.

Direct examination by Mr. Steinsitz.

Q Mrs. Liese, did you have occasion to go into the yard the next day after the accident occurred?

Mr. Mylod. Objected to as not rebuttal.

The Court. I assume it is introductory; it is calling her attention.

A I wasn't in the yard the day after the accident, no, sir.

Q When after the accident was it?

Mr. Mylod. I object. It is opening up a new matter.

The Court. You see I cannot tell yet. It may be with reference to the cutting up of this box.

Objection withdrawn.

Q When?

A I could not just tell you when, but I would look at the yards from my yard, and it was my duty in the alleyway to take care of the property.

Q How many days after?

A Probably the day after; I might have been in that day or the day after, I couldn't tell.

Q And did you see this mortar box in the yard (showing witness picture)?

A A box that looked like that.

Q Now, the box that you saw, Mrs. Liese, was any part of it broken, or chopped off?

A I never noticed that.
Q You never noticed it?
A No.
Q You mean by that that—

Mr. Mylod. Objected to.
The Court. I sustain the objection.

Q What do you mean by that?
A If it was broke I didn't see it, I never noticed that; I know the box was there, and I saw it.
Q If it were broken would you have seen it?

Mr. Mylod. I object.
The Court. I sustain the objection.

Q Would you say that no part of that box which you saw was broken?

Mr. Mylod. I object.
The Court. I sustain the objection.

Q (*By the Court.*) Do you know how long the box remained in the yard?
A Probably a week or two weeks; I know it was over a week.
Q (*By Mr. Steinsitz.*) Did you see the photographer take the photograph?
A No, sir, I did not.
Q Mrs. Liese, do you know whether this yard slopes from the back and rear to the front?
A Yes, sir, they do slightly slope.
Q It does slope?
A Yes.
Q How much of a slope would you say, if you know?

Mr. Mylod. I object. The defendant produced no evidence with reference to any slope.
The Court. Mr. Rashkober said it was level.

A That I could not tell; very slight.
Q How do you know that it slopes?

A The reason I know, when it rains the water runs down toward the house.

Q In fact, the water runs down—

Mr. Mylod. I object to the question.

The Court. I sustain the objection.

Q You did not see this box before the accident?

Mr. Mylod. I object to the form of the question.

The Court. I sustain the objection.

NOT CROSS EXAMINED.

MAY LIESE, re-called for the plaintiffs in rebuttal.

Direct examination by Mr. Steinsitz.

Q Miss Liese, did you see the mortar-box after the accident?

A I may have done.

Q (*By the Court.*) Not what you might have done, did you see it?

A Yes, I see it.

Q (*By Mr. Steinsitz.*) Did you see it?

A Yes, sir.

Q Did you notice any part of it broken?

A No, sir.

Q Were all the sides on?

Mr. Mylod. Objected to.

The Court. Objection sustained.

Q You saw no part of it broken?

Mr. Mylod. That is objected to.

The Court. The objection is sustained.

Q (*By the Court.*) How long did that mortar-box remain in the yard?

A About a week or two.

Q (*By Mr. Mylod.*) You say that you did not notice whether there was any part of the box chopped or not?

A No, sir.

ELEANOR BURNETT, re-called for the plaintiffs in rebuttal.

Direct examination by Mr. Steinsitz.

Q Mrs. Burnett, did you see the mortar-box after the accident?

A Yes, sir.

Q And did you notice whether any part of the mortar-box was broken, chopped off?

A None chopped off.

Cross examination by Mr. Mylod.

Q There was none chopped off when you lifted it up and took the child out?

A No, sir.

Q Did you move the box alone?

A No, sir.

Q The little Liese girl helped you?

A Yes, sir.

Q Just the two of you lifted the box?

A Yes, sir.

Q And there was no part chopped off?

A No, sir.

Re-direct examination.

Q Do you remember seeing the gentleman who was on the stand before, this gentlemen, Mr. Lester?

A Yes, sir.

Q Did he say to you—did you hear him say to you that you knew the box was brought there ten or fifteen minutes before the accident?

A No, sir.

Mr. Mylod. I desire to avail myself of the opportunity of laying the foundation for asking this witness the question that I should have asked her on direct examination.

The Court. You may do so.

By Mr. Mylod.

Q Do you recall Mr. Lester calling at your home some days after the accident, and talking to you, this gentleman down there?

A I remember him being there, but I don't remember the time he came in; I came in after.

Q Did you say to him during that interview words to this effect "I saw Weissman's men bring that box in the yard, and about five or ten minutes afterwards the little girl was hurt"?

A No, sir, I did not.

Q Did you say anything that sounded like that?

A I said that—

Mr. Steinsitz. That is objected to.

The Court. I will sustain the objection. The question is whether she said substantially that.

Q Did you say substantially like that, or anything meaning the same as that, about seeing the men bringing the box in the yard?

A I didn't say anything about the men bringing the box in the yard.

Q Your window is right on that side of the house?

A I am not supposed to be looking out in the yard when I was busy in the kitchen preparing for Thanksgiving.

Mr. Steinsitz. I overlooked one question, if your honor please.

Q (*By Mr. Steinsitz.*) When, after the accident, did Mr. Weissman come to see you?

A He came on Thanksgiving morning, the morning after the accident.

FRANKLIN T. BURNETT, re-called for the plaintiffs in rebuttal.

Direct examination by Mr. Steinsitz.

Q Mr. Burnett, did you see this mortar-box after the accident?

A Yes, sir.

Q Was any part of it broken?

A Not until it was destroyed for good.

Q And when was that?

A After the picture was taken; about the first or second day after the photograph was taken.

Q Did you see the mortar-box the next day after the accident, Thanksgiving day?

A Yes, sir.

Q Did you see any part of it broken then?

A Nothing at all; it wasn't touched; everything else was taken out of the yard, but the mortar-box wasn't touched; that was taken back and put up against the fence among the shrubbery.

Q Do you know whether this yard slopes?

A It certainly does. There is a fall in it, every time it rains there is a fall to the front of the house. I asked Mr. Rashkober for the purpose of putting—

The Court. No.

Q Did you meet Mr. Lester, the gentleman that was on the stand?

A Yes, sir.

Q Did he ever say to you "You know that the box was brought in ten or fifteen minutes before the accident?

A I heard nothing of that kind at all. I told him when the box was brought in.

Cross examination by Mr. Mylod.

Q You would not know that the yard sloped, only the rain runs down toward the front?

A I would certainly know it, you can see it, it is a genuine slope.

Q Can't go sleigh-riding on it, can you?

A If there was snow on the ground of course you could.

Q Steep enough for that?

A It is not steep enough to—but it is a decided grade.

Q You did have a talk with Mr. Lester in the office of your former counsel, McDermit & McDermit, didn't you?

A Mr. McDermit did the talking.

Q Mr. Lester did some of the talking?

A To Mr. McDermit.

Q And he said then to Mr. McDermit "You know the box was brought in just a few minutes before the accident occurred"?

Mr. Steinsitz. Objected to.

The Court. The objection is overruled.

A I heard nothing of the kind.

Q Tell us what Mr. Lester told Mr. McDermit with reference to the time the box was brought in?

A Nothing at all about the time at all; he simply came and told Mr. McDermit he wouldn't give a cent.

Mr. Mylod. We don't want that at all.

The Court. That may be stricken out.

Mr. Steinsitz. If your honor please, before closing my case I wish to ask, with the Court's permission, to reopen my case on direct for the purpose of introducing evidence by recalling one of the other witnesses for the purpose of proving that she heard a loud noise and crash—

Mr. Mylod. Does the Court think it is proper for counsel to state what he wishes to prove in the presence of the jury.

The Court. No. If such an application as that is made it should be made by calling the other counsel up to the bench, and making the application quietly.

(Counsel for both parties approach the bench and consult with the Court.)

The Court. The application is denied.

PLAINTIFF RESTS.

Mr. Mylod. I would like to ask Mrs. Burnett one question, as to whether she told Mr. Lester one thing or not, and I should like to call Mr. Lester.

EDWARD W. LESTER, re-called for the defendant in rebuttal.

Direct examination by Mr. Mylod.

Q When you called on Mrs. Burnett some days after the accident, did she say to you she saw the men bring the box into the yard five or ten minutes before the child was hurt?

A She did.

Cross examination by Mr. Steinsitz.

Q Who was present, Mr. Lester?

A Why, I know the little girl was there; I don't recall that any one else was there.

Q You don't recall whether Mr. Burnett was there or not, do you?

A I do.

Mr. Steinsitz. Mrs. Burnett.

The Court. What is the purpose of calling her?

Mrs. Steinsitz. For the purpose of rebutting this testimony.

The Court. She has already denied it; she said she didn't say it.

Mr. Steinsitz. That is all.

TESTIMONY CLOSED.

Renewal of Motion for Non-Suit.

Defendant's counsel renews the motion for non-suit, and also moves for the direction of a verdict in favor of the defendant, on the ground that no negligence, or want of care on the part of the defendant has been shown; that there is no proof of consent on the part of the landlord, or Rashkober for the placing of any articles in the yard; and if Rashkober did permit Weissman to place articles in the yard he was not the agent of the owner for that purpose, and had no authority to waive any of the rules and regulations of the owner: there is no proof of knowledge on the part of the owner of the presence of the mortar box in the yard, and the evidence does not show that it was there a sufficient length of time to charge the owner with knowledge of its presence: there is no proof of a dangerous condition existing in the yard; there is no evidence that the landlord has been guilty of lack of reasonable care in keeping the yard safe; the use made of the yard by the plaintiffs was a permissive use only, and the plaintiffs were mere licensees in the yard, and the duty chargeable to the landlord would be only that with relation to a mere licensee; the complaint does not set out a cause of action. The mere happening of an accident, without proof of neglect of duty on the part of the defendant, is not sufficient to permit the case to go to the jury.

(Argued.)

The Court. The motion for non-suit, and for the direction of a verdict in favor of the defendant will both be denied, and exceptions to both rulings will be noted.

An exception to the refusal of the Court to direct a non-suit is noted by the defendant as ground of appeal.

An exception to the refusal of the court to direct a verdict in favor of the defendant is noted by the defendant as ground of appeal.

Counsel summed up.

Charge.

The Court charged the jury as follows:

DUNGAN, *J.*

Gentlemen: In the first place, I think I ought to say to you that you are not to be influenced in the slightest degree by the refusal of the court to grant the motions made on behalf of the defendant to non-suit the plaintiff, and to direct a verdict in favor of the defendant. The denial of those motions was simply a decision on the part of the court that this case involves questions of fact which it is the peculiar province of the jury to determine, and it is not a case which the judge should decide as a question of law. That is all that those decisions amount to, and they should not be regarded by you as indicating in the slightest degree the view of the court on the merits of the case.

Another point which it might be well to mention is the matter of sympathy and prejudice which has been referred to in the argument. We all sympathize with this little girl in her accident. She is a bright, interesting little girl; everybody smiles when she comes forward, and our affections go out to her when we realize that she has been hurt, and comes before the court asking for damages. But it will not do for the court and jury to permit themselves to be swayed in their duty by such sympathy. The oath of the jurors requires them to find a verdict according to the evidence in the case, not according to their sympathy.

It appears, also, in this case, that it is a matter of small consequence to the defendant whether a verdict goes against it or not, because it is insured. That does not make any difference. You cannot take that into consideration. Even if the insurance company was the defendant it would have just as much right in the courts, and should receive just as much consideration from the jurors as this little girl. You must absolutely discard from your minds, in your consideration

of the testimony in this case, all sympathy and prejudice, and just remember that your oath requires you to find a verdict according to the evidence produced in the case, and not according to sympathy or prejudice.

You are trying two cases. You are trying the case of this little girl, who seeks to recover damages for the injury which she sustained, and for the pain and suffering which she has undergone as the result of those injuries. That is the extent of her right to recover. The father also joins with her in the suit, and seeks to recover damages for the money which he has expended in attempts to cure his little daughter, and to alleviate her pain and suffering, and for the loss of the society of the little girl while she was confined to her bed; we can hardly say, in this case, loss of services, as has been suggested in the argument, because the little girl was too young to render any services,we may assume, even around the house. She was only two years of age at that time. So, in this case, if the little girl is entitled to your verdict, then she is entitled to compensation for the injury which she has received, and for the pain and suffering which she has undergone as the result of those injuries; and, if she is not yet entirely cured, for the pain and suffering which she may undergo in the future as the result of her injury.

The injury alleged in the complaint, and for which the plaintiff is intitled to recover, is the breaking of the leg. It appears that her left leg was broken in two places; that is, that both bones were broken. There are two bones in the lower leg, from the knee down, and both of those bones were broken. The mother says that the little girl, from the 26th day of November, the day before Thanksgiving, 1913, when she was hurt, up to March, when a special pair of shoes was obtained for her, was confined to her bed; and that after they had obtained these shoes she was around, and limping, for some time, and that even to this time she has pain

at certain times in this leg. The testimony of the doctors—and even the doctor who attended this little girl, produced here on the part of the plaintiff—is to the effect that this leg has been permanently and perfectly cured; that there is now no deformity or disfigurement. He says he considers it a good job; and, while he says from some points of measurement the leg shows a little difference in length, from other measurements it does not show any difference in length. The parents insist that there is a limp in this little girl. You saw the little girl walk before you here, and you can say whether there is any limp. If there is a limp, and she is likely to limp in the future, then, of course, for that disfigurement she would be entitled to recover. It is also insisted on the part of the parents that because this little girl was bow-legged to the extent of which you see her right leg is bowed, and was pigeon- toed to the extent you see the right foot turned in, that the effect of breaking this leg, and setting it, and thereby straightening it, and turning the toes of the left leg forward, is a disfigurement. The doctors say it is not a disfigurement. Dr. Sutphen, who is produced by the defendant, says if it was his child he would much prefer to have one leg normal, and the other with the slight bow there is in this child's right leg, and with the slight inturning of the right toes, than to have both legs bowed, and both feet turning in. However, it will be for you to say; you have seen the little girl, and you are the judges of the facts, and it will be for you to say whether or not this setting of the leg, which all the doctors announce to be a perfect job, but which makes it a little different from the other leg, is a disfigurement. If it is, and the plaintiff is entitled to recover, then she is entitled to recover whatever would be compensatory damages for this disfigurement. I have used the word two or three times "compensation." That means that your verdict must not include any-

thing by way of punishment to the defendant, even though you find the defendant to have been guilty of negligence in this case. But the damages which you assess must be limited to what you believe will be a money return to this little girl—a return in dollars and cents—for the injury which she has sustained, for the pain and suffering she has undergone as the result of her injuries, and, if you believe there is any disfigurement, what will be a return in money to her for that disfigurement.

As to the father. If the little girl is entitled to recover, then the father will be entitled to your verdict, unless, as is suggested in one of the requests to charge, knowing the condition of things in the yard, and knowing that it was dangerous for children, the father permitted his little girl to go out in the yard and play, thereby incurring the danger of accident from conditions there which he knew to be dangerous, then he cannot recover, even though the little girl can recover. But otherwise, if the little girl is entitled to recover because of the negligence of the defendant in this case, then the father is entitled to recover also. And he is entitled to recover compensation for the loss of the society of this little girl while she was unable to be to him what she would be if she were in her normal condition, the damages for which must necessarily be very slight. Because, as I have already said, this little girl was not old enough to render any services; and, as to the loss of her society, she was in the household, but she was in bed, and all he is entitled to on that account is compensation for the loss of her society in her normal condition. He would also be entitled to recover for such money as he has expended, or for which he is responsible, in attempting to cure his daughter, or to alleviate her pain and suffering. Those items seem to be the doctor's bill of $100; special shoes which the doctor ordered, or suggested would be an advantage, $10; for medicines, $20; and for the hiring

of a maid. He said that they hired a maid soon after this accident occurred, and that she was with them until April, and that he paid her $15 a month. But you will recollect in that connection that the mother was also sick in that time, and he is only entitled in this case to be reimbursed for the money paid to this maid to the extent that it was necessary for the taking care of this child; not on account of the sickness of the mother. If you believe that the mother would have been able to take care of this child if she had not been sick, and would have taken care of her but for that fact, and that the maid was employed simply because the mother was ill, then the father is not entitled to that item. He is only entitled to such money as he has expended on account of the accident to this little girl, and the effect of the accident upon the mother cannot be taken into consideration by you.

So much for the question of damages. But, while I mention first the question of damages, because it seems to come logically at that point in the charge, of course that question should not be considered by you at all unless you find that the defendant in this case was negligent. That is, that the defendant, the Superior Realty Company, or its agent in charge of that property, omitted some duty which it owed to this little girl. Negligence is the gist of this action. The mere happening of this accident does not entitle this little girl to recover. A landlord is not an insurer of the safety of his premises, and does not insure his tenants, by leasing property to them, against accident. Something more must be shown than that there was an accident to this little girl. It must be shown that the accident occurred through the negligence of the Superior Realty Company.

At the outset two situations present themselves; and the first question which you should consider is whether or not this little girl in using that back yard, was a mere licensee, that is, was she there merely by

permission, and without any right on the part of her parents or herself to use that yard? If this little girl was there merely in that way, if this yard was used by the Burnetts merely by permission, without any right to use it, then they were mere licensees, and the only duty which the defendant, the Superior Realty Company, owed to the Burnetts, or their children, was to abstain from wilfully injuring them—that is, from intentionally injuring them—and there was no proof in this case which would entitle you to find that the Superior Realty Company, or its agent, Rashkober, wilfully, intentionally, did anything there to injure this little girl. If you find that to be the use that was being made of this yard by this little girl, simply a permissive use, without any right to be there, then your verdict must be in favor of the defendant.

But it is insisted on the part of the plaintiff, Mr. Burnett, that they not only leased the apartment, but that they leased the yard. There does not appear to have been, at the time of this leasing, anything said directly about the yard. That is, Mr. Burnett does not testify that when he leased this apartment through Mrs. Liese there was anything said that the yard was included. But he does say, you will remember, that they went there at night, and that in connection with the examination of the premises Mrs. Liese and he went out into the yard in the rear of the house, where the little girl was injured. It also appears that not only did the children of the Burnetts use that yard, but that other tenants of the house, or, at least, one other tenant, used that yard; that was Mr. Weissman, who put in this yard, you will remember, some of his tools, rakes, shovels, picks, and things of that kind. And Mr. Rushkober himself upon the stand says the children had the use of the yard with his consent. It will be for you to say, in the absence of any direct contract that the yard should be used and leased in connection with the house, whether or not there was a

use of the yard in connection with the apartment. And that fact must be established by the greater weight of the evidence in the case. If you find it to be so established, then a different duty devolved upon the defendant from that which devolved upon him if the use was that of a mere licensee. If the use which was being made of this yard by the Burnetts was as tenants, if they leased that yard, then they had a right to use it. Or if, by anything that was said or done by the defendant, or by the duly authorized agent of the defendant, the children were invited to use that yard, the duty which devolved upon the defendant then was to use reasonable care in keeping the premises safe for the use of those who had a right to use it, or who were invited to use it.

I have used the words "reasonable care," that it was the duty of the defendant under those circumstances to use reasonable care to see that the premises were in a safe condition. Something more than that is necessary, however, before the plaintiff can recover in this case. I mean, something more than that the premises were unsafe, is necessary to be shown. It must also appear that the owner had knowledge of the unsafe condition of the premises, or, if not actual knowledge, that the unsafe condition had existed for so long a time that knowledge on the part of the owner will be presumed.

It appears that Mr. Rushkober was the person who collected the rents from these premises, and Mr. Krasner, who is the president of the Superior Realty Company, the defendant, said upon his direct examination that Rashkober was the agent of the defendant for collecting rent; and he said that he made repairs, and whatever was necessary to take care of the property. It has been held distinctly that where a person occupies such a position with reference to real estate, that notice given to him is notice to the owner, and charges the owner with notice after a reasonable

time. But Rashkober himself says that he was not the agent of the Superior Realty Company, but that he was the agent of the Progressive Investment Company, and that he collected the rent for the Progressive Investment Company. Mr. Krasner, when called to the stand again, while admitting that to be the fact, said that the Progressive Investment Company was simply the agent of the Superior Realty Company for the purpose of collecting the rents for that company. If that be true, and you find that to be the situation, that the Progressive Investment Company was the agent of the defendant in this suit for the purpose of collecting the rents, and that Rashkober was the agent of that company for that purpose, and that he was the agent of the Superior Realty Company, as stated by Krasner in his direct examination, for the purpose of making necessary repairs to these premises, then you would be justified in finding, if that be established by the greater weight of the evidence, that any notice given to Rashkober was notice given to the defendant in this case, the Superior Realty Company. At this point, therefore, from all I have said you can see that it becomes important for you to determine when this box came into that yard, the box under which the little girl was found and which apparently injured her. Mr. Burnett is the only witness who testifies that the box was in the yard any considerable length of time. And you must remember, in this connection, that the burden of proof that it was there a considerable length of time, such length of time as to charge the defendant with knowledge of its presence, and with the duty to remove it, is upon the plaintiff. Those facts must be established by the greater weight of the evidence. Mr. Burnett testifies that the box came in the yard, with other things, the night before, and that then he had a talk with Rashkober about the presence in the yard of these things, and that Rashkober went up and

talked to Weissman about it, had a quarrel with him, came down, and had some conversation about it. This was, he says, the day before. This, however, is denied by Rashkober; and every other witness who testifies in the case as to when that box came in the yard says that it came there the day of, and only a few minutes before, the accident occurred. Perhaps that does not state it just exactly right. There is but one witness, I think, who testifies positively that the box came in the yard that day. That is Mr. Weissman himself. He says, you remember, that he finished working at a place that day about four o'clock in the afternoon, and then brought this box to the yard. He did not see it taken in the yard; it was taken there, he says, by two of his Italian helpers. But, at any rate, he says he directed that it be taken into the yard. The other witnesses testify—even the mother of the plaintiff in this case, that although this box, when she saw her little girl, was only about five feet from the back door—that they had not seen the box there until after this little girl was injured; that they had not seen it there the day before, or had not seen it at any time previous to the accident.

As I have stated, the facts are for you, and it is for you to say when that box came in the yard. If it did not come in the yard until a few minutes before this accident occurred, then there is no evidence that Rashkober, or anyone else was notified of that fact; and if it was there only a few minutes before the accident occurred, it had not been there a sufficient time to charge the landlord with notice of its presence, or of its dangerous position, and under those circumstances your verdict must be for the defendant; that is, unless you find it established by the greater weight of the evidence that that box was in the yard the day before, then your verdict must be for the defendant in this case; because there is no evidence that the box came in the yard at any particular time of day; it

either came in the day before, as Mr. Burnett says it did, or it did not come in until a few minutes before this accident occurred. And if it did not come in until a few minutes before the accident occurred, then it had not been there long enough to charge the defendant with notice of its presence there, and its dangerous position, and to give him reasonable time to move it, or remedy its dangerous position.

Was it in a dangerous position? There is no direct proof in this case of how this accident happened. There is no direct proof of negligence. If you find that there was negligence, you must find it from facts in the case from which negligence may reasonably be inferred. Where we are obliged to rely solely upon presumptions the presumption always is that reasonable care, ordinary care, has been exercised. From the proven facts in this case can you say that this box was left in that yard in a dangerous position? What are those proven facts? First, this child was found under the box, only the child's hair sticking out. The child was only two years old, and the testimony is that this was a heavy box, too large for this child to lift and get under himself. Miss Liese, who was coming in the alleyway before this child was found, says that she heard a crash; she immediately went into the yard, found the child under the box, nothing but her hair sticking out, and that there was no one else there. The child was bruised all around her left side, the doctors say, and this leg was broken. Would these facts indicate that the box had fallen on the child? Could it have fallen on the child and inflicted this injury if it had been lying on the ground? or by any action of the child? If it could not, then is it not a reasonable inference, from these facts, that it was on its side? If it was, in view of the fact that children used that yard as tenants, or invitees, if they did so use it, was that a dangerous position?

If you find that that box was in a dangerous posi-

tion, if you find that the proven facts justify that inference, then, if the defendant, or its agent in charge of that property, had knowledge of its presence there, and, not only knowledge of its presence, but of its dangerous character or position, or if the condition, or position, had existed so long that knowledge must be presumed, then the defendant by permitting it to be there in that condition or position would be guilty of negligence by failure to remove it, or render its condition or position safe within a reasonable time.

To sum up what I have said. Before the plaintiff in this case can recover three things must appear by the greater weight of the evidence. All of three things must appear; not one of them, or two of them, but all of them must appear. First, that the use of this yard by the Burnetts was as tenants, or invitees. That is, that they had a right to use the yard; that they were not there merely by permission as licensees. Second, that the box not only was in the yard, but that it was in a dangerous position, so that persons having a right to use the yard, or part of it, could not do so in safety. And, third, that the defendant, or its agent in charge of the premises, had knowledge of the presence there of that box; and, not only of its presence, but had knowledge of its dangerous condition or position in the yard; or that it had been there so long that knowledge of its presence and dangerous condition or position in the yard would be presumed.

If all these things appear by the greater weight of the evidence in the case then your verdict should be in favor of the plaintiff, the little girl, in any event, and of the father also, unless you shall find that it was negligence on his part to permit the little girl to use that yard with the knowledge which he says he had of the presence there of these implements and this box. On the other hand, if you do not find all these facts to be established by the greater weight of the evidence, then your verdict must be in favor of the defendant.

The first four requests to charge on behalf of the defendant I decline to charge except as I have charged; and I think I have charged the fifth and sixth requests substantially. You may retire.

(The jury retired.)

Mr. Mylod. I desire to except to that part of the charge which instructed the jury that the father of the little girl was entitled to damages for the loss of her society, for the reason that there is no such allegation of damages alleged in the complaint.

The Court. An amendment will be allowed including the loss of society. The exception will be noted.

Mr. Mylod. An exception is also taken to that part of the charge which states that if the girl is entitled to recover, then the father is also entitled to recover, as not being the proper measure of damages, and as not clearly presenting to the jury the defense of contributory negligence.

The objection is noted by the defendant as ground of appeal.

Mr. Mylod. I desire also to enter an exception to that part of the charge which makes it a question for the jury to determine whether the little girl was on the premises merely by permission.

The objection is noted by the defendant as ground of appeal.

Mr. Mylod. I desire to note an exception to that part of the charge which makes it a question for the jury to determine whether or not the child was invited to make use of the yard, or that part of the yard, for the reason that there is no evidence in the case to warrant the inference that any invitation was extended by the owner, or the agent of the owner.

The exception is noted by the defendant as ground of appeal.

Mr. Mylod. I desire to except to that part of the charge which makes it a question for the jury to determine whether or not the box "was left in a dan-

gerous condition or position," for the reason that there is no evidence in the case to show that the box was in a dangerous position, or from which it can be reasonably inferred.

The exception is noted by the defendant as ground of appeal.

Mr. Mylod. I also desire to except to that part of the charge which states "Is it a fair inference to say that the box was on its side," for the reason that the determination of that question is not a matter for the jury to speculate with, but one which should be proven by at least some evidence.

The exception is noted by the defendant as ground of appeal.

Mr. Mylod. I desire to except to that part of the charge calling upon the jury to determine whether or not the landlord, or the agent of the landlord, had knowledge of the dangerous condition of the box, or of the premises, for the reason that there is no allegation of knowledge on the part of the defendant in this suit alleged in the complaint.

The exception is noted by the defendant as ground of appeal.

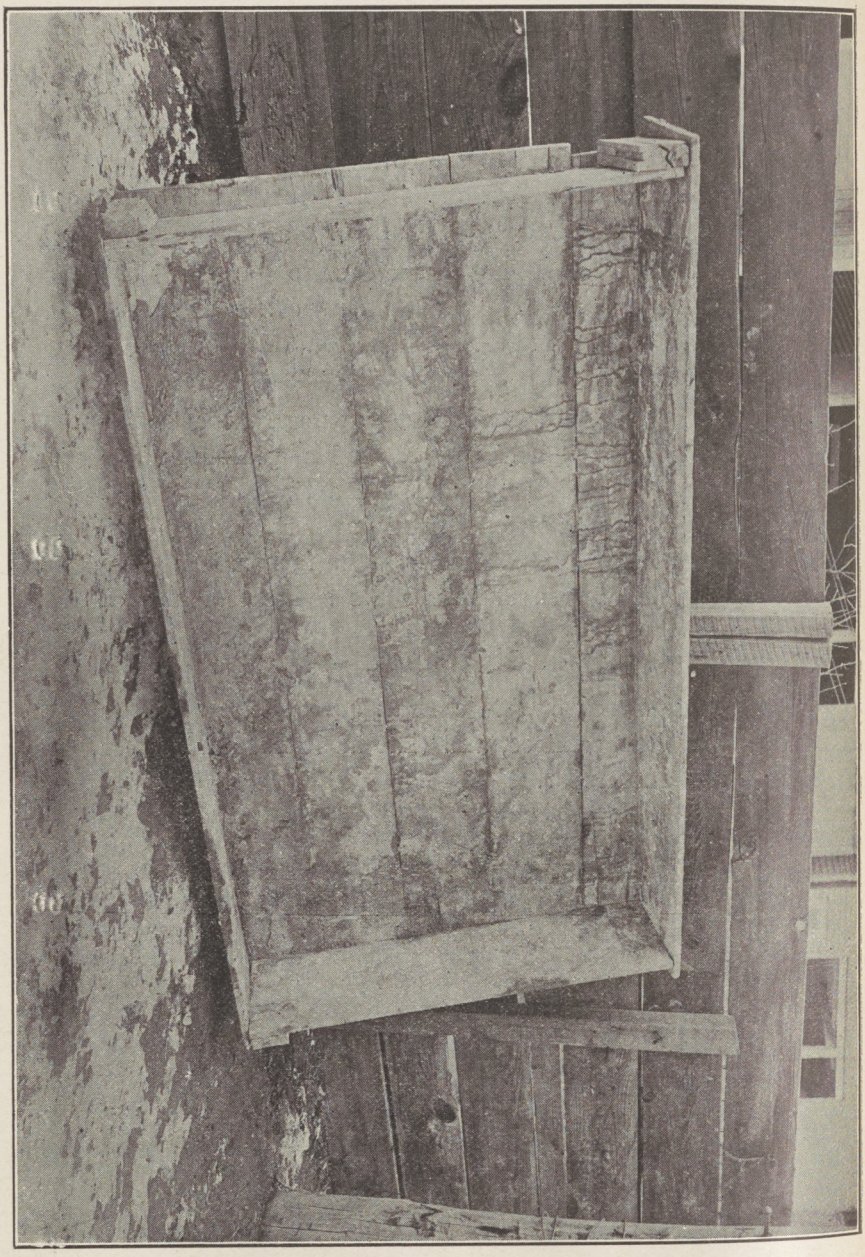
Mr. Steinsitz. I wish to except to one portion of the charge, and that is with reference to the loss of future services of the child to the father, as alleged in the complaint.

The Court. There was absolutely no proof that there is any loss of function of this leg at all; the only proof as to future condition is that there may be a slight deformity, and no one avers that that would result in the loss of services. However, you are entitled to you exception.

Defendants' Requests to Charge.

1. That under the evidence, the tenants in said building were simply given permission to use the yard.
2. That the tenants, and particularly the infant plaintiff, Eleanor Burnett, was a mere licensee.
3. That with respect to the infant plaintiff, Eleanor Burnett, the landlord's only duty was to abstain from acts wilfully injurious.
4. That there is nothing in the case to show that the infant plaintiff, Eleanor Burnett, was in the yard with any greater right than that of a mere licensee.
5. That if the jury find that the negligence of the parents in permitting the infant plaintiff to be in the yard, considering the time of the day and the condition of the yard, then the plaintiff, Franklin P. Burnett, the father, is not entitled to recover under his separate cause of action.
6. That the landlord is only required, under the law, to use reasonable care in ascertaining defects in the premises, and that he is not an insurer or guarantor.

PLAINTIFF'S EXHIBIT No. 1.



Exhibits.

PLAINTIFF'S EXHIBIT No. 2.

DAVID A. STERN, M. D.

Mr. Burnett
153 Peshine Ave
Newark, N. J.

Dear Sir:

For surgical services rendered.....$100.00
March 1-1914.

PLAINTIFF'S EXHIBIT No. 3.

FELTER & COMPANY
MANUFACTURERS OF SHOES
245-247 N. J. Railroad Ave.

Newark, N. J., Feb. 3rd, 1914.

Sold to Mr. R. F. Burnett,
153 Peshine Ave., Newark, N. J.

1 Infants Vici Kid High Cut Lace; High Counters to tops; special pair, made to order $10.00

Paid

FELTER & CO.
3/7/14 W. B. F.

Exhibits.

PLAINTIFF'S EXHIBIT No. 4.

Mr. .....
Premises .....
Apartment .....

PLEASE BRING THIS BOOK WHEN PAYING RENT

PROGRESSIVE INVESTMENT CO.

GLOBE BUILDING
Broad and Mechanic Streets
Phone 4723 Market

TERMS OF LETTING FOR ONE MONTH ONLY.

Each and every Tenant occupying the said premises shall keep peaceable and quiet and their Apartments clean and in order, causing the same to be scrubbed, with the Entries, Stairs and Privies, at least once in each week in turn, excepting when Janitor service is furnished. No dog or boarder shall be kept or admitted. Lumber or furniture of any kind will not be permitted to occupy any part of the Entries, Stairs, Stoops or Yard. Coal, Ashes or Garbage of any kind shall not be thrown or deposited in any part of the yards, cellars or privies. Splitting or cutting wood on any hearth or floor, or on the yard pavement, IS POSITIVELY FORBIDDEN. No signs to be placed on the building. In default of any of the above conditions, this Agreement is to cease and determine by giving the tenant one day's Notice to move and forfeit the rent paid the owner.

Newark, N. J.,.....191..

Received from Mr.....
the sum of.....Dollars,
Rent for the month ending.....
For .....
$.....
.....

Newark, N. J.,.....191..

Received from Mr.....
the sum of.....Dollars,
Rent for the month ending.....
For .....
$.....
.....

Newark, N. J.,.....191..

Received from Mr.....
the sum of.....Dollars,
Rent for the month ending.....
For .....
$.....
.....

DEFENDANT'S EXHIBIT No. 1.

PROGRESSIVE INVESTMENT CO.

GLOBE BUILDING

800 Broad St., Newark, N. J.

Phone 6181 Market

Newark, N. J., ...19....

Received from.....
..... Dollars
.....
.....

PROGRESSIVE INVESTMENT CO.

$..... Per.....

Reasons.

New Jersey Supreme Court.

ELANOR BURNETT, by next friend, and FRANKLIN P. BURNETT, *Plaintiffs-Appellees,* *vs.* SUPERIOR REALTY COMPANY, a corporation, *Defendant-Appellant.*	*Action at Law.* *Reasons on Appeal.*

To Peter Steinsitz, Esq.,
Attorney for Plaintiffs-Appellees.

Sir:—

PLEASE TAKE NOTICE that the following are the reasons set forth by the defendant-appellant as the grounds of appeal in the above entitled cause:

1. Because the trial Court refused to grant defendant's motion for a non-suit.

2. Because the trial Court refused to grant a direction of a verdict in favor of defendant.

3. Because the verdict of the jury is contrary to the weight of the evidence.

4. Because the charge of the Court was erroneous in law.

5. Because the charge of the Court, with respect to the measure of damages, was based upon an erroneous rule of law.

6. Because the damages awarded by the verdict of the jury were excessive.

7. Because there is no evidence of negligence on the part of the defendant.

8. Because the Court admitted illegal evidence for the plaintiffs.

Respectfully yours,

DANTE RIVETTI and
JAMES P. MYLOD,
Attorneys for Defendant-Appellant.

Dated April 20, 1916.

Service of the within reasons acknowledged April 22, 1916, as within time.

PETER STEINSITZ,
Attorney for Plaintiffs-Appellees.

Opinion.

Filed November 25, 1916.

NEW JERSEY SUPREME COURT.

June Term, 1916.

ELANOR BURNETT, by next friend, and FRANKLIN P. BURNETT, *Plaintiffs-Respondents,* *vs.* SUPERIOR REALTY COMPANY, a corporation, *Defendant-Appellant.*	*Action at Law.* *On Appeal.*

Argued June 18, 1916.
Decided November , 1916.
Appeal from Essex Circuit Court.
Argued June Term, 1916, before Justices Garrison, Parker and Bergen.
For the appellant, James P. Mylod.

For the respondent, Herbert Boggs.

The opinion of the Court was delivered by Parker, *J.*

This appeal brings up a judgment recovered by the plaintiff, an infant of tender years, based upon the verdict of a jury for damages sustained by an accident. The grounds of appeal are for the most part indefinite and do not point out any legal error on the part of the trial court except the first, which sets up that the trial court refused to grant the motion for a non-suit, and the second, that the Court refused to grant a direction of a verdict in favor of the defendant. With the third, which is that the verdict is contrary to the weight of evidence, we have nothing to do on this appeal; the fourth, that the charge was erroneous in law, specifies no error; the same may be said of the fifth, that the charge of the Court on the measure of damages was based upon an erroneous rule of law; the sixth, that the damages were excessive, is not open to consideration at this time; the seventh, that there is no evidence of negligence on the part of the defendant, is covered by grounds one and two, and the eighth and last, that the Court admitted illegal evidence for the plaintiffs, is similar to the fourth in failing to specify what illegal evidence is complained of and was objected to at the trial. The sole question therefore is whether there was a case for the jury.

The plaintiff, a little girl of tender years and too young to testify, was injured in the back yard of the apartment house or tenement house where she lived with her parents on the ground floor, by a mortar box about six feet long and four feet wide falling over upon her. No one saw it fall, but the child was heard to scream and was found lying flat on the ground on her face with the box lying over her. It was inferable from the evidence that the

mortar box had been stored in the yard on its edge so that it might easily be caused to fall in the manner in which it did fall.

Two important questions in the case are, whether there was evidence to justify a jury in finding that the infant plaintiff was invited by the owner of the premises, the defendant, to use the yard as a playground, and secondly, if so, whether there was evidence to justify the jury in further finding that the fall of the box was due to any negligence that could be brought home to the defendant company. Both of these questions turn to some extent upon questions of authority, expressly or impliedly or ostensibly conferred upon the defendant as its agent.

The defendant is the owner of the property. It turned over the management of the property to another corporation called the Progressive Investment Company, which seems to have been engaged in the real estate business, as its agent to manage and control the house and apartments and collect the rents, and generally attend to the usual details of the landlord's agent. That corporation had an employee named Rashkober, who was entrusted, as the jury might find, with the duty of collecting rents and attending to repairs. He also undertook to settle disputes among the tenants. He seems to have lived there on the premises, or next door, or near by so that he was readily accessible to tenants. In addition to this there was a janitress of the building named Mrs. Liese, who also seems to have taken more or less part in the renting of the premises, especially in showing rooms and in the preliminary negotiations for rental. There are various circumstances in the case which bear both on the question of agency and of negligence, and therefore are recited together.

We think it sufficiently appears as a jury question that the rooms were rented to the Burnetts

with a specific privilege of the yard for their children. The evidence indicates that Mrs. Burnett, who went to arrange for the rental, dealt with the janitress, who offered her the second floor rooms and Mrs. Burnett refused to take them and insisted on the ground floor on account of the children. She said that she told the janitress at the time that she was moving from the second floor. There was no denial that the children played in the yard without objection. The mortar box and a quantity of other impediments such as planks and garden tools belonged to, or were in the possession of another tenant of the building named Weissman, who caused them to be put in the yard. As soon as the mortar box and these other articles came into the yard Mr. Burnett complained to Rashkober on the ground that the yard was for the children, and, according to the testimony, Rashkober said that he would see Weissman at once in the matter. It appears that he did see Weissman and had a dispute with him on the matter of storing these articles in the yard. It also appears that Burnett announced his intention of making complaint at the office of the agents and that Rashkober told Burnett that it was his (Rashkober's) business. It further appears that on one occasion when Burnett had an errand at the office of the Progressive Investment Company about his rent book, he was informed that Rashkober was the agent and that if he did not have rent books the office would furnish them to him. We think that these facts show at least an ostensible agency of Rashkober and the janitress for the defendant company under the doctrine of *Klitch* vs. *Betts,* 98 Atl., 427, and a question for the jury as to whether the plaintiff, in common with the other children, was entitled to use the yard to play in.

The case is different from *Saunders* vs. *Realty Co.,* 84 N. J. L., 278, in that the lease in the present

case was oral, and, as the jury might find, the use of the back yard was under discussion at the time the lease was made and was an inducement to Mrs. Burnett to take the ground floor rooms instead of rooms on the second floor.

We therefore approach the question whether there was evidence for a jury of negligence on the part of the defendant in permitting the box put in by Weissman to remain in the yard an unreasonable time after the defendant had notice, or should in the ordinary course of things have taken notice that it was there and was likely to be dangerous to children using the yard. That it was a menace to children is plainly a jury question from the fact that it fell over on one of the children, and could not have done so because of its weight, some four hundred pounds, unless it was balanced in a position to be easily upset.

Now as to the question of notice and reasonable time, the jury was entitled to find that the box came in the yard on Tuesday afternoon about twenty-four hours before the accident; that Burnett, the father, saw the box and other articles, and complained almost immediately to Rashkober, who, as already stated, lived in the building or next door. The basis of the complaint is not entirely clear on the evidence, whether it was an obstruction to the yard or the foul odors from the lumber, which consisted of old stable planking, or the danger to children. It does appear, however, that Burnett said to Rashkober on that occasion: "Here is a box weighs about 400 pounds lies in the yard now," I says, "I want this stopped. When I hired the house I had Mrs. Liese, the janitress, take a lamp and show us the yard." I said, "A little boy was hurt when we lived on the second floor, and that is what I hired this yard for." He said, "I will go up and see Weissman," and he came back and said, "Well,

I have been up and told Weissman I wanted this stopped, and Weissman said, "My boy put the box in the yard."

Burnett testified that he had complained to Rashkober some nine days or two weeks before, when Weissman first began to put implements into the yard, and that the above conversation was later when the box came in. From this and the other evidence we conclude that it was at least an inference for the jury that Rashkober was notified that the premises were rendered unsuitable, if not indeed dangerous for children.

The only remaining question is whether the jury was entitled to say that there was an unreasonable delay in removing the box or rendering the yard safe. The case does not present the question of reasonable time for discovery of the box in the absence of express notice, as in *Timlan* vs. *Dilworth*, 76 N. J. L., 570, but of reasonable time after notice, within which the conditions might and should have been remedied. As the jury might find, about twenty-four hours elapsed after notice of the dangerous condition; the obstruction of the yard began apparently some nine days before and seemed to have been farming utensils that might be dangerous in themselves to children. As on the other branches of the case, we think that the question of unreasonable delay in attending to the matter was also for the jury.

This result disposes of the questions arising on the motion to non-suit and to direct a verdict for the defendant; and as no other trial errors, if existing, are adequately presented, we conclude that the judgment below must be affirmed.

Justice Bergen concurs.

Order Affirming Judgment.

Filed December 8, 1916.

NEW JERSEY SUPREME COURT.

ELANOR BURNETT, by next friend, and FRANKLIN P. BURNETT, *Plaintiffs-Respondents,* *vs.* SUPERIOR REALTY CO., *Defendant-Appellant.*	*On Appeal.* *Affirmance.*

This cause having been duly argued at the June Term, 1916, of this Court by James P. Mylod of counsel for the defendant-appellant and Peter Steinsitz and Herbert Boggs of counsel for plaintiffs-respondents, and the Court having considered the same and finding no error in the record or proceedings in the Essex Circuit Court,

It is thereupon ordered and adjudged that the judgment of the Essex Circuit Court, removed by appeal in this cause, be affirmed with costs.

Damages below	$600.00 E. B.
" "	200.00 F. B.
	800.00
Costs below	82.25
	882.25
Costs Supreme Court.....	33.00
	$915.25

Entered December 8, 1916.

On motion of

PETER STEINSITZ,

Attorney of Plaintiffs-Respondents.

New Jersey Court of Errors and Appeals

ELANOR BURNETT, by next friend, and FRANKLIN P. BURNETT, *Plaintiffs-Respondents,* *vs.* SUPERIOR REALTY COMPANY, a corporation, *Defendant-Appellant.*	*Action at Law. On Appeal from the Supreme Court.*

Brief of Defendant-Appellant

STATEMENT OF FACTS.

The plaintiff, Elanor Burnett, was on November 26, 1913, residing with her father, Franklin P. Burnett, also a plaintiff in this suit, at No. 153 Peshine avenue, Newark, N. J., at which time she was two years and a few days old (Case, p. 18, l. 22). The house in which she lived and which was owned by the defendant, was a three-story tenement with apartments for six families, the plaintiff occupying the apartment on the first floor (Case, p. 10, l. 10). In the rear of the building there was a yard about 30 feet wide by 50 feet in depth (Case, p. 34, l. 9).

The plaintiff, Franklin P. Burnett, leased an apartment on the ground floor of the premises. Nothing was said at the time about leasing the yard or the use of the yard (Case, p. 13, ll. 29 to 40). The only testimony bearing on this point is that the janitress showed Mr. and Mrs. Burnett the yard at the request of plaintiff (Case, p. 22, ll. 20 to 34).

About half-past four in the afternoon of the day

in question, Wednesday, November 26th, 1913 (Case, p. 19, l. 9), the mother of the infant plaintiff placed the child on the rear porch so that the child could go down the one step of the porch into the back yard (Case, p. 18, ll. 24 to 37). It was not dark, the mother testifying that she could see all the way down to the fence in the rear of the yard (Case, p. 19, l. 14). The child had been in the yard only a few minutes (Case, p. 18, l. 29) when the cries of a girl living next door attracted the mother's attention, and the mother ran out into the yard and found the infant plaintiff "lying on her back and only the hair sticking out from under the mortar box" (Case, p. 9, l. 28). There was no eye witness to the accident. Miss Leise, the young girl who lived next door to the plaintiffs, testified as follows: "In the alley I heard a crash. I looked over the fence and all I could see was Elanor's hair sticking from under the mortar box" (Case, p. 20, ll. 17 to 19). The mother, with the assistance of Miss Leise, raised the box up with one hand and drew the child out with the other hand (Case, p. 9, l. 31). The child's left leg was broken between the ankle and the knee, and the child's left side bruised (Case, p. 46, ll. 2 to 9). At the time of the accident, the mortar box was in the middle of the yard (Case, p. 9, l. 23; Case, p. 34, l. 12), about five feet from the kitchen (Case, p. 19, l. 20). The box was right in the middle of the yard and there was nothing at all near it (Case, p. 13, ll. 17 to 28).

Eleanor Burnett, mother of the infant plaintiff, Elanor Burnett, testified that when she opened the kitchen door and placed the child on the porch, there was no box in the yard, and again, in answer to the question whether or not the box was in the yard at the time the little girl was put out on the stoop, answered, "I don't remember. I know it wasn't" (Case, p. 19, l. 27).

The testimony fails to disclose the exact dimensions of the mortar box in question, but an idea of what the box looked like can be obtained from a photograph (print of photo, Case, p. 134) which the plaintiffs allege they caused to be made of the box some fifteen days or more after the accident (Case, p. 37, l. 38). The box was brought to the premises and was chopped up for firewood by a Mr. Weissman who lived on the second floor immediately over the Burnett family (Case, p. 102, l. 4).

The plaintiff, Franklin P. Burnett, father of the infant plaintiff, testified that he saw the box in the yard on Tuesday, November 25, 1913, about a quarter to five in the afternoon (Case, p. 22, ll. 8 to 10). The accident occurring the following afternoon, Wednesday, November 26th.

All the testimony, and particularly the testimony of the plaintiff, Franklin P. Burnett (Case, p. 34, ll. 12 to 18) proves affirmatively that at no time, either before or after the accident, was the box in any position other than lying flat on the ground, about in the middle of the yard.

The case was tried February 18, 1916, and a verdict rendered in favor of the plaintiff, Elanor Burnett, for the sum of $600, and a verdict in favor of the plaintiff, Franklin P. Burnett, in the sum of $200.

An appeal was taken to the Supreme Court and the judgment was affirmed by a divided Court, Justices Parker and Bergen voting for affirmance, and Justice Garrison for reversal.

POINT 1.

THERE IS NO PROOF OF ANY NEGLIGENCE ON THE PART OF THE DEFENDANT, AND NO FACTS HAVE BEEN ESTABLISHED BY THE EVIDENCE FROM WHICH NEGLIGENCE MAY BE REASONABLY INFERRED.

That there was no direct proof of negligence on the part of defendant is pointed out in the charge of the Court (Case, p. 129, l. 13), so that the jury must have inferred negligence.

The only circumstance from which negligence *possibly* might be inferred is the fact that one of the plaintiffs testified that an ordinary shallow box in which mortar had been mixed was brought into the back yard of the tenement house, in question, by another tenant, the day before the accident occurred, and laid flat in the middle of the yard, and that the plaintiff had complained to the so-called agent of the landlord about the box. From the foregoing it is clear that no facts are established from which negligence on the part of the landlord may be reasonably inferred.

The complaint alleges (Case, p. 4, ll. 33-40) as follows:

> "The defendant, by its agents and employes on November 26, 1913, negligently and wrongfully left and permitted to remain a certain mortar box in said yard and curtilage of said premises so as to unlawfully obstruct said yard and curtilage and by making the same unsafe and dangerous to the tenants and persons using said yard and curtilage."

The evidence discloses nothing upon which it can be reasonably or legitimately inferred, that when the mortar box was placed in the yard, the day before the accident, or at any time subsequent

thereto, and prior to the happening of the accident, an *unsafe and dangerous* condition was created.

The plaintiff, Franklin P. Burnett, was the only witness who testified that the box was in the yard the day before the accident, but there is nothing in his testimony which even remotely indicates that the box was in a dangerous condition, or created an unsafe or dangerous situation. His testimony being, as follows:

> "Q And you saw this mortar box *lying* in the center of the yard Tuesday?
>
> A On Tuesday the whole yard was taken in, yes.
>
> Q The box *lay* in the center of the yard?
>
> A About the center; a little back of the center. I should think it was very nearly in the center." (Case, p. 34, ll. 12-18.)

It was error therefore not to grant the motion for a non-suit at the close of the plaintiffs' case, as requested, and it was error for the Supreme Court to decide that "it was inferable from the evidence that the mortar box had been stored in the yard on its edge so that it might easily be caused to fall in the manner in which it did fall" (Case, p. 140, l. 40; p. 141, ll. 1-3), *since the plaintiffs' testimony shows affirmatively that the box was at no time in any position other than lying on the ground.*

It is elementary that no action can be maintained upon an act of negligence unless the breach of duty has been the cause of damage. The connection of cause and effect must be established and the defendant's breach of duty and not merely his act must be the cause of plaintiffs' damage. The simple fact that one of the tenants in a six-family tenement house brings home a discarded mortar box and *lays* it in the back yard until he finds opportunity to chop it up for firewood, even if the landlord had actual knowledge of such fact, would not be a

breach of duty on the part of the landlord toward the other five families in the house, and where there is no breach of duty, there can be no actionable negligence.

> "Negligence is not to be presumed. It is rather to be presumed that ordinary care has been used. And the person charging negligence must show that the other party, by his act or omission, has violated some duty incumbent upon him and thereby caused the injury complained of."
>
> Jones on Evidence, 2nd Ed., Sec. 15, p. 16.

The Court in ruling upon defendant's motion for a non-suit at the close of the plaintiffs' case said:

> "It may be that if nothing else should appear in the case, I will have to direct a verdict; I do not want to decide that just now."

On the plaintiffs' case, no evidence of a breach of duty on the part of the defendant was adduced, and this defect was not supplied by evidence thereafter taken in the progress of the case.

> *Sefler* vs. *Vanderbeck & Sons,* 96 Atl., p. 1009.

No negligence on the part of the defendant having been shown on the plaintiffs' case, and nothing being added to this phase of the case by the testimony offered on behalf of the defendant, the practical result of submitting the case to the jury was to put the burden on the defendant of clearing itself of a charge not proven against it, and because the defendant was not able to explain the circumstances under which the infant plaintiff was injured, to make the defendant answer in damages.

That the defendant is entitled to have the specific acts which constitutes its negligence proved against it, is shown by the following cases found in our own state.

Justice Van Syckel in writing the opinion in *Solatinow* vs. *Jersey City &c. Ry. Co.,* 70 L., p. 154, at p. 156, says:

> "The burden was upon the plaintiff to prove actionable negligence on the part of the defendant company. I find nothing in the Statement of Facts which shows any want of due care on the part of the company." The judgment entered in the case was accordingly reversed.
>
> "A plaintiff is only entitled to recover by establishing the truth of his case as laid in his declaration, and if he fails to do this, the defendant is entitled to the verdict of the jury."
>
> *Murphy* vs. *N. J. St. Ry.,* 71 L., p. 5.
>
> *Excelsion Electric Company* vs. *Sweet,* 59 L., p. 441.

In the case of *Suburban Electric Company* vs. *Nugent,* 58 L., p. 658, which was an action for the death of plaintiffs' intestate, Chief Justice Gummere said:

> "It must be conceded that the plaintiff below was bound to show something more than that the defendant was *possibly responsible for the decedent's death* in order to entitle him to a verdict.
>
> "It was incumbent upon him, in the absence of direct evidence of that fact, to show not only the existence of such possible responsibility, but the existence of such circumstances as would justify the inference that the death was caused by the wrongful act of the defendant, *and would exclude the idea that it was due to a cause with which the defendant was unconnected.*"

The proof in the case at bar is that the mortar box was lying on the ground. There was not even a stick near it at the time the accident occurred,

and it was in the middle of the yard. The photograph used at the trial shows the box leaning against the fence, but the photographer testified that it was placed in that position by some young men who were in the yard in order that it might be properly photographed. The box was about five feet from plaintiffs' kitchen door. There is absolutely no testimony in the case that the box, at any time, other than when it was photographed, was leaning against the fence. According to the testimony of the father, Franklin P. Burnett, the box was in the yard for nearly twenty-four hours before the accident happened. It was lying in the yard when he saw it, but we do not know its position, immediately prior to the accident. It is purely a matter of speculation and conjecture as to what was done with the box during the twenty-four hour interval and as to its position at the time of the accident.

Under the doctrine laid down in the case last cited, *Surburban Electric Co.* vs. *Nugent,* the circumstances surely are not such as would justify the inference that the injury was caused by the wrongful act of the defendant and would exclude the idea that it was due to a cause with which the defendant was unconnected.

In *Paynter* vs. *Bridgeton & M. Traction Co.,* 67 L., p. 618, Justice Garrison, at p. 624, said:

> "The mere happening of the accident is not sufficient to place legal responsibility for its effects upon the defendant. There is no evidence on the part of the plaintiff showing how the accident happened."

At p. 625, after reviewing many cases in which the particular acts of negligence were proven, Justice Garrison says:

> "In all these cases facts were proven of acts by the employes of the company, or of move-

ments of the cars or appliances of the company, from which the jury might infer negligence, but in this case no such facts appear in the evidence. The mere happening of the accident raises no presumption of the negligence of the defendant. It was necessary to show by direct evidence, that the defendant was responsible for the accident, or to show the existence of such circumstances as would justify the inference that the injury was caused by the wrongful act of the defendant, *and would exclude the idea that it was due to a cause with which the defendant was unconnected.*"

In the case of *Klitch* vs. *Betts,* 98 Atl., p. 427, a case in which a dentist was alleged to have fractured the plaintiff's jaw while extracting a tooth, the Court, at page 429 of the opinion shows that the testimony submitted on behalf of the plaintiff "*excluded all other causes,* except the possible one of abscess, and Dr. Snively (defendant's assistant) excludes that by testifying that there was no abcess at the time he extracted the tooth, and the jury was justified in finding that all other causes, except the fracture, had been excluded."

The appellant does not contend that the plaintiff was bound to prove his case so clearly as to exclude the possibility of any other theory, except that relied on after his proof was submitted, namely, that the box was standing on its edge for a period of about twenty-four hours to the knowledge of the owner, appellant in this cause, but does contend that when all the proofs in the case show affirmatively that the box, at all times, so far as any knowledge of the existence of the box in the yard is brought home to the owner, was lying on the ground, and no attempt is made to exclude independent intervening causes which might probably have created a dangerous situation by standing

the box on its edge, is not sufficient to permit a jury to guess that the box was *on its edge,* with the knowledge of the owner, and it was error for the Trial Court not to grant defendant's motion for a non-suit and not to grant defendant's motion for a direction of a verdict at the close of the case, and it was error for the Supreme Court to decide (Case, p. 140, l. 40) "it was inferable from the evidence that the mortar box had been stored in the yard on its edge. * * *"

It is conceded that the mortar box is not an instrument imminently dangerous to human life, nor is it, in any sense, an object attractive to children, and the uncontroverted fact that the only knowledge brought home to the so-called agent of the owner, was that the mortar box was *lying* (there is no conflicting testimony on this point) in the middle of the back yard, the yard being about thirty feet deep by fifty feet in width (Case, p. 34, l. 10) of this three-story, six-family tenement house, made it the legal duty of the Trial Court to grant a non-suit or direct a verdict.

"It is not enough for the plaintiff to show that he has sustained an injury under circumstances which may lead to a suspicion or even a fair inference that there may have been negligence on the part of the defendant. *He must go on and give evidence of some specific act of negligence on the part of the one against whom he seeks compensation.* To establish a case of negligence and fix the liability of the defendant, it is incumbent upon the plaintiff to prove some fact which is more consistent with negligence of the defendant than with the absence of it. When the plaintiff's evidence is equally consistent with the absence as with the existence of negligence on the part of the defendant, the plaintiff must fail, because there is always a presumption against negligence and in favor of

innocence. *A probability is not sufficient, nor is a mere surmise or conjecture. The plaintiff must do more than show the possible responsibility of the defendant for the injury.*"

Black's Law and Practice in Accident Cases, (1900) p. 214, Section 173.

"It is settled by many cases that it is not necessary that the evidence be direct and positive. Negligence may be proved as well by circumstances and presumptions, from which the inference or conclusion of negligence may be fairly drawn; but such presumptions and circumstances, to be legally sufficient to rest verdicts upon, must be the conclusion from facts proven or admitted in the case—*not presumptions drawn from presumptions which, in all cases of legal evidence, are too weak and uncertain to support judgments and verdicts.*"

Black's Law and Practice in Accident Cases, (1900) p. 215, Section 174.

In the case at bar, the jury in returning a verdict for the plaintiffs, must have presumed or inferred, contrary to the affirmative testimony, that the box was on its side or on its end, and from this presumption, drawn a second presumption that such was a dangerous condition or position, and must also have presumed or inferred that the box was in such a position for a period of nearly twenty-four hours, with the knowledge of the landlord, or under such circumstances from which knowledge on the part of the landlord might be presumed.

It seems beyond the realm of probability that a box of such character, as shown in the photograph (Case, p. 134) could be standing on its side or on its end in the back yard of a six-family apartment house, continuously for more than twenty-four hours and not be observed by a single person. The verdict of the jury, therefore, seems to have been based on speculation and conjecture rather than on

circumstances or presumptions from which the inference or conclusion of negligence might be fairly drawn.

That the doctrine of *res ipsa loquitur* has no application to the case, although argued at length in the brief of the plaintiffs-respondents, filed in the Supreme Court, is manifest, and need not be discussed.

It was error, therefore, to refuse to grant a direction of a verdict in favor of the defendant, as requested, and it was error for the Supreme Court to affirm such refusal, and since there was no evidence to support the verdict on which said judgment was based and no proof of any facts from which negligence might reasonably be inferred, it was error for the Supreme Court to affirm the judgment of the Essex Circuit Court.

POINT 2.

THE INFANT PLAINTIFF WAS A MERE LICENSEE IN THE YARD, AND AS SUCH, THE DEFENDANT OWED HER NO DUTY EXCEPT TO ABSTAIN FROM ACTS WILLFULLY INJURIOUS.

There is no direct testimony in the case, and no facts have been proven from which it could be fairly inferred that the use of the yard was reserved for the tenants.

The alleged agent, Rashkober, had nothing to do with the renting of the premises to Mr. Burnett, the testimony being that Mr. and Mrs. Burnett called at the premises in the evening and met a Mrs. Leise, who lived in the building and acted as janitress and showed the prospective tenants, the Burnetts, the rooms which were for rent.

Mrs. Burnett testified (Case, p. 13, ll. 30-40) as follows:

"Q You simply used this yard; you were never told to use it, were you?

A Well, I never was told, but I rented the first floor on purpose to have the yard for the children.

Q But you said nothing about having the yard for the children when you rented the floor, did you?

A I took the first floor for the children. I told the janitress that I wanted the first floor. She told me I could have the second. I told her I wanted the first on account of the children; that I was just moving from a second floor."

Mr. Burnett testified (Case, p. 22, l. 26): "When I hired the house, I had Mrs. Leise, the janitress show us the yard."

It is conceded that Rashkober, who was the janitor and had charge of the building for the Progressive Investment Company, but who was unaware that the property belonged to the defendant, Superior Realty Company, acquiesced in the use of the yard by the infant plaintiff. Rashkober's acquiescence is shown by the following testimony, on cross examination (Case, p. 95, ll. 3 to 20), as follows:

"Q The children; you permitted the children to play in the yard, didn't you?

A Yes, sir, can play in the yard.

Q You permitted Mrs. Burnett to have her children play in the yard, didn't you?

A No, sir, I don't say nothing to him, he don't ask me no questions about it.

Q You saw his children play in the yard, didn't you?

A Sometimes.

Q You didn't say 'Keep the children out of the yard,' did you?

A No, sir.

Q You always collected the rents, too, didn't you?

A Yes, sir."

It also appears in the testimony that the Burnetts lived in the apartment about a year prior to the accident (Case, p. 14, ll. 3-10) and continued as tenants for a period of two years after the accident.

The testimony further shows that a short time after the accident occurred, the back yard was entirely fenced off from the house and the tenants were excluded from its use. There is nothing in the case to show that during the two years the Burnetts resided in the house after the accident, during all of which time they were denied any use of the back yard, that any reduction was made in the amount of rent paid, or that their prior use of the yard *inured to the benefit of the defendant.*

The passive acquiescence of Rashkober, in the use of the yard, under the doctrine laid down in *Saunders* vs. *Smith Realty Co.*, 84 L., p. 276, imposed no obligation upon the defendant to keep the yard in a safe condition for the benefit of the user, and in the absence of proof of authority conferred upon the janitress, Mrs. Leise, to act as the representative of the owner for the purpose of extending an *invitation* to use the yard to the plaintiff, Franklin P. Burnett and to his children, or any persons Mr. Burnett might see fit to make members of his household or have visit him in his apartment, it was error for the Trial Court to deny defendant's requests to charge (Case, p. 133) that "the infant plaintiff, Elanor Burnett, was a mere licensee" and that "the landlord's only duty was to abstain from acts willfully injurious."

The case of *Klitch* vs. *Betts,* 98 Atl., p. 427, re-

ferred to in the opinion (Case, p. 142, l. 35) holds that: "Where a servant is acting within the scope of his employment and by his negligence causes injury to a third party, the master will be responsible, although the servant's act was contrary to his master's orders."

There is no proof, in the case at bar, as to the position of Mrs. Leise, other than that she was janitress of the apartment, and it cannot be contended that injury or damage resulted from any *negligent or wrongful act* on her part sufficient to hold the owner of the premises liable, as the master was properly held liable for the negligent act of his servant as in the case of *Klitch* vs. *Betts*.

The case under consideration seems to come clearly under the decision of *Saunders* vs. *Smith Realty Company*, cited within, and the following quotation which appears on page 279 of the opinion seems to apply:

> "There being nothing in the proofs submitted to support a finding by the jury that the plaintiff was using the rear cellar, at the time of his injury, by the *invitation* of the defendant, it was improper for the Trial Court to permit the jury to so find, and for this reason the judgment under review must be reversed."

In *Saunders* vs. *Smith Realty Company* the janitor had no authority to extend an invitation to the plaintiff, Saunders, to use the cellar, and in this case Mrs. Leise, the janitress had no authority to extend an invitation to the infant plaintiff to use the yard, nor lease the use of the yard to the parent of the infant. The janitor in the Saunders case showed the plaintiff the cellar, and in this case the janitress showed the father of the injured child the yard, but did not go as far, under the proofs, as the janitor did in the Saunders case to even extend an invitation to make use of the yard.

The fifth allegation of the complainant states that "the plaintiff, Elanor Burnett, was *lawfully* using said yard." Under the doctrine laid down in the case of *Taylor* vs. *Haddonfield & Camden Traction Co.*, 65 L., 102, and the case of *Mathews* vs. *Bensel*, 51 L., 30, such an allegation simply shows that the plaintiff was in the yard with no greater right than of a mere licensee.

There is no testimony indicating that the yard was furnished by the owner for the common use of the tenants, thus making the owner liable for defects, but rather is this idea negatived by Rashkober's testimony that he ordered Weissman not to use the yard and is negatived by the fact as brought out by the plaintiffs, that the yard was fenced off after the accident.

In the case of *Clyne* vs. *Helmes*, 61 L., p. 358, the Court held that:

> "The general rule is that one who is not a party to a contract cannot sue in respect of a breach of duty arising out of the contract."

The foregoing case was an action in *tort* to recover damages for personal injuries, and the doctrine laid down in that case seems to apply to the infant plaintiff in the case at bar.

In *Gray* vs. *Hodges*, L. R. 9, Q. B. Div., p. 80; 14 L. R. A., p. 239, it was held that:

> "Where the tenants were simply given permission to dry clothes on the roof, the landlord was under no obligation to keep it in repair."

In the case of *Klie* vs. *Broock*, 56 Eq., p. 18, it was held that under the facts in the case the yard was no part of the leased premises, and in the case of *Hill* vs. *Shultz*, 40 Eq., p. 164, it was held that a platform which formed part of the building, was not included in the demised premises.

In the case of *Sturm* vs. *Huck*, 77 L., p. 59, the opinion being written by Justice Swayze, held as follows:

> "A lease of a bedroom does not carry with it, as a necessary incident, a right to a supply of water."
>
> "Where a landlord demises a bedroom and permits the tenant to obtain water from other rooms in the house, such permission is a mere revocable license and vests no legal right."

The case of *Bonfield* vs. *Blackmore*, decided by this Court March, 1917, the opinion being written by Justice Kalisch, reiterates the doctrine laid down in *Saunders* vs. *Smith Realty Company*, and after reviewing the facts and assuming that the plaintiff below entered the appellant's (defendant below) store for the purpose of becoming a purchaser of the appellant, holds "the legal duty of the invitor to use reasonable care to protect the invitee from dangers existing on the premises and unknown to the invitee was no broader than the implied invitation, that is to the use of the store space." Further on the opinion states: "It cannot be properly said in the present case that the appellant did not use reasonable care in keeping his store to which the public was generally invited in a reasonably safe condition."

Under the proofs submitted in the case at bar, it surely cannot be said that the appellant, the owner of the premises, did not use reasonable care in keeping the yard in a reasonably safe condition, for it was the act of another tenant, Weissman, a co-licensee with the plaintiff, in bringing the box upon the premises that made it possible for some independent intervening cause to create a danger.

POINT 3.

THE JUDGMENT SHOULD BE REVERSED, WITH COSTS.

Respectfully submitted,

JAMES P. MYLOD,

Of Counsel with Defendant-Appellant.