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PLAINTIFFS' EXHIBITS.

DEFENDANT'S EXHIBITS.

Notice of Appeal.

(Filed May 3, 1929.)

New Jersey Supreme Court

MILDRED BOLITHO and HENRY W. BOLITHO, her husband, *Plaintiffs,* *v.* MAX MINTZ, *Defendant.*	Action at Law.

To Oliver K. Day, Esq.,
Attorney of Plaintiffs.

SIR:

TAKE NOTICE that the defendant appeals to the Court of Errors and Appeals of New Jersey from the whole of the judgment entered in this cause.

Dated April 29, 1929.

Respectfully,

COLLINS & CORBIN,
Attorneys of Defendant.

Service acknowledged April 30, 1929.

OLIVER K. DAY,
Attorney of Plaintiffs.

Complaint.

(Filed December 6, 1928.)

[Same Title]

First Count.

Plaintiffs, residing in the Town of Morristown, County of Morris and State of New Jersey, say:

1. On or about the 4th day of June, 1928, the defendant was the owner of a certain building known and designated as 48-50 Speedwell Avenue, in the Town of Morristown aforesaid, which said building consisted of two stores on the main floor, two apartments on the second floor, and two apartments on the third floor, in the rear of which building there was a stairway on the outside thereof, running from the ground to the third floor of said building connecting porches, which said porches ran across the rear of the building on the second and third floors thereof.

2. On the date aforesaid, plaintiffs, Henry W. Bolitho and his wife, Mildred Bolitho, were in the occupation of the easterly apartment on the third floor of the aforesaid premises, as tenants of the defendant, Max Mintz.

3. The defendant, Max Mintz, retained possession of the aforesaid porch running along the rear of the apartments on the third floor, and retained possession and control over the railing and the pillar supporting the roof over the aforesaid porch.

4. On the aforesaid date, the woodwork of the easterly pillar supporting the roof over the aforesaid porch, and the railing in the rear of the said porch, and the nails holding the said pillar and

railing, became rotted, rusted and dilapidated, and in a dangerous condition, and out of repair, and had been so for a long time prior thereto, and which rotted, rusted, dilapidated and dangerous condition was known to the defendant, Max Mintz.

5. With the knowledge and permission of the defendant, the plaintiff had attached a clothes line to the aforesaid pillar or post, which said clothes line ran from said post to a building in the rear of the defendant's property, and on the date aforesaid, plaintiff, Mildred Bolitho, took a hold of the clothes line for the purpose of hanging clothes thereon, whereupon the said post and the railing, on account of the dilapidated condition aforesaid, gave way, thereby throwing the plaintiff, Mildred Bolitho, with great force off the aforesaid porch unto the ground, thereby causing the leg of the said Mildred Bolitho to become broken at the ankle and other parts of her body to become wounded and sore, and to suffer great pain and agony, and will in the future suffer great agony and pain for a long time to come, thereby causing the aforesaid ankle to be permanently injured so that she will not be able to walk upon the same without greatly limping, and will be unable, for a long time to come, to attend to her duties as a housewife of the plaintiff, Henry W. Bolitho.

Plaintiff, Mildred Bolitho, demands as damages, the sum of Fifteen Thousand Dollars ($15,000).

SECOND COUNT.

Plaintiff, Henry W. Bolitho, repeats the first to the fifth paragraphs, inclusive, of the first count.

By reason thereof, the plaintiff, Henry W. Bolitho, who obliged and did expend divers large sums of money for doctors, nurses and medicines,

in an endeavor to cure the said plaintiff, Mildred Bolitho, of the said injuries, bruises and wounds sustained by her, and in the future will be obliged to expend large sums of money to cure the said plaintiff's wife of her wounds and injuries sustained as aforesaid; and was deprived of the society and comfort of his wife for a long time, and was obliged to employ nurses to provide for and take care of his children, and will be obliged to employ help in the future for the proper care of his children.

Plaintiff, Henry W. Bolitho, demands as damages, the sum of Three Thousand Dollars ($3,000).

OLIVER K. DAY,
Attorney for Plaintiffs.

Answer.

(Filed Dec. 20, 1928.)

[SAME TITLE]

The defendant residing in the City of Morristown, County of Morris, State of New Jersey, says that:

FIRST DEFENSE TO FIRST COUNT.

1. He denies paragraph 1.

2. He has no knowledge or information sufficient to form a belief as to paragraph 2.

3. He denies paragraphs 3, 4 and 5.

FIRST DEFENSE TO SECOND COUNT.

1. He repeats his answers to paragraphs 1 to 5, inclusive, in the first count.

Reply.

2. He denies paragraph 2.

SECOND DEFENSE TO EACH COUNT.

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

THIRD DEFENSE TO EACH COUNT.

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

COLLINS & CORBIN,
Attorneys of Defendant.

Reply.

(Filed March 22, 1929.)

[SAME TITLE]

Plaintiffs deny every allegation in the answer.

OLIVER K. DAY,
Attorney for Plaintiffs.

Consent to filing as of time March 18, 1929.

COLLINS & CORBIN,
Attorneys of Defendant.

Postea and Judgment.

(Entered April 11, 1929.)

[Same Title]

This case was tried before Judge Rulif V. Lawrence with a jury at the Morris County Circuit Court on April 10th, 1929. The jury rendered a general verdict against the defendant in favor of the plaintiff, Mildred Bolitho, for fifty-three hundred dollars, and a general verdict against the defendant in favor of the plaintiff, Henry W. Bolitho, for twenty-seven hundred dollars.

Whereupon it is adjudged that the plaintiff Mildred Bolitho do recover of the said defendant Max Mintz the sum of Fifty-three hundred dollars damages and that the plaintiff Henry W. Bolitho do recover of the said defendant Max Mintz the sum of twenty-seven hundred dollars damages, together with their costs which have been taxed at the sum of sixty-five dollars and sixty-two cents costs making in the whole the sum of Eight thousand and sixty-five dollars and sixty-two cents.

$5,300.00 M. B.
2,700.00 H.W.B.

$8,000.00
65.62

$8,065.62

Judgment signed and entered April 11, 1929.

Wm. S. Gummere,
C. J.

Byron D. Sherman, direct.

NEW JERSEY SUPREME COURT,

MORRIS COUNTY.

MILDRED BOLITHO, *et als.*, *Plaintiffs,*

v.

MAX MINTZ, *Defendant.*

Action at Law.

Morristown, N. J., April 8th, 1929.

Before—Hon. RULIF V. LAWRENCE, Judge, and a jury.

APPEARANCES:

OLIVER K. DAY, Esq., for the plaintiffs.
COLLINS & CORBIN, by CHARLES BROADHURST, Esq., for the defendant.

The Court: It is stipulated and agreed that the panel of jurors being exhausted, counsel agree that the case may be tried by the sitting panel of eleven jurors.

Thereupon the jury were duly sworn.

Thereupon Mr. Day opened to the jury in behalf of the plaintiffs.

Thereupon Mr. Broadhurst opened to the jury in behalf of the defendant.

BYRON D. SHERMAN, sworn on behalf of the plaintiffs, testifies as follows:

Direct examination by Mr. Day:

Q. Dr. Sherman, you are a practicing physician in the town of Morristown? A. Yes.

Q. And how long have you been practicing? A. In Morristown?

Q. Morristown and vicinity? A. Seven years.

Q. Do you know Mrs. Bolitho? A. I do.

Q. When did you first see her after the accident? A. I think it was—might have been the second day, because she was first admitted I think to ward service and then it was arranged for her to have a private room and private treatment and then she asked me to take care of her. It may have been the second day.

Q. Where did you find her? A. Found her in bed.

Q. In Memorial Hospital? A. Yes.

Q. When you called upon Mrs. Bolitho, what did you do first? A. Why, I asked her what happened and took a brief history of the case and then examined the injuries which she had sustained.

The Court: And you found what, Doctor?

A. Found various bruises upon the head and chest, practically the left chest, if I remember rightly, and the underside of both thighs were quite badly bruised and discolored from contact with the clothesline, and these were minor injuries. The main difficulty was in the right leg, there being considerable fracture of the right ankle joint. There had been pictures taken already—I think there had been—and they showed—

Q. Have you got these photographs, doctor? A. Yes.

Q. Will you produce them? A. This picture is of the pelvis taken because of these injuries high up there to determine—

Mr. Broadhurst: This won't mean any-

thing on the record unless these plates are marked and referred to systematically.

The Court: Yes, they should be. They were taken when?

The Witness: June 4th.

Mr. Broadhurst: Do you claim any condition of the pelvis?

The Witness: No, sir.

Mr. Broadhurst: Then why talk about it.

Q. There was an injury to the pelvis? A. In the soft part.

The Court: The parts on the inner side of the thigh.

Mr. Day: We will cut out the pelvis, there wasn't anything there.

The Court: That was taken June 4th.

Mr. Day: I offer these in evidence.

The Court: No objection, they may be marked.

(Pictures marked P-1, P-2, P-3, P-4, P-5, P-6, P-7, P-8, P-9, P-10, P-11, P-12 and P-13 respectively.)

Q. Now, I understand, Doctor, before you did anything the pictures were taken; will you now take the first picture, P-1, and tell the jury what that shows?

Mr. Broadhurst: Give us the date of each, Doctor.

A. This was taken June 4th, 1928, number P-1. This shows the right leg and ankle joint. The rest of the foot is out here. (Indicating.) This bone coming down here is the big bone, the leg bone and right on the other side of it is the small leg bone. There are two bones running up and

down the leg. This is the ankle joint. Now, this big bone is broken across. You can see right through. The little bone is also broken across right there. The fracture line is indicated; both fracture lines together. I don't know whether you can see or not that line, it is dotted, and delineates the two sides of the little bone which you see there, and the big bone. That gives you an idea. You can see the fracture there.

Q. Was there any fracture down in the ankle bone at all, Doctor? A. No, there was not. These bones are all—there are natural ligaments between the bones and they are damaged but they don't show on any plate. There may be two such separations here to test it, but there is a cartilage between the bones and it does not show on the X-ray, because you see the cap there turns so there's a dislocation. Here's the main injury, that of course is the main damage in this joint here. (Indicating.)

Q. Is that the only picture that was taken on June 4th? A. I don't think so. Here is one taken June 4th. This is P-2, taken on the same side. That picture was taken from the side and in this one the X-ray tube was in there, shows these legs from before backwards. You can see the line of fracture which shows on the front plate right across there. That's the big bone. There was some fracture there as you will see. They are separated. Judge Day mentioned a piece of bone broken off through the skin. There was none. That's a compound fracture. You have here between the bone, there is an arrangement that are covered by the periosteum which is very sensitive. Now, here's a little bone you can see where that has evidence of that lapping. Now that's the joint where the little bone hinges to the big bone here

and interferes with it materially. However, it is not displaced. This joint here is badly sprained and pretty well mussed up, due you see to the damage of the bone.

Mr. Broadhurst: You were referring to the ankle joint at that time?

The Witness: Yes.

Q. Get another there, if you have it? A. I have. Now, this was taken June 8th.

Q. All right. After you had examined the plates, what did you do? A. Well, didn't do much of anything because the leg had already been taken care of; by that I mean it had been immobilized in the fracture because bending or motion cannot take place and bothers a bone. It must be immobilized. I simply dressed the portion of the skin, being the cut involved and waiting for it to heal. I immobilized the entire bone after putting them in place and put a permanent dressing on the form of a plaster cast.

Q. When did you set the leg; how many days after? A. I think it was the eighth day; it was a number of days afterward, because this leg was a big leg anyway, and when it began swelling, it simply infiltrated the whole thing, and it didn't look like a leg at all.

Q. Did you set the bones, Doctor? A. Yes.

Q. And what day? A. I can't tell you for certain.

Q. Will you tell the Court and jury how you set the leg; what you did? A. Well, this fracture is an ominous one at best, and we judged it best to take her to the operating room and put her on what is known as a Halley table which is done with this sort of work and under a general an-

aesthetic, with the body made fast to the table and the leg at the base, in this fashion. We had it tied fast to the base and then we screw up an extension and draw down the frame. We did that and manipulated, that is as best we could, because the skin was still in bad shape. They brought in a portable X-ray machine and took pictures there and we changed it a little more and took more pictures and followed up by the permanent cast and put her back to bed.

Q. Have you got the pictures there showing where you immobilized the leg? A. Here is one taken shows before we applied the cast. This was done on the 8th. That's P-4. I take P-3 next, same thing, doesn't show much. That's P-3. Now, you will remember the other fracture of this little bone was about up to here. (Indicating.) Now we extended here and it came down to that point. That's looking at it from before backwards. That's a picture taken just before we applied the cast, taken from the side with extension and strapping this down the best we could. Now, this is taken just before putting on the cast.

Q. Then, after these pictures were taken, what did you do? A. Here is another one taken the same time, that's P-5.

Q. You put on the permanent cast then, did you? A. Yes, you don't see this as nicely because the plaster obstructs the rest of the formation. This is the same thing after we put the cast on, I will say twenty minutes later.

Q. P what? A. P-6. Now everything is pretty fair there. Here is the big bone looking at it again before backwards. Here's the little bone which you see didn't move after we got the cast on it, appreciably anyway. Here was a little spicula,

which we were unable to reflex likely because some soft tissue had become interposed. Here is the line of the leg here.

Q. How long was she on the operating table, Doctor? A. That I can't say; I don't know.

Q. I mean while you were operating? A. Can't tell. I imagine at least it must have been an hour to an hour and a half. I would not be surprised if it was an hour and a half. This is another taken lately.

Mr. Broadhurst: P-7?
The Witness: P-7.

Q. How long was she in the hospital after that, Doctor? A. Well, she stayed six weeks, I think it was October or November.

Q. Will you tell the jury what condition Mrs. Bolitho was in while in the hospital in regard to pain and suffering?

The Court: Was it a painful injury?
The Witness: Well, it was, yes, at first. She had a pretty good lot of pain while you are putting the cast on at this sort of thing. Now, after the fracture, after you get it fixed and immobilized the pain subsides and you get along nicely. This little spicula here, sticks out a little bit, caused pain.

Q. Where was it these other injuries bothered her? Did the other injuries bother her as far as pain was concerned? A. Yes, sure did. The chest was quite painful.

Q. How long would that last, this pain? A. I swear, I don't know. No longer than a week, maybe. I can't specify any time, that would be a guess on that.

Q. After she left the hospital, where did she go? A. Went home.

Q. Did you see her after that? A. I saw her at the hospital clinic once when she came back to see Dr. Taylor, I saw her in the office later on, she began to get so she could navigate a little.

Q. Have you taken any pictures since the one you showed there, P-7? A. Yes.

Q. When were they taken? A. Here is one taken July 11th.

Q. What does that show? A. Well, it was taken just to determine the progress, whether callous had been produced or not, sufficient to warrant the removal of the cast.

Mr. Broadhurst: Was later than that, P-8 on July 11?

The Witness: No, June 1st.

Q. What did that show, progress? A. Well, not much. It was only three or four days and callous doesn't form quite that soon; not enough to show it in an X-ray.

Mr. Broadhurst: What does it show as to apposition?

The Witness: To some extent—that's the one on June 8th.

Q. When did you next take a picture? A. June 11th, same day, lateral view.

The Court: About the same condition?

The Witness: Shows the same condition exactly.

Q. P-10, taken August 8th; what does that show? A. That shows some callous. This shows a pretty good amount of callous formation.

Q. Just describe that? A. Now this—this is a

good picture, you can see that; the same thing as that before only this is a better picture. This little accumulation there is new bone.

The Court: That is what you call callous?

The Witness: Otherwise is known as callous. This is all new bony formation. The thing becomes to look a little more like you see it.

Mr. Broadhurst: How does it show as to apposition?

The Witness: Well, exactly as the front.

Mr. Broadhurst: I mean, what you call good apposition?

The Witness: We call it good apposition, and fair apposition. That's this picture (indicating). Good in this picture—

Q. What do you refer to now? A. That's P-11, taken August 8th, the same day. This is a picture taken from the front again. You still see the fragments sticking out here.

Q. Well, Doctor, what have you got to say about that bone being off there? Will that interfere with walking or not? A. Where?

Q. Here? A. This fragment?

Q. Yes. A. I don't believe that will. There is a trifling shortening there and corresponding shortening here (indicating). There will be some shortening.

Q. How much? A. I don't know, not a considerable amount. These pictures here—I think they are in that picture here.

Q. How would that interfere with the walking, or will that interfere with the walking? A. Well, I don't know whether these little ends here will or not. I think the whole situation here is one

which almost devoids a party of requiring a great comfortable graceful gait. Now, just what part does it, I don't know.

Q. Have you got other plates there, Doctor? A. Yes. This one is P-12. It's dated November 21st.

Q. Now, just explain that to the jury, will you? A. Well, it's virtually the same as that before; shows a little more simply; in other words, we were trying to see whether these ends were sticking out.

Mr. Broadhurst: That shows union?

The Witness: I would say that shows pretty good union.

Q. As far as the break is concerned, there is good union there at present? A. Yes, it looks better than it had in these other pictures. The next one being front and back will not be quite so good.

Q. Is there a permanent injury to the leg?

The Court: There is one more, what does that show?

A. That is P-13, November 21st. This is about the same thing, taken from before backward. You see the distance there, that appears here (indicating), a little bit, but you can see there's a little progress there even from this which is the worst angle looking from.

Mr. Broadhurst: Indicating what bone?

The Witness: This here is the fibula and here the tibia. These fractures are still there (indicating).

Q. Does that fibula interfere with walking now, Doctor? A. I think that the fibula is, the lower end of this bone now is in pretty fair normal

apposition. I don't think that whatever is concerned in that makes it impossible to walk. I think the bones were injured badly and I think on a whole they are not quite as good as before.

Q. Is there permanent injury there in your opinion? A. The strength of the bones—I think they are as strong as they ever were; as far as her ability to function, understand, she would be somewhat limited.

The Court: To what extent; five per cent.?

The Witness: No, never, fifty per cent., I may be wrong, I think fifty per cent.

Q. Is that liable to reduce or not, to go past the fifty per cent. or not?

The Court: As time goes on.

A. As time goes on, with a good deal of manipulation on the part of the patient and diligence and manner of massage and passive motion and what not, you will get just as much as you can get.

Q. Well, how much could you get? A. Get some, maybe; but you would have to keep massaging.

Q. How long would she have to go through the massage and manipulation before the reduction would be completed? A. Well, I don't know as I can tell you. She can have that treatment maybe for six months longer; whether she will get any improvement from it, I don't know. It's a little bit doubtful, it seems to me.

Cross examination by Mr. Broadhurst:

Q. As I understand it, the last two pictures which you took in November showed a firm bony union had resulted in both bones where the fracture had taken place? A. It did, yes.

Q. And then it's your opinion, so far as weight-bearing is concerned, the bones are as strong as they had been before? A. Well, I think they are strong enough.

Q. As a matter of fact, Doctor, it's known in medical science that when natures put out callous at the sight of fracture the bone is stronger at the sight of formation than elsewhere? A. That's true but every case is different. That may apply in this case but I would not want to go on record that it did or didn't.

Q. And do I take it, Doctor, from looking at these last plates which you took in November whether there was in fact any shortening of the leg? A. Yes, you will have to consider it a trifle more shortened.

Q. The amount of shortening was small, I take it then, from the way you express it? A. To tell the truth I haven't measured these legs, but maybe possibly a half an inch.

Q. Now, that fracture, that shortening is accomodated by the dilating of the pelvis to accommodate that? A. Up to a certain point people don't limp very much, but they do limp.

Q. Well, of course they limp after a fracture, its the natural thing for them after having had a leg broken? A. For awhile.

Q. In other words, until they get the results with that leg that they already had before it, isn't that the natural experience? A. That's the natural thing to do.

Q. This woman, being a very heavy woman—how much does she weigh? A. Now?

Q. No, at the time you treated her? A. I don't know.

Q. Would she weigh as much then as she does now? A. No.

Q. No idea of the difference in weight? A. I should think she would be over thirty pounds anyhow, maybe more.

Q. And of course I suppose that's from being inactive and what not? A. I suppose so.

Q. She is the type of individual that's inclined to become weighty from inactivity? A. I suppose so.

Q. Now, Doctor, she is flat footed, isn't she? A. Yes, sir.

Q. In both feet? A. Both feet.

Q. And in fact the left is more marked than the right? A. I would not say that.

Q. And would that flat footedness also affect her gait? A. Well, I don't see how anybody that is flat footed can walk as one who doesn't have flat feet would walk, either before or after she was hurt.

Q. That's what I mean; the flat footedness existed long prior to this accident? A. Well, I would naturally suppose so. Now, again, I don't know.

Q. You mean you never actually saw her? A. I attended her four months before that when she was confined.

Q. That's the only time you saw her? A. That's the only time I saw her and I did not observe her feet.

Q. Had she had any injuries of any consequence to her left that you treated? A. I took no special notice of any injury to the left foot.

Q. And so that the natural inference that she had no injury to her left foot or both feet in fact is, that she had the flat footedness long prior to the accident; isn't that a fair assumption? A. It's a fair assumption if you want to assume, I don't know.

Q. But it is a fact that flat footedness would impair her gait? If she had flat feet prior to this injury, I mean, it would impair the gait? I mean without any injury? A. That's what I say.

Q. I asked you before when we were looking at the plates whether those plates taken in August and November, at least after callous formation had started, whether they showed good apposition and alignment, and so we will understand, the apposition refers to the bone being in proper position? A. Yes.

Q. In other words, I take it the object of the setting of a fracture after you looked at these first plates of June 4th and 10th which showed the fragments away from each other, the purpose of the operation is to bring the two fragments back into line; is that right? A. Yes.

Q. Then when you get them back in line, that's called good apposition or good alignment, if you get them in good line, with good apposition?

The Court: He means opposite each other.

The Witness: Yes.

Q. And so that the latter plate showed as the result of your operation made had been successful in getting the parts which had formerly been drawn away from each other back, as you express it, in good apposition and fair apposition? A. Yes, now, that's not an accurate statement. If you have a nice, clean, simple fracture, you hope to get in perfect apposition and position all the respective parts in alignment; in other words a perfect job; but with a fracture like this its almost hopeless, it seems to me, to except that much.

Q. I understand, I am not criticising you at all. A. We got, I will say, considering the things, a

good, fair apposition with regard to this leg. It's not perfect apposition with relation to the leg but of course you can see the fragments are not completely reduced.

Q. Considering the type of fracture you had, you got a good result, didn't you? A. I should think so.

Mr. Broadhurst: That is all.

Redirect examination by Mr. Day:

Q. Doctor, if a woman should fall two stories and land on her feet, would that have a tendency to break down the arches?

Mr. Broadhurst: I object, there is no proof here this woman fell two stories and landed on her feet.

Mr. Day: I will put it this way.

Q. If it develops that Mrs. Bolitho fell two stories and did land on her feet, would that have broken down her arches? A. Well, there again—she is a heavy person—

The Court: You can't answer that question?

Q. You don't know whether she had flat feet before the accident or not? A. No, I can't say she did.

The Court: In any event, flat feet is always due to traumatic origin?

The Witness: The average cases of flat feet are acquired possibly by standing.

The Court: And a person of heavy weight.

(No answer.)

The Court: Did you have a bill, Doctor; what was your bill?

The Witness: I think it was three hundred and fifty dollars.

The Court: That is a reasonable charge?

The Witness: I don't know, I charged a hundred or a hundred and fifty dollars for the operation and then I charged her for one call.

Q. That's your bill?

The Court: That's a reasonable and customary charge?

The Witness: Yes, I will get this if you want, three hundred and fifty dollars.

Mr. Broadhurst: I don't dispute that is reasonable, no objection to it going in.

The Court: It will be admitted.

(Marked Exhibit P-14.)

Mr. Day: That is all.

(Witness Excused.)

MILDRED E. BOLITHO, sworn on her own behalf as a plaintiff, testifies as follows:

Direct examination by Mr. Day:

Mr. Day: Mr. Broadhurst says he will consent that the Memorial Hospital bill go in, three hundred and eighty-one dollars.

The Court: All right.

Q. Mrs. Bolitho, on June 3rd last where did you live? A. 48 Speedwell Avenue, Morristown.

Q. How long had you been living there? A. It would have been a year the next month.

Q. From whom did you rent the premises? A. From Max Mintz.

Q. Will you describe that building? A. Well,

on the ground floor there's stores and it's three floors high.

Q. What was on the second floor? A. Second floor apartments.

Q. How many? A. Two apartments on the second floor and two on the third floor.

Q. Was there any porch in the rear of the building? A. Yes.

Q. Tell the Court and jury where these porches were? A. Well, in the back there was a flight of stairs going up to the first apartment house and a porch ran all the way across from—the two families used the same porch only it was divided in the middle with the stairs.

Q. What about the third floor? A. Both the same.

Q. The second and third were the same? A. Yes.

Q. Can you tell the Court how the rear of the roof on the main building was supported? A. Was supported by corner posts that we had to hang our clothes on; we ran our clothesline from.

Q. How many posts were there? A. Four posts.

Q. Going down to where? A. From one side of the porch, there's four porches, one on each corner and two in between.

Q. Were these porches used by each of the tenants?

Mr. Broadhurst: I object to that as being leading.

Q. Who used the porches? A. The four families of the house.

Q. There wasn't any railing dividing any—

Mr. Broadhurst: Objected to as leading.

Q. Was there any railing dividing the porches? A. No, there was not.

Q. Will you tell the jury what you were doing on June 3rd? A. Well, on June 3rd, I was going to go away on Monday and I had two little children, one baby was four months old and the other was a year and a half and in order to go away I had to wash out a few clothes to take them with me and I got my husband off to work and I did my washing after he had gone to work, about half-past ten and I had washed out a few pieces and I just got my little girl to sleep, then she was a year and a half old and I laid her on the bed and then I went and got the clothes and I left the door open and was in the other room, and then I came out on the porch and started to hang up my clothes, started to hang my clothes out. I got the line not quite half full and was hanging up another piece of clothes and had one clothespin in my right hand and pulled the clothesline out a bit and all at once the post and clothes and clothesline and all just pulled away.

Q. What happened to you? A. I fell to the ground.

Q. Were you conscious when you hit the ground? A. I was not conscious when I hit the ground.

Q. What do you remember next? A. I remember when two bakers from the Waldorf Bakeshop came to pick me up. I just came to as they came up to help pick me up.

Q. Where did they take you? A. They held me there and another person came down, another neighbor came down and she helped hold me till the doctor came across the street and then about ten minutes the ambulance came up and took me to the hospital.

Q. While you were in the hospital, did you experience any pain anywheres? A. My leg hurt me terribly every time from the time I hit the ground until they picked me up, it hurt something awful.

Q. Were there any other painful parts of your body? A. That was the only part that pained me just then.

Q. Who took care of you the first night? A. Dr. , then Dr. Sherman came later. He came Monday.

Q. How long were you in the hospital? A. Eleven weeks.

Q. During that time were you comfortable or in pain; just tell the jury how you suffered while in the hospital? A. Well, the whole left side was bruised so it was just black, and the other two patients in the room when they made the bed—

Mr. Broadhurst: Objected to.

A. (Continued.) It was just black and blue and they were there two weeks, at least one week, and I couldn't even turn over or move the least bit without the nurses turned me over. I had to have three nurses to turn me over all the time for a week.

Q. After that? A. Then gradually the pain went away from my hips and my left leg.

Q. When did the pain cease, Mrs. Bolitho, that is, while you were lying in bed? A. Oh, I should say I was there about three weeks, between three and four weeks, when I didn't have any more pain in my leg and my chest.

Q. After you left the hospital, where did you go? A. I went to my home.

Q. Were you able to do any work? A. I was not.

Q. Why not? A. I couldn't walk.

Q. How long were you laid up at that time before you could walk? A. Well, about a month before I could walk a distance to get around the house in.

Q. Well, after you commenced to walk, did you have any difficulty or not? A. Yes, I had to use a crutch.

Q. How long did you use a crutch? A. About five weeks.

Q. Then, after that, tell the jury how your leg progressed? A. When Dr. Sherman says I could get used to walking, I tried to walk on my right leg but it hurt so terribly I would have to have a chair or something I could put both hands on to get around the house.

Q. Anything happen to your ankle when you started to walk? A. No, it did not, except it bent in.

Q. Are you able to walk at the present time? A. I can walk, but never walk without it hurting me.

Q. Does it still hurt you? A. Yes, it does.

Q. Now, prior to the accident, do you know whether you had flat feet or not?

Mr. Broadhurst: Objected to, it undoubtedly calls for a conclusion, a medical conclusion.

Q. Did you have flat feet? A. No, I did not.

Mr. Broadhurst: Objected to as a medical conclusion and I ask the answer be stricken out.

The Court: Well, it may or may not be. (To witness) Was there anything the mat-

ter with your feet before the accident that you know of?

The Witness: No, sir, I never had anything the matter with my feet.

The Court: So far as you know?

The Witness: Yes.

Q. Before the accident, did you do much walking? A. Yes, I did.

Q. In what way? A. Most the time, spring and fall, when the weather would be just about like now or in the fall I would walk miles at a time and I always went with my husband when he would go up hunting.

Q. How many miles would you walk a day with him? A. That would depend on how long we would be out; sometimes we would be out a half a day and we would be away sometimes a day.

Q. Did you have any difficulty with your feet at that time? A. No.

Q. When was the last time you went hunting with your husband? A. Last year.

Q. 1928 or the year before,— A. 1927, I think it was.

Q. How many children have you?

Mr. Broadhurst: Objected to as immaterial.

The Court: It is immaterial. I heard her say two, but it is immaterial.

Q. What became of your children while you were in the hospital? A. They had to be boarded out.

Q. Who did that?

The Court: That is material?

Mr. Day: Yes.

The Court: How many children have you?

The Witness: Two of my own and two stepchildren.

Q. How old are your children?

Mr. Broadhurst: I don't think that is the proper measure of damage, board bills for the children.

The Court: I will consider that.

Q. How old are your children? A. The baby was a year old the 11th of February and the oldest one of my own will be three in October.

Q. How about the other children? A. The girl, she is the next one of my stepchildren, she is nine and the boy is ten.

Q. Now, Mrs. Bolitho, going back to the time you rented the premises; did you say anything to Max Mintz about the clothesline at all at the time you took the premises? A. Well, my husband had gone up—

The Court: Did you talk to Mr. Mintz?

The Witness: I didn't talk to Mr. Mintz.

Mr. Day: Cross examine.

Cross examination by Mr. Broadhurst:

Q. Mrs. Bolitho, I have here a few photographs which I would like marked for identification in order to question about the premises.

(Photographs marked D-1, D-2 and D-3 for Identification.)

Q. I show you photograph D-1 for Identification and ask you if that shows the rear of the building in which you were residing at the time the accident happened? A. Yes, it does.

Q. And I also show you another one, marked D-3 for Identification, and ask you if that also shows the rear of the building up to the bottom of the second floor in which you resided at the time the accident happened? A. Yes, it does.

Q. Now, the apartment which you had there contains how many rooms? A. Five rooms.

Q. And you say on the third floor where you lived there was another tenant living there? A. Across the hall.

Q. So that there were two tenants on the top floor and two on the floor below? A. Yes.

Q. And the floor below that was occupied by stores? A. Stores.

Q. Which side of the top floor did you live? A. On the left-hand side as you went right in between the Palace Theatre and the building, the right-hand side.

Q. Let's take it in the position as you went up the flight of stairs in the front to go in your apartment, that would be on the left or right? A. Left-hand side.

Q. And the entrance to this building was on Speedwell Avenue? A. Yes.

Q. The pictures which I show you show the rear of the building? A. Yes.

Q. And that's the rear of the building and there's a big yard? A. Yes, there's a yard there.

Q. Now, in the front of the building from Speedwell Avenue there's an entrance, is there not, up to your apartment? A. Yes.

Q. How many flights of stairs do you have to go up to get to your apartment in front? A. Two.

Q. That entrance was located where, in the center of the stores, that was on the bottom floor

of the building? A. Right in between the two stores.

Q. Now, you say that your family moved in there about a year before this accident happened? A. Well, I can't remember just when. It was in the fall we moved there.

Q. Some time in the fall of 1927? A. Yes.

Q. And the accident happened June, 1928? A. Yes.

Q. So you had been living there seven or eight months anyway? A. About that.

Q. And who rented the place from Mr. Mintz, you or your husband? A. My husband did.

Q. Now, I show you another picture marked D-2 for Identification and ask you if that shows the top floor of this porch? A. This is the stairs coming up to the top floor.

Q. You will notice a broken rail there? A. Yes, it does.

Q. And now this porch on the rear on the bottom floor, as shown in D-3 for Identification, as it went up from the yard, it went up a flight of stairs which went to the first floor of the porch directly facing the back of the house? A. Yes.

Q. In other words, when a person walked up from the yard up this first flight of stairs, they would be directly facing the back of the house? A. Yes.

Q. And then to get from the first floor of the porch or porch of the first floor to the floor that you lived on, they would turn to their left and walk up a flight of stairs; that right? A. Yes, sir.

Q. And when they got to the top of that then, they would turn to their left and then they would

be in front of where Mrs. Zanders was living at that time? A. Yes.

Q. And she was the other tenant on the top floor with you? A. Yes.

Q. Then after getting on the top of that flight of stairs to the porch at the top of the house to get in where you lived, they would have to turn around to their right and walk around to the back of that porch to your entrance? A. Yes.

Q. Now, sometime prior to your accident happening, there was a gate or something built on that top porch, was there not? A. Not that I remember.

Q. Wasn't there a gate that had been built so that when you came up the flight of stairs you could not walk on the part of the porch which was in back of Mrs. Zanders? A. Not when I lived there.

Q. When you moved there and before the accident happened, wasn't there a wooden gate there so the children couldn't fall or go down over the stairs, Mrs. Zanders' children? A. Not when I was there.

Q. You mean no time from the time you went there up to the time the accident happened? A. There was a gate there; it was one we brought with us. It was our own gate.

Q. And who put that up, do you know, you or your husband or Mrs. Zanders or somebody in the house? A. I don't know who put it up but I think the first one who put it up was my sister-in-law.

Q. Your sister-in-law lived in the same place you were living before you lived there? A. No, she lived in Mrs. Zanders' apartment before Mrs. Zanders lived there. She was there while we lived there.

Q. Then your sister-in-law moved out of the Zanders' apartment after you moved in? A. Yes, about a month after.

Q. And you say you think it was your sister-in-law that put that gate across the porch at the head of the stairs? A. Yes, I know it was now when I think about it.

Q. And did your sister-in-law have children, too? A. No, she did not.

Q. Do you know why she put that gate across the top of the porch? A. Yes, because there were dogs downstairs that used to come up on the porch.

Q. Did that gate separate your side of the porch from her side of the porch? A. No, it did not separate the two sides of the porch, but when you came up the stairs you couldn't get on the porch until you opened the gate, then you could walk on the porch.

Q. In other words, the gate was at the head of the stairs? A. Yes.

Q. Now, this post that gave way or fell at the time the accident happened was a post which went from the floor of your porch to the top of the roof there? A. Yes.

Q. As shown in Exhibit D-1 for Identification. And that would be the post on the—do you know according to the points of the compass which side of the house that would be? A. I think it would be the south.

Q. How did the house face? A. West, the back of it faces west.

Q. And that was then the post that was on the south corner of the house? A. Yes.

Q. This really is the only post on the corner of that house anyway? A. Yes.

Q. And it ran from the floor up to the roof? A. Yes, it did.

Q. And along at the bottom of this picture, D-1 for Identification, you observe what appears to be a banister or railing with a lot of upright posts in it? A. Yes.

Q. And was the porch enclosed with such a banister or railing? A. The railing went from the first post in the middle over to the corner post.

Q. Over to the corner post which is missing? A. Yes.

Q. When after you moved in the place in the fall of 1927 did you begin to use the clothesline attached from that post? A. We used it the first week we was there.

Q. And when you moved in was the clothesline then up or not? A. The clothesline was not up.

Q. What was there, the pole or just the hook, or what? A. No, the hook was up on the pole.

Q. That is a screw hook in the post? A. Yes.

Q. And who put up the clothesline, your husband? A. My husband.

Q. And that was attached to the telegraph pole or telephone pole in the back of the yard? A. Yes.

Q. Now, how frequently did you use the line to wash and hang out your clothes during that period from October to June? A. Well, before the baby was born I used it less days a week and after the baby was born I used it every day.

Q. And so that you used it—when was the baby born, by the way? A. February 11th.

Q. You used it from February 11th up to June 4th every day and prior to that a couple of times a week? A. Yes.

Q. And did you do your washing all the time dur-

ing that period at night or did you sometimes wash during the day? A. Well, most of the time I did it at night when my husband was working. When he was going on the night job or working from three in the afternoon until eleven at night.

Q. Sometime prior to this accident, you or your husband or both had a woodshed down in the yard, did you not? A. Yes, we did.

Q. With various things in it that belonged to you? A. Yes.

Q. And that woodshed was torn down, was it not, prior to the accident? A. Yes, it was.

Q. And did you then store some of the things which had been in the shed up on your porch? A. Well, there was a few things in from the woodshed.

Q. I mean particularly things that came up from the woodshed, the needs of the day? A. A few little things there, flower pots, and because we got our groceries in wooden boxes, and put the pots on.

Q. I have picture D-2 taken shortly after the accident and ask whether or not that barrel and flower pots in there belonged to you? A. Yes, they do.

Q. And I notice some automobile parts, and automobile jacks and some tools; did they belong to you, too? A. I believe they did.

Q. In the foreground of this picture is a wooden structure which looks like a gate; is that the gate that had been across the front— A. No, it is not.

Q. Is that another gate? A. Yes.

Q. Did that belong to you? A. I am not sure of that gate; ours was a wire gate.

Q. Now, in on the porch itself I observe you have a couple of baskets with some carpet on it—

A. No, I had no carpet on the floor. There's a couple of baskets out there by the rail, I think that's what the dogs used to sleep on.

Q. Your dogs? A. We had two bird dogs.

Q. Where did you keep them? A. Most of the time we kept them down in the woodshed until it was torn down.

Q. Then you took them upstairs? A. Yes.

Q. How did you keep them dogs enclosed? A. We didn't keep them enclosed.

Q. I see, but I mean did you tie them or not? A. Sometimes we tied them and sometimes they ran loose.

Q. Would they go down around the yard if the door wasn't closed? A. No, sometimes they were in the house.

Q. Now, there wasn't any flight of stairs that went from your floor of the porch up to the roof of your back porch? A. No, sir.

Q. In other words, when you got to your porch that was as high as you could go? A. Yes.

Q. And was there any place you could go except into your apartment on your side of the porch? A. No, that was all.

Q. In other words, these doors and windows shown in picture D-1 for Identification led into your apartment? A. Yes.

Q. No entrance to any hall or anything of that kind there? A. No.

Q. Had to go through your apartment to get to the hall? A. Yes.

Q. Now, I take it that in the course of your work you went out on the porch from time to time during the day for various purposes, to take care of the dogs or put something out, your work or something or one thing or another? A. Yes, sir.

Q. And in the various times you went out to use the line on your porch for any purpose, did you ever observe anything wrong with the post or with the banister or with the slat which fell? A. No, I did not.

Q. You at no time, as I understand you, have made any complaint to Mr. Mintz about this post which fell or banister which fell not being in repair? A. No, we did not.

The Court: Did you ever notice it?
The Witness: We did not notice it.
The Court: Saw nothing about it?
The Witness: No.
The Court: To attract your attention?
The Witness: No, sir.
The Court: Did you know that was rotten at the bottom?
The Witness: No.

Q. Was there anything that you could see that showed it was rotten? A. No, sir.

The Court: How much did you weigh at the time?
The Witness: The last time I was weighed was two weeks before the accident and I weighed a hundred and eighty-six pounds.

Q. What do you weigh now? A. Two hundred forty-two and a half.

Q. Now, getting down to the night that this accident happened, you say that you had about a half a line of clothes hung out? A. Not quite a half a line.

Q. And what was the character of the clothes you had hung out, baby clothes? A. Mostly baby clothes.

Q. And you say you reached out with your right hand to put a clothespin in the line? A. No, I always hung two pieces of clothes with one clothespin in the two pieces and I put one clothespin in and put up another piece of clothes and then put that pin in the two pieces and I put the clothespin in and was just pulling the line out when I fell.

Q. Now, you were pulling the line out with your right hand? A. Yes.

Q. This line would be on your left? A. Yes.

Q. And did you hold the garments you were going to pin with the right? A. Yes.

Q. That was left-handed? A. Yes.

Q. And you reached back with your right to pull the line out to that pin? A. Yes.

Q. And at that time you were going to grab a lot of clothes with the left hand and put the pins in with the other, the right? A. Yes.

Q. And it was while you were in the act of pulling on that with your right hand that you fell? A. Yes.

Q. Now, were you leaning against the railing at that time? A. No, I was not.

Q. Were you leaning over the railing at that time? A. No, sir.

Q. Do you know what gave way first? A. The post that the clothesline was on gave way first.

The Court: That is the upright?
The Witness: Yes.

Q. The upright post which the line was fastened to? A. Yes.

The Court: Where did that give way?
The Witness: The whole top.
The Court: Top or bottom?
The Witness: The top gave way first.

The Court: It fell out?
The Witness: Yes.

Q. That is, the top of the post which would be fastened up at the roof of the porch pulled out first? A. Yes.

The Court: How high was the clothesline, how near the top of the post?
The Witness: I think it was almost to the middle of it; maybe not quite the middle.

Q. How high would that be from—comparing it with yourself—be to your shoulder? A. Just say —just right here (indicating).

Q. How tall are you, about? A. I think I am five foot seven.

Q. Now, did you still have hold of the line when the post gave way? A. No, I did not. As soon as I saw it was giving way I tried to save myself on the porch.

Q. What did you do to save yourself, lean back? A. I tried to lean back and everything just pulled me.

Q. Did you have hold of everything? A. No, I let go of the clothesline when I saw the post was starting to go, but I was overbalanced.

Q. Then you must have been leaning on it before when you were moving the line? A. No, I was not leaning on it. You do not have to lean on it to reach it.

Q. Do you recollect as you put the clothes on that you leaned over when you pulled them out? A. No, I stood right up straight and reached the line almost to the left shoulder.

The Court: Stand up and show how you did it.
(Witness illustrates.)

The Witness: If the post was here, and the clothes there, then I stood by the clothes line which was just here on me and had a clothes pin in here and went to pull the line out like this and had hold of this piece, the other end of the clothes to put them on the line and just went to put it on the line when the post gave way.

Q. Now, standing in that position when this post gave way, what was it that caused you to come with it if you did not have hold of it or were not leaning on it? A. I don't know because I fainted on the way down and don't remember when I touched the ground.

Q. Do you remember landing on the ground? A. No, I don't.

Q. You don't know how you landed on the ground? A. No.

Q. When you first remember anything, you were sitting down on the ground or lying down there, or what? A. My back was against something on the ground, right across my back and my back here and I just let one groan when I came to and couldn't say anymore.

Q. Were you sitting or lying flat or how? A. No, I was half sitting up and half laying down, my two hands went back of me and kept me from falling over.

The Court: How far did you fall, about?

The Witness: I don't know just exactly how far it was.

Q. What was your weight, Mrs. Bolitho, prior to or the year prior to your baby being born; how much did you weigh then? A. Around a hundred and sixty-five.

Q. So you have been gaining in weight right along ever since? A. Well, never went over a hundred and eighty-six.

Mr. Broadhurst: That is all.

The Court: We will adjourn at this time until tomorrow morning at ten o'clock.

Morristown, N. J., April 9th, 1929.

(TRIAL RESUMED.)

MILDRED E. BOLITHO, recalled:

Redirect examination by Mr. Day:

Q. Mrs. Bolitho, on the night of the accident what kind of shoes were you wearing? A. I was wearing patent leather pumps with military heels.

Q. Did you find these shoes after the accident? A. My husband found the shoes with no heels. We found one heel but not the other heel, they looked all over for it but couldn't find it.

Q. Are these the shoes? A. Yes.

Q. I show you that with a heel? A. That was a heel that was found on the ground after I had gone to the hospital and my husband had it put on by the shoemaker on Speedwell Avenue.

Q. Were you able to find the heel for the right-hand shoe? A. No, sir.

Q. Had you been wearing these shoes prior to the accident? A. Yes, sir.

Q. How long? A. I only had them two weeks.

Q. Did you have any trouble walking with them? A. No, sir.

Q. Did you ever have any trouble walking with military heels? A. No, that was the only kind I had had.

Mr. Day: I offer them in evidence.

Mr. Broadhurst: I don't see how they are material.

Mr. Day: For the purpose of showing the jury; to say whether she had flat feet prior to the accident because of the military heels.

Mr. Broadhurst: Then I do object. There is no testimony to show she had flat feet, due usually to trauma.

Mr. Day: The testimony is she did not have flat feet before.

The Court: Unless I have evidence of it; you have got to call an expert now.

Mr. Day: All right, sir.

The Court: You haven't got it.

Mr. Day: The expert is gone, so I will stop right then and there.

Q. Now, Mrs. Bolitho, there was some question asked you about the gate, were there one gate or two gates on that porch? A. Two gates.

Q. What kind? A. One was a wire gate and the other was a board like a door.

Q. Where was the wire gate? A. At the head of the stairs.

Q. I show you this picture, D-2 for Identification, and ask you to point to the jury where that wire gate was?

Mr. Broadhurst: Suppose she marks it.

A. The wire gate was right here at the top of the stairs.

Mr. Broadhurst: Just mark "W" for wire.

A. (Continued.) And it ran over to here. (Indicating.)

Q. Who put that gate there? A. As far as I

know the lady that lived across the hall from me, Mrs. Zanders, put the wire gate up.

Q. Was that another gate there? A. Not there. There was a board like that. (Indicating.)

Mr. Broadhurst: Mark that "B" for board.

Q. Who put that there? A. Why, I think, I believe she put up the board, on Mrs. Zanders' side to keep our dogs from going over on their porch.

Q. Now, there is shown on this picture, D-2 for Identification, a lot of stuff on the porch. Where did that come from? A. That came from our woodshed that was torn down.

Q. Who put it there? A. Mr. Mintz had a man employed moving—

Mr. Broadhurst: I object to any testimony as to what some man may have done that was associated or employed by Mr. Mintz.

The Court: She may state who did it.

The Witness: Jack Cary.

Q. Who did he work for? A. Max Mintz.

Mr. Broadhurst: Object to that as being a conclusion.

Q. How do you know he worked for Max Mintz?

The Court: Who is he?

The Witness: He's a brother of the lady that lived across the hall from us.

The Court: You say he worked for Max Mintz?

The Witness: Yes.

The Court: How do you know that?

The Witness: I know Mr. Mintz paid him.

The Court: How do you know that?

The Witness: I saw him give him money and I heard him tell him.

The Court: And was he working immediately after you heard him tell him?

The Witness: Yes, and Mr. Mintz was there telling him what to do at the time.

Mr. Broadhurst: I ask for an exception.

The Court: Exception allowed.

Q. What did Mr. Mintz tell him to do? A. Why, Mr. Mintz told him to carry his tools—

The Court: You heard him do that?

The Witness: Yes,—in the rear of the car and put them on our back porch.

Recross examination by Mr. Broadhurst:

Q. These things that were carried up on to your porch were from the shed that you had formerly in the yard? A. Yes, sir.

Q. And that shed was torn down? A. Yes.

Q. And the things that were in the shed contained the automobile parts, and various things and wood? A. Yes.

Q. And you say they were carried up on your porch by Mr. Jack Cary and put on your porch as shown in this picture, D-2 for Identification? A. By Jack Cary, yes.

Q. And Jack Cary was a boarder or relation of Mrs. Mintz? A. No, he was a brother of the lady across the hall.

Q. Mrs. Zanders? A. Yes.

Q. I misspoke when I said Mrs. Mintz. A brother of Mrs. Zanders who lived on the top floor alongside of you? A. Yes, sir.

Q. And how long prior to your accident was it that these things were carried upstairs and put

on this porch? A. Why, I don't know just how long it was.

Q. Well, about how long? Would you say a month or was it before or two months? A. I don't remember just when they tore the woodshed down.

Q. Can't you give me some idea of how long they were on the porch before the accident happened? A. I don't remember whether it was just about a month or not.

Q. And did that include all the things which are up on this porch now or just some of the things? A. Well, they carried it all up at first—

Q. Who is "they"? A. Mr. Cary, and my little boy carried the wood up.

Q. That is, your boy and Mr. Cary carried up the stuff from the shed? A. Yes, and the boy carried all the wood in the back room.

Q. Did you help carry it up? A. I didn't carry it upstairs. I carried it from the back porch to the back room.

Q. How about all the other things on this porch, the flower pots and baskets and screening; did they come up from the shed? A. Yes, all the screens came from the shed.

Q. How about the boards with the flower pots? A. The board—my husband brought that up and put it there for the flower pots.

Q. And how about these inner tubes? A. They all came from the shed.

Q. How about these baskets with the carpet on? A. Well, that carpet and baskets all came from the woodshed. The carpet was the dogs' bed in the woodshed.

Q. And how many dogs did you have? A. Two little bird dog puppies.

Q. You kept them all there too? A. Until we sold them.

Q. Did you have tnem at the time of the accident? A. No, sir.

Q. How long was it before the accident you sold them? A. As soon as we could get rid of them; possibly a week or a week and a half after the woodshed was taken down.

Q. Didn't you tell me yesterday one of these gates had been built by your brother-in-law or sister-in-law? A. I think my sister-in-law had put it up, but it was the lady across the hall.

Q. Since yesterday you remember it was the lady across the hall? A. I remember, but I can't remember who put it up, I remember the gate.

Q. This one marked "W" was a wire gate that went across the head of the stairway there? A. Yes.

Q. In other words, it shut the stairway off from the porch? A. From the stairs to Mrs. Zanders' porch.

Q. In other words, it blocked the stairway; ran all across the top, across her side? A. Yes.

Q. And the other gate you refer to as wood you have marked as "B" shown on the bottom of the picture; where did that go across from the banister to the wall? A. From here over to this banister (indicating).

Q. I notice that there's a pipe that runs out from the floor of the porch to the roof. On which side of that pipe was that board fence; was it on your side of the porch? A. No, it was on Mr. Zanders' side of the porch.

Q. And both the gates at the head of the stairs; in other words, it was back in here somewhere? A. Yes, about half way between.

Q. About half way between the post and the middle of this wooden rail? A. Yes.

Q. That is the railing that protected the side of the porch from the stairway? A. Yes.

Q. Would you mind marking with an "X" that part just about where that rail of that porch went across? A. Well, I don't know exactly. The door was fastened—say half way,—

Q. Is that the rail you refer to? A. Yes.

Q. Will you mark the rail "R" so we will identify it. In other words, tnat "B" went across about half the distance of this rail "R"? A. Yes, went right straight across from that pipe.

Q. Ran between the side of the building and the rail, is that right? A. Yes.

Q. And you say that kept the dogs that you kept on your porch from going over to the Zanders porch? A. Yes.

Mr. Broadhurst: That is all.

(Witness excused.)

WILLIAM HENRY BOLITHO, sworn on his own behalf as a plaintiff, testifies as follows:

Direct examination by Mr. Day:

Q. Mr. Bolitho, are you the husband of Mildred Bolitho and a plaintiff in this case? A. I am.

Q. When did you go to live at 48 Speedwell Avenue, if you remember? A. I think it was in October, 1927.

Q. Who did you rent that from? A. Mr. Mintz.

Q. Were you home the night of the accident? A. No, I was not.

Q. Where were you? A. I was at the Martens-Partes Paper Mill, where I am employed.

Q. Where did you see your wife first after the accident? A. At Memorial Hospital.

Q. When did you go to the scene of the accident? A. After seeing my wife; immediately after seeing my wife; that same night.

Q. When you got there, what did you find? A. Well, I found the post which supported the roof over the back porch on the ground with the rail and clothes line and some articles of clothing on the ground.

Q. Do you know where the post is that fell? A. Yes, sir.

Q. What did you do with that post? A. I left it lay.

Q. Until when? A. Until the following morning.

Q. Then what did you do with it? A. I followed your advice by picking it up and putting it away.

Q. Has it been in your possession ever since? A. In my possession ever since.

Q. Did you pick up anything else? A. Yes.

Q. What? A. Some of the slats of the railing or supports of the railing and the end of the railing which you asked for.

Q. Where is the post now? A. It is right here.

Q. Come around here. Is this the post? A. That is the post.

Q. Can you tell the jury how it was fastened up? A. Yes, sir.

Q. Where was the top and where was the bottom? A. There is the top.

Q. And this was the bottom? A. Yes.

Q. What post is that; where was that post located? A. That post was located on the left-hand side of the porch right in the corner as you are facing with your back toward the rear of Mr.

Mintz's building, facing toward the rear of the Palace Theatre.

Mr. Day: I offer this in evidence.

Mr. Broadhurst: No objection.

(Marked Exhibit P-16.)

Q. What are these; have you seen these before? A. Yes, they are the supports between the railing and one of them, that is the post there as part of the railing.

Mr. Broadhurst: Suppose you mark it.

(Marked Exhibit P-17.)

The Witness: This piece is a piece that Judge Day asked for of the railing.

Q. Is that the top or bottom piece? A. As to that I can't say, I don't know because the railing was on the ground. The whole thing was on the ground and I do not know whether it was the top or bottom.

Q. And this was fastened where? A. Fastened to the railing that had been attached to this post.

(The piece of wood is marked Exhibit P-18.)

Q. Do you know what this is, P-18? A. Now, as to what part of the railing that came from, I do not know.

Q. Is that the bottom, do you think? A. It appears as though it is. As a matter of fact, I remember when I picked it up now I took the railing and took this little post out from it.

Q. I show you D-1 for Identification and ask if you can tell where that was attached to the railing?

Mr. Broadhurst: What are you talking about now?

Mr. Day: P-18.

A. No, sir, I can't tell which one of these was attached because I took off two ends.

Q. It was attached, however, to the railing there? A. Yes.

Mr. Broadhurst: The railing lying on the ground?

The Witness: Yes, the one which shows in the picture.

Mr. Broadhurst: D-1.

Mr. Day: These I offer as one Exhibit.

Mr. Broadhurst: We don't know the technical name.

Juror No. 12. They call them spindles.

Q. When you rented the apartment from Max Mintz, did you have any conversation with him? A. Well, we did in regard to the repairing of the inside of the house.

Q. Did you have any conversation with him as to where clotheslines should go? A. Yes, I did.

Q. What was your conversation? A. I wanted to know where the clothesline was to be put.

Q. What did he tell you? A. He told me that in the rear of the building that there was an electric light pole there that all the families in the house were using it and we should put ours up there too.

Q. Was there any hook on the post at the time you took the premises? A. There was.

Q. Is that the hook attached to P-17? A. That's the hook on the post at the time we came there.

Q. How was the clothesline fastened to that post? A. On a pulley.

Q. I show you this pulley and ask you where you got that from? A. That is the pulley which we attached for the clothesline on this post.

Q. I hand you some clothesline, what is that? A. That is part of the clothesline which was on this pole.

Mr. Day: I offer it in evidence.

Mr. Broadhurst: No objection, but really they are getting a lot of exhibits in, so far as the clothesline and pole are concerned they are really not material to the issue.

The Court: I will allow them in under the circumstances.

(Pulley marked Exhibit P-19 and clothesline marked Exhibit P-20.)

Q. How many children are there in your family? A. There are four children in the family.

Q. After the accident, what became of the children? A. They were all taken away before I got there.

Q. Where were they? A. Why, my sister-in-law, she had been sent for the night of the accident and had two of them and an aunt of mine had the other two.

Q. How long were they with your aunt? A. Two of them remained with her for five weeks.

Q. Who was your aunt? A. Mrs. Anna Masker.

Q. Why did they have to be there five weeks, Mr. Bolitho? A. There was nobody in the house to take care of them or look after things.

Q. How old were these children? A. One is ten and the other nine.

Q. Did you work in the daytime or night-time A. I was working at the night-time the night of the accident, from eleven to seven; but I had gone in

early, as I generally did. One engineer generally went in Sunday nights when the mill was down to let the other man get off early because there was nothing to do really outside of a little repairing until half past three or four o'clock in the morning.

Q. You say two of the children were with Mrs. Anna Masker for five weeks. What became of the other children? A. My sister-in-law took the other two down to her house the following day. Mrs. Cornine took the other one. The other one remained with my sister-in-law.

Q. Who was your sister-in-law? A. Mrs. Carrie Dixon.

Q. How long was Bobbie with her? A. I do not remember just how many weeks. It seems to me that it was five weeks.

Q. How old was Bobbie? A. He was a year the 11th of February.

Q. Is he the baby of the family? A. Yes.

Q. After the five weeks he was at Carrie Dixon's what became of Bobbie? A. Then Mrs. De Rosito in Whitmore Avenue took him.

Q. Do you know how long he was with her? A. Six weeks.

Q. Was Bobbie with Mrs. De Rosito after your wife came out of the hospital? A. I think it was a week or a half a week, something like that.

Q. Did Mrs. Langley have any of your children? A. She kept house for us after my wife came out of the hospital.

Q. How long was she there? A. Nine weeks.

Q. Was your wife in bed all the time she was there? A. No, she was not in bed all the time; just part of the time.

Q. What do you mean by that? A. There were times she would be up and then she would be com-

pelled to go back to bed again. She was not in bed permanently.

Q. You tell the Court and jury what condition you found your wife in when you went to the hospital the night of the accident? A. Well, I can't say the condition I found her in because I would not really know. She did not know me. She did not seem to have her senses.

Q. How long were you there that night? A. Possibly an hour.

Q. When did you see her next? A. The next morning.

Q. What condition did you find her in that time? A. Well, she seemed to know what she was talking about. She seemed to have regained her senses in a manner, so to speak. She looked—

The Court: I assume she talked to you?

The Witness: She did; very little.

The Court: You asked, how she was and she told you?

The Witness: Yes.

The Court: She answered you, would you say, coherently?

The Witness: Yes.

Q. What about pain and suffering?

Mr. Broadhurst: I am not disputing what the plaintiff herself and the doctor said as to pain and suffering. Unless Mr. Day feels it is essential to his case—

The Court: He knows better than to ask that question. Pain and suffering is subjective.

Q. After your wife came out of the hospital, was

she able to walk? A. Well, she was able to take a few steps at a time, yes.

Q. How long did that continue? A. With the aid of crutches.

Q. How long did that continue? A. That continued, I should judge, not knowing exactly, but apparently it must have been six or seven weeks.

Q. With the aid of crutches? A. Yes.

Q. After the six or seven weeks, what have you to say as to her ability to walk after taking the crutches away? A. Then she used one crutch. She had been using two, then she discarded one and tried to use the other by holding it in front of her.

Q. Was she able to navigate around? A. With the aid of the crutch, yes.

Q. How long did that continue? A. Now, as to that I do not remember, but it was not a great while.

Q. What have you got to say about her ability to walk now?

The Court: Can she walk now?

A. She can walk, yes.

The Court: Of course he expects you to say with difficulty.

The Witness: Naturally it shows she is walking with difficulty all right.

Q. What have you got to say about her ankle? Do you notice anything at all when she walks on her feet for a little while? A. Yes, after the tape and bandages which Dr. Taylor, the bone specialist, at the Memorial Hospital, were taken off her leg, her ankle will swell up to that size and lay out over the side of her shoe.

The Court: Have you seen it?

The Witness: Yes, I have, your Honor.

Q. Now, something has been said about—or intimated the fact that your wife is flatfooted. What have you to say as to her ability to walk prior to the accident? A. Well, she used to go on quite long trips with me hunting and fishing and picking berries and everything through the woods and sometimes we was out for a half a day at a time and traveled quite a number of miles and she was hunting with me.

Q. When was the last time she took a trip with you? A. The fall prior to the accident. She just walked so much through the woods, that is the fall before, we put up almost five hundred cans after we had gathered berries and things.

Q. Is Mrs. Bolitho able to take care of her household duties at the present time? A. No.

Q. Have you anybody to help you at the present time? A. No, those duties fall upon myself.

Q. In what way? A. I have to take care of the house and take care of the children to the best of my ability.

Q. Who takes care of the baby? A. She does when I am not there to the best of her ability. When I am there after I come home from work, it's up to me.

Q. Who is doing the washing? A. We have to send it out except the small articles of the two smaller babies that I have to wash them myself.

Mr. Day: Cross examine.

Cross examination by Mr. Broadhurst:

Q. Mr. Bolitho, this Mrs. Langley you refer to as being with you nine weeks, was that after your

wife came out of the hospital? A. After she came out of the hospital.

Q. In other words, she came out of the hospital in August? A. The 6th of August, yes.

Q. And then when she came out of the hospital you had Mrs. Langley for nine weeks? A. Yes.

Q. And at that time, during these nine weeks, were your children at home under Mrs. Langley's care or were they still with your sister-in-law and your aunt? A. No, they were home.

Q. In other words, while your wife was in the hospital with the exception of one, I think it was one week or was it two— A. She stayed a week later because our housekeeper had two babies of her own and she did not take care of them right at the start.

Q. The way it worked out then during the time your wife was in the hospital, the four children, two of them were with your sister-in-law or your aunt or this Mrs. De Rosito and when your wife came out of the hospital you got Mrs. Langley to work in your home and the children were brought back? A. Well, two of the children, the two older children were at my aunt's for five weeks and after that time I was compelled to bring them home and put up myself with the two older ones.

Q. Then after your wife came out of the hospital the two younger ones came home? A. They came home.

The Court: How old did you say they were?

The Witness: Nine and ten.

Q. When was it you moved from this apartment; from Mintz's apartment? A. I moved from

there straight down—I do not remember now for sure what month it was.

Q. Well, approximately? A. I went up there—

Q. Well, your wife came out of the hospital in August.

The Court: When did this accident happen?

The Witness: June 4th, 1927.

A. It must have been in August that we moved to the other house because that's where she moved right down to and I got it just before she came out.

Q. In other words, you were in your other place when she came out of the hospital? A. I didn't have everything straightened out.

Q. Had you moved early August just before she came out of the hospital? A. Yes.

Q. Now, on this D-1 for Identification, I want you to put an "X" for me at the place where this post was before it fell; that is, at the corner of the porch, so we will have that definite. I don't mean the exact spot where it was located, but an "X" indicating the corner. You can draw a straight line right down and then mark that line "X." A. (Witness marks.)

Q. That indicates the place where this post was? A. Yes.

Q. And the hook on this post was on the outside of the porch? A. On the outside of the porch facing toward the electric light pole.

Q. The back yard? A. The back yard.

Q. And there was a railing that went from this side of the building—now assuming—I am indicating the hook as on the outside. Will you kindly turn the post around. Assuming the back yard is

facing in that direction, the post would be the way it was on the porch and the railing was fastened to that side, the right-hand side there? A. One side of the railing, the long side, and the other part was fastened to this side here. (Indicating.)

Q. In other words, on the side opposite to which the hook is located there was a railing which ran from this post to the side of the building? A. To the side of the building, yes.

Q. That would be the other side? A. Yes.

Q. And then—as you describe it, the right of the post as you are facing it there, that went with the other post? A. Yes.

The Court: How high was that railing from the floor of the porch?

The Witness: About that high. (Indicating.)

Q. This black spot indicates where that railing fell? A. Yes.

The Court: Is the length of the piece complete there?

Q. Let's see, we will ask him. Was the height of the railing above the floor of the porch about this height or has the bottom of this post been taken off in any way? A. No, the bottom of the post has not been taken off. That's exactly the way it was.

Q. Now, the left side of this post as you are looking at it now, the side nearest the jury, that was on the outer corner of the building? A. Yes.

Q. Now, then at the bottom of this post on the right side of the hook, there's also a black mark with nails on it; was there a board fastened along there to the porch, somewhat in that style? A. There was.

Q. In other words, that board ran along the edge of the porch and constituted the thing on which these spindles were nailed? A. Yes, sir.

Q. Suppose I turn it over a second so that the jury will get the same view you are getting. Now, the outside of the post is looking toward you out in the back yard? A. Yes.

Q. And this view in the bottom her where that black spot is located— A. That's not the piece.

Q. You think it is the other piece? A. I think it is.

Q. Something like that? A. There was a moulding on the outside.

Q. There was a piece and showing the jury, whichever piece it was. Do you remember whether the moulding was on the outside or not? A. I do not know about that.

Q. You think this was the piece that I have in my hand, P-18, that was at the bottom? A. I can't say what piece came off the bottom. As a matter of fact, I can't say it was fastened to the piece at the bottom or in the other railing there.

Q. The piece which you produced shows the nails in there? A. Yes.

Q. And a black spot would indicate that a board was up against it? A. It would indicate that something had been up against it.

Q. Then you think this other piece which you have on the floor was up on the top and constituted the railing of the porch? A. That other piece was either the top or the bottom.

Q. You don't know which? A. I do not know which.

Q. And from this side here, this would be back to the house? A. That would be the right side of the post.

Q. Back to the house and this side here went along the front of the porch, in other words, as I stand now, I am looking over the porch to the back yard? A. Yes.

Q. Now, in all the time that you were there, did you ever notice anything wrong with this post? A. No, I did not.

Q. Where you got the post after the accident was down in the yard, I take it? A. Yes.

Q. That was after it had fallen down from the top? A. Yes, sir.

Q. I notice that piece which he have talked about once or twice, looks as though it was a porch rail that went across the other? A. Yes.

Q. And we will mark that with an "O" so as to indicate it. That piece went across the other? A. Yes.

Q. And that is the piece that you sawed off from the end of this P-18 and 17? A. As to numbers I do not know, but that's the piece, though.

Q. Now, on this D-2 for Identification, your wife has marked a "W" across at the head of the stairway indicating there was a wire gate or fence across the head of the stairway; is that correct? A. From the newel, the arm piece that is called a newel.

Q. From the newel piece to the side of the rail, that's marked correct; that was a wire gate? A. Yes.

Q. And then she has marked or said there was a wooden gate across from the rail on the inside of the steps as you come up the side of the building about the middle of this floor marked "R"; is that about your recollection of it? A. Well, you could not call it a gate.

Q. What would you call it? A. It was not even

fastened, it swung across this way here on account of the dogs, to keep the dogs out.

Q. Did you bring it up and put it up there? A. No, it was up there before.

Q. Who put it up there? A. As to who put it across there, I do not know.

Q. How long was it you had dogs up there closed in that way before the accident happened? A. No, I don't know.

Q. Was before you got rid of the dogs? A. I don't know.

Q. This other material indicated on this D-2, is that the stuff that came up from the woodshed? A. Absolutely, with the exception of the garbage cans.

Q. The garbage cans had been in there prior? A. Yes.

Q. And the barrel was in there previously, you brought that from your place? A. The barrel referred to in the picture was a boiler compound barrel which I had brought up for coal and wood and that was down in the woodshed and carried up with the other stuff.

Q. It was yours then? A. It was mine, yes.

Q. Can you give me any idea, Mr. Bolitho, about how long before this accident happened it was that you went on one of these long trips with your wife, hunting or berrying? A. The fall before.

Q. Well, what do you mean by that, November or December? A. Why, November, yes, during the hunting season.

Q. And you say that was a real long hike? A. I was traveling—

Q. I am talking about your last one? A. Yes, it was. The last one we took was a long one—well, about three miles anyway.

Q. That you think was some time in December? A. November.

The Court: How many of these were you accustomed to make?

The Witness: It all depended upon the shift I was working.

The Court: Well, did you go more than once in a year?

The Witness: Many a time.

The Court: How many times in 1927?

The Witness: I should imagine—I could not say exactly, I should say at least it was between, during 1927, hunting season, around ten or eleven times.

The Court: And how far would she walk?

The Witness: She followed me all the time—

The Court: Three to five miles?

The Witness: Well, sometimes more than that; considering walking back and forth and rehunting the same ground over again.

Q. This last trip you had you say was some time in November? A. Yes.

Q. And that was a hunting trip? A. Yes.

Q. Was it toward the end of November or just before Thanksgiving? A. Now, as to that, I can't say whether it was toward the end or what part of the month it was.

Q. And your last baby was born in early February? A. In February.

Q. That was the year before? A. There's over a year's difference between them.

Redirect examination by Mr. Day:

Q. Can you tell me whether or not prior to the accident that porch was all broken out like that?

Mr. Broadhurst: I object to that.

The Court: If he knows.

Q. Did you observe the bottom of this? A. No.

Q. Where it was set down to the floor? A. Before the accident?

Q. Yes? A. No, never did.

Q. What have you got to say about any repairs being made to this porch by Mr. Mintz?

Mr. Broadhurst: Objected to on the ground that I do not see the relevancy of repairs to the entire porch. We are talking about part of it—

The Court: It may involve the question of inspection and care with which Mr. Mintz is charged.

Q. (Question read.)

Mr. Broadhurst: I press my objection.

(Exception allowed and sealed.)

Mr. Day: I withdraw the question.

The Court: The question is withdrawn.

Mr. Day: I will withdraw the entire question and let it go at that. That is all.

(Witness excused.)

LOIS LANGLEY, sworn on behalf of the plaintiffs, testifies as follows:

Direct examination by Mr. Day:

Q. Mrs. Langley, you know Mrs. Bolitho? A. Yes, sir.

Q. Did you ever do any work for her? A. Yes.

Q. When? A. In August 20th, when I went to work.

Q. What did you do there? A. Kept house and tended the children.

Q. How long were you there? A. Nine weeks.

Q. Have you presented a bill to Mr. Bolitho? A. Yes.

Q. How much have you charged him a week? A. Fifteen dollars.

Q. Sure of that? A. Yes.

Q. I show you this bill, didn't you charge him ten dollars a week? A. Yes.

Q. Is that a reasonable charge? A. Yes.

Mr. Day: Take the witness.

Mr. Broadhurst: No questions.

(Bill marked in evidence Exhibit P-21.)

(Witness excused.)

ALICE CORNINE, sworn on behalf of the plaintiffs, testifies as follows:

Direct examination by Mr. Day:

Q. Mrs. Cornine, are you acquainted with Mr. and Mrs. Bolitho? A. Yes.

Q. Did you do any work for them? A. I took care of their little girl.

Q. And how long did you have her with you? A. From June 5th, two days after she was hurt until for twelve weeks.

Q. Did you do anything else besides take care of the children? A. Washing.

Q. For who? A. Mr. Bolitho and Mrs. Bolitho and bed clothing.

Q. What did you charge her per week? A. For the little girl, ten dollars a week and washing two.

Q. Is that a reasonable charge? A. I think so.

Mr. Day: I offer the bill in evidence.

(Received in evidence and marked Exhibit P-22.)

Mr. Broadhurst: What child was that?

The Witness: Mildred, the older girl.

Mr. Broadhurst: I agreed with Judge Day yesterday that I would concede that William and Mabel Bolitho were taken care of by Anna Masker for four weeks, a total charge of thirty-two dollars. And have no objection to the bill of Carrie Dixon charging for the care of Bobbie Bolitho five weeks at ten dollars a week, or Mrs. De Rosito, sixty dollars for six weeks' care of the baby.

The Court: All right.

(Bills received in evidence and marked Exhibits P-23 and P-24.)

HENRIETTA LEE, sworn on behalf of the plaintiffs, testifies as follows:

Direct examination by Mr. Day:

Q. Mrs. Lee, where do you live? A. 48 Speedwell Avenue.

Q. What apartment do you live in that house? A. Up over the store, the first floor over the store.

Q. Were you in your apartment the night of the accident? A. I was.

Q. Will you tell the Court and jury what called your attention to the accident and what you saw? A. Well, first I heard Mrs. Bolitho scream. I saw nobody. I got up; the time I got down there the two fellows were helping her up. The railing with the hook on was across her legs here and I lifted

it off, the railing or post, the post and held her back in my arms till the ambulance came for her.

Q. Was she conscious or unconscious? A. Well, she knew me as soon as I got outside. She knew me when I got out there.

Q. Did you ever go up to her porch? A. Yes.

Q. Did you ever observe this post? A. No.

Q. Never made any observation of the post? A. No.

Q. Where did you hang your clothes? A. On the post below.

Q. What have you got to say about the other tenants, where they hung their clothes? A. On the other end.

Mr. Broadhurst: We don't dispute the fact they hung their clothes on this pole; that it was a separate post.

Mr. Day: Take the witness.

Mr. Broadhurst: No questions.

(D-1 for Identification is offered by the plaintiffs and marked Exhibit P-25.)

(D-2 for Identification is offered by the plaintiffs and marked Exhibit P-26.)

Mr. Day: We rest.

The Court: Proceed with the defense.

Mr. Broadhurst: Before proceeding with the defense I wish to make a motion for a nonsuit at this time.

The Court: I will hear you in the Judge's room.

Mr. Broadhurst: I wish to move for a nonsuit in the case, first, on the ground that there is no evidence in the case to submit to the jury that the porch in question is a com-

mon passageway, the possession and control of which was retained by the defendant and which there was cast any duty upon him to keep in repair. The evidence in the case indicates clearly from the pictures which were offered in evidence and the testimony that this porch which extended across the back of the house in which the plaintiff lived, was a dead-end porch. She testified that no one could go anywhere after getting up on the top of the flight of stairs at her end of the porch excepting to her apartment. That for some time prior to the accident there was a wire gate across the top of this stairway and also a wooden gate or barrier across the top of this way here, at about the middle of this rail marked "R" and a barrier as indicated in this picture P-26. We show out on that porch articles, which appear in this Exhibit P-26, and prior to that additional articles which are not on there, and some other things as well as her baskets, barrel and flower pots and so forth.

While it is true that the duty cast upon the landlord, where the evidence shows he retained control and possession of the passageways, is that of exercising care to keep them in a reasonably safe condition, it seems to me here the undisputed evidence is that this end of the porch, or this porch and particularly the part belonging to the tenant, was controlled by them or entirely occupied by them or used by them. (Argument.) Now the ground I want to put on record, even assuming your Honor should hold this was a common passage, is that

there is no evidence of negligence on the part of the defendant. I take it under the cases his duty was to exercise reasonable care and in Schneirer *v.* Barclay, in the matter of care it says, "the defendant has not failed to perform his duty of exercising reasonable care until he has notice or reasonable opportunity to know of the defect in the premises," and here there is absolutely no evidence that the landlord had any knowledge of any defect in the premises. As a matter of fact, the evidence shows that the two plaintiffs used this dwelling for a period of eight months themselves and said nothing about it which would indicate that there was any defect in it. Now, then, assume your Honor should hold this was a common passageway, where is the evidence to charge the defendant with notice that there was defect which required his remedying it in order to fulfill his duty in exercising reasonable care? It seems to me the case is absolutely devoid of it. (Argument.)

(Thereupon the Court recessed until 1:20 o'clock in the afternoon.)

AFTER RECESS.

The Court: At the close of the morning session there was a motion made in this case for a nonsuit involving certain questions of law raised by counsel for the defendant. I am inclined to the view that the motion should be denied inasmuch as I conclude that under the evidence offered at the close of the plaintiffs' case that the issue of

fact as involved here is whether the porch from which Mrs. Bolitho fell was one used in common with tenants of other apartments. It does appear the Bolitho family made use of the porch for some purposes of their own, but such use appears not to be as a matter of law the proximate cause of the injury of which complaint is made. In the circumstance, I am inclined to the view that it is for the jury to say whether or not the porch in question was used in common and therefore the line of cases involving owners of such dwellings or apartment houses may or may not apply. In the circumstance the motion is denied and you may have an exception.

Mr. Broadhurst: Exception noted.

(Exception allowed.)

Mr. Broadhurst: If your Honor please, the defendant rests.

The Court: Any rebuttal?

Mr. Day: No.

Mr. Broadhurst: I wish to renew my motion now for a direction of verdict on the same grounds that I urged for a motion for a nonsuit, and I take it from your Honor's statement that you will deny that motion.

The Court: Since I have nothing new before me, the same ruling will prevail.

Mr. Broadhurst: Exception.

(Exception allowed and sealed.)

Mr. Broadhurst: In order that I will not cover any unnecessary ground, your Honor, you intend to leave to the jury the question as to whether or not this was a common passageway and if they should find it was a common passageway the question of the defendant's negligence in making repairs—

The Court: And inspection, yes.
Mr. Broadhurst: Thank you.

(Thereupon Mr. Broadhurst summed up to the jury in behalf of the defendant.)

(Thereupon Mr. Day summed up to the jury in behalf of the plaintiffs.)

(Thereupon the Court charged the jury as follows:)

Charge.

LAWRENCE, J.: Ladies and gentlemen of the jury, I may say to you that the mere fact that Mrs. Bolitho fell from the porch of the apartment building with which we are here concerned and was injured and that her husband was obliged to expend certain sums of money in and about her cure of the injury she received as the result, would not justify you in awarding damages in this case. You necessarily, if you are to decide this case in accordance with your oaths, are bound to observe the rules of law the Court will give you and when you have ascertained the facts and apply them to such rules of law and rendered a verdict in accordance therewith, then and then only will you have performed your duty as jurors and undertaken to decide this case in accordance with the evidence and the evidence alone, plus, of course, the observance of the rules of law the Court will give you.

Now, you have the situation here involving the relation of landlord and tenant; that is to say, a tenant and his family, and I might say again that

the mere relation of landlord and tenant would not justify the award of damages merely because Mrs. Bolitho, as a member of the tenant's family, was injured; nor would you be justified in awarding damages because you feel sorry for Mrs. Bolitho, plus the fact that her husband was obliged to expend money in an attempt to cure her of the injuries alleged to have been received in the circumstances which you have here developed in the testimony. After all, not only the Court, but the jury, as well as these litigants, are all bound by the law and therefore when I say to you that there is a settled principle of law that if I, as landlord, rent to you a building in which you and your family intend to dwell and there is nothing in the lease requiring me as landlord to repair, I am under no legal obligation to do so, and therefore if a member of your family is hurt on the premises, the law does not give you a right of action to recover damages therefor. Now, bear in mind that is the principle of law where a dwelling is leased by a landlord to a tenant. Therefore, we find our Courts of Appeal saying this: it is established as a general rule that a landlord is not liable for injuries sustained by a tenant or his family or guest by reason of the ruinous condition of the premises demised, there being upon the letting of the house or land no implied contract or condition that the premises are or shall be fit and suitable for the use of the tenant. In other words, a tenant leases the premises in the condition in which they are and in the absence of an undertaking as a part of the covenant in the lease on the part of the landlord to repair, he is not obliged to do so. Now that is the general principle of law applying in the relation of landlord and tenant

where a dwelling is leased, which is subject thereto. The Courts of Appeal, however, have annunciated the rule, which has a tendency to modify that general principle of law, and I may say before passing that I remember in my own early examination of the relation of landlord and tenant, I could never understand why it was that a landlord was not liable for the falling of a stairway or porch, as the case may be, where the tenant was hurt by reason thereof or where the premises when leased were practically in a ruinous condition, coupled with the statement of the rules that as long as a tenant occupies the premises the roof might blow off or fall in and yet such tenant be liable for rent. Now, that was the old rule. It became modified by statutory enactment as the years went on, but the old common law rule is as I have just indicated to you; but there has been a modification of the general rule as to the non-liability of the landlord for an injury resulting from the lack of repair of a building in the case of apartment houses, and that rule is this: that where a landlord leases out portions of a building to several tenants, retaining in his own possession the control of passageways or stairways, to which I will add porches, for the common use of the tenants and those having occasion to visit them, he is under the responsibility of a general owner of land or lands due to the invitation to enter upon and use his property, and is bound to use that reasonable care as necessary to have the passageways and stairways and porches reasonably fit and safe for such use. Now here we have a case of an apartment house of three stories owned by the defendant. As I recall, the statement was made that there were two apart-

ments on the first floor, two on the second and two on the third, and Mrs. Bolitho, her husband and family at the time of the accident were occupying under lease one of the apartments on the third floor. It appears that in the rear of the building there were, for the use of the tenants—that is to say, the natural inference would be such, I take it, and that is mere comment by the way—three porches, or were there two?

Mr. Day: Two porches.

The Court: You will ascertain by looking at the photographs and examining the testimony, which ran across the entire rear width of the building. If I am incorrect in that, you will consult your own recollection of the testimony and examine the exhibits, which may give you the necessary information. When you do so, you will discover that there is a common stairway leading to each one of those rear porches. That portion of the porch at the third story of the building immediately in the rear of the apartment occupied by the Bolithos has become the subject of inquiry in this case and involves the issue. The testimony of Mr. Bolitho with regard to the leasing of the apartment—it not having been in writing, by the way—would tend to indicate that that apartment was leased to him for the use of himself and his family without any statement as to the rear porch or its use or that part thereof immediately in the rear of the apartment. It does appear, however, as I recall the testimony, and if I am incorrect again, your recollection must prevail, because you are the judges of the fact, that in the conversation, if you believe it occurred, and it is for you to say, between Mr. Bolitho and the defendant, Mr. Mintz, the former asked the latter where the cloth-

ing, when washed, was to be strung for drying, and it was indicated by Mr. Mintz, the landlord, then to Bolitho that there was a hook on a post at the corner of the porch which was customarily used on a line that ran from such hook to a telephone or telegraph pole in the rear yard, used in common by the tenants for lines of that nature. It likewise appears, when you come to examine the photographs which have been offered in evidence, that there was also a hook on the center pole or post supporting the roof of the rear porch which was used apparently by the tenant occupying the other apartment, and the question therefore arises whether after all that porch was intended and in fact used in common by the Bolithos and the tenants occupying the adjoining apartment. There is a question at issue here as to whether that portion of the porch in the rear of the Bolitho apartment became so disconnected from this common use that it may be said after all that the Bolithos assumed the use and exercised exclusive control over it whereby it became a porch such as would have been attached to a whole dwelling leased by Bolithos, over which they had entire control and occupancy, and there the rule as to the landlord is that a landlord is not liable for injuries sustained by a tenant or his family or guest by reason of the ruinous condition of the premises, there being no agreement that the house would either be fit or suitable for the use of the tenant; in other words, whether you will find as a fact in this case the relation between the Bolitho family and Mr. Mintz was that of merely an isolated property or dwelling occupied by them, giving them exclusive control over that portion of the porch in the rear of their apart-

ment. Of course, if you find that the fact by reason of Bolitho exercising the use and control in the way of storage and other supplies, or whatever use was exercised and that thereby it was taken out of the category of a common porch, I say if you find the facts so exist under the fair preponderance of the proof, then your verdict should be no cause of action, because you would then have found the rule I first gave you applicable in the case under the facts. Now, I am unable to say how you will find the facts, I am giving you the law and I have just stated the general rule of law with which I began this charge.

Should you find, however, under the greater weight of credible, legal evidence that the use to which the Bolithos put that portion of the porch in the rear of their apartment was not such as to take the porch as a whole out of the common use by tenants of that building, then you will come to the questions which have been discussed by counsel with you; and that is whether Mr. Mintz has done his duty under the rule which I have given you and will restate, where a landlord leases out a portion of a building to several tenants, retaining in his own possession or control passageways, stairways and porches for the common use of the tenants and those having occasion to visit them, he is under the responsibility of a general owner of land or lands due to the invitation to use the property and is bound to use that reasonable care as necessary to have the passageways, stairways and porches reasonably safe for such use. In other words, as you find the facts in this case will depend whether the general rule or what I would call this ancillary rule or secondary rule is to apply in this case or not.

In the event you find that after all this porch where the accident happened remained in common use by the tenants and was so intended under the letting between Mr. Mintz and the Bolitho family in this case, then you will have an important question to examine before any verdict can go against the defendant; first of all you will ascertain whether the falling of Mrs. Bolitho, assuming you find that second rule to apply which I gave you, was due to the failure of the landlord, Mintz, to use reasonable care to see that the porch was safe, reasonably safe, because the rule of reason is denoted in the rule on the subject; I say, was reasonably safe for the purpose for which it was intended in common by the tenants of the apartment. Now, the plaintiffs charge negligence here and I have had occasion to say, giving the technical phrasing, that negligence is the failure to observe, for the protection of the interest of another person, that degree of care, precaution and vigilance which the circumstances justly demand whereby such other persons suffer injury. The general rule applies that the plaintiffs must satisfy you by the fair preponderance of the proof that Mintz was guilty of negligence, assuming you find that second legal rule to apply in this case. I mean in a contractual sense. That involves the inquiry whether Mintz after all is to be held for negligence because you must ascertain that the breaking of that post and guard rail was due to his negligence before you can hold him liable for damages. Now, there is no evidence in this case that his attention was called to any defect in the porch, particularly with reference to the post that apparently broke and carried the rail with it. There is no evidence of that kind of a direct nature at all, so you are

left to the circumstantial phase of the question and that is whether the proximate cause of the falling of Mrs. Bolitho was the defective character of the porch at the point of breaking due to the negligence, express or implied, of Mintz. Now, an examination of the post would tend to indicate that at its bottom it was rotten, and it is for you to say whether that was the proximate cause of its breaking. Counsel argued the other way, relying upon what he says was the statement of Mrs. Bolitho herself, that the top of the post gave way rather than the bottom. In any event, you will have to examine and ascertain whether the defects there were of such a nature and existed so long that Mr. Mintz as landlord should not have known, had he reasonably inspected the porch, including the post in question, that it was unsafe by reason of its rotten condition or some other defect which the evidence would warrant you in ascertaining; and there you have another rule as to what is a reasonable time that that condition could have existed that would charge the defendant, Mintz, with implied knowledge, if not express, as to having had time to fairly and reasonably inspect the condition to have discovered it. There is laid down for our guidance a rule that what is reasonable time, when the facts are undisputed and if the inference can reasonably be drawn from the same, is a question of fact for the jury to determine and the rule on that question is that it is one for you to determine and therefore if you find that condition had existed so long that in all reason, if a reasonable inspection had been made of the premises and of that part involving the porch, why Mr. Mintz would have discovered it in time to repair it, and if you find the lapse of time

involved was sufficient to enable him to do so and he failed in that respect, you might say he was negligent and would have been brought within the definition, and if you find the breaking of the porch having been due to such negligence, which necessarily would have been implied, and that the proximate result was the falling of Mrs. Bolitho and hurting her, then you would take up the question of damages, but not until then.

In the event you resolve this question in favor of Mrs. Bolitho, then you would return a sum which in your sound judgment and discretion would compensate her for the injuries she suffered, having in mind its nature and extent, the pain and suffering accompanying it, her being incapacitated for the period of time which reasonably would involve the nature and extent of the injury, and whether it has any permanent features, the testimony upon that being a matter for your consideration. With regard to the injuries again, she carries the burden of satisfying you by the fair preponderance of the proof of its nature, extent and the pain and suffering accompanying it.

In regard to Mr. Bolitho, he would be entitled to be awarded a sum which again in your judgment would compensate him for the loss of services of his wife in the household to which he was entitled. Also the loss of society, aside from performing the usual services of a wife. Any expense Mr. Bolitho may have reasonably incurred as far as doctor's bills, for example, or medical care, hospital treatment covering the period that was made necessary in attempt to cure his wife of the injuries. Likewise any expenditure made by him or made necessary by reason of his wife's inability to care for the other members of his family. There

is proof here that would tend to indicate that Mr. Bolitho had expended some money in that regard. If you find that to have been made necessary as a proximate result of the injury to his wife, in turn due proximately again to the negligence of the defendant Mintz, then such expenditures could be included among the items to be awarded Mr. Bolitho for the measure of damage suffered by him. Now, whether you will award anything in this case or not is predicated upon the finding that the defendant is to be held liable for negligence, impliedly, for his failure to properly repair, if you find that any existed due to his negligence to reasonably inspect and a lapse of time where it may be said that if the condition existed he would have had implied notice of it. Of course, if you find that a reasonable inspection would not have disclosed the alleged defect in the post, you cannot hold Mintz. There is no question about that, because he was not a guarantor or surety of the safety of the Bolithos. I mean Mrs. Bolitho, please bear that in mind; he was no surety. If you hold him at all it can only be upon the theory of law that he was guilty of some negligence within the rule of law I have given you as to an apartment house owner. In other words, you would find that Mrs. Bolitho had a right to go upon the porch as an invitee, in an implied sense, and to whom in the circumstances Mr. Mintz, the landlord, owed the duty to exercise reasonable care. He was not an insurer. Please bear that in mind. Not an insurer of safety at all, and, therefore, you will observe these rules of law I have endeavored to give you in settling the issues in this case and render your verdict.

You may swear an officer.

Exceptions.

Mr. Broadhurst: I desire to enter an exception to that part of your Honor's charge wherein, after stating the rule of the common law relative to the duty of a landowner, your Honor further charged that you never could understand why a landlord was not responsible for injuries, and so forth.

Also take exception to that part of your Honor's charge wherein you said that rule had been modified by later decision; my point being I don't understand that rule has in any way been modified so far as its application to tenants is concerned.

Also an exception to that part in which you said there were for the use of the tenants two porches which ran across the entire width of the building; my point being that is not consistent with the latter part of your Honor's charge which you charge there was nothing in the lease agreement which indicates the use to which the rear porch was to be put.

Take exception to that part of the charge after the point just mentioned, to use the testimony of Bolitho, he leased the entire apartment, and leased it without any one retaining use. In the charge you said there was a hook in the center of the post that was used by other families and the question was whether or not the porch was used by both. There is no testimony in the case at all as to whether or not the hook or clothesline on their post was used by the other family at all.

Take exception to that part of the charge where you said there is a question of whether or not Bolitho used and assumed control over it so as to make him liable for repairs.

Exception to that part in the charge where you

said, you leave it to them to decide whether you find as a fact that the relation was merely the right to use the porch; that was referring to Bolitho. If you find it were, then that takes it out of the category of common porch.

Exception to that part of your Honor's charge in which you said that should you find that the use to which Bolitho put the porch was not such as to take the porch out of the common passage-way, then you would come to the question whether Mintz was under the duty, under the rule as I have given you, to have the porch reasonably safe.

Later you said, if you find the porch remains in common use, then you have important questions to examine. My point is as a matter of law, whichever party is concerned, this question should be decided by the Court and not left to the jury to decide whether it is a common passage or not and if he is charged, whether he failed to use due care to make it reasonably safe for use.

Later you charged, you must ascertain that the guard-rail fell because of his negligence, before you can hold him.

That part in which you said that you left to the jury the question of circumstantial evidence in the case as to whether they say the proximate cause of the falling was the defective character of the porch and whether it was due to negligence, express or implied, of Mintz.

Exception to that part in which you said, you will have to examine the testimony to find if Mintz inspected the porch it would show it was defective and just at the beginning of the charge what your Honor said reasonable time was. You will have to examine that defect of the post to see whether it was due to Mintz's negligence and the reason-

able time in which Mintz would have knowledge is for you to decide.

Exception to your Honor's definition of the rule of reasonable time.

Exception to your Honor's charge immediately after that in which you said, if you find that condition existed so long and if inspection had been made he would have ascertained it and you found he was negligent, then you would take up the question of damages.

Exception to everything your Honor said that the defendant was negligent was left to the jury, and whatever you said in that regard.

Exception to that part of your Honor's charge in which you left it to them to decide whether the plaintiffs had a right to go on the porch as an invitee and if so, then Mintz's duty was to exercise reasonable care.

Exception to your Honor's charge where you leave it to the jury to determine the rule of law to be applied, depending upon the decision as to which set of facts they find, whether he was a tenant of the apartment or whether they had exclusive right of the porch.

Take exception to your Honor's charge in which you submitted to the jury whether or not this was a common passageway, my contention being that was a matter of law and not to be decided by the jury.

Excepting to your Honor submitting to the jury whether or not there was any duty of inspection by the defendant, my point being that where the use of the premises are as they appear in this case, in exclusive control of the tenant, that the duty of inspection does not apply. That he is only charged with responsibility, even assuming it's a

common passageway, where the use as appears from these pleadings is retained by the tenant, the stairs and gate are kept by the tenant and so far as knowledge or even being charged with notice, where the notice of defect was brought to him and then he made reasonable inspection.

After certain exceptions were taken, the Court charged the jury as follows:

The Court: As the result of certain exceptions, I may say the general rule as to the responsibility of the landlord to the tenants with respect to conditions and repairs has not been changed except by statute and I should not charge that because it is not applicable in this case. The general rule still applies. The rule you are to take is that which involves the relation of an apartment house owner and landlord to the tenant. You will bear in mind what I had occasion to say as to that. If you find that the porch in question or that portion of it in the rear of the Bolitho apartment was exclusively within their control and not in common with other tenants, in other words, whether they had the exclusive control over that porch, then you would have said that the negligence of the landlord would not apply. You will bear that in mind. You may retire.

Thereupon the jury retired.

Grounds of Appeal.

(Filed Sept. 7, 1929.)

The appellant states the following grounds of appeal:

1. The Trial Judge erroneously refused to nonsuit the plaintiff when thereunto moved by coun-

sel for the defendant, whereas said motion should have been granted on one of the following grounds urged in support of said motion:

(a) On the ground that there was no evidence in the case to submit to the jury that the porch in question was a common passageway, the possession and control of which was retained by the defendant and as to which there was no duty upon him to keep it in repair.

(b) Even assuming that the porch was a common passageway, there was no evidence of any negligence on the part of the defendant.

(c) Even assuming that the porch was a common passageway, there was no evidence that the defendant had notice of any defect in the porch and a reasonable opportunity thereafter to remedy such defect in the exercise of reasonable care.

2. The Trial Judge erroneously refused to direct a verdict in favor of the defendant when thereunto moved, whereas said motion should have been granted on one of the following grounds urged in support of said motion:

(a) On the ground that there was no evidence in the case to submit to the jury that the porch in question was a common passageway, the possession and control of which was retained by the defendant and as to which there was no duty upon him to keep it in repair.

(b) Even assuming that the porch was a

common passageway, there was no evidence of any negligence on the part of the defendant.

(c) Even assuming that the porch was a common passageway, there was no evidence that the defendant had notice of any defect in the porch and a reasonable opportunity thereafter to remedy such defect in the exercise of reasonable care.

3. The Trial Judge charged the jury:

"In other words, a tenant leases the premises in the condition in which they are and in the absence of an undertaking as a part of the covenant in the lease on the part of the landlord to repair, he is not obliged to do so. Now that is the general principle of law applying in the relation of landlord and tenant where a dwelling is leased, which is subject thereto. The Court of Appeal, however, have annunciated the rule which has a tendency to modify that general principle of law, and I may say before passing that I remember in my own early examination of the relation of landlord and tenant, I could never understand why it was that a landlord was not liable for the falling of a stairway or porch, as the case may be, where the tenant was hurt by reason thereof or where the premises when leased were practically in a ruinous condition, coupled with the statement of the rules that as long as a tenant occupies the premises the roof might blow off or fall in and yet such tenant be liable for rent."

4. The Trial Judge charged the jury:

"Now, that was the old rule. It became modified by statutory enactment as the years went on, but the old common law rule is as I have just indicated to you;"

5. The Trial Judge charged the jury:

"It appears that in the rear of the building there were, for the use of the tenants—that is to say, the natural inference would be such, I take it, and that is mere comment by the way—three porches, or were there two?

"Mr. Day: Two porches.

"The Court: You will ascertain by looking at the photographs and examining the testimony, which ran across the entire rear width of the building."

6. The Trial Judge charged the jury:

"The testimony of Mr. Bolitho with regard to the leasing of the apartment—it not having been in writing by the way—would tend to indicate that that apartment was leased to him for the use of himself and his family without any statement as to the rear porch or its use or that part thereof immediately in the rear of the apartment. It does appear, however, as I recall the testimony, and if I am incorrect again, your recollection must prevail, because you are the judges of the fact, that in the conversation, if you believe it occurred, and it is for you to say, between Mr. Bolitho and the defendant, Mr. Mintz, the former asked the latter where the clothing, when washed, was to be strung for drying, and it was indicated by Mr. Mintz,

the landlord, then to Bolitho that there was a hook on a post at the corner of the porch which was customarily used on a line that ran from such hook to a telephone or telegraph pole in the rear yard, used in common by the tenants for lines of that nature."

7. The Trial Judge charged the jury:

"It likewise appears, when you come to examine the photographs which have been offered in evidence, that there was also a hook on the center pole or post supporting the roof of the rear porch which was used apparently by the tenant occupying the other apartment, and the question therefore arises whether after all that porch was intended and in fact used in common by the Bolithos and the tenants occupying the adjoining apartment."

8. The Trial Judge charged the jury:

"There is a question at issue here as to whether that portion of the porch in the rear of the Bolitho apartment became so disconnected from this common use that it may be said after all that the Bolithos assumed the use and exercised exclusive control over it whereby it became a porch such as would have been attached to a whole dwelling leased by Bolithos, over which they had entire control and occupancy, and there the rule as to the landlord is that a landlord is not liable for injuries sustained by a tenant or his family or guest by reason of the ruinous condition of the premises, there being no agreement that the house would either

be fit or suitable for the use of the tenant; in other words, whether you will find as a fact in this case the relation between the Bolitho family and Mr. Mintz was that of merely an isolated property or dwelling occupied by them, giving them exclusive control over that portion of the porch in the rear of their apartment."

9. The Trial Judge charged the jury:

"Of course, if you find that the fact by reason of Bolitho exercising the use and control in the way of storage and other supplies or whatever use was exercised and that thereby it was taken out of the category of a common porch, I say if you find the facts so exist under the fair preponderance of the proof, then your verdict should be no cause of action, because you would then have found the rule I first gave you applicable in the case under the facts."

10. The Trial Judge charged the jury:

"Should you find, however, under the greater weight of credible, legal evidence that the use to which the Bolithos put that portion of the porch in the rear of their apartment was not such as to take the porch as a whole out of the common use by tenants of that building, then you will come to the questions which have been discussed by Counsel with you; and that is whether Mr. Mintz has done his duty under the rule which I have given you and will restate, where a landlord leases out a portion of a building to several tenants, retaining in his own possession or control passageways,

stairways and porches for the common use of the tenants and those having occasion to visit them, he is under the responsibility of a general owner of land or lands due to the invitation to use the property and is bound to use that reasonable care as necessary to have the passageways, stairways and porches reasonably safe for such use."

11. The Trial Judge charged the jury:

"In the event you find that after all this porch where the accident happened remained in common use by the tenants and was so intended under the letting between Mr. Mintz and the Bolitho family in this case, then you will have an important question to examine before any verdict can go against the defendant."

12. The Trial Judge charged the jury:

"Now, there is no evidence in this case that his attention was called to any defect in the porch, particularly with reference to the post that apparently broke and carried the rail with it. There is no evidence of that kind of a direct nature at all, so you are left to the circumstantial phase of the question and that is whether the proximate cause of the falling of Mrs. Bolitho was the defective character of the porch at the point of breaking due to the negligence, express or implied, of Mintz."

13. The Trial Judge charged the jury:

"In any event, you will have to examine and ascertain whether the defects there were of such a nature and existed so long

that Mr. Mintz as landlord should not have known, had he reasonably inspected the porch, including the post in question, that it was unsafe by reason of its rotten condition or some other defect which the evidence would warrant you in ascertaining; and there you have another rule as to what is a reasonable time that that condition could have existed that would charge the defendant, Mintz, with implied knowledge, if not express, as to having had time to fairly and reasonably inspect the condition to have discovered it."

14. The Trial Judge charged the jury:

"There is laid down for our guidance a rule that what is reasonable time, when the facts are undisputed and if the inference can reasonably be drawn from the same, is a question of fact for the jury to determine and the rule on that question is that it is one for you to determine and therefore if you find that condition had existed so long that in all reason, if a reasonable inspection had been made of the premises and of that part involving the porch, why Mr. Mintz would have discovered it in time to repair it, and if you find the lapse of time involved was sufficient to enable him to do so and he failed in that respect, you might say he was negligent and would have been brought within the definition, and if you find the breaking of the porch having been due to such negligence, which necessarily would have been implied, and that the proximate result was the falling of Mrs. Bolitho and

hurting her, then you would take up the question of damages, but not until then."

15. The Trial Judge charged the jury:

"In the event you resolve this question in favor of Mrs. Bolitho, then you would return a sum which in your sound judgment and discretion would compensate her for the injury she suffered, having in mind its nature and extent, the pain and suffering accompanying it, her being incapacitated for the period of time which reasonably would involve the nature and extent of the injury, and whether it has any permanent features, the testimony upon that being a matter for your consideration."

16. The Trial Judge charged the jury:

"Now, whether you will award anything in this case or not is predicated upon the finding that the defendant is to be held liable for negligence, impliedly, for his failure to properly repair, if you find that any existed due to his negligence to reasonably inspect and a lapse of time where it may be said that if the condition existed he would have had implied notice of it. Of course, if you find that a reasonable inspection would not have disclosed the alleged defect in the post, you cannot hold Mintz."

17. The Trial Judge charged the jury:

"If you hold him at all it can only be upon the theory of law that he was guilty of some negligence within the rule of law I have given you as to an apartment house owner."

Grounds of Appeal.

18. The Trial Judge charged the jury:

> "In other words, you would find that Mrs. Bolitho had a right to go upon the porch as an invitee, in an implied sense, and to whom in the circumstances Mr. Mintz, the landlord, owed the duty to exercise reasonable care."

COLLINS & CORBIN,
Attorneys of Defendant-Appellant.

Service acknowledged as within time.

September 4, 1929.

OLIVER K. DAY,
Attorney of Plaintiffs-Respondents.

New Jersey Court of Errors and Appeals

MILDRED BOLITHO and HENRY W. BOLITHO, her husband, *Plaintiffs-Respondents,* *v.* MAX MINTZ, *Defendant-Appellant.*	Action at Law. On Appeal from Supreme Court.

BRIEF OF COLLINS & CORBIN IN BEHALF OF APPELLANT.

(1)

Statement of the Case.

This appeal brings before this Court for review, a judgment of the Supreme Court in favor of the plaintiffs-respondents (hereinafter called plaintiffs), and against the defendant-appellant (hereinafter called defendant), in the amount of $8,065.62 (p. 6).

The action was brought by Mildred Bolitho to recover damages for personal injuries received by her, and Henry W. Bolitho, her husband, joined in the action for the loss of his wife's services and the expenses incurred by him in effecting a cure of her injuries. The plaintiffs were tenants in the defendant's house located in Morristown, New Jersey. On the night of June 4, 1928, while Mrs. Bolitho was engaged in hanging out some

clothes on a line that ran from a post on the back porch of the house to a telephone pole in the yard, the post on the porch gave way and she fell to the yard below. The suit was brought against the defendant on the theory that the porch was a common passageway under his control. The complaint alleges he was negligent in permitting the post to remain in a defective condition after having knowledge that it needed repair.

(2)

Grounds of Appeal.

The grounds of appeal which will be argued are as follows (p. 82, *et seq.*):

1. The Trial Judge erroneously refused to nonsuit the plaintiff or to direct a verdict for the defendant on one or more of the following grounds urged in support of said motions:

> (a) There was no evidence to submit to the jury that the porch in question was a common passageway, the possession and control of which was retained by the defendant and as to which there was a duty upon him to keep it in repair.
>
> (b) Even assuming that the porch was a common passageway there was no evidence of any negligence on the part of the defendant.
>
> (c) Even assuming that the porch was a common passageway there was no evidence that the defendant had notice of any defect in the porch and a reasonable opportunity thereafter to remedy such defect in the exercise of reasonable care.

(3)

BRIEF OF THE ARGUMENT.

I.

There was no evidence that the porch was a common passageway, the possession and control of which was retained by the defendant.

This point is raised by the refusal of the Trial Judge to nonsuit the plaintiff or to direct a verdict in favor of the defendant at the close of the plaintiffs' and the defendant's case respectively. An exception was noted to the Court's ruling and the grounds of appeal raise the propriety of the Court's action (p. 65, line 30; p. 68, line 30; pp. 83-84).

The determination of this question requires a summary of the testimony. There are no disputed questions of fact, as the entire testimony in the case consists of the plaintiffs' own version. There are three photographs attached to the state of case, an examination of which will visualize the situation. The plaintiffs lived in the premises eleven months previous to the accident (p. 22, lines 30-40). The building was three stories high, having two stores on the ground level, apartments for two families on the second floor, and apartments for two families on the top floor, where the plaintiffs resided (p. 23, lines 1-10). A porch extended across the entire width of the house in the rear on the second and third floors (p. 23, lines 10-20). Each porch had four posts extending from the floor of the porch to the top. One was located on each corner and two in between (p. 23, lines 20-30). About 10:30 P. M. on the day of the accident, Mrs. Bolitho started to hang out clothes. The line was

about half full and while leaning out to hang another piece on it, the corner post to which the pulley was fastened, gave way, causing the railing in front of her, the post itself, and the line of clothes to fall into the yard (p. 24, lines 10-30). She lost her balance and also fell. Her apartment was located on the top floor left-hand side as one entered the premises from the street. There were five rooms within the building. Egress and ingress to her apartment as well as the others in the building, were obtained by the entrance on Speedwell Avenue by means of a hallway and stairs (p. 29, lines 1-40). The photographic exhibits will show that there was a flight of stairs leading from the yard to the center of the second floor porch. As one went up this flight of stairs, he faced the rear of the house. On getting to the second floor porch, one turned left and went up a flight of stairs which ran parallel with the house and ended on the third floor porch in the rear of the other tenants' apartment on the third floor (p. 30, line 20 to p. 31, line 10). In order to get to the rear of the plaintiffs' apartment after reaching the third floor porch, it was necessary to turn to the right and walk back to the other side of the house (p. 31, lines 10-20). For some time prior to the accident, the plaintiff had put up a gate across the head of the stairs on the third floor porch (p. 31, lines 30-35). This was put across to prevent the dogs from going down the stairs into the yard (p. 32, lines 10-20). It was impossible to get on the porch unless this gate was open (p. 32, lines 20-30). Some time prior to the accident the plaintiffs had stored in a woodshed located in the yard, various articles. This shed was torn down and the plaintiffs moved or had moved the articles that were in the shed, on to their porch (p. 34, lines 10-20). Some of these articles are shown in the exhibits and consist of barrels, flower pots, automobile parts, auto-

mobile jacks, screens, baskets, carpets, tubs, wood, etc. (p. 34, lines 20-40). The plaintiffs also had two bird dogs which they housed and kept on their end of the porch (p. 35, lines 1-20). There was no exit from their side of the porch to the roof or to any hall in the house. The only exit from the porch was by means of a door into their own apartment (p. 35, lines 20-30). The plaintiff constantly used the porch in doing her work, etc. (p. 35, lines 30-40). A second gate was erected on the porch by the plaintiffs, which is shown in the picture Exhibit P-26, and is a wooden gate. This gate was located between the rear wall of the house and the banister of the porch which protected the stairway. This banister is shown on Exhibit P-26 marked "R" and the gate was located about midway on this banister (p. 41, lines 20-40). This gate was put to keep her dogs on her side of the porch (p. 42, lines 1-20). The articles on the porch had been there for approximately two months prior to the accident (p. 44, lines 1-30). Mr. Bolitho further testified that on the porch they kept their garbage cans, and barrels used for their coal and wood (p. 60, lines 10-30).

In this State it is established as a general rule that 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.

Namburg v. *Young,* 44 N. J. L. 331, 334;
Mullen v. *Ranier,* 45 N. J. L. 520, 523;
Clyne v. *Helms,* 61 N. J. L. 358;
Land v. *Fitzgerald,* 68 N. J. L. 28;
Murray v. *Albertson,* 50 N. J. L. 167;
Siggins v. *McGuill,* 72 N. J. L. 264;
Barthelmess v. *Bergamo,* N. J. L. .

Equally well settled is the principle that this rule does not apply to those portions of the 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 is held 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.

Gleeson v. *Bohm*, 58 N. J. L. 456, 477;
Gillvon v. *Reilly*, 50 N. J. L. 26, 27;
Siggins v. *McGuill*, 72 N. J. L. 263, 265.

Upon the rationale of the cases to which we have adverted establishing the principles of liability or non-liability, the determinative question is whether the landlord retained control of the porch for the general use of the tenants or not. In this case the testimony was not of a controverted character. There were no disputed facts for a jury to consider. The undisputed testimony showed that the plaintiffs had barred by gates, access to the porch by the landlord or anyone else. The use to which they put it in keeping dogs upon it and storing a large quantity of their personal goods, made it as much a part of their demise within their own control as the five rooms in which the remainder of their personal goods were kept within the confines of the walls of the house. We contend that in this situation it was incumbent upon the Trial Court to rule as a matter of law that this was

not such a passageway as was retained in the possession or control of the landlord for the common use of the tenants and those having lawful occasion to visit them, but that it was part of the premises demised and the duty to keep it in fit and suitable condition was upon the plaintiffs.

A careful examination of the authorities will disclose that there are very few cases in which this precise question has been adjudicated.

In *Phelan* v. *Fitzpatrick*, 188 Mass. 237; 74 N. E. 326, an action was brought in tort to recover for injuries sustained by the plaintiff in consequence of a fall from a platform on the third story of a building belonging to the defendant. The fall was caused by the breaking of a railing while the plaintiff was taking in clothes from a line attached to the railing. The plaintiff lived with her parents, who occupied a tenement on the third floor of the building. The Trial Court ordered a verdict for the defendant, and the case was appealed to the Supreme Judicial Court of Massachusetts by the plaintiff on exceptions to that ruling. MORTON, J., in writing the opinion for the Appellate Court, said (p. 327):

> "And it is plain, it seems to us, that that portion of the platform where the railing was constituted a part of the tenement which was hired by them, and which the defendant let to them. It is true that stairs connecting the various tenements with the yard went from one platform to the other. But the common use of the platforms was confined to so much of them as was occupied by the stairs and was reasonably incident thereto. The rest of the platforms was used by those occupying the tenements with which they were severally connected. The platform connected with the tenement occupied by the plaintiff and her parents was used by them to store wood and coal on, and for other private purposes. The

> water-closet belonging to the tenement was situated there; and the clothesline—whoever put it there, on which there was some dispute—was not a line for common use, but for the use of the occupants of the tenement."

In *Conahan* v. *Fisher* (Mass.), 124 N. E. 13, there was evidence tending to show that the plaintiff several years before the event in issue, orally hired at a monthly rental the tenement, which consisted of the second floor of a three story wooden apartment house; that the tenement so hired consisted of several rooms within the main wall of the building, together with a balcony or platform for the exclusive use of the tenant outside of the main wall of the building and adjacent to it and upheld by girders, which were supported in part by a corner post running from the bottom of the building to the top. While the female plaintiff was leaning against the railing of the platform it gave way, causing injuries to her. This was due to the rotten condition of the supporting post and the railing. A verdict was directed for the defendant on the ground that the post and railing were part of the demised premises. This ruling was affirmed on appeal by the Supreme Judicial Court of Massachusetts (1919). Chief Justice RUGG writing the opinion for the Court, in the course of his opinion said (p. 14):

> "The railing and corner post, so far as within the horizontal planes bounding the second floor of the house, were a part of the demised premises. The wife doubtless had all the right of a tenant. (Citing cases.) But the platform was not under the control of the landlord. It was within the confines of the tenement."

In *Palmigini* v. *D'Argenio* (Mass.), 125 N. E. 592, it was held by the Supreme Judicial Court

of Massachusetts, where the stairs on which a tenant's wife fell were let as part of the tenement, the landlord retaining and exercising no control over them, there can be no recovery for injuries to the wife or to the tenant himself, unless at the time of the letting the landlord especially undertook to repair either with or without notice.

On the trial of the case our adversary relied on the case of *Charney* v. *Cohen,* 94 N. J. L. 381; 110 Atl. 698. That case is clearly distinguishable from the case at bar. It there appeared that decedent, who was a tenant in the apartment house of the defendant, while leaning against the guard rail of the back porch on the second story of the apartment, fell to the ground and was killed, by the giving way of the guard rail, while he was engaged in the act of sweeping away the accumulated snow on the balcony, preparatory to his wife's going out to hang up her washing on a clothes line which was attached to the supporting post or pillar of the guard rail. In the course of the opinion Justice MINTURN said:

> "The balcony was in general use by the tenants for household purposes, and for ingress and egress. Upon a prior occasion a son of the deceased was leaning against another section of the guard rail, when it gave way without injury to any one, and defendant was notified of the fact, and he thereafter sent a man to repair the damage. * * * We think upon the rationale of the cases to which we have adverted, establishing the principle of liability or non-liability the question of whether the landlord retained control of the balcony, and rail, for the general use of the tenants, and whether he used due care under the facts to keep it reasonably safe, were jury questions, where the testimony, as in the case at bar, was of a controverted character. It is only where there are no facts in dispute

for a jury to consider, or where the testimony evinces the palpable negligence of the plaintiff in view of the knowledge and consciousness of the inherent danger of the act in contemplation, that the trial court is warranted in dealing with such a situation as a court in question. * * *

"The determinative questions of use, control, and reasonable notice of disrepair were here acutely controverted, and therefore became jury questions. * * * It was in evidence, as we have stated, that upon a prior occasion when the guard rail gave way the attention of the defendant was called to it and he sent a man to make the necessary repairs. 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."

It will be observed from the language of Justice MINTURN that the case in fact turned upon the liability of the landlord for negligence in making repairs which he had assumed to do without deciding the question of whether or not he had retained control of the porch so as to cast the duty upon him of making the repairs in the first instance. It is also to be observed that the questions of use and control were actually controverted, whereas in our case, there were no disputed facts. In this case it appeared that the balcony was in general use by the tenants for ingress and egress, whereas in our case the porch was not only exclusively used by the plaintiffs,

but had been for months previous to the accident barred by gates from the use of any one else in the house as well as from the control of the landlord. We do not contend that all rear porches are a part of the demise of the tenant, for each case has to stand on its own facts, but we do contend that where there are no disputed facts or inferences to be drawn from them as in this case, it cannot be left to the caprice of each jury to determine whether it is or is not a part of the demised premises within the control of the tenant.

We respectfully submit, therefore, that the Trial Court erred in refusing to grant defendant's motions for nonsuit and direction of verdict respectively on this ground.

II.

There was no evidence of any negligence on the part of the defendant.

At the close of the plaintiffs' case and of the entire case, motion was made for a nonsuit and direction of verdict in favor of the defendant, respectively, on the ground that there was no evidence of any negligence on the part of the defendant. This was predicated on the fact that there was no proof the defendant had notice of any defect in the porch and a reasonable opportunity thereafter to remedy such defect in the exercise of reasonable care on his part. The grounds of appeal reserve for argument in this Court, the action of the Trial Judge's refusal to grant the motions on this ground (pp. 65 to 69; p. 83).

The plaintiffs lived in the premises and used the porch for approximately eleven months prior to

the accident (p. 22, lines 30-40). Mrs. Bolitho put up the line in question on the post about seven or eight months before the accident (p. 33, lines 20-30). She used this line several times a week (p. 33, lines 30-40). She was on the porch from time to time every day doing her work (p. 35, lines 35-40). At no time did she observe anything wrong with the post or banister that fell (p. 36, lines 1-10). At no time did she make any complaint to the defendant about it (p. 36, lines 10-15). She testified in this regard as follows (p. 36, lines 1-25):

> "Q. And in the various times you went out to use the line on your porch for any purpose, did you ever observe anything wrong with the post or with the banister or with the slat which fell? A. No, I did not.
>
> "Q. You at no time, as I understand you, have made any complaint to Mr. Mintz about this post which fell or banister which fell not being in repair? A. No, we did not.
>
> "The Court: Did you ever notice it?
>
> "The Witness: We did not notice it.
>
> "The Court: Saw nothing about it?
>
> "The Witness: No.
>
> "The Court: To attract your attention?
>
> "The Witness: No, sir.
>
> "The Court: Did you know that was rotten at the bottom?
>
> "The Witness: No.
>
> "Q. *Was there anything that you could see that showed it was rotten?* A. *No, sir.*"

The original post was offered in evidence and there is no question but that the bottom of it in the inside was rotten. It was not that part of the post, however, which gave way, for the plaintiff testified (p. 37, lines 30-40):

> "Q. Do you know what gave way first? A. The post that the clothesline was on gave way first.
>
> "The Court: That is the upright?

"The Witness: Yes.

"Q. The upright post which the line was fastened to? A. Yes.

"The Court: Where did that give way?

"The Witness: The whole top.

"The Court: Top or bottom?

"The Witness: The top gave way first.

"The Court: It fell out?

"The Witness: Yes.

"Q. That is, the top of the post which would be fastened up at the roof of the porch pulled out first? A. Yes."

Mr. Bolitho on cross examination was also asked (p. 59, lines 10-15):

"Q. Now, in all the time that you were there, did you ever notice anything wrong with this post? A. No, I did not."

The above is all the testimony in the case on the question of negligence. To summarize it, the plaintiffs lived for eleven months in the rooms and used the porch daily. The post which gave way from the top did not disclose by examination that it was defective. While being used it fell and caused the injuries sued for.

In the case of *Schnatterer* v. *Bamberger & Co.*, 81 N. J. L. 558, this Court laid down the rule governing the duty of the defendant as follows (p. 560):

"While the rule of law is undoubted that in such cases the defendant company owes the duty to its customers to exercise reasonable care to keep its store in a safe condition for the use of its customers, and if the latter be injured in consequence of the defendant's failure to perform that duty, it is responsible for the consequences, yet what, under the undisputed circumstances, *constituted* the exercise of reasonable care by the owner of the premises, was the pivotal question to be solved

in this case by the trial court upon the motion to nonsuit.

"When the plaintiff rested her case it had not appeared that the defendant company had been guilty of any want of reasonable care in the keeping of its store safe for her use, for the reason that she had failed to show that the defective condition of the brass edging which she said existed on the night of the accident of April 24th had either (a) been in fact brought to the previous notice of the defendant, or, failing in proof of such actual notice, that (b) the defect had existed for such a space of time before that occurrence as would have afforded the company sufficient opportunity to make proper inspection of its stairways to ascertain their condition as to safety, and to repair their defects. In the absence of proof of either, the legal *presumption* is that defendant had used reasonable care.

"It need hardly be added that the company was not an insurer of the safety of its customers against accidents happening to them while walking or running up and down its stairways in its store. Its duty to the plaintiff was satisfied when it used *reasonable care* to maintain them in a condition safe for her proper use."

In the case cited *supra,* the defendant kept a department store in which there was a stairway connecting the first floor with the basement for the use of its customers. The plaintiff testified that in treading on one of the steps in going down the stairway, the heel of her shoe caught in the brass nosing (originally attached to the edge of the wooden step to prevent its wear) which was loose, but was not then noticed by her, causing her to trip and fall down the stairs. It was there held that the question of what would suffice to constitute the reasonable period of time within which the failure of the storekeeper to make proper inspection of his floors and stairways in order to

discover and remedy dangerous defects in them, before he is chargeable with responsibility of accidents of the present nature, is one, which in cases where the facts are undisputed, and different inferences cannot reasonably be drawn from the same facts, for the Court, and not for the jury, to determine.

The duty of the defendant as landlord in the present case is the same as the duty of the storekeeper in the case cited *supra,* for the case was applied and followed in *Buda* v. *Dzuretzko,* 87 N. J. L. 34. In that case the plaintiff was descending a stairway in the defendant's apartment house and the heel of his shoe caught in a tin covering which was loose, causing him to fall down the stairs. In fact this Court in the decision of *Schnatterer* v. *Bamberger & Co.,* relies on the cases of

Johnson v. *Brewing Co.,* 46 Vroom 282;
Timlin v. *Dillworth,* 47 Vroom 568;
Frank v. *Conradi,* 21 Vroom 23;

which are all landlord and tenant cases. Other cases to like effect are:

Rom v. *Huber,* 93 N. J. L. 360, 108 Atl. 361, where the injury was caused by a fall from slipping on a piece of soap in the steam room of a Turkish bath; and *Maphet* v. *Hudson & Manhattan R. R. Co.,* 98 N. J. L. 369, 119 Atl. 777, where the injury was caused by slipping upon an electric fuse upon a station platform. In *Bodine* v. *Goerke Co.,* 133 Atl. 295 (not officially reported as yet), the plaintiff fell in the entrance or vestibule of the defendant's store by slipping on snow. In *Taylor* v. *Roth & Co.,* 133 Atl. 386 (not officially reported as yet), the plaintiff slipped on a substance lying on the floor of the defendant's butcher shop. In neither case was there any proof that the condition existed long enough to charge the defendant with notice or that

it did have notice. It was held that a nonsuit should have been granted. In *Garland* v. *The Furst Store Co.*, 93 N. J. L. 127, 107 Atl. 38, the plaintiff fell on a slippery floor and this Court held that the defendant could not be put to a defense until notice was established.

We respectfully submit that if the plaintiffs who used these premises daily for a period of eleven months could not by examination determine that there was anything defective with the post, the defendant in like manner could not be charged with having notice of such a defect. Under the cases, notice was an essential element of the plaintiffs' claim and there being no proof of it, the plaintiffs cannot recover. We respectfully submit the Trial Court erred in refusing to grant the motions for nonsuit and direction of verdict on this ground.

(4)

CONCLUSION.

We respectfully submit that for one or more of these reasons the judgment of the Supreme Court should be reversed.

October Term, 1929.

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New Jersey Court of Errors and Appeals

MILDRED BOLITHO and HENRY W. BOLITHO, her husband, Plaintiffs-Respondents, vs. MAX MINTZ, Defendant-Appellant.	Action at Law. On Appeal from Supreme Court.

BRIEF OF OLIVER K. DAY IN BEHALF OF RESPONDENTS.

Facts.

The summary of the evidence is so well analyzed in the brief of the appellant, that I deem it unnecessary to again set it forth in this brief; with the exception, that the brief of the appellant does not call the attention of the Court to all the evidence in regard to the gates and the placing of the articles on the porch in the rear of the respondents' apartment.

In regard to the gates, plaintiffs testified that the gates had been placed upon the porch by Mrs. Zanders, or the plaintiff's sister-in-law, who occupied the westerly apartment on the third floor of the Mintz building (Page 31, lines 30-40; page 32, lines 1-25; page 41, lines 21-41; page 42, lines 1-13; page 45, lines 13-41; page 46, lines 1-23; page 59, lines 24-40; page 60, lines 1-10).

They further testified that most of the articles, as shown in the photograph, Exhibit D-2, were placed there by the defendant Mintz, when the woodshed in which they had been previously stored, had been torn down by him (Page 42, lines 18-41; page 43, lines 1-41; page 44, lines 1-45; page 60, lines 16-28).

Appellant further fails to call the attention of the Court to Exhibits P-16, the post which gave way; P-17, the railing support; and P-18, section of the railing. The aforesaid exhibits are now in the possession of the Sergeant-at-Arms, and an examination of these exhibits by this Honorable Court, will disclose that the bottom of the post, Exhibit P-16, was so much rotted, that for a space of several inches, it is a mere shell, and that the nails which attached the post to the porch, and the nails which attached the railing to the post, were very much rusted, and that the paint on the railing and the railing supports, was in a very bad condition; all disclosing that the post and the railing had been in need of repair for a long time. Screwed unto this post, was a large hook, which defendant told Henry Bolitho was the place for him to attach his clothesline (Page 49, lines 26-40).

ARGUMENT.

Point One.

The post which gave way, was an integral part of the outside frame work of the building, supporting the roof that was a continuation of the main roof of the building, extending over the porch, and the gravamen of the action, was the negligence of the defendant in allowing this pillar or post, to become rotted, rusted and dilapidated, and in a dangerous condition.

There was no evidence produced that the porch (save the post) was out of repair.

The case sub judice is controlled by the case of Charney v. Cohen, decided by Justice Minturn in the Supreme Court, 94 N. J. Law, 381, and affirmed on his opinion in 95 N. J. Law, 538;

> "Isadore Charney, the deceased husband of the plaintiff, who was a tenant in the apartment house of the defendant, in the City of Paterson, while leaning against the guard rail on the back porch of the second story of the apartment, fell to the ground and was killed, by the giving way of the guard rail, while he was engaged in the act of sweeping away the accumulated snow on the balcony, preparatory to the plaintiff's going out to hang up her washing upon a pulley clothesline, which was attached to the supporting post or pillar of the guard rail, the hook in which was provided for the purpose by defendant."
>
> "The balcony was in general use by the tenants for household purposes, and for in-

gress and egress. Upon a prior occasion a son of deceased was leaning against another section of the guard rail, when it gave way without injury to any one, and defendant was notified of the fact, and he thereafter sent a man to repair the damage. An examination of the rail after the accident in question disclosed that two nails holding the rail were rusted, and that the rail itself had rotted at the point where it parted from the post. It was inferable from the entire testimony that the rail was in the language of an inspecting police officer "in a very weak condition."

"The jury found for the plaintiff, upon an instruction by the trial court concerning defendant's liability based upon the doctrine enunciated in Gillvon v. Reilly, 50 N. J. Law 26, 11 Atl. 481, and Buda v. Dzuretzko, 87 N. J. Law 34, 93 Atl. 83; Siggins v. McGill, 72 N. J. Law 263, 62 Atl. 411, 3 L. R. A. (N. S.) 316, 111 Am. St. Rep. 666; Timlan v. Dilworth, 76 N. J. Law 568, 71 Atl. 33, and other cases of like tenor in this jurisdiction, declarative of the respective rights and liabilities of landlords and tenants in tenement or apartment houses, where control is retained by the landlord of the general entrances and passageways of the tenements."

"This appeal is predicated upon the theory that the court shall have nonsuited or directed a verdict upon the plaintiff's presentation of the case, as well as upon the ultimate record upon which it went to the jury. We think upon the rationale of the cases to which we have adverted, establishing the principle

> of liability or non-liability the question of whether the landlord retained control of the balcony, and rail, for the general use of the tenants, and whether he used due care under the facts to keep it reasonably safe, were jury questions, where the testimony, as in the case at bar, was of a controverted character. It is only where there are no facts in dispute for a jury to consider, or where the testimony evinces the palpable negligence of the plaintiff in view of the knowledge and consciousness of the inherent danger of the act in contemplation, that the trial court is warranted in dealing with such a situation as a court in question. The cases cited in the brief of the appellant are of this general character. The doctrine is not peculiarly applicable to this class of cases, but is a fundamental rule of procedure. "*ad questionem facti non respondent judices*" is the elemental maxim. Roesel v. State, 62 N. J. Law 216, 41 Atl. 408, 26 R. C. L. 75 and cases cited."

The appellant's position is even stronger than that of the plaintiff in the Charney v. Cohen case, for in the Charney case, it was a railing that gave way, while in the appellant's case, the supporting pillar or post of the roof gave way first, carrying with it the railing of the porch (Page 24, lines 3-27).

Granting, for the sake of argument, that appellant's position is correct, in that the mere placing of some household articles on the porch, and the swinging of gates across the porch, (I quote from the appellant's brief, "made it as much a part of their demise within their own control as the five rooms in which the remainder of their personal

goods were kept within the confines of the walls of the house"), this did not cast upon the respondents the responsbility of keeping this post in repair, any more than it was their responsibility to keep the main outside walls of their apartment in repair.

Furthermore, the appellant's contention in regard to the control of the porch is untenable, because the evidence discloses that the gates were not placed there by the respondents, but by the occupants of the westerly apartment on the third floor, and that most of the articles shown in the pictures, were placed there by the orders of Max Mintz, when he tore down the woodshed in the yard. And furthermore, that the only articles placed upon the porch by the respondents, were the garbage cans and other articles that are usually placed on the back porch by the occupants of all tenement houses.

Should the Court follow the reasoning of the appellant, then the doctrine laid down in the Charney case, would be absolutely destroyed, for thereby, the mere placing of any articles whatsoever on the back porch of a tenement, will relieve the owner thereof of any responsibility in keeping the aforesaid porches, or any part thereof, including railings of posts, in repair.

At the most, the question as to who was in control of the porch in question, was a controverted fact, and this question was left by the trial court for the jury to decide, he having specifically charged them "that it was for them to say whether or not the Bolithos assumed the use and exercised exclusive control over it (porch), whereby it became a porch such as would have been attached to a whole dwelling leased by Bolithos, over which they had entire control and occupancy * * *.

Whether you will find as a fact in this case, the relation between the Bolitho family and Mr. Mintz was that of merely an isolated property or dwelling occupied by them, giving them exclusive control over that portion of the porch in the rear of their apartment. Of course, if you find that the fact by reason of Bolithos exercising the use and control in the way of storage and other supplies, or whatever use was exercised, and that thereby it was taken out of the category of a common porch, I say, if you find the facts so exist under the fair preponderance of the proof, then your verdict should be no cause of action (Judge's Charge, page 73)."

This charge was entirely within the Charney case, for as Justice Minturn said:

> "The question whether the landlord retained control of the balcony and railing for the general use of the tenants, and whether he used due care under the facts to keep it reasonably safe, were jury questions."
>
> Charney v. Cohen, supra.

Respondents also contend that Justice Minturn decided the Charney case entirely upon the ground that there the landlord was responsible because of his negligence in making repairs, which he assumto do, without deciding the question whether or not he had retained control of the porch, so as to cast the duty upon him of making the repairs in the first instance.

I do not agree with the appellant's contention, for Justice Minturn, in the first part of his decision, decided it was for the jury to decide whether or not Charney had assumed control of the porch, and then further fortifies his opinion by the fact

that there was some evidence of the repairs being made by the landlord, which had not been adverted to by either appellant or respondent in their argument before the Court. Therefore, what Justice Minturn said in the first part of his opinion, was decisive and not obiter dicta.

The case of Charney v. Cohen, *supra*, was followed by the case of Stihowsky, Administrator v. Sempomkiewicz, 6 Misc. 651, in which last mentioned case, the post railings and poles thereof, had become rotted and faulty. Plaintiff fell twenty feet, causing her death. Judgment for the defendant, and he appealed, alleging error in refusing to non-suit the plaintiff. The Supreme Court dismissed the appeal tersely as follows:

> "We find no merit in any of these reasons. The case controlled by the case of Charney v. Cohen."

Counsel for the appellant has cited in his brief, three cases decided by the Court of Errors and Appeals of Massachusetts, Phelan v. Fitzpatrick, 188 Mass. 237; 74 N. E. 326; Conahan v. Fisher (Mass.), 124 N. E. 13; and Palmigini v. D'Argenio (Mass.), 125 N. E. 592. These cases I contend, are directly opposed to the doctrine laid down in the case of Charney v. Cohen, *supra,* and not at all binding upon this Honorable Court, and are against the weight of authority.

36 C. J. 217; 3 L. R. A. (N.S.) 316.

In the case of Palmigini v. D'Argenio, the house in question was a single house, and not a tenement house.

In Conahan v. Fisher, *supra,* the argument of the Court was as follows:

> "It has been argued ingeniously that because the corner post of the building in part supported the platform, constituted a part of the exterior construction and frame work of the building essential for the other tenants, as well as that of the male plaintiff, the landlord was bound to keep them in repair, on the same principle which holds the landlord responsible for the safe conditions and continued repair of common stairways and passages. That principle has no application to such fact as here presented. The way in which liability of the landlord for defects in common stairways and passageways has grown up and been developed, shows that liability in a case like the present, cannot be predicated upon that principle. The landlord retains control of common stairways and passages. Hence, for practical reasons he is held responsible for their safety; although as pointed out in Flanigan v. Welch, 200 Mass. 186, 107 N. E. 979, that liability is contrary to the principle commonly governing the relation of parties where one has an easement over the property of another. If the liability of the landlord touching repairs, were made to rest on the proposition here urged, little would be left of the general principles of the law of the landlord and tenant, as it has been developed and practiced respecting oral leases. That is its basis. Lack of control by the landlord involves relief from obligation to repair."

This is entirely contrary to the doctrine of this

Honorable Court, as laid down in the case of Kelly v. Lembeck and Betz Eagle Brewing Co., 75 N. J. Law, 282; affirmed 77 N. J. Law 617; Gleason v. Bohm, 58 N. J. L. 456; Gillon v. Reilly, 50 N. J. L. 26; Siggins v. McGuill, 72 N. J. L., 263; and Perry v. Levy, 87 N. J. L. 670.

Massachusetts rule was criticized by the Missouri Court of Appeals in re Lang v. Hill, 157 Mo. 688; 138 S. W. 411, where Judge Johnson said:

> "In these days of mammouth office buildings and large tenement houses, the Massachusetts rule is an anachronism."

In fact, the Courts of Massachusetts have laid down the rule in regard to repair of common stairways and passageways, that the landlord is only bound to keep them in the same repair as they were at the time of the letting.

> Flanigan v. Welch, 200 Mass. 186; 107 N. E. 979.
> Andrews v. Williamson, 78 N. E. 737.
> Domenicis v. Fleisher, 81 N. E. 191.

It is therefore respectfully submitted, that as the Massachusetts rule is entirely at variance to the laws as established by this Honorable Court, they are no precedents for this Court to follow.

Point Two.

It was a question for the jury to say whether there was any negligence on the part of the defendant in allowing the post to remain in the rotted condition in which it was found, and also, whether this condition had existed for such a time, that,

the defendant, by the exercise of reasonable care, could have discovered the dangerous condition of the post.

In the case of Timlan v. Dilworth, 76 N. J. Law, 568, Judge Dill, speaking for the Court of Errors and Appeals, said:

> "In cases of negligence, where the trial judge is requested to non-suit, or direct a verdict for the defendant, his duty is to determine whether any facts have been established by evidence from which negligence may be reasonably inferred. If none, there is no case to go to the jury; but if from facts established, negligence may reasonably be inferred, it is for the jury to say whether from these facts, negligence ought to be inferred." * * * And then Mr. Justice Dixon, in the Supreme Court in the case of Frank v. Conradi, lays down the rule to the effect that "To ascertain the time or times for making repair, we must invoke the usual legal implication, applicable to contracts indefinite as to the time of performance, that they must be performed with reasonable diligence and promptness. This legal rule, applied to the present contract, imposed upon the landlords the duty of properly inspecting the premises, and of making such repairs as a due inspection would show to be necessary. But it cannot be stretched so as to include an obligation to repair what a reasonable examination would not discover to be in need of repair. Such straining would deprive the rule of the very element which makes it applicable to contracts in general—the underlying idea of reasonableness." Frank v. Conradi, 50 N. J. Law 23, at p.

> 25; 11 Atl. 480. In Furniture Co. v. Bd. of Education, 58 N. J. Law 646, at p. 652, 35 Atl. 397, at p. 399, Mr. Justice Garrison, speaking for this court said: "The question of reasonable time is generally one of fact for the jury, and is always so when it rests upon conflicting inferences as to the mutual effect of the conduct of the parties to the transaction." Subsequently in 1904, the present Chancellor, then Mr. Justice Pitney, said: "In this, as in all cases where questions of reasonable time, opportunity, or the like are at issue, the determination of what is reasonable, where the facts are in dispute, or the inference to be drawn from undisputed facts is in doubt, is a question of fact, and not of law." Burr v. Adams Express Co., 71 N. J. Law 263, at p. 269, 58 Atl. 609, at p. 611."

In the case of Maphet v. Hudson & M. Ry. Co., 98 N. J. Law 369, Justice Bergen said:

> "Negligence is never presumed, but must always be proven. The only presumption of fact which the law recognizes is an immediate inference from the facts proved, and mere theories and inferences do not authorize a verdict, unless they are the only conclusions which can reasonably be drawn from the facts proven, and if a plaintiff is to succeed it is incumbent on him, in the absence of direct evidence, to show, not only existence of such possible responsibility, but the existence of such circumstances as would justify the inference that the plaintiff's injury was caused by the negligent act of the defendant,

> and which would exclude the idea that it was a cause with which the defendant was not connected, McCombe v. Public Service R. Co., 95 N. J. Law 188, 112 Atl. 255."

The same principle is enunciated in Schnatterer v. Bamberger & Co., 81 N. J. Law 558; where the Court held that the plaintiff could not recover unless there was evidence tending to show that the defect causing the fall, either (1) had been in fact brought to the previous notice of the landlord, or (2) had existed for such a space of time before the accident as would have afforded the landlord sufficient opportunity to make proper inspection of the stairway and to repair its defects.

To the same effect are all the cases cited in the appellant's brief under Point Two. Although appellant's counsel has been very careful to pick from the reports and cite to this Court, only such cases where the accident happened from defects, which had not been brought to the attention of the landlord, or had not been proven to exist for such a time that the landlord, by the exercise of reasonable care, could have discovered the defects.

In the Charney v. Cohen case *supra,*

> "An examination of the rail after the accident in question, disclosed that two nails holding the rail were rusted, and that the rail itself had rotted at the point where it parted from the base. It was inferable from the entire testimony, that the rail was, in the language of an inspecting police officer, "in a very weak condition."

As Justice Minturn said, "We think upon the rationale of the case to which we have adverted, establishing the principle of liability or non-liability, the question of whether the landlord re-

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tained control of the balcony, and rail, for the general use of the tenants, and whether he used due care under the facts to keep it reasonably safe, were jury questions, where the testimony, as the case at bar, was of a controverted character."

The post which gave way in the case *sub judice*, was rotted at the base, the same as the railing which gave way in the Charney v. Cohen case. An examination of Exhibit P-26, shows that the whole rear porch of the third floor of the Mintz property, was very much in need of repairs. I call the attention of this Honorable Court to the outside railing of the porch, which shows it to be in a rotting condition. Also, to the absence of the boards on the outside beam near the head of the stairs. It was for the jury to say how long, in their opinion, the post which gave way, had been in the rotted condition, and for them to say whether it had been in that condition for such a length of time that the defendant, Mintz, could have, by using reasonable care, discover this rotting condition. This required the Court to submit to them this question of negligence, which he very properly did.

The fact that Mr. and Mrs. Bolitho did not discover the defects in the post, is beside the question. It was not their duty to look for the defects in the post; it was the duty of the landlord; and the respondents had the right to assume that the landlord would perform his legal duty.

Cittadino v. Schackter, 83 N. J. Law 593.

It is respectfully submitted that the judgment of the Supreme Court should be affirmed.

October Term, 1929.

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Of Counsel with Plaintiffs-Respondents.