INDEX

SUMMONS.

DISTRICT COURT SUMMONS IN TORT.

ESSEX COUNTY,
STATE OF NEW JERSEY. } ss.:

To any Constable of said County, or to the Sergeant-at-Arms of the District Court of the First Judicial District of the County of Essex.

(L. S.)

SUMMON Mapes Holding Co., a corporation of N. J., to appear before the District Court of the First Judicial District of the County of Essex to be held at the Council Chamber, 6 So. Fullerton avenue, in the Town of Montclair, on the 17th day of April, Nineteen Hundred and Thirty-four, at Ten o'clock in the forenoon, to answer unto Margaret Polizzano and Nicholas Polizzano, her husband in an action in Tort to the damage of the plaintiff, Five ($500.00) Hundred Dollars, hereof fail not.

WITNESS, EDWARD DILLON, Esq., Judge of said Court, at Montclair, as aforesaid, the 11th day of April, in the year One Thousand Nine Hundred and Thirty-four.

LOUIS F. BRICKETT,
Clerk.

Summons.

Refer to This Suit by Number 31740

Defendant's Address:
Mapes Holding Co.,
Agent: Simon L. Fisch,
31 Clinton street,
Newark, N. J.

DISTRICT COURT OF THE
FIRST JUDICIAL DISTRICT
of the County of Essex.

SUMMONS IN TORT.

Margaret Polizzano, and Nicholas Polizzano, her husband,

vs.

Mapes Holding Co., a corporation of N. J.

Demand	$500.00
Costs	3.60
Mileage	.40

Returnable April 17th, 1934.

SIDNEY FINKEL,
31 Clinton street, Newark, N. J.
Attorney for Plaintiff.

Summons.

District Court of the First Judicial District of the County of Essex.

TAKE NOTICE, that the plaintiff's state of demand in the within action has been filed with the Clerk of this Court, and that a trial will be demanded upon the return day of this summons.

Yours, etc.,

SIDNEY FINKEL,
Attorney for Plaintiff.

To the within named defendant
or to whom it may concern.

Montclair, N. J., April 10th, 1934.

COPY OF RECORD.

DISTRICT COURT OF THE
FIRST JUDICIAL DISTRICT OF THE
COUNTY OF ESSEX.

Case No. 31740.

MARGARET POLIZZANO and NICHOLAS POLIZZANO, her husband, *Plaintiffs,*	*In Tort.*
vs.	*Copy of Record.*
MAPES HOLDING CO., a corp. of N. J. *Defendant.*	

Sidney Finkel, attorney for plaintiffs and Joseph C. Paul, attorney for defendant.

PLAINTIFF'S COST.

Summons	$2.10
Mileage	.40
Listing Fee	1.50
Order	1.00

A summons in the above stated cause was issued on the 11th day of April, 1934, returnable on the 17th day of April, 1934, wherein the plaintiff demands of the defendant the sum of Five Hundred Dollars.

The plaintiff filed a state of demand April 11, 1934.

The summons was served and returned as follows:

> I served the within summons April 12, 1934 on Mr. Fisch he being agent for Mapes Holding Co., the within named defendant by reading it to him and giving him a copy thereof.
>
> JOSEPH FANNAN,
> Sergeant-at-Arms.

April 17, 1934. This case listed.
Date for trial to be set.

Jan. 4, 1935. Case tried on this date.

The following witnesses were sworn on behalf of the plaintiff:

Margaret Polizzano
Nicholas Polizzano

on behalf of the defendant

Margaret Stokes.

The evidence being closed the Court rendered judgment in favor of the plaintiffs and against the defendant in the sum of Two Hundred Twenty-Five Dollars for Margaret and Fifty Dollars for Nicholas damages with costs, whereupon judgment is entered in favor of the plaintiffs and against the defendant in the sum of $225—Margaret.

$50—Nicholas damages with costs.

Jan. 23, 1935. Notice of Appeal to New Jersey Supreme Court filed.

Jan. 25, 1935. Bond on Appeal to New Jersey Supreme Court filed.

State of Demand.

I hereby certify this to be a true copy of the docket on file in this office.

LOUIS F. BRICKETT,
Clerk District Court of the
First Judicial District of
the County of Essex.

STATE OF DEMAND.

Filed April 11, 1934.

DISTRICT COURT OF THE
FIRST JUDICIAL DISTRICT OF THE
COUNTY OF ESSEX.

MARGARET POLIZZANO and NICHOLAS POLIZZANO, her husband, *Plaintiffs,* *vs.* MAPES HOLDING CO., a corporation of the State of New Jersey, *Defendant.*	*In Tort.* *State of Demand.*

COUNT I.

Plaintiff, Margaret Polizzano, residing in the City of Newark, County of Essex, State of New Jersey, says that:

1. On or about September 21st, 1933, plaintiff was a tenant in an apartment house owned by the defendant, Mapes Holding Co., situated at 162 Mapes avenue in the City of Newark.

2. On or about said date, plaintiff, while lawfully in possession of her apartment as tenant of

the defendant corporation, did contract poisoning of her body from a pernicious plant commonly known as poison ivy which defendant permitted to grow in and about its said premises.

3. Defendant knew of the growth and existence of said poison ivy plant on its premises, nevertheless, it failed and neglected to remove and exterminate it from its premises which was necessary for the safety, welfare and health of plaintiff as well as other tenants in the said premises.

4. Defendant did knowingly neglect and carelessly permit said poison ivy to grow and spread in and about its premises although it knew that said plant constituted a nuisance dangerous to the health and welfare of plaintiff as well as other tenants in these premises.

5. By reason of defendant's said negligence and carelessness, plaintiff, not knowing of the existence of said poison ivy upon defendant's premises, was affected thereby and poisoned, causing her grave bodily injury and causing her to be confined to her bed for a long period of time.

6. By reason of defendant's said negligence and carelessness aforesaid, plaintiff suffered great mental anguish and shock to her nervous system.

WHEREFORE, plaintiff demands damages from the defendant in the sum of Four Hundred ($400.00) Dollars.

State of Demand.

COUNT II.

Plaintiff, Nicholas Polizzano, residing in the City of Newark, County of Essex, State of New Jersey, says that:

1. He is the husband of the plaintiff, Margaret Polizzano.

2. Plaintiff repeats the allegations contained in paragraphs 1, 2, 3, 4, 5 and 6 of Count I and makes the same paragraphs 2, 3, 4, 5, 6 and 7 of Count II.

8. By reason of defendant's negligence and carelessness, plaintiff has paid and has become liable to pay large sums of money for medical attention, aids, devices and other expenditures made necessary for treatment to his wife for said injury.

9. By reason of defendant's negligence and carelessness aforesaid, plaintiff was compelled to hire and engage aid and assistance to perform the household duties ordinarily performed by his wife.

10. By reason of defendant's negligence and carelessness aforesaid, plaintiff has suffered the loss of the society and companionship of his wife.

WHEREFORE, plaintiff demands damages from the defendant in the sum of One Hundred ($100.00) Dollars.

SIDNEY FINKEL,
Attorney for Plaintiffs.

AGREED STATE OF CASE.

DISTRICT COURT OF THE
FIRST JUDICIAL DISTRICT OF THE
COUNTY OF ESSEX.

No. 31740.

MARGARET POLIZZANO and NICHOLAS POLIZZANO, her husband, *Plaintiffs,* *vs.* MAPES HOLDING COMPANY, a Corp. of the State of New Jersey, *Defendant.*	*On Appeal.* *Agreed State of Case.*

The above entitled cause is a tort action tried before the Hon. Edward Dillon, Judge of the District Court of the First Judicial District of the County of Essex on January 4th, 1935 and decided on January 17th, 1935, without a jury. The plaintiff, Margaret Polizzano, seeks to recover damages for injuries she sustained as a tenant and caused by the negligence of the defendant. The plaintiff, Nicholas Polizzano, the husband of Margaret Polizzano seeks to recover damages for the loss of his wife's services as well as for the medical expenses disbursed because of the injuries sustained by his wife, Margaret Polizzano and caused by the negligence of the defendant.

APPEARANCES.

Sidney Finkel, attorney for plaintiffs, Margaret Polizzano and Nicholas Polizzano, her husband.

Joseph C. Paul, attorney for the defendant, Mapes Holding Co., a corp. of the State of New Jersey.

Mr. Finkel made opening statement to the court on behalf of the plaintiffs.

Mr. Paul made opening statement to the court on behalf of the defendant.

ADMISSIONS BEFORE TRIAL.

The defendant admitted that it was the owner of the apartment house and that the plaintiff, Margaret Polizzano and Nicholas Polizzano, her husband, were tenants therein and that Mrs. Stokes was the Superintendent in charge of the premises and the agent of the defendant corporation.

TRIAL.

The plaintiff Margaret Polizzano was sworn, and testified that she and her husband Nicholas Polizzano were tenants in defendant's premises in an apartment located in the basement. In September, 1933, she went into the yard to wash her windows on the outside. In order to get to the windows she had to pull out some shrubbery and weeds which were growing at or near the windows. She testified that she removed the weeds with her hands; that she did not know that it was poison ivy when she saw it, and did not know she was pulling up poison ivy. She further testified that she became infected and ill

from the poison ivy which spread over her hands, arms, chest and face. That she was laid up in bed for three weeks suffering severely from the infection.

Another tenant in the apartment house testified that in June, 1933, she told Mrs. Stokes, the Superintendent of the premises, about the existence of poison ivy in the yard and that thereafter it was cut but grew up again.

The plaintiff Nicholas Polizzano testified that he is the husband of Margaret Polizzano, that he paid a doctor's bill of $38.00 and purchased medicines on prescription for $12.00; that the expenditure was made necessary for the treatment of his wife for the poison ivy infection.

The testimony further showed that there was a fence enclosing the grounds of the apartment house about eight feet from the side wall. The space was used by the tenants and also as a playground for children and people were accustomed to walk there.

After the plaintiff's case, the defendant made a motion for a non-suit on the ground that the plaintiff failed to sustain the burden of proof and that there was no actionable negligence on the part of the defendant. The motion was denied by the court.

The defendant called as its only witness, Mrs. Stokes, who testified that she was the Superintendent in charge of the apartment house. She stated that in June, 1933, she was notified by one of the tenants of the existence of the poison ivy in the yard; that she informed a Mr. Kaplan, of the defendant corporation, who gave her a pair of shears with which she clipped the poison ivy, but that she made no other or further at-

tempt or effort to eradicate or root out the noxious weed.

At the close of the case, counsel for the defendant moved for a judgment for the defendant on the same ground as urged on the motion for a non-suit. The motion was denied and exception taken. The court found that it was the duty of the defendant to keep the immediate vicinity of the place where the poison ivy was growing reasonably safe for the tenants who were permitted and accustomed to congregate in the yard; that defendant was negligent in permitting the poison ivy to grow in the yard after it was notified of the existence of the dangerous weed; that the poison ivy growing in the place where it caused the injuries, constituted a nuisance; and that the defendant's method of preventing or terminating this danger was inadequate and constituted negligence. The court further found that defendant was negligent in failing to effectually remove the danger after notice and that merely clipping the poison ivy above the ground without any attempt to remove the roots or its causes, was negligence. A judgment was entered for the plaintiff Margaret Polizzano in the sum of $225.00 and a judgment for Nicholas Polizzano, her husband, in the sum of $50.00.

SIDNEY FINKEL,
Attorney for Plaintiffs.

JOSEPH C. PAUL,
Attorney for Defendant.

1/23/35

DECISION OF DISTRICT COURT JUDGE.

DISTRICT COURT OF THE
FIRST JUDICIAL DISTRICT OF THE
COUNTY OF ESSEX.

MARGARET POLIZZANO and NICHOLAS POLIZZANO, her husband, *Plaintiffs,* *vs.* MAPES HOLDING COMPANY, a corporation of the State of New Jersey, *Defendant.*	*Decision.*

Plaintiffs were tenants of the defendant company. Plaintiff Margaret Polizzano contracted poison ivy during the month of September, 1933, while she was endeavoring to clean the windows of her apartment, which was located in the basement of the apartment.

In order to clean the windows she had to remove some of the shrubbery which was growing in front of her apartment and unconscious of the nature of the weed she came in contact with the poison ivy. The infection spread to her hands, face and chest.

The testimony further showed that there was a fence inclosing the grounds of the apartment house about 8 feet from the side wall, where children and people were accustomed to play and walk.

The janitress testified that one of the tenants notified her of the existence of poison ivy in the

yard three months before, and that she clipped the poison ivy with her shears.

I find that it is the duty of the landlord to keep the hallway of the apartment reasonably safe, also the common stairway and approaches. That the tenants were accustomed to congregate in the immediate vicinity of the place where this poison ivy was growing, and that the space surrounding the apartment house should also be kept reasonably safe.

That the defendant was notified of the poison ivy and that his agent's method of preventing or terminating this danger was not only inadequate but negligent. That instead of effectually removing the danger, she merely clipped off the part above the ground and made no attempt to remove the roots or causes.

I not only find that the defendant was negligent but that poison ivy growing in a place where it caused the injuries to plaintiff constitutes a nuisance.

I find for the plaintiff Margaret Polizzano, in the sum of Two Hundred Twenty-five ($225.00) Dollars, and her husband Nicholas Polizzano in the sum of Fifty ($50.00) Dollars.

EDWARD DILLON,
Judge.

Dated: January 17, 1935.

Notice of Appeal.

NOTICE OF APPEAL.

Filed January 23, 1935.

DISTRICT COURT OF THE
FIRST JUDICIAL DISTRICT OF THE
COUNTY OF ESSEX.

MARGARET POLIZZANO and NICHOLAS POLIZZANO, her husband, *Plaintiffs,* *vs.* MAPES HOLDING COMPANY, a corp. of the State of New Jersey, *Defendant.*	*In Tort.* *Notice of Appeal.*

To: Sidney Finkel, Esq.,
Attorney for Plaintiffs,
31 Clinton street,
Newark, N. J.

SIR:

PLEASE TAKE NOTICE that the defendant hereby appeals to the New Jersey Supreme Court from the judgment of the District Court of the First Judicial District of the County of Essex rendered in the above entitled action on the 17th day of January 1935.

JOSEPH C. PAUL,
Attorney for Defendant.

1/21/35

SPECIFICATIONS OF ERROR.

NEW JERSEY SUPREME COURT.

MARGARET POLIZZANO and NICHOLAS POLIZZANO, her husband, *Plaintiffs-Appellees,*	*In Tort.*
vs.	*On Appeal.*
MAPES HOLDING COMPANY, a corp. of the State of New Jersey, *Defendant-Appellant.*	*Specifications of Error.*

The defendant-appellant hereby sets forth the following as a specification of the determinations or directions of the District Court with respect to which it is dissatisfied in point of law:

1. The plaintiff, Margaret Polizzano was guilty of contributory negligence and the Court should have granted a non-suit.

2. The plaintiff, Margaret Polizzano failed to carry the burden of proof required by law to sustain an action against the defendant.

3. The defendant owed no duty to the plaintiff other than to refrain from acts of wilful negligence.

4. The defendant had no control over the growing of the poison ivy and same was an act of God.

5. There was no legal liability on the part of the defendant.

Respectfully submitted,

JOSEPH C. PAUL,

Attorney for Defendant-Appellant.

1/30/35

OPINION OF SUPREME COURT.

Filed August 7, 1935.

NEW JERSEY SUPREME COURT.

No. 404, May Term, 1935.

MARGARET POLIZZANO and NICHOLAS POLIZZANO, her husband,
Plaintiffs-Appellees,

vs.

MAPES HOLDING COMPANY, a corporation of the State of New Jersey,
Defendant-Appellant.

Argued May 7, 1935; decided August 7, 1935.

Syllabus.

1. A landlord of a 16-family apartment house is charged with the duty to use reasonable care to keep that part of the yard of the premises which he reserved and retained in his possession for the use in common of his different tenants, in a safe condition and free from any nuisance and danger that may result in injury to a tenant.

2. The defendant, landlord of an apartment house, had ample notice in the month of June of the existence of poison ivy in that part of the yard which the defendant had reserved for use in common by the plaintiff and other tenants, and assumed to use appropriate means to eradicate it. The defendant clipped the poisonous weed once in June and gave it no further atten-

tion. It grew, and in September following, the plaintiff, a tenant, was infected by coming in contact with the weed; *Held,* that it was open to the trial judge, sitting without a jury, to find that the defendant failed in its duty to use reasonable care to keep the premises free from danger to the plaintiff.

3. It may be properly inferred that one who is informed that a growing weed is poison ivy, and who assumed to eradicate it as dangerous, knew that it was dangerous and poisonous.

4. The court may judicially notice the peculiar properties of plant life in so far as they are generally known, and may take judicial notice that poison ivy is dangerous and poisonous.

5. A person whose negligent acts have contributed to a nuisance causing injury may be liable, although natural causes may have contributed.

On appeal from the District Court of the First Judicial District of the County of Essex.

Before Justices Trenchard, Heher and Perskie.

For the appellant, Joseph C. Paul.

For the appellee, Sidney Finkel (A. Howard Finkel, of Counsel).

The opinion of the Court was delivered by TRENCHARD, *J.*

The defendant below appeals from a judgment of the District Court rendered by the judge, sitting without a jury, in favor of the plaintiffs.

The agreed state of the case discloses the following matters of fact:

The plaintiff Margaret Polizzano was a tenant in the defendant's sixteen-family apartment

house, occupying an apartment on the ground floor in which the windows at the rear were close to the ground. At the rear of the building where such windows opened, there was a yard, enclosed by a fence, and which yard was reserved by the defendant for the common use of the tenants, and which the tenants and their children used. In September, 1933, desiring to clean her windows, it became necessary for the plaintiff to remove shrubbery and weeds which were growing at or near the windows. This she did with her hands, not knowing that the weeds were poison ivy. As a result, she became infected from the poison ivy, which spread over her body, causing her to be confined in bed for three weeks. She suffered from the infection, received the attention of a physician and required medicines. She recovered $225 damages, and the plaintiff Nicholas Polizzano, her husband, recovered $50 on account of medical expenses consequently paid by him.

The state of the case further shows that another tenant in the apartment house testified that in June, 1933, she informed Mrs. Stokes, the superintendent of the premises, (who was admittedly defendant's agent) that there was poison ivy in the yard and that thereafter it was clipped with a pair of shears but it grew up again. It further shows that the superintendent admitted at the trial that in June, 1933, she was told by one of the tenants of the existence of the poison ivy in the yard; that the superintendent informed the defendant and was supplied with a pair of shears and clipped the poison ivy, but that she had made no other or further effort or attempt to cut it or root it out.

At the conclusion of the trial the defendant moved for judgment (which motion was denied), and now argues that it, the defendant, owed to plaintiff no duty to use reasonable care and skill to make its premises reasonably fit and safe for the use intended.

On the other hand the plaintiff contends that the defendant was charged with the duty to use reasonable care to keep that part of the yard of the premises which it reserved and retained in its possession for the use in common of its different tenants, in a safe condition and free from any nuisance or danger that might result in injury to the plaintiff; and that the defendant failed to do. We think this latter contention sound.

In 16 R. C. L. 1037 it is said: "It is generally held that where he (the landlord) retains possession of a portion of leased premises for use in common by different tenants, a duty is by law imposed upon him to use ordinary care to keep in safe condition this particular part of the leased premises, and if he is negligent in this regard, and a personal injury results to a tenant by reason thereof, he is liable therefor."

Our courts have consistently followed this rule in a long line of reported cases.

Thus in *Gilloon* v. *Reilly,* 50 N. J. L. 26, Justice Dixon, referring to the owner's liability, said: "The obligation resting upon such an owner is that reasonable care and skill have been exercised to render the premises reasonably fit for the uses which he has invited others to make of them."

Again in *Siggins* v. *McGill,* 72 N. J. L. 263, Justice Pitney, speaking for the Court of Errors and Appeals, after stating the general rule that

a landlord is not liable for injury sustained by a tenant by reason of the ruinous condition of demised premises, said: "But it is recognized that this rule does not apply to those portions of his property (such as passageways, stairways, and the like) that are not demised to the tenant, but are retained in the possession or control of the landlord for the common use of the tenants and those having lawful occasion to visit them, the ways being used appurtenant to the premises demised. With respect to such ways, it has been held by our Supreme Court that the landlord is under the responsibility of a general owner of real estate who holds out an invitation to others to enter upon and use his property, and is bound to see that reasonable care is exercised to have the passageways and stairways reasonably fit and safe for the uses which he has invited others to make of them. * * * This doctrine, we think, is indubitably sound."

The Court of Errors and Appeals again applied that doctrine in *Perry* v. *Levy,* 87 N. J. L. 670, where a tenant sustained injury caused by a leaking roof after the landlord had been notified of the condition and failed to use reasonable means of eliminating the nuisance. There it was said: "The trial court properly applied the principle laid down by this court in the case of *Siggins* v. *McGill,* 72 N. J. Law 264, 62 Atl. 411, 36 L. R. A. (N. S.) 316, 111 Am. St. Rep. 666, to the case under discussion. The Supreme Judicial Court of Massachusetts, in the case of *Gilland* v. *Maynes,* 216 Mass. 581; 104 N. E. 555, held that the landlord having retained control of the outside of a building, including the roof and gutters, upon him rested the responsibility,

as to repairs, where he had let different parts of the building to different tenants."

In the present case no question of assumption of risk or of contributory negligence upon the part of the plaintiff is raised. The sole question presented for examination and determination is: Was it open to the trial judge, sitting without a jury, to find that the defendant had failed to exercise the reasonable care owed to plaintiff in the circumstances of the present case as disclosed by the evidence?

We think that it was. The evidence showed, as we have pointed out, that the defendant, in the month of June, had ample notice of the existence of poison ivy in that part of the yard which the defendant had reserved for use in common by the plaintiff and other tenants. It therefore became its duty to use appropriate means to keep that part of the yard clear of the poisonous weed. This the defendant assumed to do. It was clipped on one occasion only, and that was in the month of June. The defendant gave it no further attention, and the poison ivy grew up and the plaintiff was infected in September following by coming in contact with it. It was incumbent on the defendant to use reasonable care to clip the poison ivy as often as it grew to be a danger, or to take other means available to root it out and prevent its growth. It was therefore open to the trial judge to find that the defendant failed in its duty to use reasonable care to keep the premises free from this danger.

The defendant argues that it did not know that the weed was dangerous or poisonous.

The answer to this is that it was told that it was *poison* ivy and assumed to eradicate it as dangerous, but was negligent in that undertaking.

The defendant also argues that the court could not take judicial notice that poison ivy is dangerous or poisonous. We think it could.

Courts may judicially notice the peculiar properties of plant life in so far as they may be generally known, and may take judicial notice that poison ivy is dangerous and poisonous. 15 R. C. L. 1103 and 23 C. J. 156, 157, and cases there cited.

Lastly it is argued that "the defendant had no control over the growing of the poison ivy."

Not so. As a matter of fact, the place where it grew was under the control of the defendant, who assumed to control its growth or to eradicate it and negligently failed in that undertaking. The injury resulting to the plaintiff was not due solely to natural causes, but on the contrary the defendant's negligent acts contributed to the nuisance which caused the plaintiff's injury. A person whose negligent acts have contributed to a nuisance may be liable, although natural causes may have contributed, 46 C. J. 655 and cases cited.

The foregoing observations in effect dispose of every question presented and argued.

The judgment will be affirmed, with costs.

REMITTITUR.

NEW JERSEY SUPREME COURT.

MARGARET POLIZZANO and NICHOLAS POLIZZANO, her husband, *Plaintiffs-Appellees,* *vs.* MAPES HOLDING COMPANY, a corp. of the State of New Jersey, *Defendant-Appellant.*	*On Appeal from the District Court of the First Judicial District of the County of Essex.* *Remittitur.*

This cause having been brought to hearing on an appeal from the District Court of the First Judicial District of the County of Essex at the May term, 1935, of this Court, and Joseph C. Paul, of counsel with the appellant, and A. Howard Finkel, of counsel with the appellees, having been heard, and the Court having considered the same and finding no error in the record of the proceedings in the said District Court, it is, thereupon, on this 9th day of August, A. D. 1935,

ORDERED and ADJUDGED, that the judgment of the District Court of the First Judicial District of the County of Essex entered in the above cause and removed by the appeal in this cause, be affirmed with costs; and that the record be remitted to the said District Court to be proceeded with in accordance with this judgment and the practice of said Court.

Entered August 9th, 1935.

On motion of
A. HOWARD FINKEL,
Of Counsel with Appellees.

NOTICE AND GROUNDS OF APPEAL.

Filed August 23, 1935.

NEW JERSEY SUPREME COURT.

MARGARET POLIZZANO and NICHOLAS POLIZZANO, her husband, *Plaintiffs-Appellees,* *vs.* MAPES HOLDING COMPANY, a corp. of the State of New Jersey, *Defendant-Appellant.*	*Action at Law.* *Notice of Appeal and Grounds.*

Sat below:
TRENCHARD, HEHER and PERSKIE.

To Sidney Finkel, attorney for plaintiffs, 31 Clinton street, Newark, N. J.:

PLEASE TAKE NOTICE that the defendant in the above entitled cause appeals to the Court of Errors and Appeals in the last resort in all causes in New Jersey from the whole of the judgment entered in this cause on the following grounds, to wit:

1. Because the Supreme Court erred in affirming judgment of the District Court.

2. Because the Supreme Court erred in holding that the defendant owed the plaintiff the duty to use reasonable care to keep the entire yard in a safe condition and free from any nuisance or danger.

3. Because the Supreme Court erred in failing to hold the plaintiff guilty of contributory negligence.

4. Because the Supreme Court erred in holding that it may take judicial notice that poison ivy is dangerous and poisonous.

5. Because the Supreme Court erred in holding that the defendant had control over the growing of poison ivy and that same was not an act of God.

JOSEPH C. PAUL,
Attorney for Defendant and of Counsel.

Service of the above Notice of Appeal and Grounds is hereby acknowledged this 20 day of Aug. 1935.

SIDNEY FINKEL,
Attorney for Plaintiffs.

Arthur W. Cross, Law Printer, 55-57 Lafayette Street, Newark, N. J.

New Jersey Court of Errors and Appeals

MARGARET POLIZZANO and NICHOLAS POLIZZANO, her husband,
Plaintiffs-Appellees,

vs.

MAPES HOLDING COMPANY, a corporation of the State of New Jersey,
Defendant-Appellant.

BRIEF ON BEHALF OF THE DEFENDANT-APPELLANT.

This appeal brings up for review a judgment of the Supreme Court affirming a judgment of the First Judicial District Court of the County of Essex wherein a verdict was rendered in favor of the plaintiffs and against the defendant in the sum of Two hundred seventy-five dollars ($275.) and costs.

Facts.

The defendant was the owner of an apartment house which had a yard in the rear enclosed by a fence and that the fence was about eight feet from the side wall of the apartment. The plaintiff was a tenant occupying a basement apartment and the windows of her apartment were on the level with the ground in the yard. In September, 1933, she went to the yard to clean the windows on the outside and in order to get to the windows, she had to pull out some shrubbery and weeds which were growing near the windows and the weeds which she pulled out happened to be poison ivy, but she did not know poison ivy. As a result, she became ill.

The testimony indicated that in June of the same year, another tenant told the superintendent of the premises about the existence of poison ivy in the yard and superintendent told the owner and he gave her a pair of shears with which she clipped the ivy on various occasions. It did not appear from the testimony how near to the windows was the walk or path designated by the owner for use of the tenants.

We shall argue Points 1 and 2 as one.

POINT I.

Because the Supreme Court erred in affirming judgment of the District Court.

Because the Supreme Court erred in holding that the defendant owed the plaintiff the duty to use reasonable care to keep the entire yard in a safe condition and free from any nuisance or danger.

From the opinion of the Supreme Court, it will be observed that it lays down a new rule of law as regards a duty of a landlord in New Jersey. In effect, this new rule places the landlord under the same degree of care for the yard as it does now in the interior common stairway and hallways. There is no authority in this State for such a doctrine. The rule of law which the Supreme Court attempted to invoke was, "It is generally held that where the landlord retains possession of a portion of leased premises for use in common by different tenants, a duty is by law imposed upon him to use ordinary care to keep in safe condition this particular part of the leased premises, and if he is negligent in this regard, and a personal injury results to a tenant by reason thereof, he is liable therefor." This

rule is the law so far as it applies to the interior of the premises; that is to say, common stairs and halls, but in the case at bar, the rule was applied to the exterior of the premises, off the path, adjacent to the wall. The landlord is not an insurer of his tenants for every inch of the exterior portion of the premises.

The Supreme Court said, "The rule alluded to was consistently followed in a long line of reported cases." Let us examine that "long line of reported cases" as cited in the opinion of the Supreme Court.

In *Gilloon* v. *Reilly,* 50 N. J. L. 26, the facts were: The plaintiff was a tenant in a four-story building divided for eight families and she fell down the common stairway from the second floor to the first floor due to a defective oil cloth covering on the steps. The stairway was in the interior of the building. Of course we concede that the landlord owes a duty to a tenant to have the stairs reasonably safe for use because that is the only means whereby a tenant may get egress and ingress to the apartment.

In *Siggins* v. *McGill,* 72 N. J. L. 263, 62 Atl. Rep. 411, the facts are identical as in the Gilloon case (*supra*). A tenant fell down a common stairway. But, in the Siggins case, the court stated the general rule to be as follows: "The landlord is not liable for injuries sustained by a tenant or his family or guests by reason of the ruinous condition of the premises demised; there being upon the letting of a house *or lands* no implied contract or condition that the premises are or shall be fit and suitable for the use of the tenants."

Citing *Naumberg* v. *Young,* 44 N. J. L. 331. In the Siggins case the exception was stated to be

where the injury occurred on the common halls or stairs and which were reserved to the landlord, but nowhere has the exception been applied to the exterior of the premises, such as a yard, with the exception of the Philips case which will be referred to later.

In the case of *Perry* v. *Levy,* 87 N. J. L. 670, 96 Atl. page 569, the roof leaked and moistened the plaster so that it fell in the top apartment injuring a tenant. The court applied the rule in the Siggins case and held the landlord liable and extended the rule to cover liability of the landlord to include the roof and gutters.

In the case of *Gilland* v. *Maynes,* 216 Mass. 581, 104 N. E. 555, it appeared that a defective gutter caused rain water to run over a sidewalk and then congeal into ice. A pedestrian, on the sidewalk, fell and was injured. The court applied the rule holding the landlord responsible but the defective gutter was a part of the building and caused an accident on the sidewalk.

Are the foregoing cases sufficient to extend the exception to the rule to cover the removal of poison ivy growing adjoining the building in the yard?

The case of *Gavin* v. *O'Connor,* reported in 122 Atl. page 842, 99 N. J. L. 162 and decided by the Court of Errors and Appeals it appears that the plaintiff, a young boy, was killed by the fall of a clothes pole in the back yard of a two-family house, he being a tenant in the house. The pole was not in use at the time and it appears that he was hanging on the line when the pole broke and on a motion for a non-suit, it was granted at the trial court. The Court of Errors on appeal sustained the action of the trial court and said: "the liability of the owner or occupier of prem-

ises, who expressly or impliedly, invites others to enter thereon is only coextensive with his invitation; his duty of care is limited by that, and when the limits of invitation are exceeded, such duty ceases except as to abstaining from acts wilfully injurious." It was argued in the foregoing case that it was the duty of the landlord to keep all of the premises in a reasonable safe condition, but the court would not follow that argument because it did not follow necessarily from the letting of one floor to a tenant that that tenant's children and their playmates are thereby invited to use the back yard as a play ground and there is no evidence in the case to indicate there was such an invitation. In fact, the case of *Burnett* v. *Realty Co.* reported in 90 L. 660 was a case quite similar to the Gavin case (*supra*) and the question was quite important of whether the invitation to use the yard was inferrable and the evidence in that case showed an expressed agreement at the time of the letting that the children might play in the yard and because of that, a reliance was placed on the promise and the children had an express invitation to play in the yard.

In the absence of an expressed invitation to use the yard, in the case at bar, let us assume that it will be argued that there was an implied invitation by reason of the fact that the plaintiff went in the yard for the purpose of washing the windows from the outside. Is the landlord's duty confined as to reasonable care for the condition of the premises to each inch of the yard? What if the plaintiff had an apartment on the second or third floor; would she have gone to the yard to wash the windows, or would she have washed the outside from the inside?

This question was raised in the *Philips* v. *Library Co.* case, reported in 55 N. J. Law, page 307, wherein the plaintiff used the path not regularly laid out and saved herself from a non-suit only because the path she did use was a better track, justifying inference by the jury that it was held out as proper for her to use.

The evidence in this case does not disclose how long the poison ivy had been in the yard and whether or not the plaintiff was a tenant before or after the poison ivy was in the yard. If she was a tenant while the poison ivy was growing or was in the yard then, she accepted the premises as she found them and cannot now complain of the unsafe conditions. This doctrine is set forth in the case of *Barthelmess* v. *Bergamo,* reported in 135 Atl. Reporter, page 794, wherein the tenant was manipulating a clothes line upon the roof, and because of the additional weight on the line, she was drawn or fell from the roof and received injuries. The plaintiff had a verdict but the verdict was reversed in the Court of Errors because of the failure of the trial court to non-suit the plaintiff. In that case, the court discusses the relationship of landlord and tenant and states that the common law, in the absence of a continued nuisance or of an expressed contract, imposed the duty of repairing the demised premises upon the tenant and the sole departure from this fundamental rule, except where the place was a nuisance, because of the coming of the apartment house, new rules were formulated wherein the hallways and stairs were used as common ways and were therefore reserved by the landlord and which created upon him a duty of maintaining them in a reasonable manner, and the court held that the Barthelmess case did not come in under any of the exceptions to the

general rule; "because the condition existed at the time of the letting and with this knowledge, the plaintiff choose to occupy and use the premises and necessarily created a legal status of knowledge and consent tantamount to estoppel in pais which was held to operate as a barrier to her recovery."

In the case of *Briggs* v. *Pannaci,* reported in 150 Atl. Reporter, page 427, 106 N. J. L. 541, it appeared that goods of the tenant were damaged by reason of the ruinous condition of the premises and that the court invoked the well known rule that, "The landlord is not liable for damages to goods of a tenant sustained by reason of the ruinous condition of the premises demised, there being upon the letting of a store no implied contract or condition that the premises are or shall be fit and suitable for the use of tenant." The court recognized the exception to those portions of the property which the landlord reserves such as passageways, stairways and the like that are not demised to the tenant, but are retained in the possession or control of the landlord for the common use of the tenants and those having lawful occasion to use them, the ways being used as appurtenant to the premises demised.

From the foregoing, it is apparent that the only exception to the rule is common stairways and passageways and ways which are used to enter or leave the premises; roof and gutters. This, cannot mean the entire back yard or side yard, but only means the sidewalks or paths cut through the yard, and the court in the Briggs case (*supra*) refused to extend the rule laid down in the Siggins case (*supra*) beyond the holding in the Siggins case.

POINT II.

Because the Supreme Court erred in failing to hold the plaintiff guilty of contributory negligence.

The plaintiff had a duty to perform toward her own safety as she had no right to assume the defendant owed her one. The plaintiff was over twenty-one and ought to know that there are certain dangerous weeds, and she cannot pull them out indiscriminately and expect the landlord to protect her. Why should she be permitted to assume the defendant knew poison ivy any more than she herself knew what it was?

It must be observed that the plaintiff testified that she did not know what poison ivy was, and it will also be observed that the plaintiff did not show or prove that the superintendent of the premises, Mrs. Stokes, knew that poison ivy was dangerous. The testimony only went so far as to show that she was advised that there was poison ivy in the yard and that she cut it down, but the mere fact that a weed is growing in the yard does not of itself indicate that the weed is inherently dangerous.

The plaintiff cannot infer nor assume that the defendant knew that poison ivy was a dangerous weed although the word "poison" was used and it might be argued that that in itself would be sufficient to put the defendant on guard that it was dangerous, yet in our language today, words do not always mean what they appear to mean, and we therefore feel that the burden of proof was not established as required by law that knowledge or scienter was had on the part of the defendant or its agents that poison ivy was in fact poisonous and harmful to persons with whom might come in contact with it.

A glaring example of the misnomer of words is the present so called two per cent. sales tax. There was never a greater misnomer than that ever foistered on an unsuspecting public—the words, "two per cent." really meaning between "four and six per cent."

POINT III.

Because the Supreme Court erred in holding that it may take judicial notice that poison ivy is dangerous and poisonous.

The Supreme Court in its opinion holds that it may take judicial notice of the fact that poison ivy is in fact poisonous. We respectfully disagree with that holding. Personally, poison ivy has no effect upon the writer, nor was there any proof in the court below that poison ivy was in fact "poisonous" or that the landlord knew it to be dangerous.

"Judicial notice" is cognizance of certain facts which judges and jurors may properly take and act upon without proof because they already know them. (*James Mitchell, Inc.* v. *Kreuger's Unknown Executors,* 163 A. page 10, N. J. L. Misc. 1176).

The court in the case of *Ackerson* v. *Ellis,* 79 Atl. 883, 81 N. J. L. 1, said: "The fact that spruce trees are neither poisonous nor noxious is not so universally known that the court will take judicial notice of it and so far as there is any common knowledge on the subject, coniferous trees, including spruces have a poisonous or noxious effect upon all vegetable growth within the spread of their branches."

POINT IV.

Because the Supreme Court erred in holding that the defendant had control over the growing of poison ivy and that same was not an act of God.

This case was one of novel impression and counsel became interested in the case because of its novelty and a painstaking search was made of the cases in this State and in fact every State of the Union and no case could be found directly on point.

We did however, find a case in Massachusetts—that of *Hunter* v. *Goldstein,* reported in 267 Mass. page 183, wherein the court stated that the rule of law which requires the landlord to care for that portion of the premises in his control does not place upon him the burden of finding and removing objects placed thereon by the forces of nature.

In the case at bar, there was no proof that we planted the poison ivy, nor do we believe it will be argued that we planted it. It simply grew.

In England, Lord Coleridge, in speaking on a case involving one land owner as against the other land owner for noxious weeds, said, "I never heard of such an action as this. There can be no duty as between adjoining occupiers to cut the thistles, which are the natural growth of the soil," and this opinion was quoted in the case of *Harndon* v. *Stultz* reported in 124 Iowa, page 734, wherein the court, after quoting the Giles case said, "It is not suggested that the growing by one upon his own land of cocklebur and weeds is without legal right or that in law the field of the defendant constituted a nuisance."

We feel that the plaintiff has failed to establish her case based upon the arguments herein set forth and that she has failed to show a burden required of the landlord for her protection.

We respectfully urge this court to reverse the judgment of the Supreme Court and enter a judgment in favor of the defendant.

Respectfully submitted,

JOSEPH C. PAUL,
Attorney for and of Counsel
with Defendant-Appellant.

New Jersey Court of Errors and Appeals

MARGARET POLIZZANO and NICHOLAS POLIZZANO, her husband,
Plaintiffs-Appellees,

vs.

MAPES HOLDING COMPANY, a corporation of the State of New Jersey,
Defendant-Appellant.

BRIEF ON BEHALF OF PLAINTIFFS-APPELLEES.

Defendant appeals from the judgment of the Supreme Court affirming a judgment of the First Judicial District Court of the County of Essex wherein a verdict was returned in favor of the plaintiffs and against the defendant.

Facts.

The facts in the case as set forth in the Agreed State of Case (State of Case, p. 9) are substantially as follows:

The plaintiffs are tenants in the defendant's premises, an apartment house accommodating about sixteen families, occupying an apartment on the lower floor with the windows at the rear of the building close to the ground. At the rear of the building there is a yard reserved for the common use by the tenants where children play and which the tenants are accustomed to use.

In September, 1933, desiring to clean her win-

dows, it became necessary for the plaintiff, Margaret Polizzano, to remove shrubbery and weeds which were growing at or near the windows. This she did with her hands, not knowing that the weeds were poison ivy. As a result, she became infected from the poison ivy which spread over her body, causing her to be confined in bed for three weeks. She suffered severely from the infection, received the attention of a physician and required medicines.

Another tenant in the apartment house testified that in June, 1933, she informed Mrs. Stokes, the superintendent of the premises, that there was poison ivy in the yard and that thereafter it was clipped with a pair of shears but it grew up again.

The defendant's only witness, the superintendent of the apartment house, admitted that in June, 1933, she was told by one of the tenants of the existence of the poison ivy in the yard; that she informed the defendant and was supplied with a pair of shears with which she clipped the poison ivy, but that she had made no other or further effort or attempt to cut it or root it out from the premises.

It was admitted at the trial that the plaintiffs were tenants; that the defendant was the owner of the premises; and that Mrs. Stokes was superintendent in charge of the premises and agent of the defendant corporation.

ARGUMENT.

POINT 1.

Defendant owed to plaintiffs the duty to use reasonable care and skill to make its premises reasonably fit and safe for the use intended.

It is contended for the plaintiffs that the defendant was charged with the duty to keep the yard of the premises which is reserved for the common use by its tenants, in a safe condition and free from any nuisance or danger that may result in harm or injury to the plaintiffs. This rule is succinctly stated in 16 R. C. L. page 1037, Landlord and Tenant, Sec. 557, as follows:

> "* * * it is generally held that where he (the landlord) retains possession of a portion of leased premises for use in common by different tenants, a duty is by law imposed upon him to use ordinary care to keep in safe condition this particular part of the leased premises, and if he is negligent in this regard, and a personal injury results to a tenant by reason thereof, he is liable therefor."

Our courts have consistently followed this rule in a long line of reported cases.

In *Gilloon* v. *Reilly,* 11 Atl. 481 (50 N. J. L. 26), Justice Dixon, referring to the owner's liability, said:

> "The obligation resting upon such an owner is that reasonable care and skill have been exercised to render the premises reasonably fit for the uses which he has invited others to make of them." (Citing cases.)

In *Siggins* v. *McGill,* 62 Atl. 411, (72 N. J. L. 263) Justice PITNEY, speaking for the Court of Errors and Appeals, after stating the general rule that a landlord is not liable for injury sustained by a tenant by reason of the ruinous condition of demised premises, said:

> "But it is recognized that this rule does not apply to those portions of his property (such as passageways, stairways, and the like) that are not demised to the tenant, but are retained in the possession or control of the landlord for the common use of the tenants and those having lawful occasion to visit them; the ways being used as appurtenant to the premises demised. With respect to such ways, it has been held by our Supreme Court that the landlord is under the responsibility of a general owner of real estate who holds out an invitation to others to enter upon and use his property, and is bound to see that reasonable care is exercised to have the passageways and stairways reasonably fit and safe for the uses which he has invited others to make of them." * * * (citing cases) * * * "This doctrine, we think, is indubitably sound."

Our Court of Errors and Appeals again applied that doctrine in *Perry* v. *Levy,* 94 Atl. 569 (87 N. J. L. 670), where a tenant sustained injury caused by a leaking roof after the landlord had been notified of the condition and failed to use reasonable means of eliminating the nuisance. Justice BLACK said:

> "The trial court properly applied the principle laid down by this court in the case of Siggins v. McGill, 72 N. J. Law, 264, 62 Atl. 411, 36 L. R. A. (N.S.) 316, 111 Am. St. Rep. 666, to the case under discussion. The Supreme Judicial Court of Massachusetts, in the case of Gilland v. Maynes, 216 Mass. 581, 104 N. E. 555, held that the landlord

> having retained control of the outside of a building, including the roof and gutters, upon him rested the responsibility, as to repairs, where he had let different parts of the building to different tenants."

The question therefore is: Did the defendant in the instant case exercise that degree of care required of it to prevent the plaintiff from becoming infected with the poison ivy existing on the premises? It is commonly known that poison ivy is a noxious weed which is a nuisance *per se*. It is, therefore, dangerous to permit such weed to grow in a place which is reserved by a landlord for use by his tenants and their children.

It is admitted that the defendant had ample notice of the existence of the poison ivy in the yard. It therefore became incumbent upon it to use appropriate means to keep the premises clear of the poisonous weed and sufficiently safe from causing infection. There is no evidence that this defendant had made any effort to clear the premises from this nuisance save for the mere clipping on one occasion. The degree of care with which the defendant was charged made it incumbent upon it to clip the poison ivy as often as it grew to be a danger or to take such other means available to root it out and prevent its growth. It is common experience that mere occasional clipping of a weed with shears does not prevent its growth but in fact aids it to spread. It is therefore plain that the defendant failed in its duty to use reasonable care to keep the premises free from this danger.

POINT 2.

Poison ivy is a noxious weed and is commonly known to be the subject of communicable disease.

Defendant argues that it can not be inferred nor assumed that it knew that poison ivy was a dangerous weed and that the mere use of the word "poison" is not sufficient to put the defendant on guard. It is further argued that the court can not take judicial knowledge of the fact that poison ivy is dangerous or poisonous. It may be true that the weed can not be commonly distinguished from other weeds but it is, to say the least, shallow argument to claim that poison ivy is not generally known to be dangerous. In this case the weed was pointed out by one of the tenants to the superintendent of the premises who clipped it but once. (See State of Case, p. 11). Furthermore, the courts do take judicial notice of the peculiar properties of plant life insofar as they may be generally known.

It is interesting to note what the authorities say about a nuisance created by weeds. In dealing with this subject, 20 R. C. L. p. 412, sec. 29, says: "The authorities leave no room for doubt that pests of various sorts may constitute nuisances * * *. Upon a like principle, it is held that noxious weeds constitute nuisances * * *." In 15 R. C. L. 1103, sec. 34, it is said:

> "Courts will judicially notice the laws of nature as they appear in vegetable life, and also the peculiar properties of plant life in so far as they may be generally known. * * * And of the peculiarities of any form of vegetable life, as for instance that locust trees do not make desirable or attractive shade trees, and that many trees annually shed large numbers of dead limbs. It has been

> further recognized that trees and other forms of plant life are subject to destructive communicable diseases. Thus judicial notice may be taken that a disease known as the "yellows" frequently attacks peach trees and causes premature death."

And 1 R. C. L. p. 377, sec. 9 provides:

> "The liability of the owner or occupant of land for injuries caused to his neighbor's property from the spread of vegetation, roots, weeds, poisonous vines, and the like, does not seem to be clearly settled, but the trend of the decisions is toward the conclusion that if a certain kind of trees, or other forms of vegetation, will constitute a recognized nuisance a person who plants or permits the growth of them will be liable for resulting injury to an adjoining owner." This statement refers to

Buckingham v. *Elliot,* 62 Miss. 296, 52 Am. Rep. 188 (and 52 L. R. A. 293 Note) wherein it was held:

> "It is an admitted fact in this case that the roots of the mulberry trees destroyed the well. That proves the noxious character of the trees. The trees were planted by a former owner, but the appellee has no right to maintain and continue a nuisance after notice * * *."

The rule concerning the liability of adjoining land owners as above stated applies with even greater force in this instance where the legal relationship imposes upon the landlord a greater obligation to exercise due care.

Davis v. *Smith,* a Rhode Island case reported in 58 Atl. 630, dealt with a situation where the premises was infected with a contagious disease and the court said:

> "If one knowingly lets premises infected with a contagious disease, and fails to inform the tenant thereof, he is liable for injury resulting therefrom. * * * The landlord, on his failure to disclose concealed defects in the demised premises, is liable for injuries to the family or guests of the tenant, as well as for injuries directly to the tenant. * * * If, in the case at bar, the defendant had known that the premises were infected with germs of diphtheria, and had concealed that fact from the plaintiff, and the child, immediately upon entering the house, had contracted the disease, no doubt the defendant would be liable in damages."

Another case is *Meyers* v. *Pepperell,* Supreme Judicial Court of Maine, reported in 119 Atl. 625. That case deals with a situation involving an injury from ice and snow sliding from the roof of a building. There, the court dealing with landlord's liability said, on page 626:

> "Where the building is occupied by several tenants, even when one tenant has special facilities for getting upon the roof, but it does not appear that the place where ice and snow accumulated was under control of the tenants or that they had anything to do with the outside of the roof, and damage results wholly from the shape of the roof and the proximity of the building to the street * * * the responsibility rests upon the landlord, who has the right to go upon the roof and so alter its construction that at all seasons of the year it may not cause danger."

These cases deal with nuisances created by the natural elements and the authorities have held that the owner's failure to exercise proper care to eliminate the danger rendered him liable for resulting damage. So, in the instant case, the liability does not arise out of the creation of a nuisance by the defendant landlord. The point is that

the defendant permitted a nuisance to thrive upon its premises after notice of its eixstence and its failure to take appropriate means to exterminate it.

POINT 3.

Assumption of obligation to repair makes owner liable to perform that duty in a reasonably careful manner.

Assuming that the defendant was under no legal obligation to remove the danger of the weed, nevertheless, having actually assumed that obligation by attempting to clip the weed after being informed of its existence, it became thereby bound to eradicate the danger in a reasonably careful manner which it failed to do. In *Charney* v. *Cohen,* 110 Atl. 698, our Supreme Court said:

> "It may therefore, for the purposes of this case, be conceded that the defendant, under the terms of the contract of hiring, was under no legal obligation to repair or to protect the tenant against obvious defects in the ordinary use of the guard rail, but the fact persists that the defendant actually did assume that obligation, and, having assumed the duty to repair, he was bound to perform it in a reasonably careful manner; the liability for damages arising from his failure to perform it imposed liability upon him. Such was the rule declared in the case of La Brasca v. Hinchman, 81 N. J. Law, 367, 79 Atl. 885, where a landlord, who was under no obligation to repair the floor of a stable, undertook the duty and performed it so negligently that the floor gave way, injuring the tenant's horse. The landlord was there held liable regardless of the provisions of the demise. The doctrine thus enunciated was given its ear-

> liest recorded expression by Lord Holt, in the case of Coggs v. Bernhard, 2 Ld. Raym. 909, where a mere volunteer undertook to perform a task, and performed it negligently. The assumption of this obligation by the landlord would therefore *per se* afford a basis for an inference of liability, in the absence of a reasonable exercise of inspection and due care, and for that reason the refusal of the trial court to nonsuit and to direct a verdict was legally correct."

That doctrine was followed by our Supreme Court in *O'Connor* v. *Klamer,* 157 Atl. 244.

POINT 4.

Plaintiffs were privileged to use the yard as a part appurtenant to their tenancy.

Appellant's brief raises the question that there was no express invitation to the plaintiff to use the yard. In this connection it is to be noted that the trial court in its conclusions (State of Case, p. 13) found that: "* * * there was a fence enclosing the grounds of the apartment house * * * where children and people were accustomed to play and walk." And on page 14: "* * * That the tenants were accustomed to congregate in the immediate vicinity of the place where the poison ivy was growing * * *."

This point raised by the defense is ordinarily a question for the jury. The trial court decided this question in favor of the plaintiffs and the evidence was sufficient to justify its finding. It is commonly known that apartment house dwellers will seek and use open space if the demised premises afford such facilities. It was the privilege and habit of the tenants to use the yard as was found by the trial court. This, the plaintiffs did,

aside from the privilege or necessity of washing windows.

In the recent case of *Henry* v. *Haussling,* 176 Atl. 564, decided January 24th, 1935, where a child fell through a skylight on the roof of a tenement house, the court held that the question of invitation to use the roof, negligence, contributory negligence, assumption of risk, etc., were for the jury.

The case of *Gavin* v. *O'Connor,* 122 Atl. 842, cited by the appellant is not at all in point. That case was not decided on the basis of invitation to the yard in question but, as the court stated: "Was the party injured invited, expressly or by implication, to make use of the appliance, whatever it was, in the way in which he did use it? If he was, a duty of care was raised; otherwise not." And it was held that a clothes pole was not intended to be used to swing on as the plaintiff's intestate did in that case. It was not a question of the right to use the yard but the abuse of the clothes pole.

Appellant cites as authority the case of *Burnett* v. *Realty Co.* reported in 90 N. J. Law 660. That case does not aid its contentions but in fact helps the plaintiffs in this case, for there, too, it was shown that it was customary for the tenants and the children to congregate in and use the yard in question and the owner was held liable.

The case of *Barthelmess* v. *Bergamo,* referred to by defendant, is not at all in point for there it appears that the tenant accepted and occupied the premises in a defective condition which was apparent and the court held that since there was created the legal status of knowledge and consent, it was tantamount to an estoppel in *pais.*

Again, in *Briggs* v. *Pannaci,* 150 Atl. 427, 106

N. J. L. 541, cited by appellant, the facts do not comport with the instant case. There, the damage occurred in a storage room demised by the landlord, as the result of a leaky roof. It is therefore evident that the question there determined has no application to the case at bar.

The plaintiffs-appellees respectfully submit that from the facts as found by the trial court, and the authorities here presented in support of the court's ruling, it has been established that:

a—The yard of the apartment house premises in question being used by the defendant's tenants made it subject to the "rule of reserved control on the part of the landlord";

b—It was the duty of the defendant to keep the yard where the poison ivy was growing in a reasonably safe condition;

c—Defendant was negligent in that it failed to exercise a reasonable degree of care by permitting the poison ivy to grow in the yard after it had notice of the existence of the poisonous weed;

d—The poison ivy growing in the yard constituted a nuisance;

e—The defendant failed to use proper means and methods to prevent or terminate this nuisance after notice of its existence, and that its single effort was inadequate and constituted negligence.

It is, therefore, respectfully urged that the judgment of the Supreme Court be affirmed with costs to appellees on this appeal.

Respectfully submitted,

SIDNEY FINKEL,
Attorney for Plaintiffs-Appellees.

Of Counsel,
A. Howard Finkel.