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For Plaintiff.

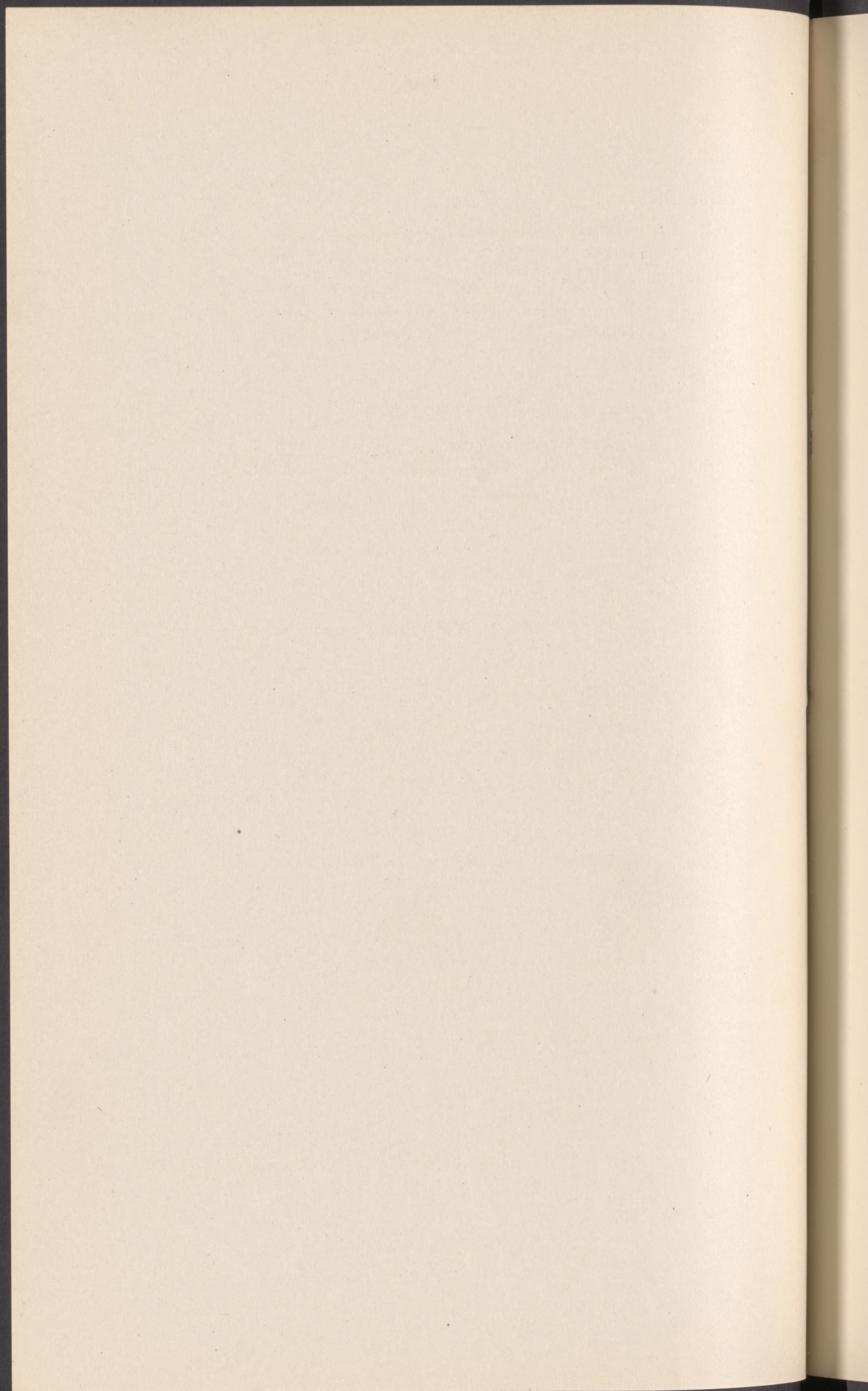
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Notice of Appeal.

10

New Jersey Supreme Court

(Filed May 18, 1926.)

ADELE PABST, individually and as
next friend of FRANCES PABST,
Plaintiff-Respondent,

vs.

HUDSON & MANHATTAN RAILROAD
COMPANY, a corporation,
Defendant-Appellant.

Action at Law.

Notice of Appeal. 20

To
Messrs. COLLINS & CORBIN,
Attorneys for Defendant-Appellant:

Sirs:

PLEASE TAKE NOTICE, that the plaintiff-respondent appeals to the New Jersey Court of Errors and Appeals from the whole of the judgment entered in this cause.

30

Dated, May 7, 1926.

Yours, &c.,

ALEX. SIMPSON,
Attorney for Plaintiff-Respondent. 40

Grounds of Appeal.

(Filed May 24, 1926.)

**NEW JERSEY COURT OF ERRORS
AND APPEALS.**

10	ADELE PABST, individually and as next friend of FRANCES PABST, <i>Plaintiff-Appellant,</i> vs. HUDSON & MANHATTAN RAILROAD COMPANY, a corporation, <i>Defendant-Respondent.</i>	} Action at Law. } Appeal from } New Jersey } Supreme } Court. } Grounds of } Appeal.
----	---	---

20 The appellant states the following grounds of appeal:

1. The New Jersey Supreme Court erred in reversing the judgment of the Hudson County Court of Common Pleas.

2. The New Jersey Supreme Court erred in refusing to affirm the judgment of the Hudson County Court of Common Pleas.

30 Dated, May 7, 1926.

Yours, &c.,

ALEX. SIMPSON,
Attorney for Plaintiff-Appellant.

Judgment of Reversal.

NEW JERSEY SUPREME COURT.

ADELE PABST, individually and as
next friend of FRANCES PABST,
an infant,

Plaintiff-Respondent,

vs.

HUDSON & MANHATTAN RAILROAD
COMPANY, a corporation,
Defendant-Appellant.

Action at Law. 10
Judgment of
Reversal.

The appeal in the above matter having been
duly considered by the Court and the Court being
of opinion that the judgment below should be
reversed; 20

It is on this eleventh day of May, 1926, on mo-
tion of Edward A. Markley, Esq., of counsel with
the appellant,

ORDERED that the judgment of the Hudson
County Court of Common Pleas in the above en-
titled action be and the same hereby is reversed
and declared null and void and for nothing holden
and that a venire de novo be and the same hereby
is granted, and the record remitted to the court
below to be proceeded with according to law and
the practice of said Court. 30

Rule actually entered this tenth day of May,
1926, on motion of

COLLINS & CORBIN,
Attorneys of Defendant-Appellant.

A true copy.

EDWARD J. KELLEHER,
Clerk.

40

Opinion of Supreme Court.

(Filed May 5, 1926.)

NEW JERSEY SUPREME COURT.

No. 78, Oct. T., 1925.

10

FRANCES PABST, by next friend,
et al.

vs.

HUDSON & MANHATTAN RAILROAD
Co.

20

Appeal from Hudson Common Pleas.

Argued before Gummere, Chief Justice, and Jus-
tices Kalisch and Campbell.

For the appellant, EDWARD A. MARKLEY and
CHARLES W. BROADHURST.

For the respondent, ALEXANDER SIMPSON.

30

PER CURIAM.

This appeal brings up a judgment entered upon
a verdict in favor of the plaintiff Frances Pabst,
who sued to recover compensation for injuries re-
sulting from a fall while going down the steps of
the railroad company's station at Exchange Place,
in the City of Jersey City. The averment of her
complaint was that she slipped and fell by catch-
ing her shoe in a defective nosing upon one of the

40

Opinion of Supreme Court.

steps. The mother of this girl also sued to recover compensation for the expenses to which she was put by reason of her daughter's injury. The jury, however, rendered no verdict either for or against her.

The first ground upon which a reversal is sought is that the court erred in refusing to direct a verdict for the defendant, the contention being that there was no evidence of any negligence on its part. Our examination of the proofs leads us to the conclusion that it was a question for the jury whether the accident occurred as the plaintiffs claim, and, if so, whether the condition of the nosing had not been in existence for a sufficient time to charge the defendant with notice thereof. We conclude, therefore, that the refusal to direct a verdict for the reason stated was proper.

The next contention is that there should be a reversal in this case because of the fact that the jury rendered a verdict in favor of the daughter, but no verdict at all either for or against the mother. This fact, however, affords no justification for reversing the judgment in favor of the daughter. The failure of the jury, instead of being harmful, was beneficial to the defendant.

The last ground upon which we are asked to reverse this judgment is directed at the following instruction of the court to the jury: "The girl was a passenger, and was entitled to have the stairway in good condition for her to be carried on it." We consider that this instruction placed upon the defendant company a greater burden than was justified by the law. In effect, it made the company an insurer. The true rule is stated

Opinion of Supreme Court.

by Mr. Justice Garrison, writing for the Court of Errors and Appeals, in the case of Mason vs. Erie R. R. Co., 75 N. J. L., 521, which, in effect, is as follows: The duty of the railroad company is merely to exercise reasonable care to provide
10 a safe place for passengers going to and coming from its trains.

For the error in the charge, we conclude that the judgment under review should be reversed.

20

30

GALLO & ACKERMAN, INC., 107 Liberty St. and 6 Church St., N. Y.
1381

40

Notice of Appeal.

NOTICE OF APPEAL.

(Filed Aug. 25, 1925.)

Hudson County Court of Common Pleas

ADELE PABST, individually and
as next friend of FRANCES
PABST, an infant,

Plaintiff,

vs.

HUDSON & MANHATTAN RAILROAD
COMPANY,

Defendants.

10

*Action at
Law.*

*Notice of
Appeal.*

To ALEXANDER SIMPSON, Esq.,
Attorney of Plaintiff.

20

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

Dated Aug. 21, 1925.

COLLINS & CORBIN,
Attorneys of Defendant.

30

Service acknowledged Aug. 22, 1925.

ALEX. SIMPSON,
Attorney of Plaintiff.

40

Grounds of Appeal.

GROUND OF APPEAL.

(Filed Aug. 31, 1925.)

New Jersey Supreme Court

10

HUDSON COUNTY.

ADELE PABST, individually and
as next friend of FRANCES
PABST, an infant,
Plaintiff-Respondent,

vs.

HUDSON & MANHATTAN RAILROAD
Co., a corporation,
Defendant-Appellant.

20

On Appeal.
Grounds of
Appeal.

The appellant states the following grounds of appeal:

1. The Trial Court erroneously refused to direct a verdict in favor of the defendant when thereunto moved, whereas said motion should have been granted on one or more of the following grounds urged in support thereof.

30

“(a) That there is no evidence of negligence on the part of the defendant;

(b) That there is no evidence that any negligence on the part of the defendant was the proximate cause of the accident;

(c) That the evidence shows that the plaintiff was guilty of contributory negligence as a matter of law.”

40

Grounds of Appeal.

2. The Trial Court erroneously charged the jury as follows:

“This is a case in which Adele Pabst, individually and as next friend of Frances Pabst, her daughter, is suing on account of injury sustained at the Exchange Place Station, on May 3rd, nineteen hundred and twenty-four, alleging that the accident happened because the Hudson and Manhattan Railway Company were negligent in the manner in which they had maintained the stairway leading down to the trains, and that the girl in going down had caught her foot in a defect in the stairs and was thereby thrown to the ground or floor and injured. The defendant company say they were not negligent and that the stairs were in good condition; and they allege that the girl was injured by reason of her own contributory negligence.”

In order to recover the plaintiff must show that the company was negligent.

The girl was a passenger and was entitled to have that stairway in good condition for her to be carried on it.”

3. The Trial Court erroneously charged the jury as follows:

“The railway company on their part say she was guilty of contributory negligence. They must affirmatively prove that.

It is a simple question of fact, and you are the sole judges of what are the facts. You are to judge this case by what has been testified to, and nothing else. You must be guided by the testimony given and decide the case according to that testimony.”

Grounds of Appeal.

The facts are in your sole control. If the counsel for the plaintiff, or the counsel for the defendant, said something has been testified to which is contrary to your recollection, your recollection must abide."

10 4. The Trial Court erroneously charged the jury as follows:

"On one side there were two or three eye witnesses and only one on the other side. The number of witnesses does not affect the case. It is not the number of witnesses that should control your verdict. It is the quality of the witnesses' testimony, and what you think the witnesses are entitled to in the way of credence in respect of their testimony.

20 If you get to the question of damages and you decide that the plaintiff is entitled to damages you will bring in a verdict against the Hudson and Manhattan Railway Company only. The counsel for the plaintiff discontinued the case against the Pennsylvania Railroad Company."

5. The Trial Court erroneously charged the jury as follows:

30 "In respect to the question of damages, if you get to the question of damages, I think the rule of law in this case is an allowance of just compensation for the pain and suffering the girl underwent and may have to undergo in respect of the effects of the accident.

40 If you do get to the question of damages for the girl, then the girl I think is entitled to recover the amount of damages which you may estimate will be a fair and just

Grounds of Appeal.

compensation for what this girl has suffered and will suffer by reason of her injury in the accident. The Court will give you no concrete rule by which you may be guided. You will have to figure that yourselves—what in your opinion is the fair and just compensation for the suffering this girl has suffered or may hereafter suffer as part of the result of this accident, the just compensation for the injuries which were the result of this accident.” 10

6. The Trial Court erroneously permitted the plaintiff to recover damages for pain and suffering alleged to have been suffered by her, whereas, in fact, the facts showed that one, Frances Pabst, met with the accident and the plaintiff was merely her next friend and mother and therefore had no right to recover for her pain and suffering. 20

7. The Trial Court erroneously permitted the jury to bring in one general verdict for two plaintiffs.

8. The general verdict of the jury is illegal, null and void, because it is in favor of two plaintiffs and it is impossible to determine how much each of the plaintiffs are entitled to of the verdict. 30

Dated August 25, 1925.

COLLINS & CORBIN,
Attorneys of Appellant.

Service acknowledged August 31, 1925.

ALEX. SIMPSON,
Attorney of Respondent.

Complaint.

COMPLAINT.

(Filed Sept. 22, 1924.)

HUDSON COUNTY COURT OF COMMON
PLEAS.

10

ADELE PABST, individually and
as next friend of FRANCES
PABST, an infant,

vs.

HUDSON & MANHATTAN RAILROAD
COMPANY and PENNSYLVANIA
RAILROAD COMPANY,

Defendants.

*Action at
Law.*

Complaint.

20

Plaintiff, Adele Pabst, individually and as
next friend of Frances Pabst, an infant, age
fourteen years, residing at No. 233 Central ave-
nue, in the City of Jersey City, in the County
of Hudson, State of New Jersey, says that:

1. Defendants are now and were at all times
hereinafter mentioned corporations engaged as
common carriers of passengers by railroad, at
Jersey City, in the County of Hudson.

30

2. Defendants maintained and operated a cer-
tain station, known as Exchange Place Station,
Jersey City, for receiving and discharging pas-
sengers, and defendants had possession and con-
trol of certain elevators, stairways and steps in
said station, for the use of passengers.

40

3. Plaintiff, Frances Pabst, on the 3rd day
of May, 1924, while in the use of a stairway in
said station, as a passenger of the defendants,
was injured.

Complaint.

4. Said injury was caused through the negligence of the defendants, which consisted in this:

Defendants failed to have, maintain and keep said stairways and passageways in said station in a proper and safe manner for the use of passengers, but on the contrary, permitted said stairway to be worn and out of repair and in an unsafe and improper condition for passage, whereby the plaintiff, Frances Pabst's foot was caught on said stairway and she was caused to fall and was injured. 10

5. Plaintiff, Frances Pabst, was at all times in the exercise of due care for her safety.

6. Plaintiff, Frances Pabst, by reason of said negligence was injured in and about her body, her right ankle and left leg, and suffered severe nervous shock. 20

7. Plaintiff, Adele Pabst, is the mother and next friend of the plaintiff, Frances Pabst, and by reason of her said injuries has been compelled to expend money for medical attendance in endeavoring to obtain her cure, and has been deprived of the services of her said daughter.

Plaintiff Frances Pabst demands \$20,000.

Plaintiff Adele Pabst demands \$2,000. 30

ALEX. SIMPSON,
Attorney for Plaintiffs.

Answer of Hudson & Manhattan Railroad Co.

**ANSWER OF THE HUDSON & MANHATTAN
RAILROAD CO.**

(Filed Sept. 23, 1924.)

HUDSON COUNTY COURT OF COMMON
PLEAS.

10

ADELE PABST, individually and
as next friend of FRANCES
PABST, an infant,

Plaintiff,

vs.

HUDSON & MANHATTAN RAILROAD
COMPANY, *et al.*,

Defendants.

*Action at
Law.*

*Answer of
the
Defendant,
Hudson &
Manhattan
Railroad
Company.*

20

The defendant, a corporation of the State of New Jersey, with its principal office at 243 Washington street, Jersey City, says that:

FIRST DEFENSE.

1. It admits paragraph 1.
2. It denies paragraph 2.
- 30 3. It denies paragraph 3.
4. It denies paragraph 4.
5. It denies paragraph 5.
6. It denies paragraph 6.
7. It denies paragraph 7.

SECOND DEFENSE.

40 The alleged accident set forth in the complaint was due to contributory negligence on the

Answer of Hudson & Manhattan Railroad Co.

part of the plaintiff, Frances Pabst, in failing to exercise reasonable care for her own safety.

THIRD DEFENSE.

The alleged accident set forth in the complaint was due to contributory negligence on the part of the plaintiff, Frances Pabst, in failing to look or otherwise inform herself of the alleged condition of which she complains. 10

COLLINS & CORBIN,
Attorneys of Defendant,
Hudson & Manhattan Railroad Company.

20

30

40

Answer of Pennsylvania Railroad Company.

ANSWER OF THE PENNSYLVANIA RAILROAD COMPANY.

(Filed Oct. 15, 1924.)

HUDSON COUNTY COURT OF COMMON
PLEAS.

10

ADELE PABST, individually and
as next friend of FRANCES
PABST, an infant,

Plaintiff,

vs.

HUDSON & MANHATTAN RAILROAD
COMPANY and PENNSYLVANIA
RAILROAD COMPANY,

20

Defendants.

*Action at
Law.*

*Answer
of the
Defendant
Pennsylvania
Railroad
Company.*

The defendant, Pennsylvania Railroad Company, a foreign corporation, having its principal office in the State of New Jersey at the foot of Exchange Place, Jersey City, says that:

FIRST DEFENSE.

30

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

40

Answer of Pennsylvania Railroad Company.

SECOND DEFENSE.

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

THIRD DEFENSE.

10

The alleged accident set forth in the complaint was due to contributory negligence on the part of the plaintiff, Frances Pabst, in failing to look or otherwise inform herself of the alleged condition of which she complains.

COLLINS & CORBIN,
Attorneys of Defendant,
Pennsylvania Railroad Company.

I consent to filing as of time.

20

ALEX. SIMPSON,
Attorney of Plaintiff.

30

40

Discontinuance.

DISCONTINUANCE AS TO THE PENNSYLVANIA RAILROAD COMPANY.

(Filed June 20, 1925.)

HUDSON COUNTY COURT OF COMMON PLEAS.

10

ADELE PABST, individually and
as next friend of FRANCES
PABST, an infant,

Plaintiff,

vs.

HUDSON & MANHATTAN RAILROAD
COMPANY, *et al.*,

Defendants.

*Action at
Law.*

*Discontinu-
ance as to
the
Defendant,
Pennsylvania
Railroad
Company.*

20

Motion having been made by the plaintiff in the above case to discontinue as to the defendant, Pennsylvania Railroad Company, and the said defendant insisting upon payment of its costs, and the Court having duly considered the matter;

30

It is on this 18th day of June, 1925, ORDERED that said action be and the same hereby is discontinued as against the defendant, Pennsylvania Railroad Company, with costs of said defendant to be taxed.

DANIEL T. O'REGAN,
Judge.

Rule actually entered this 20th day of June, 1925.

On Motion of

COLLINS & CORBIN,

Attorneys of defendant,

40

Pennsylvania Railroad Co.

Judgment on Verdict.

JUDGMENT ON VERDICT.

Entered June 29, 1925.

HUDSON COUNTY COURT OF COMMON
PLEAS.

ADELE PABST, individually and
as next friend of FRANCES
PABST, an infant,

Plaintiff,

vs.

HUDSON & MANHATTAN RAILROAD
COMPANY,

Defendant.

10

*Action
at Law.*

*Judgment
Nisi.*

Judgment on verdict in the above-entitled cause
was entered in this Court on the twenty-ninth
day of June in the year of our Lord one thou-
sand nine hundred and twenty-five in favor of
the plaintiff, Adele Pabst, as next friend of
Frances Pabst, an infant, and against the defend-
ant, Hudson & Manhattan R. R. Co., in a plea
of action at law for the sum of five thousand
dollars and — cents damages.

20

Judgment entered and signed this twenty-
ninth of June, 1925.

30

DANIEL O'REGAN,
Judge.

40

Rule to Show Cause.

RULE TO SHOW CAUSE.

Filed June 22, 1925.

HUDSON COUNTY COURT OF COMMON
PLEAS.

10	ADELE PABST, individually and as next friend of FRANCES PABST, an infant, <div style="text-align: right;"><i>Plaintiff,</i></div>	} <i>Action at Law.</i> } <i>Rule to Show Cause.</i>
	<i>vs.</i> HUDSON & MANHATTAN RAILROAD COMPANY, <div style="text-align: right;"><i>Defendant.</i></div>	

20 On due application,
ORDERED that the plaintiff show cause before
this Court on the 24th day of July, 1925, why
the verdict rendered in her behalf against the
defendant on June 16, 1925, should not be set
aside and a new trial ordered, and it is

30 FURTHER ORDERED that all objections and ex-
ceptions noted by the defendant during the course
of the trial be and the same hereby are reserved
to the defendant for appeal, and it is

FURTHER ORDERED that until the further order
of the Court execution on the verdict herein be
and the same hereby is stayed.

DANIEL T. O'REGAN,
Judge.

Rule actually entered this 22nd day of June,
1925.

On Motion of
COLLINS & CORBIN,
40 Attorneys of Defendant.

Order Discharging Rule.

RULE DISCHARGING RULE TO SHOW CAUSE.

Filed July 28, 1925.

HUDSON COUNTY COURT OF COMMON PLEAS.

10

ADELE PABST, individually and
as next friend of FRANCES
PABST, an infant,

Plaintiff,

vs.

HUDSON & MANHATTAN RAILROAD
COMPANY,

Defendant.

*Action at
Law.*

*On Rule to
Show Cause.*

*Order
Discharging
Rule.*

20

A rule to show cause having been allowed in the above-entitled cause, why the verdict should not be set aside and a new trial granted, and the same having been duly argued and the Court being of the opinion that the said rule should be discharged,

30

It is on this 28th day of July, 1925, ORDERED, that the rule to show cause be, and the same is hereby dismissed and that judgment for the plaintiff in the sum of \$5,000 be entered, with costs to be taxed.

DANIEL T. O'REGAN,
Judge.

40

Judgment.

JUDGMENT.

Entered July 28, 1925.

HUDSON COUNTY COURT OF COMMON
PLEAS.

ADELE PABST, individually and
as next friend of FRANCES
PABST, an infant,

Plaintiff,

vs.

HUDSON & MANHATTAN RAILROAD
COMPANY,

Defendant.

10

*Action at
Law.*

*Judgment
Final.*

*Damages
\$5,000.*

Judgment final be and the same hereby is
entered in this court this twenty-eighth day of
July in the year of our Lord one thousand nine
hundred and twenty-five in favor of the plaintiff,
Adele Pabst, individually and as next friend
of Frances Pabst, an infant and against the de-
fendant, Hudson & Manhattan R. R. Co., in a
plea of action at law for the sum of five
thousand dollars damages and costs.

20

Judgment entered and signed this twenty- 80
eighth of July, 1925.

DANIEL O'REGAN,
Judge.

40

Opening.

HUDSON COUNTY COURT OF COMMON
PLEAS.

ADELE PABST, <i>vs.</i> 10 HUDSON AND MANHATTAN RAIL- ROAD COMPANY.	}	<i>Tort.</i>
--	---	--------------

June 16, 1925.

This action came on for trial in the Hudson County Court of Common Pleas, held in the Hudson County Court House in Jersey City, on the sixteenth day of June, nineteen hundred and twenty-five, before Honorable Daniel T. O'Regan, Judge presiding, and a jury.

Mr. Alexander Simpson, counsellor at law, appeared for the plaintiff.

Mr. E. A. Markley, counsellor at law, appeared for the defendant company.

The case being called and answered.

A jury was drawn, selected and sworn.

Counsel for the plaintiff and counsel for the defendant stated the claims of their clients.

Mr. Simpson: I understand that it is admitted on behalf of the Hudson and Manhattan Railroad Company that that Railroad Company maintained those stairs in question on the day and at the time of the accident.

Mr. Markley: Yes, sir; but we deny negligence in respect to the same.

Mr. Simpson: And it is admitted that the same defendant is a common carrier and was

Anna Pabst, direct.

operating as such at the time and place of the accident.

Mr. Markley: Yes, without admitting negligence.

Mr. Simpson: On behalf of the plaintiff, I will file a discontinuance of the suit as against the Pennsylvania Railroad Company. 10

Further proceedings on the trial follow.

ANNA PABST, called by the plaintiff's counsel and sworn, testified as follows:

Direct examination by Mr. Simpson.

Q Where do you live? A 332 Central avenue, Jersey City.

Q How old are you? A Twenty. 20

Q On the third of May, 1924, were you at the foot of Exchange Place in Jersey City, bound on your way to New York? A Yes, sir.

Q In company with someone? A Yes.

Q Who was with you? A A girl friend of mine and a girl friend of my sister.

Q What are the names? A Charlotte Ehrenbach and Charlotte Large.

Q When you got to the Hudson and Manhattan Terminal, what did you do? A We all went down the elevator to the stairs and I went to get change. 30

Q Did you walk down to where the change booth was? A Yes.

Q Did you stop to get change? A Yes, sir.

Q What did you do to get on the train? A Walked over to the stairs, and my sister walked ahead of me, and she fell at the foot of the stairs, and I walked down after her. 40

Adele Pabst, direct.

Q Are you not the plaintiff? A No, sir.

(Witness withdrawn.)

10 ADELE PABST, called by plaintiff's counsel
and sworn, testified as follows:

Direct examination by Mr. Simpson.

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

Q What is your name? A Adele Pabst.

Q How old are you? A Forty-four.

Q On the third day of May, 1924, were you
on your way to New York by way of the tube?

20 A I was not with them. I was home.

Q Are you the person suing? A Yes, sir.
It is my daughter.

By the Court.

Q Are you the complainant? A Yes, sir;
but it is my daughter.

Q Are you the one was hurt in this acci-
dent? A No, sir. My daughter, Frances.

30 Q You are suing for your daughter's acci-
dent? A Yes, sir.

No cross examination.

Frances Pabst, direct.

FRANCES PABST, called by the plaintiff's counsel and sworn, testified as follows:

Direct examination by Mr. Simpson.

Q You are the young lady who was hurt in this case? A Yes, sir.

10

Q What is your age? A Sixteen.

Q What is your full name? A Frances Pabst.

Q On the third of May, 1924, were you on your way to New York? A Yes, sir.

Q And in the Pennsylvania Terminal of the Tube at Exchange Place, did you meet with an accident? A Yes, sir.

Q Who was with you at the time you got to the station? A My sister and a girl friend of mine, and a girl friend of hers.

20

Q What is the name of your girl's friend? A Large, Charlotte Large.

Q Where were you going, downtown or uptown? A We were going uptown.

Q Whereto? A New York City. To Hearns, 33rd street train.

Q You got in on Exchange Place? A Yes, we all went in there.

Q Did you go in the elevator downstairs? A Yes, sir; and my sister went to get change.

30

Q And did you walk along the platform to the change booth? A Yes.

Q Who got the change? A My sister.

Q Did you wait there with her? A No. I went towards the stairs.

Q What did you do when she got the change? A I started to go downstairs.

Q Is there a rail in the middle of the stairs? A Yes.

40

Frances Pabst, direct.

Q How many flights of stairs are there?

A Two.

Q What did you do and what happened as you were going down those stairs at that time?

A I walked down the first flight and there was a little platform there; and then I walked down on the second flight, and I got down to the third step from the bottom, and on that my foot caught in the metal on it, and I fell and got hurt.

Q Where was the metal? A On the top. Top of the step.

Q Do you mean the nosing on the front of the step? A On the front of the step.

Q What part of your foot caught? A My heel.

Q What happened? A It threw me over, and I fell onto the floor.

Q How far did it throw you? A It threw me down the three steps.

Q What position were you in when you got to the bottom? A I was lying down.

Q On your back? A I was lying on my face.

Q What happened to you then? A My right leg bunched against the stairs.

Q What happened to your right leg when it bunched against the stairs? A It got hurt bad.

Q Had you been troubled with that leg before? A Yes.

Q How long had you been under treatment for your right leg before the accident? A I had been in the hospital two or three weeks.

Q Were you able to walk when you got out of the hospital? A Yes, sir.

Q Before you went in the hospital, were you able to walk? A I could hardly walk when I went in the hospital.

Frances Pabst, direct.

Q And after being there two or three weeks, you were able to leave and walk? A Yes, sir.

Q And you were able to walk well on the day of the accident? A Yes, sir.

Q Did you have pain in the leg when you went in the hospital? A Yes, sir.

Q And at this time you were out after that two or three weeks' treatment of the leg? A Yes, sir. 10

Q And did you have any pain in it when you got out of the hospital? A No, sir.

Q Who picked you up? A The ticket man.

Q After that what happened? A They sat me on a seat until a train came along; and then we went on the train and we got out at Hearn's, and my leg hurt me, and the sore in it started to run again, and I had to come back.

Q Had the sore stopped running when you got out of the hospital? A Yes, sir. 20

Q And when you got to Hearn's it was running? A Yes, sir.

Q Then what happened? A We all went home by the train.

Q And when you got home, what did you do? A I treated my leg.

Q What did you do to it when you got home? A I bandaged my leg. 30

Q Did you call a doctor immediately when you got home? A No.

Q When did your mother call a doctor? A She did not have a doctor.

Q What happened, did you go back to the hospital? A I went back to the school and saw the doctor again.

Q What doctor did you see? A Doctor Sprague.

Q What happened after that? A Then I went to the school off and on. 40

Frances Pabst, cross.

Q You did not go to the school regularly?

A No, sir.

Q How did your leg act, which was not O. K. as you say, from the time that you saw Dr. Sprague and while you went to the school? A It ran again.

10 Q What do you mean by saying it ran again?

A The sore opened and was running.

Q Did you ever go to the hospital after that?

A No, sir.

Q Who attended you for the running of the leg? A The school doctor.

Q Is that leg sore still running? A Yes, sir.

Q Have you any pain with it? A A little bit.

Q How much time have you lost in school?

20 A I have lost the whole month of December.

Q Did you go back in January? A Yes, sir.

Q And was your leg still hurting? A Yes, sir.

Q Is it running now? A Yes, sir.

Q And does it pain? A Yes, sir.

Q And it has to be treated? A Yes.

Cross examination by Mr. Markley.

30 Q How long had you been going to school before this accident? A (Not answered.)

Q How long had you gone to the cripple school before this accident happened to you, do you remember? A Three or four years.

Q Did you have any trouble with your leg before that? A Yes, sir.

Q When was it you first had this trouble with your leg—is it the right leg? A Yes.

40 Q When did that trouble come? A About six years ago, when I was a little girl.

Frances Pabst, cross.

Q Do you know what caused that condition of the leg that you suffered from? A Yes, sir.

Q What was the cause of it? A I fell on the lots, and then I went to the hospital, and they operated on me.

Q That was about six years ago? A Six or eight years. 10

Q When you fell in the lot was that near your home? A Yes, sir.

Q How near? A About a block away from my home.

Q What is your age now? A Fifteen.

Q And this happened seven or eight years ago? A Yes.

Q Where were you living at that time? A Ocean avenue, Jersey City.

Q And you were playing in the lots and fell and cut your leg? A Yes. 20

Q On a tin can? A Yes.

Q And it became sore? A Yes.

Q And then after that you went to a hospital and were operated on? A Yes.

Q And you are lame ever since? A Yes.

Q The same as you are now? A Yes, sir.

Q The present accident happened May 3, 1924? A Yes, sir. 30

Q In the month of April you were in the City Hospital, all that month? A No. Two or three weeks.

Q That was April, 1924? A Yes, sir.

Q A year ago? A Yes, sir.

Q And your accident happened on May 3, 1924? A Yes, sir.

Q What did you go to the hospital for in April, 1924? A My leg was paining me.

Q And you could hardly walk? A Yes. 40

Frances Pabst, cross.

Q Do you remember the nurse's name? A Bosquett.

Q She had been treating you at the cripple school? A Yes.

10 Q Before you went to the hospital in April, 1924, she had been treating your leg in the cripple school? A Yes, sir.

Q And at that time you had been having a discharge from the leg? A Before I went to the hospital I had the discharge.

Q From the leg? A Yes, sir.

Q From the same leg? A Yes, sir.

Q The right leg? A Yes, sir.

Q In other words there was an open wound in that leg? A Yes, sir.

20 Q And that hurt you? A When I went to the hospital it was not the leg only that hurt.

Q What do you mean? A I had pain in my leg and my hip hurt too.

Q I want to take you back before that some time in April, before you went to the hospital, did Miss Bosquett treat the wound in your leg? Do you remember that? A Before I went to the hospital I was out of the school for a while.

Q For a month? A Yes.

30 Q Before that Miss Bosquett was treating your wound then in the cripple school, in March? A Yes, sir.

Q What did she do for it? A Bandaged it and took the bandages off.

Q And the bandage when taken off would have a sort of pus on it? A Yes.

Q And she would take that off and put on a new bandage? A (Not answered.)

40 Q What the nurse did in the cripple school was to bandage the wound? A Yes.

Frances Pabst, cross.

Q Where was the wound? A On the top of my leg.

Q Between the knee and the ankle? A Yes.

Q Which leg was it? A The left leg.

Q Which leg is lame? A The right.

Q Did you have this wound on the left leg?

A Yes.

10

Q The pus drain was on your left leg? A Yes.

Q Also on your right leg? A No, sir.

Q But the right leg is lame? A Yes.

Q It is a tubercular condition?

(Objected to as not proper and calling for hearsay.)

A It is not tubercular.

20

(Objection sustained. Answer stricken out. Defendant's counsel excepts.)

Q Were you operated on upon your leg? A Yes, sir.

Q Where? A City Hospital, Christ Hospital, and the Hahneman Hospital in New York.

Q After you cut your leg and when you were first operated on for your injury in the lots, where was that operation performed? A City Hospital, Jersey City.

30

Q And after that you would go for another operation there? A Yes, sir.

Q You had two operations there? A Yes, sir.

Q Who performed those operations? A I don't remember.

Q The second operation, was that due to a fall? A No. I had to go back again.

40

Frances Pabst, cross.

Q What for? A I don't remember. I don't know what it was for I went back.

Q Were you operated on the second time when you went there afterwards? A Yes.

Q Were you put under ether again and put to sleep? A Yes, sir.

10 Q How long was that after the first operation? A I don't remember.

Q What was the next hospital you went to? A Christ Hospital.

Q Do you remember the names of the doctors who performed the operation in the City Hospital? A Yes.

Q How many times did you go to Christ Hospital? A Two.

20 Q And did you have two operations there? A Yes.

Q How long was that you went to Christ Hospital? A I don't remember.

Q How long ago was it? A About six or seven years ago.

Q Was it after you came out of the City Hospital? A Yes, but I was home for a while.

Q How long were you home? A I don't know.

30 Q Was it a year? A I don't know. I can't remember that any more.

Q After you left the City Hospital how soon did you go back to the other hospital? A (Not answered.)

Q Was it a couple of years, or within a few months? A About a year.

Q Who was the doctor who operated on you there? A I don't know.

40 Q But he operated on you and put you under ether again the same way? A Yes, sir.

Frances Pabst, cross.

Q And how long after that did you go back to Christ Hospital the second time? A I don't know.

Q Were you put under ether again? A Yes, sir.

Q For the same trouble? A Yes, sir.

Q The same leg? A Yes, sir. 10

Q Was it running then? A Yes.

Q When did you go to the Hahnemann Hospital? A About five years ago.

Q Were you operated on there? A Yes.

Q For the leg again? A Yes, sir.

Q Was it running at that time? A Yes, sir.

Q Who operated there? A Doctor Roberts.

Q That was in New York City? A Yes, sir.

Q Put under ether again? A Yes, sir. 20

Q And operated the same way? A Yes, sir.

Q And did you go back there another time? A No, sir.

Q Did you not go twice? A No. I went there once, and I was operated on there two times.

Q Did you stay there for a while? A It was nearly a year.

Q After the first operation you stayed in the hospital? A Yes, sir. 30

Q And then they operated again? A Yes, sir.

Q On the same leg? A Yes.

Q And it was running all the while? A It held up a little then.

Q How long ago was that? A About five years ago.

Q Then you went to the City Hospital in April, 1924? A Yes, sir, in the Jersey City Hospital. 40

Frances Pabst, cross.

Q Were you in any hospital between those hospitals? A No.

Q When you went to the City Hospital in April, 1924, you could hardly walk? A Yes.

Q You mean you could hardly walk? A Yes.

10 Q Was the difficulty because of the extreme pain? A Yes.

Q Where was that pain? A Right in my leg.

Q The same place where the wound was? A Yes, sir.

Q The same place where you had it long before? A Yes, and the right hip also.

Q And you had pain in the left leg also? A Yes, sir.

20 Q Where were those pains? A Right where the wounds is.

Q How many wounds did you have there? A Two.

Q Were were those wounds? A Right in the front of the leg.

Q You pointed to your left leg. Do you have both wounds on your left leg? A Yes.

Q There are two wounds on the left leg? A Yes, sir.

30 Q Did you have any wound on your right leg? A No, sir.

Q Where was the running sore—on your left leg? A Yes.

Q But your right leg is the lame leg? A Yes, sir.

Q These pains you have in your right hip and leg, are down between the hip and ankle?

A Yes, sir.

40 Q The left leg? A The left leg and the right leg and hip.

Frances Pabst, cross.

Q Then you went to the hospital before the accident? A Yes, but before I met with the accident I was home, about two or three weeks.

Q That was before the accident? A Yes. I had come from the hospital two or three weeks before.

Q Why did you stay home then? A Because my leg hurted. 10

Q Did you have a doctor to treat your leg at that time? A Yes, sir.

Q Who? A Dr. Wright.

Q In Jersey City? A Yes.

Q Is he connected with the cripple school? A No, sir.

Q That school is adjoining to the City Hospital? A Yes, on Clifton Place.

Q One block above? A Yes.

Q And that is where you attended school four or five years ago? A Yes. 20

Q Was Doctor Wright connected with that school? A No, sir.

Q What did he do for you? A He gave me medicine to take.

Q Did he put anything on the sores? A No, sir.

Q Was it at his direction you went to the City Hospital? A He sent me there in April. 30

Q How long were you in the City Hospital then? A Two or three weeks.

Q Were you operated on there? A No.

Q Who had charge of the hospital? A Dr. Sprague and Dr. Bogardus.

(This witness examination suspended to permit examination of Dr. Sprague.)

Seth B. Sprague, direct.

SETH B. SPRAGUE, called by the plaintiff and sworn, testified as follows:

Direct examination by Mr. Simpson.

Q You are a practicing physician and surgeon? A Yes.

10 Q You make a specialty of bone diseases? A Yes.

Q Did you attend this young lady at the City Hospital prior to May 3, 1924? A In April. I think in April, 1924.

Q Can you tell us what her condition was? A She had an osteomyelitis of the left tibia—and had also osteomyelitis of the left hip—a similiar condition.

20 Q Did you operate on her? A I don't think I did.

Q What did you do for her while she was in the City Hospital? A Just dressed the wound and gave it rest and kept it clean, that is to the best of my knowledge now.

Q Was it discharging when she came in? A I can't just state that.

30 Q She said there was a discharge when she came in the hospital, but it had stopped when she left there. Do you recollect that? A I don't recollect.

Q What would that indicate? A That there was an improvement and that the wound might have healed over.

40 Q If after that she met with an accident and the wound started to flow again, what would that indicate if there had been that improvement and healing you mention in April and the accident was May 3rd? A That there was an abrasion and a broken skin, and that the pus begun to discharge again.

Seth B. Sprague, direct.

Q If the wound stayed healed until now, would that indicate that the condition was passing or not? A If it stayed closed until this time I would say the condition was improving.

Q You have no clear recollection as to what her condition was after she came out of the hospital? A There are so many cases I can't recollect them all. 10

Q Have you any record as to her condition when she was discharged? A Here it says—"She has no pain—five days before she left—the bone discharged—no pain she says this morning—"

By Defendant's Counsel.

Q What are you reading from? A The hospital chart. 20

Q Made by whom? A By the nurse. It is a regular record of the hospital.

(Objected to by defendant's counsel.)

By Plaintiff's Counsel.

Q That was made under your direction? A Yes, sir.

Q In the ordinary course in the hospital? A Yes, sir. 30

Q And without that you cannot recall the details of this case? A No, sir.

Q But it will refresh your recollection? A Yes, sir.

(Objected to.)

Defendant's Counsel.

Q You were not present when this chart was made? A I may have been. I can't remember. 40

Seth B. Sprague, direct.

We have about a hundred cases all the time, but those are the records that are kept of the patient by the nurse in the hospital.

Q But you are not there daily? A I attend the patients daily, and I give the nurse my orders and she makes up the notes on the case.

10 Q She records her observations on this chart?
A Yes. I think she does.

Q You don't stay there all day to see whether she makes accurate notes? A We look them over and see whether they are pretty near right.

Q You make just one visit to each patient?
A Yes.

Q And you spend perhaps five minutes at the most with a patient? A Yes.

20 Q And this nurse writes down what she thinks is important to put down in your absence?
A Yes, sir.

(Defendant's counsel objects to the use of the chart as before.)

By the Court.

Q Are these records made by your direction?
A Yes.

30 Q Do you read them in the treatment? A Yes.

Q And are you guided by them? A Yes.

Direct examination continued.

Q Can you tell what her condition was at the time she left the hospital without that chart?
A I cannot tell.

40 Q What does that chart allow you to testify to generally?

Seth B. Sprague, cross.

(Objected to on the ground that the doctor has no right to refresh his recollection on these notes made by a nurse. Objection overruled. Exception.)

Q Referring to those notes can you tell whether she was discharged as cured or not? 10

(Objected to.)

Q Was she discharged as cured? A No. She was discharged as improved.

Q Would that improvement be indicated by the closing of the wound? A Yes.

Defendant's Counsel: All this line is objected to.

20

Q What is this osteomyelitis? A Rottenness of the bone.

Q Is it caused by disease? I don't mean in this particular case. A It is some infection carried in the bone.

Q Is it aggravated by violence at any time? A Yes.

Cross examination (In Chief). 30

Q State what parts you had under treatment?
A The right hip and the left tibia.

Q What is the tibia? A The big bone between the knee and the ankle. The fibula is the little bone of the leg.

Q Was it the right hip bone? A Yes.

Q And the left tibia? A Yes, below the knee.

Q The fibula is the small bone? A Yes. 40

Seth B. Sprague, cross.

Q And she had a running of the large bone between the left knee and ankle? A Yes, sir.

Q How did you determine there was a rotteness there? A By the X-ray; and there was pain and redness and swelling around there.

Q And there was a wound there showing
10 there what was a drainage? A Yes, sir.

Q Was that open or closed? A I cannot state positively from memory.

Q Did the same condition obtain with respect to the right hip bone that you describe with reference to the tibia? A There was no opening there.

Q How did you know there was a rotting of that bone? A By the X-ray pictures.

Q Was there a swelling and redness of the
20 hip bone too? A I don't think so.

Q There was pain? A Yes, with limited motion.

Q So she could hardly walk? A Just how much difficulty she had in walking I have no recollection.

Q Were you connected with the cripple school? A Yes.

Q In charge there? A Doctor Bogardus. I am now. I was his assistant at the time. Dr.
30 Bogardus is dead now.

Q He was the bone specialist? A He was the attending surgeon and I was his assistant.

Q He specialized in the bone surgery and treatment? A Yes.

Q How long was this girl under your observation? A From the fourth of April to the fifteenth of *May, (sic)*.

Q Then she was in the City Hospital proper during that time as distinguished from the
40 cripple school? A Yes.

Seth B. Sprague, cross.

Q And what did you do for her in the hospital? What was done to relieve that condition she complained of? A Kept the wound clean and gave it rest.

Q What was the condition? A The wound on the leg was running; there was a discharge from the wound.

10

Q There were two wounds as a matter of fact? A I don't remember how many.

Q What was done in the hospital was to keep the wound or wounds clean and bandaged? A Yes.

Q So as to give the girl rest? A Yes.

Q Was she discharged on April 15th? A Yes.

Q As cured? A No. As improved.

Q There was a covering over the outer surface of the wound? A Yes, sir.

20

Q And that was liable to break open? A Yes.

Q Such coverings frequently break open? A Some times they break open.

Q How soon? A Some times within five days, and some times they will last five years.

Q They break out any time without any accident or fall? A Yes.

30

Q There is a sort of gathering in the wound underneath? A Yes.

Q And there has to be an outlet for that? A Yes.

Q And the wound breaks open? A Yes, sir.

Q She was lame when she came to the hospital, was she not, on April 4th? A Yes.

Q You did not perform any operation there? A No.

40

Seth B. Sprague, re-direct.

Q Did you see her at all in the cripple school before she came to the hospital April 4th? A No.

Q Have you seen her since she left the hospital on April 15th? A Not to my recollection.

10 Q Did you examine her in the school? A Not to my recollection.

Q Did you see her there? A I have seen her in the school but I have not examined her as I remember.

Q You mean the cripple school maintained by the city near the City Hospital? A Yes, sir.

Q And you have seen her there? A Yes, sir.

Q But not for the purpose of examination? A No, sir.

20 Q What would you dress the wound with? A Put on gauze with a Dr. Wright's solution.

Q What is the purpose? A To relieve pain and heal.

Q How often is that done? A Some times every half hour and some times not for two hours. It is a wet dressing.

Q Do you know or remember how often the wet dressing was put on? A I don't remember.

30 Q Had she been under your observation prior to April 4th? A No.

Re-direct by Mr. Simpson.

Q If the wound healed up and the discharge stopped and it continued that way for a year, it would be a sign that the condition was clearing up? A Yes, sir.

Frances Pabst, cross.

FRANCES PABST, resumes the witness chair and the

Cross examination is continued by Mr. Markley.

Q Do you remember when you came out of the City Hospital? According to Dr. Sprague it was April 15th—(Not answered.) 10

Q You did not go back to the school then?

A No, sir.

Q You stayed home? A Yes, sir.

Q You were living home? A Yes, sir.

Q As a matter of fact you did not go back to school until after the time that you fell in the depot? A Yes, sir.

Q You did not? A No, sir.

Q So that you stayed home from April 15th, when you came out of the hospital, until the time you fell? A Yes, sir; I was living home. 20

Q How many days had you been out of the house before you started to New York to shop, on May 3rd? A I was not going out any at all. I was resting up.

Q And that was the first day you went out since your return from the hospital on that occasion? A Yes, sir.

Q Then it was the first time after you came from the hospital, April 15th, that you were out—that day was the first time? A I was out before that, but I was not on a trip. 30

Q You mean that you had been outside of the house before that day? A Yes, sir.

Q But this was the first real trip you took away from the house? A Yes, sir.

Q And you and your sister, Anna, and two girl friends decided to go to New York to shop on that particular day? A Yes, sir.

Q You four together? A Yes, sir. 40

Frances Pabst, cross.

Q Who were the girls? A Charlotte—I don't know her last name, and there was also Charlotte—Charlotte Large.

Q How did you go to Exchange Place in Jersey City? A We walked.

10 Q What route did you take? A First we went for my sister at Colgate's, and then after that we walked down to the Pennsylvania Station.

Q Did your sister work at Colgate's? A Yes, sir.

Q And these other girls also? A One.

Q Which way did you go? A We went through Exchange Place to get my sister.

Q And after that? A My girl friend was walking on the other side, while we were walking down to get the train.

20 Q The other side of what? A The other side of the rail.

Q What do you mean by the other side of the rail? A On the stairs going downstairs.

Q Did she leave home with you? A Yes, sir.

Q Live near you? A Yes, sir.

Q Next door? A No.

Q She met you at your home? A Yes, sir.

30 Q She said she would go with you? A Yes, sir. She came down with me, and to see my sister.

Q She went with you to help if you needed help? A Yes.

Q And then she and you went to Colgate's? A Yes.

Q What time was that? A Between a quarter after one and half-past.

Q On a Saturday? A Yes.

40 Q Then you went to the depot? A Yes.

Frances Pabst, cross.

Q And there you went down in the elevator?

A Yes.

Q You went down the elevator all right?

A Yes.

Q And proceeded to the stairs? A Yes, sir.

Q And you walked along that passageway to the stairs all right? A Yes. 10

Q There are two little flights of stairs there?

A Yes, sir.

Q About how many steps in each flight, do you know? (Not answered.)

Q From five to eight steps? A About six or seven I guess.

Q You passed the change booth all right?

A Yes. We wanted to get change there.

Q Who got the change? A My sister was getting the change there. 20

Q While she was getting the change you started downstairs with your friend, Charlotte?

A Yes, sir.

Q It was your girl friend, Charlotte? A Yes, sir— She was on the other side of the rail.

Q She had hold of your arms? A No, sir.

Q Who had hold of your arms? A No- 30 body.

Q Where was the other girls? A One Charlotte was in back of me and the other was on the other side of the rail.

Q You and one Charlotte were on one side of the rail? A Yes, sir.

Q Was that your friend Charlotte? A No. my sister's Charlotte.

Q Where was your friend Charlotte? A She was in back of me. 40

Frances Pabst, cross.

Q You got down the first flight all right?

A Yes.

Q And off the first landing all right? A Yes.

Q And you were down on the second flight and got to the third step from the bottom of the second flight all right? A Yes.

Q And that is from where you fell? A Yes, sir.

Q It was the heel of your shoe caught in the step? A Yes.

Q And you fell at the time your heel caught? A Yes.

Q You don't know just how it caught, do you? A No.

Q As you go down that step or flight it is divided in the center by an iron rail? A Yes, sir.

Q On which side of it were you going down? A The right side.

Q Did you hold on to that rail with your left hand as you went down? A Yes.

Q Which side of the rail were you on? A The right side, going down.

Q Did you have hold of the rail? A Yes, sir.

Q With which hand? A With my left hand, all the way until I fell.

Q You went down to the last few steps holding on the railing with your left hand? A Yes, sir.

Q And you could hold on to it all right? A Yes.

Q Were you going down slowly? A Yes.

Q Carefully? A Yes, sir.

Q Anybody have hold of your arm? A No, sir.

Frances Pabst, re-direct—re-cross.

Q Are you sure? A Yes, sir.

Q Didn't your friend on the other side hold your hand? A No, sir.

Q You were going down slowly? A Yes, sir.

Q Unassisted? A Yes.

Q You merely had hold with your left hand? A Yes. 10

Q Was there anything in your right hand?

A No, sir.

Q In your left hand? A No, sir.

Q But at the third step from the bottom your heel got caught? A Yes.

Q Which heel? A The right heel, the heel of the right shoe.

Q Is that your lame foot? A Yes, sir.

Re-direct by Mr. Simpson. 20

Q It was on the worn metal nosing of the step your heel got caught? A Yes, sir.

Q And that made you fall? A Yes, sir.

Q And you had hold of the rail at the time you fell? A Yes, until my heel got caught.

Q Then you let go? A That threw me and I had to let go.

Q Until you fell you had hold of that rail? A Yes, sir. 30

Q When your foot caught you were about three steps from the bottom—When you fell?

A Yes.

Re-cross by Mr. Markley.

Q Then after you fell, you went to New York? A Yes.

Q Was it to Gimbels you were going? A No. We went to Hearn's. We went to some store and I had to come home. 40

Frances Pabst, re-cross.

Q I thought you said you went to 33rd street?

A Yes, 33rd street train.

Q Are you sure? A Yes.

Q To Hearn's? A Yes.

Q Hearn's is on 23rd street, is it not?

10 Mr. Simpson: Fourteenth street.

Q Was it not Gimbel's store you went to on 33rd street? A I don't know what store it was.

Q After you did shopping you came home?

A We did not do much shopping.

Q You did some? A A little.

Q And then you came home again? A Yes.

Q And you had no doctor at all then? A

No, sir.

20 Q Then you went back to the school? A Yes.

Q Do you remember when that was? Was it in May? A I think it was a week or two after I fell.

Q And you have been going to the school ever since except some times off and on out?

A Yes.

Q And you were off and on out before this accident? A Yes.

30 Q Has the wound healed up? A No. Still running.

Q You have not been in the hospital since? A No.

Q Did the wound heal at all since the accident? A No.

Q Do you still go to the cripple school? A Yes, sir.

40 Q There was plenty of light as you walked down those stairs, was there not? A Yes, sir.

Dr. Joseph Adler, direct.

Re-direct by Mr. Simpson.

Q You have been treated by the cripple school doctor? A Yes.

Q You have not had a doctor that you paid? A No, sir.

Q But you have been attended by the cripple school doctor? A Yes, sir. 10

Q And that sore is still running now? A Yes, sir.

Q And at the time you fell down the stairs the sore had been healed? A Yes, sir.

Re-cross by Mr. Markley.

Q Have you a bandage on that wound now? A Yes, sir.

Q You had been a cripple and had attended the cripple school before the accident? A Yes, sir. 20

Q And were operated on before the accident? A Yes, sir.

DR. JOSEPH ADLER, called by the plaintiff and sworn, testified as follows:

30

Direct examination by Mr. Simpson.

Q You are a practicing physician and surgeon? A Yes.

Q And you have had a lot of experience in respect to injuries to bones, &c.? A Yes.

Q Familiar with their diseases? A Yes.

Q What is osteomyelitis? A Necrosis of the bone.

Q Does it ever respond to treatment? A It does. 40

Dr. Joseph Adler, direct.

Q Assuming the case of a young girl suffering with osteomyelitis, attended with discharge of pus of the bone, and the wound heals up, and that she soon after has a fall, and immediately after the fall the wound is broken and the pus discharges again—What would you say as to the effect of the fall on the wound and on the condition of the bone? A In those cases there is a swelling or bulging on the surface that breaks open and discharges pus; and when the sore is healed the wound closes and there is no discharge of pus. The discharge of pus comes through the opening to the surface, allowing the pus to have draining freedom from the inside of the wound. The bone condition, when healed, allows the wound to close and heal. But, an injury of any character can relight the fire in that weakened bone so that there is a recurrence of the former condition of necrosis.

Q Suppose in the case of a girl fifteen years of age, after the wound is broken open again it still continues to discharge for over a year—the same as in this case—what would be your opinion as to the persistence of the osteomyelitis? A It will persist up to until such time as a cure is made.

Q What are the requisites of a cure? A The necessary conditions to bring about a cure would be a re-operation—that is a re-opening of the wound—and scraping the bone and dressing it and allowing it to heal.

Q How long does it take? A Those cases take a long time to heal. I have under my observation a boy now about four years.

Q What effect has it on the limb? A It impairs the use of the limb.

Dr. Joseph Adler, direct.

Q Suppose on June 9th—following an accident May 3rd—that the patient showed a slight ulceration of the upper angle of an abrasion wound—which wound was clean and was apparently of a superficial nature, and which was not healing up—would that indicate anything as to the force applied there? A I don't get that. 10

Q The accident was May 3rd. On June 9th the doctor found that there was a slight ulceration of the abrasion. Would that indicate the severity of the injury? A It would indicate that the injury she sustained on May 3rd, if that was there on June 9th, was a severe injury, taking five weeks, and not effecting a cure within five weeks showed that there was considerable injury to the tissue parts. 20

Q So when you are told that the girl was fifteen years of age and was operated on in a hospital, and the wound had healed and the discharge stopped, and when she left the hospital she was able to walk without difficulty, and was able to go down to the Hudson Tube, what would that indicate to your mind as to whether the wound was clearing up or not? A I don't get that. 30

Q She goes to a hospital and has this discharging wound, and there is a running sore, and her walking is difficult, and she comes out of the hospital after treatment, and then she is able to travel to Exchange Place—would that indicate whether she is improving? A What do you mean by discharging wound?

Mr. Simpson: The running sore.

The Witness: The wound would not heal until the osteomyelitis had cleared up, not 40

Dr. Joseph Adler, cross.

until the opening would close. In order to get a discharge of pus you have to have an opening.

Q If she suffered violence after the healing was there, would that indicate that the fire had been started again? A Yes, sir.

10

Cross examination by Mr. Markley.

Q Sometimes they heal up on the surface and then break out again? A There would be no healing of the surface merely; but the pus might stop, and that would indicate an inflammatory condition when it broke out again.

20

Q There might be a healing on the surface and a sore condition underneath? A No. There might be a temporary closing of a few days' duration, and then there would be a breaking up of the skin again.

30

Q Some of these closings break out four or five years afterwards? A No, sir. An osteomyelitis brings about a weakening condition of the bone tissue—I mean a perpetual weakening of the bone condition—which would allow the person to enjoy life without trouble, but that bone is weakened in part where the injury was, and if there is a blow that starts that all over because that bone is weakened from the former state, but without that blow it would not reopen, and the person could go through life to the three-score-and-ten limit with which we are credited.

Q Assuming an osteomyelitis existing for five or six years, continuing to run or to give off a pus, at the end of five or six years that is pretty serious? A I have case of four years.

40

(Question repeated.)

Dr. Joseph Adler, cross.

A I would not say it is serious or not serious. Osteomyelitis depends very much on the treatment she was receiving.

Q Suppose she was under the care of a good surgeon, such as Dr. Bogardus—you knew him?

A Yes.

Q He was a specialist in cases of this kind? 10

A Yes.

(Objected to.)

Q He stood high— A Dr. Bogardus did the same work I am doing. I am associated with the college in the teaching of that work.

Q I did not ask you that? A You asked me to characterize Dr. Bogardus.

Q I did not ask you to characterize yourself? A No, sir; but I can mention my basis. 20

Q You appear in court a great deal?

(Objected to.)

A Yes.

Q I am asking you about Dr. Bogardus and not yourself, and we all properly appraise you, I am sure. You knew Dr. Bogardus? A Yes, sir. I was associated with him in a great many cases. 30

Q Can't you limit yourself to Dr. Bogardus just a little while? A I can.

Q Will you please do so? A Yes, sir, I may.

Q He was the leading bone specialist in this county in his lifetime? A I would not say he was or was not the leading man. I know he was a good man in his line.

Q Assume that this young lady was under his care and that she had osteomyelitis with a 40

Dr. Joseph Adler, cross.

running condition or open bone wound for a period of six or seven years, would you say that was a serious osteomyelitis to continue so long? A No. I would say it was osteomyelitis; nothing unusual.

10 Q What is the discharge in that class of cases? A The discharge is made up of some bone cells and tissue. The pus that does not contain that does not contain the operative organism or the active germ.

Q Suppose after suffering this condition six or seven years she has in her right hip an osteomyelitis still existent without any opening. How do you account for that? A I don't.

Q Why not? A She will not have an osteomyelitis without an opening in an active state.

20 Q I am assuming an osteomyelitis that is shown by X-ray plates, and there is no opening at all. How do you account for that?

(Objected to that it is incompetent and there are no X-ray plates produced here.)

(Objection overruled.)

Q There can be an osteomyelitis of the bone without any opening or discharge? A No.

30 Q Once the osteomyelitis has a covering on the surface and is cleared on the surface so that there is no bulging, or as you describe it, that osteomyelitis is cured—is not that so? A That is incomplete as to what I said.

Q Is that so? A That is not complete. I am referring back to my earlier answer. That is incomplete.

(Objected to that there is no evidence of an osteomyelitis being healed on the surface.)

40

Anna Pabst, direct.

Q Is that so? A There can be no osteomyelitis without the opening there.

Q Not without a sore? A There can be no osteomyelitis without the opening there.

Re-direct by Mr. Simpson.

Q You were asked about Dr. Bogardus, and you said he was what you call a good man; and you were asked about his treatment in cases of osteomyelitis. I ask you if this girl was under his treatment and the wound had healed so that she was able to walk well, would that indicate she was cured then? A It would indicate that the wound was healed. 10

ANNA PABST, heretofore called and sworn and partially examined and withdrawn, is recalled by the plaintiff. 20

Direct examination by Mr. Simpson.

Q You are a sister of Frances Pabst? A Yes.

Q The girl that was hurt? A Yes, sir.

Q On the third day of May last year, did you start with her for the Manhattan & Hudson Tube at Exchange Place in Jersey City? A Yes. 30

Q And there were two more girls in the party? A Yes.

Q Where did you start from? A From corner of Greene street and York street.

Q Did she arrive with you at the Exchange Place station of the Tube? A Yes, sir.

Q How did you go to the Hudson and Manhattan Tube on that occasion? A Walked over 40

Anna Pabst, direct.

Greene to Montgomery and then to the Tube. I was working and she came to meet me at the place where I worked at ten minutes after—I was working at the time at Colgates.

Q Did she come alone? A No. With Charlotte, her friend.

10 Q She met you at Greene street? A Yes.

Q And she walked along Greene to Montgomery? A Yes, sir.

Q And down Montgomery? A Yes, sir.

Q On which side? A We walked over from Greene street on the left side.

Q Inside of the station you went down the elevator to the steps? A Yes, sir, over to the change booth.

Q Who got the change? A I did.

20 Q What happened? A When I turned around from the change booth I saw the other girl was half way down and my sister was down already, and then I went to find her and I saw her as she was falling from the steps.

Q Do you know whether she had hold of the rail? A I did not see.

Q How was she lying when they picked her up? A On her face.

30 Q Did she fall with force? A She must have.

Q You saw her fall? A Yes, sir. I saw her as she was falling from the steps.

Q Did she fall with force? A Yes, pretty heavy force.

Q You saw the position she was in when she fell? A Yes.

Q Did you go back to look at that step? A Yes.

40 Q What did you see? A She said her foot caught on something, and when I went back there

Anna Pabst, direct.

was that broken piece of metal on the front of the step.

[Q Worn or how? A It was worn; and torn and broken.

Q What position was it in? A Sticking up.

Q Did it appear old or new? A Old, and shining. 10

Q How much was it up from the edge of the step? A About that much.

Q How much is that? A About an inch.

Q Did you take the ticket chopper over to see it? A Yes.

Q Did you show him the condition? A Yes, sir.

Q After doing that did you take your sister away?]

(MEM: All the foregoing testimony on this page [in brackets] was read aloud by the stenographer at the request of the Court.) 20

Q You took your sister on the train then? A Yes, sir.

Q Did she walk alone? A No, sir. I was on one side and my girl friend on the other side because she was rather shakey.

Q Did the ticket chopper do anything? A Only took her name and address, and my name, and the names of the two Charlottes. 30

Q There were four in the party? A Yes.

Q And all their names were taken? A Yes.

Q When you got over to New York what did you do? A Rode to Fourteenth street.

Q Then what? A We went to the anteroom in Hearn's and we sat there a while.

Q Did you go to Gimbel's? A No. Not at all. 40

Anna Pabst, cross.

Q What store did you go to? A To Hearn's on Fourteenth street.

Q What was her condition? A She said her leg hurt her very much.

Q Anything done about that? A We went and sat on a bench and she showed where the discharge was coming through her stocking.

10 Q And then what did you do? A Took her home.

Q There did you put her to bed? A Yes, sir.

Q Did she walk alone? A Yes, sir.

Q She walked down the elevator? A Yes, sir.

Q And right down the steps? A Yes, sir.

Q How did she walk from Colgate's to the station? A Very well—all right.

20

Cross examination by Mr. Markley.

Q Did you stop to get change at the change booth? A Yes, sir.

Q Any of the other girls with you? A No; I went there alone.

Q Was there anybody else there getting change at the same time you were there? A

30 There was a man ahead of me getting change.

Q Anybody ahead of him? A Not that I noticed.

Q You don't know? A No.

Q While you were getting change the other girls started downstairs? A Yes.

Q While you were at the change booth your back was toward them? A That booth is cat-cornered, and I was standing sideways to them at the booth and looking after them at the same

40

Anna Pabst, re-direct.

Q But your back was to the stairway? A No. Not completely. Sideways, I could see in that direction.

Q When you looked at the cashier you couldn't see her falling at the foot of the stairs? A I had taken my change with one hand and looked around half way, and I saw her fall. 10

Q When you were getting change your back was to the stairs? A Sideways.

Q Looking at the cashier? A I was not looking at the cashier all the time. I took my change in my hand with one hand.

Q Did you look at the stairs while getting change? A No. Looking at my change and standing sideways to the stairs.

Q Then you were not watching your sister? A I was turning from the cashier's box when she fell, and I saw her falling. 20

Q You did not see her going down the first flight? A No, sir.

Q Did you see her reach the second flight? A I saw her when she was walking down below on the second flight of stairs and fell.

Q You did not see her going down the first flight of the stairs? A No, sir.

Q Did you see her at the top of the second flight of the stairs? A I just saw her as she fell down—near the bottom. 30

Re-direct examination by Mr. Simpson.

Q Did you see her have hold of the centre rail? A Yes, sir.

Q With the left hand? A Yes, sir.

Q Did you see her walking slowly? A Yes.

Q Taking one step at a time? A Yes.

Q Anybody helping her? A Nobody. 40

Anna Pabst, re-cross.

Q Anybody back of her? A Charlotte was at the top of the first landing, or about the middle—she was way behind, I know.

Q Helping your sister? A When my sister was on the second landing Charlotte was behind her and she helped her.

10 Q Do you mean to say that your Charlotte was with her? A No, sir. My friend was on top of the stairs near the cashier's booth.

Q And your sister and the other Charlotte were on top of the landing and second flight? A Yes, sir.

Q So there was no one with her at all? A No, sir. And she was not hopping or jumping either as the gentlemen said to the jury.

Q She had hold of the railing? A Yes, sir.

20

Re-cross examination by Mr. Markley.

Q Did you look at her shoes after the accident? A No.

Q Did you see her heel catch? A Yes, sir.

Q Did you see that? A Yes, sir.

Q With your own eyes? A Yes, sir.

Q You saw no projection from her heel? A No, sir.

30 Q There was a projection over the step you say of half an inch that you say you saw? A About an inch.

Q And that caught her heel? A Yes—the piece of metal.

Q And you saw that with your own eyes? A Yes.

Q And you were at the cashier's booth when you saw that? A Yes.

40 Q You saw that metal stick up? A Yes, sir; it was sticking up.

Anna Pabst, re-direct.

Q And it was about an inch high? A Yes.

Q Projecting over the metal edge? A Yes, sir; it stood up. That metal strip was sticking up.

Q You mean that part of the metal nosing on the step projected like this? A Yes.

Q And you saw that catch on the heel of your sister's shoe? A Yes. 10

Q Which shoe? A The right shoe.

Q And she fell? A Yes.

Q The shoe on her foot? A Yes.

Q The heel on her shoe? A Yes, sir.

Q She used that shoe walking to New York? A Yes; sir.

Q You couldn't see that from the booth, could you? A Why not? It was only a few steps from there. 20

Q How many steps are on the first flight? A I don't know.

Q Can't you tell? A May be six or seven, as she says, but I never counted them.

Q And there was an immediate landing below that? A Yes.

Q And then there is another step? A Yes.

Q And when she fell she was at the third step from the bottom? A Yes, sir. 30

Q And you had no difficulty seeing that step? A No, sir.

Q There was plenty of light? A There was enough light to see her foot catching there.

Re-direct examination by Mr. Simpson.

Q You took the ticket taker and showed the step to him? A Yes. 40

Charlotte Ehrenbach, direct.

Q You said it was worn. Do you mean that it was worn so thin that it was broken and projected up?

(Objected to. Objection sustained.)

10 Q What did you mean when you said it was worn? A It was so worn that it made it thinner and broken from the other piece, and that made it stick up above the step an inch.

CHARLOTTE EHRENBACH, called by the plaintiff and sworn, testified as follows:

Direct examination by Mr. Simpson.

20 Q Where do you live? A Bayonne, New Jersey.

Q Do you know Frances Pabst? A Yes.

Q Were you with her on the 23rd of May, 1924? A Yes—third of May.

Q Where did you meet her that day? A In front of Colgate's on Greene and York street.

Q I am talking about the little girl who fell? A Yes, sir.

30 Q Where did you meet her? A The same place. I worked with her sister there.

Q Where did you meet her? A Greene and York.

Q Whom did she come there with? A A girl friend.

Q What was her name? A Charlotte Large.

Q Frances came with this girl Charlotte Large? A Yes.

40 Q Was Frances walking alone when she met you? A Yes.

Charlotte Ehrenbach, direct.

Q Where did you go when you met her? A Over to the Hudson Tube.

Q What route did you go? A Walked down Greene street and crossed over to Montgomery, and then to the Pennsylvania depot.

Q And then crossed to the left-hand and took the elevator and went down? A Yes. 10

Q One of the party got change there? A Yes, at the booth.

Q Who stopped for change at the booth? A Anna.

Q Who went down the stairs first? A Frances. I was standing at the top of the steps.

Q Was there anybody else of your party going down at the same time? A No; not of our party. 20

Q What happened when she got to the third step from the bottom? A When I looked down she had already tripped. 20

Q You don't know where she had fallen from? A No, sir.

Q When you looked she was lying on the ground? A Oh, no. She was in the act of falling.

Q Where was she then? A It was near the bottom of the steps—second or third step. 30

Q What did you do? A I went down when she fell and picked her up and held on to her and Anna came down right after and helped me.

Q Did you take her from where she had fallen? A Yes, sir. Anna helped me.

Q Where did you take her? A To a bench after the ticket chopper took our names.

Q Did Anna go back with the ticket chopper to the step? A Yes, sir. 40

Charlotte Ehrenbach, cross.

Q You did not go there with them? A No, sir.

Q Did you see what steps she went to with the ticket chopper? A The lower flight.

Q What particular step in it? A Third step from the bottom of the flight.

10 Q Could you see whether she was talking to him and he to her? A I was not watching.

Q But you know she did go back with him to the steps? A Yes.

Q And when she came back from him you all got on a train? A We sat down about ten minutes first.

Q And then what? A We got on an uptown train.

20 Q Did Frances complain of her leg? A Not until we got on the train, and then she complained about her leg hurting.

Q Did you see this condition of discharging? A No. I did not look at that.

Q But you heard her complain it was discharging? A Yes.

Q And you brought her home? A Yes—we brought her home.

30 *Cross examination by Mr. Markley.*

Q Where was this other Charlotte? A About three steps behind Frances.

Q Were you at the top of the stairs? A Yes, sir.

Q On Frances' side? A Yes, sir, the same side of the railing that she was.

Q Looking down? A Yes, sir.

Q Standing there? A Yes, sir.

40 Q Waiting for Anna? A Yes, sir.

Mrs. Adele Pabst, direct.

Q Anna was getting change then? A Yes, sir.

Q And you waited for her? A Yes, sir.

(MRS.) ADELE PABST, recalled by the plaintiff's counsel. 10

Direct examination by Mr. Simpson.

Q You are the mother of Frances? A Yes, sir.

Q How old is she? A Fifteen years.

Q Do you remember her coming out of the Jersey City Hospital in April before she was hurt? A Yes.

Q And when she went in the hospital what was her condition? A She was complaining that her leg hurt her and so she went there. 20

Q Then she went there for treatment? A Yes, because of the leg.

Q Before she went in there was she able to walk? A She complained about her leg.

Q Did you notice anything strange in her walk before she went to the hospital before she fell down these steps? (Not answered.) 30

Q Before she went to the hospital for treatment was her walking bad? (Not answered.)

Q Her walking was not good? A No, sir.

Q When she came out of the hospital was her walking changed? A Yes, sir.

Q In what way was it changed? A It was pretty good then.

Q How was the sore? A Healed.

Q Do you remember her starting out of the house on this third day of May? A Yes. 40

Mrs. Adele Pabst, cross.

Q Then as far as you could see was her walking all right? A Yes, sir.

Q When she came back what was her condition? A I was not home. I was out to work.

Q Is her father alive? A No, sir.

Q Did she live with you then? A Yes, sir.

10 Q After you came home did you look at her?

A Yes.

Q Was the sore open then? A Yes, sir.

Q You did not have a doctor? A No, sir.

Q How long before you got a doctor? A Three weeks.

Q You had no money for a doctor? A No, sir.

Q Something has been said about Dr. Wright treating her. He treated her in the hospital? A Yes, sir.

20 Q Since she came home after the accident has the sore continued to remain open? A Yes.

Q And discharging? A Yes.

Q And do you have to wash it out? A The nurse at the hospital attends to that.

Q That is not done at her home? A No. She goes to the hospital and comes back.

30 Q How does she come home? A The bus of the Cripple School brings her home.

Q She goes for medical attention to the Cripple School? A Yes.

Q She gets all her treatment there, and lives with you? A Yes, sir.

Q And you have no money to pay a doctor to treat her at home? A No, sir.

Cross examination by Mr. Markley.

40 Q The bus is provided by the city? A Yes, sir.

Mrs. Adele Pabst, re-direct.

Q How long has she been lame? A Seven or eight years.

Q Has the wound been draining all the time during those years? A It would dry and then open up again.

Q That was so for six or seven years? A Yes, sir. 10

Q Ever since she had the accident seven years ago? A Yes, sir.

Q And that is the reason she went back to the hospital so often? A Yes.

Q To have the wound drained out? A To have it attended to, yes.

Q And then after it drained up she would have pain? A Not so bad.

Q What did she go to the hospital in New York City for? A I took her out of the hospital at that time on account of the food at that time, and then they took her to the Hahnemann Hospital so that they could take the bone out or scrape it or something. 20

Q The wound would heal up? A Yes.

Q And then open again? A Yes.

Q How often? A Every couple of weeks.

Q Was that so for five or six years? A Yes. 30

Re-direct examination by Mr. Simpson.

Q At this time was it healed up ever since Dr. Bogardus treated her? A Yes.

Q After she came out of the hospital after Dr. Bogardus treated her the wound stayed healed? A Yes.

Q She was treated by Dr. Wright? A Yes, sir.

Q Who was Dr. Wright? A She was so bad we called him up. 40

Mrs. Adele Pabst, re-direct.

Q What do you mean by was so bad? A She was in such pain, and we couldn't lift her from the bed after she came from the fall—her leg was so bad.

Q You had Dr. Wright before she fell in the Tube? A Yes, sir.

10 Q You did not have a doctor after she fell? A No, sir.

Q Did Dr. Wright come to the house? A Yes, sir.

Q Dr. Wright only gave her medicine internally? A Yes, sir, that's all.

Q He did not do anything for her leg? A He would not touch it.

Q He told her to go to the hospital? A Yes, sir.

20 Q And she did go to the hospital? A Yes, sir.

PLAINTIFF RESTS.

Defendant's counsel reads in evidence:

Deposition of Dr. Lorne M. Ryan, produced as a witness on behalf of the defendants, who being first duly sworn on his oath according to law, testified by deposition by agreement of the parties,

30 The deposition being taken before Edwin J. O'Brien, Supreme Court Examiner, at the office of Collins & Corbin, Exchange Place, May 12, 1925.

No rulings were made on the trial now on, upon any objection in the deposition.

Counsel: Attach copy of deposition to this transcript.

RECESS.

Deposition of Dr. Lorne M. Ryan, direct.

HUDSON COUNTY COURT OF COMMON
PLEAS.

ADELE PABST, individually, and
as next friend of FRANCES
PABST, an infant,

Plaintiff,

vs.

HUDSON & MANHATTAN R. R. Co.,
and PENNSYLVANIA R. R. Co.,
Defendants.

Depositions 10
De Bene
Esse, Taken
by Consent.

Transcript of stenographer's notes of depositions *de bene esse*, taken by consent, before Edwin J. O'Brien, Esq., a Supreme Court Examiner of New Jersey, at the office of Collins & Corbin, Esqs., Suite 418, 1 Exchange Place, Jersey City, New Jersey, on the twelfth day of May, A. D., 1925, at five o'clock P. M.

20

Appearances:

Archie Elkins, Esq., (Alexander Simpson, Esq.) for the plaintiff.

David Newton, Esq. (Collins & Corbin, Esqs.) for the defendants.

30

It is stipulated and agreed by and between the attorneys for the respective parties that the deposition be taken stenographically by the examiner and afterwards reduced to typewriting, the signature of the witness to the said deposition being waived.

EDWIN J. O'BRIEN,
Supreme Court Examiner.

40

Deposition of Dr. Lorne M. Ryan, direct.

DR. LORNE M. RYAN, produced as a witness on behalf of the defendants, having been first duly sworn, upon his oath, according to law, by the examiner, testified as follows:

Direct examination by Mr. Newton.

10 Q Where do you live, doctor? A 38 Livingston, Brooklyn.

Q And you are a physician and surgeon? A Yes.

Q By the way, do you plan leaving the United States in the near future? A Yes.

Q When? A Twenty-first of May.

Q And how long do you expect to be gone? A Three months.

20 Q And you are a physician and surgeon? A Yes.

Q And licensed to practice where? A In New York and New Jersey.

30 Q And will you state your education? A My preliminary education was at the University of Toronto, where I received the degree of A. B. My professional education was received at the University of McGill, where I received the degree of M. D. C. M. I was, after that, house surgeon in the Meseri Cordia Hospital in New York.

Q When was that? A After I graduated, 1905-1906. Since then I have been connected with the Long Island College Hospital in Brooklyn, and I am now associate surgeon of St. Peter's Hospital in Brooklyn. I am a fellow of the American College of Surgeons.

Q Are you connected with any other institutions? A I am associate surgeon of the Polyclinic Hospital in New York.

40 Q And how long have you been practicing? A It will be twenty years in June.

Deposition of Dr. Lorne M. Ryan, direct.

Q Now, on June 9th, did you examine a girl, Frances Pabst? A Yes.

Q And will you state where you examined her? A In my office in the Hudson Terminal Building, 30 Church street, New York.

Q And will you state the examination you made at that time? A I asked her, in a general way, how the accident happened, and also the history of her past illnesses, and then asked her with special reference to her injury, and examined the part where she complained that her injury took place. 10

Q What history did she give you of the history that she complained of? A She said that she injured the left leg at the seat of the previous operation and illness.

Q Did she say when she had sustained this injury? A Yes; she said on May 3, 1924. 20

Q And did she say where she had sustained it? A She said that she fell on the stairs, Exchange Place Station, injuring her left leg.

Q And what history did she give you of previous trouble, of illnesses? A She said that she had suffered from osteomyelitis of this leg when she was seven years old, and that she was three years under treatment before it healed up. She was treated in the Hahnemann Hospital. 30

Q Where? A In New York. And the City Hospital, and the Christ Hospital, Jersey City.

Q Did she say she had been treated by any doctors for that osteomyelitis? A No; she didn't say, except the hospitals.

Q Now, will you tell us what your examination disclosed? A That there was a slight ulceration at the upper angle of the operation wound which was clean, and apparently of a superficial nature and was now healing up. 40

Deposition of Dr. Lorne M. Ryan, direct.

Q Did you notice anything the matter with either ankle? A No.

Q Was there any indication at that time of any nervous shock? A No.

Q This slight ulceration that she spoke of, did she say what that resulted from? A She
10 said that was due to her injury.

Q And that was healing up at the time you saw it? A Yes.

Q And you have stated, before, that the injury appeared to you to be superficial? A Superficial.

Q What about the condition of osteomyelitis at that time? A That apparently was quiescent.

Q And will you state, in the language of the
20 layman, what you mean by osteomyelitis? A Decay of the bone, from inflammation.

Q From inflammation? A From inflammation.

Q Did she tell you how she had contracted osteomyelitis? A Nothing except that she had had an injury to the leg when she was seven years old. She told me, also, that the leg had not been healed up—no, I won't say that, either.
30 She said it had been healed up since 1921. So, apparently, she had treatment up until three years before the time of the injury, for this leg.

Q Did she make any complaint about the osteomyelitis at the time you examined her? A No.

Q Did your examination disclose any injury to the body other than what you have testified to? A No.

Q In your opinion was this slight ulceration
40 that you saw of a temporary or a permanent

Deposition of Dr. Lorne M. Ryan, cross.

character at the time you made the examination?

A Of a temporary character.

Mr. Newton: Cross examine.

Cross examination by Mr. Elkins.

Q When did you examine her, doctor? A 10
June 9th, which was about one month and six
days after her injury.

Q And that was at your office? A Yes.

Q Who brought her there? A Why, I don't
remember. I think it was some lady with her.
I don't remember who it was.

Q Do you know how she came; how it was
she came to your office? (Question repeated by
the stenographer.) A Well, I don't know, ex- 20
cept, I presume, she came to the claim depart-
ment at their request, and they asked me to see
her.

Q And you are a physician for the railroad
company? A Yes.

Q What railroad company? A Hudson and
Manhattan.

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

Q Twenty years? A Twenty years first of 30
January; 1906.

Q And you often testify for them? A No;
not often. We don't have many cases in court.

Q Have you ever testified for them in New
York? A Oh, yes; I have testified for them,
but not often.

Q There have been many times in the twenty
years you have testified for them? A I sup-
pose possibly twenty times.

Q Have you ever testified for them in New
Jersey? A Yes, I have. 40

Deposition of Dr. Lorne M. Ryan, cross.

Q How many in New Jersey? A Beg pardon?

Q How many years have you been testifying for them in New Jersey? A Well, I should say probably about fifteen years.

10 Q Fifteen years. And you presume she came by reason of instructions from the claim department? A Yes.

Q And you say the examination was made on June 9th? A Yes; that was the date.

Q What kind of an examination did you make? A superficial examination? A Yes.

Q And you took no X-rays at all? A No X-rays; no.

Q And you say you find a condition of osteomyelitis? A She had had an osteomyelitis for
20 which she had been operated on several times.

Q That is what she told you? A No; you can see the scars of an operation.

Q Did she use that medical term? A Yes.

Q She did? A Yes; she had it so long "osteomyelitis" was the same, as to you saying "pie." She knew enough for that.

Q You say she had been cured since 1923? A No.

Q 1921? A No; she did not.

30 Q How long? A She said her leg was healed up. She didn't say it was cured. Because I don't believe those patients in a great many cases are ever cured.

Q She said the leg had been cured up? A She said the leg had been healed.

Q She said the leg had been healed? A Since 1921. That's what she told me.

40 Q And she hadn't been getting any treatment since that time? A That's what she told me, yes.

Deposition of Dr. Lorne M. Ryan, cross.

Q And at that time was she able to walk, when you examined her? A Oh, yes.

Q She could walk? A Yes.

Q Did she limp any? A Well, I don't remember that. I think she did, but I don't remember.

Q You do not remember? A No.

Q You say there was a bruise, did you say?
A An ulceration. 10

Q An ulceration. And you say that was caused by the accident? A No; I didn't. She said it was.

Q What was that caused by? A She said it was caused by it.

Q What in your opinion was it caused by?
A It might have been caused by an accident, or it might have come without an accident, because the skin over an operative wound like that is very tender and very sensitive, and a very slight irritation is apt to occur at any time, even without an injury. 20

Q And would trauma bring about the condition which you saw? A Yes, it would.

Q She told you she had an accident? A Yes.

Q And that abrasion was caused by the accident; is it probable that that was so? A Yes. 30

Q Now, you say you found nothing wrong with the ankle? A No; nothing complained of.

Q Did you look to find out? A I don't remember that I did. I asked her to show me what part was injured, and I examined that part. The rest of her body I didn't examine, naturally, any more than I would examine her eye or ear if she did not have any complaint of it.

Q And it was because she did not make any complaint, that was the only reason you did not 40

Deposition of Dr. Lorne M. Ryan, cross.

examine her? A Because she said that was the only part of her body that was injured.

Q You have not seen her since, have you? A No.

Q And how long did that examination take place, how long a time? A Oh, I suppose, possibly from five to ten minutes.

Q Five to ten minutes. Now, what would you say as to her present condition, as to whether she has any permanent injury or not? A Not from her accident, I wouldn't say it was permanent.

Q You do not know anything about her physical condition except what she told you? A That's all, and except what I saw.

Q Is there any condition she was suffering at the time of examination which was permanent, which is of a permanent nature? A Yes; not from the injury, but there was a condition which was permanent.

Mr. Elkins: I ask that be stricken out as not responsive.

Mr. Newton: Just repeat the question again.

(Question repeated by the examiner.)

30 A Yes.

Q You did not treat her at all? A No.

Q Or give her any treatment? A No.

Q What was the purpose of your examination, doctor? A Well, I can hardly tell that. I examined her at the request of the claim department. That is all.

Q And was it not also for the purpose of testifying in court? A If necessary, yes.

Q And they pay you for doing that work?

40 A Yes; always have.

Deposition of Dr. L. M. Ryan, re-direct—re-cross.

Mr. Elkins: I think that is all.

A None of us want to work for nothing; even the lawyers.

Re-direct examination by Mr. Newton.

Q When you stated "yes" in answer to counsel's question as to whether or not you found anything of a permanent nature, to just what did you refer? A Her old osteomyelitis. 10

Q And you stated that this slight ulceration was nicely healed up— A No; healing.

Q Was healing. In your opinion, based on your experience, how long would it take it to completely heal? A Oh, I should say possibly two or three weeks.

Q And would this slight ulceration cause her to limp? A It might. 20

Q If it had completely healed up—if it were completely healed up, apart from the osteomyelitis? A No, I don't think it would. The wound would not.

Mr. Newton: I guess that is all.

Re-cross examination by Mr. Elkins. 30

Q Assuming she had osteomyelitis, is that the correct pronunciation? A That's right; osteomyelitis.

Q Assuming she was suffering from that condition, and she said that the leg had healed up in 1921, is it probable that trauma would aggravate the condition, the trauma received subsequent to 1921 would aggravate her condition? A It might. 40

Deposition of Dr. L. M. Ryan, re-cross—re-direct.

Q And assuming that she fell down a flight of steps and landed on a concrete platform, would that aggravate her condition? A It might. I can't say it would. It might. Anything could cause anything.

10 Q Is it possible one having suffered from osteomyelitis and her leg having cured up in 1921, and that person had a fall in 1924, is it probable that the fall would aggravate the condition? A Not necessarily so.

Q Well, would it? A Nobody could tell.

Q Probably? A Nobody could tell.

Q Is it probable from your experience as a physician? A I wouldn't say so.

20 Q What effect has trauma upon the person who has been suffering with osteomyelitis, and the leg having cured up in 1921? A Well, there you have the effect here, we have what happened here.

Q And her condition you say is of a permanent nature? A Her osteomyelitis.

Q Would you say that the osteomyelitis was aggravated by the fall? A It wasn't apparently, in this case.

30 Q Why wasn't it in this case? A That is a pretty hard question to answer.

Q You cannot answer that? A No. How could I answer "Why wasn't it?" Osteomyelitis is an infection. An injury alone could not cause an infection unless there was purulence there.

Re-direct examination by Mr. Newton.

40 Q Did she make any complaint to you at the time of your examination that the osteomyelitis had been aggravated by the accident? A No.

Deposition of Dr. L. M. Ryan, re-cross—re-direct.

Q And did your examination indicate in any way that the osteomyelitis had been aggravated by the injury? A No; she told me she had only seen the doctor once since the injury, during the month previous to my examination.

Re-cross examination by Mr. Elkins.

10

Q Would a superficial examination disclose any aggravation of her condition of osteomyelitis? A Yes.

Q It would? A Yes.

Q And it would not be necessary to take X-rays? A No. X-rays, as a matter of fact, are of very little value in osteomyelitis, because they frequently do not show the trouble. We depend upon the constitutional symptoms. Osteomyelitis is a very debilitating sickness, and patients are laid up with temperatures from a 103 to a 105. Not able to walk around with active osteomyelitis.

20

Q Did you take her temperature? A No; I didn't but I can tell—

Q At the time you examined her what was the condition of the osteomyelitis? A Apparently quiescent.

Q But you did find an ulceration? A Yes; ulceration.

30

Q And that was probably caused by the fall?

A I did not say that. I said it might be.

Q Is it probably caused by the fall? A I couldn't say that, either.

Mr. Elkins: That is all.

Re-direct examination by Mr. Newton.

Q Did you ask her what doctors had treated her for the injuries from the accident? A Yes.

40

Dr. Nicholas F. Feury, direct.

Q And what did she say? A She said that the school doctors seen her once.

Mr. Newton: All right. That's all.

10 Which was all of the testimony given by the above witness and taken by me stenographically at the time, place and date hereinbefore mentioned.

EDWIN J. O'BRIEN,
Supreme Court Examiner.

DR. NICHOLAS F. FEURY, called by the defendant and sworn, testified as follows:

Direct examination by Mr. Markley.

20

Q What is your profession? A Physician and surgeon.

Q How long have you been such? A Twenty-eight years.

Q Where do you practice? A In Jersey City.

Q How long? A Twenty-eight years.

Q Up until the present time? A Yes, sir.

30 Q Did you make an examination of Frances Pabst, the plaintiff in this case, on behalf of the defendants? A Yes.

Q When? A In November last year, 1924.

Q Where was it made? A At her home.

Q Who was present? A Her sister.

Q Anybody else? A Not that I recall.

Q What did you find from your examination?

A I ascertained her condition.

40 Q What examination did you make? A I examined her leg—it was her left leg—and after getting the history of the case from her and the

Dr. Nicholas F. Feury, direct.

evidence that was present at the time, it was my opinion that she was—

(Opinion based on history of the case is objected to, the witness being called as an expert.)

By the Court.

10

Q Is your opinion based on the history and the examination? A Yes, on the history and the examination.

Q Are all your opinions necessarily based on examination and history of the case? A Yes.

(Objection overruled. Exception.)

The Witness: I found from my examination and the history that she was suffering from osteomyelitis. That is a condition in which the bone is attacked by some germ from without, causing disintegration of the bone, and the bone after a while becomes soft like. This is evidenced in her left leg. She has a number of scars on there. At the time of my examination in November she had one open discharging wound there.

20

30

Q Could you tell from observation by looking at it whether it was a recent or old opening?

A It was a recent opening.

Q That was in November, 1924? A Yes, sir.

Q This osteomyelitis, or rotting of the bone, is that a disease well known to the medical profession? A It is.

Q Can you tell me probably when the wound heals up as to when it will open again? A It 40

Mike Mounskey, direct.

may open at any time. Osteomyelitis is like a smoldering fire, and may break out again and again.

Q Would that be so without any accident?

A Yes. They slow down and break out again without any apparent cause.

10 Q Assuming that the skin heals over the wound, would there still be an osteomyelitis?

A Yes, probably. It is like a smoldering fire, dying down and then breaking out again with force.

Q Is the fact that the surface heals over any evidence of a complete cure? A It is not.

Cross examination by Mr. Simpson.

20 Q When a cure is made there is no further discharge of pus? A I have never known a case of real tubercular osteomyelitis in my life to be cured.

Q It is an incurable disease? A Yes, in this case.

Q But you say it dies down and comes up without any apparent cause? A Yes, sir.

Q Would a blow cause it to come up again after it had died down? A It would.

30

MIKE MOUNSKY, called by the defendant and sworn, testified as follows:

Direct examination by Mr. Markley.

Q Where do you live? A 75½ East Park street, Newark.

40 Q How old are you? A Twenty-four.

Mike Mounskey, direct.

Q For whom do you work? A Hudson and Manhattan Railway Company.

Q How long do you work for them? A Twenty-three months.

Q Were you working for the Hudson and Manhattan Railway Company May 3, 1924? A Yes.

10

Q Were you at work on that day? A Yes, sir.

Q Where? A Exchange Place, Jersey City, Pennsylvania Station.

Q At what kind of work? A Tickets, taking tickets. Ticket taker.

Q Were you at the box where they put the coins in? A Yes.

Q Where is that located? A Three or four feet from the stairs.

20

Q How many flights of stairs are there? A Two.

Q Is there a landing between the first and the second flight? A A little landing.

Q How large is it? A About four feet wide, I guess.

Q Do you know the height of each flight of stairs? A No, sir.

Q Are they about the same depth? A Yes, sir.

30

Q You have seen them very often? A Yes, sir.

Q About how many steps are there to each of those flights of stairs? A Eight steps for each one.

Q Where is the cashier's booth? A In the corner opposite the elevator.

Q About how far away from the top of the stairs is the cashier's booth? A About three feet, I guess.

40

Mike Mounskey, direct.

Q Is it in a corner? A Yes, sir.

Q Do you remember the occasion when this girl, Frances Pabst, fell down from that stairs?

A Yes.

Q Did you see her coming down the stairs?

A Yes, before she fell.

10 Q Were you seated or standing up at the coin box? A Standing up.

Q Which way were you facing? A Up towards the stairs.

Q Was there a hand railing in the middle dividing the stairs right and left? A Yes.

Q What kind of railing? A Three by five railing.

Q As she came down the stairs which side did she come down? A The right.

20 Q How do you mean? A The right-hand side going down the stairs.

Q Was there anybody else with her as she came down the stairs when you saw her? A There was another girl alongside of her as she came down.

Q Was there anybody else coming down the stairs at the same time? A No, sir.

30 Q What made you watch them? A They were fooling.

Q What did you observe as they were coming down the stairs? A The two girls were top of the stairs when I saw them first, and I noticed another girl getting change at the same time, and I heard the two girls laughing until when they came down the stairs and hit the second flight; and when they came to the second flight they were fooling, and she came down, skipped, and then she threw her other foot on the other stairs on the other side of the railing, and—

40

Mike Mounskey, direct.

Q Wait. What is that answer? You saw her come down the first flight? A Yes, sir, with the other girl.

Q And then you saw her coming down the second flight? A Yes.

Q Was there anybody with her coming down the second flight? A Yes. There was another girl. 10

Q Tell what you saw coming down that stairs—what they were doing? A The two girls came down the stairs and they hit the first flight and then hit the second flight, and I saw they were fooling, and when she hit the second stairs of the second flight she was fooling, and she fell and hit the floor on her face.

Q How was she fooling? A She was throwing her feet, one foot after the other, with a skip and skip and then she hit the bottom stairs on her knee, and then she fell down; and I went over and asked if she was hurt, and she said no, and then the porter went over there to see the stairs was in perfect condition, and then after I got the addresses I went and made out my statement. 20

Q You say she fell on her knee first? A Yes.

Q Was her heel caught at any step? A No, sir. 30

Q On which of the steps was she from the bottom when she fell? A The second.

Q It was not the third step? A The second.

Q Was the heel of her shoe off? A No, sir.

Q Or the shoe damaged? A No, sir.

Q Was there any part of the metal nosing on the steps sticking up? A No.

Q Neither the edge of the metal was shining, loose, or sticking up? A No, sir. 40

Mike Mounskey, cross.

Q Nor broken? A No, sir.

Q You saw nothing at all wrong with it?

A No, sir.

Q And you looked at it immediately? A Yes, sir.

Q And you made a report? A Yes.

10 Q It has been testified here that you went over and pulled a part of the metal nosing off the step after the accident. Is that so? A No, sir.

Q Were you shown anything like that? A No, sir, and I didn't see anything of the kind.

Q Did the girls stop there any time after the girl was picked up? A Just as I took the names and addresses and then they walked away over towards the train platform.

Q Did she say to you that her foot caught?

20 A No; she did not.

Q What did she say? A She did not say anything—didn't say anything to me.

Q Was the stairs crowded at that time? A No, sir.

Q Was this other girl alongside of her on the same side of the separating railing while they were going down the stairs? A The same side. They were going down the stairs together.

30 Q Is that other girl in court here today? A I didn't see her this morning.

Q Is that all you know about it? A That's all.

Q You did not go to the platform where she got the train? A No, sir.

Cross examination by Mr. Simpson.

Q How long had you been working there the day of the accident? A Since eight o'clock in
40 the morning.

Mike Mounskey, cross.

Q How many months or days? A Seven days.

Q Was there a porter there on duty the same time you were there? A Yes.

Q What is his name? A He is a colored man.

Q What is his name? A I don't know. 10

Q Is he here? A No, sir.

Q He swept the platform and stairs? A Yes, sir.

Q You say these girls were fooling on the stairs? A Yes, sir.

Q Pushing each other around? A No, sir. Not quite.

Q What does that mean? A They were skipping down the stairs and laughing.

Q And you say this girl walked away perfectly after the accident? A Yes, sir. 20

Q Perfectly natural walk? A Yes, sir; the same as anybody would.

Q No trouble about it? A No, sir. I didn't see any trouble with her walk.

Q Don't you know she was a cripple and had been lame for five years before that accident? (Not answered.)

Q You say she walked away perfectly after the fall? A Yes, sir. 30

Q No limp or anything that was wrong in her walk while you saw her walking? A I really did not notice.

Q But you said to Mr. Markley that she walked away perfectly, and there was nothing the matter with her walk, and now you say you really didn't notice? A I saw she walked and went about twenty feet, that's all I know.

Q Did she run the twenty feet? A No, sir. Walked. 40

Mike Mounskey, cross.

Q After you saw her going twenty feet there was nothing the matter with her walk, is that so? (Not answered.)

Q Why do you hesitate— You swore very glibly that she walked perfectly when Mr. Markley examined you? (Not answered.)

10 Q Why don't you answer? (Not answered.)

Q What did you mean by that? (Not answered.)

Q Don't you know that she has been a cripple five or six years and couldn't walk perfectly? A No, sir; I don't know that.

Q You say she walked perfectly that day? A Yes, sir.

Q And that you saw her skipping down the stairs? A Yes, sir.

20 Q Like a normal girl? A Yes, sir.

Q And she did not come down the stairs like a cripple? A No, sir.

Q She was skipping down the stairs? A Yes, sir.

Q You are sure she did that? A Yes, sir.

Q And when she came to the foot of the last stairs, she threw out her foot and fell? A No, sir; she went right down on her knee.

30 Q How did she come to do that? A By fooling and skipping down.

Q When you say fooling, do you mean skipping and laughing with the other girl? A Yes.

Q Don't you know you are under oath? A Yes, sir.

Q Don't you know she was a cripple and couldn't skip? A I don't know that.

Q Having seen her skip and fall, did you pick her up? A No, sir. The porter did.

40 Q Did you go and examine the step? A Yes.

Mrs. Nellie Vanhoff, direct.

Q Which step? A First, second and third.

Q Did this other girl show you where the step was broken? A No, sir; nobody spoke to me.

Q You did not see this woman with the white hat there? A No, sir.

Q You are still working for the Manhattan Company? A Yes. 10

Q You worked there only seven days before the accident? A Yes.

Q How many thousand people use those stairs every day, do you know? A On that day we had between ten and twelve thousand people.

Q These stairs had metal edging along the edge? A Yes.

Q You don't know how long that metal was there? A No, sir.

Q Don't know when they were repaired? A No, sir. 20

Q Or when they were inspected? A No, sir.

Q Who inspected it? A The porter is one.

Q Who else inspected it? A The inspector.

Q He walked up to it two or three times a day? A Yes.

Q And the porter is not here, is he? A No, sir.

30

MRS. NELLIE VANHOFF, called by the defendant and sworn, testified as follows:

Direct examination by Mr. Markley.

Q What is your name? A Mrs. Nellie Vanhoff.

Q Where do you live? A Harrington Park, New Jersey. 40

Mrs. Nellie Vanhoff, direct.

Q Have you worked for the Hudson and Manhattan Railroad? A Yes, sir.

Q How long? A Seven years.

Q Were you working for them on May 3, 1924? A Yes.

Q Where? A Exchange Place.

10 Q What position did you have there on that day? A Agent.

Q What did your duties consist of? A Looking around the station and seeing everything was all right.

Q Did you make change at the ticket booth? A Yes.

Q Where was that booth? A Near the top of the stairs.

20 Q On the left as you go down to the stairs? A Yes.

Q Were you on duty there on Saturday, May 3rd, a year ago? A Yes, sir.

Q About noon time? A Yes.

Q What time did you go to work that morning? A Seven.

Q When did you quit? A Three.

30 Q Do you remember the occasion when these girls went down the stairs? A I don't remember them.

Q Did you have your attention called to this accident? A Yes.

Q What did you do at the time your attention was called to it? (Objected to.)

Q Who called your attention to it? A The ticket chopper.

Q The man who just left the stand? A Yes.

Q When was that? A A little after one, I think.

40 Q On May third? A Yes.

Mrs. Nellie Vanhoff, direct.

Q What did you do? A I asked him if he examined the stairs— (Conversation objected to.)

Q What did you yourself do or say? A I did not say anything.

Q Did you go down the stairs? A No; not then. I was too busy. I went down about twenty after two. 10

Q Did you look at the stairs? A Yes. The stairs were in good condition then.

(Good condition stricken out. Exception by defendant's counsel.)

Q Did you look at the stairs? A Yes.

Q Which side of the stairs? A Both sides, up and down.

Q On both sides? A Yes. 20

Q Did you see any projection sticking up?

A No, sir.

Q See any metal worn or torn on the step?

A No.

Q But with particular reference to the right side going down and the third step from the bottom, could you see it was shining and worn? A No. I did not notice that.

Q The third step from the bottom, was it worn? A I did not see it. 30

Q Did you examine the metal nosing? A Yes.

Q Was it worn? A It did not seem to be worn.

Q Was the nosing sticking up? A No, sir.

Q Or broken? A No, sir.

Q Do you keep track of the number of persons that go through in the course of a day? A Yes, sir. 40

Mrs. Nellie Vanhoff, cross.

Q Have you got that record here? A I think so.

Q Tell us about how many people pass through there between twelve and one? A Between about seven and eight hundred the hour.

Q Do thousands of persons go through daily?
10 A Yes. Six or seven thousand from seven to seven.

Q When is the traffic heaviest? A On week days it is heaviest in the morning.

Q Take Saturday? A Then it is heaviest at noontime between twelve and two.

Q This chart made May 3, 1924, is that in your handwriting? A Yes, sir.

Q Does that show the number of passengers went through there? A Yes, sir.

20 Q Between nine and twelve? A 1,050.

Q And between one and two? A 1,204.

Q Is that the heaviest time? A Yes, sir.

Cross examination by Mr. Simpson.

Q You still work for the Hudson and Manhattan? A Yes, sir.

Q At the same station? A No, sir.

30 Q How long had you been at that station the day of the accident? A A year and a half.

Q You did not examine the stairs until the ticket chopper told you somebody had fallen down the stairs? A I examined them in the morning.

Q Was it your duty to examine the stairs?
A Yes, but in the rush hour I couldn't examine them, but I examined them twenty after two.

40 Q Did you inspect them twenty after two because the ticket chopper told you somebody had fallen there? A No, sir. I do it every day.

Mrs. Nellie Vanhoff, cross.

Q Then you did not do it because your attention was called to it? A I examined them that day and every day.

Q I ask you whether you examined the stairs at twenty minutes after two that day because there was an accident? A I examined it before my attention was called to it by the ticket taker. 10

Q What was said when he called your attention to it? A He said there was an accident.

Q Did he say anything else? A He said a little girl fell.

Q Did he tell you how she fell? A No, sir.

Q Did you examine the stairs then? A No, not then; but about twenty minutes after two I examined them.

Q After he told you that she fell, and without your knowing how she came to fall, you examined the stairs, then, after two o'clock? A Yes, sir. 20

Q Which side did you look at first? A I went down the stairs.

Q Merely went down? A I looked as I went down the stairs.

Q Which part of the stairs did you look at first? A I don't know.

Q Which part did you examine last? A I don't know. No part particularly. I just went down the stairs. I looked as I went down. 30

Q You simply walked down the stairs and looked down on them as you went down? A Yes.

Q You don't know how long that metal nosing had been on the step in question? A No, sir.

Minot McNeill, direct.

MINOT McNEILL, called by the defendant and sworn, testified as follows:

Direct examination by Mr. Markley.

10 Q Where do you live? A 263 West 133rd street, New York.

Q Employed by whom? A Hudson and Manhattan Railroad Co.

Q How long? A Three and a half years.

Q Were you in their employ May 3, 1924?
A Yes.

Q Were you working that day? A Yes.

Q What job? A Porter.

Q Where? A Exchange Place. Station.

20 Q What was your duty? A Keep the place clear.

Q How about the platform? A Platform, too.

Q How about the stairway? A Also.

Q Did you have charge of keeping the stairway clear that runs from the booth for change?
A Yes, sir.

Q Did you go over that stairway in your work? A Yes.

30 Q How often? A I cleaned it about three times a day.

Q I did not hear you? A I pass over the stairs about six times a day.

Q Is it your duty to clean it? A Yes. I clean it about three times each day.

Q On May 3rd what were your hours of employment in that station? A Seven to four.

Q Were you on duty there May 3, 1924, Saturday? A Yes.

40 Q What time do you go over the stairs first?
A Right after I get there.

Minot McNeill, direct.

Q What time do you begin? A About a quarter after seven generally.

Q Did you do that May 3rd? A Yes, sir.

Q Would you look over the stairs as you went over them? A Yes, sir.

Q What would you do then, sweep them? A Yes.

Q Both sides of the railing? A Yes, every step. 10

Q Anything else? A No, sir.

Q Did you see any part of the metal nosing sticking up on any step on that day? A No, sir.

Q Particularly with reference to the third step from the bottom of the second flight, was there any metal sticking up from that? A No, sir.

Q Was there any part of it loose? A No, sir. 20

Q If there was anything like that what would you do. A I would have it reported.

Q When do you go over the stairs the second time to clean? A At twelve o'clock.

Q Did you go over it that day at twelve o'clock? A Yes.

Q Did you then notice any part of the metal nosing on the third step from the bottom sticking up? A No. 30

Q Was there anything so sticking up? A No, sir.

Q If there was what would you do? A I would have it reported.

Q Was there any of that metal shining or sticking up? A No, sir.

Q Was any of it broken? A No, sir.

Q When did you go over it the second time? A After dinner. 40

Minot McNeill, cross.

Q Did anybody inform you there was an accident? A No, sir.

Q When did you clean it the third time? A About three o'clock.

Q Did you notice any metal torn or sticking up or shining or slippery? A No.

10 Q Anything out of order? A No.

Cross examination by Mr. Simpson.

Q Are you working for the Hudson and Manhattan now? A Yes.

Q How long have you been working for them now? A Three and a half years.

Q How long were you away from them? A No time.

20 Q You have worked since the third of May, 1924, you have not been away? A Only Sunday.

Q Have you been continuously employed by the company since May 3, 1924? A Yes, sir.

Q Always in the same work? A Yes, sir.

Q Your business was not to repair the stairs? A No, sir.

Q And your business was to clean? A Yes.

30 Q And you say no part of the metal was shining? A It was not shining.

Q Was there metal on the stairs? A Yes, sir.

Q Was it shining? A No.

Q Do you mean to say eight or ten thousand people went daily over on that metal without shining it? A Why, yes, there was some shiney on it.

40 Q Do you say now it was shining? (Not answered.)

Minot McNeill, cross.

Q What part was shiney? A The top, I guess.

Q Back, front, or side? A There was shiney parts all over.

Q Was there on top of the steps shining? A Yes, sir.

Q Did you look on that third step from the bottom on the third of May? A No. 10

Q You did not look at it as you swept it? A Yes, sir.

Q You say you worked for the Hudson & Manhattan ever since this accident? A Yes, sir.

Q Every day? A Not every day.

Q How many days did you lose? A Only about two.

Q Is it not a fact that they had to go and get you to bring you in court today? A No, sir. 20

Q Is it not a fact that they couldn't locate you the last time the case was on because you were not working for them? A No.

Q Were you working for them when the case was on a month ago? A Yes.

Q And they did not have to put the case off because you were out of their employ and they couldn't find you? A No. 30

Q You were not out of their employ then? A No.

Q You swear you were working for them right along? A Yes.

Q Where? A On the same station.

Q You have been in the same place and station ever since 1924, the third day of May, 1924? A Yes.

Q Who was your superior? A This lady, the cashier. 40

Charles K. Thom, direct.

Q Has she been there every day you were there? A No, not Sunday. She don't work on Sunday.

Q Was she every day while you were there? A She was in there until a few weeks ago when she was put on another station.

10 Q Was there any other operator there? A Yes, sir.

Q You say you would have reported it when you found metal sticking up? A Yes, sir.

Q Did you ever report metal sticking up? A Yes, sir.

Q On which stairway? A The long stairway coming in from the street. I reported it and it took about two hours for the men to fix it.

20 Q Do you know how long this metal had been on the stairs that leads from the coin box down to the train? A No, sir.

Q You did not specially inspect this step after one o'clock the third day of May? A No, sir.

Q Nobody called your attention to it? A No, sir.

Q You don't know how long that metal was there before the third day of May, 1924? A No, sir.

30

CHARLES K. THOM, called by the defendant and sworn, testified as follows:

Direct examination by Mr. Markley.

Q By whom are you employed? A Hudson and Manhattan Railroad Company.

40 Q How long have you been employed by them? A Eighteen months.

Charles K. Thom, direct.

Q Were you employed there on May 3, 1924?

A Yes.

Q Where? A At the Exchange Place Platform.

Q What were your hours of employment? A Seven A. M. to eleven A. M.

Q Did you have occasion in the course of your employment to use the stairs at Exchange Place from the coin box to the cashier's booth? A Yes. 10

Q How often did you use that? A I used it on that day from eleven to twelve.

Q Did you go upstairs at eleven o'clock that morning? A Yes, sir.

Q Did you notice any projection of any kind on any of the steps? A Not a thing.

Q If you had what would you do? A Immediately report it to my superior. 20

Q Which side of the stairs did you go down? A The left-hand going up.

Q As you went up you looked at each step on the side of the railing you were on? A Yes. I examined every step as part of my duty.

Q You looked at every step as you went up on it? A Yes.

Q And your look told you it was all right? A Yes. 30

Q Did you get on your knees to look? A No.

Q Did you stop at each step? A Yes; examined every step, and went right upstairs and had my dinner.

Q Why did you examine the one side only? A They are all one step with a railing between.

Q How long is the step? A Six feet wide altogether. 40

Charles K. Thom, direct.

Q Each side of the railing? A No. Three feet each side of the railing.

Q You made an examination of the left side going up? A Yes; and then the right side going down after I had my dinner.

10 Q You did not go down to make a special investigation of the condition of the stairs? A I don't know what you mean.

Q I mean by looking close at the step for the purpose of detecting imperfections? A No, sir.

Q Did you run your hand over the edges of the steps? A It was not necessary.

(Answer stricken out.)

20 Q Did you run your hand across any of the steps? A It was not necessary. (Answer stricken out.)

The Court: You can answer that question yes or no. Answer the question **without** volunteering information and without arguing.

The Witness: I will say no. I did not run my hand over the stairway.

30 Q Were these steps smooth and shiney? A No, sir.

Q Ten thousand people going over them every day for two or three weeks would not make them smooth and slippery either? A No, sir. It would not wear the tread down that far.

Q Do the treads ever get worn? A Yes.

Q And what happens then? A New ones are put in by men under Mr. Moran.

40 Q How long have you been working there? A Eighteen months.

William Fleming, direct.

Q What are your hours? A From seven to eleven every morning.

Q How long were you there on May 3, 1924?

A Seven to eleven A. M.

Q How many days before that? A Fourteen months.

Q Was there any change made in the metal of the steps while you were there those fourteen months? A Yes. 10

Q How long before this accident? A Three or four months before the accident some were put in.

Q How many? A I couldn't answer that.

Q On which steps? A I couldn't answer that.

Q You don't know which? A No.

Q And you don't know how many steps? A No. 20

WILLIAM FLEMING, called by the defendant and sworn, testified as follows:

Direct examination by Mr. Markley.

Q Where do you live? A 474 Gregory avenue, Weehawken. 30

Q Where are you employed? A Manhattan Railroad, at Exchange Place.

Q How long employed by that company? A About three years.

Q Were you employed by them May 3, 1924? A Yes.

Q What capacity? A Elevator foreman.

Q What were your duties? A Look after a force of men to repair the elevator. 40

William Fleming, cross.

Q Did you have occasion to go over these stairs in the course of your duty that lead to the change booth from the coin box? A Yes.

Q How often did you go over those stairs? A On an average four or five times a day.

10 Q Did you go that number of times over them on May 3, 1924? A I expect so; I had two elevators then to look after.

Q Did you have anything to do with regard to the repair of the stairs if they needed it? A No.

Q Do you recollect whether you passed over those stairs on the morning of May 3, 1924? A I should say I did. I generally went up the other end—the Exchange Place end—to look at the elevators in the morning each day while there.

20 Q On the morning of May 3, did you notice anything with reference to the metal on the stairs sticking up anywhere? A No, sir.

Q Or imperfect condition of the nosing on those steps? A No.

Q Or any slippery condition? A No, sir.

Q Or badly worn? A No.

Q Which side of the steps did you go up? A I don't know. I generally go up the right side of the stairs.

30 Q Was your attention called to this girl and her accident that day? A No, sir.

Cross examination by Mr. Simpson.

Q You had nothing to do with the repair of the steps? A No, sir.

Q You used them simply in going about your work? A Yes, sir.

40 Q And as you used them that way you did not notice anything wrong? A No.

James Moran, direct.

Q But you don't know whether there was anything wrong? A No.

JAMES MORAN, called by the defendant and sworn, testified as follows:

10

Direct examination by Mr. Markley.

Q Where do you live? A 687 Greenwich street, New York City.

Q By whom are you employed? A Hudson and Manhattan Railway Company.

Q How long have you been employed by them? A A little over fourteen years.

Q Did you go with them when they first started to operate? A No, sir.

20

Q How soon after? A I been there since fourteen and a half—I started in 1908.

Q When did you go there? A 1912.

Q You worked with them since 1912 up to the present time? A Yes, sir.

Q What is your job now? A Head foreman of repairs.

Q How long been head foreman of repairs? A I been foreman ever since I been on the job. Head foreman is a new name made a couple of years ago for the same job.

30

Q Does that job include repairs of the station platforms and stairs? A Station repairs; stairways and ticket booths, and things like that.

Q I ask your attention specifically to two flights of stairs at the Exchange Place Station, from the cash booth to the coin box. Are you familiar with those stairs? A Yes, sir.

40

James, Moran, direct.

Q How long have you been familiar with them? A Every day since I been on the run.

Q There are two flights in the stairs? A Yes.

Q With a landing between? A Yes.

Q How many steps are there in each flight?

10 A Eight.

Q Have those steps got metal on their noses?

A Yes. Copper on them.

Q Do you know when the metal nosing was put on? A Yes.

Q Please state? A March, 1920.

Q The plates taken off then were there how long? A Since 1909.

Q Do you know the life of such plates? A Ten years.

20 Q You had occasion to go over those stairs every day? A Yes.

Q Did you look after the job to see that they were properly kept? A Yes, sir.

Q When prior to May 3, 1924, did you do work on those stairs last? A I think the last work was around December and was the last before May 3—just a couple of hours repairing.

30 Q Was there any work done there in March, 1924, on those stairs? A There was a few hours done in March; just a few hours work going over the stairway.

Q What for? A Every time you find a loose screw you would go and fasten them.

Q How often did you go over the stairs to tighten up screws? A About once in about two weeks.

Q Did you do that in March, 1924? A Yes, sir.

40 Q Were you informed that this girl fell there on May 3? A The report I got was that there was some accident at Exchange Place May 3rd.

James Moran, cross.

Q Did you go there then? A Yes, about two o'clock.

Q Did you look at the metal nosings on the steps? A Yes.

Q Did you look at the metal nosing on the three steps from the bottom? A Yes.

Q Was there any part of the metal nosing sticking up? A No, sir. 10

Q Any portion broken? A No, sir, nothing broken.

Q Any part of the metal nosing missing? A No, sir. They all are there.

Q Were the plates worn smooth or shiney? A They were a little bright, but nothing to make anybody fall.

Q Or were those steps slippery? A No, sir.

Q Was it necessary to make any repairs to them in the condition they were? A No, sir. 20
If it had been I would have made them, and I have not done any work on them yet.

Q That would be your job? A Yes, sir.

Q You went down those steps you say almost daily? A Yes.

Q Are you acquainted with the traffic down there? A Yes.

Q Do you say the old plates were on from 1909 to 1921? A Yes, sir. 30

Q And these plates were put on in 1920? A Yes.

Cross examination by Mr. Simpson.

Q You are still employed by the Hudson and Manhattan? A Yes, sir.

Q You are responsible for the condition of this stairway? A Yes, sir.

Q You say on the day of the accident at two o'clock you went over the stair plates and they 40

James Moran, cross.

were shining? A Yes. It was shining, but that had nothing to do with the condition of the stairway.

Q You say that thousands of people passing over these stairs every day up to May 3, 1924, would not make them smooth or shiney or slippery although there since 1920? A You
10 couldn't slip on them. It would make them bright.

Q They would be worn, would they not? A There is a groove fitted in—

Q And if it were worn more smooth in one place than another— A The ridges would have to be worn all the way down before you can slip down.

Q If the ridges were worn down on the left-hand side and not worn down on the right-hand
20 side, the one side would not more slippery than the other; do you mean that? A It would be shiney; but when it is smooth and shines on top you can't slip on it. The ridge is $\frac{3}{8}$ high. You have to wear off those ridges.

Q When you took off those plates in 1920 were they worn down? A Yes. Almost worn down, almost worn through.

Q When you took them out you put down another new set in 1920? A Yes.
30

Q Are all those plates there yet? A Yes.

Q Is the wear on each one identical with the wear on the others? A Where the main traffic is they are a little bright, that's all.

Q Where is the main traffic? A Generally on the right side on one side, and less on the other side. One person will handle the left rail, and the other the right.

Q Do you mean the right-hand going down, when you say the right-hand? A I don't know
40

James Moran, cross.

what you are talking about. They will wear bright there, but that has nothing to do with it. Any metal wears bright.

Q Don't argue the case. You have sworn it is more worn and bright where the main traffic is on the right-hand side? A Yes, sir.

Q Now I want to know do you mean the right-hand side going down or going up? A I am talking about the right-hand side going down the stairs. 10

Q How long have those plates been down there? A Since 1920.

Q And not one has been changed on any of the steps since that time? A No, sir.

Q Is any one of those plates worn more than the others are worn? A Some are brighter than the others naturally for more wear. 20

Q Which side of the stairs? A The right-hand side going down the stairs.

Q Which step; first, second, or third? A It makes no difference with the whole stairway. They are worn bright where the heavy traffic is of course.

Q The most wear is on the right-hand side of the railing going down? A Yes, sir.

Q What causes that? A Some people take the right-hand and some the other. 30

Q And some skip? A Yes; some people go down faster than others.

Q How many steps are there in each of these two flights? A Eight.

Q Sixteen steps altogether? A Yes; eight above and eight below the landing.

Q Do you keep a record of what you do with the stairs? A Yes, sir.

Q The work you do and the date of it? A Yes, sir. Everything we do. 40

James Moran, cross.

Q When did you do work before the accident on these stairs? A December, 1923.

Q You mentioned March, 1924, to Mr. Markley. What do you mean by that? A Four hours repair.

10 Q Then why did you say to me it was December, 1923? A You said previous to that.

Q I said previous to May 3, and you said December? A Yes, sir.

Q And you say March? A Yes.

Q When in March? A Twenty-eighth of March.

Q Have you got your sheet here of those repairs? A Yes.

Q And your sheet tells you what you did to the stairs in March, 1924? A The sheet is down there.

20

(Sheet given to the witness by Mr. Markley.)

The Witness: I must have the other sheet, Mr. Markley.

Mr. Simpson: Get it right.

The Witness: I have it here.

Q What is the date in March? A March 27, 1924.

30 Q Does that show the details of the work done on the stairs then? A Yes.

Q What did you do there then? A Repairing loose screws over all the stairway.

Q That is all you find on that date? A Yes, sir.

Q How many loose screws? A I couldn't tell you.

Q What do you mean by repairing screws? A Just finding out whether the screws were
40 loose in the metal on the steps.

James Moran, cross.

Q What do your sheets show you you did on the twenty-seventh of March, 1924? A We go over all the stairway and try all the screws.

Q Did you do that March 27th? A Yes, sir. Went over all the stairs.

Q Did you tighten every thing that you found loose? A Yes. 10

Q What did you find loose? A My sheets don't show.

Q How many screws are there? A I don't know. It is a big stairway.

Q You say you are responsible for the stairway? A Yes.

Q You are responsible to keep it in good condition? A Yes, sir.

Q You are expected to keep it safe for the traffic? A Yes, sir. 20

Q And you say you have a sheet to show what you did the twenty-seventh of March, 1924? A Yes.

Q What were the repairs? A When there is any extra repairs it is put down there.

Q It shows no such repairs? A This is only for the loose screws.

Q What do you do with loose screws? A Tighten them.

Q What would be the effect if you did not tighten the screws? A Loosen. 30

Q What would be the effect on the metal nosing if the screws were loose? A It would raise up.

Q How much time did you put in tightening screws? A Four hours.

Q To tighten all the loose screws on sixteen steps four hours? A Yes.

Q Did you do anything after that up to the third of May? A No, sir. 40

Olive Belcher, direct.

Q Not a thing? A This shows up to the first of May.

Q Did you tighten up any screws there as shown by your sheet?

(Objected to.)

10 Q Do your sheets show what you did after the third of May? A Not on that stairway. My sheets show on other stairways, but not on this particular sheet.

Q I am talking about Exchange Place? A That is the one I am talking about also.

Q You have not done anything on those stairs since the twenty-seventh of March, 1924, up to date? A No, sir.

Q You say the plates there now were put down in 1920? A Yes, sir.

20 Q Do you know what time? A Yes, March, 1920.

Q Have you anybody under you who inspects the stairway as a job? A No, sir.

Q Do you make regular inspection? A I have men under me.

Q To do the inspection? A I am testifying from my own eyesight.

30 Q That is, you were there on the twenty-seventh of March? A Yes. And these are only some of the sheets that I must make up.

OLIVE BELCHER, called by the defendant and sworn, testified as follows:

Direct examination by Mr. Markley.

40 Q Where do you live? A Chatham, New Jersey.

Olive Belcher, cross.

Q Where do you work? A Colgate Company.

Q Did you see this stairway on May 23, 1924?

A Yes, sir.

Q Did you go down them on that day? A Yes, sir.

Q Which side did you do you go down on? 10

A The right-hand side.

Q Were you near the centre rail? A I think the right-hand rail.

Q What time did you go down those stairs on May 3rd? A Three or four minutes after twelve.

Q Did you see anything wrong with the metal on the stairs? A No, sir.

Q Any part of the metal nosing sticking up on those steps? A No, sir.

20

Cross examination by Mr. Simpson.

Q Where are you employed? A Colgate Company.

Q Are you stair inspector? A No, sir.

Q What is your business at Colgate's? A Typist—typing.

Q Have you made a study of the inspection of stairs and metal plates? A Why, no.

30

Q Is that part of your employment at Colgate's? A No, sir.

Q Did you go to inspect those stairs in the Tube station? A No, sir.

Q Did you pay any attention to those stairs except that you were walking down on them? A That's all.

Q You were not looking for projections? A No. I was going home to Hoboken.

Q You were not looking for holes in the stairway? A No, sir.

40

Olive Belcher, cross.

Q You paid no attention to the stairs except the fact that you walked down on them? A That's all.

Q Were you subpoenaed to come here by the other side? A Yes.

10 Q Do you know how these people knew you walked down these stairs on May 3, 1924, between twelve and one o'clock that day? A I testified for them in another case.

Q Another stairway case?

(Objected to.)

Q You did testify in another case? A No. I just gave a statement.

Q Then how did they find out you had been tripping down these stairs May 3, 1924?

20

(Objected to.)

A I told them.

Q You do not know this complainant? A No, sir.

Q You do not know this girl that was hurt? A No, but they told me.

30 Q In giving a statement in another case you happened to tell them you had been down these stairs on the third of May? A Yes, sir.

Q But you did not tell them that you had made an inspection of the stairs, did you? A No, sir.

Q And you did not inspect it? A No, sir.

Catherine Holden, direct.

CATHERINE HOLDEN, called by the defendant and sworn, testified as follows:

Direct examination by Mr. Markley.

Q Where do you live? A 613½ Henderson street, Jersey City.

Q What is your age? A Thirty years. 10

Q Where do you work? A The Atlantic & Pacific Company.

Q Did you have occasion to use the stairs at Exchange Place Terminal during the month of May, from the cashier's booth to the coin box?

A Yes, sir.

Q May 3, 1924? A Yes, sir.

Q What time? A Five minutes after one.

Q Were you there when Miss Pabst fell? A Yes. 20

Q Which way were you going? A Coming from New York.

Q Did you go up the stairs? A Yes.

Q Which side? A Right-hand side going up.

Q Where was Miss Pabst when you saw her?

A I was right at the bottom of the steps when I saw her fall, and some men went to her when she fell, and I did not see whether the girl was hurt or not. 30

Q Did you look at the stairs after she fell?

A No, sir.

Q You saw her fall? A I saw her just as she was falling.

Q Did you notice any projection on those stairs? A No, sir.

Q Was anything sticking up? A No. I did not see that.

Q Did you look at her when she fell? A Yes, sir. 40

*Motion for Direction of a Verdict.**Cross examination by Mr. Simpson:*

Q You did not look for projections? A No, sir.

Q You only saw the girl fall? A Yes, sir.

Q You did not look to see what made her fall?

10 A No, sir.

Q You just saw her falling? A Yes, sir.

Q And you did not look at the steps to see what caused her falling? A No, sir.

Q And you don't know what the condition of the steps was? A No, sir.

Defendant rests.

20 FRANCES PABST, recalled by the plaintiff in rebuttal, testified further as follows:

Direct examination by Mr. Simpson.

Q This man said you skipped down those stairs? A I did not. I can't skip.

Q How long since you were able to skip? A Not since I was seven years old.

Q You are fifteen now? A Yes, sir.

30 Q And since you were seven you never knew what it was to skip? A No, sir.

TESTIMONY CLOSED.

Mr. Markley: I move for a direction of a verdict for the defendant on the following grounds:

40 (1) That there is no evidence of negligence on the part of the defendant;

Charge to Jury.

(2) That there is no evidence that any negligence on the part of the defendant was the proximate cause of the accident;

(3) That the evidence shows that the plaintiff was guilty of contributory negligence as a matter of law.

The Court: Motion denied.

10

(Exception by defendant's counsel.)

Counsel then summed up to the jury.

The Court thereupon charged the Jury.

CHARGE TO JURY.

20

O'REGAN, J.

Gentlemen of the Jury: This is a case in which Adele Pabst, individually and as next friend of Frances Pabst, her daughter, is suing on account of injury sustained at the Exchange Place Station, on May 3, 1924, alleging that the accident happened because the Hudson and Manhattan Railway Company were negligent in the manner in which they had maintained the stairway leading down to the trains, and that the girl in going down had caught her foot in a defect in the stairs and was thereby thrown to the ground or floor and injured. The defendant company say they were not negligent, and that the stairs were in good condition; and they allege that the girl was injured by reason of her own contributory negligence.

30

In order to recover the plaintiff must show that the company was negligent.

40

Charge to Jury.

The girl was a passenger and was entitled to have that stairway in good condition for her to be carried on it.

The railway company on their part say she was guilty of contributory negligence. They must affirmatively prove that.

10 It is a simple question of fact, and you are the sole judges of what are the facts. You are to judge this case by what has been testified to, and nothing else. You must be guided by the testimony given and decide the case according to that testimony.

The facts are in your sole control. If the counsel for the plaintiff, or the counsel for the defendant, said something has been testified to which is contrary to your recollection, your recol-
20 lection must abide.

Counsel for the defendant at the end of the case asked for a direction of a verdict in favor of the defendant; and that motion was denied by the Court. You are not to consider the fact that the Court denied that motion as having any bearing on your decision or consideration of the case. The Court has nothing to do with the facts in the case. Whatever opinion the Court might
30 have would have no bearing on your verdict. You are to decide the case on the facts.

On one side there were two or three eye witnesses and only one on the other side. The number of witnesses does not affect the case. It is not the number of witnesses that should control your verdict. It is the quality of the witnesses testimony, and what you think the witnesses are entitled to in the way of credence in respect of their testimony.

40 If you get to the question of damages and you decide the plaintiff is entitled to damages you

Exceptions to Charge.

will bring in a verdict against the Hudson and Manhattan Railway Company only. The counsel for the plaintiff discontinued the case against the Pennsylvania Railroad Company.

In respect to the question of damages, if you get to the question of damages, I think the rule of law in this case is an allowance of just compensation for the pain and suffering the girl underwent and may have to undergo in respect of the effects of the accident. 10

If you do get to the question of damages for the girl, then the girl I think is entitled to recover the amount of damages which you may estimate will be a fair and just compensation for what this girl has suffered and will suffer by reason of her injury in the accident. The Court will give you no concrete rule by which you can be guided. You will have to figure that yourselves—what in your opinion is the fair and just compensation for the suffering this girl has suffered or may hereafter suffer as part of the result of this accident, the just compensation for the injuries which were the result of this accident. 20

The Jury thereupon retired to consider of their verdict. 30

Mr. Markley: May I note an exception to that part of the charge which left to the jury the question of whether or not the defendant was negligent.

Also to that part of the charge which left to the jury to determine whether the plaintiff was guilty of contributory negligence.

Also to that part of the charge which said that the plaintiff was entitled to have the stairway in fit condition for her to use safely. 40

New Jersey Court of Errors and Appeals 10

ADELE PABST, individually and as
next friend of FRANCES PABST,
an infant,

Plaintiff-Appellant,

vs.

HUDSON & MANHATTAN RAILROAD
COMPANY, a corporation,
Defendant-Respondent.

Action at Law.

Appeal from
Supreme
Court.

20

BRIEF FOR PLAINTIFF-APPELLANT.

Facts.

The facts in the case were, that the infant plain- 30
tiff, a girl about 14 years of age, while in the
station of the defendant, going down the station
steps, was thrown to the bottom of the steps be-
cause her foot caught in a projection of worn
metal (page 22). She was permanently injured.
She recovered a verdict of \$5,000 in the Common
Pleas of Hudson County, which was reversed in
the Supreme Court: Observation of the condition
of the steps (pages 23, 45, 46 and 47). The metal
nosing was worn (page 43, line 20). There was 40
a broken piece of metal at the place where the

girl fell (bottom of pages 52 and 53). It was worn and torn and broken and sticking up and appeared old and shiny; stuck up about an inch (page 53). Testimony about the metal being old, worn and shiny and projected and broken was not touched on cross examination (pages 54, 55), but was on re-cross because he had the witness testify that she saw the metal touch the heel. The plaintiff fell from the third step from the bottom (page 60). The metal had not been repaired for 4 years (page 103).

No Error in Charge of Court.

The Supreme Court reversed this judgment obtained in the Common Pleas Court. The Supreme Court opinion found no error in the case except, in part of the charge as follows:

“The girl was a passenger and was entitled to have that stairway in good condition for her to be carried on it” (S. C., page 112, lines 1-3).

In *HEXAMER vs. PUBLIC SERVICE*, 132 Atl., page 310, the Supreme Court on a similar point said:

“The ground urged for a new trial under Point 7 is purely hypercritical. It is argued that because the trial Judge in his charge to the jury in speaking on the duty of the defendant, in the relation of the construction and the maintaining of a station platform said that ‘it was its duty to construct a station safe for its passengers,’ that this in effect was in amount to a charge that the de-

defendant was an insurer for the safety of passengers. But the Judge made it quite clear that the defendant was not an insurer for the safety of the passengers but he said in connection therewith, etc. Negligence must be proven, etc.”

Yet in the instant case the Supreme Court said that after the trial Judge had charged the negligence of the defendant was necessary to a recovery, the mere fact that he said the plaintiff was entitled to have this stairway safe, wiped out all that the trial Judge had said about negligence and made the assertion clearly one that the defendant was an insurer, which it is respectfully submitted is a twisting of language. 10

In *KARGMAN vs. CARLO*, 85 N. J. L., 633, the Court of Appeals said it is not what the ingenuity of counsel can twist out of a charge, but what the plain meaning was. In the instant case, the Court plainly charged that no recovery could be had except for negligence, and the mere saying that the plaintiff was entitled to have the stairway safe, could not be twisted into a statement that the defendant was an insurer. 20

CONNOLLY vs. P. S., 94 N. J. L., 157, construes Secs. 27 and 28 of the new Practice Act, providing for a complete administration of justice by forbidding a reversal unless it appears that the alleged error harmed the defendant. 30

No request was made by the defendant here, for amplification of the charge, if defendant deemed it ambiguous, so as to set forth what facts would be required to show the defendant was negligent, but the defendant took an exception to these three lines, and now attempts to, and successfully attempted in the Supreme Court to get a reversal, after the trial in which plaintiff was successful, 40

and a full hearing of the case. It is respectfully submitted that the instructions complained of was not harmful to the defendant; did not charge that the defendant was an insurer, but clearly charged that defendant must be guilty of negligence.

The Court of Appeals in *BERGMAN vs. PUBLIC SERVICE*, 98 L., page 489, top of page, said:

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“In relation to defendant’s negligence there was proof that the car was approaching a point where defendant had posted a notice that cars would stop, and it was the duty of the motorman to have the car under such control as not to endanger the lives of persons waiting at the stopping place to take the car.”

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No one questioned this language because it was clearly a correct statement. It was the duty of the motorman to have his car under control. If he was acting with reasonable care, he would have had it under control. So it was the duty of the defendant here to have the stairway safe, if the absence of negligence would do it.

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The whole theory of the plaintiff’s case, as referred to by the Judge, was that the defect in the stair was old and worn, and existed a long time. If the defendant claimed that there should have been a charge, that the defect must be of such a character that reasonable men could find it existed long enough to put the defendant on knowledge and on duty to repair, that was for the defendant to request. It did not so do.

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It is respectfully submitted that there was no injury to the defendant in this case and that *KARGMAN vs. CARLO*, 85 N. J. L., 632; *Schoeffler vs. Philipsburg*, 90 N. J. L., 265; *Schneider vs. Winkler*, 74 N. J. L.; *Addis vs. Rushmore*, 74 N. J. L., 649, are all authority for

the proposition that even if there was technical error in this statement of law, it was not such error as to have harmed the defendant. In taking exception, it is said in *KNOUSE vs. DONATIONIA*, 94 N. J. L., 516:

“The new Practice Act does not relieve a party from pointing out at the trial to the Judge the portion of the charge to which he objects as heretofore.” 10

While it is true that the defendant objected to this part of the charge, he did not directly call the Court's attention to the fact that it was not sufficiently clear, taken in connection with the other part of the charge, as to whether the Judge was charging the defendant was an insurer, and the Judge was entitled to have this brought to his attention before the exception could be valid, otherwise the trial instead of being the administration of justice, is simply a question of adroitness of counsel or matching of wits. If there was ambiguity in the charge, it was for the defendant to request a clarification; if he was satisfied to go to the jury under the charge in the present situation, he should not now complain. 20

When an instruction is not erroneous, but is insufficient or confusing, it is the duty of counsel to request a further instruction upon the point in question. 30

Richmond vs. Bates, 2 Misc. Reports, 438.

The instruction was not the same as the instruction in *Mason vs. Erie Railroad*, 75 N. J. L., 521, which the Supreme Court in the opinion in the instant case cites. In the *Mason* case the erroneous instruction was: 40

“It is undoubtedly the duty under the law, of this defendant as well as all railroads, to provide a reasonably safe place for its passengers to alight from its trains. There is no question about that * * * it must provide a reasonably safe place for its passengers to alight from its trains.”

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This is entirely distinct from the instruction in the Pabst case, which was that negligence was the ground of the action. In the Mason case there was a clear charge that the duty was not the duty to use reasonable care, but the duty to supply a reasonably safe place, which was in fact charging defendant was an insurer. Not so in the instant case, where the Court clearly charged that it was the negligence of the defendant only that was actionable.

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In *Brown vs. P. S.*, 98 N. J. L., 747, the criticism of the Court's charge in the language of the Court of Errors and Appeals was:

“At any rate the defendant had the right to have the question of negligence or no negligence submitted to the jury, and this the Judge failed to do.”

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In the Pabst case, the negligence was submitted to the jury and the criticism in the *Brown* case was that the Judge charged the duty as an absolute duty. That is what it is attempted to be argued in this case, whereas, there was no such charge made; if it could be spelled out of the charge, it could only be inferentially spelled out and then rather thinly spelled out, because in the three lines relied on the Court says nothing about the defendant or its duty, and if the three lines are read in connection with what is said about

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negligence, it will be seen that the plaintiff was entitled to have the steps safe only so far as the absence of negligence on the part of the defendant would make it safe. The Court of Appeals speaking in the Brown case, 98 N. J. L., 459, top of page 754, said the suit was one that counted on the negligence of the defendant. It cannot be said in the Pabst case that two distinct propositions were charged, from one of which the jury must make its selection, as was stated in the Brown case, because there the language of the Court was italicised in the Court of Appeals opinion:

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“The whole question was as to the existence of the hole and whether the company provided a reasonably safe place for passengers to alight and whether the condition of the plaintiff’s foot was brought about by the hole in the pavement.”

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These three lines must be read “in the light of the context of the whole charge.” State vs. Giberson, 122 Atl., 724, and cases cited. Here are the three lines which caused a reversal:

“The girl was a passenger and was entitled to have that stairway in good condition for her to be carried on it.”

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The Supreme Court said that unescapably this meant that the defendant was an insurer, but this is a straining of the language, because it reads it without the context, which, as in the previous cases cited, made the defendant’s responsibility rest on negligence. Was not a passenger entitled to have the stairway in good condition for her to be carried on it if reasonable care would

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make it so? The objection seems to be that the Court did not put in between the words "good condition" and the words "for her" the words "as far as reasonable care on the part of the defendant could make it so," but the absence of these words does not imply the contrary, that without these words they make the right of the plaintiff an absolute right, and the three lines must be so read by this Court by spelling into them things that are not there to make the statement one of an absolute duty on the part of the defendant. It is the truth that she was a passenger. It is a fact that she was entitled to have the stairway in good condition. To what extent the defendant would have to exercise care to keep it in good condition is not involved in these three lines, and if the defendant thought itself injured, it could have very readily submitted a request to add to these three lines whatever it thought was necessary, but it must stand or fall on the proposition that the three lines as they now stand import an absolute duty, whereas they import nothing of the kind. They import the right of the passenger to a good stairway, and she is entitled to a good stairway. It cannot be argued that she is not entitled to a good stairway. To what extent the defendant must use a degree of care to make it a good stairway is another thing and appears in another part of the charge. The case relied on by the Supreme Court, *Mason vs. Erie*, 75 N. J. L., 521, is where the Court directly stated an absolute duty on the part of the defendant, which is not the fact here. Before an absolute duty can be spelled out of these three lines, something must be added to them. It cannot be argued that because they are without qualification that, therefore, the Supreme Court can read into them something they don't contain; more so because the

three lines are not dealing with the defendant, but with the rights of a passenger, otherwise it must be held as a matter of law, that the plaintiff was not entitled to a good stairway if reasonable care would furnish it, which, of course, answers itself. She was entitled to a good stairway as far as reasonable care on the part of the defendant could make it. If the defendant as before stated complains of this absence of the qualification, it was for the defendant to put it in. 10

The ground of exception must be stated. *Smith vs. Atlantic City R. R.*, 74 N. J. L., 452. Must be requested. *Gruen vs. Ohl*, 81 N. J. L., 626. An exception which does not call the Court's attention to the objection is nugatory. *Timlan vs. Dillworth*, 75 N. J. L., 105, bottom half of page. This case was reversed in 71 Atl., page 33, but not on this point, but on the point of what was reasonable care. It is, therefore, submitted: first, that the excerpt from the charge has been read alone, which was improper; second, even when read alone it does not put a duty upon the defendant as contended for by the Justices of the Supreme Court; third, that the exception was valueless because it was a sort of slight of hand exception, which did not indicate the grounds so as to call the attention of the trial judge to the specific objection which should be done in a proper administration of justice, where rights are being determined. 20 30

It is respectfully submitted that this alleged error was not error.

Blumenfeld vs. H. & M. R. R., 89 L., 581;
Leiferant vs. Progressive, 98 L., 526;
Folley vs. Vantuyl, 9 L., 153;
Parkers Digest, Vol. 1, col. 485, S. 398 40
 (e);
Hatfeld vs. Dow, 27 L., 440.

“An excerpt from instructions to a jury upon which error is assigned must be read in connection with the context, and if, when taken together, no error appears, the excerpt alone will not support the assignment.”

10 Shoeffler vs. Philipsburg Co., 90 N. J. L.,
page 235, Court of Appeals.

20 A rule to show cause why a new trial should not be granted was taken and argued in this case. One of the reasons was that the verdict was against the charge of the Court. The defendant adopted the charge of the Court and argued that it was proper and that the verdict of the jury showed it was disregarded. Having so argued upon the charge, how can it now argue upon a reservation of exceptions which waived by adopting the charge and arguing upon it?

El Mora Realty Co. vs. Griffin, Vol. 2,
Misc. Rpt., 1187;
Fragasso vs. Introcasso, 1 N. J. Adv.
Sheets, 1034.

30 “A court of review will read the context of the whole charge and if upon considering it in its entirety no error appears, the defendant can take nothing by the exceptions.”

State vs. Giberson, 99 N. J. L., 95.

The simple practice of this Court is to leave unconsidered alleged errors to which no exceptions have been taken at the trial.

40 Stickel vs. Vrieland, 99 N. J. L., 468;
Brown vs. P. S., 98 L., 749.

“So long as the law is stated correctly and intelligently the ultimate test of the soundness of instructions is not what the ingenuity of counsel can, at leisure, work out the instruction to mean, but how and in what sense, under the evidence before them and the circumstances of the trial, would ordinary men and jurors understand the instructions as a whole.” 10

Lenz vs. P. S. Rwy. Co., 98 N. J. L., 849.

“The inquiry should be whether the jury would have been misled to the injury of the defendant by the language of the Court, and in this case we think it clear, in view of the context, that they could not have been misled by the charge as an entirety. Brown vs. Spence, 79 N. J. L., 452; Crosby vs. Wells, 75 N. J. L., 790.” 20

This is the language of the Court in the case of LENZ vs. PUBLIC SERVICE RWY. CO., 98 N. J. L., 852. What the trial Judge said to the jury in the Pabst case was, that the plaintiff was entitled to a safe stairway; if she didn't get this safe stairway because of the negligence of the defendant, the defendant is liable unless she, the plaintiff was guilty of contributory negligence. This is the correct statement of the law. If the defendant wanted it amplified, it should have requested it. 30

In the case of READING vs. CENTRAL R. R. CO., 39 Vroom., 641, page 646, the Court said:

“It is unreasonable to suppose that with these numerous utterances drumming in their ears the jury could have been misled by a 40

single expression which omitted the proper qualification."

In the Reading case, the Judge charged the duty of the plaintiff to be an honest belief instead of a reasonable belief.

10 In the case at bar, the Judge charged simply that the plaintiff was entitled to a safe stairway basing the right to recover solely upon negligence in the defendant and making the defendant only responsible if the stairway was not safe through its negligence. It is, therefore, following the language of the Court of Appeals in the Reading vs. Central R. R. case. It is unreasonable to suppose that the jurors could have assumed that the Judge was charging the law to be that the defendant was
20 liable even if it was not negligent.

"Where several statements are assigned as error each must be erroneous." State vs. Bove, 98 N. J. L., 352.

Argument.

30 There was thus evidence to go to the jury as to whether the defendant has used reasonable care as to the steps.

See

Vosler vs. Lackawanna, 77 L., 727;
Murphy vs. Street Railway, 81 L., 706;
Costello vs. Payne, 95 L., 538;
Dotson vs. Erie, 68 N. J. L., 679;
Proud vs. Lackawanna, 35 Vr., 702.

40 It is, therefore, respectfully submitted on the part of the plaintiff, that if this evidence was be-

lieved, there was a jury question, as to whether the defendant had used reasonable care. It is admitted that the railroad company is only under the duty to use reasonable care under the cases cited in defendant's brief, but it was for the jury to say whether it was reasonable care to have an old, worn, shiny piece of metal, which could not have come suddenly in that condition, project up on a step so as to throw the plaintiff. That there was ample evidence from which the jury might infer that the defendant knew, or could have known of the condition and that it was not a sudden condition. See *Murphy vs. Street Railway*, 81 L., 706, and foregoing cases. 10

There is no contention that the doctrine of *res ipso loquitur* applies. There was positive evidence of facts, making the observations of the Court in *Murphy vs. Street Railway*, applicable. In the *CONOVER* case relied on by the defendant, the contention was for *res ipso loquitur*. If the defendant had made the inspection it claims, it would have revealed the defect. If the testimony of the defendant's witnesses is scrutinized carefully, it will be seen that most of the testimony was as to a casual inspection. 20

“Inspection to be valuable must be thorough and deliberate.” 30

Proud vs. Lackawanna, 35 Vr., 706; 127 Atl., page 4.

There was testimony from which the jury could have found that there was a defect in the stairway which had existed a long enough time to come to the notice of the defendant, and that the presence of that defect, unexplained, was evidence of negligence and would charge the carrier with 40

liability. Testimony of Anna Pabst (S. C., page 51, line 20 to page 53, line 20):

“Q. You saw her fall? A. Yes, sir. I saw her as she was falling from the steps.

Q. Did she fall with force? A. Yes, pretty heavy force.

10 Q. Did you go back to look at that step? A. Yes.

Q. What did you see? A. She said her foot caught on something, and when I went back there was that broken piece of metal on the front of the step.

Q. Worn or how? A. It was worn, and torn and broken.

20 Q. What position was it in? A. Sticking up.

Q. Did it appear old or new? A. Old and shining.

Q. How much was it up from the edge of the step? A. About that much.

Q. How much is that? A. About an inch.

Q. Did you take the ticket chopper over to see it? A. Yes.

30 Q. Did you show him the condition? A. Yes.”

40 The jury had a right to find that the condition was not a sudden condition but a condition of gradual growth because it is common knowledge that metal doesn't wear out in a day; it takes considerable friction and time to produce the condition described by this witness. If the jury believes the witness, Anna Pabst, they had, therefore, the right to find that this was a condition of some duration and that the defendant in the exercise of reasonable care should have known about this condition and remedied it. If this

was so, this was negligence. If there was any evidence to support the verdict it cannot be disturbed; there is evidence as referred to in the State of the Case, showing that the metal was old, worn and torn and projecting; upon this the jury was amply justified in finding that the facts warrant the inference that it was a condition of long standing and a slow growth, that it would have been error to direct a verdict. 10

- Exton vs. C. R. R. Co., 62 N. J. L., 7;
 Dotson vs. Erie R. R., 68 N. J. L., 679;
 Feil vs. West Jersey & Seashore R. R.,
 77 N. J. L., 502;
 Costello vs. Director General, 95 N. J. L.,
 538;
 Cullen vs. W. J. & S. R. R. Co., 85 N. J. L., 708; 20
 Murphy vs. N. J. St. Rwy. Co., 81 N. J. L., 706;
 Schnatterer vs. Bamberger, 81 N. J. L.,
 588.

In the case of Schnatterer vs. Bamberger, 81 N. J. L., 558, there was simply the sudden condition of loose boards which had come loose immediately before plaintiff fell; in the instant case the metal was old, worn and shiny. All the cases cited in this Schnatterer case, are cases where the cause of the fall might have occurred an instant before the falling, which is not the condition the jury is bound to find here. There is a clear distinction between the instant case and the case of Conover vs. Lackawanna, 92 N. J. L., 602, for in the latter case no one knew what caused the plaintiff to fall. In the case of Maphet vs. H. & M. R. R., 98 L., 369, a passenger fell over a fuse, but recovery was denied because anyone could 30 40

10 have placed the fuse on the platform. See also Smith vs. Lackawanna, 89 L., 643. It was clearly, therefore, for the jury to say under the testimony of the second witness of the plaintiff who observed the steps from which plaintiff fell immediately after her fall as to whether the defect had existed time enough for the defendant to be aware of it.

Verdict.

There was no general verdict as alleged by the defendant. There was a verdict for the infant plaintiff, Frances Pabst, in the following language:

20 "June 16, 1925, evidence closed, and the Court having charged the jury and a constable being sworn to attend them, they retired to consider their verdict; they again came into Court and say they find in favor of the plaintiff Frances Pabst, by next friend Adele Pabst, against Hudson and Manhattan Railroad Company and assess damages at the sum of Five thousand (\$5,000.00) Dollars and so say they all." Judge O'Regan (S. C., page 30 114, lines 1-10).

40 By inadvertence the cause of action of the mother was disregarded by the trial Judge and the trial counsel and the case went to the jury simply for the infant plaintiff and the verdict shows what the jury brought in. There was no apportionment because there was no general verdict; it was a special verdict of the damages of the daughter. The judgment was entered by the clerk incorrectly by inadvertence, not in favor of the mother but in favor of the next friend; strictly

speaking, it should have been for the infant who sued by next friend, but that judgment may be amended. *Brown vs. P. S.*, 98 L., 749. If there was a general verdict for two plaintiffs for \$5,000 the argument of the defendant would apply, but that is not the case; there was only one verdict for one plaintiff.

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It is respectfully submitted that the judgment of the Supreme Court should be reversed and the judgment recovered in the trial court affirmed.

Respectfully submitted,

ALEX. SIMPSON,
Attorney for Plaintiff-Appellant.

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Arthur W. Cross, Law Printer, 55-57 Lafayette Street, Newark, N. J.

New Jersey Court of Errors and Appeals

ADELE PABST, individually and
as next friend of FRANCES
PABST, an infant,
Plaintiff-Appellant,

vs.

HUDSON & MANHATTAN RAILROAD
COMPANY, a corporation,
Defendant-Respondent.

*Action
at Law.*

*On Appeal
from
Supreme
Court.*

BRIEF IN BEHALF OF THE RESPONDENT.

(1)

Statement of the Case.

This appeal brings before this Court for review a judgment of the Supreme Court reversing a judgment of the Hudson County Court of Common Pleas in an action wherein the appellant (hereinafter referred to as the plaintiff) brought suit in two capacities, that is, individually and as next friend of her daughter, Frances, to recover damages from the defendant for personal injuries sustained by Frances while descending the stairway of the defendant at its Exchange Place Station, Jersey City, on May 3, 1924. The jury brought in a verdict in favor of the plaintiff for \$5,000 without specifying whether it was for her individually or as next friend of Frances and without apportioning the amount as between the plaintiff in her individual capacity and in her capacity as next friend of Frances. The defendant appealed to the Supreme Court and one of the grounds for reversal was that the trial court erred in instructing the jury that the girl as a passenger was entitled to have the stair-

way in good condition for her to be carried on (p. 112, ll. 1-5). This instruction, which was the only one the trial court gave the jury on the subject, made the respondent (hereinafter referred to as defendant) an insurer of the safety of its passenger. It was therefore erroneous, since the only duty was to exercise reasonable care. The Supreme Court therefore reversed the trial court's judgment and thereupon the plaintiff appealed to this court.

(2)

Grounds of Appeal.

The only ground of appeal urged by the plaintiff is that the Supreme Court erred in reversing the judgment below (p. 2a).

(3)

Prefatory Statement.

We think the ground upon which the Supreme Court based its judgment of reversal is unassailable. However, out of an abundance of caution, we shall also argue in this brief the other grounds of appeal urged in the Supreme Court because if the judgment of that court is sustainable on any ground, it should be affirmed.

Kleinert v. Hutchinson, 98 N. J. L. 831, 835;

Solomon v. P. S. Ry. Co., 87 N. J. L. 284, 286.

In the Supreme Court the following grounds of appeal were urged:

1. The trial court erred in refusing to direct a verdict for the defendant because there is no evidence that the defendant was negligent.

2. The trial court erred in instructing the jury that the plaintiff "was entitled to have the stairway in good condition for her to be carried on it."

3. The general verdict of the jury and the judgment based thereon is illegal, null and void because it is for a single sum as damages and cannot be applied or apportioned to either claim presented in the complaint.

(4)

BRIEF OF THE ARGUMENT

I.

The trial court erred in refusing to direct a verdict for the defendant because there is no evidence that the defendant was negligent.

The motion for a direction of verdict was on three grounds, as follows (p. 110, l. 35; p. 111, l. 10):

(a) There is no evidence of negligence on the part of the defendant.

(b) There is no evidence that any negligence on the part of the defendant was the proximate cause of the accident.

(c) The evidence shows that the plaintiff was guilty of contributory negligence as a matter of law.

The plaintiff, age sixteen, with three other girls, including her sister Anna, was on her way to New York (p. 21, ll. 11-20). She entered the Exchange Place Station of the defendant at Jersey City, took the elevator downstairs to the change booth level, where her sister obtained change (p. 21, ll. 20-30). Frances proceeded downstairs from the change booth to the ticket collector's box (p. 21, ll. 30-40). That was the first time she had been out after returning to

her home from the hospital on April 15, 1925 (p. 39, ll. 30-35). She had been to the hospital for an injury to her legs from which she had been suffering for from six to eight years, and which had resulted in making her a cripple (p. 25, ll. 1-20). She suffered from osteomyelitis or rotting of the bone of the right hip and the left tibia, which is the large bone between the knee and the ankle (p. 35, l. 30; p. 36, l. 20). That trouble had compelled her to go to the hospital for operations on six occasions (p. 25, l. 30, *et seq.*).

The stairway on which the accident happened consisted of two parts with a landing in the center. Each flight had from five to eight steps (p. 41, ll. 10-20). While her sister was getting change she proceeded down the stairs with her friend Charlotte, who was in back of her, while her other girl friend was opposite to her on the other side of the center railing (p. 41, ll. 20-40). She proceeded down the first flight safely and had passed over the landing and was going down the second flight of stairs and had reached the third step from the bottom of the second flight when she fell (p. 42, ll. 1-10). The heel of her shoe caught in the step. She was on the right side of the center railing and had hold of the rail with her left hand until she fell, and she fell the last two or three steps, holding the railing. She was proceeding very slowly and carefully and was unassisted (p. 42, l. 20, to p. 43, l. 10). She said her foot caught in the metal nosing on top of the step (p. 22, ll. 10-20).

Her sister Anna, age twenty, testified that she stopped to get change while her sister walked ahead. When she turned around from the change booth, she saw the other girl was half-way downstairs and her sister was down all the

way, and she then "went to find her, and I saw her as she was falling from the steps" (p. 52, ll. 20-30). Frances informed her that her foot had caught in the step, and she went back to the stairway and saw a piece of metal on the front of the steps sticking up, and it was worn and torn and broken and appeared old and shiny, and stuck up from the edge of the step about an inch (p. 53, ll. 1-20). She did not see her sister until just as she was falling (p. 55, l. 30). She was standing at the change booth at the top of the stairs and she saw the heel of Frances' shoe catch in the piece of metal which was sticking up and projecting over the metal edge of the step. It caught the heel of the right shoe, which was not injured at all. She said she could plainly see the metal sticking out from her position on the top of the two flights of stairs (p. 57, ll. 1-30).

One of the other girls, Charlotte Ehrenback, testified that she was standing at the top of the stairs waiting for Anna, who was obtaining change (p. 59, ll. 10-20). She did not see Frances fall (p. 59, l. 20). The other girl was also named Charlotte and she was three steps behind Frances as she proceeded down the stairway (p. 60, ll. 30-35). She did not see any defect in the step (p. 60, ll. 1-30). The foregoing is all of the testimony offered by the plaintiff and merely indicates that the metal nosing on the third step from the bottom was broken so that a part of it sticking up about an inch was plainly visible to a person a considerable distance from the step. It did not appear how long that condition had existed, or whether it had existed for any length of time, or that the defendant had knowledge or notice of its condition.

Defendant's Testimony.

Mounskey was the ticket taker at the bottom of the stairs. His box was located three or four feet from the bottom of the stairs (p. 79, ll. 1 to 20). He faced the stairs and saw Frances coming down; she was to the right of the center railing and there was another girl alongside of her; they were fooling and laughing when they came to the second flight, and she slipped and fell (p. 80, l. 10, to p. 81, l. 20). She fell first on her knee, and at that time she was on the second step from the bottom; no part of her shoe was injured or damaged (p. 81, ll. 30 to 40). No part of the metal nosings on any of the steps was sticking up or broken, for he examined the stairs immediately (p. 81, l. 40, to p. 82, l. 10).

Nellie Van Hoff was the woman in the change booth at the top of the stairs, and she was also the agent of the station; part of her duties were to look around the station and see that everything was proper (p. 86, ll. 1 to 15). Her attention was called to the accident shortly after it happened, and she immediately examined the stairway and could find nothing the matter with it; there was no projection from any of the steps, including the third step from the bottom on the right side; neither were the metal nosings worn or torn and no part of the metal nosings was sticking up (p. 87, ll. 1 to 40). The accident happened on Saturday and by actual count 1,050 persons passed over the stairs between nine and twelve in the morning and between one and two P. M., 1,204. Daily, six or seven thousand persons pass over the stairway (p. 88, ll. 1 to 20). The accident happened between one and two P. M. (p. 40, ll. 30 to 40).

She also examined the stairs in the morning prior to the accident, and her examination after

the accident was at 2:20 P. M. It was her duty to examine the stairway every day, and she did so (p. 88, ll. 30 to 40).

McNeill was employed as a porter. It was his duty to keep the stairs clean; the stairs were cleaned by him three times a day, and he passed over the stairs six times a day (p. 90, ll. 30 to 40). He was on duty on May 3, 1924, from 7 A. M. to 4 P. M. He first examined the stairs shortly after 7 A. M. Not only would he keep the stairs clean, but he would also inspect them, and if there was anything out of repair he would report it immediately. He said that there was no part of the metal nosings sticking up on any of the steps and if there had been he would have reported it. He made an examination at twelve noon on the day of the accident, and no part of the metal nosing on the third step from the bottom was sticking up; the metal nosing was not shiny, worn or broken (p. 91, ll. 20 to 40). He again cleaned the stairs at three o'clock on the day of the accident, and no part of the metal nosing was torn, sticking up, shiny or slippery (p. 92, ll. 1 to 10).

Thom was employed on the Exchange Place platform from 7 A. M. to 11 A. M. on the day of the accident and had occasion to go over the stairs from eleven to twelve noon (p. 95, ll. 1 to 15.) There was no projection of any kind on any of the steps, and if there had been he would have immediately reported it to his superior. He examined each step and found nothing wrong (p. 95, ll. 20 to 35). The steps are six feet wide, three feet on each side of the center railing (p. 95, l. 40, to p. 96, l. 10). The steps were not smooth or shiny or worn (p. 96, l. 10, to p. 97, l. 20).

Fleming, elevator foreman, had occasion to go over the stairs in the course of his duty on an average of four or five times a day. He was on duty on May 3, 1924, at the time of the accident. He said that in going over the stairs he found nothing wrong with the metal nosing or the steps. No part of the metal nosing on any of the stairs was sticking up, slippery or worn (p. 98, ll. 10 to 30).

Moran was head foreman of repairs and had been for fourteen years; his job included repair of the stairs in question, and he was thoroughly familiar with their condition. There were two flights with a landing between; each flight had eight steps and each step had a metal nosing made of copper. The metal plates had been entirely renewed in 1920. The metal plates removed at that time had been on the stairs since 1909; the life of the plates is at least ten years. He had occasion to go over the stairs every day and his job was to see that they were properly kept. The last time that he had had any work done on the stairs was in March, 1924, and prior to that in December, 1923. The work in March consisted of tightening the screws (p. 99, l. 10, to p. 100, l. 40). On May third he received a report of the accident and he immediately went to the stairs, getting there about 2 P. M. He examined all of the metal nosings, including the metal nosing on the three steps from the bottom of the stairway. No part of any of the metal nosings was sticking up or broken or missing. They were all there, somewhat bright, but not slippery (p. 101, ll. 10 to 30). After the accident no work was done on the stairs (p. 101, l. 20). Even though the step was shiny, still there is a ridge of three-eighths of an inch which would prevent slipping on the metal plates (p. 102, ll.

20 to 30). Up to the time of the trial not one of the plates had been changed or renewed since they were put down in 1920 (p. 103, ll. 10 to 20). A record is kept of all repairs to the stairs. The record showed that on March 28, 1924, there were four hours spent on the stairs by Moran's workmen, tightening loose screws all over the stairway (p. 104, l. 20, to p. 105, l. 20). That was the only work that was necessary (p. 105, ll. 20 to 30). Prior to that time some work was done in December, 1923, on the stairs. No work was done on the stairway or any of the steps from the time of the accident on May 3, 1924, up to the time of the trial on June 16, 1925 (p. 106, ll. 20 to 40).

Olive Belcher, a passenger, went down the stairs on the right-hand side about twelve o'clock noon on May 3, 1924, and failed to observe anything wrong with the metal nosing on any one of the steps and saw no part of any of the metal nosing sticking up (p. 107, ll. 10 to 20).

Catherine Holden, another passenger, was just about to start up the stairs when Frances fell; she said it was five minutes after one o'clock (p. 109, ll. 10 to 30). She saw her fall but failed to see any projection on the steps or anything sticking up on the steps.

The law is well settled that a railroad company is under a duty to exercise only ordinary or reasonable care to so construct and maintain station buildings, platforms, stairways and approaches that they be reasonably safe for the use of passengers.

Holtzman v. Hudson & M. R. Co., 128 Atl. (N. J. S.) 623;

Feil v. W. J. & S. R. R. Co., 77 N. J. L. 501;

Mason v. Erie R. R. Co., 75 N. J. L. 521;
Dotson v. Erie R. R. Co., 68 N. J. L. 679.

An examination of these cases shows clearly that the duty respecting the construction and maintenance of station buildings, stairways and approaches is not so rigorous as that imposed upon railroad carriers in relation to roadbeds, tracks, cars and the like.

Where the duty owing is to exercise only ordinary or reasonable care and there is a defect such as that complained of in this case, namely, the sticking up of a portion of the metal nosing on one of the steps of the stairway, the burden is on the plaintiff to prove that the defect which she says caused her to trip and fall had (a) in fact been brought to the notice of the defendant before the accident, or (b) had existed for such a length of time as to charge the defendant with notice thereof, and give it a reasonable opportunity to repair the defect. In the absence of proof of either, the legal presumption is that defendant had used reasonable care.

Maphet v. H. & M. R. R. Co., 98 N. J. L. 369, affirmed on opinion below, 124 Atl. 925;

Rom v. Huber, 93 N. J. L. 360;

Garland v. Furst Store, 93 N. J. L. 128;

Conover v. D., L. & W. R. R. Co., 92 N. J. L. 602;

Buda v. Dzuretzko, 87 N. J. L. 34;

Schnatterer v. Bamberger, 81 N. J. L. 558;

Cass v. Sanger, 77 N. J. L. 412;

Fitch v. Central R. R. Co., 74 N. J. L. 135;

Proud v. P. & R. R. R. Co., 64 N. J. L. 702.

The doctrine of *res ipsa loquitur* does not apply.

Garland v. The Furst Store, 93 N. J. L. 126, *supra*;

Conover v. D. L. & W. R. R. Co., 92 N. J. L. 602, *supra*.

In the latter case, the undisputed facts were that the plaintiff was a passenger on the defendant's coach. When the train arrived at the station, the plaintiff left her seat for the purpose of alighting. There were several male passengers who preceded her to the door and who walked on to the platform and alighted from the car. The plaintiff then proceeds to describe how she met with her injury. She says: "I went just the natural way from my seat to the platform. There was something on the platform of the car that caught my heel. It was torn off and I was thrown so violently forward, and I put out my left hand to catch the rail or recover my balance. In doing so, both feet slipped from under me and I struck my thigh from the steps of the car." The heel was torn off her shoe and the only part left of the heel was the leather to which the heel had been attached. She said that something stuck up on the platform that caught her heel. She did not see what it was, but felt something hold her heel and throw her forward. The defendant's witnesses testified they examined the platform immediately after the accident and there was no foreign substance or anything slippery on the platform, and that there were no obstacles, slips or holes on or in the platform or steps. At p. 605, this court held:

"Ascribing to the testimony and circumstances of the present case their widest range and import, they fail to give rise to any reasonable and permissible inference that the plaintiff's injury was due to a defective platform or to something placed thereon by the defendant's servant or by a stranger, and if by a stranger that the obstruction, or whatever it was, was there long enough to have been discovered by the de-

defendant's servant in the exercise of reasonable care.

"The plaintiff says that there was something on the platform that caught her heel. According to her story it was not due to any defect in the platform, for she says, 'I know something stuck up, was there that caught my heel.' She further testified that she had no idea what it was but that she felt something catch her heel.

"An undisputed fact in the case was that an examination of the platform immediately after the accident disclosed no structural defects, and no obstruction on or anything sticking up from the platform, which was the ordinary one, in general use on railroad coaches. Moreover, the statement of the plaintiff that there was something sticking up from the platform which caught her heel is based upon pure conjecture and clearly of no probative force. Without any proof that the 'something that stuck up' was visible to the ordinary prudent person and was a part of the platform and in the exercise of ordinary care could have been discovered by defendant company, or was an object placed there by defendant's servants, or if placed there by a passenger had been there long enough for the servants of the company to discover in the exercise of ordinary care, there were no facts from which negligence of the company could be reasonably inferred."

In *Buda v. Dzwretzko*, 87 N. J. L. 34, *supra*, the evidence showed that the plaintiff, while descending one of the stairways in an apartment house, fell and sustained personal injuries. His heel caught in a tin covering (originally attached to the wooden step to prevent its wear) which was loose, causing him to trip and fall downstairs. The Supreme Court held that the evidence was not sufficient to justify a finding that the landlord had been guilty of any want of reasonable care because there was no evidence

tending to show that the defect causing the fall either (1) had been in fact brought to the previous notice of the landlord, or (2) had existed for such a space of time before the accident as would have afforded a sufficient opportunity to make proper inspection of the stairway and to repair its defects. Judgment in favor of the plaintiff was reversed.

In *Schnatterer v. Bamberger & Co.*, 81 N. J. L. 558, *supra*, the plaintiff in going down the stairway leading to the basement of the defendant's department store caught her heel in the brass nosing (originally attached to the edge of the wooden step to prevent its wear) which was loose, causing her to trip and fall downstairs. The trial court held that the plaintiff could not recover, and was unanimously affirmed by this Court. At page 560, held:

“When the plaintiff rested her case it had not appeared that the defendant company had been guilty of any want of reasonable care in the keeping of its store safe for her use, for the reason that she had failed to show that the defective condition of the brass edging which she said existed on the night of the accident of April 24th had either (a) been in fact brought to the previous notice of the defendant, or, failing in proof of such actual notice, that (b) the defect had existed for such space of time before that occurrence as would have afforded the company sufficient opportunity to make proper inspection of its stairways to ascertain their condition as to safety, and to repair their defects. In the absence of proof of either, the legal presumption is that the defendant had used reasonable care.”

In *Fitch v. Central Railroad Co.*, 74 N. J. L. 135, *supra*, the plaintiff slipped on an icy platform at a railroad station while going to a train. The accident happened at 8:23 A. M. The plat-

form had been cleaned and sanded between 7:00 and 8:00 A. M. It was held by the Supreme Court that the trial court erred in refusing to direct verdict for the defendant.

In *Proud v. P. & R. R. Co.*, 64 N. J. L. 702, the passenger in attempting to alight from a car slipped on some vomit with which the car steps were covered. Judgment for plaintiff was reversed, this Court holding that the defendant's duty was satisfied when it inspected its cars at regular intervals and that the defendant was not negligent in the absence of a showing that the condition of the steps had been brought to its notice or had existed a sufficient length of time to remedy the defect.

These cases all demonstrate that the plaintiff in the case at bar failed to prove negligence, for it did not appear that the defendant had been guilty of any want of ordinary or reasonable care in the keeping of its stairway safe for her use, for the reason that she failed to show that the defective condition of the copper nosing (originally attached to the step to prevent its wear) which we can assume for the present was loose or torn, had either (a) been in fact brought to the previous notice, or failing in proof of such actual notice, that (b) the defect had existed for such space of time before the occurrence as would have afforded the defendant sufficient opportunity to make proper inspection of its stairways to ascertain their condition as to safety and to repair their defects.

Furthermore, the testimony is demonstrative that the defendant had exercised reasonable care to inspect and clean the steps. As stated in *Schnatterer v. Bamberger & Co.*, *supra*, at page 561, "It need hardly be added that the company

was not an insurer of the safety of its passengers against accidents happening to them while walking or running up and down its stairways. Its duty to the plaintiff was satisfied when it used *reasonable care* to maintain them in a condition safe for her proper use."

It appears without dispute that the stairs were cleaned and inspected three times during an eight-hour day by the porter at the station; first, when he came on duty at 7:00 A. M.; second inspection and cleaning was at 12:00 noon; the third cleaning and inspection was in the afternoon before he quit, at 4:00 P. M. The porter was on duty on the day of the accident from 7:00 A. M. to 4:00 P. M. (p. 90, l. 30, *et seq.*).

The station agent at the head of the stairs and the ticket taker at the foot of the stairs, both testified to inspections made of the stairway and the particular step upon which the plaintiff claims she fell immediately after the accident and they could find no defect of any kind; the copper plates were all intact and not torn or worn or the part of any one sticking up. The platform man at the station and the elevator foreman both of whom had to pass over the stairs repeatedly on the day of the accident, the train platform being at the one end of the stairs and the elevators at the other, both positively testified that there was no defect in the stairway or any step thereof, including the third step from the bottom where the plaintiff fell. Moran, the head foreman of repairs, appeared at the stairway within an hour after the accident and not only testified that there was no defect in the steps, including the third step from the bottom but also that no repairs were made to that step or the metal nosing or to any step from the date of

the accident on May 3, 1924, up to the date of the trial, on June 16, 1925, more than thirteen months later. In addition two passengers, one on the stairway at the time that the accident happened shortly after 1 P. M. and the other at 12 noon on the day of the accident both said that there was no defect in the step or the metal nosing thereon so far as they could observe. Even the girl friend of the plaintiff did not testify to any defect, although called as a witness by the plaintiff (p. 58). This, notwithstanding that her attention was called particularly to the third step from the bottom of the flight (p. 60, ll. 1 to 10). Her sister Anna who was at the top of the stairs and who did not see her descend the stairs because she was getting change, said she saw Frances in the act of falling from the steps and Frances told her that her foot had caught on something and when she went back to the stairs, she said that she saw a broken piece of metal on the third step from the bottom sticking up one inch (p. 53, ll. 1 to 10).

Finally, it appears, that the life of these metal nosing is at least ten years; the first set of steps having been on the stairs from 1909 to March, 1920 (p. 100), when all of the metal nosings were renewed (p. 102) and that on March 27, 1924, all of the steps had been gone over for a period of four hours at which time they were all tightened up; the accident happened on May 3, 1924, only a month and six days later and from the day of the accident—from March 27, 1924, up until the time of the trial, on June 16, 1925, over thirteen months later, no repairs were made or were necessary. Surely, the defendant had exercised reasonable care when it provided inspection three times a day by a porter, several times a day by the station agent and ticket taker as

well as constant supervision and maintenance. In any event, there is no evidence that the defendant failed to exercise reasonable care, and the mere fact that the plaintiff's sister Anna testified that a part of the metal nosing on the third step from the bottom was sticking up one inch, is not enough to charge the defendant with negligence, that is the failure to exercise ordinary or reasonable care for the safety of its passengers.

Furthermore, it is quite apparent that the plaintiff fell because of the weakened condition of both of her limbs, by reason of the disease which she suffered from for a period of six or eight years, namely osteomyelitis. This disease, which is really a rotting of the bone causing continual drainage involved the right hip and the left leg and had compelled the plaintiff to go to the hospital for repeated operations, she having only left the hospital on April 15, 1924, a few days before the accident (p. 35, l. 30 *et seq.*; p. 24 *et seq.*) The day of the accident was the first day she had left her home.

We therefore respectfully submit that the trial court should have directed a verdict in favor of the defendant.

(b)

The third ground urged in support of the motion was that the plaintiff was guilty of contributory negligence as a matter of law. If we are to take the testimony of the plaintiff's sister Anna as evidence that the defendant was negligent, it follows that the condition complained of was equally obvious to the plaintiff. Anna testified that while standing at the cash booth at the head of the stairs she could see a portion of the

metal nosing on the third step from the bottom projecting and sticking up about one inch, and that she actually saw it catch her sister's heel (p. 56, l. 20 to p. 57, l. 30). There was plenty of light and she had no difficulty in seeing the step or the projection of part of the metal nosing (p. 57, ll. 30 to 35). There were sixteen steps in the two stairways with a landing in between (p. 100). The plaintiff was sixteen years of age at the time of the trial (p. 21, l. 10).

In *Kingsley v. D. L. & W. R. R. Co.*, 81 N. J. L. 536, at p. 541, this Court said with respect to the space between the side of a coach and the side of a station platform:

“It may be said in passing that if this space presented a condition of danger which was obvious to the defendant to a degree requiring the exercise of care in its use and to superinduce a duty of care and foresight, it was equally obvious to the plaintiff and under such circumstances, it has been held by this court that exists for common use for foot passengers are places of obvious danger and that passing over them suggests and requires a prudent watchfulness by the user against the danger attendant upon their use. *Hoboken Ferry Co. v. Feiszt*, 29 Vroom 198.”

We respectfully submit that the trial court should have directed a verdict for the defendant because there was no evidence of negligence.

II.

The trial court erred in instructing the jury that the plaintiff “was entitled to have the stairway in good condition for her to be carried on it.”

As shown in Point I, the defendant was not an insurer of plaintiff's safety. A railroad is under a duty to exercise only ordinary or rea-

sonable care to so construct and maintain station buildings, platforms, stairways and approaches that they be reasonably safe for the use of passengers.

This accident happened on a stairway leading from the change booth to the ticket taker's box, which was some distance from the platform where trains passed to and from Exchange Place Station. The only instruction given by the trial judge to the jury on the question of degree of care owing by the defendant to the plaintiff was as follows (p. 112, ll. 1 to 5):

“The girl was a passenger and was entitled to have that stairway in good condition for her to be carried on it.”

Exception was duly noted to this portion of the judge's charge (p. 113, ll. 35 to 40), and error is assigned thereon (p. 3, ll. 20 to 30). The trial court in effect told the jury that the defendant was an insurer of the plaintiff's safety and left out of consideration entirely, the fact that its duty was only to exercise ordinary or reasonable care. His instruction was that the plaintiff was entitled to have the stairway in good condition, not that the defendant was under duty to exercise only ordinary or reasonable care to so construct and maintain the stairway that it shall be reasonably safe for the use of passengers.

Holtzman v. Hudson & Manhattan R. R. Co., 128 Atl. 623, 624;

Feil v. W. J. & S. R. R. Co., 77 N. J. L. 501;

Mason v. Erie R. R. Co., 75 N. J. L. 521;

Dotson v. Erie R. R. Co., 68 N. J. L. 679.

The instruction is also erroneous because it incorrectly stated the duty of the defendant was to provide the plaintiff with a stairway in good

condition, whereby the jury was permitted to determine whether reasonable care had been exercised by the defendant, not from the qualities of its conduct in that respect, but solely by the jury's opinion as to the results of that conduct.

In *Mason v. Erie Railroad Co.*, 75 N. J. L. 521, 523, this Court held that a similar instruction was reversible error. At page 523, the Court said:

“The instruction exhibited by the first of the foregoing exceptions was erroneous in that it incorrectly stated that the duty of the plaintiff-in-error was to provide a reasonably safe place for its passengers to alight from its trains, whereby the jury was permitted to determine whether reasonable care had been exercised by the plaintiff-in-error, not from the qualities of its conduct in that respect, but solely by the jury's opinion as to the results of that conduct. The duty of the railroad company was, it is perhaps needless to say, merely to exercise reasonable care to provide a safe place for its passengers to alight. *Dotson v. Erie Railroad Co.*, 39 Vroom 679.

“‘This distinction is fundamental,’ as was said in the opinion of this Court in *Foley v. Brunswick Traction Co.*, 37 Vroom 637, ‘since it marks the difference between a carrier's liability for negligence and its guaranty of safe carriage. The former inheres in the implied duty owed by the defendant to the plaintiff. The latter does not so arise, and was not within the undertaking of the defendant.’ In the same opinion, this further language is used touching an instruction that is not distinguishable in principle from the one now before us: ‘This instruction was, we think, erroneous. Its error lay in this, viz., that it gauged the liability of the defendant not by the quality of its conduct, but by the results of that conduct, thereby covering indiscriminately injuries resulting to the plaintiff from causes pre-

ventable by the exercise of due care on the part of the defendant, and injuries that might have happened notwithstanding the exercise by the defendant of the degree of care legally imposed upon it as a carrier of passengers. * * * The gravamen of the plaintiff's action was the failure of defendant to use reasonable care for her safety as a passenger, hence the correct instruction would have been that the defendant was liable for the plaintiff's injuries if it failed to take reasonable precautions to see that the place provided by it for her discharge was a safe one for that purpose. * * * It was the defendant's right to have that question submitted to the jury. The question that was submitted to the jury did not give the defendant its right in this respect, for while the occurrence of the accident demonstrated the unsafe character of the place at which the plaintiff was invited to alight, it could not lawfully be permitted to establish also the negligence of the defendant, which upon this writ of error was the effect given to it by the verdict.' Upon the authority, therefore, of the case cited, and of the reasoning on which it rests, the charge in the respect indicated was reversible error."

That a common carrier is under a high degree of care as to its means and modes of conveyance is settled without question. (See cases cited in *Holtzman v. H. & M. R. R. Co.*, 128 Atl. 623, *supra*.) That a railroad company is under a duty to exercise only ordinary or reasonable care to construct and maintain station, depots and appertenances that they shall be reasonably safe for the use of passengers appears likewise to be well settled. (See cases cited *supra*.) In the case at bar, the trial court imposed an absolute duty on the defendant to have the stairway safe for the plaintiff and if it was not safe, then

the defendant was liable. That instruction was clearly erroneous. That such an instruction is prejudicial and justifies reversal was held in *Van Blarcom, Admr., v. C. R. R. Co. of N. J.*, 73 N. J. L. 540, reversing 72 N. J. L. 33; also *Holtzman v. H. & M. R. R. Co.*, 128 Atl. 623, *supra*.

III.

The general verdict of the jury and the judgment based thereon, is illegal, null and void because it is for a single sum as damages and cannot be applied or apportioned to either claim presented in the complaint.

The complaint in the case at bar contains two causes of action, one by the plaintiff, Adele Pabst, as next friend for her infant daughter, Frances Pabst, who was fifteen years of age (p. 26). The complaint alleges that Adele Pabst is the mother of Frances Pabst, and by reason of the injuries sustained by the daughter, the mother has been compelled to spend money for medical attendance in endeavoring to obtain a cure for her daughter and the mother has been deprived of the services of her daughter. The mother demands \$2,000 for her individual claim (p. 7). The claim of the infant, Frances Pabst, as set forth in the complaint, is to recover \$20,000 damages for personal injuries suffered in and about her body, her right ankle and left leg and severe nervous shock (p. 7, ll. 15 to 20).

The jury brought in a single verdict for a single sum as damages, viz., \$5,000, without apportioning it to either the mother or the daughter (pp. 13 and 17).

That such a verdict is null and void has been settled by *Spencer v. Haines*, 73 N. J. L. 325, and

O'Carroll v. Stark, 85 N. J. L. 438. Those cases also hold that a writ of error (now an appeal) after judgment is one of the proper ways in which this imperfect verdict can be declared null and void and a *venire de novo* obtained.

In *Spencer v. Haines*, 73 N. J. L. 325, *supra*, the Supreme Court held:

“From the *postea* it appears that the action was brought to recover damages arising from an injury to one Lizzie Spencer, a married woman, which injury was caused by a machine in the laundry of the defendant. The counsel for the plaintiff, taking advantage of the provisions of section 21 of the Practice Act (Pamph. L. 1903, p. 540), added to the claim of the wife, in which the husband joined, a claim of the husband for loss of services by his wife resulting from her injury. The jury returned as damages by reason of the injuries sustained by the said Lizzie Spencer a verdict of \$500.

“It is perceived that there was no assessment of damages for the claim of the husband and wife, and then a distinct assessment for the claim of the husband alone. There is no basis by which the sum assessed can be appropriated to one or the other of these claims, nor is there any standard presented by the *postea* by which the sum found can be apportioned between the two claims. It is at once apparent that it is impossible to enter a legal judgment upon this verdict under the pleadings. The only course to be taken to rectify the situation is to have a new trial.

“The object of the plaintiff is to obtain this object by the issuance of a *venire de novo*. He could have accomplished this after a judgment entered in the language of the verdict by a writ of error. The appellate court, after the reversal of the judgment entered upon this imperfect verdict, could have directed a *venire de novo*. 2 Tidd 933; *Hooper v. Shepherd*, 2 Str. 1089; *Grant v.*

Astle, Doug. 722; *Miller v. Trets*, 1 Ld. Raym. 324; *Grah & W. New Tr.* 36.”

In *O'Carroll v. Stark*, 85 N. J. L. 438, *supra*, the action was by husband and wife for injuries to the wife, due to an assault and battery by the defendant; the wife claimed \$300 damages and the husband \$200. The Supreme Court (p. 439) held:

“The defendants were entitled to a judgment which should finally settle the claims of both plaintiffs, and bind all parties, so that no suit could thereafter be brought upon this same cause of action. The present judgment would not avail for that purpose, since it is impossible to tell from its terms whether it is based on the count in favor of the wife claiming \$300 or the count in favor of the husband claiming \$200. Perhaps, in view of the court's findings, the judgment might have been amended to one in favor of the wife for \$200 and one in favor of the defendant against the husband. But if that amendment had been made, the husband would have had the right to appeal, and his appeal ought to have been successful, in view of the evidence, at least against the male defendant. The case is within the reason of *Spencer v. Haines*, 44 Vroom 325. There must be a reversal and a new trial.”

This error is a plain error appearing on the face of the record or an error manifest in the record and may be taken advantage of on appeal, even though there was and could be no exception.

Goekel v. Erie R. R. Co., 126 Atl. (N. J. E. & A.) 446, 449;

Loper v. Somers, 71 N. J. L. 657;

Rollins v. Atlantic City R. R. Co., 70 N. J. L. 664, 667.

In the case last cited this Court on page 667 held:

“We are of opinion that the plaintiffs did not produce sufficient evidence of their right, and therefore that no error warranting reversal is disclosed by the bill of exceptions.

“But there is manifest error in the record of the judgment. It is there averred that the plaintiffs were non-suited because, when the jury had agreed upon their verdict and returned to the bar of the court to deliver it, the plaintiffs, being solemnly called, came not. For such a cause judgment of non-suit was warranted at common law. *Bauman v. Whitley*, 28 Vroom 487. But the practice in this respect was changed in 1862 by rule of the Supreme Court (Nix. Dig. 1868, p. 1087, 81), which regulation is now embraced in section 160 of the Practice Act of 1903.

“For this error the judgment should be reversed.”

The Supreme Court in passing upon this ground of appeal said that the judgment was only in favor of the daughter and that therefore the defendant was not harmed. That conclusion is based on an erroneous premise for the record clearly shows that the judgment covered the claim of the mother as well as that of the daughter (p. 17). The trial judge submitted both claims to the jury (p. 111, ll. 20-30). While it is true that there was only one plaintiff, she presented the claims of herself and her daughter as next friend of the daughter. Although this may have been somewhat irregular in form, it was due primarily to the manner in which the complaint was drawn, for the complaint recited only one plaintiff, namely, the mother, as suing individually and as next friend (pp. 6 and 7). The complaint contains only one count which covers both claims and damages were asked by the plaintiff to cover each claim (p. 7, l. 30).

Under the circumstances, we think both claims should be regarded as having been adjudicated.

IV.

For these reasons we respectfully submit that the judgment of the Supreme Court should be affirmed.

October term, 1926.

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