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Summons.

(Filed November 4, 1927.)

THE STATE OF NEW JERSEY TO COPESTONE TEMPLE ASSOCIATION, a corporation of New Jersey, and PAUL NOLDEN:

YOU ARE SUMMONED to answer the annexed complaint of Frances A. Handlon and Thomas Handlon in an action at law in the Hudson County Circuit Court. And take notice that unless you file your answer to said complaint with the Clerk of the Hudson County Circuit Court at Jersey City within twenty days after service upon you of this writ, and the annexed complaint, the plaintiff may proceed in the suit and judgment may be entered against you.

[SEAL]

WITNESS Frank L. Cleary, Judge of the said Court at Jersey City, this 3rd day of October, Nineteen hundred and twenty-seven.

JOHN J. McGOVERN,
Clerk.

WOLBER AND GILHOOLEY,
Attorneys.

Complaint.

(Filed November 4, 1927.)

HUDSON COUNTY CIRCUIT COURT,

HUDSON COUNTY.

FRANCES A. HANDLON and THOMAS HANDLON,
Plaintiffs,

v.

COPESTONE TEMPLE ASSOCIATION, a corporation of New Jersey, and PAUL NOLDEN,
Defendants.

Action at Law.

Plaintiffs, Frances A. Handlon and Thomas Handlon, who are residing at 199 Kearny Avenue in the Town of Kearny, in the County of Hudson and State of New Jersey, say that:

FIRST COUNT.

1. Defendant Copestone Temple Association is a corporation duly organized and existing under the laws of the State of New Jersey and was such on October 29th, 1926. Said Corporation on said date was the owner of the brick building and lot known as #223 Kearny Avenue in the Town of Kearny, County of Hudson and State of New Jersey. Prior to said date said defendant leased the store located at the southerly end of said building to the defendant Paul Nolden who is now and was on October 29th, 1926, in possession of said store.

2. The said defendant Paul Nolden does and

did on October 29th, 1926, conduct in the store in question a shop more particularly known and designated as a delicatessen store for the sale of delicacies to the public at a profit.

3. In the street in front of said store of said building forming a part thereof and level therewith there was on October 29th, 1926, an opening about five foot long and about four and one-half feet wide leading into the cellar of said building, which opening was covered by a pair of metal doors to prevent pedestrians and the customers of said delicatessen store from falling therein when passing over the same along said street and on entering or departing from the store in question.

4. Said opening was used and maintained by the defendants Copestone Temple Association, its servants and agents and Paul Nolden as an entrance to and as an exit from the cellar of said building aforesaid.

5. On October 29th, 1926, the said defendants Copestone Temple Association, a corporation, its servants and agents and Paul Nolden carelessly and negligently permitted and allowed said pair of metal doors and/or one of them to become worn, slippery and out of repair and further the said Paul Nolden had raised and opened said collar doors and had permitted them to remain open and the said opening leading into the cellar of said building to be unguarded so that when the plaintiff Frances A. Handlon came out of the delicatessen shop of the defendant Paul Nolden upon the premises in question and into which shop she had entered for the purpose of making a purchase and had made a purchase, she by reason of the said negligence of the defendants Copestone Tem-

ple Association, a corporation, its servants and agents and Paul Nolden was precipitated down the said opening hereinbefore referred to into the cellar with great force and violence.

6. As a result thereof plaintiff Frances A. Handlon suffered contusions and lacerations about her whole body and head, internal hemorrhages and more particularly a bruise and cut upon her right leg, which leg by reason thereof has become stiff and its movement has become permanently impaired. Said leg by reason of the lacerations and contusions has been rendered unsightly thereby hampering her and preventing her from displaying same in public. And also as a result thereof the plaintiff Frances A. Handlon was greatly shocked and rendered very nervous and thereafter and up to the time of bringing this suit the plaintiff Frances A. Handlon has undergone and is undergoing great pain and suffering and will in the future, suffer great pain from said injuries and condition resulting from said fall. Said injuries and condition are permanent and said plaintiff's right leg will always be stiff and scarred and unsightly.

Plaintiff Frances A. Handlon demands $15,000 as damages.

SECOND COUNT.

1. Plaintiff Thomas Handlon is the husband of the plaintiff Frances A. Handlon.

2. Plaintiff Thomas Handlon repeats paragraphs 1, 2, 3, 4, 5 and 6 of the first count of the complaint.

3. By reason of the injuries plaintiff Thomas Handlon was deprived of his said wife's services

during the term of her said illness and still is deprived to a great extent of his said wife's services and also was obliged to expend large sums of money for medicines, nurses and medical attention and housekeeping bills, and because of the permanent character of said injuries and condition he will be obliged to continue for a long time to give payment for medicines, nurses, medical and household attention, and further the clothing worn by the plaintiff Frances A. Handlon at the time of the accident was totally ruined.

Plaintiff Thomas Handlon demands as damages $5,000.00.

WOLBER AND GILHOOLEY,
Attorneys for Plaintiffs.

I hereby deputize Othel Baxter to serve the within Writ. Witness my hand and Seal this 4 day of Oct., 1927.

JOHN J. COPPINGER, Sheriff,
By THOMAS J. PRIOR, Under Sheriff.

Served within Summons and Complaint Oct. 6/27, personally on the defendant Paul Nolden, at 223 Kearny Avenue, Kearny, on the defendant Copestone Temple Association (A Corporation) by delivering a True Copy thereof to Burton E. Canfield, Agent of the said defendant Association.

JOHN J. COPPINGER, Sheriff,
By OTHEL BAXTER, S. D. S.

Filed Clerk's Office
November 4, 1927,
Hudson County, N. J.

JOHN J. McGOVERN,
Clerk.

Answer of the Defendant Copestone Temple Association.

(Filed October 21, 1927.)

HUDSON COUNTY CIRCUIT COURT.

FRANCES A. HANDLON and THOMAS HANDLON, *Plaintiffs,* *v.* COPESTONE TEMPLE ASSOCIATION, a corporation of the State of New Jersey, and PAUL NOLDEN, *Defendants.*	Action at Law.

The defendant, Copestone Temple Association, a corporation of the State of New Jersey, having its principal place of business in the Town of Kearny, County of Hudson and State of New Jersey, answering the complaint says:

FIRST COUNT.

1. It admits paragraph one.

2. It admits paragraph two.

3. It denies paragraphs three, four, five and six.

SECOND COUNT.

1. It has no information sufficient to form a belief as to paragraph one and leaves the plaintiff to proof thereof.

2. It repeats the answers to the allegations made in paragraphs one, two, three, four, five and

six of the first count and makes them a part hereof as if stated at length.

3. It denies paragraph three.

FIRST SEPARATE DEFENSE.

This defendant says that at the time of the accident alleged in the complaint, the defendant, Paul Nolden, had the sole and exclusive use of the cellar door alleged in the complaint and this defendant retained no right over same.

SECOND SEPARATE DEFENSE.

This defendant says that any injuries occasioned to the plaintiffs were the direct result of the negligence of some person other than this defendant, if there was any.

THIRD SEPARATE DEFENSE.

This defendant says that any injuries occasioned to the plaintiffs were the direct result of the contributory negligence of the plaintiffs.

ROBERT CAREY,
Attorney for Defendant,
Copestone Temple Association.

Filed Clerk's Office
Oct. 21, 1927,
Hudson County, N. J.

JOHN J. McGOVERN,
Clerk.

Reply.

(Filed November 4, 1927.)

HUDSON COUNTY CIRCUIT COURT.

FRANCES A. HANDLON and THOMAS HANDLON, *Plaintiffs,* *v.* COPESTONE TEMPLE ASSOCIATION, a corporation of New Jersey, and PAUL NOLDEN, *Defendants.*	Action at Law.

The plaintiffs, Frances A. Handlon and Thomas Handlon, replying to the answer filed herein by the defendant, Copestone Temple Association, a corporation of New Jersey, say that:

1. They deny the allegations set forth in the First Separate Defense thereof.

2. They deny the allegations contained in the Second Separate Defense except that they admit and declare that the injuries suffered by the plaintiffs were the result of the negligence of the defendants.

3. They deny the allegations contained in the Third Separate Defense thereof.

WOLBER AND GILHOOLY,
Attorneys for Plaintiffs.

Filed Clerk's Office
Nov. 4, 1927,
Hudson County, N. J.

JOHN J. MCGOVERN,
Clerk.

Summons.

(Filed November 4, 1927.)

THE STATE OF NEW JERSEY TO COPESTONE TEMPLE ASSOCIATION, a corporation of New Jersey, and PAUL NOLDEN:

YOU ARE SUMMONED to answer the annexed complaint of Frances A. Handlon and Thomas Handlon in an action at law in the Hudson County Circuit Court. And take notice that unless you file your answer to said complaint with the Clerk of the Hudson County Circuit Court, at Jersey City within twenty days after service upon you of this writ, and the annexed complaint, the plaintiff may proceed in the suit and judgment may be entered against you.

[SEAL]

WITNESS Frank L. Cleary, Judge of the said Court at Jersey City, this 27th day of October, Nineteen hundred and twenty-seven.

JOHN J. McGOVERN,
Clerk.

WOLBER AND GILHOOLEY,
Attorneys.

Complaint.

(Filed November 4, 1927.)

HUDSON COUNTY CIRCUIT COURT,

HUDSON COUNTY.

FRANCES A. HANDLON and THOMAS HANDLON,
Plaintiffs,

v.

COPESTONE TEMPLE ASSOCIATION, a corporation of New Jersey, and PAUL NOLDEN,
Defendants.

Action at Law.

Plaintiffs, Frances A. Handlon and Thomas Handlon, who are residing at 199 Kearny Avenue in the Town of Kearny, in the County of Hudson and State of New Jersey, say that:

FIRST COUNT.

1. Defendant Copestone Temple Association is a corporation duly organized and existing under the laws of the State of New Jersey and was such on October 29th, 1926. Said corporation on said date was the owner of the brick building and lot known as #223 Kearny Avenue in the Town of Kearny, County of Hudson and State of New Jersey. Prior to said date said defendant leased the store located at the southerly end of said building to the defendant Paul Nolden who is now and was on October 29th, 1926, in possession of said store.

2. The said defendant Paul Nolden does and

did on October 29th, 1926, conduct in the store in question a shop more particularly known and designated as a delicatessen store for the sale of delicacies to the public at a profit.

3. In the street in front of said store of said building forming a part thereof and level therewith there was on October 29th, 1926, an opening about five foot long and about four and one-half feet wide leading into the cellar of said building, which opening was covered by a pair of metal doors to prevent pedestrians and the customers of said delicatessen store from falling therein when passing over the same along said street and on entering or departing from the store in question.

4. Said opening was used and maintained by the defendants Copestone Temple Association, its servants and agents and Paul Nolden as an entrance to and as an exit from the cellar of said building aforesaid.

5. On October 29th, 1926, the said defendants Copestone Temple Association, a corporation, its servants and agents and Paul Nolden carelessly and negligently permitted and allowed said pair of metal doors and/or one of them to become worn, slippery and out of repair and further the said Paul Nolden had raised and opened said cellar doors and had permitted them to remain open and the said opening leading into the cellar of said building to be unguarded so that when the plaintiff Frances A. Handlon came out of the delicatessen shop of the defendant Paul Nolden upon the premises in question and into which shop she had entered for the purpose of making a purchase and had made a purchase, she by reason of the said negligence of the defendants Copestone Tem-

ple Association, a corporation, its servants and agents and Paul Nolden was precipitated down the said opening hereinbefore referred to into the cellar with great force and violence.

6. As a result thereof plaintiff Frances A. Handlon suffered contusions and lacerations about her whole body and head, internal hemorrhages and more particularly a bruise and cut upon her right leg, which leg by reason thereof has become stiff and its movement has become permanently impaired. Said leg by reason of the lacerations and contusions has been rendered unsightly thereby hampering her and preventing her from displaying same in public. And also as a result thereof the plaintiff Frances A. Handlon was greatly shocked and rendered very nervous and thereafter and up to the time of bringing this suit the plaintiff Frances A. Handlon has undergone and is undergoing great pain and suffering and will in the future, suffer great pain from said injuries and condition resulting from said fall. Said injuries and condition are permanent and said plaintiff's right leg will always be stiff and scarred and unsightly.

Plaintiff Frances A. Handlon demands $15,000 as damages.

SECOND COUNT.

1. Plaintiff Thomas Handlon is the husband of the plaintiff Frances A. Handlon.

2. Plaintiff Thomas Handlon repeats paragraphs 1, 2, 3, 4, 5 and 6 of the first count of the complaint.

3. By reason of the said injuries plaintiff Thomas Handlon was deprived of his said wife's

services during the term of her said illness and still is deprived to a great extent of his said wife's services and also was obliged to expend large sums of money for medicines, nurses and medical attention and housekeeping bills, and because of the permanent character of said injuries and condition he will be obliged to continue for a long time to give payment for medicines, nurses, medical and household attention, and further the clothing worn by the plaintiff Frances A. Handlon at the time of the accident was totally ruined.

Plaintiff Thomas Handlon demands as damages $5,000.00.

WOLBER AND GILHOOLEY,
Attorneys for Plaintiffs.

Due and legal service of the within summons and complaint as and for the defendant Paul Nolden is hereby acknowledged this 31st day of October, A. D. 1927.

BENJAMIN WEINBERGER,
Attorney for Paul Nolden.

Due and legal service of the within summons and complaint as and for the defendant Copestone Temple Association, a corporation of New Jersey, is hereby acknowledged this 2nd day of Nov., A. D. 1927.

ROBERT CAREY,
Attorney for Copestone Temple Association.

Filed Clerk's Office
Nov. 4, 1927,
Hudson County, N. J.

JOHN J. MCGOVERN,
Clerk.

Stipulation.

(Filed November 4, 1927.)

HUDSON COUNTY CIRCUIT COURT,

HUDSON COUNTY.

FRANCES A. HANDLON and THOMAS HANDLON,
Plaintiffs,

v.

COPESTONE TEMPLE ASSOCIATION, a corporation of New Jersey, and PAUL NOLDEN,
Defendants.

Action at Law.

To

ROBERT CAREY, Esquire,
75 Montgomery Street,
Jersey City, New Jersey.

It is hereby stipulated by and between Robert Carey, as attorney for Copestone Temple Association, a corporation of the State of New Jersey, and Wolber and Gilhooly, attorneys for the plaintiffs Frances A. Handlon and Thomas Handlon, that the answer heretofore filed by the said defendant Copestone Temple Association to the complaint issued in this matter out of the Hudson County Circuit Court on October 3rd, 1927, be also the answer of the said defendant to the complaint

issued out of the said Court in the same matter on October 27th, 1927.

ROBERT CAREY,
Attorney for Copestone Temple Association, a corporation of N. J.

WOLBER AND GILHOOLY,
Attorneys for Plaintiffs.

Filed Clerk's Office
Nov. 4, 1927,
Hudson County, N. J.

JOHN J. MCGOVERN,
Clerk.

Amendment to Complaint.

(Filed May 8, 1929.)

HUDSON COUNTY CIRCUIT COURT.

FRANCES A. HANDLON and THOMAS HANDLON,
Plaintiffs,

v.

COPESTONE TEMPLE ASSOCIATION, a corporation of the State of New Jersey, and PAUL NOLDEN,
Defendants.

Action at Law.

Paragraph Five of the complaint is amended to read as follows:

"5. At the time of the demise of said premises by Copestone Temple Association a corporation, aforesaid, to the said Paul

Nolden, the said pair of metal doors or one of them was worn and in disrepair, and the said Copestone Temple Association had knowledge of the defective condition of said cellar doors or should have acquired knowledge thereof by reasonable inspections, and on October 29th, 1926, the said defendants Copestone Temple Association, a corporation, its servants and agents and Paul Nolden carelessly and negligently permitted and allowed said pair of metal doors or one of them to become worn, slippery and out of repair, and further the said Paul Nolden had raised and opened said cellar doors which were of such construction that when opened the said opening leading into the cellar of said building became and remained unguarded, and as a result of the defective condition of said doors and the fact of said opening to said cellar was so unguarded the plaintiff Frances A. Handlon who came out of the delicatessen shop conducted by the said Paul Nolden and into which shop the said Frances A. Handlon had entered and had made a purchase was, by reason of the said negligence of the defendants, precipitated down the said opening hereinbefore referred to and into the cellar with great force and violence."

Paragraph Six is amended to read as follows:

"6. As a result of the said negligence of the defendant's and as a result of her fall, the said Frances A. Handlon was severally injured about the chest and the breast and as a result of the injuries and bruises to her

chest and breast the said Frances A. Handlon suffered a Scirrhus carcinoma of the left breast, muscles and nodes and her condition became so serious that it was necessary for her to be operated and her left breast removed, and in addition the said Frances A. Handlon is now suffering from a Scirrhus carcinoma of the right breast and her said injuries are permanent and her condition is now incurable. In addition to the injuries aforesaid, the said Frances A. Handlon suffered contusions and lacerations about her head and body and she had internal hemorrages. In addition thereto the said Frances A. Handlon suffered bruises and lacerations upon her right leg and as a result therefrom her leg has become stiff and sore and its movement has become permanently impaired, and the said leg by reason of the lacerations and contusions has been made unsightly. In addition to the foregoing injuries the plaintiff suffered severally from shock and was rendered extremely nervous and is still nervous, and by reason of all of the injuries aforesaid she has undergone great pain and suffering and still continues and will in the future suffer considerable pain."

The claim for damages by the said Frances A. Handlon is amended to read as follows:

"Plaintiff, Frances A. Handlon demands as damages the sum of Seventy Thousand Dollars ($70,000.00)."

WOLBER AND GILHOOLY,
Attorneys for Plaintiffs.

Rule for Final Judgment.

We hereby consent to the foregoing amendments.

CAREY & LANE,
Attorneys for Defendant, Copestone Temple Association, a corporation.

BENJAMIN WEINBERG,
Attorney for Defendant, Paul Nolden.

Filed Clerk's Office
May 8, 1929,
Hudson County, N. J.

JOHN J. McGOVERN,
Clerk.

Rule for Final Judgment.

(Filed May 8, 1929.)

HUDSON COUNTY CIRCUIT COURT.

FRANCES A. HANDLON and THOMAS HANDLON, *Plaintiffs,* *v.* COPESTONE TEMPLE ASSOCIATION, a corp., and PAUL NOLDEN, *Defendants.*	Action at Law.

This matter being tried before Judge Frank L. Cleary and a jury on May the first and second, 1929, and the jury having rendered a verdict in favor of the plaintiff Frances A. Handlon and against the defendant Copestone Temple Association for the sum of Two thousand dollars ($2,000),

and in favor of the plaintiff Thomas Handlon and against the defendant Copestone Temple Association for the sum of ($500) Five hundred dollars.

It is on this 2nd day of May, 1929, Ordered that final judgment be entered in favor of the plaintiff Frances A. Handlon and against the defendant Copestone Temple Association for the sum of Two thousand Dollars ($2,000) and in favor of the plaintiff Thomas Handlon and against the defendant Copestone Temple Association for the sum of Five hundred Dollars ($500).

On Motion of

WOLBER AND GILHOOLEY,
Attorneys for Plaintiffs.

Rule actually entered May 8, 1929.

Statement.

The jury rendered a general verdict in favor of the defendant, Paul Nolden, and against the plaintiffs. The defendant, Paul Nolden, has not entered a rule for judgment on that verdict.

Rule to Show Cause.

(Filed May 31, 1929.)

HUDSON COUNTY CIRCUIT COURT.

FRANCES A. HANDLON and THOMAS HANDLON, *Plaintiffs,* *v.* COPESTONE TEMPLE ASSOCIATION, a corporation, and PAUL NOLDEN, *Defendants.*	Action at Law.

This matter being opened to the Court on motion of Carey & Lane, attorneys for the defendant, Copestone Temple Association, and said application having been made within six days of the rendition of verdict in the above entitled cause;

It is on this 16th day of May, A. D. 1929, ORDERED that the plaintiffs show cause before this Court on the 31st day of May, A. D. 1929, at 11 o'clock in the forenoon (daylight saving time) or as soon thereafter as counsel can be heard why the verdict in favor of the plaintiffs and against the defendant, Copestone Temple Association, should not be set aside and a new trial granted;

It is further ordered that all of the exceptions allowed to the defendant at the trial of this cause be and they are hereby reserved.

FRANK L. CLEARY,
Judge.

Filed Clerk's Office
May 31, 1929,
Hudson County, N. J.

JOHN J. McGOVERN,
Clerk.

Reasons.

(Filed June 3, 1929.)

HUDSON COUNTY CIRCUIT COURT.

FRANCES A. HANDLON and THOMAS HANDLON,
Plaintiffs,

v.

COPESTONE TEMPLE ASSOCIATION, a corporation of New Jersey, and PAUL NOLDEN,
Defendants.

On Rule to Show Cause.

The defendant, Copestone Temple Association, writes down the following reasons for the reversal of the judgment entered herein and the granting of a new trial.

The verdict is clearly excessive.

CAREY & LANE,
Attorneys for Defendant,
Copestone Temple Association.

Dated May 28, 1929.

Service of the above is hereby acknowledged this 29th day of May, 1929.

WOLBER & GILHOOLY,
Attorneys for Plaintiffs.

Filed Clerk's Office
June 3, 1929,
Hudson County, N. J.

JOHN J. McGOVERN,
Clerk.

Acknowledgment of Service.

(Filed June 3, 1929.)

HUDSON COUNTY CIRCUIT COURT.

FRANCES A. HANDLON and THOMAS HANDLON, *Plaintiffs,* *v.* COPESTONE TEMPLE ASSOCIATION, a corporation of New Jersey, and PAUL NOLDEN, *Defendants.*	On Rule to Show Cause.

We, Wolber & Gilhooly, attorneys for plaintiffs, hereby acknowledge service of a copy of the transcript of the testimony taken at the trial of the above entitled cause.

WOLBER & GILHOOLY,
Attorneys for Plaintiffs.

Filed Clerk's Office
June 3, 1929,
Hudson County, N. J.

JOHN J. McGOVERN,
Clerk.

Rule Dismissing Rule to Show Cause.

(Filed June 17, 1929.)

HUDSON COUNTY CIRCUIT COURT.

FRANCES A. HANDLON and THOMAS HANDLON, *Plaintiffs,* v. COPESTONE TEMPLE ASSOCIATION, a corporation, and PAUL NOLDEN, *Defendants.*	Action at Law.

This matter being opened to the court by George Moser, Esq., attorney for the defendant, Copestone Temple Association and in the presence of Benjamin M. Weinberg, Esq., attorney for the defendant, Paul Nolden, and Edward J. Gilhooley, Esq., attorney for the plaintiffs, and it appearing to the court that heretofore and on May 16th, 1929, a rule to show cause was issued out of this court on behalf of Copestone Temple Association directing the plaintiffs to show cause why the verdict in favor of the plaintiffs and against Copestone Temple Association, a corporation, should not be set aside, and it further appearing that heretofore and on May 8th, 1929, a rule to show cause was issued out of this court on behalf of the said plaintiffs, directing the defendant Paul Nolden to show cause why the verdict in favor of said Paul Nolden should not be set aside and a new trial granted to the plaintiffs.

And the court having duly considered the evidence presented at the trial of the above entitled cause and having heard the arguments of counsel;

Rule Dismissing Rule to Show Cause.

It is thereupon on this 17th day of June, 1929, ORDERED that the aforesaid rules to show cause be and the same are, hereby dismissed with costs, and the judgment is hereby affirmed.

FRANK L. CLEARY,
Circuit Court Judge.

The foregoing order is satisfactory as to form.

BENJAMIN WEINBERGER,
Attorney for Defendant,
Paul Nolden.

CAREY & LANE,
Attorney for Defendant,
Copestone Temple Association.

Filed Clerk's Office
June 17, 1929,
Hudson County, N. J.

JOHN J. McGOVERN,
Clerk.

Notice of Appeal.

(Filed July 25, 1929.)

HUDSON COUNTY CIRCUIT COURT.

FRANCES A. HANDLON and THOMAS HANDLON,
Plaintiffs-Appellees,

v.

COPESTONE TEMPLE ASSOCIATION, a corporation,
Defendant-Appellant.

On Appeal.

To

Messrs. WOLBER & GILHOOLY,
Attorneys for Plaintiffs-Appellee.

Gentlemen:

PLEASE TAKE NOTICE that the defendant, Copestone Temple Association, a corporation of the State of New Jersey, hereby gives notice of its intention to appeal from the whole of the judgment entered in favor of the plaintiffs and against the defendant to the New Jersey Court of Errors and Appeals.

Respectfully,

CAREY & LANE,
Attorneys for Defendant-Appellant.

Dated July 18, 1929.

Service of the within notice of appeal is hereby acknowledged this 19th day of July, 1929.

WOLBER & GILHOOLY,
Attorneys for Plaintiffs.

Filed Clerk's Office
July 25, 1929,
Hudson County, N. J.

JOHN J. McGOVERN,
Clerk.

Grounds of Appeal.

NEW JERSEY COURT OF ERRORS AND APPEALS.

FRANCES A. HANDLON and THOMAS HANDLON,
Plaintiffs-Appellees,

v.

COPESTONE TEMPLE ASSOCIATION,
Defendant-Appellant.

On Appeal to the Court of Errors and Appeals.

To Messrs. WOLBER & GILHOOLY,
Attorneys for Plaintiffs-Appellees.

GENTLEMEN:

TAKE NOTICE THAT the Copestone Temple Association writes down the following grounds upon which it will rely for a reversal of the judgment heretofore entered in the Hudson County Circuit Court:

1. The Court erroneously refused to grant the motion on behalf of the Copestone Temple Association to nonsuit at the close of the plaintiffs' case.

2. The Court erroneously refused to grant the motion on behalf of the Copestone Temple Association at the close of the entire case for a direction of verdict in favor of the defendant, Copestone Temple Association.

3. Because the Court erroneously charged the jury that the defendant Nolden used the bar in the manner in which he found it.

4. Because the Court in defining the negligence

of the defendant, Copestone Temple Association, did not go far enough and did not define the relation of landlord and tenant insofar as the duty to make repairs was concerned.

5. Because the Court erroneously charged the jury as follows:

> "If you find that on the night in question one of the metal doors was in a defective condition and because of this defective condition, the doors when raised did not afford a reasonable safeguard from falling into the opening to the plaintiff walking in front of the show window and the defendants provided no other safeguards and provided she was exercising reasonable care for her safety, both of the defendants are liable to the plaintiff for the injuries which she received as the proximate result of her fall into the opening."

6. Because the Court erroneously charged the jury as follows:

> "If you find that the opening into the cellar was improperly guarded and the plaintiff was exercising reasonable care for her safety and by reason of the fact that the opening into the cellar was improperly guarded the plaintiff Frances Handlon fell into the opening, she is entitled to recover."

Respectfully,

CAREY & LANE,
Attorneys for and of Counsel with
Defendant-Appellant.

Due and legal service of a copy of the within

grounds of appeal is acknowledged this 24th day of August, 1929.

WOLBER & GILHOOLY,
Attorneys for and of Counsel with
Plaintiffs-Appellees.

Motion to Amend Complaint.

Mr. Gilhooly: At this stage, I would like to make a motion to amend the complaint. I have caused a copy of the proposed amendment to be served on the attorneys for the respective defendant, and Mr. Moser of Carey & Lane has consented to it. I don't know whether Mr. Weinberg does or not.

Mr. Moser: It was received by me yesterday. I have not had an opportunity to formally answer it. Of course, we deny the allegations set forth in the amended complaint.

The Court: Neither defendant has any objection; and if both have not had an opportunity already to do so, may enter a denial on the record.

Mr. Weinberg: I consider our answer heretofore filed will cover it.

The Court: Then the amended complaint may be filed.

Testimony.

JOHN J. BRACKEN, sworn for the plaintiffs:

Direct examination by Mr. Gilhooly:

Q. Mr. Bracken, what is your occupation? A. Civil engineer and surveyor.

Q. You have been such for how long a time? A. Twenty-six years.

Q. Are you connected in any official capacity with any municipality? A. Town of Harrison, Borough of East Newark.

Q. Did you make a survey of the premises known as 223 Kearny Avenue for the plaintiffs in this case? A. I did.

Q. When did you make such a survey? A. The date is on the map, counsellor. I think I have it here in my notes: February 3, 1928.

Q. I show you a map and ask you what that map is? A. It is a map showing the front of the Copestone Temple, and a sketch showing the stairs and areaway into the cellar below the delicatessen store and Copestone Temple, and the front of the building with the entrance.

Q. Is that a map which accurately represents the conditions which existed at the time you made the survey? A. It does, yes, sir.

Mr. Gilhooly: I would like to offer it in evidence.

(Accepted and marked as Plaintiffs' Exhibit P-1 of this date.)

Q. Mr. Bracken, referring to the map, which is Exhibit P-1, will you kindly explain to the jury the detail of the upper portion of the map? A. In the center here is the entrance to Copestone Temple. On both sides of that is the Temple. This is the delicatessen store, the street number is 223 Kearny Avenue. This is the entrance to the store, going in this way, showing where the door opens. This is the front of the building, leads out as it is shown there. On the right, here, on the outside of the building, shows the iron doors, a sketch of them closed, and one open as it would go across a distance of 1 foot 4¾ inches; it would go out

when open. Then this shows a diagram of the doors open, and shows the place going into the cellar below the delicatessen store at 223 Kearny Avenue. The blue line is the curbline. Dimensions are given on the side of the doors, as I already mentioned, the elevation of the front of the store, the curbline, and the depth of the cellar below the sidewalk as you enter for the cellar. The depth below the sidewalk is 8.10 feet, 8 feet 1¼ inches; the width of the doors is shown; the opening is 3.30, that will be 3 feet one and three-fifths inches; also the depth of the door extending out from the property line at the sidewalk on Kearny Avenue.

Q. You say that the iron cover on that areaway extends out from the building a distance of how much did you say? A. Four feet two and a half inches.

Q. Can you tell us the distance from the corner of the show window at the entrance to the store to the door, the iron door, when the iron door is open? A. The iron door open, in the broken condition it was at that time, extends directly opposite of the south side of the entrance. I have got the condition shown. The scale of that is one inch to the foot. It would be inside that doorway there perhaps an inch or two inches.

Q. Can you tell us, Mr. Bracken, whether or not any part of the areaway is in what is properly called the street? A. Yes, sir.

Q. And if so, how much of that areaway extends into the street? A. Four feet of it.

Q. And when you speak of the street, will you kindly tell the jury what is meant, what it embraces? A. Well, in that instance then, I mean the building line of the property line, that is what would be known as the west property line of

Kearny Avenue. There is your property line, along the Copestone Temple (indicating).

Q. Can you tell us whether or not, when a reference is made to the property line that it embraces not only the space between the curbs, but also the space on each side of the curb? A. Each side of the curb; the sidewalk is there (indicating) the property is from the curb in to the building line if it is built, or there may be fences. This is the street line, what we call the street in this case, you see, the westerly line of Kearny Avenue.

Q. The areaway in existence at the time of the accident, extends into the street a distance of four feet? A. It extends that much into the street.

Cross examination by Mr. Moser:

Q. By street, you mean the sidewalk? A. The sidewalk, yes, sir.

Q. What is the distance between the outer end of the door and the easterly side of the door? A. Well, tell me which door you refer to.

Q. Well, this cellar door; can you tell me the distance between that end and the easterly end of the door? Or the distance from there to the curbline? A. It is 12 feet and a little over; it would be 12 feet and a half.

Cross examination by Mr. Weinberg:

Q. As you go into the store, is the cellar entrance on the northerly or southerly side of the building? A. As you enter the store, it is on the southerly side of the building. Here is the point, counsellor—

Q. Which is Kearny Avenue according to your map? A. This is Kearny Avenue; this is the curbline of Kearny Avenue and this is the house line, the property line.

Q. You don't show the show window on Kearny Avenue frontage? A. Yes, the windows are shown. Here, the double line. The window extends over to there, where you see the line here (indicating).

Q. I suppose that is so, but they just seem to be placed in back of the building. To make it clear, as you enter the store from the avenue, Kearny Avenue, side, you find two windows, one on the right and one on the left side? A. Yes, sir.

Q. The cellar entrance goes underneath the window on the left or southerly side of building? A. Southerly side, yes, sir.

Redirect examination by Mr. Gilhooly:

Q. Do you recall what kind of materials, construction materials, are on the side of the opening? A. You mean the building here?

Q. Yes? A. Why, it is cement sidewalk, and the doors are fastened in by hinges into the cement sidewalk.

Mr. Weinberg: Does it appear when this was made?

Mr. Gilhooly: He testified February, 1928.

The Witness: February 3rd. I think the date is on the map; February 3rd, 1928.

Mr. Gilhooly: I would like at this time to read the deposition of Mrs. Frances Handlon.

(Reading): "Testimony taken in the above entitled cause *de bene esse* on April 1, 1929, at four o'clock P. M. at No. 199 Kearny Avenue, Kearny, New Jersey, in the presence of Wolber & Gilhooly (by Thomas Glynn Walker), counsel for plaintiffs, and Carey & Lane (by George P. Moser) counsel

for defendant Copestone Temple Association, and Benjamin M. Weinberg, counsel for defendant Paul Nolden, and before Lawrence Squire, Supreme Court Examiner.

Mr. Moser: It is stipulated between Messrs. Wolber & Gilhooly and Carey & Lane that the testimony of Frances A. Handlon may be taken at her residence No. 199 Kearny Avenue, Kearny, New Jersey, on the 1st day of April, 1929, without court order, and may be offered in court and received in evidence with the same force and effect as if she had testified in court, subject, however, to the objections of counsel made at the hearing.

"FRANCES A. HANDLON, one of the plaintiffs, sworn:

Direct examination by Mr. Walker:

Q. You are the wife of Thomas Handlon? A. Yes, sir.

Q. On October 29, 1926, where did you live? A. 199 Kearny Avenue, Kearny, New Jersey, second floor.

Q. On that date between nine-thirty and ten P. M. what did you do? A. I went to the store.

Q. Where did you leave from? A. My home.

Q. Where did you go to? A. To the delicatessen.

Q. Where is that store located? A. I don't know. I just couldn't say the number, but it is in the Copestone Temple Building.

Q. What kind of store is that? A. Delicatessen.

Q. Who runs the store? A. Mr. Paul Nolden.

Q. When you got into the store, what did you do? A. I was in the back talking to Mrs. Nolden a little while.

Q. Then, what did you do? A. Then I go out and purchase a box of crackers and Snappy cheese.

Q. Did you pay for them? A. Yes, sir.

Q. Then what happened? A. Why, I was talking to Mrs. Roland.

Q. Who? A. Mrs. Edward Roland, and when Mrs. Roland finished getting what she wanted we started for home.

Q. Which way did you come out of the store? A. I came out facing across that way (indicating), the door opens to the left.

Mr. Moser: I ask that that be stricken out."

Mr. Moser: I will waive that.

(Reading resumed by Mr. Gilhooly.)

"Q. Now, tell me just what happened from the time you were in the store, as you left the store, up to the time of the accident? A. I opened the door with my left hand.

Q. What kind of a door was it? A. Screen door.

Q. Which way did the door open? A. To the north.

Q. The door opened to the north? A. I opened it with my left hand.

Q. That was towards your left? A. The door was towards the north.

Q. It opened to the north? A. Yes, and I opened it with my left hand and I put one foot to the right to come down this way (indicating), and my foot caught on the cellar door.

Q. Which foot? A. My right foot, and threw me forward, face down, into the cellar, on my side. The cellar door, face down into the cellar and hit me a little above the ankle, the cellar door hit me.

Q. Which ankle? A. On the right foot, the right ankle.

Q. Which way did you land? A. At the foot of the stairs, between the stairs. I hit the sides.

Q. Of the stairway? A. Of the stairway and went down to the bottom. That is all I know until I was taken upstairs.

Q. Did anything happen as you reached the bottom of the stairs? A. Only that I went to the bottom and some one caught me by the head.

Q. Who caught you? A. I believe it was Mr. Nolden.

Q. Did you see who it was? A. Yes.

Q. Who was it? A. Mr. Nolden.

Q. The operator of the store? A. The owner of the store.

Q. What did he do? A. He took me upstairs, I don't know who else carried me, only Mr. Nolden, and they brought me inside of the store.

Q. Where did they take you? A. Inside of the store, in the back. I don't remember anything until some one said, 'Hospital.'

Q. What was the next thing you remember after that? A. They had me on a couch in the back room.

Q. How long were you there? A. Until about one o'clock.

Q. From what time? A. Between half past nine and ten o'clock I got hurt, I couldn't tell you just when. We sent for Dr. Dukes.

Q. What time did the doctor arrive? A. He came right away.

Q. What did he do? A. He jerked my leg and pulled it around different ways, and put something on it, bandaged it up. He said he couldn't tell until the next morning, but I was to put hot

water bags on until he came, to keep the swelling down, because it was all bruised. My fingers were scratched and put some iodine on them and bandaged my fingers.

Q. Did any other part of your body bother you? A. Yes, my right arm, and my hip hurt.

Q. Which hip? A. This hip here, the right. There is a spot there, and my back bothers me on the side (indicating).

Q. Your back, whereabouts? A. On my back, the right side, one side (indicating) here. Sometimes all the back hurts, but the right side always bothered me, it was very bad, and the right arm.

Q. Any other part of you? A. Well, my breasts hurt, and under my arms, I must have thrown my arms up, I suppose, to save myself, and underneath here hurt me (indicating).

Q. Indicating the pit of both arms? A. Yes.

Q. Of both arms, and your breasts? A. My breasts hurt.

Q. Both of them? A. Yes.

Q. Who removed you from Nolden's store? A. Mr. Nolden.

Q. Where did he take you? A. He brought me in his car home.

Q. Who took you upstairs? A. Mr. Nolden.

Q. Did he carry you upstairs? A. Well, the position he had to carry me was my back was on his back, and I tried to hold my hands around his neck, that is the only way he could get me upstairs, because my leg was swollen and stiff.

Q. What did they do, put you to bed? A. Put me to bed, and Mr. Nolden stayed a little while, and Mrs. Roland put hot water bags on and stayed until pretty nearly early in the morning and Mr. Handlon put hot water bags on until the next morning.

Q. Did you get up out of bed the next day? A. No, sir.

Q. How long did you remain in bed? A. Two or three weeks.

Q. What doctor treated you during that time? A. Dr. Dukes.

Q. Where is his office? A. Across the street here, on Kearny Avenue.

Q. For how long a period did Dr. Dukes treat you? A. He came up until April.

Q. What year? A. From 1926 to 1927. From October 29th until April, 1927.

Q. During which time he treated you for what? A. For hemorrhages. He gave me medicine for hemorrhages. I had hemorrhages the day after I was hurt, on Saturday morning.

Q. Did you ever have hemorrhages before? A. No, sir.

Q. How often did you have hemorrhages? A. I had it for six months? It would only stop when I got a bottle of medicine.

Q. What kind of hemorrhages were they? A. From the womb, and I had nasal hemorrhages from the nose.

Q. What else did he treat you for? A. Nervousness. The shock inside my whole system, nervousness, from nervous shock.

Q. Had you been nervous before? A. Never. Never was sick.

Q. At the time of the accident were you under the care of a doctor? A. No, sir.

Q. Did you have any other doctor treat you? A. Yes, I went to Dr. Haller.

Q. When did you first go to Dr. Haller? A. I first went to Dr. Haller August or September, I couldn't say which.

Q. What year? A. 1927.

Q. What did he treat you for? A. I went to him for nervousness, to see about my breasts, my arm hurt me and my breasts started to harden.

Q. Had they been troubling you before? A. No, sir.

Q. I do not mean before accident. I mean from the time of the accident up until the time you called Dr. Haller? A. Yes, I had a pain in the nipple on that side (indicating).

Q. On which side? A. The left.

Q. Had you ever had that pain before the accident? A. No, sir.

Q. How often did you go to see Dr. Haller? A. I went to Dr. Haller twice a week for a few weeks, and after that I only went once a week.

Q. For how long? A. He came to my house twice; up until April.

Q. Of what year? A. Last year.

Q. 1928? A. Yes, when I went to the hospital.

Q. What did he treat you for? A. He gave me inward electric treatment to take the nervousness away.

Mr. Weinberg: I haven't objected under the circumstances, but do you think it is right for her to tell what the doctor treated her for?

Mr. Walker: Yes, I think that would be proper."

(Objection not pressed at trial.)

(Mr. Gilhooly resumed the reading.)

"Q. What treatment did the doctor give you? A. Electric treatment.

Q. What other treatment? A. For nervousness; not for the breasts.

Q. What other treatments? A. Then he gave me hot applications to put on.

Q. And where? A. On the breasts, to soften it.

Q. What else did he do? A. That was all the treatment I got from him except that he gave me tablets.

Q. Did you have any other doctor? A. Dr. Toye, from Arlington.

Q. Now, when did you first go to Dr. Toye? A. My daughter was sick and he came in to see me the end of April.

Q. What year? A. 1928.

Q. How often did he come to see you? A. I couldn't tell you how many times he came to see me.

Q. Is he still coming to see you? A. Yes.

Q. Has he been coming to see you since April, 1928? A. Since I have been home from the hospital. He attended me until I went to the hospital.

Q. When did you go to the hospital? A. In May.

Q. 1928? A. 1928.

Q. What hospital did you go to? A. Skin & Cancer Hospital, 19th Street and Second Avenue, New York.

Q. What did they do to you there? A. Took my breast off.

Q. Operated on you? A. Yes, sir.

Q. Who operated upon you? A. Dr. Perez.

Q. Where is Dr. Perez's office? A. I don't know where his office is.

Q. Is he connected with the New York Skin & Cancer Hospital? A. Yes, as assistant to the Professor at the Skin & Cancer Hospital.

Q. Did any other doctor see you over there? A. Several doctors examined me before I was operated on.

Q. The names of the doctors who examined you were— A. Dr. Chamberlin, Dr. Perez and Dr. Torik.

Q. Who else? A. Several doctors. There was a lady doctor, Dr. Clark.

Q. Do you remember the day you were operated on? A. Yes, if I am not mistaken I was taken there on a Monday and operated on a Tuesday morning.

Q. What date, do you remember? A. The day after Mother's Day, I think the 15th of May I was operated on.

Q. For how long were you confined to the hospital? A. Seven weeks.

Q. You were in bed all that time? A. Until the week I came out, I had to get up around the bed and walk around. I should think I stayed three weeks longer, but I begged to come home on account of my daughter being sick.

Q. When you came home— A. I was put to bed.

Q. Have you been in bed ever since? A. No, I had been in bed four or five weeks after I came home.

Q. When you came home you went to bed? A. Yes, sir.

Q. And you stayed in bed for how long? A. Five weeks, and then I used to go to bed and sit up until I was able to walk around.

Q. When did you go back to bed again? A. To stay?

Q. Yes? A. I am in bed three months tomorrow night.

Q. Do you remember the date? A. No, the first week in January, the first Tuesday.

Q. In 1929? A. Yes. It is three months tomorrow night, exact.

Q. Since you returned from the hospital what doctors have been treating you? A. Dr. Toye has bandaged me when I could not get to the hospital and Dr. McGlennon, once.

Q. What part of your body bothers you at the present time?

Mr. Moser: This is objected to unless it is connected up, on the theory it is too remote, and not the result of the accident."

Mr. Moser: I press the objection made there. I thought I had objected before in the testimony where it referred to the Skin & Cancer Hospital, but it is not in the record. But on this point, I object to this question on the theory that they are trying to connect up directly, for the first time, this condition with the accident. It is too remote, and could not be relevent unless it was connected up by some medical testimony that a condition she was suffering from in 1928 was a direct and proximate result of an accident that occurred in 1926.

The Court: (After argument.) I will permit it, and will entertain a motion to strike it out unless connected up, later on in the case.

Mr. Weinberg: It does not appear that I had any objection. I did not make any to any of the testimony. I went on the assumption that all of this will have to be connected up, not just that one question, but the whole question of the cancerous condition.

The Court: Of course the jury will not be allowed to guess that she suffers a cancer now as a result of a fall that she had in 1926.

(Mr. Gilhooly resumed his reading of testimony.)

"Q. What part of your body bothers you at the present time? A. My arm, my back and the breast that was taken off.

Q. Which arm? A. The left.

Q. Which part of your back? A. The left.

Q. Which breast was removed? A. My left.

Q. What other part of your body, if any part or parts, was bruised? A. Bothered me?

Q. Yes? A. My leg.

Q. Which leg? A. The right leg was cut, where the scars are.

Q. Where? A. A little above the ankle.

Q. To go back for a minute, who was with you when you came out of the delicatessen store? A. Mrs. Roland.

Q. Who came first? A. Mrs. Roland.

Q. Did she go out first? A. Yes.

Q. How far behind her were you? A. Right in back of her.

Q. Practically how far? A. Mrs. Roland walked out first and I put my hand and held the door right in back, right in back of one another, close to one another.

Q. The cellar door, did you notice that when you went into the store? A. It was not open.

Q. Was it closed when you went into the store? A. It was closed because I walked near to it, if it hadn't been open I wouldn't have fallen. I noticed that when I came out.

Q. The cellar areaway into which you fell, was

that the cellar areaway directly in front of the delicatessen store of Paul Nolden?

Mr. Weinberg: I object. I think she should tell us where it was. It fact, I do not think it was in front of the entrance, if that is what you mean, the door in the front part of the store.

Mr. Walker: Withdraw the question.

Q. Will you please tell us just where the cellar door is and the cellar areaway into which you fell. Where they are located? A. It is in front of the right-hand side window, which I would call the left side, on the southerly side of the store.

Q. Of which store?

Mr. Weinberg: She means the right-hand window as she comes out. We can agree on that. The cellar entrance is on the southerly side of the building.

The Witness: Yes.

Mr. Weinberg: And the front of the southerly show window.

The Witness: Yes.

Mr. Weinberg: And the entrance to the store is between the two windows.

The Witness: I may not say it the way you want.

Q. (By Mr. Walker.) Now, Mrs. Handlon, were you on the bottom of the cellar steps when Mr. Nolden caught you? A. Yes, sir.

Q. Who did your housework prior to October 29, 1926? A. I had one sister over here who done it while she—

Mr. Walker: Withdraw the answer.

Q. Before October 29, 1926, the date of the accident, who did your housework? A. Oh, myself.

Q. Did you do all of it? A. I done every bit and minded the baby besides.

Q. After the accident did you at any time take care of the house? A. I haven't done anything since.

Q. Who has done the work for you since the accident? A. I had a friend come in and do it, and my sister.

Q. Have they been doing it up to the present time? A. Yes, the sister who is here has done it ever since.

Q. Did you pay them any compensation for doing it? A. Yes.

Q. How much did you pay them, do you know? A. $12 a week.

Q. When did you make the first payment? A. It is before I went to the hospital first, about two months before I went to the hospital.

Q. Is that when you first paid them? A. Yes.

Q. Which trip to the hospital are you referring to? A. The trip to the Skin & Cancer Hospital.

Q. Prior to that time had you paid them any compensation? A. No, only $5 or something like that, to buy something; I couldn't afford it. She left her family to come here, she left her husband and family to come to me.

Q. Have you any children? A. Yes, one.

Q. How old are you? A. Forty, now.

Q. When was your last birthday? A. October 3rd.

Q. The child, how old is the child? A. She will be seventeen in July, sixteen her last birthday.

Q. A boy or a girl? A. A girl.

Q. A normal child? A. No.

Mr. Weinberger: That is objected to as immaterial.

Q. The internal hemorrhages, rather, the nasal hemorrhages, have they stopped? A. Yes.

Q. The other hemorrhages, have they stopped? A. They have all stopped since I have been operated on, except the piece here on my shoulder which opens every once in a while and feels pretty badly.

Q. Indicating a point where? A. The piece left on that they could not take off (indicating), here. The operation was too much at one time.

Mr. Walker: I think we can agree that the point is where the arm and shoulder joins the body.

Q. You say that still bleeds? A. Yes, sir."

(End of Mr. Gilhooly's reading of direct examination.)

Mr. Weinberg (reading his cross examination):

"Q. Do you think that you can undergo any further questioning, Mrs. Handlon, this afternoon? A. Well, I will try.

Q. Mr. Walker's examination has been a little longer than I thought it would be, and you seem to be somewhat excited"—

Mr. Weinberg: It should be "exhausted."

(Continuing.) —"exhausted, and my cross examination should be as long as Mr. Walker's? A. I will try to answer as much as I can.

Q. Do you want to take a rest now or do you want us to continue? A. You might as well go ahead.

Q. I understand that as you came out of the store you found the entrance to the cellar to your right, that is correct? A. Coming out?

Q. Yes? A. On the right-hand side.

Q. That is the side you have called the southerly side? A. Yes, sir.

Q. Your home is to the south of Nolden's store? A. Yes.

Q. Was there one door or two doors leading to Nolden's store? A. One screen door, he had a storm door on.

Q. How did that open, to your right as you came out, or to your left as you came out? A. To the left.

Q. To the left as you came out? A. It was my left hand, I opened it this way (indicating).

Q. With your left hand you pushed it over toward your left, which was the nearest? A. Yes, sir.

Q. Mrs. Roland had gone out just before you? A. She stepped right in front of me.

Q. She opened the door, did she? A. I believe I opened it with my hand on the inside, I don't know whether she did or not, but I held my hand on the door when she stepped out.

Q. Did she go out before you did? A. Yes, sir.

Q. Nothing happened to her, when she went out of the store? A. No.

Q. As you went out of the store what direction did you take? A. I took one foot to the right.

Q. As you pushed this door open, it took you some distance away from the cellar entrance, did it not? A. I only took one step and my foot caught and threw me over, and before I had a chance to do anything I was down in the cellar. That is how short it was.

Q. Do you mean that you had left the store and closed the door and then turned to your right and then took a step? A. I turned and put my foot to the right and it was over.

Q. Did that happen as you were coming out of the store or after you left the store? A. I believe I closed the door.

Q. You had closed the door and then you turned to the right, is that what you mean? A. That is all I remember. Turning one foot to the right and went right over the cellar; the foot caught in the cellar door.

Q. When you say you "went over the cellar," just explain that a little more. What do you mean by "going over the cellar"? A. It threw me over the side of the cellar door.

Q. Was there a cellar door down there? A. It was down, if it was up I would not have fallen. It was down to the sidewalk.

Q. Lying over toward the north? A. It must have been lying over for my foot to strike it.

Q. You did not see it? A. I did not see anything, after they carried me in.

Q. The question is did you see it? A. No, but I know it was down.

Q. As you came out of the store this cellar door did not interfere with you at all, did it, it was not in your way as you came out of the store? A. Well, it hit my foot.

Q. You mean, of course, that you hit the cellar door with your foot, you struck it while you were walking. Now, my question is, when you came out of the store was the cellar door immediately in front of that or did you have to turn to your right before you struck it? A. I had to turn to the right.

Q. So it was perfectly clear as you came out of the doorway? A. It was not in front, but just as you turn; it was not in front of the screen door.

Q. How far is this cellar door to the side from the entrance of Mr. Nolden's store? A. You mean when the door opens?

Q. No, any time, whether it is open or closed. Can you tell us how far to the south of the entrance the cellar entrance is. How far to the south of the store entrance? A. I couldn't say how far, but I know it is pretty close.

Q. You noticed that before? A. I know it is not far away from the door. I never saw it open.

Q. You never saw it open? A. I never saw it open before.

Q. When you came into the store it was closed? A. Yes, it was closed.

Q. You know where the cellar entrance it, where it was, that is so? A. Yes, I know where it is.

Q. You have been in the store many times? A. I have been in the store many times.

Q. Was there a light burning in the store? A. Yes, there was a light burning.

Q. Does that light shine out through the front window? A. I think he has lights in each window. The windows were decorated up with a lot of fancy paper, whatever they have in a window on a holiday; both windows.

Q. For the holidays? A. It was the night before Hallowe'en.

Q. Did he have false faces, and things like that in the window? A. Not in that window, but I mean they have these cardboards and fancy things they have in the window.

Q. Was there a light in the store? A. I couldn't tell you that.

Q. When you fell into the cellar and saw Mr. Nolden, was there a light in there? A. I don't know whether he had a light in the cellar. He must have.

Q. When you came out of the store you did not notice any light coming through the cellar opening, did you? A. I went over so quick, I couldn't tell you.

Q. You came out and turned to your left and tripped over the door? A. I turned to my right. I just turned with my one foot and my foot struck the cellar door whatever was laying there, there was something near the door, or it would not have struck my ankle there.

Q. Did you see the cellar door before you struck it? A. No, I felt myself going over, that is all.

Q. But you did not see it? A. No.

Q. When you fell, how did you go, head first? A. Face forward.

Q. Did you go head first down the cellar steps? A. I went over and I went on my head, the sides, and went down.

Q. Did you strike any of the cellar steps going down? A. Did I strike anything?

Q. Did you strike any of the cellar steps on the way down? A. I hit myself, I felt myself here in the back (indicating) and I was all sore.

Mr. Walker: Indicating across the breast.

Q. What part of the cellar did your breast strike? A. I couldn't tell you that.

Q. Your head did not strike anything that you know of? A. I think Mr. Nolden caught my head at the foot of the cellar stairs.

Q. Explain how you went down as Mr. Nolden caught you? A. All I can say is I hit the side and

went down face forward to the cellar. I hit the side, but I could not tell you. I remember having my hands up in the air, and I remember I was speechless.

Q. Do you remember what your hands struck as you went down the cellar? A. They must have struck the cellar, because I was all scratched.

Q. I understood you to say that Mr. Nolden caught you? A. I believe that Mr. Nolden caught me at the foot of the stairs.

Q. He was not on the stairs as he caught you, was he? A. He was in the cellar.

Q. Do you know how he got to the steps to catch you? A. He must have been in the cellar to catch me.

Q. You did not fall and strike the cellar steps or the cellar bottom, did you? A. That I couldn't tell you.

Q. You know you struck Mr. Nolden, that is so, isn't it? A. I struck Mr. Nolden.

Q. You say as he caught you, you struck him? A. I believe Mr. Nolden caught me by the head at the foot of the stairs.

Q. Are you sure that you tripped over the cellar door or that you just fell down the steps? A. Oh, no, I didn't fall down no steps.

Q. How wide is the cellar entrance, do you know? A. I couldn't tell you that.

Q. Just the ordinary width of a cellar entrance? A. I couldn't tell you that.

Q. It had two doors that closed? A. Two doors that closed and stand up and have a bar on them.

Q. But it is the width I am asking you about now. Do you know about how wide those are? A. I don't exactly know.

Q. The reason I have been asking you that is

to explain if we can, how you went down those steps. Just retrace a little; your foot caught in the cellar door, as it lay over on the sidewalk; that is right? A. I believe that is the way it happened.

Q. That door was probably a foot or a foot and a half or two feet wide? A. I don't know how wide it is.

Q. As you fell, did your foot loosen itself from under that cellar door? A. My foot struck that part of the door and threw me over.

Q. As you fell did your foot loosen itself from underneath the door where you say it was caught? A. Well, it must have unloosened when I went right over the cellar.

Mr. Moser: Do not argue, Mrs. Handlon, if you do not understand. Just say that you do not understand.

A. I went over the side, it all happened so quick.

Q. Now, if we take it a little slower, we will get through quicker. A. I am not a bit nervous, but I am not like myself.

Q. That is why I inquired if it is going to make you nervous I will stop now. I must go back, however, to that same subject. The door lay parallel with the sidewalk instead of being upright. You say it laid over toward the sidewalk? A. Down on the sidewalk.

Q. Your foot caught under it, as it lay that way? A. I couldn't say whether it caught under, but it struck it anyway.

Q. You do not know whether it struck the top then or under it? A. I couldn't say.

Q. Do you know whether your foot or your toe struck it? Or what part of your foot? A. Only I was cut here, a little above the ankle. That is

where it struck me in two or three places and one was pretty deep to the bone.

Q. You struck the side of the door somewhere about your ankle, and then went over to the cellar, that is correct, is it? A. It threw me over to the side.

Q. You went over the side and fell into the cellar. Now, what I asked you before, and I will ask you once more, is this, what, if anything, connected with the building did you strike before Mr. Nolden caught you? A. What do you mean, going down?

Q. In plain language, did you strike or hit on the cellar steps? A. No, I did not strike my head, but I struck my shoulder. I know my shoulder.

Q. Indicating the right shoulder. A. I know that struck, whether the side or where, I couldn't tell you.

Q. Was it after you had fallen that Mr. Nolden picked you up, or did he, as you said before, catch you as you fell? A. I think he caught me at the foot of the stairs.

Q. And before your shoulder touched the step? A. No, I was already down. He must have been in the cellar and got there in time to touch my head. My feet were up in the air and my head was down.

Q. Your feet were up in the air and your head was down? A. Yes.

Q. You do not remember where your head was then? A. My head was at the foot of the stairs.

Q. But not resting on the steps. You did not strike the cellar bottom or the steps? A. No, I couldn't say.

Q. How soon after the accident did you have an opportunity of looking at yourself to see what was the matter with you? A. After the accident?

Q. How soon after the accident did you notice what injuries you received? A. Do you mean the night it happened?

Q. How soon after, was it that night or the next day? A. They sent for Dr. Dukes right away.

Q. You came home? A. They brought me home about one in the morning. They kept me on the couch there in the back room.

Q. Where? A. At Mr. Nolden's store.

Q. Did you have any doctor at Mr. Nolden's store? A. Oh, yes, Dr. Dukes.

Q. What did he do for you right there? A. He tried my leg all around, he jerked it and pulled it all around and he looked at my hands where they were scratched and then he put something on them and bandaged them up and the same way with my leg, he bandaged my leg and put something on it; it was pretty badly bruised.

Q. When did you notice that your leg was bruised? A. In the store it was swelling up and getting black. While I lay there I took my shoes and stockings off.

Q. Did you notice any other bruises on yourself besides these bruises on your ankle? A. My legs from the knee down.

Q. That same leg where the ankle was injured? A. My right leg.

Q. Where else? A. My fingers.

Q. What was the matter with your fingers? A. All scratched and cut, the skin here (indicating).

Q. That is your left hand? A. Yes, and there is another one here, but I didn't say anything about it, but the scar is there now.

Q. Where did you notice these parts? You said you saw them between the knee and the ankle on the right leg, and then you say there was some

scratches on your left hand. Did you see any other marks on yourself? A. On the body?

Q. Anywhere. A. There was none on the body.

Q. There was none on the body except those you have mentioned? A. Yes.

Q. When did you have the nosebleed? A. Shortly after.

Q. How long after? A. I just couldn't tell you when it began.

Q. A day or a week? A. A few weeks after I started to get them, and I had them very bad.

Q. Had you ever had nosebleeds before? A. Only when a child.

Q. Most of us have had nosebleeds when we were children. I mean just involuntary bleeding of the nose? A. No.

Q. The first time that appeared was several weeks after the accident? A. Yes, sir.

Q. You do not know what brought that on. You did not hurt yourself in the meanwhile? A. No, sir.

Q. Then, do I understand, that you had a hemorrhage from the womb, did you say? A. Yes.

Q. When did that commence? A. The Saturday after I got hurt.

Q. The week after? A. No, the day after, I was hurt on a Friday night and Saturday morning it started.

Q. Was that your regular period? A. Oh, no.

Q. How long before that had you had your regular flow? A. Two weeks before that.

Q. About two weeks before that? A. Yes, when I was regular, but this is something different that started with a hemorrhage.

Q. How long did this hemorrhage keep up? A. I think I had it for six months, and I would get a bottle of medicine to stop it.

Q. A prescription of the doctor or something you got yourself? A. From Dr. Dukes.

Q. You had never had this flow before that continuously. You were just perfectly regular before? A. Yes, I was perfectly healthy.

Q. I am speaking of the menstrual period. That had always been regular before? A. That was always regular.

Q. How long did you remain in bed immediately following the day of the accident? A. Three weeks.

Q. Were you not out long before three weeks? A. Oh, no, I was not out of the house, I couldn't stand up.

Q. You are quite sure? A. I couldn't stand up.

Q. You remained here in this house for a period of three weeks after the accident and then did you go out? A. No, I used to get up and sit in a chair and then I got back to bed again.

Q. How long was it before you left the house after the accident, or how long after the accident was it before you left the house? A. I went out once to go to the store.

Q. How soon after the accident was that? A. It was New Year's day, I went up there and back. I went to the hospital in a machine, in December.

Q. Where were you X-rayed? A. In the Stumpf Hospital.

Q. What hospital? A. The leg.

Q. They found no broken bones there? A No. they found that it was cut right down to the bone.

Q. Up to New Year's day the only thing troubling you was this hemorrhage, and the injuries to your leg? A. My back, I couldn't straighten up, when I leaned over I couldn't straighten up, my back was so bad.

Q. Did they X-ray your back? A. No.

Q. You could not say that your back was discolored or not? A. No, there were no bruises on my body at all.

Q. Do you know that was so? A. I didn't see any.

Q. You were not told of any? A. No.

Q. You were not even told that you were bruised on the back? A. No.

Q. So, now, I want to sum this up, see if I am right or not. You told me that the only bruises that you found on your entire body that you know of were those you described on your legs between your knee and ankle and on your hand, that is correct? A. Those are the only bruises that showed.

Q. Now, after January what happened. 1927, was it? When did this happen?

Mr. Walker: October 29, 1926.

Q. So, in January, 1927, when you got up were you able to get around? A. I walked with a limp.

Q. Did you keep on attending to your affairs, did you? A. I didn't do any housework. My arm would not let me, this arm was hurt at that time.

Q. Which arm? A. Underneath the arm.

Q. Which arm? A. My right arm.

Q. But there was no bruise on that right arm, was there? A. No.

Q. When was it in January, 1927, you went to bed? I do not mean to sleep, but I mean, of course, when you went to bed ill? A. When I went to bed?

Q. Yes? A. I had those hemorrhages all the time even when I was up or not, I had hemorrhages just the same.

Q. Were you confined to your bed at any time after January, 1927, and if so, when? A. Not steady. I do not know. I would lay down if I felt sick, and I had hemorrhages bad, and sometimes I could not stand on my feet, but not so steady.

Q. Did you go to bed at any time before you went to the Cancer Hospital in New York? A. Oh, yes.

Q. How long before that? A. I had very bad pains in my side and my breasts, and I used to get sick to my stomach and had to lie down.

Q. How long before you went to the hospital in New York was that? A. Since, I believe, August or September, that is when I started with the pains.

Q. August, 1927, you started to feel these pains in your side, the left side, you did not feel those pains before? A. Under my arm, under both arms here (indicating). But this arm hurt me most because there was a lump formed there.

Q. On the left side under the left arm? A. Yes, sir.

Q. You first noticed that lump when? A. In September when I started to go to Dr. Haller.

Q. What drew your attention to that lump under the left arm? A. It was not the lump, it was the pain under the arm. When I lifted my arm I used to get some pains like when you are tired out, sore all over, and I had to put my arms down, and I went to the doctor to find out what it was.

Q. You spoke about a lump under your arm. When was it you first felt that lump? A. The doctor found the lump.

Q. You did not know anything about the lump? A. I felt it myself after, and I was what was hurting me.

Q. When you felt it, was it a big lump? A. Quite a lump.

Q. Then, I suppose, you doctored on and off until you went to the hospital for the operation? A. Until I was taken right off in a hurry.

Q. Then, you were operated and had the treatment you mentioned here to Mr. Walker on direct examination? A. Yes, I went to the hospital on a Monday and I was operated on Tuesday morning.

Q. You had received no treatment for that trouble on your left arm prior to the operation? A. From Dr. Haller?

Q. From anybody? A. From Dr. Haller.

Q. When was that? A. I went to him as soon as it started to bother me. I went to him for the treatment that I spoke of, nervousness, and that, too.

Q. You say as soon as that left arm started to bother you you went to see Dr. Haller? A. The left arm, both arms bothered me right along, but it got more painful and then I noticed my breasts started to get hard.

Q. Where is Dr. Haller? A. He is on Montclair Avenue, Newark.

Q. Is he a specialist? A. He is supposed to be for ladies, mostly, for treatment, go to him.

Q. Were you recommended to him by one of your physicians? A. I was recommended by my father and mother to go there; he cured my stepfather who was sick.

Q. This operation took place when? A. May.

Q. Last year? A. Yes, sir.

Q. You have been confined to bed ever since? A. I have been in and out of bed, but steady now three months in bed; I cannot stand up."

(Mr. Weinberg's reading of cross examination stops here.)

(Recess to 2 P. M.)

(After recess 2 P. M.)

Deposition of FRANCES A. HANDLON.

(Mr. Moser read his cross examination as follows:)

"Q. As you walked to Nolden's store, was the cellar door in a closed position? A. You mean when I entered the store first?

Q. Yes. A. I believe it was, yes.

Q. In other words, these doors were flush down with the sidewalk covering the areaway? A. Yes.

Q. How long were you in the store? A. I couldn't tell you how long. I was in there talking with Mrs. Nolden for a while.

Q. Ten or fifteen minutes? A. I was in there longer than that.

Q. A little longer than that? A. Maybe twenty-five minutes or half an hour, or so.

Q. When you came out of the store you fell into the areaway, is that right? A. Yes, sir.

Q. One of the cellar doors had been open or were both open? A. Both of them must have been open.

Q. As you fell down into the cellarway or areaway did you see anybody down there? A. No.

Q. When you got to the bottom of the steps was there anybody there? A. Well, I heard screaming and Mr. Nolden caught me.

Q. Is he the only man that was there that you know of? A. Yes.

Q. You remember Dr. Farden coming up to see you shortly after the accident? A. Yes, there was a doctor came to see me. I do not know his name.

Q. That was about three weeks after the accident, was it not? A. I don't remember when he

came, but he had the dates drawn when he did come, that is what I remember.

Q. But he got here? A. He was here.

Q. Did you have your vaginal hemorrhage on the day Dr. Farden was here? A. Yes.

Q. Are you sure about that? A. Yes, I had them the day after the accident.

Q. And you had them the day that Dr. Farden was here? A. Yes, sir, he was here twice, if it is the same doctor.

Q. Yes. Did you have the hemorrhage when Dr. Farden appeared the second time to examine you? A. Well, I don't think I did. I believe I did, yes, too, because it used to stop for a day or so, and go away, and that time I didn't want him to examine me for that reason. I felt out of place.

Q. Which time? A. The second time. The first time he did not examine me. No one had except Dr. Haller.

Q. When did you first go to Dr. Haller? A. I believe it was—I can't just tell you the date, but around the end of August or September.

Q. Around the end of Augusta or September, 1927? A. I couldn't tell you.

Q. That is the first time you had a vaginal examination? A. Yes, and he examined me inside, he found something inside.

Q. You also remember the man coming from the Copestone Building Company, do you not? A. Copestone Building?

Q. The Copestone Temple Association. A. No one ever came to me from Copestone.

Q. I show you a paper with the signature attached thereto 'Frances A. Handlon,' and I ask you whether that is your signature?"

Mr. Walker: I object at this time to the statement which is being referred to.

Mr. Moser: Do you press that?

Mr. Gilhooly: No.

(Mr. Moser resumes the reading.)

"A. This is my signature, but—

"Q. Do not answer any more. On the 17th day of November, 1926, where did you live? A. When?

Q. On the 17th day of November, 1926, where did you live? A. 199 Kearny Avenue.

Q. What is your name? A. Frances A. Handlon.

Q. How old were you on November 17, 1926? A. Thirty-eight.

Q. What was your business? A. Business: housewife.

Q. What day did the accident happen? A. 29th of October.

Q. What year? A. 1926.

Q. About what time? A. Between half-past nine o'clock or ten.

Q. What did you purchase at Mr. Nolden's delicatessen store? A. Crackers and cheese.

Q. Did a woman by the name of Mrs. Roland come out with you? A. Mrs. Roland?

Q. Did she come out with you? A. Yes.

Q. She was in the store with you? A. Yes.

Q. You were treated by Dr. Dukes every day since the accident for a period of about a month or so? A. Dr. Dukes was in here every day for two or three weeks and after that twice until it started in again.

Q. In November, 1926, your injuries were bruises of the right leg and hemorrhages, spine, and shaken up? A. Nervousness, right arm and that

part you mean is a spot in the back here (indicating) that the doctor looked at.

Mr. Walker: Indicating where?

The Witness: Right here (indicating).

Mr. Moser: On the right side of the hip.

A. It is in the back away down.

Mr. Walker: Above your hip?

The Witness: Yes.

Mr. Walker: In the small of the back?

The Witness: This one spot always did bother me.

Q. Now, I ask you if you signed this statement that was brought to your attention and if that is your signature? A. I signed a paper stating how I came out and how I felt, the same as I spoke to you today, and nothing else.

Q. This was the paper you signed? A. This was a plain piece of paper.

Q. Was there writing on it? A. There was no writing on it.

Q. There was no writing on it? A. But the young fellow who came here was writing on it, as he asked me questions.

Q. After he finished it you signed it? A. He asked me to sign my name and he told me it was stating how I came out.

Q. Wasn't this read over to you at the time? A. I don't remember whether it was read over. The day he came in I was like this (indicating nervousness) and he said he would come back when my husband came home, but he never came, and the young man was very impudent, and made me go to bed.

Mr. Moser: I ask to have this statement marked for identification.

(Statement is marked D. C. No. 1 for Identification.)

Q. Did you have a hemorrhage when Dr. Farden was here the second time? A. Yes, because I did not want him to examine me, and he did not like it, that is why I objected, because he examined me inside and he found other things inside that I cannot tell you.

Q. Dr. Farden I speak of? A. Yes, that is the doctor.

Q. He conducted a vaginal examination, did he not, the second time he was here? A. He examined me thoroughly inside and found different things.

Q. Did you have a hemorrhage before or while he was examining you? A. I couldn't tell you. I had it right along and he knew it, because I asked the other doctor if it was all right to let him, I do not know who he was at that time and I felt hurt to have any one examine me like that.

Q. Your doctor was here at the time? A. Dr. Haller.

Q. Dr. Dukes was here the first time? A. Yes.

Q. Dr. Haller was here on the second occasion when Dr. Farden examined you? A. Yes, I went shortly before about this to Dr. Haller.

Q. You say you had a hemorrhage when Dr. Farden was examining you on the second occasion? A. I had them right along then because—do you mean it was the second time he examined me?

Q. Yes. A. I couldn't tell you that. The doctor can tell you that.

Q. Were these hemorrhages continuous or intermittent? A. They were steady.

Q. For how long? A. Four or five days, and when I took medicine to stop it, it would probably stay two days and come right back again.

Q. How much medicine did you take? A. I couldn't tell you that.

Q. What doctor prescribed that for you? A. Dr. Dukes. After a while it went away and came back three times a month until I went to the hospital; it cleared away since I was operated on.

Q. Your operation merely was an operation on the left breast? A. Yes.

Q. That is the only part of your body that was affected by the operation? A. This arm.

Q. And your arm? A. Yes.

Q. That is the left arm? A. Yes, the armpit is closed entirely. There is a piece left down. I can explain it to you.

Q. Yes. A. This piece was left down, the doctor could not go through with the operation, he said it was too serious in one day. It is a piece he left on and sewed on, and this piece has broke out since, a hemorrhage. The skin breaks and the blood pours out. I have this swollen several months, but I am able to hold it in a sling. It got so that it was out in front of me, and prevented me from standing. It pulls me down.

Q. That swollen condition of the left arm came about after the operation at the Skin & Cancer Hospital in New York which usually comes with an operation or confinement to bed, at the present time is the result of your operation, is that right? A. Yes.

Mr. Walker: I object." (End of reading.)

Mr. Moser: That was answered before the objection.

Mr. Gilhooly: Go right on.

(Mr. Moser resumed the reading.)

"Q. You were never confined to bed after January, 1927, as the result of the leg condition, or the injury to your shin sustained in this accident, were you? A. In bed steady, that I went to bed steady for the leg?

Q. You were never confined to your bed as the result of your leg injury? A. No, only I had to stay off my feet as little as possible. I cannot walk on them, I was unable to walk to the hospital. I cannot even take my own daughter out, an invalid.

Q. Between January, 1927, and August, 1927, did you go about your usual duties? A. I haven't done any work since I was hurt at all.

Q. What did you do between January and August, 1927, did you go to the store at all? A. I went out in the air when I was unable to walk. I used to go out in the car. Mr. Handlon took me out for air that way.

Mr. Weinberg: I just want to say this on the record. I did not bring the pleadings along, and I do not understand, so far as my recollection goes, that the plaintiff is claiming that the cancer resulted from the injury.

Mr. Walker: At the present time I am going to make an application to amend the pleadings to include this condition which has arisen subsequent to the filing of the original papers."

(End of reading by Mr. Moser.)

(Mr. Gilhooly read the redirect examination as follows:)

"Q. Did you see the cut on your ankle which you received at the time you came in contact with the cellar door? A. After I was in the store, yes, I saw it bleeding, my stocking was all blood.

Q. How big a cut was it? A. Like that (indicating). It was a funny shape, all cut around.

Q. Just tell us? A. About that size. The skin was right off to the bone. It was left like a running sore for a while.

Q. About how wide was it? A. Just about that size.

Mr. Moser: Indicating a half an inch in diameter.

A. Yes, you can see it better if you wish to, because the scars are all there.

Q. How often have you been X-rayed? A. One leg.

Q. Have you been X-rayed on any other part of your body? A. No, sir.

Q. When did your breasts first begin to pain you? A. Well, they pained me a little bit a long time before.

Q. When is the first time? A. Well, bad pains was around August, it pained me always after when I moved, but I didn't pay any attention to it.

Q. When did you first notice the hardening; was it the right breast? A. The left.

Q. When was it? A. The end of August.

Q. What year? A. 1927.

Q. Have any blood tests been made of your blood? A. In the hospital?

Q. In the hospital or any place else? A. No.

Q. Have you ever taken samples of your water and analysed it? A. They did that in the hospital.

Q. Which hospital? A. Skin & Cancer. They do that before you are operated on.

Q. That was done the day before the operation? A. Yes.

Mr. Walker: Can we stipulate as to about the point on the left arm at the present time for the purposes of the record, without going into it?

Mr. Moser: Subject to my objection.

Mr. Weinberg: You will probably have a doctor testify as to the abnormality, if it is connected up.

Mr. Walker: Yes."

(End of the reading of the deposition *de bene esse* of Frances A. Handlon.)

DR. HOWARD R. DUKES, sworn for the plaintiffs:

Direct examination by Mr. Gilhooly:

Q. You are a practicing physician, are you not? A. I am.

Q. You have been for how long? A. Since 1912.

Q. Your office is where? A. 220 Kearny Avenue, Kearny.

Q. Do you know Mrs. Handlon, the plaintiff in this case? A. I do.

Q. Do you recall treating her in October, 1926? A. I do.

Q. Will you please tell the Court and jury when you were called to Mrs. Handlon, what condition you found, when you first saw her? A. It was about half past nine at night I was called over by a message from Mr. Nolden, to come over and see Mrs. Handlon, who was in Mr. Nolden's store, in the back room, lying on the couch. At the examination, I discovered a cut about an inch, irregular

cut about an inch long and about two or three inches above the ankle on the right leg. The leg at that time was very much swollen and bruised. I also noticed a—well, not until next morning when she was in bed, I gave her a complete physical examination.

Q. Let me interrupt you. Did you give her a complete physical examination the night you were called in? A. No; I just examined her leg, and asked if it hurt her any other place. She said, "No." She didn't feel any pains outside of a few scratches to her hand.

Q. Can you tell us whether she was in shock at the time? A. Yes, she was. She was very nervous at the time.

Q. Tell us what you found the following morning? A. Next morning she was in bed and I gave her a complete examination, and found a contusion of the right hip and a contusion of the right arm.

Q. Can you tell us where that contusion of the right arm was? A. The contusion was about midway between the elbow and the shoulder on the outside of the right arm.

Q. To interrupt; did you find anything else at the time? A. That was all I found at the time.

Q. What was her nervous condition at that time, the following morning? A. She was still nervous.

Q. What recommendation did you make to her? What did you do in treating her? A. I kept her in bed and dressed the leg, and took a look at her arm and her hip and had hot water bottles applied to her foot where the swelling was around her ankle.

Q. Now, with respect to this injury to the leg,

was that leg sore for any length of time? A. That leg was sore for several months.

Q. Can you describe it to the jury, the kind of sore it was, and what kept it open? A. The sore was extended through the skin down to the periosteum of the bone. The situation where the injury was, the incision extended down to the periosteum or the covering of the bone, the covering over the bone.

Q. Now, with respect to—did you say a contusion about the hip? A. Right hip.

Q. How about that, what progress was made in healing? A. That gradually cleaned up; inside of a couple of weeks that was entirely disappeared; that had entirely disappeared.

Q. And the arm? A. The same way.

Q. Can you tell us whether or not you ordered her to remain in bed for any period of time? A. She was in bed probably a week at that time.

Q. And then did she get up? A. She was up and around, yes, sir.

Q. How long did you continue to treat Mrs. Handlon? A. The last time I saw her was April 6th.

Q. In what year? A. The following year.

Q. How often had you treated her, or had she consulted you between October and April; can you tell us? A. Well, I could not tell you exactly how many visits I made there. I had not seen her from February until April.

Q. You had not seen her from February until April? A. No.

Q. Between October, 1926, and February, 1927, were your visits frequent or infrequent? A. I would probably say I would see her probably once every week or ten days.

Q. Could you tell us, doctor, whether or not these injuries were of a painful nature? A. Well, they were painful, for the leg had caused her to walk with a limp.

Q. How long did you notice that limp? A. Why, that limp continued about two months, I guess, before it entirely disappeared.

Q. Did it disappear during the time she was under your treatment? A. Yes, she apparently walked normally after two months.

Q. Can you tell us what your charge was for Mrs. Handlon? A. I don't remember just exactly. I sent her a bill.

Q. What charge did you make for each visit; can you tell us? A. $3.

Q. Can you tell us about how many visits, or how many times she consulted you? A. Must have been twenty or twenty-five times.

Q. You, of course, consider $3 a reasonable charge for treatment? A. Yes, sir.

Q. You have not treated her since April, 1927? A. I have not seen her since.

Q. At the time that she stopped taking treatment from you, what was her nervous condition at the time? A. Well, her nervous condition had improved very much over what it was before.

Q. Did she show any signs of nervousness at the time? A. She still complained of some nervousness.

Q. Can you tell us whether or not there is a scar on the leg of Mrs. Handlon, as a result of this cut? A. There is.

Q. About how large is that scar? A. About an inch long.

Q. Doctor, I show you, for the purpose of refreshing your recollection, a bill under date of

April 22, 1927; does that refresh your recollection as to the amount of your charge? A. That is my bill.

Q. How much is that bill? A. $72

Q. You consider that a reasonable charge? A. I do.

Q. Doctor, did you find Mrs. Handlon suffering from hemorrhages? A. Yes, she had hemorrhages the second day after the injury.

Q. And these hemorrhages were where? A. Uterine hemorrhages, in the womb.

Q. Did she have any nasal hemorrhages? A. I haven't noticed any nasal hemorrhages.

Q. How long did these hemorrhages continue? A. About six or eight weeks.

Q. Did you prescribe medicine for that condition? A. I did. The medicine seemed to control the hemorrhage.

Q. Could you attribute any cause to these hemorrhages, doctor? A. Well, I don't know whether she had these hemorrhages before the accident or not; that is, I could not say.

Q. From the history she gave you, what have you to say about these hemorrhages? A. It seemed to me it was due to some chronic condition of the lining of the womb.

Q. Did she say she had them before this accident, when giving the history to you? A. I don't remember whether she had them before or not.

Q. With respect to that sore on her leg; did that have pus in that cut? A. No, that cleared up. It was all entirely healed in about three weeks, scabbed over and healed.

Q. Did you have to use a drain in that? A. No.

Cross examination by Mr. Weinberg:

Q. Have you stated all of the conditions that you found present at the various examinations that you made of Mrs. Handlon? A. I believe so.

Q. The physical condition that you found present on the different occasions when you examined Mrs. Handlon? A. Yes, I believe I have.

Q. As I understand it, all the injuries that you saw were confined either to the right hip, right arm, and the cut somewheres around the shin? A. Yes, sir.

Q. And I believe I understood you correctly when you say that the patient, Mrs. Handlon, made no other complaint? A. No other complaint.

Q. You say that you discovered these vaginal hemorrhages? A. Yes, sir.

Q. And did you make any examination to determine the cause of them? A. Not at the time; she was flowing at the time. That is when they first started. They would stop and she would feel better. She would apparently feel all right, and then in a few days, that would start up again.

Q. You say not. At the time, did you make an examination internally? A. No, I didn't examine her vagina.

Q. I understand you relied for your information as to the cause of that trouble on Mrs. Handlon herself? A. Yes, sir.

Q. So when she told you, you concluded that it was some chronic condition that existed in the vagina? A. Well, it was either that or due to some nervous disturbance.

Q. That will bring that flow at times, nervousness? A. Yes, sir.

Q. Without any real structural injury there? A. Yes, sir.

Q. There were no bruises in the vicinity of the private portion of this lady? A. No.

Q. There was no complaint made of such? A. No.

Q. Did you ever attend Mrs. Handlon for any trouble prior to the time when you attended her for this particular trouble? A. I don't remember taking care of Mrs. Handlon. I took care of Mrs. Handlon's child about six or seven years prior to this accident.

Q. And do you know, Doctor, whether prior to the time that you treated her for the troubles resulting from this accident, whether she had ever had a hemorrhage from the vagina? A. I don't recall treating her for that.

Q. Do you know how long it was since you first attended her? A. What do you mean?

Q. How long back did you first attend her? A. It must be—attended Mrs. Handlon?

Q. Yes. A. I don't recall ever treating her before that. Before the injury, I took care of her child. I was brought in the house to take care of her child.

Q. And during the entire time that you treated her, namely, from October, 1926, to February, 1927, and thereafter in April, your treatment was solely for the injuries to which you referred? A. Yes.

Cross examination by Mr. Moser:

Q. As I understand it, the hemorrhage condition cleared up in six to eight weeks? A. Yes, sir; as well as I can recollect, six weeks.

Q. How long did it take the cut on the ankle to close up? A. That cut was healed up in about three weeks.

Q. Now, how long was Mrs. Handlon confined

to her home and about the house as a result of the nervous condition you speak of? A. She was up and out of bed after the first week.

Q. Then just confined to the home and about the house, taking it easy, about how long after that? A. A couple of months; the leg was quite painful when she walked on it. There was still some swelling in the leg.

Q. The bruise to the arm, what type was that, just superficial? A. Just a superficial contusion.

Q. For what period of time did that last? A. That cleared up in about two weeks.

Q. As I understand it, your last visit was on the 6th of April, 1927? A. Yes, sir.

Q. And you then discharged Mrs. Handlon from your care? A. I did not. I discharged her in February. I made a visit in the same house and she called me upstairs.

Q. In other words, in February, 1927, you discharged Mrs. Handlon? A. Yes, sir.

Q. As cured from her hurts received in the accident? A. Yes, sir.

Q. And then in April you happened to be in the house? A. It is a three-family house. I was visiting the family downstairs and she called me upstairs.

Q. She called you in; that was the last time you saw her as a result of the hurts she received in the accident? A. Yes, sir.

Redirect examination by Mr. Gilhooly:

Q. You mentioned, in response to Mr. Weinberg's question, you thought these hemorrhages might be due to a chronic condition of nervousness. You didn't make any particular examination to trace the source of these hemorrhages? A.

They cleared up under medication. She was very nervous at the time. I didn't think it advisable to examine her vaginally.

Q. So you cannot definitely state the cause of them? A. No.

Q. Now, is that scar on her leg permanent, doctor? A. Yes, sir.

Q. When you say you discharged her in February, 1927, was she still complaining of feeling ill? A. I think she was a little nervous.

Q. In April, when she called you in, she was still complaining? A. Still complaining.

Q. Did she complain of anything else at that time, that you recall? A. No.

DR. HENRY T. HOLLER sworn for the plaintiffs:

Direct examination by Mr. Gilhooly:

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

Q. How long have you been practicing? A. Since 1900.

Q. Do you specialize in any particular branch of medicine? A. Yes, sir, diagnosis.

Q. Anything else? A. Why, I specialize in uterine disease, women, children, eye, ear, nose and throat.

Q. Where is your office? A. 234 Montclair Avenue, Newark.

Q. Do you know Mrs. Frances A. Handlon? A. I do.

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

Q. Will you please tell us when you treated Mrs.

Handlon? A. The latter part of 1927, I was called to see her.

Q. Do you recall the month? A. I believe it was in September.

Q. When she called to see you, did you take a history of her case? A. Yes, sir.

Q. Did she consult you for the purpose of obtaining treatment from you? A. Yes, sir.

Q. And what history did she give you at that time?

Mr. Weinberg: I object to that. Anything connected with her ailments I think he is competent to testify to, but I think what history she gave is wholly immaterial and irrelevant. The question is so broad, "what history did she give you."

The Court (after argument): Let the doctor tell what she told him at that time and from which he partly made his diagnosis.

The Witness: The history of the patient: she had an injury, she had fallen down an areaway, some kind of opening, and she was badly injured and shaken up. Of course I can tell exactly what I found.

Q. Tell us, please. A. She was in a very nervout state to begin with. She had an enlargement of her left breast, about the size of an egg. There was a great deal of redness and swelling near the mid-axillary line, that is near the line under the arm. At that time, she had a great deal of pelvic pain, down through the lower region of her pelvis, with a history of hemorrhages from the vagina. I examined her breast and found this congestion, which was very painful. Motion of the left arm

was very painful. I examined her locally, and found she had congestion all through her pelvis, which would produce hemorrhage at different times. That hemorrhage was controlled with different medications. I saw her at the home a number of times, and then she came to my office for treatment. I gave her local applications for her breast. I gave her internal medication, and high frequency treatment to relieve the congestion in the uterus and ovaries. She seemed improved for a while; then she would have another hemorrhage. It seemed impossible at that time to keep the hemorrhages from returning. The mass in her breast seemed to subside, and then returned again. I saw her continually until she finally must have consulted some other physician. When I saw her last, she was far from normal; the mass in her left breast, the condition of the uterus and uterine appendages, were still in very bad condition.

Q. Do you know during what period of time you treated her? A. Not exactly. I treated her for several months. I saw her at different times at home. I saw her at the office several times a week and gave her these treatments. Then I finally lost track of her entirely.

Q. Did she make any complaint to you with respect to any pain that she might have? A. She had a great dea of pain. She had pain down in the pelvis, in her left breast and under her arm.

Q. Did she make any complaint of pain in her leg A. Not of any moment.

Q. Can you tell us what her nervous condition was at that time? A. She was in a highly nervous state when I saw her, and continued to be in a nervous state all through her treatment, which would improve for a while and then she would

gradually relapse into this nervous state and the mass in her left breast would improve and then also the treatment would seem to fail to produce the desired result.

Q. What treatment did you give her with respect to this mass in her left breast? A. I gave her high frequency current; I gave local applications of iodex to apply. I told her to put the breast at rest, suspend it, keep pressure from it.

Q. As a result of your examination and the treatment which you gave to Mrs. Handlon, did you form any diagnosis as to the condition of her breast? A. My impression was that she had carcinoma, or cancer of the left breast. During the time I saw her, it was not in condition to be operated, nor for any surgical intervention.

Q. By that, you mean what? A. We treat these cases in three different ways. We treat them with what we term deep X-ray therapy, that is, a very high frequency machine which has a tendency to control a cancer condition in all parts of the body. We treat with radium. We treat with total extirpation, that is, we take away the entire breast and the glands in the arm pit, and in that way prevent metastasis, that means the transfer of these various areas, or whatever it is, to the different parts of the body. Sometimes we have to make a complete surgical operation. She was not in condition at the time I saw her to take any of these treatments. My idea was to build her up as much as possible, and then determine one form of treatment or other, which was better for her, or best for her.

Q. Doctor, can you tell us what are some of the recognized causes of cancer? A. No one knows the causes of cancer.

Q. Can you say whether or not an injury caused by a fall is—

Mr. Weinberg: One moment.

Mr. Moser: I desire to object. The doctor has testified that no one can testify as to the cause of cancer.

(Question withdrawn.)

Q. Are there any causes which are recognized as causes producing cancer? A. It is generally—

Mr. Moser: Yes or no, please.

The Witness: That is a hypothetical question. That is indirect.

Mr. Gilhooly: I think the witness is entitled to explain this question. I really think it might be embarrassing if he were forced to answer yes or no. I think he may give us a medical opinion on it.

The Court: Can't you answer that?

Q. (Question read as follows: Are there any causes which are recognized as causes producing cancer?). A. There are many causes that are recognized.

Q. Can you tell us what they are?

Mr. Weinberg: I don't know it is competent that the doctor testify as to what causes are recognized. I think the doctor now is being asked a question as an expert, and I think the question now should be limited to the knowledge of the doctor. Otherwise, he might be attempting to recite from some textbook which we haven't before us, which might or might not bear him out. If the doctor is asked to qualify as an expert—

I think this question should be limited to personal knowledge or opinion.

The Court: I think that is so. I think the doctor should be limited to what in his opinion are the causes, or some of the causes of cancer.

The Witness: May I give my opinion?

The Court: Yes.

The Witness: My opinion is that carcinoma or cancer very often follows an injury. That is my personal opinion. No one has yet ever been able to trace it directly, due to the different theories propounded; some of them are supposed to be caused by some germ; some are caused by some acid or alkali embodied in the system. There are so many different theories extended, that there are not any that we can say definitely is the cause of cancer.

Q. This opinion you have expressed, is that based on your personal experience in the treatment of cancer? A. Personal experience. I might add, in a number of cases I have had in the last twenty-five years, there has been a history of an injury some time previous to the formation of this mass, wherever it happened to be in the body.

Q. Doctor, if a woman was well on October 29th, 1926, and she fell over an iron door, which, when closed, would cover an opening in an areaway, and she struck her breast in falling, and suffered considerably thereafter from shock and was confined to her bed as a result of that fall, and it later developed that a mass had formed in her breast, and her condition was a carcinoma; could you say whether or not it was reasonably probable that condition was brought about by that fall?

Mr. Moser: I object to that on the ground it does not contain sufficient facts; does not contain when the condition appeared in the breast; and further, on the ground that we have no evidence that this plaintiff received any treatment whatsoever immediately following the accident, or made any complaint to her attending physician that she had that condition of the breast, or whatever it might be to the left breast.

Mr. Weinberg: May I add, I don't recall any testimony at all that she received any injury to the breast that was removed.

The Court (after argument): This doctor was the attending physician, treating the patient, and was permitted to tell the history of the case as he got it from her and the diagnosis he formed. Why not let him tell what in his opinion was the cause of the condition which he found, if he has an opinion upon it.

Mr. Gilhooly: I will accept your Honor's suggestion.

The Court: I don't think this doctor need be called upon to base an opinion on a hypothetical question. He was not just the examining physician for the purpose of testifying; he was the treating physician, with a history of the case given him by the patient, with actual knowledge of what the facts were as he found them there. So I suppose he can form an opinion.

Q. Doctor, have you formed any opinion as to the cause of the condition that you found in Mrs. Handlon? A. If the facts and the history as I received them from her were clear and to the point,

and the cause, I can truthfully say that I believe the injury that she received had produced the condition in her breast.

Q. That is the condition which she had when you were treating her? A. Yes, sir.

Cross examination by Mr. Weinberg:

Q. Doctor, I didn't understand that in reciting the history that you say was given to you by Mrs. Handlon that she ever told you that she received any injury to her right breast, or her left breast? A. If you will look up the records—

Q. Did you say that? A. I will say now, from the first time I saw Mrs. Handlon, she gave me a history of having an injury to the left breast, and gave me a history of hemorrhagic condition from her vagina. She also told me that she did not have this condition in her left breast prior to the fall.

Q. You asked her that? A. Yes, sir.

Q. Did she tell you what sort of injury she received to her breast? A. She told me she fell through the opening.

Q. I asked you, did she tell you the sort of injury that she received to her breast? A. Let me tell you that she is not qualified to say anything of the kind of injury she might have received. She is not a physician.

Q. You didn't think she was able to tell you she fell sufficiently hard to raise a lump or to make black and blue spots or anything of that sort? A. She told me she fell very heavily and she fell through a hole and she was injured in the breast. She didn't tell the kind of injury it was. She would not be able to tell you that.

Mr. Weinberg: I ask that that be stricken out; that she would not be able to tell.

Q. You don't mean to say she would not be able to tell you she cut the skin of her breast, or that she broke a rib, or that she had a lump raised there, or anything else; you say she was not competent to say anything more than she received an injury to her breast? A. I mean to say she would not be competent to say. I mean that she would have a fractured rib, taking your own statement, without having known it. She may have lacerations or contusions of different degrees that she would not be able to qualify.

Q. Then you do want to stand by your statement that this woman was not able to tell you or would not have been able to tell you, if she had received any injury to her breast? A. I can tell you exactly what she told me of the kind of injury. She was unable to tell me the kind of injury. It takes a medical and surgical man to diagnose the kind of condition. She told me she had an injury to her breast, fell through this hole and injured her breast. I was called to tell her what kind of injury it was.

Q. You didn't see the result of any injury yourself? A. I saw the condition in her breast that was attributed to the injury.

Q. I must again repeat this question: whether she gave you any information at all as to the sort of injury, physical injury, that she received as a result of this fall? A. She told me her breast was bruised.

Q. Now, she was competent to tell you that? A. Not qualifying the kind it was or degree.

Q. Continue; she told you the breast was

bruised; what else? A. She told me she had a severe shock when she fell, and this nervousness.

Q. I mean with relation to the breast; I don't want to go all over the other things. A. Told me the breast was swollen and inflamed after the accident.

Q. Did she tell you how soon after the accident the breast became swollen and inflamed? A. Immediately after.

Q. She told you all that? A. Yes, sir.

Q. What else did she say about her breast? A. That was all; it was painful ever since. She had a mass in her breast; that was very painful, and when I saw it, it was very prominent, a lump or mass there the size of an egg.

Q. Now, Doctor, you first said nobody knows and that includes yourself, what causes cancer? A. No one can tell.

Q. It is a malignant growth, isn't it? A. Yes, sir.

Q. You do not know what the cause of the growth is? A. I do not.

Q. Now, not knowing what the cause of the thing is, how can you then say, to be consistent, what causes it? A. If I may explain this way. We have histories of thousands of cases where there has been an injury, and month and years afterwards there is carcinoma formed at that spot. The natural inference is that it was produced by that injury at some prior time.

Q. Who had the thousands of cases, you? A. Physicians throughout the world.

Q. To whom you have spoken? A. No.

Q. Just confine— A. The history of the cases.

Q. Just confine this to your knowledge, because it is obvious I cannot cross examine you on the thousands of cases referred to by doctors all over

the world? A. That is the way we gather information.

Q. I start out by having you admit that you don't know the cause of cancer? A. No.

Q. Now, then, I ask you if you don't know the cause of any, how can you say that any particular thing was the cause of that thing we are speaking of? A. No more than you can tell how you came in existence.

Q. Well, then, if I can't tell you how I came into existence—without argument, I certainly can't—A. You are surely here, there is evidence of it.

Q. I don't know; you say so? A. Can you tell me how?

Q. No? A. You are here. It applies in the same way.

Q. What is the first physiological condition after an injury which finally results in a cancer? A. Different in many cases.

Q. Then you have got to know exactly the extent of the injury in order to know just what happens? A. Not necessarily.

Q. Suppose you tell us, with the history that you had by this lady, as you say now she gave you a history of a bruise to her left breast, can you tell us what was the first thing that happened as a result of the bruise which finally resulted in this cancer? A. I can only explain the condition I found her in when I saw her.

Q. I am asking you now as an expert who has just rendered an opinion that this particular cancer came from this particular injury; you say that, do you not? A. I believe it came from—that it produced the condition that produced the cancer.

Q. In other words, you say that the injury that she received, about which she told you, produced the cancer? A. If her statements were correct.

Q. If what she told you was correct? A. The way I got it from her. Remember, I didn't see this woman when she was first injured.

Q. Suppose it to be true that the injury she received was one to her hip, to her right elbow, and to her ankle? A. Yes, sir.

Q. And then you find ten months thereafter this swelling in the breast which made you suspicious that it was a carcinoma, could you then make any connection between them? A. Not unless you had an original injury to her breast.

Q. Then you are answering my question by saying that if the only things that occurred were injuries to her hip, and her arm and ankle or knee or whatever it was, this cancer did not result from that? A. Absolutely not from the arm or leg.

Q. Now, is it necessary for you to know, in order to base your opinion in this matter, how severe the injury to the breast was? A. No, it is not necessary.

Q. So that anything at all in the way of injury, such as a slap, or anything of that sort, upon the woman's breast, may produce cancer? A. It depends what the injury does.

Q. I am trying to bring that out from you. What kind of injury must it necessarily be in order to result in this sort of cancer this woman had? A. You have many kinds of injury; punctured wounds, bruises of different degrees; injuries due to electricity; injuries due to some foreign body which became infected. I could go on a long time telling you. It is very difficult for me to tell you just the degree and depth of injury and explain to you just how much. There is no line of demarcation that I could tell you where it might produce cancer, or where it would not produce carcinoma.

Q. You mean to say any sort of injury could produce cancer? A. No.

Q. You enumerated a number of things here; then you say it is not possible to say what would be required? A. I do. I mean to say, you may have many injuries and not have carcinoma anywhere.

Q. What would be the minimum injury to be received by the breast before a cancer would result? A. Depends on the individual. They may have the breast entirely torn off and not have carcinoma at all. We have to treat each individual case; they all have different reactions.

Q. Will you tell me what occurred between October, 1926, and August, 1927, in this woman's breast? A. I am unable to tell you. I didn't see her.

Q. I understood you to say you don't know whether cancer is the result of a germ? A. I do not.

Q. You don't know whether it is the result of heredity? A. I do not.

Q. You don't know whether it is from the blood vessels? A. There is nothing positive on the subject to date.

Q. It is your opinion that it came from an injury, and that is just as unpositive, isn't it? A. I have explained that thoroughly in the course of my examination.

Q. That is to say, if you can't tell us what causes a thing, you can't pin on any particular thing? A. It is mere supposition.

Q. In other words, you do find cancer breaking out in women who have theretofore had no history of injury whatever? A. Apparently.

Q. Who have had no history of any condition in their ancestors? A. No.

Q. Who have had nothing, so far as you know, to have produced this condition; otherwise apparently healthy? And then are found to have cancer? A. Yes.

Q. You find a great many people who have been injured and never had cancer? A. Yes, sir.

Q. So that all you can say, cancer may come from injury and it may not come from injury? A. Yes, true.

Q. Which is tantamount to saying you don't know what it comes from? A. I have answered that.

Mr. Gilhooly: I object to that as argumentative.

Mr. Weinberg: It is not; the question does not appear to be my conclusion.

Q. Is that tantamount to saying you don't know the cause of cancer? A. In which particular case do you mean?

Q. I thought we covered the ground rather thoroughly as to conditions that might or might not have existed? A. Might or might not; I have answered that in the affirmative.

Q. Now, do you know how long a time elapsed from the very inception of the cancer until it reaches a point where it produces a swelling and pain? A. No one knows.

Q. Speaking for yourself, you say you don't know? A. No.

Q. You don't know, then, whether it is possible for this particular cancer, of which you found evidence in August, to have resulted from an injury which occurred in October? A. May I hear that question?

Q. (Question repeated.) A. It is possible.

Q. Well, do you say with any degree of certainty that it did result? A. To make a statement possible does not state there is any certainty about it.

Q. We very seldom use that word possible. If the cancer did come from the injury which was received in the previous October, Doctor, when in your opinion would the first symptom of that cancer appear? A. I don't know.

Q. You spoke of metastasis, did you not? A. Yes, sir.

Q. Which is a jump one point to another? A. Yes, carried by the blood.

Q. Which is the common or ordinary place for the cancer to originate? A. In this particular case?

Q. I am speaking now generally; you don't know where this one originated you say? A. May I answer that question, your Honor?

The Court: Go ahead.

The Witness: Cancer, uterine, and cancer of the breast are locations where we usually find cancerous conditions; also cancer of the stomach.

Q. So that a cancer that has its origin in the female uterus, has its metastasis, or terminii, do you believe, in the breast? A. Not necessarily.

Q. But frequently? A. Not frequently.

Q. Occasionally? A. Sometimes.

Q. What was the trouble with this lady's uterus when you examined her? A. She had endometritis, that is inflammation of the lining of the uterus.

Q. What sort of examination did you make? A. I made a digital examination, an examination, manual digital examination.

Q. Do you know what that resulted from? A. What resulted from?

Q. That condition you found in the uterus? A. I do not.

Q. Why? A. Why, maybe one of a hundred causes.

Q. That is what you said about cancer? A. Why, certainly.

Q. Can you give me some of the causes to produce this condition that you found in the uterus? A. A great many; to begin with, it is due to infection, bacteria get into the lining of the womb and produce inflammation.

Q. You mean human bacteria, coming from a human? A. Yes, sir.

Q. All right; go ahead. A. Sometimes we have exfoliating endometritis, a condition in which the whole lining of the uterus is shed off from the diseased condition. Sometimes we have catarrhal endometritis much as you would have a catarrhal condition in your nose or throat.

Q. Now, did you ever know of a case of cancer that originated in the uterus? A. Originated in the uterus?

Q. Yes. A. Yes, sir.

Q. Can you tell what the appearance of the uterus was? A. You would like the pathological appearance, microscopic, or if you will tell me the kind, I will give you an idea as near as possible, so that you can understand it.

Q. I mean from the examination you made of this lady, some sort of examination, did you ever detect cancer in the uterus? A. I did not.

Q. In order to detect it, you make a microscopic examination? A. Yes, we do.

Q. You did not in this case? A. No.

Q. You made no microscopic examination of any part of the breast? A. No.

Q. You made no complete examination? A. No.

Q. So that in August, 1927, you were not at all positive as to what was the matter? A. I didn't see her in August, 1927. It was later than that, because I was out of town in August, 1927.

Q. When was it? A. September.

Q. September; I believe you said in September, 1927, you did not determine that she had cancer, did you? A. Where?

Q. Well, where we have been talking about? A. The breast or uterus? We were talking about the uterus.

Q. I just asked whether you determined in September, 1927, that she had a cancer? A. My diagnosis was that, tentative diagnosis was that she had carcinoma of the breast.

Q. You gave her a local application for that? A. Yes, to reduce the inflammation in the surrounding glands and in the tissue.

Q. Did you tell her she had cancer? A. No, I didn't at first.

Q. Did you advise an operation? A. Not at that time; she was not in condition to stand an operation.

Q. Is that why you didn't advise her, because she was not in condition, or because you didn't know? A. Because she was not in condition.

Q. Can you tell us with any reasonable certainty, how long, excluding if you please any history that you received from this case, how long this cancer or carcinoma was in forming? A. I don't know.

Q. And the only reason that you say that in your opinion this carcinoma came from this injury is because you have had a history of injury? A. That is all.

Q. I am just going to go back to this uterine condition. Would the flow that you saw, the hemorrhages, from the uterus, be consistent with that condition? A. In which particular case?

Q. In this lady's particular case? A. It is possible, as I told you, from many causes in this woman.

Q. You examined the uterus; you found a chronic condition of something. I am asking whether that condition, whatever it was I don't know and I don't suppose the jury knows; whatever that condition was, would you say that the hemorrhage from the uterus was the probable thing that you would expect to go along with that condition? A. Which condition, the condition of the uterus?

Q. The condition that you found in the uterus? A. Certainly; the hemorrhage was due to that, or she could not have had it.

Q. Did the hemorrhages produce the condition of the uterus that you found or did the condition in the uterus produce the hemorrhages? A. The condition in the uterus produced the hemorrhage.

Q. What produced the condition in the uterus, if you know? A. Nobody knows.

Q. "Speak for yourself, John." Do you know? A. No.

Cross examination by Mr. Moser:

Q. As part of the history you took from Mrs. Handlon in 1927, did you take from her when she first noticed the condition of her breast, the lump? A. From the time of the accident.

Q. From the time of the accident, Mrs. Handlon noticed the lump in her breast? A. She noticed soreness in the breast.

Q. No; I am asking you about the lump you found? A. I found the lump I told you. The soreness she told me of.

Q. That is what I am asking you. Now, did you take, as part of her history, when Mrs. Handlon first noticed the lump in her left breast? A. I have no record of her saying anything about the lump at all.

Q. Have you any recollection of having asked her when she first noticed the lump? A. No, she did not specify the lump at all. She merely said she had an injury to the breast with swelling and redness.

Q. When you saw Mrs. Handlon for the first time in September, 1927, you found a lump about the size of an egg; is that correct? A. Yes, sir.

Q. Did you ask Mrs. Handlon when she first noticed the progressiveness of that lump? A. Didn't specify the lump at all. I merely asked her how long she had the condition in her breast, the inflammation in her breast.

Q. Did you ask her whether the lump had gotten larger over a period of time? A. Yes, sir.

Q. Over what period of time did she tell you that lump started to progress and become larger? A. It increased in size more rapidly just before I saw her.

Q. In other words, isn't it a fact that Mrs. Handlon told you that she noticed the condition of her breast just about two or three months before she saw you? A. No; told me it was due, from the date of the injury she had the condition of her breast.

Q. You remember being at Mrs. Handlon's with Dr. Farden at one examination? A. Yes, sir.

Q. Did you hear any conversation Dr. Farden

New Jersey State Library

had with Mrs. Handlon concerning when she first noticed it? A. That had nothing to do with my evidence. That is Dr. Farden's examination.

Q. Please answer my question; we will forget Dr. Farden for a moment—

Mr. Gilhooly: I object to that as not proper cross examination. I didn't cover any conversation witn Mrs. Handlon by Dr. Farden.

The Witness: I don't remember Dr. Farden asking the question as to how long she had it.

Q. You do not remember it? A. I don't remember, asking her the question of durability or time.

Q. In September, 1927, when you first saw Mrs. Handlon, you diagnosed this condition to be carcinoma? A. Not at first. My suspicion was that it was carcinoma. It was a tentative diagnosis.

Q. When did you make your positive diagnosis? A. Well, I don't know just exactly when I made that. Some time before she left my service.

Q. Shortly after you first saw her? A. I don't know exactly the time.

Q. May I ask if you are connected with any hospital which specializes in women's diseases? A. I have been, with the Post Graduate Hospital years ago; I have operated in that hospital over there. I have been with a private hospital with Dr. Waites for twenty some years. I have the courtesy of three different hospitals in the City of Newark: Beth Israel; Presbyterian Hospital, where I do most of my work now; also the Homeopathic Hospital.

Q. You are not associated in a hospital that specialized in the treatment of diseases of women? A. No.

Q. You do, however, know the sanitarium operated by the Mayo Brothers in Rochester, Minn.? A. Yes, sir.

Q. You know of their experience in surgery and the conditions of women? A. Yes, sir.

Q. Isn't it a fact that the Doctors Mayo prescribe in their opinion, that whenever you determine that there is any lump, of any kind, whether it is a tumor or carcinoma, or not, to get it out as soon as possible? A. Unless the patient was in a condition where she would die under the operation, and the patient would die and the operation was successful.

Q. Where was this carcinoma, in the deep tissue of the breast when you first saw it? A. Yes, sir.

Q. That means that, in order for the deep tissue of the breast to be affected, first the skin must have been affected, if it was the result of trauma; isn't that so? A. I didn't see it when she was injured.

Q. Well, now, isn't it a fact that she could not have affected deep tissue of the breast, without first affecting the skin, if the condition was a result of trauma, or blow? A. They are both affected at the same time.

Q. That is, you would have to have some condition which was the result of trauma to the skin, isn't that so? A. Yes, as well as the other tissue.

Q. Doctor, if Mrs. Handlon did not have a condition that necessitated any treatment to the breast because of the trauma or otherwise, at the time of an accident, you still want it to be your opinion that the carcinoma was the result of trauma? A. She may have had a condition; I could not say anything about it.

Q. Would the trauma to the breast have to be

of such a degree that a person in making an examination noticed it, as a doctor, in making an examination, would notice it? A. He would notice it.

Q. So that, unless she had a condition to the breast that would be noticed by either a physician who was treating her, or an examining physician, it is your opinion that the carcinoma would not be the result of trauma? A. Anything sufficient to show?

Q. In other words, you have to have a great degree of trauma, or blow, to the particular part affected in order to in any way connect up the cancer with the trauma? A. That depends on what you mean by great.

Q. Well, substantial force? A. Yes, sir.

Q. Isn't that sufficient? A. That is better.

Q. In other words, you at least have to have a degree of blow that would cause ecchymosis, or black and blue marks, or a bruised condition? A. Yes, sir.

Q. Now, if the only condition of trauma about the breast was a condition of trauma to the arm between the elbow and the shoulder, you would not say that was sufficient to cause carcinoma of the breast? A. An indirect injury through the arm?

Q. Trauma to the arm? A. And not to the breast?

Q. Yes. A. No.

Q. In other words, you must have a direct blow to the affected part? A. Yes, sir.

Q. Speaking of the degree of that blow, what would you say as to the extent of time that you would be able to ascertain that blow? A. I don't know.

Dr. Henry T. Holler, redirect.

Q. Well, would you say it would have to be such a blow or bruise or condition that would last over a period of a few weeks, or something like that? A. That depends on the individual. Every individual has a different reaction as to contusions.

Q. Without anything individual, it would have to be a substantial blow on the breast? A. Substantial blow.

Q. That would probably need medical attention immediately? A. Yes, sir.

Redirect examination by Mr. Gilhooly:

Q. If a blow had been received to the chest and had been overlooked by the attending physician, would you say that that might increase the possibility of carcinoma?

Mr. Weinberg: I object to that on the ground that there is no evidence that anything was overlooked by the attending physician; no evidence in the case that she ever had any injury to her breast which could be seen by anybody.

The Court: I will sustain the objection.

Q. Do you know the amount of your bill? A. I do not.

Q. Do you know how much you charged her for each visit? A. About three dollars.

Q. How many visits did she make to you? A. I don't know. She paid cash every time I saw her. I may have charged her more in consultation, $10, to $100. It depends on the condition.

MRS. ELIZABETH ROWLAND, sworn for the plaintiffs:

Direct examination by Mr. Gilhooly:

Q. Do you know Mrs. Handlon? A. Yes, sir.

Q. Did you know her in October, 1926? A. Yes, sir.

Q. Did you meet her on the night of October 29th, 1926? A. I did.

Q. Where did you meet her? A. In the delicatessen store, Nolden's delicatessen store.

Q. Did you go to the store together, or did you meet her in there? A. No, she was in there when I went in.

Q. Did you have any conversation with her? A. She was getting waited on when I went in there. She waited for me to go out.

Q. Had you been there before that time? A. Yes, sir.

Q. You knew her? A. Yes, sir; years.

Q. Did she make a purchase, do you know? A. Yes, sir.

Q. Who left the store first, you or Mrs. Handlon? A. I did.

Q. Could you tell us whether or not there was any screen door on the premises at the time? A. Of the store?

Q. Yes? A. Yes, sir.

Q. Where was the screen door; was the screen door inside of the closed door or out here, alongside of the window; do you recall? A. It was in the center of the two windows, the screen door, as you go inside, in the center of the store.

Q. Was the screen door back here where the other doors, or permanent doors, or was it out on the line of the window? A. I think it was back. I am quite sure of that.

Q. Now, did you go out first? A. Yes, sir.

Q. Did Mrs. Handlon follow? A. Yes, she followed.

Q. What, if anything, did you hear or see right after Mrs. Handlon had left the store? A. Well, I went out first and then I started to my left.

Q. Let me stop you there; you went out first and you turned to your left? A. Yes, I turned to my left and there was a masquerade or something on next door, I looked, all at once I heard a noise.

Q. What kind of noise? A. As if she caught something with her foot. All at once I heard a noise and she was going over the side of the cellar, face downward down the cellar steps.

Q. Did you do anything when you heard that noise? A. Yes, I turned quick.

Q. Just tell the jury what you saw? A. Well, she was going over the side of the cellar door. She went over the top of the steps and then she rolled over, and Mr. Nolden caught her at the bottom of the steps.

Q. How far were you away from this opening would you say? A. I could not just exactly say, but I wasn't far away because I was with her.

Q. Were the doors open or closed? A. They were open when we went out, but they were closed when we went in.

Q. They were open when you went out? A. Yes, sir.

Q. Now, this door, we will call it the northern iron door, and this southerly door; was the northerly iron door in an upright position? A. No, it was not.

Q. Was it lying on the sidewalk? A. It was lying three or four inches from the floor as far as I know.

Q. Was there any iron bar running along the front holding the doors together? A. No.

Q. After Mrs. Handlon fell, what did they do with her? A. Why, Mr. Nolden carried her up out of the cellar into the store.

Q. Let me ask you; when she fell, did you see what part of her body came in contact with either side of the hole when she fell? A. The south side; well, she fell face downwards and she struck the left side as she fell; as she fell she struck the left side.

Q. What part of her body struck? A. The left part of her body.

Q. The whole left part? A. Right from her shoulder. She did not strike her whole right shoulder; then she rolled and went through and she went to the bottom and Mr. Nolden caught her.

Q. After Mr. Nolden caught her, did he bring her up in the store? A. Yes, brought her up in the store.

Q. Were you there when Dr. Dukes came? A. No, I was not.

Q. Did you go home? A. I left. I went to the cripple girl she has; she has a little crippled girl so I went to attend to her until she came.

Q. Do you know what time that was? A. About one or half past as near as I can tell.

Q. Were you there at the time she came? A. Yes, I was.

Q. Who took her in? A. Mr. Nolden, I am not sure whether he carried her on his back.

Q. Did she walk up? A. No.

Q. Did you remain with her that night? A. I remained with her until about three or four o'clock, between three and four.

Q. Did you do anything with relation to her pain? A. Yes, I put hot water bottles on her.

Q. Where? A. Her leg.

Q. Did she have a cut on her leg? A. Yes, sir.

Q. That of course was bandaged up? A. That was bandaged up.

Q. You said you knew Mrs. Handlon before? A. Yes, sir.

Q. Could you tell us whether she was a well woman or sickly? A. She was never sick.

Mr. Moser: I object to that.

Mr. Gilhooly: It is answered.

Mr. Moser: Without the answer being repeated, I object on the ground it calls for a conclusion; secondly, it calls for a medical conclusion; thirdly, that this person is not qualified to testify to the condition of Mrs. Handlon either before or after the accident.

The Court: You might ask whether or not she was complaining.

Mr. Gilhooly: I will redraft the question.

Q. Prior to the time of this accident, can you tell us whether or not Mrs. Handlon complained of being ill? A. No.

Mr. Moser: I object as immaterial.

The Court: I will permit the question.

Q. Did you see her quite often? A. She lived in my house six years; I have known her for about seven and a half years, as near as I can tell.

Q. Have you seen her since the accident? A. Oh, yes, lots of times.

Q. Have you visited her? A. Yes, sir.

Q. What has been her condition which you have observed? A. Well, she has always complained ever since she was hurt.

Q. Don't tell us what she said; you said she was complaining? A. She was complaining.

Q. Has she been doing her housework? A. Not since her hurt; she done it before.

Q. Did anybody else do it for her? A. Yes, her sister.

Q. She is in bed at the present time? A. Yes, sir.

Cross examination by Mr. Weinberg:

Q. Just where were you at the time Mrs. Handlon fell? A. Well, I was coming out of the delicatessen store, and I turned to my left as I came out. The door opens to the left. Of course I turned to the left and there was a masquerade parade at the Copestone Temple. I turned to look at them. As I turned to look at them, and as I turned I heard a noise. I turned around quick and Mrs. Handlon was going over the side of the cellar door, face downwards.

Q. Now, you see, I asked you where you were at the time that Mrs. Handlon fell? A. Well, I was coming out of the delicatessen store.

Q. No, not you were coming out; just where were you when you saw her fall, how far away were you from Mrs. Handlon? A. I could not tell you exactly how far away I was. I just stepped to one side; that is all I can tell you.

Q. Were you close enough to her to see down the stairway? A. Yes, sir.

Q. Could you see the bottom of the cellar from where you were? A. Yes, sir.

Q. It was well lighted up? A. Yes, I think there was a light downstairs. Mr. Nolden was down.

Q. Tell me what your memory is; when you came out of the store, you saw the cellar was lit, didn't you? A. Yes, sir.

Q. Which way were you going? A. Down left, towards Kearny Avenue, this side.

Mrs. Elizabeth Rowland, cross.

Q. You were going down in the direction of Mrs. Handlon's home? A. The same direction as Mrs. Handlon, yes, sir.

Q. You saw this cellar opening, didn't you, when you came out? A. Yes,—no, I didn't see it open when I came out, not until she fell over it.

Q. Did you see the cellar opening? A. I seen the opening, but I didn't see it open until she fell down.

Q. You saw the light coming out of the cellar? A. When she fell.

Q. You didn't turn in the same direction she did? A. Yes, sir, I did.

Q. You didn't strike your foot on it? A. Well, I didn't get so close as she did. I turned to watch the parade.

Q. You say she fell face downward? A. Yes, sir.

Q. Could you see whether she struck anything? A. She struck—

Q. Could you see was the question I gave you? A. Yes, I seen her struck.

Q. After she disappeared down the opening, could you see her—how near to the opening were you? A. Well, I could not tell you that. I was close enough to see.

Q. That doesn't give me any idea at all.

Mr. Gilhooly: Suppose you point out in the courtroom.

Q. Tell us about how far you were away from the cellar opening? A. I wasn't above that far away (indicating).

Q. You were not far away? A. No, sir.

Q. So that you could see everything as she fell downward? A. Yes, sir.

Q. She fell, you say, face downwards; did her face strike anything? A. Yes, sir.

Q. She fell face downward; what prevented her face from striking anything? A. I can't tell you that; she struck her shoulder.

Q. You are quite sure she struck her left shoulder? A. I ran to try and save her.

Q. You were out on the sidewalk? A. Yes, sir.

Q. That has no connection with the way she fell, the fact you wanted to save her. You didn't grab her at all? A. No, I did not.

Q. You saw Nolden come upstairs? A. Yes.

Q. Did you see whether she fell on Nolden? A. No, I could not tell you. She didn't fall on Nolden, because he dropped—

Q. She struck the stone steps with a thud? A. Yes, sir.

Q. Did she hit her head? A. She didn't hit her head. I don't know that she struck it.

Q. Isn't that a fact, because you didn't see? A. Yes, I seen it.

Q. Have you been talking to anybody, particularly with reference to the fact that she received an injury to her left side? A. No, I have not.

Q. Don't you know that the injuries she received were on her right side? A. Oh, yes, I know, but she struck her lett side.

Q. You didn't say any word about the injuries to her right side; do you recall that? A. Oh, yes, she hurt her leg in that.

Q. Does it occur to you that while you were testifying you at no time referred to any injuries to her right side?

Mr. Gilhooly: I object to that as not proper cross examination.

(Argued.)

Mr. Gilhooly: I withdraw the objection; you can answer the question if you can.

The Witness: On the right side I never said—it wasn't because I would not. I never thought about it.

Q. You never thought about the injuries to the right side; you are quite sure about the injuries to the left side? A. Well, I seen her fall, that is why.

Q. When she came upstairs and was in Mr. Nolden's store, did you see any injuries to her left side? A. No, because I went home. I didn't stay.

Q. I am just asking you if you did? A. No.

Q. You did see her right ankle was hurt? A. Yes, sir.

Q. You heard her complaining about her right side? A. Yes, sir.

Q. Did you hear her say anything about her left side? A. She complained all the time.

Q. I didn't ask you what she complained of. You are testifying now as to what you saw. So that all you know about any injuries to her is what she complained of? A. No, I seen her leg.

Q. Have you spoken to either Mr. or Mrs. Handlon concerning the question of the injuries to her left side, any time? A. No, I seen them—

Q. I am asking you now Mrs. Rowland, whether you talked with anybody about the matter of where these injuries were received by Mrs. Handlon? A. No.

Q. You didn't have a talk with anybody on the particular point as to whether she received injuries to her left side? A. No.

Q. You say "no"? A. Her left side I know was hurt.

Q. My question is: have you ever spoken to any-

body about Mrs. Handlon having been hurt on the left side? A. Well, I could not answer that.

Q. To nobody; is that so? Answer my question, please? A. No, I didn't.

Q. Well, which was uppermost in your mind, when you first saw it, the instant of the injury, her right side or left side?

Mr. Gilhooly: I submit that the plaintiff is not bound by her conjectures.

Mr. Weinberg: This is produced by the fact that the lady on her direct examination said nothing at all about injuries to the right side, about which there has been testimony from the plaintiff and the doctor. She has been testifying about the left side, and it is for the purpose of attacking her credibility that I am asking if she saw injuries to her right side, whether that was not in her mind as well as the left side injury.

The Court: You may put it that way, but which was uppermost—

Q. Wasn't that also in your mind, the fact that she hurt her right side? A. No.

Q. That was not? A. No.

Q. You know that she had had trouble with her left breast since the accident, don't you? A. Yes, sir.

Q. Is that any reason why you are now telling this jury that she received this injury to the left side? A. No.

Q. Did you ever see any injury on Mrs. Handlon's left side? A. Oh, yes, sir.

Q. You did? A. Yes, sir.

Q. Where and when, and what kind did you see? A. She had a great big lump here (indicating).

Q. That was long after wasn't it? A. It wasn't so long after that it began to come.

Q. Tell us that, about when you first saw the big lump on the left side? A. Why, the big lump started first about four or five months I think it was.

Q. Suppose you go back to the night of the accident, or thereabouts, did you then see the injury you are speaking about now, the swelling? A. Yes, sir.

Q. I am asking you about the injury, such as we commonly call a cut, or a bruise, did you ever see anything like that on the left side? A. No.

Q. You did the injury on the right side, the foot? A. Her leg.

Q. How long have you known her? A. I know Mrs. Handlon I think between six and seven years.

Q. How near to her do you live? A. I am nothing at all to her—what do you mean, relative?

Q. I say how near do you live? A. I live at 295 Argyle Place, quite a distance away.

Q. You see her quite often? A. Yes, sir.

Q. You were quite friendly with her? A. We lived in the same house at that time.

Q. Was there a light in Mrs. Handlon's store when this occurred? A. In whose store?

Q. In Mr. Nolden's store? A. A light, yes.

Q. The light was out of the window over this entrance? A. Well, I could not tell you that. I just forget. I know they were decorating the store windows that night with ribbon.

Q. Wasn't that window empty; were not the decorations in the other window? A. They started that window, I think.

Q. What part did the decorations play in your answer; would you say that held the light out, or

was the fact they were decorating— A. I guess it darkened the place a little bit.

Q. Did you notice that? A. It was not quite so light.

Q. Darkened that cellar opening? A. It darkened a little there from what it should be; it was not as light as it should be.

Q. It was light enough there; there was this light that came out of the cellar? A. I could not tell you that; I just forget.

Q. When she fell, didn't you say it was very light down there? A. I forget that.

Q. Is that what you say, that you forget that? A. There was a light down in the cellar, yes, sir.

Q. That you could see? A. Yes, sir.

Redirect examination by Mr. Gilhooly:

Q. Had you looked at the doors after she fell? A. No.

(Recess to 10 A. M., May 2, 1929.)

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10 A. M., May 2, 1929.

DR. JOHN B. TOYE, sworn for the plaintiffs:

Direct examination by Mr. Gilhooly:

Q. Doctor Toye, you are a practicing physician, are you not? A. Yes, sir.

Q. You have been for how long? A. About 28 years.

Q. Did you treat Mrs. Handlon, the plaintiff in this suit? A. I am treating her now.

Q. When were you first consulted by Mrs. Handlon? A. Approximately the first of May a year ago.

Q. What condition did you find then? A. Found she had carcinoma of the left breast.

Q. Do you know whether or not she has been operated on for that? A. She had not been at the time.

Q. Has she since? A. She has.

Q. Since she was operated on, have you been treating her? A. Yes, sir.

Q. How long is it now, as you recall, you have been treating her after the operation? A. She was operated a year ago, some time in May a year ago; the middle of May when she came back from the hospital. She has been since more or less under my care.

Q. On what part of the body was she operated? A. On the left breast, axilla.

Q. What was the nature of the operation? A. Removal of the breast for cancer.

Q. What is her condition at the present time? A. It is very bad.

Q. What has it been since the operation? A. Progressively worse.

Q. Could you tell us whether or not that is of a painful nature? A. Very.

Q. You are still treating her? A. Yes, sir.

Q. Doctor, as the result of your examination and treatment what is your diagnosis? A. She is going to die.

Q. Doctor, as a result of your examination and your treatment of Mrs. Handlon, and as a result of the history that you had, could you tell us what in your opinion is the probable cause of her present condition?

Mr. Weinberg: I object. There has been no foundation laid so far for an opinion from the doctor.

Q. In your experience, I think you said thirty-one years— A. 28 years.

Q. —have you had experience with carcinoma? A. Yes, sir.

Q. What has been your experience in that particular disease; have you had many cases? A. A good many, yes, sir.

Q. Have you made a study of cancer? A. Not a special study.

Q. You don't consider yourself a specialist, is that what I understand? A. No.

Q. You have not specialized in the treatment of carcinoma? A. No.

Q. But you have had cases of carcinoma? A. Large numbers; any general surgeon gets a large number.

Q. Can you tell us whether or not a blow is a pre-disposing cause of cancer? A. Yes, sir.

Mr. Weinberg: I object and ask that the answer be stricken out. I ask leave of your Honor to further examine him; I don't think he qualified himself at all.

The Court: The answer may be stricken out.

Cross examination by Mr. Weinberg:

Q. Have you ever made any research to determine the cause of cancer? A. No.

Q. Do you know the cause of cancer? A. I know what the general opinion—no.

Q. From your own experience, at all? A. No.

Mr. Weinberg: Then I object; he is not qualified.

Mr. Moser: I move to strike out all the testimony concerning carcinoma itself as too

remote and in nowise connected up with the alleged accident on October 29th, 1926.

The Court: No, I will permit that part of the doctor's testimony, as to her present condition, to remain, in connection with what has been shown. You may have an exception.

Mr. Moser: Exception.

THOMAS D. HANDLON, sworn.

DR. JOSEPH L. FARDEN, sworn for the defendant, Copestone Temple Association:

Direct examination by Mr. Moser:

Q. Are you a practicing physician of the State of New Jersey? A. I am.

Q. How long have you been? A. Fifteen years.

Q. Have you had any experience in connection with diseases of women? A. I am attending physician of the Newark Hospital for women and children.

Q. Does that hospital specialize in diseases of women and children? A. Yes, sir.

Q. What other connections have you, Doctor; please tell us just briefly what your experience has been in the profession? A. Well, that is the only hospital I am connected with. I was formerly connected with St. Michael's in the City of Newark. My work is all gynecology, which deals with the diseases of women, all diseases of women.

Q. In what capacity are you connected with the the hospital? A. Attending surgeon.

Q. Have you a clinic? A. We have our own

clinic with operating services, sometimes operating twice weekly.

Q. Have you examined Mrs. Frances A. Handlon, the plaintiff in this case? A. I did.

Q. On how many occasions? A. I saw her in November, I think the 18th, 1926, and again in December 12th, 1927.

Q. Will you just tell us what the complaints were on the first occasion of your attendance there and what you found resulting?

The Court: When did this accident occur?

Mr. Gilhooly: October 29th, 1926.

A. At that time I saw the case with Dr. Dukes. Dr. Dukes informed me that she had a laceration—

Mr. Gilhooly: I think he was asked what the complaints were. Was this remark made in the presence of Mrs. Handlon, or in a conference?

The Witness: Mrs. Handlon was naturally present.

Q. You examined her at the time? A. We were examining her; with Dr. Dukes; we were both there.

Mr. Gilhooly: I think he ought to be confined to what she said.

Q. Did you have a conversation in the presence of Mrs. Handlon with Mrs. Handlon or Dr. Dukes? A. I spoke to both of them.

Q. Just relate what your conversations were, keeping in mind all must be in the presence of Mrs. Handlon. A. I inquired of Dr. Dukes as to the nature of her injury, and I learned that she

had a laceration of the right shin, contusions of the right arm, right thigh and right ankle.

The Court: Dr. Dukes was representing Mrs. Handlon at the time?

The Witness: Yes, sir.

The Court: And present in order that he might be there as her representative while you were making the examination?

The Witness: Yes, sir.

Q. Was the Dr. Dukes who was present at the examination the Dr. Dukes who testified in court here yesterday? A. Yes, sir.

Q. Will you proceed, Doctor? A. That was the history of the injuries that I obtained: right arm, right thigh, right shin and right ankle. I went over these parts. There was at that time still a little swelling of the right ankle on the outer side, under the malleolus, as we call it, that is, under the ankle bone. There was an open wound on the right shin, about an inch in length, which was not healed at that time. There has been no X-rays taken up to that time of the leg. The right thigh showed no evidence of any injury, and the arm showed no evidence of any injury; that is, the bruising had cleared up at the time. The only thing I found on that examination was a laceration of the right shin, with a little swelling on the outer side of the right ankle.

Q. If bruises or a bruise to the arm and hip had been there, they had disappeared over the period between the accident and your examination? A. Yes, sir.

Q. At my request, you re-examined Mrs. Handlon later; is that correct? A. Yes, sir.

Q. When was that; just let us have that again?

A. That was December 12th the following year, 1927.

Q. Who was present at that examination? A. Dr. Holler.

Q. Was the Dr. Holler present at that examination the Dr. Holler who testified here yesterday? A. Yes, he was.

Q. Mrs. Handlon was there, of course? A. Yes, sir.

Q. Just tell us, Doctor, what you found at that examination? A. At the second examination, I recalled the injuries that I examined first hand. I looked at her shin; the wound had completely healed. The skin was not adherent to the bone, freely moveable over the shin bone. The right ankle had entirely cleared up. Mrs. Handlon then was complaining of pain over the entire right side of her body, her right shoulder, right hip, right leg. Also her left arm and left breast. She told me that she had developed a lump in her left breast since I last saw her. I asked her at what time she first noticed that lump. She said approximately two months ago; that was in December, 1927; the lump started to develop. I examined the breast and found a mass about the size of a baseball in the left breast tissue, with one enlarged gland of the axilla or armpit on the left side. The right armpit was free of any glandular enlargement. I spoke to Dr. Holler and asked him what he thought, and as I recall—

Mr. Gilhooly: I am just wondering if that is admissible. I think Dr. Holler has testified.

Mr. Moser: I withdraw that.

Q. Just proceed with your opinion, leaving out

Dr. Holler's opinions. A. Well, my opinion was that the woman probably had either early—

Mr. Gilhooly: I object to his stating an opinion until I have an opportunity to cross examine. I think he is going to testify to carcinoma and I think I ought to be permitted to question him as to his qualifications.

Q. What has your experience been concerning carcinoma? A. I have had many cases of it, involving the breast and genital organs.

Q. Have you ever operated for it? A. Many times.

Q. Over your period of experience at the Hospital for Women's Diseases in Newark, can you give us an estimate of about how many women you have seen and examined for this particular condition? A. I could not offhand. I could not tell you the number. We run into that rather frequently, run into either breast carcinoma or vaginal. I have a case in the hospital now of carcinoma.

Q. So that you have operated on many cases of women, and examined many cases for this particular condition of carcinoma of the breast? A. Yes, sir.

Q. Will you now proceed to give us your opinion as to what you found?

Mr. Gilhooly: May I cross examine?

Cross examination by Mr. Gilhooly:

Q. Are you a specialist; do you consider yourself a specialist in cancer? A. Not of cancer; of diseases of women.

Q. You have never personally made any re-

search into the study of cancer? A. No, not personally.

Q. You, of course, have probably read up on this subject in aid of your practice? A. Yes, sir.

Q. Your opinion would be based in the most part on what you had read? A. And my experience, coupled together.

Q. You can't tell us the cause of cancer? A. No, sir; it is unknown.

Q. You can tell us some causes, however, predisposing cause of cancer? A. Well, I can only tell you of my experience of relations. You can draw your own conclusion, the same as I can. There is no definite knowledge of the causation of cancer today.

Q. You have drawn your conclusion from certain facts you have seen in your study? A. No, I am still in a dilemma about it. I still do not know the cause of cancer.

Mr. Gilhooly: I withdraw my objection; you may proceed.

Redirect examination by Mr. Moser:

Q. Will you let us have your opinion as to Mrs. Handlon's condition at the time of your examination? A. The fact that she showed axillar involvement, large glands, on the side of the tumor in the left breast, made it appear very suspicious that it was probably the beginning of a malignant growth; I did not follow the case any further. I think I told Mr. Holler that. There was one other examination I made; I don't know whether you want that at this time. It was a vaginal examination.

Q. In furtherance of your attempt to ascertain the condition of Mrs. Handlon, did you conduct a vaginal examination? A. I did.

Q. In the presence of Dr. Holler? A. Yes, sir.

Q. Tell us what you found there? A. I found the uterus was in normal position. It was of normal size, freely moveable, not adherent to the pelvis. She had a bilateral laceration of the surface, that is, the neck of the womb, was torn both sides. The cervix was swollen and inflamed, which usually occurs after a laceration. The ovaries and tubes were pliable. I found no enlargement of the tubes and ovaries. In other words, it was practically negative, except for the laceration of the surface.

Q. Would the laceration of the surface, in your opinion, be the result of trauma a year or so ago? A. No, the laceration was due to childbirth.

Q. Doctor, could a carcinoma of the breast be the result of trauma, without the direct application of considerable violence to the affected portion?

Mr. Gilhooly: I think the doctor has very clearly said that he does not know what is the cause of cancer. I think he has disqualified himself completely. He would not even say there was any predisposing cause.

The Court: Well, I think that is so. I think the doctor has testified in such a way as to prevent his giving any more than a mere opinion, which would not even be in the nature of an opinion, because he has testified he has no opinion upon the causes of the condition of cancer. However, I suppose this will be subject to cross examination. You may have an exception.

Mr. Gilhooly: Exception.

A. If we accept the theory that trauma plays a

part in the causing of cancer, then that trauma certainly must be of sufficient severity or violence to produce an irritation of the breast tissue, and the primary tissue from which the tumor springs.

Mr. Weinberg: Did you say "if we accept"?

The Witness: Yes, sir.

Mr. Gilhooly: I think that should be stricken out as not being his opinion.

Mr. Moser: It is an opinion on the question of whether or not trauma is the cause of cancer.

The Court: The difficulty is that it is not his opinion. It is just "If we accept somebody's opinion, somebody else's opinion." If this doctor is able, from his experience, to give an opinion as to whether it is or not, it is relevant; if it is predicated on the assumption of somebody else's opinion, I don't think it is relevant.

Mr. Moser: Exception.

Q. What medical school did you attend? A. Georgetown University, City of Washington.

Q. How long did you attend? A. The regular course.

Q. Did you have any interne service? A. Interne in Georgetown University, and then Georgetown Medical School, City of Washington. I graduated from there.

Q. While at Georgetown University Hospital and Medical School, did you study the question of carcinoma? A. We did.

Q. As a result of your experience there, your study there, did you learn so much on the subject of carcinoma as would enable you to formulate

your own opinion as to the causes of carcinoma, if there are any causes for it? A. Well, we studied all we knew about it at that time. Science has advanced some, but on that question, I think we are practically at a standstill.

Q. And after you came out of medical school, did you subscribe to any medical pamphlets or any medical books in your practice? A. Yes, sir.

Q. Have you kept up with the subject of carcinoma, in connection with your work and your association with the Hospital for Women's Diseases in Newark? A. I have.

Q. Are you able to give us, as a result of your experience, an opinion, and your opinion, as to whether or not carcinoma can be caused by trauma?

Mr. Gilhooly: May I just amend that "may probably be caused."

Mr. Moser: Yes; we all can only deal with probabilities; we cannot deal with possibilities.

Mr. Gilhooly: I withdraw my objection.

Q. Can you give us your own opinion? A. Well, I can give you my opinion about it.

Q. What is your opinion, doctor, in connection with whether or not carcinoma can be the result of trauma? A. Well, I can answer that one way. There are certain groups of physicians that believe there is a relation between trauma and the development of carcinoma. There is another group that feel there is absolutely no relation, because the history of trauma is so common in any individual. We get a cancer, we will say of the breast; well, it would be very hard not to be able to find a history of the woman possibly knocking

that breast at some time. Therefore they feel that the history of trauma is unimportant, that we are all knocking or bumping ourselves in different places at different times, and we can always find a history of trauma; and they don't believe there is any connection. Personally, my opinion is that the cause is unknown, and one theory is as good as another.

Q. Taking the theory that carcinoma is the result of trauma, what in your opinion is the degree of trauma that must be applied to the affected part?

Mr. Gilhooly: Now, the doctor has said that there is one school of thought that believes trauma is the predisposing cause of cancer, but it is his own opinion they don't know what the cause of cancer is. I don't think he ought to be permitted to delve in the realm of speculation.

Mr. Moser: He is giving his own opinion.

The Court: Has he given an opinion as to what is the cause of cancer, or has he given what are the schools of thought, rather than his own. Have you an opinion upon it yourself?

The Witness: Yes, sir.

The Court: What is your opinion?

The Witness: My opinion is that trauma plays very little part in it.

Q. Now, if trauma does play a part, what would the degree of trauma, in your opinion, have to be in order to produce carcinoma in the affected part? A. Well, dealing with the breast, unquestionably, the blow would have to irritate or injure the breast tissue itself.

Q. Now, when you say the breast tissue, do you mean the underlying tissue? A. The underlying tissue.

Q. In order to affect the underlying tissue of the breast by trauma, would there have to be some outward appearance, on the outer surface? A. Yes, as a rule.

Q. And why is that? A. Because the skin would naturally show evidence of the injury, if the underlying parts were injured.

Q. On your examination, the first examination in November of 1926, was there any evidence of trauma to the breast? A. There was no complaint of the breast being injured at that time. Dr. Dukes didn't call my attention to it, nor Mrs. Handlon.

Q. In your opinion, could trauma to the upper part of the arm, between the elbow and the shoulder, which had cleared up in the space of time between October 29th, 1926, and the date of your examination on November 18th; could that trauma have been sufficient or could it in any way be the cause of the carcinoma?

Mr. Weinberg: May I add to that; you haven't said where the injury was. You said on the other side. The injury was to the right side.

The Court: The doctor testified the right arm and right shin. Include that in your question: could the injuries to the right arm, right shin, and right ankle, such as you found to exist on November 18th, 1926, could those injuries or any of them, cause the condition which is now found to exist in the left breast?

The Witness: It could not.

The Court: Have you an opinion, assum-

ing that trauma may have some—I think you said slight—relation as a cause for cancer? You said it didn't make much difference, I think, from your own phraseology?

The Witness: I think there is little connection. The reason I made that statement was that occasionally we will find an injury followed by a rapid growth, which under the microscope is diagnosed as malignant. With that particular case where the growth comes on rapidly after injury in this tissue, very rapidly I should say the trauma in that case was so direct and not remotely removed and there must have been a connection.

The Court: Have you an opinion as to the time?

The Witness: I think that usually, in the epitheliomal type of cases, where it comes on suddenly, I think trauma probably would be a part, and that would certainly be within a few weeks.

The Court: Have you an opinion as to whether or not, if trauma was, or did cause the condition of this kind, as to the time in which it would first evidence itself after the injury itself?

The Witness: I should think within a few weeks. I mean by that, there would be some development of the growth, or some comparable amount which you would be able to discover within, certainly through this area, three weeks.

Cross examination by Mr. Gilhooly:

Q. Doctor, when you were told that Mrs. Handlon had an injury to her right arm, you did

not proceed with your examination any further than the arm; is that right? A. I asked when I went in—

Q. Will you kindly answer my question; you did not proceed? A. I only examined the parts that were injured, that were told me were injured.

Q. You found at that time, did you not, that there was a cut on her right leg, just above her right ankle? A. Yes, sir.

Q. And that was a pretty deep cut, was it, Doctor? A. It was not deep in one sense of the word, because the shin bone is right under the skin; it did involve the periosteum of the bone.

Q. It had not healed when you made your examination? A. It had not.

Q. Your examination was almost a month after the time it happened, all but ten days? A. About three weeks.

Q. In the normal course of events, a superficial wound there should heal in three weeks, shouldn't it? A. I said that I thought it involved the periosteum, from its appearance.

Q. Doctor, did you find that Mrs. Handlon, in your examination of November 18th, was complaining about hemorrhages at that time? A. As I recall it, yes, sir. She did tell me about bleeding, and she also told me that it stopped when she took medicine given her by Dr. Dukes. Dr. Dukes didn't seem to pay a great deal of attention to it and I did not examine at the time. I think there was a flow at that time. I am not positive, but I think she was flowing at the time.

Q. She told you that was an unusual condition with her, didn't she? A. I think she told me that it started up since the accident, yes, sir.

Q. Doctor, in answer to Mr. Moser's question as

to what condition you found, you didn't say anything about that condition of hemorrhage. Now, is there anything else was said to you at that time that you have since recalled to your mind, other than what you answered to Mr. Moser? A. Well, the hemorrhage I didn't examine her for. I took her word; she told me she was bleeding, as I recall it. I asked Dr. Dukes about it. He said it was controlled by medicine. On the second examination it was a little different story.

Q. You felt at that time that it was rather unusual that she should be complaining of these hemorrhages, didn't you, Doctor? A. No, not from what Dr. Dukes told me.

Q. It required medication, didn't it? A. Yes, sir.

Q. And that was an abnormal condition, because people don't take medicine to stop their ordinary flow? A. It is abnormal; not unusual.

Q. You found in November, 1926, that Mrs. Handlon was highly neurotic? A. Well, she was nervous, I should say, but not as much as she was on the second examination.

Q. Did you take her temperature on the first examination? A. I did not.

Q. Did you feel her pulse? A. I don't recall; I don't think I did.

Q. Well, Doctor, didn't it strike you as being a trifle unusual that this woman should be in that nervous state when you made that examination? A. No, I would expect, three weeks after the accident, to find it; she seemed to be quite excited over the fact that she fell, worked up over it.

Q. You were given a history of how she fell? A. I didn't hear that. She told me she fell through the cellar door, fell through an opening.

Dr. Joseph L. Farden, recross.

Q. You felt at that time it was a severe shock? A. Well, I could not tell you how severe it was. I didn't see her until three weeks after the accident.

Q. She was very nervous when you saw her? A. Yes, sir.

Q. You saw her December, 1927; she was more nervous than she was before? A. Yes, much more.

Q. Did you attribute that to the shock which she suffered in the accident? A. No, I think she was worried about this growth in her breast. I think it worried her a good deal.

Q. When you examined Mrs. Handlon the first time, didn't she say she felt sore all over? A. No, all the right side.

Q. Didn't she say she felt sore, all her right side? A. I think the right arm, right thigh and the right leg and right ankle.

The Court: Didn't she feel sore under the right arm?

The Witness: Under the right arm?

Q. Yes? A. No.

Q. You knew from the history if a woman fell through an areaway, other parts might be affected than those she told you? A. Possibly.

Q. You didn't make inquiry? A. I naturally would not examine her unless she complained of some injury. I didn't examine her head, because the head was not injured.

Q. You went there for the purpose of trying to find out what her injuries were at the time? A. I was there to determine her physical condition.

Q. And then? A. And then report on it to the defendant's counsel.

Q. And that is your purpose in making this examination, wasn't it? A. Yes, absolutely.

Q. You were there in a zealous mood? A. Trying to be fair.

Q. I appreciate that. I don't accuse you of being unfair. You were not there for the purpose of trying to find out other things, other than those which had been told you? A. Oh, yes. A person is injured. I am asked to examine them. I go into it very carefully, as to where they were injured. I never miss a part that they tell me they are injured.

Q. You didn't go into this case carefully, by looking for other parts of her body? A. She never complained about any other parts except what I did examine. Naturally I was not going to disrobe the woman and examine her all over.

Q. So you don't know whether she had a discoloration of her chest and breast or any other place? A. I do not know that.

Q. Now, Doctor, in December, 1927, you still found a scar on her leg? A. The wound was completely healed and a rather thin line was there. The skin was not adherent to the bone; it was freely moveable. The skin across the shin bone was completely healed.

Q. That of course was a permanent scar? A. Yes, all scars are permanent.

Q. That would of course show through a silk stocking, would it not, if she wore one? A. I don't think this would show through a stocking. It was not a hideous scar by any means.

Q. Coming down to the lump in the breast; you found that out in December, 1927, didn't you? A. Yes, sir.

Q. You started to tell us about another examination you made of her. When was that? A. That was the only two; I made no other examination.

I made the vaginal examination at the second examination. I didn't make a vaginal at the first.

Q. Now, Doctor, you spoke about this hemorrhage in the uterus; that you attribute to childbirth? A. No, I didn't say due to childbirth.

Q. You said the laceration; I don't remember word for word. It went over my head; there was a laceration? A. The laceration of the cervix.

Q. That was not causing the hemorrhage? A. Possibly.

Q. That was right at the neck of the womb? A. Yes, sir.

Q. She was flowing pretty freely the first time you saw her? A. Well, the hemorrhage could come either from the neck of the womb or from the body. Sometimes we can't tell.

Q. You didn't know where this hemorrhage was coming from? A. She was not bleeding when I examined her.

Q. She was the first time? A. I did not examine her.

Q. She said she was? A. She said she was.

Q. Did the doctor tell you he was giving her medicine? A. Yes, sir.

Q. He said he stopped the flow with it, with this medicine? A. Yes, sir.

Q. If there was bleeding from the head of the womb, he would not be giving medicine to stop it? A. Yes, if it is slight, he would give ergot or gossypium. You will often attempt to control mild flow. If it is severe, they usually pass a urethroscope for examination, and then curette, scrape the womb with a spoon-like instrument.

Q. They also give medicine? A. I said in some hemorrhages you can control it with medicine.

Q. That condition could have been the result of

a fall, couldn't it? A. It is possible. I have seen cases where the woman was menstruating at the time of the accident and had an increased amount of flow. She had, you might say, a regular hemorrhage. In this case, I think it is not due to any trauma, or trauma to the womb. I think it is due to nervous irritability and excitement, which is always increased at the time of the menses, and there is increased outpouring of blood. You might say it is due to nervous shock.

Q. If there had not been some contributing cause of the nervousness, that condition would not become abnormal, as it did? A. Possibly, if it was of nervous origin. It is possible she could have started bleeding, as she did as the result of nervous shock. I don't doubt that.

Q. She could, and it is probable that she could have had this unusual flow, due to the fall that she had? A. Due to the nervous shock. I would not say due to acts of violence to her womb. I don't think she got any, but I do think, from the nervous shock, she could certainly have an increase there.

Q. If that produced that, caused the unusual flowing, could that not be a contributing cause of the condition you found in her breast? A. Absolutely no connection between the breast and the uterus, so far as it developed into the cancer, in the flow.

Q. There is a connection, is there not, through the womb and the breast? A. Only through the sympathetic nervous system.

Q. A person is liable to have a cancer in the breast due to some condition in the uterus, isn't that so? A. No.

Q. They never do; they are not correlated? A.

No, you see, cancer spreads out, through the body, by means of the lymphatics, which is a separate chain of vessels, carrying fluid like serum, which run along with the blood vessels. Now, the blood is not a complete form in itself; it is, through the lymphatic system. The lymphatic system may carry enough, transfer from a tumor and form a secondary cancer of the liver, that is what could happen from carcinoma of the uterus. Carcinoma of the breast is localized, in one particular tissue. That is usually very possible of cure, because we can take the breast completely off; we cut in and through that part. You can't do that in every part of the body. That is the reason we have more success in breast cancer than in any other.

Q. Then I take it, we can dismiss from our consideration any connection between this bleeding from the uterus and the condition in the breast? A. Absolutely.

Q. Taking that away from consideration, don't you think, Doctor, that there must have been the application of some direct force to the breast, in order to produce this condition? A. Not necessarily. Thousands of women develop cancer of the breast, without a known reason in the world. They go right along and suddenly they develop it.

Q. Might it not be that they strike the breast at some time and disregard it for a moment? A. Possibly of traumatic origin; that is only theory; I can't tell you any more about it than probably you know about it.

Q. I know nothing about it. But, Doctor, isn't it a fact that there is, as you said, a school of thought that attributes trauma as a pre-disposing cause of cancer? A. There is a rapid formulating growth, and develops very suddenly, fairly suddenly. After

a blow I certainly could not dismiss the influence of the blow itself.

Q. Now, Doctor, isn't it a fact that you have in your experience, in attending women and children, been constantly warning them against blows to the breast? A. I don't think so.

Q. Haven't you, as a practicing physician, in your treatment of women and children, cautioned them to be careful of a blow in the breast?

Mr. Moser: I object to that.

Q. Because of the danger of cancer of the breast? A. I don't think I have cautioned women about that. I think they know it. It is a known fact that it is a pretty tender part of a woman's body, and she protects it herself. She doesn't need to be told.

Q. They do make a real effort to prevent it? A. I imagine they do. I am not a woman.

Q. You know from your experience, that women have a pre-disposing fear of a blow to the breast? A. Yes, I think they do. I don't think there is any question.

Q. They are afraid of cancer? A. Yes, through stories that they have heard.

Q. Doctor, can you give us any theory, based on what you have seen through, or from your examination of this woman that caused this cancer of the breast. Can you give us anything, of your knowledge? A. That I could. If I could, I could tell you the cause of cancer.

Q. If it is not from a blow, you can't tell us what it is from, can you? A. It probably just grew, that's all.

Q. Doctor, you said on direct examination, that as a result, if cancer is caused by trauma, that

there would have to be some marked indication on the skin of that blow; is that right. Did I understand you correctly? A. Yes; in other words, the breast tissue is fairly soft and you might say elastic; it gives. Of course it is possible, I suppose, to receive an injury that might puncture the breast tissue and without showing a great deal of evidence on the skin. In the majority of cases when a woman knocks the breast against the corner of a chair, she would certainly show an ecchymosis or black and blue mark on the skin of the breast.

Q. As I understand you, when you examined her in November, 1926, all evidence of the condition of the hip had gone; is that right? A. Yes, sir.

Q. There was no black and blue mark then? A. There was none on the arm either.

Q. Dr. Dukes told you that she had hurt her arm and her hip? A. Her right arm and hip.

Q. Did he tell you there was a contusion there? A. Yes, sir.

Q. And then it disappeared? A. Yes, sir.

Q. Now, it is quite probable, Doctor, that any contusion in the region of the breasts had also disappeared by that time?

Mr. Moser: I object to that. Dr. Dukes testified in this case there was no contusion.

Mr. Gilhooly: He didn't say anything of the kind.

The Court: I don't see the relevancy of it. This doctor has testified he made no examination of the breasts. He has not testified there was or was not.

Mr. Gilhooly: I withdraw it.

Q. Doctor, when this lump commenced to form, it is very small at first and then the mass forms?

A. Well, it might take different forms. It might start off with a conglomeration or adhesion of the breast tissue; it might start the size of a pea. There is no way of telling about carcinoma, as to how it is going to start, as to size.

Q. If it started off, we will assume the size of a pea, it would take several months' progressive growth before it would get to the point where it was really noticeable to a person? A. If it started that way.

Q. And such carcinoma could be the result of a severe blow, couldn't it, starting in very small? A. I could not say, because I don't believe the blow is connected with carcinoma.

Q. That is your theory? A. By the size we get in carcinoma, no more than the throw of a base-ball.

Q. That is because you have no opinion on it? A. I have an opinion, as I told you before. I am not positive about it. I don't think any of us are.

THOMAS W. HANDLON, called, having been previously sworn:

Direct examination by Mr. Gilhooly:

Q. Mr. Handlon, you are the husband of Frances Handlon, and one of the plaintiffs in this suit? A. Yes, sir.

Q. How long are you married? A. Eighteen years.

Q. How many children have you got? A. I have one. I had two; one is dead.

Q. When were your children born? A. The one living will be seventeen in July.

Q. And the one that died, when was that child

born? A. If she had been living, she would have been fifteen this year.

Q. You have had had no children since? A. No.

Q. In 1926, what was your occupation? A. Salesman.

Q. For whom? A. Loose Wiles Biscuit Company, Long Island City.

Q. Did your territory cover Kearny? A. Yes, sir.

Q. Did your territory cover the Nolden store? A. Yes, he was one of my accounts.

Q. Did you serve him in the year 1926? A. Yes, sir.

Q. When you served him, did you have occasion to visit his premises? A. Yes, sir.

Q. How often would you visit these premises? A. My regular calls were once a week.

Q. Did you at any time work for Mr. Nolden? A. I have worked for him Saturday afternoons and Sundays and holidays. Those were his busy days and I worked behind the counter for him.

Q. How long did you do that? A. Possibly a year.

Q. Was your employment with him regular during that period? A. Yes, just Saturdays, Sundays and holidays.

Q. Do you remember the night your wife was injured? A. Yes, sir.

Q. Where were you at the time? A. I had been up at Nolden's. You see, when you work for the Biscuit Company as a salesman, you have to decorate windows. I had been up there decorating one of his windows.

Q. Were you in the store? A. I was in back of his store, getting tables ready in his kitchen.

Q. Were you attracted to the areaway in front

of the store that night? A. That night somebody hollered. I just don't recall who.

Q. Don't say what they said. Were you attracted to there? A. I was attracted when I heard the scream.

Q. Was your wife there at the time? A. When I was attracted? Why, she was down in the cellar.

Q. What was the position of your wife when you got to the front of the store? A. When I got to the front of the store, Mr. Nolden was holding her, trying to sit her up.

Q. Just how far away was Mr. Nolden and your wife? A. Next to the bottom step.

Q. Where was your wife taken? A. Into Nolden's kitchen.

Q. What was done then? A. They laid her on the davenport in the kitchen and then sent for Dr. Dukes.

Q. Did the doctor come shortly after? A. Right away.

Q. How long did your wife remain in Nolden's store in the rear? A. Till a little after one o'clock next morning.

Q. What time did this happen? A. Before ten o'clock; between half past nine and ten.

Q. How was your wife removed to her home? A. Mr. Nolden had a big car. We got the car out and between us, we got her in the back seat and Mr. Nolden drove her to my home. He put her on his back and carried her upstairs to the second floor.

Q. Where was she placed then? A. In bed.

Q. Can you tell us how long she remained in bed? A. Three weeks.

Q. Now, getting back to this store; I just want to

bring out one point, or find out. There has been some testimony about a screen door? A. Yes, sir.

Q. Can you tell us where that screen door was, referring to this map? A. The screen door was flush with the front windows, on the building line.

Q. At that point (indicating). Indicating the show window? A. Flush with the front of the windows. The winter door is set back.

Q. Do you know whether or not that screen door was up that night? A. Yes, sir.

Q. Did you examine the metal doors in front of this other window at any time from the time your wife was injured? A. Yes, sir.

Q. When for the first time did you see these doors after your wife was injured? A. Well, shortly afterwards; a few minutes.

Q. The night of the accident? A. Yes, the same night.

Q. What was the condition of the doors when you saw them then? A. The northly door, the one nearest the screen door—

Mr. Moser: I object to any testimony as to the condition of the doors, as to the physical construction of the doors, on the ground that certainly it cannot be said to be the proximate cause of the accident, what the condition of the doors was; that it was the opening of the doors by someone aside from the defendant, Copestone Temple Association, that was the proximate cause.

Mr. Gilhooly: That is not our complaint. Both the original and the amended complaint of the plaintiffs is that this accident was caused because the doors were in a defective condition. I am trying to develop what that condition was. I certainly think

we are entitled to state definitely what that condition was.

Mr. Moser: I say it is immaterial.

The Court: On what theory do you hold that? I will permit; if not chargeable to one, it might be chargeable to the other defendant, depending on what the relationship was between themselves and who would be responsible for this repair and condition; I can't shut it out as against one defendant against whom it might be admissible.

(Argued, and same ruling.)

Q. (Question read as follows: What was the condition of the doors when you saw them then?) A. The right-hand door as you are facing the front of the building, or the nearest to the screen door, the hinges were broke.

Q. Which of the hinges was broken? A. Both of the hinges were broke that hold the door up.

Q. Do you know whether or not that condition had existed for any length of time? A. Why, had for a considerable number of months, yes, sir.

Q. Did you ever speak to Mr. Nolden about it, or did he ever speak to you? A. Mr. Nolden told me at times that he had asked to have the doors repaired.

Mr. Moser: I object to that.

The Court: Mr. Nolden, the defendant.

Mr. Moser: As not binding on the Copestone Temple Association. I don't think it is relevant.

Mr. Gilhooly: I don't urge it.

Mr. Moser: As to the statement made by Nolden, that could not affect the Copestone.

Q. Tell us what was your conversation with Mr.

Nolden? A. Working with Mr. Nolden, I had occasion to go down to the cellar many times to get things up. I often spoke to him about that door being broken. He said he had spoken to the agent of the Copestone to have it repaired and it had not been repaired up to the night she fell.

Q. Do you know whether or not it was repaired afterwards? A. About three days after she fell flying, the doors were repaired.

Q. What was the normal position of these doors up, when open? A. If the hinges were perfect, they should open at an angle, about like that (indicating).

Q. Was there any guard rail or any other means of keeping the doors in their upright position? A. Why, there is a hook on the stairs, like that, and an iron bar with a hook on each end to put in two holes in front of the door, to hold it up straight.

Q. Was that used the night of the accident? A. It could not be used at that time. The hook on the top there, the doors would have flopped over.

Q. Why? A. On account of the broken door.

Q. Of what hinge? A. All of the hinges being broken.

Q. Where was this outside rail kept? A. The left of the stairs; Mr. Nolden kept it right on top of the stairs.

Q. It was not in use at the time? A. Could not use it.

Q. Now, after your wife was taken to her home, will you tell the jury what you observed as to her physical condition? A. Well, that night we got her home, Mrs. Rowland and myself; Mrs. Rowland stayed until about three o'clock. I stayed up all night applying hot water bottles to her. Her legs were running from two open cuts on the leg.

Her arm was sore, her fingers of the left hand were sore, her shoulder was red, her breast was red, where she possibly struck.

Q. Tell us what you saw? A. Well, that is what I saw, her legs cut in two places, her arm and left fingers and her shoulder and the breast were red.

Q. What about her hip? A. Her hip had just a black and blue bruise on it, a mark.

Q. Now, prior to this accident, had your wife been complaining of being ill? A. Ordinary colds, headache, or something like that.

Q. Nothing unusual at the time? A. No, sir.

Q. With respect to the hemorrhages which have been testified to here, can you tell us when that condition was first found? A. The following day.

Q. And has that continued at any time since then? A. Well, when Dr. Dukes took care of her, he gave a prescription to stop it, and it would stop and start and stop and start again. Dr. Holler took care of her and it acted the same way, until just before she went to the Cancer Hospital. Since the operation, it has stopped.

Q. Prior to this accident, was that condition present? A. No, sir; she was normal.

Q. Now, after the accident, what did you notice about your wife's condition? A. Just how do you mean?

Q. Well, as distinguished from that which existed prior to the accident; what did you notice? A. I noticed that leg being sore all the time; her arm; irritable; nervous; nights she lay in bed sweating, sweat just pouring out of her hands.

Q. Had she been that way before the accident? A. No, sir.

Q. What was the difference in the condition of the arm? A. The right arm had black and blue

marks where she fell, and they stayed on there a week or so, or something like that, and disappeared; her fingers healed up naturally and then the wound on the hip disappeared.

Q. Did she have the freedom of that arm after? A. She could not get a dress on. It would always bother her afterwards.

Q. Where would it bother her? A. All the sides, the sides of the breast and under the arm. She told Dr. Dukes about it.

Q. How about this reddened condition of the breast, how long did that continue? A. That only stayed a few days.

Q. Did any other change take place at any later time? A. Well, while Dr. Dukes was taking care of her, her arms would not go over her head. She did not stay with Dr. Dukes; I think it was April the following year was his last call, if I remember right. She told him then, when he came, it was still bothering under the arms and then she could not get her arms over her head. The doctor's theory was she strained the cords and ligaments—

Mr. Weinberg: No.

Mr. Gilhooly: Don't tell us what he said.

Q. How long did that condition last? A. She has never been able to put her arms over her head since she fell.

Q. Did you notice any lumps in her breast? A. No, just red marks after the fall.

Q. Do you remember when she learned she had carcinoma, when it was that she was told she had it? A. When it was she was told she had cancer?

Q. Do you remember when? A. Dr. Holler didn't tell her; she went to Dr. Holler—

Q. You don't remember; I am talking about what

you know of your own knowledge? A. I don't remember when she was first told.

Q. After your wife was injured, was she able to do the housework? A. No, sir.

Q. Who did that then? A. Well, we had different people come in. Her sister has been with her since February a year ago.

Q. That would be February, 1928? A. Yes, sir.

Q. Who did the work for her prior to that time? A. She always done her own housework.

Q. I mean prior to February, 1928? A. We had different ones, ones that went away; one came in there, a friend of ours, stay a couple of months, then she got employment and went to work.

Q. Did your wife ever do any housework after this accident? A. No, sir.

Q. Was she nervous before the accident? A. No. sir.

Q. Do you know how much you paid for the employment of people to do her housework? A. Well, the sister that is taking care of her now, she has been there since the last week in February a year ago, we have been giving her $12 a week. You see, she had a job in the factory and she quit it to come over.

Q. Well, does she take care of your wife? A. Yes, sir.

Q. All during her illness? A. Since just before she went to the hospital.

Q. Can you tell us whether or not she attends to the dressing of your wife's wounds? A. Yes, she does it sometimes.

Q. Who else does it? A. Dr. Toye does it. At times, I have helped, myself, when Dr. Toye has not been able to come down.

Q. Now, is your wife confined to bed? A. Yes, sir.

Q. How long has she been confined to her bed? A. Over four months in bed now.

Q. Who takes care of her physical wants? A. Her sister.

Q. She does all the work? A. She does the housework, gives her something to eat, or a drink of water.

Q. After this accident, how long was your wife confined to her home? A. I think it was the second week of December we went to West Hudson Hospital to have an X-ray of her legs; that was the first time she was out.

Q. That was December, 1926? A. 1926.

Q. Have you any record of any of the bills that you paid for medicines? A. Well, doctors and medicines were always paid by cash.

Q. Do you know how much you paid for medicines? A. Close to it.

Q. How much?

Mr. Weinberg: One moment, please.

The Witness: When you pay cash, you don't receive bills.

Mr. Weinberg: The question now being put to the witness is the simple question as to how much he has spent for medicines.

Our position is that there is no evidence in this case which will permit the jury to find that the cancer was the result of this injury. Now, if that position is correct, then we feel that the question of expenses must be limited to what he laid out in trying to effect a cure of the other injuries in the case.

The Court (after argument): I will look over the cases submitted by counsel and make my decision after recess.

(Recess to 2 P. M.)

(After recess, 2 p. m.)

The Court: So as to get it on the record, and both sides have their record complete, there is a question pending with an objection:

The objection will be sustained.

The testimony of this witness will be limited to such damages as he was put to toward having his wife cured of the injuries which she sustained as a result of this fall; excluding, however, any testimony as to the expenses that he was put as a result of this cancer condition.

Exception will be allowed to the plaintiff upon that line.

Mr. Gilhooly: Exception.

THOMAS W. HANDLON resumed the stand:

Direct examination by Mr. Gilhooly (continued):

Q. Can you tell the Court and jury how much you paid for people to do the housework up to the month of May, 1927, between October and May, 1927? A. Not off hand; not as to these months, from October to May.

Q. October, 1926, to May, 1927? A. I think it was about $120.

Q. You have, of course, paid Dr. Dukes? A. Yes, sir.

Q. His bill was $72? A. $72.

Q. Do you know how much you paid for medicines right after your wife was injured? A. $23.

Q. That is for the injuries she had right there? A. While Dr. Dukes was taking care of her only.

Q. I don't know whether I asked how long these

hinges were broken on the door; will you kindly tell us, if you know? A. Possibly eight or nine months.

Q. Before the accident? A. Yes, sir.

Q. You were working there at the time? A. Yes, sir; I worked there about a year.

Q. Did you open them yourself? A. Yes, sir.

Q. Now, there has been a light spoken of coming from the cellar; do you know where that is? A. The light sets near the boiler in the cellar. It is possibly six or eight feet back of the cellar door.

Q. Back of the bottom step or top step? A. The bottom step.

Q. What kind of light was burning? A. I should judge about 20 c. p. light; small electric light.

Q. When that light was lighted, did it light up the cellar steps to any appreciable extent? A. Not so much.

Q. How about the window, the show window here; were they brightly lighted? A. There was one light in each window.

Q. What kind of light was that? A. Covered in with a glass dome, bell-like.

Q. Were there any decoration in the window in back of the areaway on the night in question? A. Well, they all have decorations, crepe paper, big cardboard signs, bottles and things like that.

Q. Was there any panels in the back of the show window? A. The panels are about half way up the window.

Q. What kind of material are they? A. The bottom half is wood; the top glass. They run up to the ceiling.

Q. The bottom is wood, and the balance is glass? A. Yes, sir.

Mr. Gilhooly: Cross examine.

Cross examination by Mr. Weinberg:

Q. Did I understand you to say that after this accident, your wife had these vaginal hemorrhages? A. The following day they started, yes, sir.

Q. Didn't she have them a long time before this accident? A. No, sir.

Q. Isn't it true that you told Mr. Nolden, with whom you were quite friendly aside from the business relation, that you were not able to have intercourse with her because she was generally flowing? A. No, sir; she was regular, except right after this accident.

Q. I am asking you whether you didn't say that? A. No, sir.

Q. To Mr. and Mrs. Nolden? A. No, sir.

Q. You would frequently gather in the store in the evening and have tea together? A. We always had a cup of tea together, yes, sir.

Q. And these statements were not made? A. No.

Q. Had your wife been hurt shortly before she fell down this cellar? A. She hurt her ankle, her left ankle before that, months before.

Q. How long before that? A. Possibly a year before that.

Q. Wasn't it within a few months before? A. No.

Q. Was it in connection with some taxicab? A. No, a gutter; when she stepped off the trolley car on the gutter. She came home in a taxicab.

Q. She hurt herself? A. Yes; she did not fall. She twisted her ankle.

Q. She had that ankle taped up? A. Yes, sir.

Q. Didn't you notice this flow after this acci-

dent? A. She didn't have anything like that after that accident.

Q. You didn't hear anything like that? A. No.

Q. You didn't see anything like that? A. No, sir.

Cross examination by Mr. Moser:

Q. Mr. Nolden was the only one that used the cellar underneath the store? A. Yes, it was for the delicatessen store only.

Q. And when you went down into the cellar, did you lay the door back there on the sidewalk? A. When I had to use the cellar any time, it was the only way the door would open, would be to lay on the sidewalk.

Q. There was an iron door there, was there not? A. There was.

Q. And that iron door hooked into the eyes on the outer extremity of the door? A. They did, yes, sir.

Q. And the cellar doors were countersunk into the sidewalk, so that when they were closed, they were flush with the wall? A. Flush with the wall.

Q. When I say countersunk, I mean that they were set right in, that there was an indentation that the doors set right in; that is correct, isn't it? A. Yes, sir.

Q. So that when the door opened, it opened in that countersunk portion; is that correct? A. The hinges were in the iron frame, set in cement.

Q. Set in the cement? A. Yes, sir.

Q. So that when the door opened, it opened in that countersunk part, so that it was a little below the sidewalk? A. Yes, the edge of the hinge would be below the sidewalk.

Q. Which one of the hinges? A. Both hinges of the door nearest to the screen door.

Q. Both hinges? A. Yes, sir.

Q. Nevertheless, the door would open and lay back flat on the sidewalk, would it not? A. It could not lay perfectly flat because of the iron ring there, and a hook you lay the door upon and raise it with.

Q. In order to open the door, you didn't have to lift it out of the countersunk portion and put it up against the building, did you? A. Could do that, because there was nothing to prevent you from doing it.

Q. You didn't have to do that? A. When you lifted it over, it would not stand up; there was nothing to hold it up.

Q. It would not stand up when nothing held it up; that is correct, isn't it? A. Yes, sir.

Q. It would have stayed up if this iron bar had been put across the front and the eye hooked into it? A. Positively not.

Q. Do you know whether or not both doors were opened on the night in question? A. They were both opened.

Q. What was the position of the left-hand door when Mrs. Handlon fell down in the cellar? A. It was on an angle.

Q. An angle which way; down toward the sidewalk? A. An angle that way, from the wall.

Q. How far from the sidewalk was the outer end of the door? A. I never measured the doors; I could not tell you.

Q. Well, about; six inches? A. Of the door that had the good hinge on it?

Q. Yes. A. The outer edge of the door from the walk?

Q. Yes. A. Possibly eighteen inches. Whatever it was measured lying flat, it measured that much when it was standing up.

Q. You said the door was on an angle. It was on an angle, was it not? A. The door would not stand perfectly straight; it would fall down again.

Q. That door had two good hinges on it? A. It did, as far as I know, yes, sir.

Q. And the only way to make these doors stand up straight was to put this iron bar across and put the hook and eye on each door? A. If you would put—

Q. Will you please answer my question. The only way to make these doors stand up perfectly straight was to put the iron bar across and put the hook in each eye? A. If they were good hinges, they would both stand up without the iron bar.

Q. Will you please answer my question.

Mr. Gilhooly: I don't think that is a question which can possibly be answered by yes or no, because it embraces several factors.

The Court: Unless you limit to the condition the doors were in that night.

Q. The doors were in their flat position, we will assume, and they were opened. One you say had no hinges and the other had two good hinges; is that correct? A. Yes, sir.

Q. The one with two hinges, did that stand up perfectly straight? A. A small angle, on account of the hinges on the door that would not let it stand perfectly straight.

Q. That would not stand perfectly straight, that was over at an angle? A. A very slight angle.

Q. There was a bar? A. There was a bar there, yes, sir.

Q. And that was a plain iron bar with a hook in each end, similar to that? (Indicating.) A. Yes, sir.

Q. The only way to make this good door that was leaning slightly towards up the street, stand up would have been to put the hook in? A. It would stand up without the hook.

The Court: It would not stand up straight; you just said that?

The Witness: No, positively.

Q. You were asked whether there was any way to make it stand up perfectly straight, except by this bar? A. Even with the bar on that would not stand, because the bar is made to stand off almost right angles to the walk.

Q. The bar is to make them stand at right angles? A. Not a full right angle; pretty near a right angle.

Q. And that would have brought this good door up to almost right angles? A. It would not set any straighter without the bar than it did with the bar.

Q. What was the distance from the walk to the bar if it was in its position, stretched across between the doors? A. I could not tell you. I never measured them doors. I think the height of the door was possibly eighteen inches; I would not swear to it.

Q. And if a person were coming up from the cellar and the door was there, and they had something in both hands, they would have some difficulty in getting out; isn't that so? A. You would have to shove your stuff under the bar on the walk and then crawl under the bar.

Q. If you wanted to go down into the cellar for something and come right back again in a few seconds, you just opened the cellar door and go down and come right back; isn't that so? A. I don't know what anybody else would do.

Q. Well, you worked there? A. All the time I worked there, that door was broke. You could not put the bar on the door.

Q. Just let us forget the broken part of the door for a second. You were going down that cellar for just something that was only going to take a minute or so and coming right back, would you open the door and put the bar in, or just open it and go down and get your stuff and come back? A. Not the door in good condition. Naturally you would put the bar on; that is what it is there for.

Q. And the door could have been opened and then closed behind you when you went down in the cellar, couldn't it? A. Well, that is not the practice, to close the door when you go down to the cellar, because somebody might be standing on the door when you are trying to get out.

Q. It could have? A. They would not get out of the cellar if somebody would stand on the door when they were in the cellar.

Q. Let us assume nobody was standing on the door; the door could have been closed and opened from the inside, pushed up and you come out? A. It could be done. It is ridiculous to be done. It has never been the practice that way.

Q. There was a light down in the cellar? A. A small light, yes, sir.

Q. Was there anything going on at the Copestone Temple on the night of this accident? A. Well, there was a masquerade dance or something.

Q. There is a marquee or covering extending

out from the building, isn't there? A. Over the entrance to the lodge rooms only.

Q. Are there any lights in connection with the marquee? A. I believe that there is two lights. I am not positive.

Q. Are they fairly bright? A. They are lights that are closed in with a glass.

Q. They give quite some light? A. They give a pretty good light.

Q. And the light from the cellar showed up on the sidewalk, didn't it? A. Not what you would call a bright light. That light was six or eight feet back of the cellar, whatever the depth of the cellar was, it was back by the boiler.

Q. That light operates from the store? A. No, that light you had to turn it up when you were in the cellar.

Q. The only thing stored in the cellar was merchandise used in connection with the delicatessen store? A. That is all that was stored there, yes, sir.

Redirect examination by Mr. Gilhooly:

Q. You were asked by Mr. Weinberg if you had a conversation with Mr. Nolden pertaining to a rather intimate subject. Did you usually, or occasionally, discuss matters of such intimacy with Mr. and Mrs. Nolden?

Mr. Weinberg: I object to that question.

The Court: Sustained. Did you have any such conversation?

Q. Did you ever have any such conversation of that intimate a nature? A. Not that I know of. We talked over the usual things, after we done working.

Q. Did you have such a conversation? A. No, sir.

Q. This accident about the stepping from the trolley car on to the curb, can you tell us whether or not your wife had fully recovered from that? A. It was just a sprain of the ankle. She had recovered from it.

Q. Did that bring on any unusual flow? A. No, sir.

Q. This iron bar you were speaking of; was that iron bar put there for the purpose of holding the doors up, or put there for the purpose of giving a guard rail for people passing by there?

Mr. Moser: I object to that. It has been already testified to, to hold the doors straight out.

Mr. Gilhooly: You brought that out by way of argument.

The Court: I don't recall that the witness testified that the purpose was to hold them straight up.

The Witness: Well, the bar is used, I should imagine, for both things, to keep people walking across from falling into there, and possibly to hold the doors up. But they would stand up, them doors, themselves. The hinges would hold them up.

Q. These lights on the marquee in front of the Copestone Temple proper; what kind of lights were they, do you know? A. They were ball lights, like these you have in the court room here.

Q. Were they frosted? A. Frosted bulbs, yes, sir.

Q. Were they all along that marquee or on the corner? A. There is one on each corner, I believe.

Q. The front part? A. Yes, sir.

Cross examination by Mr. Weinberg:

Q. You said to Mr. Gilhooly, in reply to his question, that this other injury didn't amount to anything. Didn't I understand you to say that it had occurred a year before this accident? A. Possibly a year.

Q. And at the time of this accident, she still had her leg taped up? A. No, sir; she was all right.

Q. Wasn't there a tape around that injured ankle at the time when she had this accident? A. No, sir.

Q. And wasn't the tape there the night that Dr. Dukes first came in to see you? A. No, if there was, Dr. Dukes would have found it.

Q. He would have found it if it was on the other leg? A. He took her stockings both down.

Q. You were not present at the time she hurt herself alighting from the car, were you? A. No, sir, I was at home.

Q. You had a doctor? A. We had a doctor, yes, sir.

Q. Who was that? A. Dr. Toye, our own family physician.

Q. The man who was here this morning? A. Yes, sir.

Q. He took care of her for the other injuries? A. He just came down; it was a sprain of her ankle, that was all. He gave her liniment and only made one visit.

PAUL NOLDEN, sworn for the plaintiffs.

Direct examination by Mr. Gilhooly:

Q. Mr. Nolden, you are one of the defendants in this case, are you not? A. Yes, sir.

Q. You kept the delicatessen store? A. Yes, sir.

Q. Mr. Handlon worked for you week ends, did he not? A. Yes, sir.

Q. Are you familiar with the cellar entrance, the areaway and the doors over it? A. Yes, sir.

Q. Did you make any observation regarding the hinges of the door? A. I did.

Q. What was the condition of that door at the time of this accident? A. The front hinge was no hinge pins, what goes through and the eye was broken, busted through.

Q. When you opened the door, it lay flat on the sidewalk? A. No, it did not.

Q. It came up a little bit? A. A little bit.

Q. It did not stand upright? A. No, didn't stand upright.

Q. Did you ever speak to the Copestone Temple Association about it? A. Yes, I spoke to Mr. Canfield several times. Mr. Canfield told me he notified the blacksmith to fix it.

Q. How long did this condition exist? A. About a couple of months.

Q. Did they ever fix this door? A. Yes, sir.

Mr. Moser: I object to that as immaterial.

Mr. Gilhooly: It is material for this reason, for the purpose of showing ownership.

Mr. Moser: There is no purpose in showing ownership. We admit ownership of the building.

Mr. Gilhooly: I withdraw it.

Q. Was that door in such condition that it required repair?

Mr. Moser: I object to that as calling for a conclusion.

The Court: Yes, he can tell just what it was.

Q. Did you repair this door after the accident?

Mr. Moser: I object to that as immaterial.

The Court: No; it might be used, not for the purpose of showing any responsibility, but corroborative of the fact that it did need repair, it was out of repair. It has not anything to do with your client. I will permit the question to be answered.

Q. Will you answer that question? A. What question?

Q. (Question repeated as follows: Did you repair this door after the accident?) A. That door got fixed after the accident. The Copestone Temple Association paid for it.

Mr. Moser: I move to strike that out.

The Court: Strike it out.

Q. Were there any gas meters, and electric meters in the cellar? A. The main fuses from the whole building.

Q. The main fuses for the whole building? A. From the whole building.

Q. Did that include fuses running into your section of the building? A. No, sir.

Q. Where were those fuses? A. In the cellar; there is the temple there, the Copestone Temple.

Q. Did you ever have any occasion to go into the cellar to look at these fuses, or attend to them during your tenancy? A. No, sir.

Q. If anything went wrong, you would have to go into your cellar? A. Nobody can fix it except the Public Service.

Q. They had to use your cellar to do it? A. Yes, sir.

Q. The main fuses for the entire building were there? A. Yes, sir.

Q. Were there any gas meters in the cellar? A. No, sir.

Q. Were there any electric meters? A. No, sir.

Q. Where were the water meters? A. The water meters wasn't in there then. It does not belong to—

Q. It wasn't there at the time? A. No.

Q. You say the Public Service would go in to look at the fuses? A. The Public Service got only the right to fix.

Q. Did they exercise that right; did go in there? A. If anything happened to the main fuses.

Q. You say they had that right? A. Yes, it is Public Service property; nobody else can touch it.

Cross examination by Mr. Moser:

Q. You rented this store and cellar from the Copestone Temple Association? A. Yes, sir.

Q. You were the only person who had any control over that cellar? A. Yes, sir.

Q. Anybody that wanted to go down into the cellar had to ask you A. Yes, sir.

Q. You had all things you used in your business down in the cellar? A. Yes, sir.

Q. How many hinges were on this door? A. On which door?

Q. On the cellar door? A. On the broken cellar door?

Q. The one nearest the screen door? A. Two hinges.

Q. Was one of them in good condition? A. One was in good condition and one was busted.

Q. Was there an iron bar right next to the cellar door? A. It was.

Q. And could you have put that iron bar through the eyes in each of the doors and hold them up straight? A. No, I could not use the bar, because it was no protection there, you know, to hold that door open. The pin what goes through the eye was rusted through, was no protection there to hold it.

Q. But one of the hinges was in perfect condition? A. One was all right.

Q. You are sure about that? A. I am sure.

Q. And the two hinges of the other door were all right? A. Yes, sir.

Q. And in order to save anybody from falling down this cellar from the front, you could have put up this iron bar; isn't that so? A. Yes, sir.

Q. And that iron bar would have held these doors in an upright position; isn't that so? A. On a slant.

Q. But it would have held them up? A. Not straight up, no.

Q. On a little slant? A. A little slant.

Q. On the night in question you went down in the cellar for some shrimps? A. Yes, sir.

Q. And you only expected to be down a short time? A. I never was down there for a short while; I have been for two minutes.

Q. In other words, you opened the cellar door; you went down into the cellar, got your shrimps, came up a minute or two later, and as you were coming up the stairs, Mrs. Handlon fell in your arms? A. Yes, sir.

Q. There wasn't anybody there associated with or connected with the Copestone Temple Associa-

tion, was there, at the time you opened the door? A. No.

Q. You were the only person who opened this door on the night in question? A. Yes, sir.

Q. You were the only person who had a right to open this door; isn't that so? A. Yes, sir.

PLAINTIFF RESTS.

Mr. Moser: I move for a nonsuit in favor of the Copestone Temple Association, on the ground that there is no evidence of negligence on the part of the defendant Copestone Temple Association.

I cite for your Honor, Durant *v.* Palmer, 29 N. J. L., page 545:

"There are cases in which the tenant alone is liable, but it is in those cases in which the nuisance results from some act or negligence of the tenant, and not of the landlord, as if he leave open a cellar door or a coal hole, or suffer a nuisance to exist for want of repairs, which he, and not the landlord, is bound to make; but for a nuisance arising from the structure of the building the landlord is liable."

The Court: (After hearing argument.) The motion will be denied. I am basing the denial of it upon the authority of Davis *v.* Tallon, in 91 N. J. L., page 620, in which the Court says:

"The jury might infer from the evidence that the appellants leased the land and sidewalk for a use not consistent with the purpose for which the walk was constructed; that they had knowledge of the character of the proposed use, and that such use might,

and probably would, create a nuisance by obstructing the safe use thereof by pedestrians."

And also, upon the case of Zac *v.* Craig, 136 Atlantic Reporter page 410, at 412, in which the Court says:

"The plaintiff's case was not rested upon any legal obligation of the owner to keep the sidewalk in repair, but upon the claim that defendants, by subjecting the sidewalk to a use not intended, that of use by ordinary pedestrians, they created a nuisance which rendered them liable for injuries to persons lawfully using it." That is a Supreme Court case.

In other words, they make a distinction which I make, in this kind of a case, which is, that while it is true that the landlord, if he had properly constructed they did properly construct, so that it was safe for pedestrians to use this opening in the sidewalk when closed, but nevertheless that he had knowledge of the character of the proposed use, and that such use might, and probably would, create a nuisance by obstructing the safe use thereof by pedestrians, and that therefore he would be responsible for it as distinguished from a case where, if they were not in use but were merely left open through some negligence of the tenant, where, for instance, if the tenant had used it and then left it open for half a day or something of that kind, so that the landlord would not be called upon to have any knowledge that it might be used, or probably would be used for such purpose as

that. But here the tenant, was actually using it, and in the only way it could be used, and knowledge was brought home at all times to the Copestone Temple Association, that it would be used in that way, and therefore, in following the Durant case, which has some features like the present one, but based upon the case which I have just cited, the motion for a nonsuit on behalf of the landlord owner will be denied, and exception allowed.

Mr. Moser: Exception.

BURTON E. CANFIELD, sworn for the defendant, Copestone Temple Association:

Direct examination by Mr. Moser:

Q. On or before October 29th, 1926, were you president of the Copestone Temple Association? A. I was.

Q. Was the Copestone Temple Association the owner of the building in which Paul Nolden had a delicatessen store? A. It was.

Q. Did the Copestone Temple Association have a lease with Mr. Paul Nolden? A. Yes, it had a lease that had been assigned to Mr. Nolden. I don't think it was made originally to him.

Q. Did they have a lease with someone for the premises prior to this accident? A. Yes, it was made. I think Mr. Nolden bought the business from Neeshaw. The lease was transferred from Neeshaw to Nolden.

Q. Neeshaw was the original lessee? A. Prior to Nolden.

Q. And that lease was assigned to Nolden; is that correct? A. Yes, sir.

Q. Is this a copy of the lease?

Mr. Weinberg: I would like to cross examine.

Cross examination by Mr. Weinberg:

Q. This paper appears to be a copy of some lease and not an executed copy. You are not prepared to say it is a true copy in all particulars of the lease? A. Let me see it?

Q. Is everything in there exactly as the original? A. That is a copy that was prepared in my office at the request for a written lease.

Q. When was that copy made? A. After the summons and complaint in this case was served.

Q. Where is the original? A. I suppose it is on file among the papers.

Q. What papers? A. Of the Copestone Temple.

Q. You mean they have it in their possession? A. I think so.

Mr. Moser: If you want to object to it, I won't press it.

Mr. Weinberg: The technical objection that it is not proper evidence.

Redirect examination by Mr. Moser:

Q. What was the condition of the cellar doors of this building about October, 1926; do you know. When they were in a closed position, were they flush with the sidewalk? A. The doors lay flush on the sidewalk when closed.

Q. Was there a bar there, if you know, to hold these cellar doors? A. There was a bar made with the doors, furnished by the builder, and I understand is still there; has been at all times, as far as I know.

Q. Did that bar hold the cellar doors in an up-

right position when it was in position, if you know? A. This bar holds the doors at about that angle (indicating).

Q. What would be the position of the cellar doors, without the iron bar placed across them? A. Practically the same.

Cross examination by Mr. Gilhooly:

Q. Mr. Canfield, when did you see these doors with respect to October 29th, 1926? A. I could not tell you that.

Q. So you haven't any idea then, what the condition was on that date, have you? A. No, I would observe the doors occasionally. I don't think I had any reason for taking notice of the doors at that time, or just prior.

Q. You were President of the Association? A. Yes, sir.

Q. That was not part of your duties? A. I had supervision of the building, so far as the letting of the building is concerned.

Q. You had a janitor? A. Had a janitor in charge of the building; had a building Committee, that took care of repairs.

Q. The janitor's duty was to look after these things? A. Of course.

Q. If the janitor would call your attention to it, you would have fixed it, as you did after the accident?

Mr. Moser: I object to that part of the question saying "after the accident, you fixed it," as immaterial.

Mr. Gilhooly: I withdraw that.

Q. Did you ever see that bar that was supposed to go across? A. Yes, I would see it, when I was at the temple, many times, and occasionally when

the doors were standing open, have seen the bar in there.

Q. And that bar was there, being a protection to people passing by, so that they would not fall into the cellar way? A. It strengthened the setting of the doors, and a little protection facing the stairs.

Q. And that was its primary purpose; these doors did not need support, did they? A. No, I don't think they would have to be held up, because the bar would hold them up so that they could not be knocked down.

Q. That bar would be in there so that if anybody struck it through misadventure, they could not budge it? A. If they light on it, would not drop into the hole.

WILLIAM D. RICHMOND, sworn for the defendant, Copestone Temple Association:

Direct examination by Mr. Moser:

Q. Mr. Richmond, in 1926, were you the janitor of the Copestone Temple Building? A. I was.

Q. Are you still the janitor there? A. I am.

Q. In October, 1926, and on the 29th day of October, do you know whether or not there was a bar annexed to or near to the cellar doors at the entrance to the cellar occupied by the delicatessen store? A. That bar lay there all the time. It was inside the cellar door, on the stairs.

Q. When was your attention first called to the fact that an accident had happened there? A. That was about ten minutes after the accident happened that I was told about it.

Q. When was the next time that you looked at the door? A. After the accident.

Q. Was the iron bar there when you looked at those cellar doors? A. Well, I didn't look to see if the iron bar was still there or not. It always lay on them stairs. It always did.

Q. Just tell us what that iron bar was like? A. An iron bar about five feet long, extended to the doors, to support the doors, or protect anyone from falling down the front of the cellar entrance to the cellar.

Cross examination by Mr. Gilhooly:

Q. Mr. Richmond, how often did you see this iron bar around October, 1926? A. Well, I never looked for the iron bar. I knew it always lay there.

Q. You had no occasion to use that cellar? A. Never had.

Q. Your superintending duties did not call for you to? A. No, sir.

Q. If you did see it, it would be only a casual glance? A. That is all.

Q. Did you see the hinge broken? A. One hinge was broken.

Q. Did you ever tell your employer about it? A. I had nothing to do with that.

Q. You never told the Copestone authorities? A. I never had anything to do with that.

Q. You knew it was broken? A. I knew it was broken all right.

Mr. Moser: That is the defendant Copestone Temple Association's case.

PAUL NOLDEN, called in his own behalf:

Direct examination by Mr. Weinberg:

Q. You were the owner of this delicatessen store? A. Yes, sir.

Q. Which was a little store on the ground floor of the building owned by the Copestone Temple Association? A. Yes, sir.

Q. How big is that building, the Copestone Building? A. I can't tell you.

The Court: How many stories?

The Witness: There is two stories, that is in front there is two stores and the entrance for the Temple, what goes to the Hall.

Q. And the cellar was immediately underneath your store room? A. Yes, sir.

Q. How big is that cellar? A. Was a small cellar.

Q. How big? A. I can't tell you for sure.

Q. Is it as large as this court room? A. No; a small corner; from about there to here.

Mr. Gilhooly: Indicating about how many feet?

The Witness: About twelve.

The Court: From the witness chair to the end juror is about 14 feet; using that as a comparison, what would you say it was?

The Witness: 14 by 10.

Q. How was it lighted? A. With a light in the front of the step about four feet in.

Q. Electric or gas? A. Electric light.

Q. How large a light did you use that night? A. I only use 150 candle power on the whole stair.

Q. Did that throw much light? A. Light up the whole step.

Q. How deep is that cellar, how many steps down? A. Nine steps.

Q. I understand this was the night before Hallowe'en? A. Yes, sir.

Q. So it was Hallowe'en Night? A. Hollowe'en night.

Q. Now, was there anything in the show window immediately back of the cellar entrance that cut off the light from your store? A. That window was not fixed at all.

Q. It has been said here you were trimming up one window for Hallowe'en? A. Mr. Handlon was trimming the other window. Not the window over the cellar.

Q. That was the window on the north side? A. On the north side.

Q. This was the window on the south side? A. Yes, sir.

Q. Was there any light in that window? A. In each window, 250 candle power lights.

Q. You had a call, as I understand, to go in the cellar to bring up something for a customer? A. For shrimps.

Q. Where was Mrs. Handlon when you went down to the cellar? A. Mrs. Handlon was in the store.

Q. Where was Mrs. Rowland? A. Mrs. Rowland was standing on the side.

Q. Where? A. Near the entrance to the Copestone.

Q. There was some affair going on upstairs, a masquerade was being given at the time? A. Yes, sir.

Q. You say she was by there? A. Yes, sir.

Q. And that was how far from the cellar? A. About eight feet.

Q. Now, was the door closed when you went downstairs, or just before? A. Yes, sir.

Q. What did you do as you went downstairs, as you started to go downstairs? A. I opened both doors. I took one door that was busted and stands on the sidewalk.

Q. What was busted? A. The hinge, that was busted. There was no protection there to hold it up. I got the door and put it right on the sidewalk.

Q. You mean you let it drop back, let it drop down on the sidewalk? A. That is a door here, the hinge in the front here; the pin was busted. Here is the sidewalk; holds on to the iron frame. I took the door, put it on the edge from the sidewalk and let it stand there.

Q. Did it stand up or did it drop down? A. On an angle.

Q. How much of an angle? A. About twelve inches.

Q. It was standing up twelve inches? A. Yes, sir.

Q. You could have brought it up higher? A. If I used the cross-bar.

Q. Why didn't you use the cross-bar? A. I could not use the cross-bar because it was no protection there. The cross-bar is in the front and that door was out of the hinge there, you know. I could not use the cross-bar, and it was, the door hanging there, to hold it. It would have went down in the cellar with one hinge.

Q. You mean what you did that night was all you could do with the door? A. No.

Q. You could not fix it any better? A. I could not do anything else much.

Q. How long were you down in the cellar? A. I only went down for five cans of shrimps.

Q. You got those and were coming upstairs? A. Coming upstairs.

Q. What is the first you knew about this accident? A. I seen Mrs. Handlon coming over the door.

Q. And then I understand you took her upstairs? A. Mrs. Handlon grabbed me with her two hands, one around my neck, and she scratched me on my both cheeks where she was holding me.

Q. That wasn't done intentionally, of course? A. No.

Q. Then when you got her upstairs, did you send for Dr. Dukes, and what he testified to as to his treatment occurred? A. Yes, sir.

Q. Had Mrs. Handlon been in your store very often? A. Pretty near every day.

Q. Do you know whether she knew how this cellar door worked? A. She did.

Q. How do you know that; did she ever see it open? A. She seen it open and she seen it closed.

Q. How often would she come into your store? A. Pretty near every day.

Q. Did she come to see you or only on business? A. No, she come other times, and she come in.

Q. You were very friendly with the Handlons? A. Yes, sir.

Q. Mr. Handlon had worked for you on week-ends and holidays? A. For about two years.

Q. Holidays and week ends after business; did you ever have any social conversation? A. Every night we got a cup of tea and crackers.

Mr. Weinberg: That is not dissipating very much.

Q. At these conversations, did you or did you

not talk about private matters? A. We was quite friendly together.

Q. Was anything said prior to the accident in regard to Mrs. Handlon's condition?

Mr. Gilhooly: I would like to ask by whom the statements were alleged to have been made.

Mr. Weinberg: Of course he is going to tell you.

Q. Were any of these conversations had; did you have any talks? A. Yes, sir.

Q. Who was present at the time you did have the talk? A. My wife.

Q. Who else? A. Mr. Handlon.

Q. Who else? A. Nobody else.

Q. Was Mrs. Handlon there? A. No.

Q. Just Mr. Handlon, you and your wife. Did he ever say anything to you with regard to his wife's condition? A. He did.

Mr. Gilhooly: I object to any conversation alleged to have been had between Mr. Handlon and this witness on the ground it is not binding upon Mrs. Handlon. I appreciate the foundation may be laid for contradicting this witness.

Mr. Weinberg: He is a party to the action.

Q. What did he say about his wife's condition? A. One night, Mr. Handlon, he told us, you know, quite some time ago he lived on Devon Street, his wife got hemorrhages and Dr. Dukes saved his wife from bleeding.

Q. Did he say anything about being able to have anything? A. And some other times, Mr. Handlon

told me that he could not have any fun, every month twice his wife menstruates.

Q. Twice a month? A. Yes, sir.

Q. How long after this accident was it before you saw her around your place? A. The day, I don't know when it was, Mrs. Handlon went into the Hudson Hospital to get the X-rays taken.

Q. How long was it after the night she got hurt before you saw her? A. The third day, on Monday.

Q. Where was she? A. Mrs. Handlon opened the door for me.

Q. Where? A. In her house.

Q. Did you call there, you and your wife, to see her? A. I got there. The door was closed; I knocked on the door, you know, and she let me in.

Q. Did she come around to the store after the accident? A. No, the first time I seen Mrs. Handlon in the store, that was the day she went in the hospital for the X-rays.

Q. When was that? A. I can't tell.

Q. How long approximately? A. I believe it was spring.

Q. After that, did you see her around? A. My wife went down a couple of times.

Q. How long did Mr. Handlon continue to work for you after the accident? A. A year after.

Q. During that year, was anything said to you by either he or Mrs. Handlon regarding her injuries? A. No, sir.

Q. You didn't know there was any claim made until you received the summons in this case, about a year afterwards? A. Mr. Handlon told me somebody from the Insurance Company was going to settle with him.

Q. Well; I am not asking you anything about that. I am asking you whether or not he had ever spoken to you about the injuries? A. No.

Cross examination by Mr. Gilhooly:

Q. Mr. Nolden, do I understand you to say that Mr. Handlon told you that some time prior to this accident, that Dr. Dukes had saved Mrs. Handlon from bleeding? A. Yes, sir.

Q. You knew that when you were preparing this case for trial, didn't you? A. No; that was before Mrs. Handlon ever fell in the cellar.

Q. You knew about that conversation? A. What conversation?

Q. That you had with him about when Dr. Dukes had saved his wife? A. Yes, sir.

Q. You remembered that conversation, didn't you, when you were preparing this case? A. I never prepared anything.

Q. When you talked to your attorney about preparing your evidence; you remembered that conversation? A. Yes, sir, I did.

Q. Did you ever ask Dr. Dukes whether he had ever saved her life, through bleeding?

Mr. Gilhooly: That is objected to as immaterial.

The Court: Sustained.

Q. Do you know why Dr. Dukes was not asked whether he had ever—

Mr. Weinberg: Objected to as wholly immaterial and irrelevant.

The Court: Sustained.

Q. When you first saw Mrs. Handlon on the night in question, she came over in pretty much of a hurry into this opening? A. She did.

Q. And she was coming down with considerable violence, wasn't she? A. She was.

Q. And she hit some part of the areaway before she hit your arms? A. Mrs. Handlon with her both hands she fall, was holding my neck.

Q. She came right down on her hands? A. And sne was holding me.

Q. Did she hit you with her head or chest? A. With the arms.

Q. Her arms struck you? A. Her arms struck me.

Q. Did any part of her body come in contact with you? A. I don't know.

Q. Outside of her arms? A. I don't know.

Q. As she hit you, did her feet hit the stone step? A. There is no stone steps around.

Q. She hit the steps? A. I don't know.

Q. Now, after that, you carried her up into the store? A. No, Mrs. Handlon walked up.

Q. Did you assist her; did you help her? A. Yes, I got her under the arm.

Q. She stayed there until one o'clock, didn't she? A. Yes, sir.

Q. The reason she stayed there until one o'clock was that she didn't feel well enough to go? A. No, because I told Mr. Handlon to go home, I said, "Never mind, I stay here and I fix the other window. Everything is all right."

Q. Mrs. Handlon was lying down all this time? A. Lying down on the couch.

Q. You carried her up on your back when you got to her house? A. I did.

Q. That was because she wasn't able to walk? A. She could not stretch her leg.

Q. You paid a visit three days after the accident? A. I did.

Q. You never saw her again then until she came into your store in the spring? A. Once after I saw her.

Q. How long after was that? A. That time Dr. Dukes and the insurance doctor was there.

Q. Then you next saw her in the spring? A. Then I seen her the time she went to West Hudson Hospital.

Q. You paid no other visits? A. My wife always went down.

Q. You did not? A. I never went down.

Cross examination by Mr. Moser:

Q. The iron bar was there? A. The iron bar was there.

Q. So that if you wanted to use it, you could have used it? A. I could have.

Q. Now, when you opened this door, what did you do with it? A. I stand it with the edge on the sidewalk, on the iron arm.

Q. Did it fall down flat on the sidewalk? A. No, it did not.

Q. Stayed up straight? A. Not straight, on an angle.

Q. Now, when you moved it over, did you move the bottom over or the top? A. The front.

Q. Now, you could have leaned the top all over and put the hook in? A. You could not; there was absolutely no support there.

Q. Did you ever use that iron door? A. I always used it.

Q. When you were down there for just a few minutes? Did you put the iron bar in then? A. I could not have used the bar.

Q. Did you put the iron bar in? A. I could not use the bar.

Q. All right; did you ever use the bar? A. I always used the bar.

Q. How long before this accident was it you did not use this bar? A. It was so busted for about six or eight weeks.

Q. Did you use the bar any time within that period? A. Yes, for a while I used the bar. Then the other door was not worn so bad; after the door didn't get fixed, I could not use the bar no more.

Q. Then every time you did use the bar, you used it with one hinge, is that so? A. I did.

Q. But on the night of the accident to Mrs. Handlon, when Mrs. Handlon fell down into the cellar, you didn't put the bar on? A. I did not.

Q. Isn't that because you were just going to be down there for a minute to get some cans and come right up? A. Before I could not use the bar.

Redirect examination by Mr. Gilhooly:

Q. When Mrs. Handlon fell down the stairway was there a light in the cellar burning or not? A. It was.

Q. When did you put it out? A. After Mrs. Handlon went down, I picked the shrimps that was lying under the cellar steps.

Mr. Moser: Defendant Copestone Temple Association rests.

ALL PARTIES REST.

Mr. Moser: I desire to move for a direction of verdict, on the ground there is no proof in the case which establishes negligence on the part of the Copestone Temple Association.

The defense has now proven through cross examination by Mr. Gilhooly, the cross examination of Mr. Richmond, that he had nothing to do with

the cellar door, and that, I think, conclusively establishes beyond any question, that the Copestone Temple Association had nothing to do with the cellar way and had no control over it; that the defendant Nolden lifted the cellar door that night. If he had closed it behind him, and if he had acted as a reasonably prudent person, this accident would not have happened.

For that reason, I desire to move for a direction of verdict in favor of the Copestone Temple Association.

On the further ground, that the proof did not comply with the allegation of negligence.

The Court: The motion will be denied and exception allowed.

Mr. Moser: Exception.

Charge of the Court.

The Court then charged the Jury as follows:

The Court: Gentlemen of the Jury:

This is an action brought by these plaintiffs against these two defendants, to recover for damages which the plaintiffs claim they sustained by reason of an accident that occurred on October 29th, 1926, when one of the plaintiffs, Mrs. Handlon, while leaving the store occupied by one of the defendants, Paul Nolden, and owned by the other defendant, Copestone Temple Association, stumbled over a door leading into the cellar underneath the store of the defendant Nolden, and was thrown into the cellar and sustained certain injuries which have been described to you here on the witness stand.

For the injuries which she sustained by reason of this fall, this plaintiff now seeks to recover damages.

The wife and husband both are plaintiffs, and I will dispose of the husband's case, without making it necessary for me to take up your time later in reference to his claim.

The husband's right to recover is predicated entirely upon the wife's right to recover. If she is entitled to recover, then he, the husband, is, and by the same token, if you find the wife is not entitled to recover, then of course, her husband would not be entitled to, because his right, and the damages which he seeks to recover, are based upon the expenses which he was forced to expend in having his wife cured of the injuries which she sustained by this accident, plus loss of society and consortium of his wife during the period she was incapacitated because of and as a result of this accident.

And so, you see, as to this accident which she suffered, if no one else was responsible for it, why, then of course, he could not recover from that same person or persons any damages because of what he lost as a result of it.

So, without making it necessary later on to discuss with you the husband's right to recover, let me say to you now, that he can recover only if his wife is entitled to recover.

If he is entitled to recover, he would be entitled to be compensated for the sums which he has been forced to expend toward having his wife cured of her injuries, and for whatever sum you think would be compensation for the loss of society and consortium of his wife during the time she was incapacitated.

I don't recall just what the sums were, and it seems to me that I should say to you now that you are to make the same distinction as far as the hus-

band's damages are concerned, as you will make when it comes to the question of the wife's damages, and that is, to distinguish between her present condition, brought about by reason of these cancers, which the Court has now ruled to be outside of this case. Whether the Court is correct about that you are not to determine here. You are to take the law as the Court gives it to you; whether it is correct or whether it is not correct will be determined, if incorrect, by some higher Court when that question comes before it to be passed upon.

So you are not to let your own ideas of what the law should be, nor any sympathy which might arise naturally in a case of this kind, to influence you; but you are to limit the damages which the husband is entitled to recover, to the amount which he was forced to expend toward having his wife cured of the injuries, separating those injuries from the amount which he has been forced to expend because of this present condition which the Court has ruled has not been so connected up with this accident as to make a recovery for that condition possible in this case.

Now, so as to come then to the wife's case, which is really the important case so far as the damages are concerned, because she is the one that has actually suffered the injury.

This woman plaintiff says that on the night in question that she was a customer in this store of one of the defendants. She came out of the door of this store, and as she stepped out, she stumbled over the doorway covering this passageway into the cellar, which had been left open by one of the defendants, when he went down into the cellar, to obtain some article of merchandise which he

kept down there. And she says that because of the negligent manner in which this door was left there, that she stumbled over it, and was precipitated into the cellar, suffering these injuries.

She charges both of these defendants with negligence. She says that it was negligence on the part of the store owner to leave the door in that condition and in that position and to use it when it was in that position so as to make it dangerous for herself or any other people using, lawfully using, the highway or sidewalk at that point; and she alleged that the defendant Company, the owner of the building, was negligent in having leased to this defendant a part of the sidewalk to be used in some other manner other than the ordinary use to which pedestrians have a right to use a sidewalk, and that, having leased it for some other purpose other than the ordinary manner in which the sidewalk is to be used, that it became their duty to protect those others lawfully using the sidewalk, by having this door in proper condition so as to avoid injuring others upon the sidewalk.

In other words, she charges negligence, first, by the man using it in the condition in which it was, and secondly, by the Company for having allowed it to get into a condition where it became dangerous when used by others who had a right and were lawfully on the highway.

Therefore, Gentlemen of the Jury, the criterion in the whole case, as in every other case, and this case is no different from any other negligence case you might have had during your term of service, in the sense that in order to entitle the plaintiffs to recover, they must prove as alleged, not that she was injured, not that the accident occurred—

because that in itself is not sufficient—but that the accident occurred as a result of the negligence of one or both of these defendants.

Now, unless one or both of these defendants were negligent, then the mere happening of the accident itself means nothing as far as the right to recover is concerned, and the burden is upon the plaintiffs who allege that negligence, to satisfy you that these defendants were negligent, one or both, by a fair preponderance of the evidence.

Now, by preponderance of the evidence, we mean the greater weight; not necessarily the greater number of witnesses, but by the greater weight of the evidence that one or both of these defendants were negligent, and that that negligence was the proximate cause of the injury.

Now, by proximate cause, we mean the moving cause, the main cause, the one which sets the others in motion, and without which the accident itself would not have happened. You can understand that very readily when you recall that it is possible for a man to be negligent without causing any damage; and so, the mere fact, if you should find one or both of these defendants negligent, would not be sufficient to entitle the plaintiffs to recover, unless that negligence meant something, unless it caused something, unless it was the proximate cause of the accident.

To illustrate that, you can readily see that it might be considered to be negligence for a person driving an automobile, to drive it all the way down on the sidewalk, instead of out in the road, and to be driving at a high rate of speed, and to be driving without any lights when it was night, and so forth; and yet, if nothing happened, the negligence itself would not entitle anybody who

wanted to sue, to come along and get damages, unless that negligence caused something, unless it was the proximate cause, the moving cause, the main cause which caused somebody some damage.

And so, in this case, as in every other negligence case, you must find, first, that there was negligence in order to entitle the plaintiffs to a verdict, and secondly, that that negligence was the proximate cause of the accident.

Now, what do we mean by negligence? Negligence has been defined to be the doing of something which a person should not do, or the failure to do something which a person should do, and measuring the actions of these defendants, in their conduct, management and control of this stairway, at that time, it is for you to say whether one or both of these defendants either did something which they should not do in the management and control of it, or that they failed to do something which they should have done in the management and control and conduct of this particular place at that time.

And so, as I say, measuring it by this test, you will determine the question of whether or not there is negligence on the part of one or both of the defendants, and whether that negligence was the proximate cause of the accident.

Now, it was the duty of these defendants, to use reasonable care in seeing that their use of the sidewalk was such as a reasonably prudent person would use it, having in mind that others lawfully using the highway would not be injured by their actions, by the sidewalk. Did they use reasonable care to see that others who had a right to be on that sidewalk, and who were lawfully upon that sidewalk? Did they refrain from causing injury to these others?

The defense in this case by both defendants is, first of all, a denial that they were negligent in any manner.

The defendant owner of the building says that they put the place in condition, they kept it in condition as far as they knew, and that anything that happened there was caused by some agency over which they had no control, and caused by some action of the other defendant, the storekeeper, himself.

The storekeeper says that he was not negligent because he used it in the manner in which he found it, and that he used it in the only way in which he could use it, and that he used it in a reasonable manner under the circumstances, and in the only way in which he could.

Secondly, the defendants say, that even if you should find that one or both of these defendants was negligent, and that that negligence was the proximate cause, that nevertheless this woman plaintiff was herself guilty of contributory negligence. They say that when she came out, she knew the condition of this door, having seen this door upon many occasions, knowing its condition when open; that there was a light in the store; that there was also a light in the cellar; and that when she came out there and tripped over this door, causing this fall, that in doing that she did it without having taken the care that a reasonably prudent person would for their own safety, and that then she is guilty of contributory negligence.

It was the duty of this woman to use reasonable care to see that she was not injured by coming in contact with this door, or any other obstruction, having in mind that a person has a right to expect the street to be free from impediment or dangerous

condition, but nevertheless, such care, under the circumstances, as a reasonably prudent person would use was the duty of this woman on the night in question. If she exercised that care, that is all she was called upon to do.

Now, that is an affirmative defense, as it is called in the law, this defense of contributory negligence, because if you find that this woman was guilty of contributory negligence, it would defeat recovery as against both defendants, or as against either, and that, regardless of the degree of that contributory negligence. That is, there are no comparative degrees in this State. You can't find one guilty of ninety per cent., and one guilty of ten per cent., and say, we will take the difference and allow eighty per cent.

If you find this woman was guilty of contributory negligence, of negligence which contributed to and which helped cause the accident, in no matter what degree that might be, it would be sufficient to defeat recovery, and that being an affirmative defense, the burden is placed upon the defendants who allege that, and the defendants must prove to your satisfaction by a preponderance of the evidence, and again that is by the greater weight of the evidence, this contributory negligence, if they are to avail themselves of that as a defense.

And so, after you have considered all the evidence in the case, the first question that you have got to determine as to either one or both of the defendants, is the question of liability, and if you determine that in favor of both of these defendants, that ends the case and your verdict would be in favor of the defendants.

If you determine it as to one favorably, then your verdict would be in favor of the one defendant, and the question would be over as to that one.

If you find in favor of the plaintiffs, as against one or both of the defendants upon the question of liability, then and then only would you have the next question to determine, and that is the question of the measure of damages.

If this woman is entitled to recover, she would be entitled to be compensated, in so far as money can be said to compensate, for the losses she was put to as a direct and proximate result of this accident.

And now here, to repeat what I told you in regard to the husband's damages. You are not to consider in this case any compensation which this woman might receive because of this cancerous condition, which, unfortunate and regrettable as it may be, she seems to now be suffering from.

You are not to allow sympathy to enter into your verdict and speculate as to whether or not that condition is the result of this accident. The ruling of the Court is based upon the evidence that has been introduced, and therefore, so far as you are concerned, consideration of that as an element of damages is to be eliminated entirely and not to be considered by you.

So, you are to consider only such damages as resulted from the accident, as the direct and proximate result of it.

Now, she would be entitled to be compensated for any pain and suffering which she has already suffered as a direct and proximate result of the accident. She would be entitled to be compensated for any pain and suffering, if any pain and suffering, which she will probably suffer in the future, if you find there is any evidence to justify you in finding she will suffer in the future from, and only from the accident itself.

She would be entitled to be compensated for any permanent injury that she sustained, the scars, if there are any scars testified to.

Such sum as would compensate her for the pain and suffering and for any losses that she has been put to, as a direct and proximate result of this particular accident, and of no other, or for no other cause; such sum as in your judgment would compensate her.

I think practically that is all there is to be said about the case, except that I think it is proper to say that during the course of the action the defendants, or one of the defendants, made motions, one for a nonsuit and the other for a direction of a verdict. The Court's refusal to grant either or both of these motions is not to be taken by you as indicative of what the Court's opinion might be as to the right to recover in this case. There are no such indications in the Court's refusal, indeed the Court has no notion as to whether or not there should be any recovery, and would have no right to have any such notion if it did have. But it simply means that under the law, where a case gets to a point where it is a law question, a question of law alone, then it becomes a question for the Court to determine. But where there are controverted questions of fact, two sets of facts, one of which may be believed or the other, which the jury may believe, then it becomes a fact question and a question for the jury, and it was because the Court thought, that under the evidence this case had gotten to a point where there were different sets of facts, which might or might not be believed by the jury, that the motions were refused and the case sent to you for your determination.

Requests to Charge.

I have been requested to charge you certain requests.

Mr. Weinberg: My requests are covered, your Honor.

The Court: I understand plaintiff's first request is withdrawn.

Mr. Gilhooly: The first and second are withdrawn.

The Court: 3. If you find that on the night in question one of the metal doors was in a defective condition and because of this defective condition the doors when raised did not afford a reasonable safeguard from falling into the opening, to the plaintiff walking in front of the show window and the defendants provided no other safeguards and provided she was exercising reasonable care for her safety, both of the defendants are liable to the plaintiff for the injuries which she received as the proximate result of her fall into the opening.

I think I have so charged before; if not, I do so charge you.

4. If you find that the opening into the cellar was improperly guarded and the plaintiff was exercising reasonable care for her safety and by reason of the fact that the opening into the cellar was improperly guarded the plaintiff Frances Handlon fell into the opening, she is entitled to recover.

I so charge you.

5, 6, and 7 I refuse to charge, except as I have already charged.

You make take the case.

(The jury retired.)

Exceptions.

Mr. Gilhooly: I would like to take an exception to that part of your Honor's Charge wherein you took from the jury all consideration of the condition of carcinoma, or cancer, because it is my opinion that the plaintiff has properly established a causal connection between the fall and the cancerous condition of the plaintiff.

The Court: You may have an exception.

Mr. Moser: I except to that part of the Court's Charge wherein the Court said, speaking of the negligence of the defendant Nolden that he used the bar in the manner in which he found it, on the ground that is not the fact, but that the fact is that he, the defendant Nolden, found the bar in perfect condition at the inception of the letting, and under the testimony the defendant Copestone Temple Association had no control whatever over the door.

The Court: You may have an exception.

Mr. Moser: I also except to that portion of the Charge wherein the Court defined the negligence of the Copestone Temple Association, in that the Court did not go far enough and because the Court should have defined the relation of landlord and tenant insofar as the duty to make repairs was concerned, the testimony being that the Copestone Temple Association had nothing to do with the door.

Also an exception to the Court's charge of the two requests of the plaintiff that the Court did charge.

The Court: You may have an exception.

Mr. Weinberg: Insofar as they are applicable to my defendant, I ask the same exceptions as urged by Counsel for the Copestone Temple Association. In other words, exceptions on the same grounds.

The Court: Exceptions allowed.

PLAINTIFFS' REQUESTS TO CHARGE WHICH WERE REFUSED BY THE COURT.

5. Not all negligence on the part of a person injured is contributory negligence. Where the defense of contributory negligence is set up, as it is in this case, it must be established by the defendants by the greater weight of the evidence that Mrs. Handlon was herself negligent and that her negligence contributed to the injuries in such a way that if she had not been negligent she would have received no injuries at the hands of the defendants.

6. If you find for the plaintiff Frances Handlon, she is entitled to receive by way of a verdict at your hands compensation for the injury which she received as a result of this fall and for the consequence of those injuries to the extent, if at all, that her present condition is and her future condition is likely to be the result of injuries received in this fall, is your duty, if you decide she is entitled to your verdict, to express that compensation in terms of dollars and cents based on the proximate results of the injuries received in this fall.

7. If you conclude the plaintiffs are entitled to your verdict, then in assessing the amount of damages which would compensate the husband, it is proper for you to consider the loss of the society and the services of his wife during the period of her disability and sickness, as the proximate result of this fall; also all sums of money he may have expended in the proper care and attendance upon her during her sickness, and those which he will be compelled to expend in the future as the proximate result of this accident, and the Court

instructs the jury in this connection that a wife's services to her husband are not to be valued as the services of a mere hireling. The frugality, industry, usefulness, attention and tender solicitude of a wife make her services greater than those of an employee, and these elements should be considered by you, so far as the evidence discloses them, in making a money estimate of the value of her services.

1200CT.T.1929

New Jersey Court of Errors and Appeals

FRANCES A. HANDLON and THOMAS HANDLON, *Plaintiffs-Appellees,* *v.* COPESTONE TEMPLE ASSOCIATION, a corporation, *Defendant-Appellant.*	Action at Law. On Appeal from Hudson County Circuit Court.

BRIEF OF DEFENDANT-APPELLANT.

This is an appeal from a judgment entered in favor of the plaintiff Frances A. Handlon in the sum of $2,000 and in favor of the plaintiff Thomas Handlon in the sum of $500 and against the defendant Copestone Temple Association.

Statement of the Case.

This suit was instituted by the plaintiff Frances A. Handlon and her husband, Thomas Handlon, against the defendants Copestone Temple Association and Paul Nolden to recover damages for personal injuries alleged to have been sustained by the plaintiff Frances A. Handlon falling down a cellar opening, *the door of which had been opened and permitted to remain open by the defendant Paul Nolden.* The husband sued for moneys expended and for medicines, etc., and loss of services of his wife during the term of her illness. The defendant Copestone Temple Association was the

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owner of the building and had leased the store on the ground floor and the cellar to the defendant Paul Nolden, who conducted a delicatessen store therein. *The tenant, Paul Nolden, had the sole and exclusive possession of the store and of the cellar and used the cellar exclusively for the storage of goods.* On the day in question, the tenant, Paul Nolden, had raised and opened the cellar doors and had permitted them to remain open while he went down into the cellar to get some shrimp for a customer. While he was down in the cellar, the plaintiff Frances A. Handlon fell into the opening.

Motions for a nonsuit and for the direction of a verdict were made on behalf of the defendant Copestone Temple Association, which motions were denied and exceptions duly taken (see pp. 157-159 and 173-174). The Court sent the case to the jury as against both defendants, and the jury brought in a verdict in favor of the plaintiffs and *solely* against the defendant Copestone Temple Association, and in favor of Paul Nolden and against the plaintiffs (p. 19). Judgment was duly entered and from this judgment this appeal is taken (p. 18).

A rule to show cause why the verdict should not be set aside on the ground that it was excessive was granted and argued before the Trial Judge with the result that the Court dismissed the rule. *All exceptions were reserved* in the rule to show cause and were not argued before the Trial Judge (pp. 20-24).

Grounds of Appeal.

The grounds of appeal are six in number and printed on pages 26 and 27 of the record. They will all be considered in one or the other of the points argued in this brief.

Because of the fact of there being two defendants, we will in this brief refer to the defendant Copestone Temple Association as the appellant.

ARGUMENT.

POINT I.

The Trial Court erroneously denied appellant's motion for a direction of a non-suit and for a direction of a verdict.

Under this point we will argue the first and second grounds of appeal.

At the conclusion of the plaintiffs' case, motion for nonsuit was made on behalf of the appellant, and exception duly taken to the Court's refusal to grant the same (pp. 157-159).

At the conclusion of the trial, motion was made for the direction of a verdict in favor of the appellant, and exception was duly taken to the Court's refusal to grant the same (pp. 173-174).

The complaint set forth that the appellant was the owner of the building and that prior to the date in question had leased the store located at the southerly end of said building to the defendant Paul Nolden, who at the time of the accident was in possession of said store; that the said Nolden conducted in said store a delicatessen shop; that in the street in front of said store and level therewith there was an opening about five feet long and four and one-half feet wide, leading into the cellar of said building, which opening was covered by a pair of metal doors to prevent pedestrians, etc., from falling therein. That said opening was used by both the appellant and the said Paul Nolden; that on the day of the accident the appellant and the defendant Paul Nolden care-

lessly and negligently permitted and allowed said pair of metal doors or one of them to become worn, slippery and unrepaired, and further that said Nolden had raised and opened said cellar doors and had permitted them to remain open and neglected so that when the plaintiff Frances A. Handlon came out of Nolden's delicatessen shop, she, by reason of the negligence of the two defendants, was precipitated down into the opening (pp. 10-12).

Paragraph five of the complaint was subsequently amended (see p. 15). It was amended by adding that at the time of the leasing of said premises by appellant to Nolden, that the said pair of metal doors, or one of them, was worn and in disrepair, and that appellant had knowledge of the defective condition of said cellar doors, or should have acquired knowledge thereof by reasonable inspection prior to the accident.

The answer of the appellant admitted ownership of the building and the leasing of the store to Paul Nolden, and denied all other allegations of the complaint. It set up as separate defenses that at the time of the accident, the defendant Paul Nolden had the sole and exclusive use of the cellar doors and that it retained no right over same; that the injuries occasioned to plaintiff were the direct result of negligence of some person other than appellant, and contributory negligence (p. 6).

TESTIMONY.

In reference to the testimony we will of course not refer to any portions relating to the injuries sustained by the plaintiff or her medical testimony.

Plaintiffs' Case.

John J. Bracken:

Mr. Bracken testified that he was an engineer and surveyor and had made a survey of the premises in question. The store in question had a separate entrance of its own and that outside of the building, in front of the store, to the side of the entrance, was the cellar entrance covered by the two doors. That the doors extended out from the building about four feet, two and one-half inches. That it extended out on the sidewalk about four feet from the building line. That the sidewalk was a cement sidewalk and the doors were fastened in in by hinges in the cement sidewalk (pp. 29-33).

Frances A. Handlon, Plaintiff:

Mrs. Handlon testified that on the evening of October 29th, 1926, between 9:30 and 10 P. M. she went to Nolden's delicatessen store; that she was in the back talking to Mrs. Nolden a little while and after making her purchases she started out of the store and through the door (pp. 33-34); that her foot caught on the cellar door and she fell down the cellar stairway (p. 34). On page 42 she testified that the cellar door was not open when she went into the store; that the cellar areaway which she fell into was directly in front of Nolden's right hand side window and on the southerly side of the building; the entrance to the store was between two show windows of the store (p. 43).

On cross examination Mrs. Handlon testified that when she went into the store, both cellar doors were closed and flushed with the sidewalk. That when she came out, they were both open and that Mr. Nolden was down in the cellar areaway and caught her when she fell down (p. 59).

Mrs. Elizabeth Rowland:

Mrs. Rowland testified that she was in the delicatessen store with Mrs. Handlon and that she left the store first and Mrs. Handlon followed her; that all at once she heard a noise and Mrs. Handlon was going over the side of the cellar down the cellar steps, and Mr. Nolden caught her at the bottom of the steps; that the doors were open when they went out, but were closed when they went in; that the northerly cellar door was lying over the sidewalk three or four inches from the floor (p. 99). There was no iron bar running along the front holding the doors together (p. 100).

On cross examination by counsel for the defendant, Nolden, Mrs. Rowland testified that the cellar was lighted; that she did not fall over the door when she walked out (p. 104).

Thomas Handlon, the Husband of Mrs. Handlon, and One of the Plaintiffs:

Mr. Handlon testified that on the night of the accident he had been up to Nolden's store; that somebody hollered, and when he went out of the store he found Mr. Nolden holding his wife, trying to sit her up; that they were next to the bottom step (p. 134). That the screen door of the store was flushed with the front windows on the building line. That he examined the metal cellar doors the night of the accident; that the hinges of the northerly door that held the door were broken. On page 137 he testified as to the statements he made to Mr. Nolden or Mr. Nolden to him, which of course while competent as against defendant Nolden, were not competent as against appellant. That there was an iron bar with a hook on each end to put in two holes in front of the door to hold the door straight, which was not used at the time of the accident (p. 137).

On cross examination by counsel for appellant, Mr. Handlon testified that the cellar underneath the store was used exclusively by Mr. Nolden and was for the exclusive use of the delicatessen store; that there was an iron bar to hook on each door when open so as to hold them upright; that the edge of the hinge was below the level of the sidewalk; that both doors were open on the night of the accident (p. 146); that the only things stored in the cellar was merchandise used in connection with the delicatessen store (p. 150).

Paul Nolden:

The defendant Paul Nolden was called on behalf of the plaintiffs. He testified that he kept a delicatessen store at the place in question and that Mr. Handlon worked for him week-ends; that the condition of one of the doors at the time of the accident was such that the front hinge was broken and the pin which goes through the eye was rusted through; that when he opened the door it did not lay flat on the sidewalk but came up a little bit; that he spoke to Mr. Canfield about it several times and Mr. Canfield told him he notified the blacksmith to fix it (p. 154).

On cross examination he testified that he rented the store himself from the Copestone Temple Association, appellant; *that he was the only person who had any control over the cellar;* that anybody that wanted to go into the cellar had to ask him; that he had all goods he used in his business down in the cellar; that there were two hinges on the cellar door nearest the screen door; that one was in good condition and one was broken; that there was an iron bar right next to the cellar door; that he could not use the bar because it was no protection to hold the door open; that he was sure that one of the hinges was all right and that the two hinges on the other door were all right.

He was asked the following questions:

"Q. And inorder to save anybody from falling down this cellar from the front, you could have put up this iron bar; isn't that so? A. Yes, sir.

"Q. And that iron bar would have held these doors in an upright position; isn't that so? A. On a slant.

"Q. But it would have held them up? A. Not straight up, no.

"Q. On a little slant? A. A little slant.

"Q. On the night in question you went down in the cellar for some shrimps? A. Yes, sir.

"Q. And you only expected to be down a short time? A. I never was down there for a short while; I have been for two minutes.

"Q. In other words, you opened the cellar door; you went down into the cellar, got your shrimps, came up a minute or two later, and as you were coming up the stairs, Mrs. Handlon fell in yours arms? A. Yes, sir.

"Q. There wasn't anybody there associated with or connected with the Copestone Temple Association, was there, at the time you opened the door? A. No.

"Q. You were the only person who opened this door on the night in question? A. Yes, sir.

"Q. You were the only person who had a right to open this door? A. Yes, sir" (pp. 156-157).

The above was all of the testimony submitted on behalf of the plaintiffs relating to the cause of the accident.

At the conclusion of the plaintiffs' case, counsel for appellant moved for a nonsuit on the ground that there was no evidence of negligence on the part of the defendant, Copestone Temple Association.

Counsel based his motion principally upon the case of *Durant* v. *Palmer*, 29 N. J. L., page 545, where this Court held that "there are cases in

which the tenant alone is liable, but it is in those cases in which the nuisance results from some act or negligence of the tenant, and not of the landlord, as if he leave open a cellar door or a coal hole, or suffer a nuisance to exist for want of repairs, which he, and not the landlord, is bound to make."

The Court refused the nonsuit, basing his refusal upon the authority of cases wherein the sidewalk had been subjected to a use not intended, as for instance in the case of *Zac* v. *Craig,* 136 Atl. Rep., page 410, where premises had been rented for a garage and the driving of heavy motor trucks had created a hole about 7 inches across and 6 inches deep in the sidewalk.

There was of course nothing like that in the case at bar. So far as the plaintiffs' case went, there was nothing upon which any verdict against appellant could be based. The testimony showed that the store and cellar premises had been rented by appellant to Nolden; that he had exclusive use of the cellar and that no one had the right to go down there without his permission and further than this that the accident was caused solely by his not placing the bar in the hooks on the doors so that the doors would remain upright, or nearly upright, with an iron bar across while he was down in the cellar. There was no proof whatever of any negligence on the part of appellant, and the nonsuit should have been granted.

Defendants' Case.

Burton E. Canfield:

Mr. Canfield was the president of the appellant and testified that appellant had leased the premises to a man named Neeshaw and that Mr. Nolden bought the business from Neeshaw and the lease

was transferred to him (page 159). That when the cellar doors were in a closed position they were flush with the sidewalk; that there was a bar made with the doors which held the doors at a certain angle; that he saw the bar there several times.

William D. Richman:

Mr. Richman testified that he was the janitor of the building for appellant and that on the 29th day of October, 1926, he knows the bar for the cellar doors was there; that it was an iron bar about 5 feet long, extended to the doors to support the doors or protect anyone from falling down the front of the entrance to the cellar. On cross examination by counsel for plaintiffs Mr. Richman testified that he had no cause to use the cellar and that his superintending duties did not call for him to (p. 163).

Paul Nolden:

Mr. Nolden testified in his own case that he was the owner of the delicatessen store; that the building in question was owned by the Copestone Temple Association and consisted of two stores and the entrance for the Temple that goes to the hall. That the cellar was immediately underneath his store room and was a small cellar about 14 feet by 10 feet. That it was lighted in the front of the steps about 4 feet in by electric light, which lit up the whole step; that the hinge of one of the doors was broken and he let the door drop back down on the sidewalk (pp. 164-166).

On cross examination by counsel for appellant he testified as follows:

> "Q. The iron bar was there? A. *The iron bar was there.*
>
> "Q. So that if you wanted to use it, you could have used it? A. *I could have.*

"Q. Now, when you opened this door, what did you do with it? A. I stand it with the edge on the sidewalk, on the iron arm.

"Q. Did it fall down flat on the sidewalk? A. No, it did not.

"Q. Stayed up straight? A. Not straight, on an angle.

"Q. Now, when you moved it over, did you move the bottom over or the top? A. The front.

"Q. Now, you could have leaned the top all over and put the hook in? A. You could not; there was absolutely no support there.

"Q. Did you ever use that iron door? A. I always used it.

"Q. When you were down there for just a few minutes? Did you put the iron bar in then? A. I could not have used the bar.

"Q. Did you put the bar in? A. I could not use the bar.

"Q. All right; did you ever use the bar? A. I always used the bar.

"Q. How long before this accident was it you did not use this bar? A. It was busted for about six or eight weeks.

"Q. Did you use the bar any time within that period? A. Yes, for a while I used the bar. Then the other door was not worn so bad; after the door didn't get fixed, I could not used the bar no more.

"Q. *Then every time you did use the bar, you used it with one hinge, is that so?* A. *I did.*

"Q. But on the night of the accident to Mrs. Handlon, when Mrs. Handlon fell down into the cellar, you didn't put the bar on? A. I did not."

This is a résumé of the testimony on behalf of both the plaintiffs and the defendants relating to the accident and its cause.

Counsel for appellant moved for a direction of verdict in favor of appellant upon the ground that there is no proof in the case which establishes

negligence on the part of appellant. Further, that the defense had proven through cross examination of Mr. Richmond by counsel for plaintiffs that he had nothing to do with the cellar door; that the appellant had nothing to do with the cellar way and no control over it; that the defendant Nolden lifted the cellar door that night and if he had closed it behind him the accident would not have happened. And on the further ground that the proofs did not comply with the allegations of negligence. This motion was denied.

There was no evidence to show any negligence on the part of the appellant.

The uncontradicted evidence showed that the store and cellar in question had been leased to the defendant Nolden and was in his exclusive control.

There was no evidence to show that at the time of the leasing, the cellar doors were not in a proper condition.

There was evidence to show that if the defendant Nolden had closed the cellar doors or had hooked the iron bar in between them the accident would not have happened.

The Trial Court based his denial of appellant's motion for nonsuit *upon a theory that was not in the case* and to sustain which there was no evidence whatever (pp. 157-158).

The Court said that he was basing the denial of the motion upon the authority of *Davis* v. *Tallon,* 91 N. J. L., page 618, in which this Court on page 620 said:

> "The jury might infer from the evidence that the appellants leased the land and sidewalk for a use not consistent with the purpose for which the walk was constructed; that they had knowledge of the character of the proposed use, and that such use might, and probably would, create a nuisance by obstructing the safe use thereof by pedestrians."

And further upon the case of *Zak* v. *Craig,* 136 Atl. Rep., page 410 (not officially reported), in which the Supreme Court followed the opinion of Mr. Justice BERGEN, speaking for this Court, in the case of *Davis* v. *Tallon,* where, on page 619, he said:

> "The plaintiff's case was not rested upon any legal obligation of the owner to keep the sidewalk in repair, but upon the claim that defendants, by subjecting the sidewalk to a use not intended, that of use by ordinary pedestrians, they created a nuisance which rendered them liable for injuries to persons lawfully using it."

In the first place, there was absolutely no evidence that the premises were let for a purpose other than a proper purpose.

In the case of *Davis* v. *Tallon* the premises were leased to different tenants for storing wagons. The lot was fenced with a grateway to allow wagons ingress and egress to and from the street and lot over the sidewalk, by reason of which use the sidewalk was broken, and through which condition the plaintiff met with her injury.

Mr. Justice BERGEN also drew attention to the fact that "there was testimony from which the jury might have inferred that the land had been leased to prior tenants for the same purposes, subject to the same use of the sidewalk and that the impairment of it was caused by prior tenants. With the broken condition of the flagstones existing, subject to the inference that the condition was caused by using the sidewalk for the passage of heavy carts from the street to the lot by prior tenants, with the knowledge and implied participation therein by the owners, and the testimony of the defendant Schreiber that the flagstones were not broken by him, the jury might infer that the nui-

sance was created by the act of former tenants * * *."

Likewise, in the case of *Zak* v. *Craig*, the premises were leased as a garage for the storage of motor trucks and in the driving of the motor trucks over the sidewalk a hole 7 inches across and about six inches deep was made in the sidewalk and the ground beneath. The Court also drew attention to the fact that there was testimony to show that at the time of the expiration of the lease and the renewal thereof that the hole in the sidewalk existed and the flagstones were broken.

Both of the foregoing cases are distinguishable from the case at bar. In the case of *Davis* v. *Tallon* Mr. Justice BERGEN called attention to the fact that the plaintiff's case was not rested upon any legal obligation of the owner to keep the sidewalk in repair, but upon the claim that defendants by subjecting the sidewalk to a use not intended, they created a nuisance which rendered them liable to injuries to persons lawfully using it. In the case at bar the amended complaint sets forth that at the time of the demise of the premises to Nolden, the doors were worn and in disrepair and appellant had knowledge of the defective condition of said cellar doors, etc.

In the first place, there is absolutely no evidence, and in fact the uncontradicted evidence is directly to the contrary, that the cellar doors or one of them was worn or in disrepair at the time of the leasing of the premises.

In the second place, there is no evidence whatever that the sidewalk was subjected to any use other than the ordinary use as in the case where carts and automobiles were driven across the sidewalk, making holes and breaking the flagstones.

Further, the uncontradicted testimony as to the fact that the exclusive possession and dominion

over the leased store, cellar and cellarway was in the defendant Nolden, bringing the case squarely within the case of *Durant* v. *Palmer*, 29 N. J. L. 544, decided by this Court.

There being no evidence that the premises were in disrepair at the time of the letting or that the purpose for which the premises were let constituted a nuisance, or any negligence on the part of appellant; and the uncontradicted evidence being that the store premises and the cellar underneath were let to the defendant Nolden solely for his exclusive purposes and in his exclusive possession and over which the appellant had no control; and further, that the proximate cause of the accident was due entirely to the negligence of the defendant Nolden in opening the cellar doors and laying them back on the sidewalk and in not placing the iron bar across from door to door holding them upright or nearly so or in not closing the doors when he went down into the cellar, the motion for a nonsuit and a direction of a verdict in favor of the appellant should have been granted, and the denial of same constituted reversible error.

POINT II.

The Trial Court erroneously charged the jury that the defendant Nolden used the bar in the condition in which he found it.

This is covered by the third ground of appeal (p. 26).

The Court, on page 180, in its charge, said:

> "The storekeeper says that he was not negligent because he used it in the manner in which he found it and that he used it in the only way in which he could use it, and that

> he used it in a reasonable manner under the circumstances and in the only way in which he could."

The Court was referring to the use by the defendant Nolden of the leased store and cellar and particularly of the metal doors in the sidewalk leading to the cellar.

The testimony of the defendant Nolden, which has been referred to above, is to the effect that he did not use the cellar door in the manner in which he found it; that is, *he did not use the iron bar to hold the door upright or nearly so,* nor did he close the doors when he went down into the cellar, but his uncontradicted testimony is to the effect that *he negligently threw the doors open and permitted them to fall over on the sidewalk and to lie there while he went down into the cellar.*

As the Court knows, a statement of this kind by a Trial Court has very great weight with the jury. It purports to be a statement of the testimony of the storekeeper Nolden, whereas reference to Nolden's testimony shows that it was not a correct comment upon his testimony and therefore reversible error.

POINT III.

The Court erroneously charged two of the plaintiffs' requests to charge.

Under this point we will argue the fifth and sixth grounds of appeal, and also the fourth ground of appeal which reads as follows:

> "Because the court in defining the negligence of the defendant, Copestone Temple Association, did not go far enough and did not define the relation of landlord and tenant insofar as the duty to make repairs was concerned" (p. 27).

On page 184 the Court charged plaintiffs' third request to charge in the following language:

> "If you find that on the night in question one of the metal doors was in a defective condition and because of this defective condition the doors when raised did not afford a reasonable safeguard from falling into the opening, to the plaintiff walking in front of the show window and the defendants provided no other safeguards and provided she was exercising reasonable care for her safety, both of the defendants are liable to the plaintiff for the injuries which she received as the proximate result of her fall into the opening. I think I have so charged before; if not, I do so charge you."

Also on page 184, the Court charged plaintiffs' fourth request to charge as follows:

> "If you find that the opening into the cellar was improperly guarded and the plaintiff was exercising reasonable care for her safety and by reason of the fact that the opening into the cellar was improperly guarded the plaintiff Frances Handlon fell into the opening, she is entitled to recover. I so charge you."

By charging these requests, the Court erroneously charged the jury that if on the night in question one of the metal doors was in a defective condition and because of this defective condition the doors when raised did not afford a reasonable safeguard from falling into the opening, to the plaintiff walking in front of the show window and the defendants provided no other safeguards that *both* of the defendants were liable to the plaintiff for her injury. Further, that if the opening into the cellar was improperly guarded and by reason thereof the plaintiff fell into the opening, she was entitled to recover.

We submit that this is not a proper charge.

It must be remembered that the charging of these requests submitted by the plaintiff was the last that the Court stated to the jury before it retired to consider its verdict.

We respectfully submit that so far as appellant was concerned, these two requests to charge constituted an erroneous charge to the jury. By these paragraphs the Court directly told the jury that if they found that on the night in question one of the metal doors was in a defective condition and because of this defective condition the doors when raised did not afford a reasonable safeguard, and further that if the opening to the cellar was improperly guarded that then the plaintiff was entitled to recover judgment against both defendants. This entirely left out from the consideration of the jury the main defense of the appellant, to wit: that the appellant had leased the entire store and cellar premises to the defendant Nolden and that they were for his exclusive use and that they were in the defendant, Nolden's, exclusive possession, and that no one, *including appellant,* had any right to enter upon the said premises except with the permission of Nolden. Furthermore, these two *paragraphs excluded from the jury the right to find that the proximate cause of the accident was solely the negligence of the defendant Nolden.* That this was undoubtedly so is demonstrated by the fact that the jury brought in a verdict in favor of the defendant Nolden which was in direct conflict with all the testimony in the case. We submit this uncontradicted testimony shows that the proximate cause of the accident was the negligence of Nolden in not either placing the iron bar across the doors and thereby holding them upright or nearly so (which was the express purpose for which the iron bar was provided) or in not closing the doors when he entered the cellar instead of

opening the doors wide and laying them out on the sidewalk, leaving the cellarway entirely open and unprotected and also leaving the cellar door over which the plaintiff tripped lying on the sidewalk.

The only possible theory upon which a verdict against appellant could be based is that alleged in the amendment to the complaint, to wit: that at the time of the demise of the store and cellar that the cellar doors were in a defective condition. The uncontradicted proof is that the cellar doors were not in a defective condition at the time of the leasing of the premises. Further, the only testimony as to any defect in relation to the cellar doors was that on the night in question, one of the hinges of one of the doors had become broken. Even assuming that (*which is not the fact*) this hinge on the door was broken at the time of the leasing of the premises by appellant, nevertheless the Court erroneously charged the jury that it could find a verdict against both defendants without charging the jury that in order to find a verdict against appellant it was necessary for the jury to find that the broken hinge was the proximate cause of the accident. The Court did not charge this in the two requests to charge hereinbefore referred to.

A reading of the third request to charge (p. 184) shows that the only mention of the word "proximate" was where the charge referred to the *injuries which the plaintiff sustained* wherein the Court said that the plaintiff could only recover for injuries which she received as the *proximate* result of her fall into the opening. Nor did the Court in any other part of his charge to the jury charge that they must find that the broken hinge was the proximate cause of the injury. The Court in its charge referred at various times to the duty of the defendants, but nowhere in the charge did the Court say that before the jury could find a verdict

against appellant that it was necessary for the jury to find, first, some negligent act on the part of appellant in the performance of a duty which it was legally obligated to perform and also that the negligence of the appellant was the *proximate* cause of the accident. In other words, *nowhere in the Court's charge is there a direct statement that the jury must find that the fact that the hinge of the door was broken was the proximate cause of the injury.*

We submit that irrespective of the fact that the charging of these two requests was the last statement of the Court to the jury before it retired the erroneous statement of what was necessary to support a finding against appellant was not corrected or taken care of in any part of the Court's charge.

Therefore, the charging of these two requests to charge was erroneous and prejudicial to appellant and constitutes reversible error.

CONCLUSION.

It is respectfully submitted that the judgment below should be reversed.

Respectfully submitted,

CAREY & LANE,
Of Counsel with Appellant.

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1200CT.T.1929

New Jersey Court of Errors and Appeals

FRANCES A. HANDLON and THOMAS HANDLON, Plaintiffs-Appellees,	Action at Law.
vs.	On Appeal from Hudson County Circuit Court.
COPESTONE TEMPLE ASSOCIATION, a corporation, Defendant-Appellant.	

BRIEF OF PLAINTIFFS-APPELLEES.

This suit was instituted by the plaintiff Frances A. Handlon and her husband, Thomas Handlon, against the defendants, Paul Nolden and Copestone Temple Association to recover for personal injuries sustained by the plaintiff Frances A. Handlon who fell down a cellar opening which was a part of the building owned by Copestone Temple Association and rented by said association to Paul Nolden. The accident occurred on October 29th, 1926. The premises were known as No. 223 Kearny Avenue, Kearney, New Jersey. The demised premises consisted of a delicatessen store being a part of a large building owned by Copestone Temple Association and included in the demise was an areaway leading from the sidewalk in front of one of the show windows to the cellar. The cellar was included in the demise. The depth below the sidewalk to the floor of the cellar was eight feet, one and one-quarter inches; the width of the metal doors was three feet, one and three-fifth inches. The areaway was covered by two iron covers which

extended four feet two and one-half inches from the building proper. Four feet of the areaway extended into the street or west property line of Kearny Avenue. This appeared from the testimony of John J. Bracken, Civil Engineer and Surveyor (pp. 29-30-31). The tenant, Paul Nolden, was in possession of the store, areaway and cellar. Mr. Nolden testified that the main fuses for the entire building were located in the cellar and that to get to them it was necessary to enter into that part of the demised premises. Other than this feature the cellar and store on the first floor were in the exclusive possession of the defendant, Paul Nolden, but nevertheless and because of the placing of the aforesaid fuses in the cellar of the premises occupied by Paul Nolden, the landlord retained a right to go upon the demised premises either by itself or through others designated by it for the purpose of attending to the fuses.

At the time the accident happened one of the iron doors was in a defective condition. There was no serious dispute on this score. The iron cellar door nearest to the doorway into the store was defective in that one of the hinges was rusted through. Mr. Nolden testified that the pin which goes through the eye was rusted and there "was no protection there to hold it." (p. 156). An iron bar had apparently been provided to be placed between the doors when they were in an upright position and on the night in question this iron bar was not in place and Nolden explains that by saying that it was impossible to keep the doors in an upright position by placing the bar between them due to the defective hinge. (p. 165). As a consequence when the doors leading to the cellar were open one of them lay almost flat on the sidewalk. On the night of October 29th, 1926, between 9:30

and 10:00 P. M. Mrs. Handlon went into the store of the defendant Nolden for the purpose of making a purchase. When she entered the store the iron doors were down and closed and were then on a level with the sidewalk. While she was in the store some customer other than herself called upon Mr. Nolden for some article of merchandise and he went into the cellar to procure it. When he went into the cellar he raised the iron doors and in the meanwhile Mrs. Handlon proceeded to leave the store. Opening the outside screen door she proceeded in the direction of her home, stumbled over the defective iron door and fell into the opened areaway. She was injured about the arms, legs and chest. Mr. Nolden was about to come out of the cellar as she fell and he testified that she fell against him. She was carried by Mr. Nolden into the store, a doctor summoned and later removed to her home. Mr. Nolden carried her into her house and bed. Mrs. Handlon suffered for a considerable time by reason of the fall and subsequently manifested signs of carcinoma. For a considerable time after the accident she suffered from injury to her leg and in addition had hemorrhages none of which were present before the accident. Dr. Henry T. Holler testified that a cancer developed in Mrs. Handlon's breast and he expressed his opinion that the cancer was produced by the blow which she received on her chest. However, due to the fact that Dr. Holler could not give the causes of cancer the learned trial judge excluded from the jury's consideration any question pertaining to the cancer which developed in Mrs. Handlon's breast and from which she died shortly after the trial. Consequently the case went to the jury on the question of the negligence of the defendants and the injuries sustained by Mrs. Handlon exclusive of cancer.

Mr. Nolden testified that this metal door had been in disrepair for a considerable length of time and that he notified his landlord from time to time about its defective condition. (p. 153). He further testified that Mr. Canfield who was the supervisor of the building (p. 161) informed him, Nolden, that he, Canfield notified the blacksmith to fix it. On page 153 he said that this condition existed for a couple of months. There was no testimony in the case as to respective duties of the landlord and tenant under the lease held by Mr. Nolden. Why the lease was not introduced in evidence is not clear to the plaintiff. A copy of a form of lease was presented at the trial by the defendant Copestone Temple Association, but its admission was objected to by the attorney for Mr. Nolden on the ground that the copy was not the best evidence and that the paper presented could not be identified as an exact copy of the lease in existence. (p. 160). The supervisor of the building and William D. Richmond were called by Copestone Temple Association and neither of these witnesses gave any testimony as to when the metal door became in this defective condition although the janitor admitted that he did see that the hinge was broken, but that he ignored it because he had nothing to do with it as he claimed. (p. 163). Summarizing the facts in connection with that part of the demised premises leased by Copestone Temple Association to Paul Nolden, we would say that it was practically admitted and conclusively established that the areaway covered by the metal doors extended into the street and that at the time of the accident one of the doors was in a defective condition. The question as to the negligence of the defendants or either of them as well as the contributory negligence of the plaintiff was submitt-

ed to the jury. A rule to show cause reserving all of the exceptions taken at the trial by Copestone Temple Association was allowed and argued. The defendant, Copestone Temple Association in its argument on the rule to show cause contended that the verdict was against the weight of the evidence and that the damages were excessive. This rule was subsequently discharged and we are only concerned here with the grounds of appeal set forth on page 26 of the State of the Case.

ARGUMENT.

POINT ONE.

The trial court did not err in denying appellant's motion for a non suit and a direction of a verdict.

Under this point appellant argues the first and second grounds of appeal.

From an examination of appellant's brief we understand that appellant contended that the nuisance resulted from some act or negligence of the tenant and not of the landlord in that the tenant permitted a nuisance to exist for want of repair which he, the tenant, and not the landlord was bound to make. Counsel relies upon *Durant* vs. *Palmer*, 29 N. J. L. 545. In that case it appeared that the sidewalk in front of the building owned by the defendant was fifteen feet wide, excepting in the part along the area which occupied five feet of it. The plaintiff was passing by the building of the defendant and seeing some hats displayed in the side window of the store stepped closer to the window and in doing so stepped into the area. It

was insisted that the plaintiff was bound to walk within the space of ten feet left by the area and that he was guilty of negligence when he attempted to approach the window to look into it. This court held such a position to be untenable. Mr. Justice Haines, who wrote the opinion for this court, said in part:

> "The street, and every part of it, by force of the common law, is so far dedicated to the public that any act or obstruction that unnecessarily incommodes or impedes its lawful use by the public is a nuisance.
>
> The travelling public have a right to suppose that there is no dangerous impediment or pitfall in any part of it, without a light placed to give warning of it or a suitable railing to protect from it. * * *
>
> The court was responsible to charge that the city alone was responsible to the public for the secure and safe condition of the streets, and the refusal so to charge is assigned for error.
>
> We have already seen that while the city is liable, the person who unlawfully causes or permits a nuisance is also responsible for the injury sustained. * * *
>
> The defendant testified that areas are made for steps to the basement and to protect the building from dampness, and that this area was intended for steps down the entire way. If so, it surely belonged to the house, and both the owner and occupant are required to render it safe to the public. The defendant, as the owner of the building, had caused or permitted the area to be made. If he continued in possession of that part of the premises, he was liable both as occupier and owner. If he had leased it with the store, he was still liable as the owner, continuing the nuisance and receiving rent as the consideration for it"

In the case at bar the appellant, as owner of the premises in question had no common law right to interfere with the public highway in which the fee was either in the municipality or an easement to pass to and fro in the public. Any intereference by such a property owner amounts, per se, to a nuisance. It is assumed that the construction of this areaway was permitted by some municipal authority, thereby saving it from being a public nuisance. Nevertheless, the fact remains that appellant leased to Nolden a part of the public highway. The appellant knew that this public highway was devoted and intended for the use of pedestrians, and when it interfered with this highway in any manner, shape or form it did so at its own peril, in that it was under an obligation to see at all times that the conditions of the highway as changed by it did not amount to a nuisance.

While it is true that with the exception of the right of the owner and its designated agents or servants to enter into the cellar for the purpose of fixing the fuses for the entire building, the exclusive possession of the store and cellar were in Nolden, it is respectfully submitted that the accident in the case at bar did not occur in the store or the cellar, but it occurred on the sidewalk. We do not contend that in the absence of a covenant to the contrary that the landlord is under an obligation to make repairs to premises rented by the landlord and exclusively in possession of a tenant. The landlord would be a trespasser if he ever went on the tenant's property. We do contend herein that the landlord could have repaired this defective cellar door without committing any trespass. The doors were in the sidewalk and it was not necessary for appellant to go upon the premises of the tenant at any time for the purpose of making these necessary repairs. An examination of the

testimony given by the supervisor of the building and the janitor shows that they completely ignored these doors in question, in that they assumed that the duty of taking care of them was on the tenant. Their testimony shows, beyond a doubt, in our opinion, that they were negligent, in completely ignoring the areaway and covering over the same. We can advance no stronger argument in answer to points one and two of appellant's brief than to call attention to the decision of the learned trial judge in denying the appellant's motion for a nonsuit and which we take the liberty of quoting:

> "The Court: (After hearing argument.) The motion will be denied. I am basing the denial of it upon the authority of Davis v. Tallon, in 91 N. J. L., page 620, in which the Court says:
>
> "The jury might infer from the evidence that the appellants leased the land and sidewalk for a use not consistent with the purpose for which the walk was constructed; that they had knowledge of the character of the proposed use, and that such use might, and probably would, create a nuisance by obstructing the safe use thereof by pedestrians."
>
> And also, upon the case of Zac v. Craig, 136 Atlantic Reporter page 410, at 412, in which the Court says:
>
> "The plaintiff's case was not rested upon any legal obligation of the owner to keep the sidewalk in repair, but upon the claim that defendant, by subjecting the sidewalk to a use not intended, that of use by ordinary pedestrians, they created a nuisance which rendered them liable for injuries to persons lawfully using it." That is a Supreme Court case.
>
> In other words, they make a distinction which I make, in this kind of a case, which is, that while it is true that the landlord, if

> he had properly constructed they did properly construct, so that it was safe for pedestrians to use this opening in the sidewalk when closed, but nevertheless that he had knowledge of the character of the proposed use, and that such use might, and probobly would, create a nuisance by obstructing the safe use thereof by pedestrians, and that therefore he would be responsible for it as distinguished from a case where, if they were not in use but were merely left open through some negligence of the tenant, where, for instance, if the tenant had used it and then left it open for half a day or something of that kind, so that the landlord would not be called upon to have any knowledge that it might be used, or probably would be used for such purpose as that. But here the tenant, was actually using it, and in the only way it could be used, and knowledge was brought home at all times to the Copestone Temple Association, that it would be used in that way, and therefore, in following the Durant case, which has some features like the present one, but based upon the case which I have just cited, the motion for a nonsuit on behalf of the landlord owner will be denied, and exception allowed.
>
> (pp. 157 to 159.)

It is respectfully submitted that the case at bar is well within the rule of law established by this court in *Davis* v. *Tallon*. It is manifest that the appellants leased the land and part of the sidewalk for a use which was not consistent with the purpose for which the walk was constructed. They can not deny that they had knowledge of the character of the proposed use nor could they deny that such use might, and probably would, create a nuisance by obstructing the safe use thereof by pedestrians.

POINT TWO.

The trial court did not charge the jury that the defendant Nolden used the bar in the condition in which he found it.

Under this point the appellant argues its third ground of appeal.

In answer to the argument advanced by appellant on this point we would respectfully direct attention to the charge appearing on page 108. The learned trial Judge did not make a statement that the defendant Nolden used the bar in the manner in which he found it, but such language must be read in connection with that which preceded it. The trial court pointed out to the jury the contention which was made by the defendant Nolden and prefaced his remark by saying, "the storekeeper says." That such a contention was made by the defendant Nolden appears from his testimony on pages 172-173. Stating to the jury the contention which was made by Nolden did not, in anywise, enlarge on the duty which was placed on the other defendant and surely the appellant can not claim here that it was prejudiced by such a remark. We must dispute the remark in appellant's brief on page 16 wherein it is stated that the uncontradicted testimony of Nolden was to the effect that he negligently threw the doors open and permitted them to fall over on the sidewalk and to lie there while he went down into the cellar. While it was contended that both the tenant and the landlord were negligent, nevertheless Nolden contended that he used the demised premises to the best of his ability and he did contend that it was impos-

sible to use the iron bar originally intended to hold the doors upright because he said that the defective hinge prevented the use of this iron bar. (p. 172). As we read appellant's brief it appears that complaint is made to this portion of the charge in that it was not a correct comment on the testimony of Nolden. Appellant does not point out how such a remark was prejudicial to its defense but nevertheless from an examination of Mr. Nolden's testimony we can not help but conclude that the learned trial judge did not unfairly or improperly comment on such testimony.

POINT THREE.

No error was committed in charging the third and fourth of plaintiffs' requests to charge.

Under this point the appellant argues the fourth, fifth and sixth grounds of its appeal.

The appellant states as its fourth ground of appeal the following:

> "4. Because the Court in defining the negligence of the defendant, Copestone Temple Association, did not go far enough and did not define the relation of landlord and tenant insofar as the duty to make repairs was concerned."

If the exceptions (p. 185) taken after the charge will be examined it will appear that the trial judge's attention was not called to any particular part of the charge as being defective in law. We have carefully examined the charge of the court and can not even now definitely find any particular part of the charge to which exception is taken

and this despite the fact that we have the printed record before us. How much more difficult must it have been for the learned trial judge to have understood the meaning of the exceptions taken at the trial. It is so well established that it hardly needs any citation of authority to support it that if a litigant desires the trial judge to charge the jury on a particular point it is incumbent to submit proper requests to charge. An examination of the charge will disclose that there was no error therein contained with respect to the explanation given to the jury pertaining to negligence. If defendant desired a further explanation it was incumbent upon it, we respectfully contend, to submit an appropriate request to charge. This was not done and consequently we respectfully submit that appellant can not avail itself of any such point in this argument.

The fifth ground of appeal is based on an alleged erroneous charge to the jury. We respectfully submit that under the authority of *Durant* v. *Palmer,* 29 N. J. L. 545; *The Board of Chosen Freeholders of Hudson County* v. *Woodcliffe Land Imp. Co.,* 74 N. J. L. 355 (65 A. 844), *Zak* v. *Craig,* 5 Misc. R. pg. 274 and *Davis* v. *Tallon,* 91 N. J. L. 618 (103 A. 236), this request was proper. It was for the jury to determine on the evidence whether or not the metal doors which were a part of the building and areaway were or were not a nuisance due to their defective condition. If the defendant Nolden with a knowledge of that defective condition raised the doors and exposed a pedestrian to danger his act was an act of negligence. As we have heretofore pointed out in an earlier part of this brief, the owner of the building knew or reasonably should have known that these doors were intended to be used by the tenant as a means of

ingress to the cellar. The owner of the building knew that at times these doors were intended to be opened and that the highway was to be devoted to an unusual use. Consequently it was incumbent upon the owner to afford a reasonable safeguard to prevent a pedestrian from falling into the opening. If the doors were in a defective condition then it was incumbent upon the owner to provide other means of warning and other means of safety to pedestrians, and if the owner failed to do this it is respectfully submitted it became liable for injuries sustained by a pedestrian who, as the charge stated, was exercising reasonable care for her safety. In addition this part of the charge must be read in connection with the entire charge and the learned trial judge expressly commented to the jury that he thought that he had previously charged to like effect.

In answer to the exception taken to the plaintiffs' third and fourth requests to charge, our argument is the same.

The appellant on page 18 of its brief claims that it was prejudiced because the charge left out from consideration of the jury the main defense of appellant to wit: "That the appellant had leased the entire store and cellar premises to the defendant, Nolden and that they were for his exclusive use and that they were in the defendant, Nolden's exclusive possession, and that no one, including appellant, had any right to enter upon the said premises except with the permission of Nolden." As we have heretofore pointed out the appellant could have gone upon the sidewalk and repaired the doors without committing any trespass. Further complaint is made that these two charges excluded from the jury the right to find that the proximate cause of the accident was solely the neg-

ligence of the defendant Nolden. The attention of the jury was expressly directed to what was meant by proximate cause in the charge of the court (page 178) and we quote from a portion of the charge.

> "Now, by proximate cause, we mean the moving cause, the main cause, the one which sets the others in motion, and without which the accident itself would not have happened. You can understand that very readily when you recall that it is possible for a man to be negligent without causing any damage; and so, the mere fact, if you should find one or both of these defendants negligent, would not be sufficient to entitle the plaintiffs to recover, unless that negligence meant something, unless it caused something, unless it was the proximate cause of the accident."

Thus we contend that the jury was free to determine whether or not the mere fact that Nolden did not place the iron bar in its position caused the accident or whether the defective condition of the door was responsible for it. Nolden said he could not use the iron bar. The appellant was under a duty to provide safe means of protecting the public from injury after having interfered with the highway. On page 19 of appellants' brief it is stated that the uncontradicted proofs are that the cellar doors were not in a defective condition at the time of the leasing of the premises. We respectfully submit that the State of the Case will be examined in vain for any testimony supporting this claim. The trial court's attention was not directed to any specific error in charging the third and fourth requests of plaintiff but appellant rests upon a general exception to each charge. Manifestly it would be unfair not only to the learned

trial Judge but to the plaintiffs to reverse the judgment entered in this cause without pointing out at the trial specifically the manner in which the charge was incorrect in law.

For the reasons hereinbefore stated it is respectfully submitted that no error was committed in the trial of this action and that this appeal should be dismissed.

Respectfully submitted,

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EDWARD J. GILHOOLY,
On the brief.