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NOTICE OF APPEAL.

ATLANTIC COUNTY CIRCUIT COURT.

DANIEL JENKINS and IVIE }
L. JENKINS, his wife, }
 Plaintiffs, } Action at Law. 10
 v. } Notice of Appeal.
JULIUS SCHNEIDMAN, }
 Defendant. }

To Cole & Cole, Esquires, Attorneys of Plaintiffs:

Take notice that the defendant appeals to the
Court of Errors and Appeals of New Jersey from 20
the whole of the judgment entered in this cause.

CARR & CARROLL,
*Attorneys of Defendant-
Appellant.*

[ENDORSED]

Service of the within notice of ap- 30
peal is hereby acknowledged this 11th
day of March, 1925.

Cole & Cole,
Attys. of Plaintiffs.

GROUNDS OF APPEAL.

(Filed January 11th, 1926.)

NEW JERSEY COURT OF ERRORS
AND APPEALS.

10

DANIEL JENKINS and IVIE
L. JENKINS,
Plaintiffs-Appellees,
v.
JULIUS SCHNEIDMAN,
Defendant-Appellant.

Action at Law.
Grounds of Appeal.

20 The following are the grounds of appeal under the appeal in the foregoing cause:

30 1. The Court struck out over the objection of counsel the first defense under the rule admitting the rule amending the answer. Said defense, in substance, set up that the plaintiff, Daniel Jenkins, was barred by reason of the fact that the defendant in this suit (Julius Schneidman) had instituted a suit in the Atlantic City District Court upon a claim for rental due from Daniel Jenkins, and had secured a judgment against Daniel Jenkins, and that the matters and things set forth in the complaint were available to the said Daniel Jenkins as a defense in bar of said suit, and that the plaintiff, Daniel Jenkins, is thereby concluded, and the matter, so far as the said plaintiff (Daniel Jenkins) is concerned, is *res adjudicata* and cannot be litigated in this cause.

(See page 6 for the pleadings so stricken out and page 12 for the Court's ruling thereon.)

2. Because at the conclusion of the plaintiffs' case the defendant's motion for a non-suit was overruled and exception noted (page 160).

3. Because on the whole case there was no proof of negligence on the part of the defendant, nor is the doctrine of *res ipsa loquitur* applicable to the facts in this case. 10

4. Because at the conclusion of the whole case the defendant's motion for a directed verdict in favor of the defendant was overruled and exception noted (page 160).

5. Because the Judge charged, "You will first determine whether or not you should infer negligence from the mere fact that gas was present in the apartment" (page 166), and exception having been taken thereto (see page 167). The above involves the application of the doctrine of *res ipsa loquitur* to the facts in this case, said doctrine not being applicable thereto. 20

CARR & CARROLL,
Counsel for Julius Schneidman,
Defendant-Appellant.

30

[ENDORSED]

Service of the within Grounds of Appeal is hereby acknowledged this 8th day of January, 1926.

Cole & Cole,
Counsel for Plaintiffs-Appellees.

COMPLAINT.

Daniel Jenkins and Ivie L. Jenkins, his wife, of Atlantic City, New Jersey, complain and say:

1. On the 8th day of November, 1922, defendant demised to plaintiff, Daniel Jenkins, all that apart-
10 ment known as number 1, consisting of four rooms and bath, and situated on the second floor of premises 103 South Virginia Avenue, Atlantic City, New Jersey, with the appurtenances from November 10, 1922, to November 10, 1923; said demise was in writing and plaintiffs are in possession of the duplicate original ready to be produced.

2. Pursuant to said demise plaintiffs entered into possession of said premises and continued therein
20 continuously until about the 28th day of September, 1923, when they moved for the reason hereinafter to be stated.

3. Defendant had the exclusive control of the plant in the basement of said premises designed to heat the apartment demised to plaintiff and to supply hot water to said apartments; and he attempted to use and control said heater for the purpose of providing heat and hot water for plaintiff
30 Daniel Jenkins, as he agreed to do.

4. For at least three or four months prior to said September 28, 1923, said heating plant when in operation emitted coal gas to a considerable extent, and the same found its way through the entire apartment building and especially in that demised to and occupied by plaintiffs.

5. Plaintiffs called defendant's attention to the existence of said coal gas, and defendant, on a number of occasions before the 28th day of September, 1923, promised to eliminate the same but neglected to do so.

6. By reason of the presence of said coal gas in the apartment, plaintiff's wife became ill, the gas having entered her system and she became so ill by reason of the presence of said coal gas that plaintiffs were obliged to move from said premises. 10

7. Plaintiff, Daniel Jenkins, has been obliged to expend the sum of approximately \$1,000 to effect the cure of his wife, Ivie L. Jenkins, and will be obliged to expend more as she has not yet fully recovered.

8. Plaintiff, Ivie L. Jenkins, was made permanently ill because of coal gas entering her body and her heart has become permanently injured. She has suffered great pain and will continue to suffer for some time, and will not recover her health as it was before she was affected by the presence of said coal gas. 20

Plaintiff, Daniel Jenkins, will claim the sum of five thousand dollars damages and plaintiff, Ivie L. Jenkins, will claim the sum of ten thousand dollars damages, for which amounts they will respectively ask judgment. 30

COLE & COLE,
Attorneys of Plaintiffs.

ANSWER.

The defendant, Julius Schneidman, answering the plaintiffs' complaint, says that:

1. This defendant admits the averments of paragraph 1 of the complaint.
- 10 2. This defendant denies the averments of paragraphs 2, 3, 4, 5, 6, 7 and 8 of the complaint.

Attorneys for Defendant.

RULE AMENDING ANSWER.

- 20 It is, on this 26th day of February, nineteen hundred and twenty-five, ordered that the answer be amended by adding thereto the following:

FIRST DEFENSE.

- 30 The rights of the plaintiff, Daniel Jenkins, were adjudicated in a certain suit lately pending in the Atlantic City District Court in an action wherein Julius Schneidman was plaintiff, and Daniel Jenkins was defendant, said action being based upon a claim for rental due from the said Daniel Jenkins to the said Julius Schneidman under a lease for the apartment referred to in the complaint in this cause, and resulted in a judgment in favor of the said Julius Schneidman, the plaintiff therein; that the matters and things set forth in the complaint were available to the said Daniel Jenkins, as a defense

in bar of said suit, and said plaintiff, Daniel Jenkins, is thereby concluded, and the matter, so far as the said plaintiff is concerned, is *res adjudicata*, and cannot again be litigated in this cause.

SECOND DEFENSE.

The plaintiffs knew of the presence of the coal gas alleged to have escaped into the said apartment, being the alleged cause of the injury; that said knowledge dates from a period early in November, 1922, and plaintiffs were fully cognizant of the danger and hazard of continuing to occupy the said apartment, and in so doing assumed the said hazard, and are, therefore, barred from recovery. 10

THIRD DEFENSE.

The allegations of the second defense are hereby repeated, by reason whereof the plaintiffs were guilty of contributory negligence, which bars a recovery in this action. 20

On motion of

CARR & CARROLL,

Attorneys for Defendant.

Let this rule be entered:

THEO. W. SCHIMPF,

C. C. J.

JUDGMENT.

ATLANTIC COUNTY CIRCUIT COURT.

January Term, 1925.

10 DANIEL JENKINS and IVIE
 L. JENKINS, }
Plaintiffs, } Action at Law.
 v. } On Verdict.
 JULIUS SCHNEIDMAN, } Cole & Cole, Attys.
Defendant. }

Judgment entered March 5, 1925, at 8 A. M.

	Damages of Daniel Jenkins	\$400.00
20	Damages of Ivie L. Jenkins	\$600.00
	Costs	49.44
	Total	<u>\$1049.44</u>

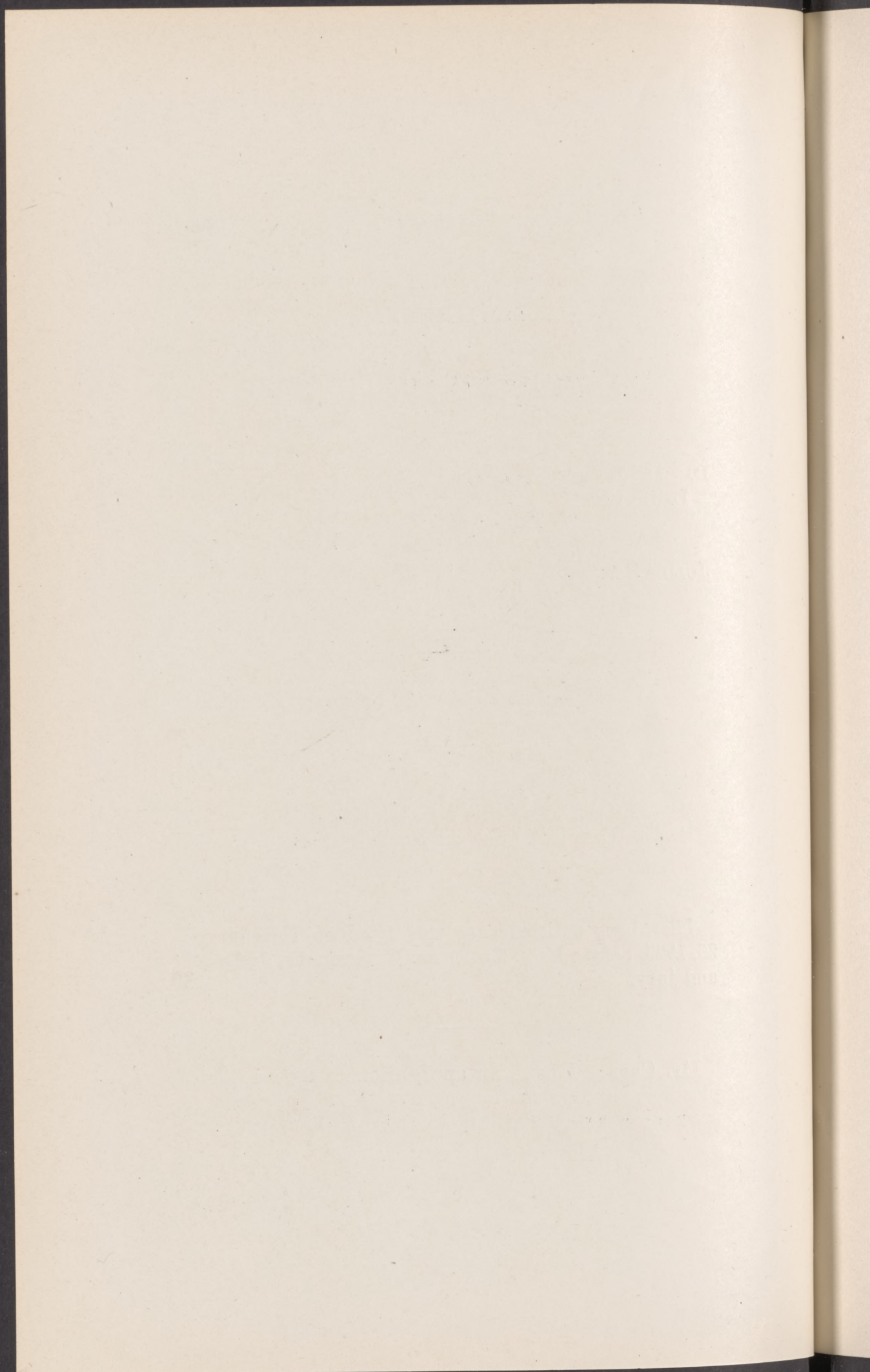
This action was tried before Judge Theo. W. Schimpf, with a jury, on February 26th, 1925.

The cause having been heard and submitted to the jury, they returned their verdict in favor of the plaintiffs and against the defendant.

30 Whereupon it is ordered that the plaintiff, Daniel Jenkins, recover of the defendant, Julius Schneidman, the sum of four hundred dollars damages, and that the plaintiff, Ivie L. Jenkins, recover of the defendant, Julius Schneidman, the sum of six hundred dollars damages, and forty-nine dollars and forty-four cents cost of suit.

WM. A. BLAIR,
Clerk.

County Circuit Judgment Book No. 14, page 93.



think more than a week ago. I do not know whether he opposes or not. Here is the proposed amendment to the answer.

Mr. Cole: I do not think this first defense is properly pleaded. I do not know that I care so much about that as I do that I would want to move to strike out. I do not think it is in the case legally and I think that point ought to be disposed of so that we won't have a lot of testimony if it be that 10 that is not a defense. Now, the second defense is all right—contributory negligence. I haven't any objection to the contributory negligence defense, but I do object to the first. I think we ought to have that settled,

The Court: Well, shall we go out and argue it or shall we argue it here?

Mr. Cole: I have some law on the subject and I 20 suppose he has, too.

Mr. Carr: May I suggest that the amendment be allowed and that Judge Cole's application be considered, a motion to strike it out as not stating a legal defense? We are prepared to meet that.

The Court: Suppose we do that. Then the amendment is allowed.

Mr. Cole: Yes. I do not object to the amendment 30 going in so long as we are permitted to move to strike it out, and if not stricken then to object to it on the ground that it is a legal conclusion.

Mr. Cole: (In chambers.) In the first place, the defense is replete with conclusions. When this suit

was brought for what rent it was brought,—when it was determined is not set out; therefore, that of itself ought to be enough to strike it out. But if we get to what seems to be in the mind of counsel, to wit, that payment of rent is a bar to the right to sue for damages flowing from the neglect of the landlord as set forth in the complaint, it is our submission that that is not the law of New Jersey. A tenant must pay his rent. This was a suit in the district
10 court. The amount of the plaintiff's claim was in excess of the jurisdiction of that court. There is no right to counter-claim for damages in the district court for collection of rent. I supposed the law of New Jersey was settled, except in the case of an eviction, that the tenant must pay the rent. If he has any independent cause of action he brings a suit for it; so that the mere payment of rent by the tenant as he agreed is no bar to a right of action for damages if there is such right, by reason of the neglect
20 on the part of the landlord in consequence of which the tenant is injured. Now, if there is any law that holds that the mere payment of rent is a bar, I do not know of it.

Mr. Carr: Answering the first proposition that the judgment is not set forth with the precision that perhaps it should be set forth with, the answer to that is that we have now the district court record before us. At the time the amendment was prepared
30 we did not have the definite data and this case was on the trial list, and of course, if that were insisted upon we could now describe the judgment with the definiteness with which I think it should be expressed; but I take it that is not a serious objection. The defendant's position is not that the mere payment of rental would bar the action. The point is that if this were available as a defense in bar then

it would be *res adjudicata*. That brings us down, first, to the primary question—was it available in bar of the action? The general rule in New Jersey, and I think elsewhere, following the line of Naumberg against Young and a number of other cases, is that there is no implied warranty of fitness of the dwelling house; no implied warranty that it is good for habitation, the *caveat emptor* rule applying. But that is *caveat emptor* as to the condition in which the lessee then takes it, subject, of course, to whatever may later happen, not the result of the act of the landlord. In Naumberg against Young as in all of these cases, there is a well defined exception to that general rule, that where the premises are rendered uninhabitable by the affirmative act of the landlord, then the tenant has a right to surrender and has a right to bar the action by showing the premises to be uninhabitable by reason of the affirmative act of the landlord. Now, I have noted here the general doctrine of the law is on a demise there is no implied contract that the property is fit for the use; consequently its unfitness for such a purpose will not justify the tenant in abandoning the premises and on such ground make a defense to an action for rent. The exception, however, is where there has been found to be a fraudulent representation of concealment as to the state of the premises which were the subject of the letting or else the premises proved to be uninhabitable by reason of some wrongful act of the landlord himself; the tenant may withdraw from the tenancy and refuse the payment of rent. This application is recognized by *Loree v. Eldredge*, in *First Taylor's Landlord and Tenant* at Section 382; in *Naumberg v. Young*, and also in a New York case. *Naumberg against Young* sets that exception out to the rule. As near as we can get to this case so far as the fact situation is concerned, is a case in

New York where insufficient heat was supplied to a tenant in an apartment house. The lease itself contained no terms for heating, but in New York they read into the lease that implied condition. The tenant, however, stayed on and attempted to set up his recoupment in bar of the action. The Court said: "No; you could have vacated; you could have surrendered and you certainly would have been in bar of an action for the rental." I think I have this case noted here. The pertinent part of the New York case, says: "But in modern times the rule has been liberalized in favor of the tenant, and now any acts of the landlord or anyone who acts under authority or legal right given him by the landlord which renders the demised premises unfit for the purpose for which they were leased, or which seriously interferes with the beneficial enjoyment thereof, in consequence of which the tenant abandons the premises, constitutes an eviction by construction of law and whenever it takes place the tenant is released from the obligation under the lease to pay rent accruing thereafter."

Now, in this case it is claimed that Jenkins was forced to vacate because of the presence of gas after notice to the landlord, and that he was compelled to abandon the premises for that reason. The exception that I have just spoken of is to be found in *Morris against Kittle*, 57 New Jersey Law, 218, at page 220, the portion that I have just read.

Now, as to the question as to whether or not, assuming that this would have been in bar of the action in the district court—whether that amounts to *res adjudicata* I think is well settled. The case in the United States Court of Cromwell against the County of Sac has been followed by numerous cases, and in New Jersey by numerous cases: "A judgment rendered on the merits constitutes an absolute bar to

a subsequent action. The parties and those in privity with them are precluded not only as to every matter offered and received to sustain the defeated attempts, but as to any other admissible matter which might have been offered for that purpose.”

The case that most nearly approaches this case in New Jersey is the case of McMichael against Horay, 90 New Jersey Law, 142, which was a case arising in the district court where the defendant was not obliged to file any written pleadings and did not file any written pleadings. In that case it was held by the Court of Errors and Appeals that since the defense was available to him in that action he was bound whether he actually availed himself of it or not. That case, as I say, most nearly approaches this case, but happens to be a case in the district court in which there were no written pleadings required, and the Court there applied the doctrine of Cromwell against the County of Sac. So that if in fact this gas condition rendering these premises uninhabitable or untenable was something that justified the defendant in leaving—I mean the defendant in the district court suit—in abandoning the premises, then it was in bar of the action.

Now we come to the class of exceptions referred to in the case I have just mentioned here, and the New York case I referred to, Jackson against somebody, 112 New York Supplement, 924. That is our position as precisely as I can state it.

Mr. Cole: Now, your Honor will keep in mind that this was an apartment house, and that by the averments the tenant had no control over the heating plant; that was controlled entirely by the landlord; and that by reason of his negligence the coal gas permeated the apartment and we were injured. Now, the cases, of course, all say in New Jersey, at

least, where the landlord retains control over any part of the building he is liable for any damage that may flow either to the tenants or invitee wholly apart from any question of the terms of the lease. But in this case, this being an apartment, the heating plant being entirely under the control of the landlord, and the landlord taking the responsibility of heating the property and not doing it properly—if the jury should so find, that is the averment—then there is
10 undoubtedly a claim against the landlord. Now, as I understand counsel, he says that if all that be true, that we had a defense available against this action for rent and that we are barred as a result. Now, I think that is not true.

I am reading from leading cases, landlord and tenant, sixteen, under the caption "Defenses to liability for rent."

The Court: Well, Judge, you need go no further
20 if you do not want to; because I am ready to decide this matter.

The first defense under the rule amending the answer will be stricken for the reason that I think it is not a proper defense to the action brought by the plaintiff, Daniel Jenkins. I agree with everything Mr. Carr, counsel for the defendant, has said with respect to the law, but I think it does not apply to this defense. Daniel Jenkins might have interposed
30 the defense that the premises were unfit for habitation as the result of the affirmative act of the landlord as a bar for rent; but the claim set up by him in the case at bar is a suit for expenses paid by him as the husband of his co-defendant—or his—co-plaintiff, Ivie L. Jenkins, his wife; and if that claim had been urged in the suit in the district court it must have been by way of recoupment or counter-claim, not as a bar to the action of the landlord, but as an affirma-

tive action by Jenkins against the landlord for a cause of action which, though then existing, subsisted after the time of the judgment in the district court, and that recoupment or counter-claim being for an amount in excess of the jurisdiction of the district court could not have been asserted there.

Mr. Carr: May I just say a word? I do not like to say anything after the Court has ruled, but I do not think I have made myself clear. It was not with the thought that this would be asserted by way of counter-claim or recoupment, but that it would be asserted simply in bar of the immediate action upon this theory: the landlord in that case—district court case— said: "You owe me a month's rent." The reply was: "I don't owe you a month's rent because I was forced to surrender this property by reason of your affirmative act," which in itself would defeat the immediate action. That was the theory upon which this application was made. 10 20

The Court: Well, that is the theory that I understood.

Mr. Carr: Now, may I have an exception to the ruling, striking out?

The Court: Yes.

(The jury was thereupon duly impaneled, accepted and sworn.) 30

(Mr. Cole opened the plaintiff's case to the jury.)

(Mr. Carr opened the defendant's case to the jury.)

Mr. Carr: I understand that your Honor's overruling the amendment or striking out the amendment is not due to the fact that the date of the judgment is not set forth with particularity, but on the substance your Honor feels that it should not be a defense; because if it is merely a matter of the formal part we would like to set it forth.

The Court: No; the reasons why I struck it out
10 are those which I put in the record. The question of the formality of the pleadings I do not pay any attention to.

Mr. Carr: All right; thank you.

(Recess to 1.15 P. M.)

20 THOMAS R. PERRY, called as a witness on behalf of the plaintiff, being duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Cole:

Q. Mr. Perry, where do you live?

A. Kenapac Apartments, Pacific and Kentucky
30 Avenues.

Mr. Carr: I didn't hear that.

A. Kenapac Apartments, Pacific and Kentucky Avenues.

Q. In Atlantic City?

A. Yes, sir.

Q. How long have you lived in Atlantic City?

A. Since about the middle of March, 1922.

Q. Will you speak just a little louder. The jury have to hear you.

A. Since about the middle of March, 1922.

Q. And what is your business?

A. Head clerk Pennsylvania Railroad Company, Philadelphia.

Q. Won't you kindly speak up just a little louder?

A. Head clerk in Pennsylvania Railroad Company, 10 Philadelphia.

Q. Now, do you know Mr. Jenkins?

A. Yes, sir; I do.

Q. When did you first become acquainted with him?

A. Oh, about twenty-five years ago.

Q. Do you visit his apartment on Virginia Avenue, Atlantic City?

A. Yes, sir.

Q. And during what period?

20

A. About two weeks after he moved there on Virginia Avenue above Pacific, towards the Boardwalk.

Q. And you say you visited there about two weeks after he moved in?

A. Yes, sir.

Q. Were you there more than once?

A. Yes, sir; about every two weeks. We generally stopped in for half an hour or so and then went on up the Boardwalk.

Q. You and he were friendly; were you?

30

A. Yes, sir.

Q. Friends for some years?

A. Yes, sir.

Q. And during the time you were having these visits there were you then living in Atlantic City?

A. Yes, sir; and then prior to that before I moved

here I used to come here every year, sometimes twice a year.

Q. How long would you stay on these visits?

A. Oh, sometimes half an hour, sometimes an hour; probably longer.

Q. Do you recall on which floor of the building his apartments were?

A. On the second floor. There was a storeroom down under it.

10 Q. What?

A. There was a storeroom on the first floor, I think it was.

Q. There was a storeroom on the first floor and his apartment was on the second?

A. Yes.

Q. And off of what street did you go to get his apartment?

A. Off Virginia Avenue.

20 Q. Now, on any of these occasions when you visited him did you discover or note anything that was unusual?

A. Yes; I noticed a peculiar odor, which I asked where the gas was——

Mr. Carr: I object to that.

Q. You cannot tell what you asked. Just state what you noted that seemed to you to be unusual.

30 A. Why, the peculiar odor in the rooms upstairs. The first time I was there I noticed it more particular than any time else. I noticed this odor and asked him what it was. I assumed ——

Mr. Carr: Just a moment.

The Court: You cannot tell what anyone else said to you.

Q. Take your time, Mr. Perry. You said you noticed a peculiar odor ?

A. Yes, sir.

Q. Could you determine what it was?

A. I asked where the gas came from.

Mr. Carr: I object to what he asked.

Q. Don't tell us what you asked.

10

A. I did so; it was gas. I know it was gas.

Q. Could you tell what kind of gas it was?

A. No, not very well. I am not an expert on that.

Q. Well, it smelled to you like gas, you say?

A. Yes.

Q. And did you discover that on more than one occasion?

A. I noticed it afterwards frequently when I was there.

Q. What part of his apartment were you in when you discovered this gas?

20

A. The first time I noticed it was in the living room, in the front part of the building. That was the first time I went there. Then I went clean back to the kitchen. They showed me the house or the apartment, and it was more particularly in the center room. I noticed it there more particularly than either in the front or back.

Q. Now, during the time that you were there and you noticed this odor, was any illuminating gas burning or any gasoline burning?

30

A. No; it was in the daytime.

Q. You were there in the daytime?

A. Yes, sir.

Q. Were all your visits during the day?

A. Well, some were at night, yes; but they had an electric light burning at night.

Q. You did not see any illuminating gas burning in the room where you discovered this odor?

A. Not to my knowledge.

Q. Now, up until how near the time ——

Mr. Cole: Withdraw that.

Q. Do you know about the time that they left this apartment?

10 A. No; I don't know exactly the time because I was away for awhile there.

Q. All right. During how many months do you think it was after you visited this apartment?

A. Oh, I suppose I was there about twenty times, and the time I lived there.

Q. How many times did that cover?

A. Practically about ten months.

Q. Now, can you tell us—if you can recall—how long it had been before the last time that you were
20 in the apartment that you noticed this odor of gas?

A. Oh, I cannot say now.

Q. Did you know Mr. Schneidman, the landlord?

A. No, sir.

Q. Did you ever meet him in connection with the matter at all?

A. No, sir, never met him.

Mr. Cole: Cross-examine.

30 Cross-examination.

By Mr. Carr:

Q. Mr. Perry, you said that you called there about two weeks after the Jenkins had moved in?

A. Yes, sir.

Q. Would that be sometime in November?

A. It was around the—Oh, about I think four or five days of the end of the month; around that time?

Q. Around the latter part of November, 1922?

A. 1922.

Q. Is that right?

A. Yes, sir.

Q. You noticed gas there on every occasion you called?

A. Yes I did; each time I was there; more particularly when I went back through the house. Of course, I was not through the house all the time.

Q. I think you said the odor of gas was greater in the middle room?

A. That is what I noticed the most, yes.

Q. More there than there was in the front or in the rear?

A. I didn't notice so much in the back at all.

Q. Not so much in the back. What were those center rooms in the apartment, do you know? 20

A. One was a dining room, the other a bedroom.

Q. Was there a kitchen in there also?

A. The kitchen I think was in the rear.

Q. In the rear?

A. I think it was in the rear. It is a good while since I have been through it,

Q. You are not sure where the kitchen was?

A. I think it was in the back, though I am not sure.

Q. Wasn't the bedroom in the back?

A. No; I wouldn't be sure about that. The two middle rooms were the bedroom and dining room. Now, I am not sure of that. 30

Q. At any rate, it was in the two middle rooms that there was the most odor of gas?

A. That is where I noticed the most, yes.

Q. Did the gas make you ill?

A. Didn't make me ill, but it made my eyes watery.

Q. Didn't actually make you ill?

A. Didn't actually make me ill because I wasn't in there long enough to feel the effect of it.

Q. You would stay a half hour or hour at a time?

A. Sometimes a little longer, but not longer than that.

Q. Not longer than an hour?

10 A. Probably stayed about two hours, but not longer than that; not enough to affect me any.

Q. During those two hours was the gas noticeable during that time?

A. Oh, you could notice it, yes.

Mr. Carr: That is all.

Re-direct examination.

20 By Mr. Cole:

Q. Did you make any effort during any of your visits to locate where this gas came from?

Mr. Carr: Objected to —

A. No.

Mr. Carr: —as to the effort he made.

30

The Court: Well, he may state, "Yes" or "No."

The Witness: No.

(Witness excused.)

ANTHONY LABASCO, called as a witness on behalf of the plaintiff, being duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Cole:

Q. Where do you live? 10

A. 138 North Missouri Avenue, Atlantic City, New Jersey.

Q. And how long have you lived in Atlantic City?

A. About twelve years.

Q. What is your business?

A. Police officer.

Q. How long have you been a police officer?

A. Eight years.

Q. Do you know the apartment of Mr. Schneidman's on Virginia Avenue near Pacific in Atlantic City? 20

A. I do.

Q. How long have you known that apartment or those apartments?

A. Just the one night we had a call there.

Q. And when was that?

A. I judge it was around about the latter part of January, 1924.

Q. You say you had a call. Who called you?

30

Mr. Carr: I object, if your Honor please.

Mr. Cole: Well, that is not important.

Q. You say it was January, 1924 or 1923?

A. I think it was 1924, if I ain't mistaken.

Q. And do you know those apartments?

A. Yes, sir.

Q. Did you go inside?

A. Yes, sir.

Q. And how long were you there?

A. Oh, about fifteen minutes.

Q. Did you notice anything unusual on that occasion?

Mr. Carr: I object, if your Honor please. This
10 was in January, 1924, while the pleadings say these
folks left in October or September, 1923.

The Court: Yes; I am inclined to think the testimony will have to be confined to times between the periods they lived there.

Mr. Cole: It has to be confined to that so far as
any damage to us is concerned, but if we can show
continuity doesn't it go to establish the fact—if we
20 can show it was there in 1924, and running back cer-
tainly we are not confined to the period we were
there to show the existence of the thing. Of course,
we cannot recover for any damage that may flow to
us during any other period. For example, couldn't
we show its presence there before the period, and
couldn't we show the presence there after the period
for the purpose of establishing that it was there at
the time we were there?

30 The Court: I do not think so.

Mr. Cole: It would be a question for the jury.

The Court: No; I think that is objectionable. I
will sustain the objection.

Mr. Cole: Your Honor overrules that?

The Court: Yes.

Mr. Cole: Exception.

Q. Who called you to that apartment?

Mr. Carr: Same objection.

Mr. Cole: I want to show it was the defendant.

The Court: I do not think it makes any difference. 10
I will sustain the objection.

Mr. Cole: Allow me an exception.

Mr. Carr: No questions.

(Witness excused.)

20

HARRY B. LEECH, called as a witness on behalf of the plaintiff, being duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Cole:

Q. Mr. Leech, where do you live?

A. Virginia Terrace, Atlantic City.

Q. How long have you lived in Atlantic City?

A. Forty years.

Q. And what is your business?

A. Retired.

Q. What?

A. Retired.

30

Q. Do you know Mr. and Mrs. Jenkins?

A. Very well.

Q. How long have you known them?

A. Since she was born.

Q. Is she your daughter?

A. My niece.

Q. Your niece, rather. Now, do you remember when they lived in the apartment on Virginia Avenue near Pacific, in Atlantic City?

10 A. Yes, sir.

Q. Did you visit there?

A. Quite often.

Q. How soon after they moved in did you make your first visit?

A. Well, very shortly. I just couldn't recall, but very shortly.

Q. How nearly up to the time they left did you visit there?

A. Up until they left.

20 Q. Now, during that period that they were there, how frequent were your visits?

A. Well, sometimes two or three or four times a week. On my way to the Boardwalk I had to pass her door, and I occasionally dropped in. I would not say how often, but I would drop in in the morning, sometimes in the evening.

Q. Now, on any of the occasions when you were there did you note or notice anything unusual, out of the ordinary?

30 A. Yes, sir; I did.

Q. What did you notice?

A. Well, the smell of gas.

Q. How soon after your first visit did you notice this gas?

A. Well, I could hardly say that. I could hardly say until Mrs. Jenkins—I noticed the odor but there

was nothing said about it until she commenced to complain ——

Q. Now, just a moment, Mr. Leech. You cannot tell about the complaining. She must tell about that.

A. But that is what I noticed. I noticed like gas would come off of the furnace or grate.

Q. Now, what I would like to know was how long was it after your first visit that you noticed that?

A. Well, just shortly after she moved in.

Q. All right.

10

A. Yes, sir; just shortly after she moved in.

Q. Now, did that condition continue until they moved out?

A. Yes, sir; yes, sir.

Q. Do you know where that coal gas came from?

A. Only what I heard.

Q. Was there any illuminating gas in the room where you noticed this smell?

A. No, sir; no, sir. It seemed to be stronger ——

20

Mr. Carr: Just answer. You have answered the question.

Q. You started to say it seemed to be ——

A. Seemed to be stronger ——

Mr. Carr: I object to the form of the question.

Q. Was it more noticeable in one room than in another?

A. Yes, sir; decidedly.

30

Q. Which room was it the most noticeable in?

A. In the bedroom over where she slept, where she slept over the furnace.

Q. Was the bedroom in which she slept over the furnace?

A. Yes, sir.

Q. By the way, on which floor were her apartments?

A. Second.

Q. And what was there below her?

A. A storeroom and furnace.

Q. And you got to these apartments off of Virginia Avenue?

A. Yes, sir.

10 Q. Were there other apartments in the same building?

A. Yes, sir, as far as I know.

Q. Do you know how many apartments there were?

A. Three besides hers.

Q. And were they all on that same floor?

A. No; across the hall was one opposite her, and then two above, opposite each other.

Q. Then this building was how many stories high?

A. Three.

20 Q. Apartments then on the second and third?

A. Yes, sir.

Q. Now, during any of your visits there did you see Mr. Schneidman?

A. I never met him, but I saw him in there, with Mr. Jenkins.

Q. You saw him there; did you?

A. Yes, sir.

Q. In their apartment?

A. Yes, sir.

30 Q. Was there any talk had at that time?

A. Yes, sir.

Q. Who did the talking?

A. Well, Mr. Jenkins and Mr. Schneidman.

Q. What was the talk about?

A. Well, there was quite an odor of gas —

Q. First of all, what was it about?

A. About the gas.

Q. About the gas?

A. Yes, sir.

Q. Now, you tell the jury your recollection of the talk about the gas.

A. Well, the odor was quite noticeable at the time, and Mr. Jenkins went to the phone and called Mr. Schneidman, and from what I understood him to say, he was not in —

Mr. Carr: I object to that if you did not hear 10 what was said.

The Witness: Then Mr. Jenkins said he would go down for himself and see if Mr. Schneidman was in, and when he got down we were looking out the front window and he met Mr. Schneidman right at the corner of his store and they came up and went in. He called Mr. Schneidman's attention to the gas.

Q. Now, in what room were you at that time? 20

A. I was standing in the bathroom.

Q. Could you hear the talk?

A. Oh, yes, yes.

Q. Then tell us what the talk was.

A. Well, Mr. Schneidman admitted that he smelled the gas —

Mr. Carr: I object to "admitting."

The Court: Yes. Say what Mr. Schneidman said, 30 then what Mr. Jenkins said.

The Witness: Well, they talked about the gas and they took matches and went around over the range and they found there was no gas there.

Mr. Carr: I object to what they found.

Q. Was there any gas at the range?

A. No, sir; couldn't find any at all.

Q. You are speaking now of the range in the kitchen?

A. Yes, sir; yes, sir.

Q. All right. Proceed.

A. And Mr. Schneidman I understood him to say that he admitted there was gas there —

10 Mr. Carr: I object to that and ask that it be stricken out.

Q. Mr. Leech, the objection is to your using the word "admitted." What they want you to do is to state as nearly as you can what words were used. See?

A. Well, they talked about having the thing fixed so there would be no complaint made.

Q. Who talked about having it fixed?

20 A. Mr. Schneidman; said he would have a man there to look after it.

Q. About how long was Mr. Schneidman there?

A. Oh, I judge about fifteen or twenty minutes or so; I just couldn't fix the time.

Q. And how long was that after Mr. Jenkins moved in?

A. Well, that was I think early in the spring.

Q. Of 1923?

A. Yes, sir; 1923. I know the weather was warm.

30 Q. On that occasion did you notice gas?

A. Yes, sir; Oh, yes, sir; yes; particularly that evening.

Q. Was there ever any other occasion that Mr. Schneidman was in the apartment while you were there?

A. No, sir.

Q. That was the only occasion?

A. That is all I can remember.

Q. Now, where did Mrs. Jenkins live before she moved to Atlantic City?

A. In the Stratford Apartment, Pacific and South Carolina.

Q. How long had she been living in Atlantic City, about?

A. About ten or eleven or twelve years, I should judge.

Q. And where did she live before she moved to 10 Atlantic City?

A. In Pittsburgh.

Q. Where?

A. In Pittsburgh.

Q. Pittsburgh. Now, had you seen her shortly before she moved into this apartment?

A. Oh, yes; quite frequently.

Q. And that was when she was living where?

A. At the Stratford.

Q. Well, what was the condition of her health at 20 that time before she moved into this apartment?

A. Very good; always found her fairly good; never heard her complain. She didn't complain.

Q. Have you noticed any change in her physical condition since she moved in this apartment on Virginia Avenue?

A. Yes indeed; yes, sir.

Q. Tell us what you have observed. Tell us what you have observed by way of change in her condition from the time she moved in this apartment. 30

A. Well, when she came in there she was—she had a very nice complexion, and her complexion was good; her eyes were bright; she had been working; she did her own work; she was active. Shortly after she moved in she commenced to complain and go down; she got sallow, had headaches. I have gone in there in the morning early and she would be vom-

iting, had headaches, and I have noticed her bleeding at the nose, and her general condition was bad and she was getting worse right along until they finally moved out.

Q. Did you notice any of those conditions while she was at the Stratford Apartments?

A. Never; no, sir; no, sir.

Q. Was she in bed during any of the time she was in this apartment?

10 A. Yes, sir; she was.

Q. How much of the time, roughly, do you think you saw her in bed?

A. Well, I should judge—it is a pretty hard matter to recall, but I would judge anywhere from seven to ten weeks.

Q. Well, during that time do you know whether she was under a doctor's care?

A. Yes, sir.

Q. What doctor?

20 A. Dr. Dunlap.

Mr. Cole: Cross-examine.

Cross-examination.

By Mr. Carr:

Q. You first went there sometime in November, 1922?

30 A. Yes, sir; shortly after they moved in.

Q. A few days after they moved in?

A. Yes, sir.

Q. Did you notice the odor of gas then?

A. Yes, sir.

Q. You say you noticed the odor of gas every time you called?

A. Well, I cannot say, not at all times.

Q. But many of the times?

A. More frequently in the morning. It seemed stronger, it seemed to me, in the morning when I would drop in.

Q. Now, this occasion you speak of that Mr. Schneidman came up to the apartment, you say it was in the spring?

A. Yes, sir.

Q. That would be the spring of 1923, wouldn't it?

A. Yes, sir.

10

Q. Was it warm weather, do you remember?

A. Well, it was quite warm; it was warm weather.

Q. That is warm enough not to have heat in the house?

A. Yes, sir.

Q. And were the windows open, do you know?

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

Q. Might it have been as late as June?

A. No, sir; it was not that late. It was April or May, I would judge.

20

Q. April or May?

A. Yes, sir.

Q. Now, I understood you to say that Mr. Jenkins complained about the gas to Mr. Schneidman; is that so?

A. Yes, sir; yes, sir.

Q. And Mr. Schneidman said that he would have a man there to look after it; was that it?

A. Yes, sir. He would try to remedy it.

Q. And Mr. Schneidman and Mr. Jenkins were trying to locate the cause of the gas?

30

A. Yes, sir; spoke to her about —

Q. Mr. Schneidman, I should say. Mr. Schneidman didn't know where the gas came from; did he?

A. Seemingly.

Q. Beg pardon?

A. Seemingly.

Q. Well, they were trying to locate the cause, weren't they?

A. Yes, sir.

Q. And not having located the cause of it he said he would send a man there to look at it; isn't that it?

A. Yes, sir.

Q. And is that substantially all that he said with reference to it?

10 A. Well, I couldn't recall that.

Q. And insofar as you can recall?

A. Yes, so far as I can recall.

Q. There was a gas range there, wasn't there?

A. Yes, sir.

Q. And where was that in the apartment?

A. Well, that would be between the dining room and the bedroom—kitchenette, they called it.

Q. Would that be in the rear of the dining room?

A. Yes, sir.

20 Q. And the next room in the rear of that would be the bedroom?

A. The bedroom.

Q. I do not suppose you were ever overcome by this gas, were you?

A. Well, I was hardly in there long enough. I generally dropped in to make a call as I went to the Boardwalk.

Q. As a matter of fact, you never were overcome by gas?

30 A. Never.

Q. Did you stay a half hour or an hour at a time?

A. Yes, about.

Q. And when your niece was ill in bed would you visit her in her bedroom?

A. Yes, sir; yes, sir.

Q. Stay there perhaps an hour or so?

A. No; I don't think I ever remained over half an hour or so, probably.

Q. Did you stop around in the evenings sometimes?

A. Yes, sir.

Q. Spend the evening there with her?

A. Yes, sir.

Q. Then you stayed perhaps two or three hours?

A. Yes, sir; I did.

Q. Now, when your niece was ill in bed, did you notice the odor of gas then? 10

A. In the mornings.

Q. I see. Now ——

A. In the mornings, was not so noticeable in the evenings.

Q. I see.

A. In the mornings, but not so noticeable in the evening.

Q. Was she occupying the bedroom, that is, the room in the rear? 20

A. Yes, sir; sometimes she—after she got a little better she was lying on the couch in the front room.

Q. Was there more or less gas in the front room?

A. Well, I cannot say that it was ever noticeable through the front of the house, not like the rear.

Q. Now, the front room had four windows in it; didn't it?

A. Well, the front room I believe was windows.

Q. Four windows?

A. I wouldn't say. I know the whole front of the building was windows. How many I couldn't say. 30

Q. It was a much larger room than the bedroom, wasn't it?

A. Yes, sir; it was.

Q. Do you know how many rooms above the bedrooms?

A. Two, I believe; two or three—three.

Q. You think it was three?

A. Yes, sir.

Q. Now, when you smelled this odor of gas were the windows open or closed?

A. Well, when I went in, in the morning Mrs. Jenkins would usually have her windows up, but you could smell the gas. She did that for ventilation, but the odor was there distinctly.

Q. Yes.

10 A. Yes, sir.

Q. When the air was cold did they keep the windows closed?

A. Yes, sir.

Q. Notwithstanding the gas, they kept the windows closed in cold weather?

A. Well, I won't say entirely; I won't say that.

Q. Well, now, which was it, do you know, or didn't you notice?

A. No; I didn't.

20 Q. Beg pardon?

A. No; I didn't.

Q. You didn't notice. That is all.

Re-direct examination.

By Mr. Cole:

30 Q. On the occasion when Mr. Schneidman was there was any mention made of this furnace?

A. Yes, sir; they spoke about the furnace.

Q. Who spoke about it?

A. Mr. Schneidman.

Q. What did he say about the furnace?

A. He said he would have a man there to look after the furnace and try to determine where the odor was coming from.

Mr. Cole: That is all.

Mr. Carr: That is all.

(Witness excused.)

FRANK PARKER, called as a witness on behalf of the plaintiff, being first duly sworn was examined and testified as follows: 10

Direct examination.

By Mr. Cole:

Q. Mr. Parker, where do you live?

A. 17 North Delaware Avenue.

Q. Atlantic City?

A. Yes, sir.

Q. And how long have you lived in Atlantic City? 20

A. Twenty-five years.

Q. What do you do for a living?

A. Janitor, apartments and like that.

Q. Were you ever janitor of Mr. Schneidman's apartments on Virginia Avenue?

A. I was.

Q. When were you there?

A. Oh, it was about three years ago, I think.

Q. How long were you employed?

A. Well, I don't know; I think about six or seven months. 30

Q. During the time that you were janitor there did Mr. Jenkins live in the apartment?

A. He lived in the apartment.

Q. Were you ever in Mr. Jenkins' apartment during the time he lived there?

A. I was in there one morning, he called me.

Q. About when was that?

A. What do you mean?

Q. Well, what time of year was it?

A. Oh, that was in about—I think it was about in November or December—December; somewhere along there. It was in the winter, anyhow.

Q. About how long was it after he moved in, do you know?

10 A. Well, that I couldn't say particularly, Judge.

Q. At that time was a fire in the furnace, in the heater?

A. Furnace—fire in the heater; yes, sir.

Mr. Carr: I object to any testimony that goes outside of the time complained of in the pleadings. The time fixed here is at least three or four months prior to September twentieth, 1923. The testimony is now being given November or December, 1922.

20

The Court: Yes; there isn't any claim that there was any gas except for a period of three or four months prior to said September twenty-eighth, 1923.

Mr. Cole: Our lease, may it please your Honor,

—
The Court: Your lease began November tenth, 1922.

30

Mr. Cole: Our lease began November, 1922, and ended in November, 1923. Now, this period that we are fixing is during the time we were there.

The Court: Look at paragraph four in your complaint. That is what the present objection is founded on.

Mr. Cole: Well, it says for at least three or four months prior to said September twenty-eighth, 1923, said heating plant, etc. Certainly we are not to be confined to just those three months prior to that time. I would like to get as nearly as I can this time first, to show we are agreed about that.

Q. When do you think it was that you were in Mr. Jenkins' apartment?

A. I think it was just before the holidays; somewhere around before the holidays. 10

Q. Now, what holidays do you mean?

A. Well, between Christmas and New Year's—just before Christmas, I think.

Q. Just before Christmas?

A. Yes.

Q. Of what year?

A. Oh, I guess—what is this, 1925? Well, 1923; somewhere around there. I didn't keep no track of 20 anything like that, you see.

Q. Well, it is a fact in this case, Mr. Parker, that they moved in there in November, 1922; in 1922, they moved in. Now, how long do you say it was after that—your best judgment—that you were in their apartment?

A. Oh, I was in there off and on every morning that year. See?

Q. You mean you were there often during the time they were living there? 30

A. Yes, sir; I was up in there every morning to carry out the stuff for them. See? That is how I met them.

Q. Now, let us get that straight. What were you doing in that apartment?

A. I was taking down the garbage early in the morning.

Q. Did you do that all the time they were living there?

A. All the time they were living there.

Q. Was that part of your duty?

A. That was my duty. That was my duty and every morning I seen to the fire, yes.

Q. Now, on any of these occasions when you were up in their apartment did you notice anything unusual or out of the ordinary order?

10

Mr. Carr: I object.

A. Yes, sir; I did.

Mr. Carr: I ask that the answer be stricken out.

The Court: Strike it out.

Mr. Carr: Unless it is confined to the time within
20 the pleadings. He has testified so far that this was in November or December. He has not enlarged that time.

Mr. Cole: Evidently you have not been watching the testimony. He has now said he was there continuously taking out the garbage.

Mr. Carr: But he does not say what period of time. He had previously testified that he was there only a few weeks after these people came. The original testimony, as I recall it. Let us find out how long he was there, Judge.
30

(At the direction of the Court the testimony of the witness was read by the stenographer.)

Mr. Carr: The pleading says that the condition

was at least three or four months prior to September twenty-eighth, 1923. This witness says he was there during the cold weather. Well, that was probably at an end before the period mentioned here began. So if he is going to testify at all I think we ought to find out the accurate period of time; because if it is not within the pleadings it has no place here.

The Court: Well, the trouble is he confined him in the pleadings. The defendant reading that could say, well, that covers a period between May twenty-eighth and February twenty-eighth, and they did not have the heater lighted, pretty nearly rely upon that as a defense. 10

Mr. Cole: The witness has now testified that he took garbage from this apartment during all the time in which plaintiff lived there.

The Court: Oh, no; he did not testify to that. He said he was only employed there six or seven months himself, and he said that he was employed there during the time they lived there; but he didn't say during all of the time that they lived there. 20

Mr. Cole: Well, we will see.

Q. Mr. Parker, can you recall when you went to work at this apartment?

A. Well, I was working around into a music store around the corner from Mr. Miller—around the corner in Mr. Schneidman's building, and when he built this apartment, when the apartment was done he asked me to come around and take charge of it. See? So I went around there and took charge of it. See? And I wasn't there but a short time. See? And Mr. Jenkins moved in before I quit. See? Before I quit. 30

Q. Now, how long had Mr. Jenkins been living in the apartment before you quit?

A. Oh, he had been there for quite some time. I couldn't say really. About two or three months, maybe: something like that.

Q. He had been living there —

A. Yes.

Q. —you think, two or three months before you left?

10 A. Somewheres around that. Of course, I never put nothing down, you know, anything of that kind; because I was working. I didn't pay no attention to it.

Q. Was there a fire in the furnace during all the time you were there?

A. No—yes; there was fire in the furnace. I built fire in the furnace; I built fire in the furnace.

Q. You mean you started it?

A. I started the fire in the furnace.

20 Q. Now, was it continued in the furnace during all the time you were there?

Mr. Carr: I object to it.

A. Yes, sir.

Mr. Carr: —as irrelevant and immaterial. Two or three months would bring it about November, December—January or February at the latest.

30 The Court: Yes; I do not think this testimony is within paragraph four of the complaint.

Mr. Cole: I should think, may it please your Honor, if I could show, even though I am to be confined to apparently a statement as though I had said during specific periods, whereas my complaint says

that for at least that period this had continued—if I could show a beginning at any time that we were there when this coal gas was escaping and getting into our rooms, that would be evidence the jury could take to say whether it continued, unless there was some proof to show it had been discontinued by some act of the landlord.

The Court: I think you are in exactly the same position as though an automobilist were to proceed 10 on different parts of the road, conduct himself in some particular way, and then that testimony was offered in proof of the fact that he was responsible for an accident at some other place. I do not think that is so at all. Coal gas might escape at one time of the year and not at another. The question is did it escape and injure this plaintiff at the time she says it did? Now, if it did not I do not think you can prove that it did by showing that at same other time it might have done so or did do so. No, I think you 20 must be confined to your allegation.

Mr. Cole: Allow me an exception.

Q. During any of the time that you were in the apartment of Mr. Jenkins did you notice anything unusual or out of the ordinary? Now, do not answer that.

Mr. Carr: I make the same objection.

30

The Court: Objection sustained.

Mr. Cole: Exception.

Q. On any occasion when you went to Mr. Jenkins' apartment did you notice the smell of coal gas?

Mr. Carr: Same objection.

The Court: Objection sustained.

Mr. Cole: Exception.

Q. Did Mr. Schneidman ever talk to you or did you ever talk to him about coal gas in that building?

10 Mr. Carr: I make the same objection, if your Honor please, if it is confined to a period prior to the time alleged in the complaint.

The Court: The objection will be sustained unless it is fixed within the time alleged in the complaint or subsequent to the time.

20 Mr. Cole: I thought your Honor ruled that he could not put anything in subsequent to the time.

The Court: Well, I think Mr. Schneidman might make statements which would bind him after the time with respect to these allegations.

Q. Did Mr. Schneidman ever talk to you or did you ever talk to him about coal gas in that building? Answer "Yes" or "No" first.

A. I spoke to him about it a couple of times.

Q. And when was that?

30 A. Well, that was shortly after we started the fire.

Q. What did you say to him —

Mr. Carr: Same objection.

Q. —and what reply did he make?

Mr. Carr: I object.

A. He said ——

Mr. Cole: Wait a moment.

Mr. Carr: Same objection, if your Honor pleases.

The Court: Objection sustained.

Mr. Cole: Your Honor will allow me an exception? 10

The Court: Yes.

Mr. Cole: That is all, Mr. Parker.

Mr. Carr: No questions.

(Witness excused.)

20

ALICE HAGGERTY, called as a witness on behalf of the plaintiff, being duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Cole:

Q. Where do you live? 30

A. 22-24 North Virginia Avenue, Sidney Apartment.

Q. How long have you lived in Atlantic City?

A. Eleven years.

Q. Do you know Mr. and Mrs. Jenkins?

A. I do.

Q. How long have you known them?

A. Eleven years.

Q. Are you in any way related to them?

A. No way at all.

Q. Did you visit their apartment on Virginia Avenue near Pacific while they were living there?

A. I did.

Q. And how soon did you go there after they moved in?

10 A. I was there sometime in the latter part of January, between the middle and the last of January, 1923, the first time.

Q. Now, did you continue to visit them after that?

A. I was there a number of times. I don't know how many.

Q. Do you recall the time they moved?

A. Yes; they moved there in November.

Q. No, I mean when they moved out?

A. When they moved out, yes.

20 Q. How recently were you there before the time they moved out?

A. Well, not for some time.

Q. What do you mean by some time?

A. Well, not for several months.

Q. Now, they moved out in September, 1923, I think. You think you were there several months before that?

A. Yes.

Q. Visiting as a friend?

30 A. Yes.

Q. Now, how many times in all do you think you were there?

A. I couldn't tell.

Q. Well, just roughly.

A. It is impossible for me to give an estimate.

Q. You were there more than once?

A. Yes; I was there twice one day.

Q. Were you there on more than one day?

A. Several days.

Q. Well, through how much of a period were you there?

A. Well, probably four weeks.

Q. Now, did you notice on any of your visits anything unusual or out of the ordinary?

A. I did.

Q. What did you notice?

A. The strong odor of coal gas.

10

Mr. Carr: Wait a minute. I am going to object to anything that occurred to the date fixed in the pleadings. The date is not yet identified; consequently I don't see how it is material.

The Court: Well, I suppose the date in the pleadings by calculation fixes itself at May twenty-eighth, that is, between May twenty-eighth and September twenty-eighth. I think the objection will have to be sustained until the witness fixes the time she is talking about. 20

Mr. Cole: The witness says that she was there several months before they moved out, which was in September.

The Court: Well, maybe you will tell me what "several" means.

Mr. Cole: Well, that may be a question for the jury. I cannot. 30

The Court: What do you mean by "several?"

The Witness: Strictly speaking I couldn't tell how long. I had been through an awful trouble of

my own and I was too much taken up with that to recall exactly the dates of calls after the twelfth of March.

The Court: I am afraid the objection will have to be sustained.

Q. Do you know whether you were there after the twelfth of March, 1923?

10 A. I was there once that I know of. I was out of the city for some weeks in between the trouble and March twelfth, 1923.

Q. Did you tell us how long it was according to your best judgment after March twelfth, you were there?

A. In May, I think.

Q. Of 1923?

A. (No audible answer.)

20 Q. Now, on that occasion did you notice anything —

Mr. Carr: I object unless that date is fixed more definitely; because it may or may not be the time. She says, "In May, I think."

30 The Court: Yes, I think so. The allegation is that between these dates the heating plant emitted coal gas and I think we will have to have proof to show that it was between those dates. Objection sustained.

Q. (Repeated by the stenographer at the request of counsel.) Now, on that occasion did you notice anything—did you notice anything unusual or extraordinary about that apartment?

Mr. Carr: Same objection.

The Court: Objection sustained.

Mr. Cole: Exception.

Q. Did you on that occasion in May, 1923, notice the presence of coal gas in that apartment?

Mr. Carr: Same objection.

The Court: Objection sustained, 10

Mr. Cole: Allow me an exception?

The Court: Yes.

Q. How often did you meet or see Mrs. Jenkins before she moved into this apartment?

A. Well, I think I seen her at least every week and sometimes more often than that.

Q. Do you know what her physical condition was before she moved into that apartment? 20

A. It was very good when she moved in there.

Q. Have you noticed any change in her condition between the time that she moved in and now?

A. I certainly have.

Q. What have you observed?

A. Well, she has been sick in bed twice—very sick, and she is a wreck now to what she was when she moved in there physically.

Mr. Carr: I object to her characterization. 30

Mr. Cole: You may strike out her characterization. I do not care for that.

Q. Is there any change in the color of her face?

A. There is.

Q. What is the change?

A. She was fair and fresh looking.

Q. And how is it now?

Mr. Carr: I think that can speak for itself, if your Honor pleases.

Mr. Cole: Well, it may so far as this court is concerned, but the court above may not be able to see
10 that.

Mr. Carr: I do not think it is necessary for this lady to testify how the other lady looks. I do not think it is material.

The Court: I will permit the question.

Q. And how is it now?

A. Well, I would say that it was quite sallow and
20 blue about the lips now.

Cross-examine.

Mr. Carr: No question.

(Witness excused.)

THOMAS G. DUNLAP, called as a witness on behalf of the plaintiff, being duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Cole:

Q. You are a practicing physician? 10

A. I am.

Q. And where do you practice?

A. Virginia and Pacific Avenue, Atlantic City, New Jersey.

Q. How long have you been practicing?

A. Twenty-two years in Atlantic City; twenty-seven all told.

Q. From where did you graduate?

A. University of Louisville.

Mr. Carr: We admit his qualifications, Judge. 20

Q. From where did you graduate?

A. University of Louisville, Louisville, Kentucky.

Q. Has your practice been active since then?

A. Absolutely.

Q. And general?

A. General.

Q. Have you specialized in any way?

A. No particular specialty; general internal medical. 30

Q. Do you know Mrs. Jenkins?

A. I do.

Q. How long have you known her?

A. I saw her first in the summer of 1921—1921.

Q. And have you been seeing her ever since then?

A. Ever since that time.

Q. Do you remember about the time she moved into the apartment at Virginia and Pacific Avenue, Atlantic City?

A. I do.

Q. Do you know what the condition of her health was before she moved in?

Mr. Carr: I object to that—well, all right.

10 The Court: You may answer, Doctor.

A. The condition of her health prior to the time that she moved into this apartment at Virginia and Pacific Avenue was excellent,—I had not seen her for five months.

Q. Now, were you called in to see her after she moved into the apartment?

A. On numerous occasions.

Q. Do you recall your first visit?

20 A. I do.

Q. What was the date of it?

A. It was November, 1922.

Mr. Carr: I object to anything which may have occurred that early.

30 The Court: I do not understand why this complaint is not amended under the rule if you want to put this testimony in. I will say now if you desire to amend it as to the time these fumes are alleged to have affected the plaintiff I will permit the amendment. If it is not amended I won't permit this testimony.

(There being no reply by Judge Cole to the Court's objection, the Court sustained the objection.)

Mr. Cole: Your Honor will allow me an exception?

Q. How long did you continue to see her?

Mr. Carr: Same objection, if your Honor please.

Mr. Cole: Well, I purpose now, may it please your Honor, to show the existence of gas and this trouble during the period mentioned in the complaint. I am limiting it to the actual period in the complaint.

10

The Court: May twenty-eighth to September twenty-eighth, 1922?

Mr. Cole: 1923.

A. She is still under my care, during the whole period.

Q. Did you treat her during the time—May, June, July, August and September, 1923?

A. I did.

20

Q. How often during that period were you there?

A. I saw Mrs. Jenkins—sometimes it would be necessary for me to see her four or five days consecutively —

Mr. Carr: No, how many times did you see her there?

The Witness: Well, that is what I mean. How many times? I should say all told probably thirty 30 times to the apartment after the middle of May.

Q. During this period of May to September inclusive did you notice anything unusual or extraordinary about that apartment?

A. I did.

Q. What did you notice?

A. Fumes emanating seemingly from a furnace.

Mr. Carr: I object to "seemingly," and ask that the latter part be stricken out as being a conclusion of the witness.

Q. Irrespective of where it came from for the moment, doctor, what did you notice?

10 A. Gas fumes.

Q. What kind of gas fumes?

A. The fumes that you characteristically get from faulty combustion, not illuminating gas.

Q. During this period you say you were there did you notice any illuminating gas?

A. There was no illuminating gas in the apartment ever burned to my knowledge. They had a gas cook range which I personally examined very carefully.

20

Mr. Carr: I ask that the latter be stricken as volunteered.

The Court: Well, perhaps it is not entirely responsive, but I will let it stand.

Mr. Carr: Exception, please.

30 Q. What was Mrs. Jenkins' condition during these four months?

A. You allude to the time from May on until September?

Q. Yes.

The Court: May twenty-eighth, doctor, to September twenty-eighth.

A. During all of this period Mrs. Jenkins was suffering from a condition that we call anaemia; in other words, a deficient quality of her blood. She suffered from terrific headaches, recurrent attacks of nausea, exhausting cardiac weakness, prostration and exhaustion upon the least physical effort. The most dominating and characteristic phenomenon was the weakened condition of her heart due primarily to the lack of blood in her body. This lack of blood was also an element in the production of these terrific headaches. 10

Q. What is her present condition?

A. Improved.

Q. Is she permanently cured?

A. She is not.

Q. What is your prognosis?

A. Well, since I volunteered the information to the patient I probably will not upset her by telling her that she is as well as she will ever be. She must be very careful in her manner of living, and so on. 20

Q. Is there a difference in her physical condition now and what it was before she moved in this apartment?

A. Oh, positively, vastly.

Q. Will you tell what it is?

A. When Mrs. Jenkins moved into this apartment she was, I should say, one hundred per cent normal for a woman her age. She had good color, lots of life, very energetic, was able to do all of her own work. I saw her coming down the street carrying a lot of packages. She was assisting in the moving herself and said she never felt better. 30

Mr. Carr: I object to what she said.

Mr. Cole: Strike out what she said.

The Witness: Beg pardon. Her physical condition was excellent.

Q. Now, today?

A. About seventy-five per cent of normal.

Q. Is she able to do physical work?

A. She is not able to do physical work.

Q. Why not?

A. On account of her weakness, exhaustion, prostration and general condition that we would term a
10 heart condition, a weakened heart, in other words, without being technical.

Q. To what do you ascribe her condition?

A. I ascribe her condition entirely to the constant inhalation—the almost constant inhalation of gas; sometimes excessive quantities, again very small quantities; gas poisoning.

Q. Was she in bed under your treatment?

A. Ten weeks.

Q. What was your treatment?

20 A. Tonics, heart stimulant, drug used to make blood given by the mouth, and hypodermically into the veins; elimination; had her eyes examined, tried to overcome her headaches; in other words, supportive treatment, tonic treatment.

Q. Did she have any treatment other than that you gave her during the time you were treating her?

A. I do not recall with accuracy. I think she had some massage.

30 Q. What does the inhalation of this gas do to bring about the condition which you found Mrs. Jenkins in?

A. It acts as a heart poison. It affects the blood in the sense of making the blood laked, as it were; in other words, it produces anaemia; it produces loss of the quality of the blood. It acts as a muscle poi-

son, as a nerve poison; in other words, it acts directly as any poison would act.

Q. Does it in any way affect or retard the presence of oxygen and its effect on the blood?

A. It causes the oxygen really to be destroyed, thrown out of the blood; you get deficient oxygen.

Q. And is oxygen essential to life and health?

A. Absolutely.

Q. Now, does the extent of the damage done by the inhalation of gas depend somewhat upon the percentage of saturation?

10

A. Absolutely.

Q. Does it depend upon the length or period over which it continues?

A. It does. If you get sufficient at one time it kills you. If you get it right along it poisons you.

Q. Have you charged Mrs. Jenkins for your services?

A. I have.

Q. Did Mrs. Jenkins suffer any pain?

A. Excruciating headaches that were absolutely incapacitating: attacks of nausea, vomiting that would prostrate her.

20

Q. Did you ever meet Mr. Schneidman, the landlord, in connection with this matter?

A. Not in connection with this proposition. I have known Mr. Schneidman for quite a time.

Q. Now, is there any particular part of the body that the attack is first made on when this gas is inhaled or is it general throughout the system?

A. It has a general effect, understand, by affecting largely the muscles and nervous system which prevail throughout the whole economy.

30

Q. What about Mrs. Jenkins' nervous condition?

A. Well, she was constantly getting, in my opinion, nerve poison; consequently her nervous condition was exaggerated.

Q. How was it before she moved into this apartment?

A. Perfectly all right.

Q. Did you give her the standard treatment during the time you were treating her?

A. I gave her symptomatic treatment for her conditions as they arose. In several emergencies I used emergent treatment.

10 Q. Can you ascribe the condition in which you found her in May, June, July, August and September, and the condition in which she now is, to any other cause than the inhalation of this gas?

A. I am unable to do so.

Mr. Cole: Cross-examine.

Cross-examination.

By Mr. Carr:

20 Q. Doctor, is there any specific treatment for gas poisoning?

A. No specific treatment, any more than the treatment that the condition produces demands. If primarily the gas produces anaemia we treat that; if it produces cardiac symptoms we treat that. It is symptomatic treatment except in the emergency, when one is overcome, or partly overcome.

Q. And in the emergency or acute stages do you use oxygen to combat the immediate trouble?

30 A. It is next to impossible to do that because when you are on the case you have no means of getting oxygen. You induce artificial respiration to give them more oxygen, to make them breathe, or breathe more freely. You give them inhalations of ammonia. You use cold water in their faces; you give them atropin to stimulate their heart and things like that,

unless you have access to a pulmotor or oxygen tank, which is usually not very accessible except in hospitals.

Q. In an emergency case you take them to the hospital where the oxygen is available?

A. That would depend on the degree of emergency.

Q. I mean in a real emergency?

A. No; they are all emergent; but if the patient is profoundly comatose, unconscious, and you do not get results, from immediately instituting radical treatment as artificial respiration and heart stimulants and drugs of that character, then you immediately get to the hospital, as quickly as possible. That would depend on the degree of poison. 10

Q. The first thing you do is throw open windows, isn't it?

A. You get all the fresh air you can get.

Q. You get all the fresh air you can get, and that is to get more oxygen; isn't that the idea?

A. Exactly. 20

Q. Now, what sort of gas was this? Chemically, what sort of gas was it?

A. It was carbon monoxide.

Q. Carbon monoxide, or carbon dioxide?

A. Monoxide, not dioxide. It is harmless.

Q. Monoxide is harmless?

A. No, sir.

Q. Dioxide is harmless?

A. Yes, sir.

Q. You say that dioxide is harmless? 30

A. I do.

Q. Carbon monoxide is odorless, isn't it?

A. Absolutely.

Q. It is an odorless gas, isn't it?

A. Absolutely.

Q. And yet you smelled the carbon monoxide?

A. Whenever you have gas fumes of a sulphuric

type characteristic of those emanating from a furnace you can gamble that carbon monoxide is a deadly follower. It is always there.

Q. Did you analyze any of this air?

A. No; I made no analysis from the air. I had an example in the patient. I was satisfied.

Q. Satisfied of the cause, were you?

A. I felt—my diagnosis was carbon monoxide poisoning.

10 Q. Do you know what the specific gravity for carbon monoxide is?

A. I do not.

Q. You haven't any idea, have you?

A. It does not interest me. That is for the technical specialist to give us the specific gravity.

Q. I say you haven't any idea, have you?

A. No.

Q. And since carbon monoxide is odorless you can only be sure by chemical analysis; can't you?

20 A. There is no combustion or a gas fume that does not contain it. You know it is there.

Q. Do you say that the combustion of coal will not produce carbon dioxide?

A. Oh, it will produce carbon dioxide.

Q. What?

A. Yes; it will produce carbon dioxide.

Q. And you say that carbon dioxide is harmless?

A. In the atmosphere it is not regarded as a deadly poison.

30 Q. But carbon monoxide in the atmosphere is not a deadly poison, is it?

A. In quantity.

Q. I mean if allowed to escape in the air it is not deadly, is it?

A. If you have enough air, if you have a big place.

Q. Depends on the concentration?

A. Out of the atmosphere of the great world you

would never know it was there, especially a day like this.

Q. Neither with carbon-dioxide?

A. No.

Q. So it depends on the degree of the concentration, doesn't it?

A. It depends on the degree of concentration and the closeness of the room.

Q. And carbon-dioxide the same thing; isn't that true?

A. That is true of everything, carbon-dioxide ———

Q. But the carbon-dioxide concentrated will poison, will poison?

10

The Witness: Before you go any further, your Honor, am I qualified as an expert or a medical man?

The Court: I do not recognize the difference between an expert and a medical man in medical testimony. You have testified as to the results of certain causes and you are now examined as to what you know about the causes.

20

The Witness: All right.

Q. But the carbon-dioxide concentrated will poison?

A. Oh, yes, concentrated.

Q. Aren't many recorded instances of death from carbon-dioxide poisoning?

A. Probably. I have never encountered any myself.

30

Q. How many carbon-monoxide cases have you treated in your practice in the last few years?

A. In the last few years? More than I ever did before, knowingly.

Q. How many did you treat?

A. Oh, I should say in round numbers a dozen.

Q. And did you determine the presence of carbon-monoxide gas by the same method, that is, by your sense of smell and not by chemical analysis?

A. Gas, the odor of gas.

Q. That is, wherever you smelled the odor of gas, the product of combustion, you say it is carbon-monoxide?

A. Always the deadly element is monoxide.

10 Q. Wherever you smell gas coming from a furnace you say that the product is carbon monoxide, do you?

A. The deadly product. We have sulphur and a lot of other things in there. You have sulphur, phosphorus and a lot of other things.

Q. Now, Doctor, if you can answer my question I wish you would.

A. Well, I don't quite get it.

20 Q. Wherever you smell gas coming from a furnace you say that the product is carbon monoxide, do you?

A. I do; the deadly product. I qualified it. There are more products than one.

Q. Well, do you say that whenever you smell gas from a heater, that there is present carbon-monoxide?

A. Yes.

Q. You say that, do you?

A. Yes.

30 Q. And the other is never present, carbon-dioxide?

A. Oh, no; carbon-dioxide, too.

Q. Do you say that carbon-dioxide is not produced from the combustion of coal?

A. No; I do not.

Q. Well, what do you say?

A. Do you want to know whether it is produced?

Q. Is it produced?

A. Dozens of gases; that among others.

Q. And without a chemical analysis you cannot tell which, can you?

A. You mean which gas is present?

Q. Yes.

A. Without a chemical analysis it would be an almost impossible proposition to say which gases are and which are not present; but we do know this, that where there is combustion and gas fumes we have carbon-monoxide; that that is the deadly one. 10
And we look for the deadly one. We haven't time to go around and pick out all the other fellows. We are looking for the thing that does the work.

Q. And how do you know, short of a chemical analysis, that that deadly and odorless and invisible gas is there?

A. As a product of combustion.

Q. How do you know that it is there?

(Addressed to Mr. Carr who had text book.) 20

A. Read it out of the book and see if it does not tell you it is there.

Q. I ask you how you know?

A. Because we know it is an essential product.

Q. But how do you know?

A. By chemical analysis of the gases.

Q. Have you ever made such an analysis?

A. No.

Q. Have you ever made a chemical analysis on any 30
gas case that you had?

A. No.

Q. The only sure way of determining the presence of carbon-monoxide, it being invisible and odorless, is by a chemical analysis, isn't it?

A. No; I wouldn't say that.

Q. All right. Short of a chemical analysis how

could you detect the presence of something that is invisible and odorless?

A. In my own instance, my own self, for example, if I go in where there are gas fumes, as I frequently do, and I begin to get the dryness in my nose and terrific headache, the ugly taste in my mouth, I am satisfied that I am getting gassed. I know that the deadly element in that gas is monoxide of carbon.

Q. How do you know that?

10 A. Because it is. It has been demonstrated. You will find it in the text book,, and the expert will tell you that; and I get out of the gas. I am satisfied.

Q. That is the thing to do, isn't it, Doctor—to get out of the gas?

A. If you can.

Q. That is the thing to do, isn't it?

A. Or get the gas out; one of the two.

Q. Either—if you can't get the gas out, the thing to do is to get out yourself, isn't it?

20 A. That would depend entirely on conditions.

Q. I mean from a medical point of view.

A. That would depend altogether on how grave your condition was,

Q. Would you recommend the patient to remain where that condition was?

A. No; I would not.

Q. What would you recommend the patient to do?

A. I would recommend them to get out.

30 Q. That would be the sensible thing to do, wouldn't it?

A. Yes, exactly.

Q. The common-sense thing to do would be to get out?

A. Exactly.

Q. Now, in this case did you tell this lady and her husband that this was gas fumes that were ailing her?

A. I did.

Q. Did you tell her that right at the start?

A. Right on the start.

Q. And did you advise her to stay or get out?

A. To get out unless it was remedied.

Q. Did you apprise her of the danger of her remaining while that condition existed?

A. I did.

Q. What did you tell her the danger would be?

A. That it would ruin her health and might cost 10
her her life.

Q. And did you tell her that on the first occasion?

A. I am talking about the twenty-eighth of May.

Q. Well, I am doing some more talking. I am asking whether you told her that on the first occasion that you detected it?

A. No; I didn't.

Mr. Cole: Wait a moment, Doctor. I suppose that testimony must be limited to May to September? 20

The Court: Well, the doctor can only be cross-examined within the scope of this direct-examination, and that is only between May twenty-eighth and September twenty-eighth.

Mr. Carr: Well, I am not quite sure of that, if your Honor please. I think we have a right to show that this lady knew at that time of the danger—that is applying, as we hope to later on, the doctrine of assumed hazard—I think that we have a right to show that she had knowledge that gas poisoning was dangerous. If she had that knowledge before May twenty-eighth—because if she had that knowledge, of course, the knowledge continued. It is different from the gas continuing, I think, on that theory. 30

Mr. Cole: I will withdraw my objection, because I supposed we would come to this.

The Court: I supposed so, too.

Q. I am asking whether you told her that on the first occasion you detected it?

A. No; I didn't.

10 The Court: As a matter of fact, the first three witnesses were all permitted to testify from November; then when we got to about the fourth witness was when we came down to May twenty-eighth. Now, Mr. Carr, you may ask him about time prior to May twenty-eighth.

Q. When did you first tell this lady that the gas was dangerous to her?

A. When I was called to see her in an emergency, in November, 1922.

20 Q. You pointed out the danger to her?

A. I did.

Q. Recommended that she get out?

A. No.

Q. Did you sometime later make such a recommendation?

A. I recommended that she have the condition removed, the cause removed.

Q. Did you point out the danger of its continuance?

30 A. I did. I alluded to that part.

Q. What did you tell her about it?

A. I told her I would not live in a place that was like that unless it was corrected. I qualified my remark.

Q. That is not my question. I asked you what you said to her about the danger to her health.

A. Oh, I didn't comment on the danger to her health at that time any more than the fact that it was dangerous to her health and life to constantly inhale those fumes. I didn't point out every little specific point as to what might happen, whether it would be her heart or her head.

Q. But you did tell her it was dangerous, didn't you?

A. Oh, yes.

Q. Now, Doctor, this treatment you gave this lady 10 was I think what you described as symptomatic treatment?

A. Oh, yes.

Q. It was not a specific treatment for gas, was it?

A. It was specific when I found her almost overcome.

Q. That was the emergency treatment?

A. That was the emergency treatment.

Q. And, what was that emergency treatment?

A. Fresh air, inhalation of vaporoles of ammonia: 20 hypodermic injections of atropin, artificial respiration, cold water dashed on the face and chest.

Q. Those same measures are applied in many cases of prostration; are they not?

A. All cases where people are overcome with fumes or anything of that sort.

Q. It does not make any difference whether they are overcome with fumes or not, does it? I mean as to your treatment. Isn't that quite a standard for a case of prostration? 30

A. Any case, like drowning, gas poisons like drowning, the same thing; if that is what you allude to; the shock, if that is what you allude to.

Q. Any condition of shock or prostration you would use about the same treatment; isn't that so?

A. About the same, yes. They are general treatments that are applicable in a broad sense.

Q. And was there anything about her condition that was peculiar, distinctive, to the gas poison that you described?

A. I would say, yes.

Q. I mean if you had not had the history of the case?

A. If I had not smelled the gas I might have thought it was something else.

Q. I mean the symptoms might easily have been of something else had it not been for the odor of gas?

10 A. If it had not been for the gas?

Q. Yes.

A. It might have been; a fine point.

Q. Is there any difference in the odor of gas escaping from imperfect combustion—any difference between the odor, whether it contains carbon-monoxide or carbon-dioxide?

A. I am not conversant with that point. It may be a fine point. I know that illuminating gas has one odor and furnace gas another.

20 Q. Is your answer that you do not know?

Q. (Repeated by the stenographer.) Is there any difference in the odor of gas escaping from imperfect combustion in a heater—any difference in the odor, whether it contains carbon monoxide or carbon-dioxide?

A. No; monoxide is odorless, as you said.

Q. And what you do smell from the gas escaping from a heater is neither the carbon-monoxide or the carbon-dioxide; isn't that so?

30 A. No.

Q. Isn't that right?

A. Perfectly right.

Q. So that you may smell the odor of gas from the heater and the contents of it be perfectly harmless; isn't that true?

A. No.

Q. The contents is never harmless?

A. The dangerous part of the gas is the odorless part; but there is no gas that is not dangerous to inhale it. The fumes of sulphur, for instance, or formaldehyde, or anything.

Q. I mean in the ordinary house under living conditions where you occasionally smell some gas escaping from the heater, would you say that contained carbon-monoxide gas?

A. Absolutely.

Q. In a condition to be harmful? 10

A. That the fumes coming from a furnace containing monoxide? Absolutely.

Q. Then you say whenever there is an escape of gas from a furnace that there is always carbon-monoxide?

A. Always carbon monoxide.

Q. And you are not stating that upon chemical analysis or by reference to any medical authority; are you?

A. By text books and the expressions of experts 20 regarding the matter. I don't specialize in gas. I am willing to accept their statements.

Q. Are you willing to refer to a single authority that supports your proposition?

A. Off hand I do not. I have read many authorities. I was after the text and not the writer so much.

Q. But you cannot recall a single authority now to support your position?

A. Right at this moment I could not. 30

Q. All right. And your entire position, then, is founded upon some text books, the writer whose name you cannot recall; isn't that right?

A. Not at all.

Q. What else is it founded on?

A. The opinion of other medical men.

Q. Expressed to you?

A. Experts.

Q. What medical men have expressed it to you?

A. Dr. Woolbert, for instance, Dr. Roy Woolbert of Atlantic City.

Q. In some public meeting or something?

A. No, on more than one occasion I have talked with him about the effect of gas. Dr. Ward Scanlan of Atlantic City, another one who is doing a great deal of work in that line, very much interested.

10 Q. Are you basing it now on any specialist in that line of work—the opinion of any specialist?

A. Unless you regarded Dr. Woolbert as a specialist.

Q. Is he in fact? I don't know.

A. Dr. Woolbert is a very profound scientist and has given a great deal of his work to this subject.

Q. Is he a specialist in gas work?

A. I think the best we know of in our part of the country.

20 Q. Is he a specialist in gas work?

A. I think he is. He can answer himself. I wouldn't like to go on record as saying that he is. He may not care for it. But we recognize him—I do particularly—as an expert, knowing of his work with the government in that line, in the Department of Mines, and so forth.

Q. But, at any rate, so far as your sense of smell goes, the thing that you smell is probably the combustion of sulphur or something of that sort?

30 A. Sulphur is the most characteristic one you notice.

Q. It isn't the gas itself that you actually smell?

A. Well, you smell the gas; you don't smell the sulphur itself; you smell the gas from the sulphur, the odor of combustion.

Q. You don't smell the carbon-monoxide?

A. Oh, no.

Q. So its presence is not detectible by sense of smell?

A. No.

Q. Nor by sense of sight?

A. No; invisible gas, colorless, odorless absolutely invisible.

Mr. Carr: That is all.

10

Re-direct examination.

By Mr. Cole:

Q. Doctor, is it the sulphur that warns of the presence of this gas?

A. It warns you that gas is present.

Q. Now, did you have the windows open in this apartment during the time that you were there, ordered it open?

20

A. Had the windows kept open; free ventilation.

Q. Does the inhalation of gas have a smothering effect on the person?

A. It depends on the degree. It is like drowning, the same thing.

Q. Now, you spoke of certain effects, such as dryness of the throat and headaches. Did you experience that on any of your visits to this apartment?

A. On most of my visits, especially during the emergencies in which I saw Mrs. Jenkins.

30

Mr. Cole: I think that is all.

Mr. Carr: That is all, Doctor.

(Witness excused.)

Mr. Cole: I offer in evidence lease dated November eighth, 1922, between Schneidman, the defendant, and Jenkins, the plaintiff.

(The paper referred to is received in evidence and marked Exhibit P1.)

10 DANIEL L. JENKINS, called as a witness on behalf the plaintiffs, being duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Cole:

Q. Calling your attention to the lease of November eighth, 1922, just offered in evidence, I ask you when you moved into the apartment described therein?

20 A. About the fifth or eighth of November, 1922, although the lease was dated on the tenth of November.

Q. And who accompanied you?

A. When I moved?

Q. Yes.

A. Mrs. Jenkins and I.

Q. How many rooms have you?

A. Four rooms and bath.

30 Q. On which story? In which story of the building were you?

A. The first floor from the ground; that would be the second floor, I should say.

Q. And were there radiators in your apartment?

A. Yes, sir.

Q. Was the heat steam or hot water?

A. Hot water, I believe.

Q. And where was the source? Where was the furnace?

A. In the ground floor, in the rear of the building.

Q. Anywhere near one of your rooms?

A. Directly under the bedroom.

Q. What was the condition of Mrs. Jenkins' health before you moved into that apartment?

A. I would say normal; very good.

Q. Now, did you discover anything unusual or out of the ordinary in that apartment while you were in 10 possession?

Mr. Carr: I object unless it is confined to the period.

Mr. Cole: Let him answer "Yes" or "No" first.

The Court: Yes, he can answer "Yes" or "No."

Q. Did you?

20

A. Yes, sir.

Q. Now, confining yourself under the Court's ruling to the period between May and September of 1923, I ask you whether you discovered anything out of the ordinary or unusual in any one of the rooms in that apartment?

A. I did.

Q. What was it?

A. Well, it smelled like fumes from a furnace: that is, when you make a fire in the furnace; the fumes which come out; it smelled that way to me. 30

Q. Did you undertake to find where that came from?

A. I thought possibly it might have come from the gas —

Mr. Carr: I object as to what he thought.

The Court: Yes; strike it out.

Q. My question is did you undertake to find out where that came from?

A. Not until I first consulted Mr. Schneidman.

Q. And did you consult him?

A. I did.

Q. Where did you see him?

A. Seen him at the store, and also on the street
10 between my home and his.

Q. Did you talk about this gas or fumes?

A. Every time I met him.

Q. Well, tell us just what you said to him and what he said to you.

A. Between the dates you mean?

Q. Any time.

Mr. Carr: Well, I object, except between the dates mentioned.

20

A. Between the dates of May —

The Court: I do not see exactly how we are going to try one phase of this case from one date and another phase from another date.

Mr. Cole: I would suppose that I would have the right to bring to this defendant's knowledge that there was something wrong with his heater, at least
30 in time. Now, the question of when we were damaged might under your Honor's ruling be confined to the period.

The Court: The trouble is you do not allege there was gas at any time until May twenty-eighth. The language "at least three or fourth months," cannot

be extended beyond three or fourth months. I will have to confine the testimony within the allegation.

Q. Can you recall whether or not during that period of May, June, July, August and September that you talked with Mr. Schneidman about this case—this gas, or fumes?

A. Spoke to him continually between those dates.

Q. And what was your conversation?

A. Always about coal gas in our apartment. 10

Q. Tell us as nearly as you can just what was said, and what he said.

A. I was after him continually: used to call him on the telephone. He evaded me at every —

Mr. Carr: I object to that. That question is what was said.

The Court: Strike that out.

Q. Just what was said, Mr. Jenkins. 20

A. I told him that there was coal gas in the apartment. I wanted him to come up and smell it himself; couldn't get him to come; he would not come; he knew it was there.

Mr. Carr: I object to that and ask that it be stricken out.

The Court: Yes; strike it out. 30

Q. Did he never come to that apartment?

A. Yes, sir.

Q. Well, a moment ago you said he never would come.

A. That is between those dates, May twenty-eighth, I believe, and September twenty-eighth.

Q. Had you talked to him during that period?

A. Yes, sir.

Q. Had he been in the apartment before that?

A. Yes, sir.

Q. And what was he doing there?

Mr. Carr: I object to that as immaterial and irrelevant.

10 The Court: How long before?

The Witness: Not over a month prior to that time. I believe it was in the month of May. It was either the latter part of April or May.

The Court: I think I will permit that.

Mr. Carr: Exception.

20

Q. May it have been the month of May?

A. Yes, sir.

Q. When he was in the apartment?

A. Yes, sir; it was in the spring.

Q. And what was he doing there?

A. I brought him up.

Q. Well, then, what happened?

A. I asked him if he smelled anything in the apartment —

30

Mr. Carr: No, if your Honor please, this game may or may not be before or after May twenty-eighth.

The Court: Well, he says it was the latter part of April or the early part of May.

Mr. Carr: Well, if he thinks it is subsequent to May twenty-eighth I think it is fair but otherwise I do not think it is.

The Court: No; he is fixing it before May twenty-eighth, but he is fixing it very nearly the time of his allegation.

Mr. Carr: Well, may I have an exception?

10

The Court: Yes.

Q. (Repeated by the stenographer.) Well, then, what happened?

A. I asked him if he smelled anything in the apartment and he said he did. He thought it may be a leak from the stove. I said it could not be because I tested that myself several times before and I handed him a box of matches. He went over every part of the kitchen and all over the range. He says, "No; there is no leak there." I said, "You don't suppose I wouldn't have found it if there had been a leak." He said—he smelled that way (indicating) and he said, "My goodness! Mr. Jenkins, that is coal gas. I will have to have that fixed." That was the only time I could drag him up in the apartment.

20

Mr. Carr: I ask that that be stricken out.

30

The Court: Yes; that will be stricken out.

The Witness: And he admitted that he smelled the coal gas.

Mr. Carr: I ask that that be stricken out.

The Court: That will be stricken.

Q. You have already testified that he did say he smelled it?

A. Yes.

Q. Did he ever cure that trouble?

Mr. Carr: I object to "cure that trouble."

10 The Court: Yes, there has not been any proof of any trouble yet that I know of.

Q. After he said he smelled this gas and promised to do something did he do anything?

A. Not to my knowledge.

Q. Did that smell continue thereafter?

A. Until the day we moved.

Q. When did you move?

A. On the twenty-eighth day of September, 1923.

20 Q. Had you called his attention to the presence of this gas in your apartment before May, 1923?

A. Yes, sir.

Q. How long before?

Mr. Carr: I object to that.

The Court: I will permit it.

Mr. Carr: Exception.

30 The Court: Yes.

A. At every opportunity I got; at least a month, if not oftener, from the day we moved in until the twenty-eighth day of May, or until the day we moved out.

Q. What did you say to him?

A. I told him that the coal gas was making Mrs. Jenkins ill —

Mr. Carr: I object to that. That is long before this case. It is a vague and uncertain time.

The Court: Well, I will permit him to testify what he told Mr. Schneidman.

Mr. Carr: Exception.

10

The Court: Yes.

The Witness: I told him that the coal gas would have to be remedied or we would have to move out; he would have to do something. He promised every time: "I will have that fixed the first thing in the morning." It got down that he was going to have it fixed the first thing in the morning. One particular evening there he said he was going to try to get the man on the telephone.

20

Mr. Carr: May we have the date?

Q. Will you give us the dates as nearly as you can recall them, if you can recall them?

A. That I spoke to him about the coal gas?

Q. Yes.

A. Continually from the day we moved in until we moved out: at least—not less than twice a month. Just what dates —

30

Mr. Carr: Now, I move to strike that out. It is tied up with a period ahead of the time charged in the complaint.

The Court: I think unless the complaint is amended it will have to be stricken out.

Mr. Cole: Your Honor will allow me an exception?

The Court: Yes.

10 Q. Were you ever in the basement where this furnace is?

A. When I first moved there to put a screen door in; that is the only time to my knowledge I was ever there.

Q. Did you have anything to do with the heater?

A. No, sir.

Q. Did that heater provide the heat for the entire apartment?

A. For the four apartments.

Q. Did you have any control over it at all?

20 A. No, sir.

Q. In whose control was it?

A. Well, I suppose the janitor.

Mr. Carr: I object to what he supposed.

The Court: Yes; strike it out.

Q. Now, Mr. Jenkins, was your wife sick while you were there?

30 A. Yes, sir.

Q. How long was it after you took possession before she took sick?

Mr. Carr: I object to that unless it is confined to the period stated in the complaint.

The Court: I will permit him to say when it was that she was taken ill.

Mr. Carr: I ask an exception.

A. I would say two weeks after we moved in.

Q. How long did her illness continue?

Mr. Carr: Same objection.

The Court: I will permit it.

10

Mr. Carr: Exception.

A. Until the day we moved out.

Q. How much of the time was she confined to her bed?

Mr. Carr: Same objection.

The Court: I will permit it.

20

Mr. Carr: Exception.

A. Four weeks at one time, or five weeks, rather, I think was the longest time: and then a week or so at intervals while we lived in that apartment.

Q. And who attended her?

A. Dr. Dunlap.

Q. In what respect is her physical condition today different, if at all, from what it was when she entered this apartment?

30

A. Well, she is an entirely different looking woman in my estimation. She is delicate, sickly looking, compared to what she was when she moved in. Of course, she has gained considerable since that time.

Q. You say she is an entirely different looking woman. Is she different in any other respects?

A. By the look I mean, sallow look.

Q. Well, apart from her looks, is she any different from what she was when you moved in? Is she as strong a woman as she was?

A. Oh, no, no, no; and she is not physically fit, I don't think.

Q. That is what I want to find out from you.

A. No, sir.

10 Q. Is she able to do the work she did before she came into that apartment?

A. No, sir.

Q. Is she as strong a woman as she was before?

A. No, sir.

Q. Has she suffered any pain?

A. I would say so.

Q. Why do you think she suffered pain?

A. Well, I have sat up with her so many nights that I don't think it would be necessary to do that unless you are suffering pain.

20 Q. Had you had to do that before you went into this apartment?

A. Never.

Q. What else is there about her condition that you can recall that is different from what it was before she moved into the apartment?

A. Well, she can't eat the things today that she could before we moved in there. I have known her to sit down and eat certain things and she vomits them immediately, things of that character.

30 Q. Well, did she have vomiting attacks while she was in the apartment?

A. Yes, sir.

Q. Did she have those while she was in bed?

A. While she was in bed?

Q. Yes, while she was sick abed?

A. Well, I suppose—I think she did.

Q. Did she have headaches?

A. Yes, sir, very severe headaches.

Q. Did she have any heart trouble?

A. The doctor said she did.

Mr. Carr: I object to that.

Mr. Cole: Well, you ought not to object so late.

The Court: It is not very important, the doctor
has already testified.

10

Q. Now, to what expense have you been put during her sickness?

Mr. Carr: Is that from May twenty-eighth on?

Mr. Cole: No; it is general.

Mr. Carr: Well, I object to it unless it is limited
to the period set forth in the complaint.

20

The Court: I think I will have to limit that to
the period set forth in the complaint.

Q. Now, have you any bills here?

A. I haven't any here but I can get them.

Q. Well, have you never had bills?

A. Oh, yes.

Q. Why, didn't you bring them?

A. Well, I just neglected them.

30

Q. What?

A. I just neglected them; I didn't bring them over.

Q. Whose bills have you?

A. Dr. Dunlap's.

Q. Anyone else's?

A. The oculist and the optician. I believe we have

those bills, for examination of her eyes, and the druggist.

Q. Drug bill?

A. He will give me that any time I want it. That has got to be all itemized. It takes some time to do that.

Q. Are you indebted now for any services, doctors, or otherwise?

A. No, sir.

Q. All your bills paid to date?

10 A. Outside of Dr. Dunlap. He has not rendered me the last bill. I think he only renders a statement every three or four months. I haven't got one yet. The last one I have.

Q. Dr. Dunlap is still attending Mrs. Jenkins?

A. Yes, sir.

Q. Where are you living now?

A. At Kenapac Court, Kentucky and Pacific Avenue.

20 Q. And how long have you been living in Atlantic City?

A. Since 1912.

Q. Now, who did your housework before you moved in this apartment?

A. Mrs. Jenkins.

Q. Did she do it all?

A. Absolutely.

Q. Doesn't she do it now?

A. Not altogether.

Q. Who helps?

30 A. She gets different people to help her. For instance, she has somebody do her washing and somebody come in and clean for her.

Q. Do you pay for that?

A. Yes, sir—Mrs. Jenkins does; I don't; I don't arrange that; she takes care of that.

Cross-examination.

By Mr. Carr:

Q. Mr. Jenkins, you say there was a gas stove in the kitchen there?

A. Gas stove?

Q. Yes.

A. Gas range, I would say.

Q. Gas range?

A. Yes, sir.

10

Q. And you at one time thought that might be the source of trouble; did you?

A. I wanted to make sure that it was not that.

Q. Did you at one time think that that was the source of trouble?

A. I thought it might be.

Q. I see. I understood you to say the heater room was below the bedroom, on the floor below?

A. Directly in under or beneath the bedroom, the rear of the building.

20

Q. And as far as you could see was there any break in either the wall or the chimney, flue, or the wall paper?

A. Not that I could notice.

Q. It was comparatively a new building, wasn't it?

A. I think so.

Q. It looked to be a new building?

A. I think so; just a few months old before we moved into it.

30

Q. And did the doctor—you believe this was gas that you smelled, of course, did you?

A. I have smelled gas before coming from a furnace and it was the same; practically the same smell that would come from it.

Q. You believed it was gas when you smelled it?

A. Yes; I believed it.

Q. And did the doctor tell you the same thing, that it was gas?

A. Well, he said that it was what it was; that it was the fumes from the coal gas.

Q. Did he tell you that was dangerous to your wife's health?

A. Yes, sir.

Q. Recommend your getting out of there; did he?

10 A. Yes, unless I moved or had the thing remedied.

Q. But he did tell you it was dangerous to your wife's health?

A. Yes, sir.

Q. Did he tell your wife the same thing?

A. Yes, sir.

Q. Tell her that was what was causing her illness?

A. Yes, sir.

Q. And you remained there until some date in September, 1923?

A. Twenty-eighth day of September, 1923.

20 Q. You stayed there in the neighborhood of eleven months?

A. Yes, sir. To be exact, from the date of the lease it was ten months and eighteen days.

Q. You were not overcome yourself with gas, were you?

A. Not entirely overcome. I would get up in the mornings; my head would ache, I couldn't eat the breakfast I used to, a thing I never had in my life; never had —

30 Q. Did you eat —

Mr. Cole: Wait a moment. I ask that he be allowed to finish the answer.

The Court: Yes, let him finish.

A. (Continuing.) I never had a headache.

Mr. Carr: Just a moment, please. I think the question was whether he was ever overcome by gas himself.

Mr. Cole: Now he is giving his idea of being overcome. Now, some people might think he had to be killed to be overcome; other people might not think so. 10

The Court: I suppose "overcome" is synonymous with prostrated, isn't it? I do not know. I am just asking for information.

Mr. Cole: I do not know myself. Sometimes I think I am overcome. Other folks think I am not. I think he can say "Yes" or "No," or "I don't know." 20

Q. Now, you never required medical attention as the result of being exposed to gas yourself; did you?

A. I would not say—not from coal gas: no, sir; not while I was in there. So far as my eyes were concerned I did my own personal self. I never wore a glass in my life until I moved into that apartment. Now I have to put glasses on to read. I supposed it was from my headache when I got up in the morning—a thing I never had to do in my life, wear glasses. 30

Q. What is your age?

A. Beg pardon?

Q. What is your age?

A. Fifty years old.

Mr. Carr: That is all.

(Witness excused.)

Mr. Cole: Will you let me have the examination?

Mr. Carr: I do not think it is evidence unless we introduce it.

Mr. Cole: You will change your mind before we get through.

Mr. Carr: Well, maybe.

10

Mr. Cole: I want to read the examination of Mr. and Mrs. Jenkins made by the defendants in this case.

Mr. Carr: I object on the score that it is not evidence unless it is offered by the parties taking it.

The Court: Well, that is a matter of statute.

20

Mr. Cole: Surely, and the statute says it is admissible.

The Court: Now, let me see the statute.

Mr. Cole: I happen to have been through that once before.

Mr. Carr: I do not think my objection is any good.

30

The Court: I do not think it is, either.

Mr. Cole: Now, we will read a little testimony that was taken by my friend on the other side for his benefit. He examined the two plaintiffs and the law says when he does that you have a right to have it, and I will now read the examination of Mrs. Jenkins by Mr. Carr.

“Ivie L. Jenkins, sworn.

Direct examination.

By Mr. Carr:

Q. Mrs. Jenkins, where do you live, please?

A. Kenapac Court, 411 Kenapac Court.

Q. You are one of the plaintiffs in this suit, are you not? 10

A. Yes, sir.

Q. Were you at one time a tenant of an apartment at 103 South Virginia Avenue?

A. Yes, sir.

Q. How long did you occupy that?

A. Eleven months.

Q. Beginning when?

A. We moved in there November.

Q. Of 1922?

A. Yes, sir. 20

Q. And remained until September?

A. September twenty-eighth, I think, the following September.

Q. 1923?

A. 1923.

Q. What apartment did you occupy?

A. The first floor.

Q. Is there more than one apartment on the first floor?

Q. Well, it is a duplex, there is one up and one 30 down on each side, that makes it a four-apartment house.

Q. Four apartments in that one building?

A. In that building.

Q. When you say the first floor, is there a store on the floor below?

A. Yes, sir.

Q. You have to climb one flight of stairs?

A. One flight of stairs, yes, sir.

Q. So that, counting the store as one floor, it would really be the second floor?

A. Yes, sir; it is really the first apartment.

Q. Store is on the street level?

A. Yes, sir.

Q. How many rooms were there in the apartment?

10 A. Four.

Q. How many sleeping rooms?

A. One.

Q. One sleeping room?

A. Yes, sir.

Q. That would be on the west side of Virginia Avenue, the apartment?

A. That is on the Pacific Avenue side, yes, is that the west side?

20 Q. The apartment is on what they call the west side of Virginia Avenue, isn't it?

A. We call it the south side.

Mr. Cole: Apartment on the southwest corner.

Q. That would be the side toward the Inlet?

A. Yes, it isn't the ocean side; it is this side.

Q. The building itself would face on the ocean side—I mean on the side toward the Inlet, would it not?

30 A. No, the front of the building faces this way.

Mr. Cole: Pacific Avenue?

A. The front faces Virginia Avenue.

Q. Is the apartment on the left side of Virginia Avenue as you go to the ocean?

A. Going to the walk, yes, sir.

Q. Now was the sleeping room in the front or the back of the apartment?

A. The back.

Q. What was the front room of the apartment?

A. Living room.

Q. Then the next room would be what?

A. The bath room was next to the living room, then the dining room, then the kitchen and then the bedroom.

Q. How many windows did you have in your sleeping room?

A. Two.

Q. One facing toward Pacific Avenue?

A. And one to the back of the building.

Q. And one to the rear of the building? And who occupied that sleeping room?

A. Mr. Jenkins and I.

Q. Now you charge here that there was escaping gas in the apartment, do you not?

A. Yes, sir.

20

Q. When did you first notice the gas?

A. I noticed it the day I moved in, but didn't realize what it was.

Q. How did you notice it?

A. Well, I just noticed a peculiar odor the day we moved in; I thought was due to the place being closed up.

Q. Was that odor continuous after that?

A. Continuous; it was very rarely that there was a time that that odor wasn't there.

30

Q. Did it smell like gas, like coal gas?

A. It was smoke, just as if there was a fire.

Q. It smelled like gas?

A. Yes.

Q. Coal gas?

A. Yes, it was like the gas and it was a peculiar odor, it was just like the smell you know would come

in, you could detect it, sometimes it would have the odor as if it came from the alleyway. We had that investigated but it just continued whether there was anything there or not.

Q. Well, you are familiar with the odor of coal gas?

A. Yes; oh, it was coal gas, yes.

Q. Smelled to you like coal gas?

A. Oh, my; yes.

Q. It smelled that way when you first came in you
10 say?

A. Yes, we noticed that from the day I moved in there.

Q. That is the odor of coal gas?

A. Yes, it was coal gas.

Q. Did it keep right on all the time you were there?

A. At times it was more noticeable than others. Sometimes you could scarcely notice it, then other times it would be just so strong you could scarcely
20 stand in the back part of the house.

Q. But it was never free from the odor?

A. Never what you would call altogether free.

Q. And just the same in the summer time, was it?

A. Yes, just the same in the summer; in fact it seemed more noticeable in the summer.

Q. In the summer time?

A. Yes.

Q. I suppose you had your windows open in the summer?

30 A. Yes, we did have the windows open. You see it was like, there was an alley, it isn't built in a very good way for ventilation, just a small window in the kitchen, it isn't any wider than that, and it is right at the stove and you couldn't keep that open all the time and that kept the kitchen full of it all the time,

while cooking you just were compelled to close that window.

Q. Is your kitchen also in the back of the building?

A. Right next to the bedroom, between the dining room and the bedroom.

Q. It is further front in the apartment, is that it?

A. Yes. You see the kitchen was only thirty-eight inches wide, it is a kitchenette, only thirty-eight inches wide and ran the length this way of the apartment. 10

Q. Kitchenette you say?

A. Yes, I call it a kitchenette, thirty-eight inches wide.

Q. Don't sound like a full-sized kitchen?

A. You see it was a long narrow kitchen.

Q. Could you determine definitely how the gas got in the room?

A. No, I couldn't, because I don't understand—just one thing I do know the smoke that came from the furnace came up around the baseboard because every week when I would wipe it up it would be smoked; I know where the smoke came from but the other I couldn't explain; it was there. 20

Q. You found the same condition in the summer time, the smoke coming up?

A. Yes; we didn't have the smoke quite so bad in the summer as in the winter, because I think we had from both furnaces in the winter; at times our bedroom was just the same as if there was a fire. 30

Q. Was this bedroom papered?

A. Yes, sir.

Q. Was there any break in the paper or the chimney that you could see?

A. No, not while I lived there. There wasn't, you see the chimney was only about that square and stood in the corner, it wasn't any wider than that,

just a tiny—you see the bedroom was only six by nine, I think the bedroom was.

Mr. Jenkins: It was wider than that.

A. What was it? We measured it for a rug, seven and a half by ten, perhaps.

Q. You couldn't see any break in the chimney or any opening?

10 A. No, I never found any break in the paper.

Q. You see any break or opening in the walls anywhere?

A. No, you see it was all papered.

Q. No break in the paper?

A. No, there wasn't, it was never really enough, really to break that paper.

Q. Was it comparatively a new building?

A. We were supposed to have been the first tenants, but we weren't; there was a tenant in there before us that moved a week or so.

20 Q. Was it comparatively new?

A. Oh, yes; the people only lived in there a week.

Q. When did you first notice that you were affected?

A. I hadn't lived there very long when I had a terrible headache and I could hardly walk, I staggered around and I just got really too sick to call the doctor and Mr. Jenkins came in and I had no dinner ready, I was sitting there, I was just almost wild by the time the doctor came there, I was just about unconscious.

30 Q. How long was this after you had moved in?

A. Well, I would judge about a month.

Q. That would be some time in December, 1922?

A. It was before Christmas, I know that, because I was sick Christmas time.

Q. Were you sick in bed?

A. At that time, yes, sir; oh, yes, I was all night, the doctor stayed until twelve o'clock that night.

Q. What doctor was that?

A. Dr. Dunlap.

Q. How long did he treat you on that occasion?

A. Constantly ever since, I have never been out of his care since, but on that case called for about four days.

Q. You were ill in bed?

10

A. I was in bed two days, then I got up and went to the davenport, I couldn't stay in the bedroom, the smoke was too bad, and I was weak from the attack I had, so I went to the living room and stayed a day or two.

Q. Did you have a davenport in there?

A. In the living room, we did, yes. We slept most of the time in there, get up in the night and go in there to sleep.

Q. Was that a bed arrangement?

20

A. To the front of the house.

Q. Convertible into a bed?

A. Yes, sir.

Q. Did the front of the house have a bay window?

A. Yes, sir.

Q. Three windows?

A. Four windows.

Q. Gas wasn't as bad there?

A. Very little. It had to be very bad through the house before you would detect it there at all; very little in the bath room; it seemed to be the dining room, kitchen and bedroom. Of course, the smoke would go all through the house but not so bad as the back of the house. You see the back of the house was over the furnace room, the bedroom was directly over the furnace room and that little kitchen.

30

Q. You are sure it was directly over the furnace room?

A. Well, yes, it must have been because that was the end of the building and the furnace room was right down under there.

Q. Did you ever do down to see where the furnace room was?

10 A. I went down one day to hunt Mr. Schneidman and I couldn't find him and I went back through that alley but I didn't go in, I just looked in and saw that was the furnace room and I know that was the end of the building, our bedroom was right on the end of the building, so it must have been directly over it.

Q. Now, after those four days attendance by Dr. Dunlap, I presume you got better then?

A. Yes, I got better.

Q. And then did you have another attack?

20 A. About two weeks afterwards I had a bad attack and I was about a month getting over that, a month before I left the house.

Q. In the bed would you be all the time?

A. In bed off and on, lie down, get up, used to do a little, but I was in bed a week at that time, didn't get up at all.

Q. Did you occupy the bedroom then or the front room?

A. No, I stayed in the living room all together at that time.

30 Q. And it still seemed to be gas?

A. Oh, yes. You see the doctor would always—you see I would get a cold every time, that helped to make it worse, because the doctor would come in and throw open all those windows, and I would get chilled through and get a cold and that helped to keep me longer in bed, you know, longer in the house,

I would get those terrible colds from opening up the house.

Q. When you were being treated the first time were you satisfied it was from gas?

A. Oh, my, yes, the other reason I was just overcome when the doctor came in, the house, was just full of it.

Q. Doctor tell you it was gas?

A. Yes, he opened the windows right away.

Q. Did he tell you your trouble was due to gas? 10

A. When he first came in he said to move out right away. I said, "I can't move out of here, we just moved in." He said, "I wouldn't go on and finish any fixing up of the curtains or anything.

Q. Why did he tell you to move, did he say?

A. I beg pardon?

Q. Why did he tell you to move out, did he say?

A. Because he said in time that would kill you if that kept up.

Q. Now you say the doctor treated you for about 20 a month on the second occasion?

A. Second time, yes, sir.

Q. Then I got better and got out again and this gas was always there, you see, I wouldn't get what you would call better, but I just had to get better and get around.

Q. Then did you have to call him in again later?

A. Then I was going to his office, then ran along until New Year's Day, I was sick, I had a little dinner and every person there felt the effect of it, really every person had the headache, they said, as if we had had a wine dinner, they all had sort of a sick headache, and we didn't have any wine, but every person felt the same. It wasn't any joke when every person got sick. 30

Q. Then you continued to go to Dr. Dunlap's office?

A. Then I went to the doctor's office on, I ran along to the doctor's office then until in February, then in February I had another bad spell.

Q. Then you were confined to your home?

A. Then I was in my home until way late in March, I wasn't out for ten weeks, outside of my apartment door.

Q. Then did you occupy —

A. You see my heart got so bad I couldn't go up and down stairs.

10 Q. Did you occupy the front room then?

A. No, because it was too cold, I slept in the bedroom, at night and went to the living room in the daytime and my mother stayed with me and at that time slept on a Morris chair because she couldn't sleep in the bedroom any more than I could, so we fixed a Morris chair for her to sleep on.

Q. Then were you confined to your house any more than this time you have last mentioned?

20 A. No, not after March, after that I just went back and forth to the doctor's and he told me to keep out of the house as much as I could until our time expired when we could move and I had, I wanted Mr. Jenkins to just get up and move out, but when he would go and talk to Mr. Schneidman he said he would hold his goods, but Mr. Jenkins wouldn't do it, he never had any trouble like that, and we would just get out, possibly when the warm weather would come that would end it, but it didn't, we had it all summer.

30 Q. How did this affect you, Mrs. Jenkins?

A. Well, just dizzy, sick to my stomach and vomit and after, as I told you, the last spell I had, my nose took to bleeding and every morning my nose would bleed.

Q. You speak of the last spell.

A. That was when I told you I took sick in Feb-

ruary, or rather it was January, and I wasn't out until March, ten weeks I was sick, and I would get up in the morning sick, just like you had had a little poisoning in you, just half sick, dizzy sick, and I lost my appetite, I had no appetite, and the doctor said it affected my heart, and I couldn't go up and down stairs, I couldn't do my own work, the least exertion I just felt as if my heart beat clear out of the top of my head.

Q. When you say you had the nose bleed that was 10
some time in March?

A. Yes, sir; that was that last sick spell.

Q. How long did that continue?

A. For weeks, all through that sick spell my nose would bleed every morning.

Q. You mean in the time from the first of January until March that happened?

A. Yes, sir.

Q. Then after that did your nose bleed?

A. A little after we moved out of the house, for 20
about a week, and it never has, never since, I have got to have the slightest tendency since.

Q. You mean you did have the nose bleed until you left there?

A. From that sick spell until I left there, yes, sir.

Q. You didn't actually go in this heater room yourself, did you?

A. No, I did not; I never went in to that heater room, but if I had it to do over again I would go in.

Q. Have you regained your normal health? 30

A. No. I am still under the doctor's care.

Q. Dr. Dunlap's care?

A. Yes, sir.

Q. Did you complain to Mr. Schneidman about this?

A. Repeatedly, more times than I could tell you.

Q. Did you personally?

A. I did personally; yes, I did.

Q. When did you first complain about it?

A. Well, after I had that first spell I phoned him and asked him if he thought that it was the grade of coal he was using. I said our house was full of smoke and I spoke of his new paper. I had no hard feelings about it and you know that coal gas is bad any place. I spoke of his new paper. It was elegantly papered. I spoke of that. He said, “Mrs. Jen-
10 kins, it may be the coal; I will see to it.” Whether he did see to it or not at that time I couldn’t tell you, but at one time he brought a man in and told me he had a furnace man and he looked all around the baseboard and he examined the radiators and he sounded that chimney in the bedroom, who that man was I don’t know anything about that but he brought him in and told me he had a furnace man. I don’t suppose he was but he told me he was.

Q. Did the condition improve any after the fur-
20 nace man was there?

A. No, but he did get another coal, he bought better coal. You see I was in the house so much I would see this coal coming. He just had a small place for it, could only get about a ton at a time, a small amount, I don’t know whether that was a ton.

Cross-examination.

By Mr. Cole:

30 Q. What was your health before you moved into this apartment?

A. Well, I had good health, Judge. I had done all my own packing to move and fix up my home without any aid whatever and I don’t feel there was anything wrong with me.

Q. Have you lost any weight by reason of your sickness?

A. My, yes, I went down to ninety pound in March. You see that is almost a year ago; you couldn't stay that way.

Q. How much did you weigh before you were sick?

A. One hundred and twenty-six.

Q. You went as low as ninety?

A. I went to ninety, yes, sir, first time I was in the doctor's office I weighed ninety.

10

Q. Do you know what you weigh now?

A. He weighed me about a week ago, one hundred and fourteen, but I have been doctoring constantly.

DANIEL JENKINS, SWORN.

Direct examination.

20

By Mr. Carr:

Q. Mr. Jenkins, you are one of the plaintiffs in this case, are you not?

A. Yes, sir.

Q. And you are the husband of the lady who has just testified?

A. Yes.

Q. At one time you occupied an apartment 103 South Virginia Avenue?

30

A. Yes.

Q. As I understand it you went in there in November, 1922?

A. 1922.

Q. Remained there about eleven months?

A. Until the twenty eighth of September, 1923.

Q. That was the apartment immediately above the store, was it?

A. Yes. There is a dividing line. There are four apartments above the store, dividing line separate entrance to each two apartments above the stores, ours 103 next 105, but you can't go from 103 over to the next 105 without coming out on the street.

Q. Your apartment was ——

A. The first one up, first door up from the street.

10 Q. Immediately above the store?

A. At 103, yes, sir.

Q. And you had a room in front—I wish you would just tell me the layout of the rooms, please?

A. The room facing on Virginia Avenue, facing this way, which we would call facing the south or east, is the first room, is the living room, next room bathroom, next room dining room, next room is the kitchen and the rear room is the bedroom.

Q. Does the chimney run up through the bedroom?

20 A. Right through the bedroom.

Q. And you and your wife occupied the bedroom or rear room?

A. The rear bedroom.

Q. Were there any breaks in the chimney that you saw?

A. Not that I noticed.

Q. Did you see any breaks in the wall?

30 A. No, outside of, I believe, that the paper had let go a little bit I think in the room, I can recall, but just newly papered I suppose right in the crevice of the ceiling, but hardly noticeable, but I really think the paper had let go right near the ceiling.

Q. Did you see anything looked like any cracks or breaks in the wall?

A. No.

Q. Nor any breaks in the wall paper itself?

A. Not that I can recall just now; I don't think so.

Q. When did you notice any odor of gas?

A. Well, I noticed a peculiar odor when we first went in and I thought it was just simply the house had been vacant and just closed up and I just threw the windows up and thought that would go out.

Q. After you had been in there a little while was there still an odor?

A. Yes.

10

Q. Was it the odor of gas?

A. Yes, I would detect it every evening when I would come home.

Q. And would it smell like coal gas to you?

A. Yes.

Q. You are familiar with the smell of coal gas?

A. Yes, some.

Q. At least it seemed to you as though it were coal gas, is that right?

A. Yes, smelled to me just as though you went in the furnace, raked up the furnace and put coal in your own furnace, as though the fumes would come out, that is the way it smelled to me. 20

Q. Was that continuous during your occupancy?

A. Well, I would say pretty near all the time. Of course, I wasn't there through the day, I just came home from the office in the evening.

Q. Did it affect you?

A. I never had the headache in my life until I moved into that apartment and I never had it since. that is only an instance. I never had a headache, never knew what it was. 30

Q. Did you have headaches then?

A. Yes, I did. I never had to wear glasses in my life and I thought I had these headaches and I attributed it to my eyes, so went to the oculist, he examined my eyes, he says "Glasses won't hurt you."

Now to read I have got to wear glasses, never had that in my life before.

Q. How old are you?

A. I am fifty-one.

Q. Did you have to have any medical treatment as the result of the gas?

A. No, I didn't. Just simply, I used to go out in the evenings, when I would detect it, when Mrs. Jenkins was able to I used to take her out and take her out to get away from it.

10 Q. Did you go down in the furnace room yourself?

A. The only time I was ever in the furnace room, we moved a screen door there and I took the screen door down, when we first moved, that first day we moved there.

Q. That would be in November, 1922?

A. That would be in November, 1922.

Q. Took it down there to be stored, I suppose, to get it out of the road?

A. Yes, just put it down there to store it, yes.

20 Q. Did you ever speak to Mr. Schneidman, about the gas?

A. I imagine I spoke to Mr. Schneidman on the average of at least twice a month. The peculiar thing about Mr. Schneidman he tried to avoid me all the time; I couldn't get him to talk to me.

Q. How about the days when the rent was due?

A. That is about the only time I could ever get hold of him, so I was after him continually.

30 Q. Well, you would come in contact with him, I suppose, once or twice a month?

A. Yes; on one occasion I just simply dragged him up in the apartment when it was full of it and I took him right straight into the dining room there and I said, "Now, you tell me what this is."

Q. What did he say?

A. He says, "My goodness," he says "your stove

is leaking." I says "Here is the matches" and I handed him a box of matches. I said, "Mr. Schneidman, you will do me a great favor if you will go around the stove," he just lit, I suppose, eight or ten different matches and went over the pipe all the way, the gas stove in the kitchen. I says, "Now, don't you think I would detect gas coming out of there, that I would live in here with escaping gas." He says "Mr. Jenkins, it isn't gas" and he says "My God, I have to have this thing attended to" and he says "You couldn't live in this."

10

Q. And when was this?

A. That was after you had had your first opportunity, I judge that would be the first part of the summer, 1923, just the date, I remember I didn't get home that day until about six o'clock, and I telephoned him, it was so bad, at the store and his son answered the telephone, he said his father wasn't in, so I went to the bay window in the front room, in this living room, looked out, and I seen Mr. Schneidman standing on the pavement. Mrs. Jenkins was ill then, complaining, and I says "I can't stand this any longer." I says "He has got to do something but I want to prove to him that there is coal gas here," and I went down and I got him himself, and he was in his bare head and it strikes me he was in his shirt sleeves, I just can't recall, but I know he was in his bare head, and he didn't want to come up to the house, but I insisted upon it, I said there was something wrong. He asked me what it was. I wouldn't tell him on the street. I said, "You come up, I want to show you something," so I got him up and I told him, "Now," I says "you just go through this house and tell me what this is, if this isn't coal gas and you oughtn't to have this fixed." As I say, I took the box of matches. He says "Oh, my, yes." By the way, I had a gentleman caller that

20

30

night and he was sitting there in the living room, overheard the whole conversation, I didn't even have time to speak to him, I just got in from the office.

Q. Was this of an evening?

A. This was of an evening, about, I judge, about seven o'clock in the evening.

Q. What time of year was it?

A. That was in—in May, June or July, it was right —

10 Q. 1923?

A. 1923, yes. It was in the spring of 1923.

Q. Was that the only time you brought Mr. Schneidman up there?

A. That is the only time I could ever get him up. I asked him, oh, dozens of times, to come up, but he simply evaded me every opportunity. I called him up all hours of the night, all hours of the day, absolutely refused to talk to me. The only time ever I could get in touch with him was when I would meet
20 him on the street or go into the store, and always putting me off from day to day, "I will have that attended to. I will have that attended to."

Q. You are speaking about trying out the gas range, did you have a gas range in there for cooking?

A. Gas range, yes, cooking range. No gas for light, nothing but cooking.

Q. Was that gas range already installed?

A. Yes, that was his own range.

30 Q. And there apparently was no escape of gas from the range or its pipe connection?

A. Absolutely none; he tested that.

Q. And so did you?

A. I insisted upon him doing that and I gave him the matches to do it.

Q. Did you say the heater room was immediately below you?

A. Directly under the bedroom, the rear of the building.

Q. You are sure of that, are you?

A. Positive.

Q. That is the flooring of the bedroom went over this furnace?

A. Is right over the furnace room, yes, sir.

Q. Do you know what your medical expenses have been, Mr. Jenkins?

A. Really I couldn't. I would have to—I know 10
there was one bill, it amounted to five hundred and sixty some odd dollars, and what was it, nine or ten months, something like that, and I have been paying continually ever since.

Q. Dr. Dunlap?

A. Dr. Dunlap, yes, sir.

Q. Have you any idea what you have paid since that bill?

A. I should judge since, for Dr. Dunlap attending 20
Mrs. Jenkins since, I would say since the latter part of 1922, when we moved in there, up to the present time, way over a thousand dollars.

Q. Including the bill you have mentioned?

A. Yes, that is including that, yes, considerably more than a thousand dollars.

Q. Were there any medical bills or bills for nursing?

A. Outside of, there was another thing I wanted to call your attention to, Mrs. Jenkins never had 30
anything wrong with her eyes, she had to go to an oculist, Dr. Pilkington on Virginia Avenue. She got pretty near blind, she had to wear dark glasses for a long time and he said that he had every reason, he said "There is something wrong; there is some poison in there that is just simply poisoning your eyes." She never had to wear glasses.

Q. How much was that bill for the oculist?

A. I would have to ask Mrs. Jenkins. Do you remember, Ivie, just what you paid?

Mr. Jenkins: / Can I answer?

Mr. Carr: Yes.

10 Mrs. Jenkins: Well, my bill to the doctor at that time was twenty dollars and then I made, afterwards the glasses had to be changed because they were dark glasses, and I wore them six weeks and then had them changed.

Mr. Carr: What was your total bill to the oculist?

20 Mrs. Jenkins: Twenty dollars at that time and ten another time, and I paid Freund twenty dollars, first glasses and I think twenty-six or twenty-eight dollars for the second glasses, Freund Brothers.

20 Q. Was that on top of the oculist bill?

A. Yes, that was separate; that was only for the glasses.

Q. Was there any nursing or anything of that sort?

Mrs. Jenkins: My mother.

A. I had Mrs. Jenkins' mother come in there and she was there three months.

Q. Did she make a charge for what she did?

30 A. Of course, she didn't make a charge to us, but, nevertheless, I feel as though that I owe her something for it.

Q. Who composed your household when you lived there?

A. Just my wife and I.

Q. Yourself and your wife?

A. Yes.

Cross-examination.

By Mr. Cole:

Q. Did you have any control over the heating apparatus in the apartment?

A. Did I, Judge?

Q. Yes.

A. Not a thing, no, sir.

Q. Landlord was supposed to furnish the heat? 10

A. Yes.

Q. Hot water or steam?

A. Hot water.

Q. When you would make these complaints to your landlord, did you ever tell him that you thought it was coal gas?

A. I told him it was coal gas.

Q. And did he ever make any promise or suggestion?

A. He promised every time, he would say, "Mr. Jenkins, I will have it attended to." One time there he said that he was going to call his furnace man up immediately that night so that he would have him there the first thing in the morning. This was a continual matter with him all the time, never less than twice a month. 20

Q. Was your lease in writing?

A. Yes, sir.

Q. Have you it?

A. I think I have it, Judge. 30

Q. Not here?

A. No.

March 2, 1925.

(Trial resumed pursuant to adjournment.)

DANIEL L. JENKINS, recalled, having been previously sworn, was further examined and testified as follows:

10

Direct examination.

By Mr. Cole:

Q. Were you supplied with hot water for kitchen purposes and bath purposes as well as hot water for heating?

A. Yes, sir.

20

Q. Were they separate heaters?

A. Separate heaters.

Q. Was coal used in both of them?

A. Both.

Mr. Carr: I object unless he shows he knows.

Mr. Cole: That is what I am going to show.

Q. Do you know?

A. Yes, sir.

30

Q. How do you know?

A. When I took the screen door there, when we first moved, I noticed two furnaces and they were both fired by coal.

Q. Did you get the hot water throughout the summer, throughout the year?

A. All year.

Q. Even when you didn't have hot water for heat purposes?

A. Yes, sir.

Q. Now, have you examined the bills here—have you some of the bills here that are referred to in your testimony?

A. I have.

Q. Will you produce them, please?

A. (Witness produces papers.) 10

Mr. Cole: I want to offer this testimony formally.

Mr. Carr: Well, if your Honor please, I do not know whether the testimony was relevant; at least, it would seem to give over emphasis to some of the testimony if the jury had the transcript of some of the testimony.

Mr. Cole: I am not now suggesting that the jury 20
can have this testimony; I don't know; I will have to look it up. But I certainly have a right to offer it; otherwise there is no record of it.

The Court: Well, you have a right; there is no doubt about that. Whether you have a right to read it and offer it—anything that is offered as an exhibit certainly would go to the jury. I do not think the jury could take that testimony any more than they could any other part of the proceedings to the exclusion of the rest, as an exhibit in the jury room. 30

Mr. Carr I think the original section is 104 of the Practice Act of 1903, and then I think section 145 deals with the right to offer the testimony.

The Court: Yes; I think the testimony can be

read but not offered as an exhibit. I will sustain the objection.

Mr. Cole: Allow me an exception. I am not sure.

(The testimony referred to, heretofore read to the jury, is marked as an exhibit for identification P2.)

10 Q. I show you a bill of Freund Brothers and ask you whether you paid that bill?

A. Yes, sir.

Q. And what was that for?

Mr. Carr: If your Honor please, I object to that. That is not the proper way to prove the damages.

20 Q. The question of the bill does not prove the amount of the damage. The question is, what was a fair charge? I do not want to be technical, however. If Judge Cole will submit his bills to me so I can look them over it may be that we can admit some things that we are not compelled to admit.

Mr. Cole: The testimony is in, produced by the defendant, that certain debts were contracted. Now, I want to prove the bills to which the reference was made and show that they were paid. I think I have a perfect right to do it.

30 The Court: No; I do not think so. I do not think the bills themselves are evidential.

Q. Can you tell independently of the bill how much you paid Freund Brothers for glasses?

Mr. Carr: I make the same objection, if your Honor please; first, that is not the way to prove it;

and, secondly, it is not shown that the trouble to the eyes was the result of the gas. The testimony was that he had said that, but that was mere hearsay evidence on the part of the person making the declaration; but, at any rate, the bill itself nor the amount of it is not evidence unless it is first shown that that was a fair charge.

The Court: I will sustain the objection.

Mr. Cole: Allow me an exception. I ask that this bill be marked for identification.

10

(The paper referred to is marked as an exhibit for identification P3.)

Q. Did you pay for medicine for your wife while Dr. Dunlap was attending her?

A. Yes, sir.

Q. And have you a bill for that medicine?

20

A. I have not; but you have there.

Q. Is this it?

A. That is it, sir.

Q. Was that bill paid by you?

A. It was.

Mr. Cole: I offer it in evidence.

Mr. Carr: I make the same objection.

The Court: Objection sustained.

30

Mr. Cole: Exception. I will ask that this be marked for identification.

(The paper referred to is marked as an exhibit for identification P4.)

Q. Did you get bills from Dr. Dunlap for his services?

A. Yes, sir.

Q. And were they paid?

A. Yes, sir; they were.

Mr. Cole: I offer them in evidence.

Mr. Carr: Same objection, if your Honor please.

10

Mr. Cole: Is that objection sustained?

The Court: Well, the question was answered before the objection came, and I think it is proper for him to say he paid bills to Dr. Dunlap.

Q. Were the bills you paid Dr. Dunlap for the services that he performed during this illness while you were in this apartment?

20

A. Yes, sir.

Q. Are these the bills that were paid?

A. Yes, sir; they are.

Mr. Cole: I offer the bill.

Mr. Carr: Same objection.

Mr. Cole: Five bills attached.

30

The Court: Objection sustained.

Mr. Cole: Exception. I ask that those be marked for identification.

(The papers referred to, five in number, are marked as an exhibit for identification P5, marked as one exhibit.)

Q. The testimony shows you had an oculist. Who was he?

A. Dr. Pilkington.

Q. Was that while your wife was ill in the apartment?

A. Yes, sir.

Q. Did you pay the bill or bills?

A. I did.

Q. Are these the bills?

A. Yes, sir; those are the bills.

10

Mr. Cole: I offer them.

Mr. Carr: Same objection.

The Court: Objection sustained.

Mr. Cole: Exception. I ask that they be marked for identification.

(The papers referred to, two in number, are marked as an exhibit for identification P6, as one exhibit.)

Mr. Cole: Cross-examine.

Mr. Carr: No question.

(Witness excused.)

30

IVIE L. JENKINS, called as a witness in her own behalf, being duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Cole:

10 Q. Mrs. Jenkins, are you the wife of Mr. Jenkins who was just on the stand?

A. Yes, sir.

Q. And did you and he live together in the apartment referred to in this lease which has been offered in evidence?

A. Yes, sir.

Q. About when did you go in?

A. I beg your pardon?

Q. About when did you go in the apartment?

20 A. Well, between the fifth and eighth of November, 1922.

Q. Perhaps you will have to speak just a little louder. And when did you leave?

A. The twenty-eighth day of September.

Q. What was the condition of your health when you went into the apartment?

A. Well, I was in good health.

Q. Were you taken sick while you were there?

A. Yes, sir.

30 Q. And how long were you sick?

A. I was sick off and on all the time I lived there.

Q. What is the condition of your health now?

A. Well, it is much improved.

Q. Do you recall how much you weighed before you went into the apartment?

A. 126.

Q. How much?

A. 126.

Q. Were you reduced in weight during your sickness?

A. Oh, my! Yes; 90 pounds.

Q. How much do you weigh now?

A. Well, about two weeks ago 114.

Q. Now, in what way were you affected by this sickness?

A. Well, sick to my stomach and headaches, vomiting. I couldn't eat. I was sick up until noon. You see, the most of the trouble seemed to be in the morning, until the house was opened, and I would be sick and vomiting with sick headaches; my nose bleeding. Sometimes I would be dizzy — 10

Q. Were your eyes affected?

A. Very much.

Q. Did you do anything for them?

A. Well, yes; I went to Dr. Pilkington.

Q. What did he do?

A. Well, he treated them and gave me dark glasses. I wore dark glasses about six weeks; then I wore glasses ever since. 20

Q. How many times did you go to see Dr. Pilkington?

A. Well, I went many times. I made about four visits; then he told me to come in any time I liked, and just when I felt bad I would stop in.

Q. And where did you buy the glasses?

A. Freund's.

Q. Have you been wearing the glasses ever since? 30

A. Constantly.

Q. Had you worn glasses before?

A. Never in my life.

Q. Now, did you suffer any pain?

A. Violent headaches.

Q. What about your heart?

A. Well, my heart is weak too. I could scarcely get up and down the steps, any exertion —

Q. Have you done your housework before moving into this apartment?

A. Yes; I have.

Q. Entirely, or did you have some help?

A. No; I never had any help.

Q. Are you able to do housework now?

A. Not as I should; no, sir.

10 Q. Did you have help—do you have help?

A. Yes, sir.

Q. Who helps you?

A. My mother.

Q. Now, what treatment did Dr. Dunlap, your physician give you while you were ill?

A. Well, he gave me medical treatment and lots of hypodermic treatment, iron through the vein of the arm.

Q. And how long was he treating you?

20 A. Oh, I had about—well, he treated me all the time I lived there and I am still under his care.

Q. You are still under his care; are you?

A. Yes, sir.

Q. Do you go down or does he come to you?

A. No; I go to his office.

Q. Now, do you know what made you sick?

A. Why, coal gas.

Q. Now, you tell the jury just what you discovered that you think made you sick.

30 A. Well, after I first moved in there I noticed vapor, smoke, always through the house, particularly in the night. Along through the night the house would fill up with smoke, and my bedroom was very small and the windows—there was one window at the back of the bedroom and one on the side and I couldn't open the side window, because the ropes were very bad. That in there; so I didn't get much

ventilation. I would wake with these terrible headaches. Then through my kitchen the odor of gas was terrible; it was all the time, mostly; but at times—at certain times it was more strong than others, and more or less of it was there all the time in those three rooms. It didn't reach the living room so much, or bathroom. The bathroom was between the living room and dining room. I kept that bathroom open all the time. But the balance of the house had fumes of gas.

Q. Now, do you know where that came from?

10

A. Well, there couldn't be any place for it to come from —

Mr. Carr: I object to that.

Q. Well, you must not say —

A. Well, it did come from the furnace room.

Mr. Carr: I object unless the witness shows how she knows. That is a conclusion. 20

Q. Was it coal gas?

A. Yes, yes, indeed; it was coal gas.

Q. Was there any coal being used in any heater in your room in the apartment?

A. Oh, no, sir.

Q. Was there a heater below you?

A. In the furnace room there were two.

Q. And what did they use for fuel?

A. Different grades of hard coal.

30

Mr. Carr: I object unless this witness knows.

Q. Do you know?

A. Yes; I saw them put it in.

Q. You saw it go in there?

A. Oh, yes; they couldn't bring it in there without my seeing it.

Q. So you know they did use coal in both heaters?

A. Yes. I sat by the window and watched them put it in. You see, I was in the house most of the time.

Q. Did one of those heaters supply the hot water that you used in the kitchen?

A. Yes; a small heater.

10 Q. Was that supplied throughout the year, throughout the summer?

A. Yes, sir.

Q. Now, were you present on any occasion when Mr. Schneidman came into the apartment?

A. Yes, sir.

Q. Did you hear any talk between him and your husband?

A. Yes.

Q. State what you heard?

20 Mr. Carr: Do you mind fixing this time?

Mr. Cole: No.

Q. When was that, Mrs. Jenkins?

30 A. Well, they fought so much about it, it is hard to tell what time just exactly; but it was in the spring of the year when Mr. Jenkins brought him in, because I remember Mr. Schneidman said the furnace was bad. Mr. Jenkins said: "It is not from the big furnace; it is from the hot water furnace; because when we have plenty of hot water we don't have much coal gas, but when the hot water gets low and it is not so warm, then we have the smoke and the fumes," because they could close up that furnace. We wouldn't have much hot water —

Mr. Carr: Is this what Mr. Jenkins was saying?

The Witness: Didn't you ask me what Mr. Jenkins said?

Mr. Carr: This is all what Mr. Jenkins said?

The Witness: This is that Mr. Jenkins said to Mr. Schneidman. Well, Mr. Schneidman said he would try to rectify it and he would have a man in and would use better coal, and he did; he brought in larger coal, and for a little while it was better; but it started right over again and we had it through the summer up until the day we left. 10

Q. Did you see anything done while he was there to locate where the gas came from?

A. Yes; he examined the range in the kitchen.

Q. Did this gas you spoke of come from that range? 20

A. Oh, my! No.

Mr. Cole: Cross examine.

Cross-examination.

By Mr. Carr:

Q. When did you say you first noticed the odor of gas?

A. I really noticed it the day I moved in, without knowing what it was. 30

Q. That would be about the fifth of November?

A. The fifth to the eighth.

Q. 1922?

A. Yes, sir.

Q. Then when did you first believe it was coal gas?

A. Well, after—you see, we moved in there; the place was closed up, and I felt, owing to it being a new building, it might be the odor of plaster or something else; but after I had aired the house and I found it was still there.

Q. And that was sometime in November, 1922?

A. Yes, sir.

Q. And you believed that it was coal gas?

A. Oh, I know it was coal gas.

10 Q. How long did you know it was coal gas—how long did you notice it?

A. Why, just as long as we lived there.

Q. Continued all the time you were there?

A. Yes, sir; halls were full of it.

Q. Was this a new apartment you went into?

A. Well, no; there had been a family in a week before, stayed in one week.

Q. But it was a new building; was it?

A. Yes; the building was practically new.

20 Q. And did you see any breaks in the wall anywhere?

A. No, I never noticed any breaks in the wall, but the little wainscoting around the floor, you know, while that was tight there was always smoke around there.

Q. Did you see any break in the flue? Did the flue or chimney run through your room?

A. No, sir; it was just a weak little flue about that thick.

30 Q. Did you see any breaks in it?

A. No; I never did. You see, it was papered.

Q. Did you see any breaks in the paper?

A. No; I never noticed any breaks in there.

Q. Were there any cracks in the paper?

A. No, just one above one of the windows.

Q. How long was it after you moved in there before you were taken ill?

- A. The latter part of November.
- Q. And were you ill in bed?
- A. Yes, sir.
- Q. How long?
- A. Well, three or four days, I was in bed at that time.
- Q. Were you attended by a doctor?
- A. Yes, sir.
- Q. Dr. Dunlap?
- A. Yes, sir. 10
- Q. Did he tell you what the trouble was?
- A. Yes, sir; just as soon as he came in he said, "It is a wonder you are not dead. Why, this place is full of coal gas."
- Q. And he told you it was full of coal gas?
- A. Yes, and he opened the windows.
- Q. And were you taken ill again?
- A. Yes, sir.
- Q. So that you had to go to bed?
- A. Yes, sir; I was. 20
- Q. When was that?
- A. Oh, that was later on. If I remember correctly, it was the latter part of November or early in January—I meant to say December.
- Q. December. And how long were you in bed then as a result?
- A. Well, I was in bed about a week, but I was sick a month. You see, I went into the davenport and slept.
- Q. And did the doctor ascribe it to gas? 30
- A. Yes, sir; he did.
- Q. Did he recommend that you get out of the place?
- A. Yes, he did; but Mr. Schneidman said we couldn't.
- Q. The doctor told you to get out of there?
- A. Yes, he did.

Q. Did the doctor tell you about the danger of remaining where the gas was?

A. Yes; he said it would affect my heart.

Q. Did he tell you whether it would do you harm or not?

A. Yes; he said if I stayed there it would kill me. He said it was bringing on muscular heart trouble.

Q. And he told you that in January, you suppose?

A. Yes, sir; he told me that at all times.

10 Q. Were you sick in bed after the January illness?

A. Yes, sir.

Q. When did that happen?

A. Well, in the summer I had a sick spell just before I went away for awhile.

Q. What time in the summer?

A. Well, I meant to say that I came back from being away right in the summer, around in the latter part of June, I was sick.

20 Q. Had you been away?

A. I was away for a couple of weeks.

Q. Did you feel better while you were away?

A. Yes, indeed, I did.

Q. Now, do you mind telling me again what your husband said to Mr. Schneidman and what Mr. Schneidman said to your husband on the occasion, some part in the spring, when he had Mr. Schneidman come up to the apartment?

30 A. Well, he told him I was having trouble with coal gas; the house was full of it, and Mr. Schneidman said, "Are you sure it is not the kitchen range?" Mr. Jenkins told him he could go out and examine it. He said he had examined it and didn't find anything wrong. So he went out and burned matches all around the pipes. They tested all the burners and then Mr. Schneidman said no, it was not from the range. He said, "I don't know how

you stand it. We will attend to it. I will have a furnace man in to look at it." He said, "You are good tenants and I don't want to lose you, and I will fix it up if I can."

Q. Said he would have a furnace man?

A. Said he would have a furnace man in and look at the furnace. He said he had changed the coal and asked if it made any difference.

Q. You say the coal was better at one time?

A. Yes; he used a larger coal.

10

Q. How could you tell it was better?

A. Well, I didn't notice the smoke in the house the same nor the fumes.

Q. You couldn't tell my looking at the coal whether it was better?

A. Well, I imagined that would be the difference. I had saw him with that real fine coal just before that. Then he brought in this better coal, larger lumps of coal.

Q. You mean by better coal —

20

A. A better grade of coal.

Q. How would you know whether it was a better grade?

A. Because I know that big coal is better than that fine buckwheat coal.

Q. Beg pardon?

A. I know that large stove coal is better than stove or buckwheat coal.

Q. In what way is it better?

A. It is better grade of coal.

30

Q. In what respect is it better?

A. It makes a better fire, clear fire. It doesn't make the smoke that that fine coal does.

Q. Well, you think it is better coal because it is a larger coal?

A. Yes, I do. I know when we had a furnace up home when we burned big coal we had a better fire.

Re-direct examination.

By Mr. Cole:

Q. Mrs. Jenkins, you started to say and were interrupted by counsel—something that Mr. Schneidman said when there was some suggestion about your moving.

A. Well, he said that we were good tenants and
10 he didn't see why we couldn't get along, and stay. He said, "We like people without children, and that we would better—he would like to keep us if he could, and if there was anything he could do he would do it."

Q. Now, was that while you were talking about this trouble?

A. That is the night Mr. Jenkins brought him in to look at the stove.

Q. Did you hear anything said by Mr. Schneid-
20 man as to what he would do if you moved out?

A. Well, he said he would hold us for the rent; he would hold our furniture.

Mr. Cole: That is all.

Mr. Carr: That is all.

(Witness excused.)

ROY WOOLBERT, called as a witness on behalf of the plaintiff, being duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Cole:

Q. Do you practice medicine? 10

A. Yes.

Q. How long have you been practicing?

A. About a quarter of a century.

Q. And where?

A. In Atlantic City.

Q. And where did you graduate from?

A. From the University of Pennsylvania.

Q. Have you made any special investigation or study of the matter of the effect of illuminating and coal gas upon the human system? 20

A. I have.

Q. What have you done?

A. Studied in the University of Pennsylvania, with particular reference to gas poisoning, and also took a special course under the late John Marshall who was professor of chemistry in the University of Pennsylvania, and also dean, recently died.

Q. Now, just what is meant by what we commonly call coal gas?

A. Coal gas is a carbon compound. In fact, there are two carbon compounds that are common in the burning of coal. One is carbon-monoxide which is represented by the chemical formula of "CO" in which twelve parts of carbon are associated with sixteen parts of oxygen to make carbon-monoxide. There is also another exhaust of carbon resulting from the burning of coal, which is called carbon- 30

dioxide, in which twelve parts of carbon are associated with thirty-two parts of oxygen to make the product that we represent by the formula of "CO-2." Most of us are familiar with CO-2 as being the gas in effervescent drinks—carbon-dioxide.

Q. Now, is either of those gases poisonous to the system?

A. Both are poisonous to the system.

Q. And how does it affect the system?

10 A. To which gas are you referring?

Q. Give us both, because there may be some controversy.

A. Both of those gases in concentration are very poisonous.

Mr. Carr: Pardon me. I didn't hear part of your answer.

20 The Witness: Both; both gases are very poisonous. If combustion is perfect; that is, if a furnace is burning properly the carbon-dioxide is formed. If a furnace is burning properly by reason of being banked too much, carbon-monoxide is formed. Carbon-monoxide is about fifteen times more poisonous than carbon-dioxide.

Q. How is the presence —

Mr. Cole: I withdraw that.

30 Q. How does the inhalation of these gases affect the system? What does it do to it?

A. Very differently. So far as inspiration of carbon-dioxide it is not likely that we are apt to get too much of that. It is a pungent gas that makes its presence felt in the nostril, as the jurymen and women have experienced in drinking soda water. If

you get too much of that gas its pungency affects the nostrils so that you will withdraw from it; in other words, avoid it; whereas, the more poisonous gas—the carbon-monoxide—has no odor whatever. It gives us no warning unless it be associated with other gases which have odor.

Q. Now, what is there that warns of the presence of carbon-monoxide?

A. Sometimes we have no warning whatever of carbon-monoxide poisoning. Frequently, however, we get the odor of sulphur from a banked fire which indicates invariably the presence of carbon-monoxide in the atmosphere. Whenever we smell a stove gas we may be very certain that we are also inhaling carbon-monoxide. The smell that we detect is the carbon-dioxide or sulphur. It has a very penetrating odor, as most of us have experienced. We may, however, breathe carbon-monoxide in large quantities in unsuspected places. Carbon-monoxide is a very diffused gas; it is a light gas; it is a gas that tends to ascend, and a person living over a heater which is not properly taken care of may be poisoned by carbon-monoxide gas due to the accumulation in the upper story; whereas, with carbon-dioxide, which results at the same time, from the same faulty combustion, it will run down hill very much like quick-silver; in other words, carbon-dioxide is to gases very much like quick-silver is to metal, tends to run down hill. We get it in wells. For example, a well digger will often hesitate to go down the well until he bails it out, and the method of bailing it out is to open an umbrella, tie a rope to the handle, drop it down in the well and pull it up; in other words, bailing out the heavier-than-air carbon-dioxide and making that well safe for entry.

Q. Now, still I think you did not answer the ques-

tion, as to what effect the presence of either of these gases may have on the system. What will it do to it?

A. They act very differently. Small quantities of carbon-dioxide stimulate the system. Carbon-dioxide may be swallowed with impunity. In fact, it is sometimes beneficial to swallow a certain amount of carbon dioxide. A certain amount of inspiration and expiration of carbon-dioxide is healthful; it is a stimulant to respiration up to a certain degree. It is the familiar choke damp of the miner. When it gets in large concentration it is poisonous, too; because it tends to usurp the place of oxygen in the blood. Carbon-monoxide, on the other hand—that is the CO—is one of the most lethal gases of which man has any knowledge. It is a frightful poison. Even in very small concentration it is apt to very greatly interfere with health and well-being. It has the particular property of uniting with the haemoglobin of the blood. Now, we depend upon the haemoglobin of the blood to carry oxygen to the remote tissues. If we don't get enough, we suffer. Our health is broken down. Curiously, carbon-monoxide has a wonderful affinity for haemoglobin. We have some examples of that in chemistry, in other substances. For example, charcoal, if it is dried and hot, will absorb, sometimes, hundreds of times its own value of other gases; it occludes them, as we say, takes them up. Platinum has the property of absorbing large quantities. Nobody but God knows why, but they do. Even in greater proportion, the haemoglobin of the blood absorbs oxygen, and it carries that oxygen by means of the red corpuscles of the blood to remote tissues. I might explain that the red corpuscle under the microscope is very much like a coin, circular, almost truly circular, and it has in it haemoglobin which literally translated means iron ball,

and this iron ball in the haemoglobin takes up oxygen and distributes it. Now, we all know from personal experience that we cannot hold our breath for long. Some of us can hold our breath for a minute, some for longer than that; but we all know from personal experience that we cannot keep our head under water long. The reason for that is that our oxygen balance is disturbed. Enough is as good as a feast, but there must be enough. The balance is very critical; just a little difference and we are distressed. Now, carbon-monoxide has some three hundred to six hundred times the affinity for the haemoglobin of the red corpuscle that oxygen has; in other words, if there is a possibility of carbon-monoxide being in the atmosphere it will get into the haemoglobin; it will usurp the place of the oxygen and while the blood may circulate in the ordinary way, it does not feed the tissue, and just as we cannot refrain from breathing very long, so our most remote tissues cannot long sustain the strain of absence of oxygen, and if the strain is kept up too long, they perish, sometimes irretrievably. 10 20

Q. Now, what are the symptoms where there is what I call an overdose or prolongation of the dose of this poison?

A. Any gradations of evidences of carbon-monoxide poisoning—for example, the boy who smokes his first cigar is made sick, largely by carbon-monoxide; not so much by nicotine as because of the improper burning of the cigar or cigarette, he gets the feeling of weakness, sweatiness, and nausea by reason of the fact that he has for the time being, shut off his ability to properly oxygenate his tissues. Sunday morning headaches, common enough among most of us, are the result of lying in bed maybe longer than we have been doing during the other days of the week, and getting a larger dose of car- 30

bon-monoxide which has come up through the layers of the house or through the plastering, and through the lathing.

Q. Will it finally affect the heart, or may it?

A. It may; but it more pronouncedly affects the blood. It affects the haemoglobin first. It diminishes the power of the haemoglobin to occlude or to absorb oxygen; in other words, instead of getting what we need, what we are accustomed to, what we
10 must have, we get poison, and that poison affects the nervous system, that being the most susceptible to its toxic properties.

Q. What is the difference, if any, between what we call the common illuminating gas and this carbon-monoxide?

A. Very little difference, except that with illuminating gas we get a fairly constant percentage of carbon-monoxide. Illuminating gas differs in various cities, depending on the process by which it is
20 made, and it contains generally from fifteen to thirty, possibly even thirty-five per cent of carbon-monoxide; whereas, the heater, if it is improperly banked, with its invisible gas, may be polluting the atmosphere even more so than illuminating gas.

Q. Will the presence of that gas, the carbon-monoxide, affect the eyes?

A. It may affect every portion of the body, depending upon the dosage.

Q. Assuming that Mrs. Jenkins, one of the plain-
30 tiffs here, had been in good health before she moved into an apartment in November, 1922, and shortly thereafter she inhaled coal gas and that continued through a period of months, and she had nausea, severe headaches, became nervous, her heart became affected so that she was not strong and able to do household work that she had previously done,

what would you say as to whether those things could be ascribed to the presence of coal gas?

A. I would say that it would be typical, very typical of coal gas poisoning; and I might make it clear, Mr. Cole, that we are considering in this case chronic carbon-monoxide poisoning, which is a very different thing than the acute or overwhelming poisoning by carbon-monoxide. All of us have had personal experience with cases in which individuals have been found dead from breathing illuminating gas. 10
Acute poisoning from carbon-monoxide is a good deal like drowning or not drowning. If a man falls overboard in the ocean he either drowns or he does not drown. If he is fished out in time he may get entirely well, and have no after effect at all of that drowning. So a person overwhelmed completely with illuminating gas or coal gas, which amounts to the same thing—poisoning ingredient being the carbon-monoxide in either case—he may get entirely well from that overwhelming experience with the 20
illuminating gas or coal gas; but where we have a chronic condition in which the individual is exposed day after day, week after week, or perhaps month after month to small quantities, we have the same condition that would exist if we almost drown a man every day the year round—break-down his nervous system. He could stand one great dose in that manner,—very similar to intoxication. A man may go on a very profound drunk and recover completely. 30

Mr. Carr: You say he may, Doctor?

The Witness: But it is the dram drinker that suffers; because he gets another dose before he has completely eliminated his previous dose. In other

words, there is an overlapping, just like shingles on a roof. The time comes when he is overwhelmed.

Mr. Cole: Cross-examine.

Cross-examination.

By Mr. Carr:

10 Q. Doctor, when you get the odor from coal gas, it is the carbon-monoxide that you smell, is it?

A. No.

Q. And when you get the odor from illuminating gas what is it that you actually smell?

A. You do not smell any—you do not smell in either case carbon-monoxide.

Q. Beg pardon?

A. In either case you do not smell the carbon-monoxide.

20 Q. That is absolutely odorless, as I understand?

A. Absolutely odorless.

Q. But what is it you do smell in escaping illuminating gas?

A. Acetylene and ethylene, principally.

Q. Well, do you get any dioxide of sulphur?

A. Not in illuminating gas; if so, only the merest traces.

Q. Is that present at all in the make-up of illuminating gas?

30 A. Sulphur dioxide in very small percentage, if at all. It does not belong there. In fact, it does not belong in coal, but it is a very good thing it is in coal because it gives us a warning in the case of furnace or range of the presence of carbon-monoxide.

Q. Just what is it you smell in illuminating gas?

A. Acetylene, principally.

Q. Acetylene?

A. Acetylene, yes.

Q. What is acetylene?

A. Acetylene is a carbon compound. Most of us are familiar with that. We have experience with motor cars in the old days, the gas that we put in tanks which had a very peculiar odor. It is toxic, too, but very mildly so in comparison with carbon-monoxide.

Q. Now, illuminating gas carries both carbon-di-oxide and carbon-monoxide; does it not? 10

A. A very small quantity of carbon-dioxide. It has about—average illuminating gas has about eight per cent of carbon-dioxide.

Q. And about anywheres from twenty to thirty per cent of carbon-monoxide?

A. Yes; that is the illuminating gas.

Q. It varies a great deal?

A. It varies a great deal in different cities; in fact, in some states there is a law prohibiting the manufacture of illuminating gas with a higher percentage than the twenty. 20

Q. Than the twenty per cent of carbon-monoxide?

A. Yes. Carbon-dioxide is not inflammable; it will not burn; in fact, it is the chiefest ingredient of fire extinguishers. Carbon-monoxide is inflammable.

Q. You say carbon-monoxide may run twenty to thirty?

A. Yes. 30

Q. In illuminating gas?

A. In illuminating gas.

Q. And would the carbon-dioxide run as high as five per cent?

A. Not if it could be prevented. It might enter in illuminating gas as an impurity, depending upon the process of manufacture.

Q. Well, does it run as high as five per cent, sometimes?

A. I could not answer that. That would depend entirely on who was making the gas. If an expert were making it he would minimize it to the lowest possible degree.

Q. Where do you get the figures from, doctor? Did you make analysis of illuminating gas?

A. I have made analysis, yes.

10 Q. Frequently?

A. That is a relative term. I would not say frequently, but enough to know that carbon-dioxide is not present in illuminating gas in very large percentages. If it were, the gas would not burn.

Q. What would you say to this as coming from

Mr. Carr: Just strike that out.

20 Q. Will you tell me whether you recognize this as an authority? (Referring to a book.)

A. I can tell you right now, I don't believe everything I see in a book.

Q. Of course not. You have not even looked at it. Tell me whether this would be recognized as an authority in the medical profession?

A. Well, I would prefer not to pay any attention to that at all.

Q. Without looking at it?

30 A. Yes, without looking at it. No; I would not accept it. I would have my own figures.

Q. You say without reading it you know it is not an authority?

A. I won't say that, but I don't care what is in that book.

Q. You don't care what anybody else says?

A. Oh, yes, indeed.

Q. Then why don't you —

A. Well, I don't listen to everybody. I have here my own figures. I can tell you —

Q. Never mind. I haven't asked you to. Do you happen to know these gentlemen by reputation? Dr. Charles A. Perkins, New York; Dr. McNally of Chicago?

A. No; I am not acquainted with them.

Q. I say, do you know them by reputation?

A. No.

10

Q. Don't know them at all?

A. No.

Q. What would you say to this being a typical analysis of gas from a city main? Carbon-dioxide, five per cent —

The Witness: Just a minute. (Referring to notes.) I don't attempt to keep all these figures in my mind. If I did I would be swamped.

Q. Sure. Ready? Carbon-dioxide, five per cent; illuminants, 8.40 —

20

A. What, illuminants?

Q. Yes.

A. Well, that might mean a dozen, twenty or thirty or forty.

Q. Doctor, you can say anything you want when I get through: Illuminants 8.40; carbon-monoxide 26.90; oxygen 2.70; hydrogen 31.20; methane 11.20; nitrogen 14.60; having B. T. U's 470 to 565?

30

A. Yes; I think that would be fairly so.

Q. Is that typical?

A. That would be fairly so. Illuminating gas, you must understand, varies from day to day and from hour to hour, and it varies in different cities and in different quantities. The idea in making illuminating gas is to get something—as many thermal

units in it as possible, and the highest grade of illumination.

Q. Then it is possible for carbon-monoxide to escape from a gas range; isn't it?

A. I beg pardon?

Q. It is possible for carbon-monoxide to escape from a gas range; isn't it?

A. Oh, yes; yes, indeed. It does not make any difference whether it is —

10 Q. Now, wait a moment, please. And doesn't the danger depend upon the degree of concentration?

A. Not altogether. That might be one factor. Of course, the more carbon-monoxide in illuminating gas the more there would be at the disposal.

Q. What I mean is diffusion of the atmosphere—the more air the less danger; isn't that true?

A. Generally.

Q. So that the danger of gas depends upon how highly concentrated it may be?

A. No.

20 Q. As regards the atmosphere; does it not?

A. No; it is in the combustion. For example, if the draught is correct—are you speaking now of the gas range or the coal burning?

Q. No; I am speaking now of a room such as this. Would it make any difference to our health whether there was a very small percentage of either carbon-monoxide and a high percentage of air?

30 A. Absolutely; if there were one-half of one per cent, if we stayed in here for two hours we would all die—one-half of one per cent.

Q. And the more air and the smaller percentage of the gas, the safer we would be?

A. Not necessarily. Some of us might inhale carbon-monoxide from unsuspecting places. I might be getting ventilation here that would be very good.

Q. Oh, I am supposing, doctor, uniform conditions.

A. Well, you cannot suppose that because they don't exist.

Q. Well, I will suppose a uniform condition affecting one person in one room. Now, you can start with that, can't you?

A. I cannot start with that.

Q. Can you start anywhere for cross-examination?

A. Why, yes; I can start at the gas stove. 10

Q. Well, never mind. I will do the starting for you. Assume that there is a person in a room, one person in one room—you can do that, can't you?

A. No; I cannot do that.

Q. That is all. If you cannot assume that, I am through.

A. I can explain why I cannot assume it.

Q. Never mind; if you cannot assume one person in one room, I haven't any further questions to ask you. 20

Re-direct examination.

By Mr. Cole:

Q. Do you want to explain, doctor?

A. Yes; I do.

Q. Explain.

A. It depends entirely on where that person is in that room. Now, this good man is assuming that if carbon-monoxide is in that room it is in every part of that room to the same degree — 30

Mr. Carr: I have accepted the doctor's statement that he cannot, and ask no further questions of him.

The Court: Yes; I think that is all.

Mr. Carr: I do not think he needs to explain any further.

Mr. Cole: Your Honor will allow me an exception to refusing to let him explain?

Mr. Carr: Oh, I do want to ask the doctor another question. This is not hypothetical at all.

10 Re-cross examination.

By Mr. Carr:

Q. Doctor, the dangerous qualities of carbon-monoxide and dioxide are generally known to the medical profession; are they not? Matters of general knowledge?

A. Yes; I would think so.

20 Q. And if you have a patient exposed to gas poisoning, what is the first thing you do?

A. Get them away from the gas if it is possible.

Q. Get them away from the gas and get them where the oxygen is; isn't that it?

A. Yes, but sometimes that is not possible because gas poisoning is a very obscure condition.

Q. Well, where its presence is made known by the odor which you have spoken of, of sulphur dioxide, I think—where that persists the danger is known; isn't it?

30 A. By the doctor, yes.

Q. By the doctor.

A. But sometimes it is very difficult to convince the patient of that.

Q. I haven't asked you that, Doctor. The doctor knows the danger; doesn't he?

A. Yes.

Q. And would you undertake to cure a patient of

a carbon-monoxide, if the carbon-monoxide was being fed to the patient every day? Would you undertake to cure the patient in that present location?

A. Yes, I would; because I might not be able to induce that patient to believe that gas was poisonous.

Q. But if you could, you would get the patient out?

A. I might not be able to do so.

Q. I say, if you could, you would get the patient out? 10

A. No I would not get the patient out.

The Court: Doctor, you are being asked what the sensible thing to do would be, as a medical practitioner.

The Witness: To get away from it. Of course, that does not require any medical opinion. If you can persuade patients to do certain things and they 20 won't do it —

The Court: Then you would get them out of the gas?

The Witness: Yes, or I would get the gas out of the room. That would be the most logical thing.

Q. And you would tell the patient that, wouldn't you? You would tell the patient that? 30

A. As soon as I became aware of it, yes.

Q. And you would become aware of it as soon as you smelled it; wouldn't you?

A. No; there is not a house in Atlantic City that does not have gas in it at some time, and I couldn't put all those people out of the houses because I happened to smell gas in them.

Q. The mere odor of gas does not indicate gas in dangerous quantities; is that it?

A. Yes; it does indicate gas in dangerous quantities.

Q. Well, Doctor, if you saw the patient overcome, as you believed, by gas, ill in bed, and you smelled the odor of gas, then you would not have any doubt, would you, that the gas was causing it?

A. Just repeat that again.

10 Q. Well, Doctor, if you saw the patient overcome, as you believed, by gas, ill in bed, and you smelled the odor of gas, then you would not have any doubt, would you, that the gas was causing it?

A. I might have.

Q. You might have?

A. Yes; there are lots of things that might happen incidentally.

20 Q. If you saw the patient having the precise symptoms described by Judge Cole in his hypothetical question, you would not have any doubt that that person was suffering gas poisoning, would you?

A. I might; I might go into anyone's house —

Q. Just a moment, please. You say that you now doubt that a person who has the symptoms which Judge Cole described to you and to which you replied that it was due to gas poisoning—that you now have a doubt whether that is so or not?

A. My answer is just the same.

Q. You would have a doubt?

30 A. I would have a doubt as to what I would do in that condition.

Q. You would have a doubt whether the symptoms described by Judge Cole spell gas poisoning, would you?

A. That might be due to other causes.

Q. Well, do you have a doubt or don't you have a doubt? Now, which is it?

A. If I am permitted to explain I think I can clarify it.

Q. You would have a doubt whether the symptoms described by Judge Cole spell gas poisoning, would you?

A. I would have a lot of doubts. I would have to do some tall thinking.

Q. Just a moment, now. You have a lot of doubt, then, as to whether the conditions described by Judge Cole in his hypothetical question were the results of gas poisoning; is that true or not? 10

A. I cannot answer that in one word, Judge, but I can explain it.

Q. You cannot explain it yet. You can say whether you have a doubt or whether you have no doubt.

A. I would have a doubt in the beginning.

Q. You would have a doubt?

A. Yes; I would have to look around.

Q. You have that doubt now? 20

A. I would with all those windows up in that room.

Q. Just a minute. I am attempting to place before you the exact condition described by Judge Cole in his hypothetical question and I ask you now would you have any doubt, or whether you don't have any doubt, that that was the result of gas poisoning?

A. I would have some doubt about it providing it was visit —

Q. Never mind; you have answered it. As I understand, your advice to your patient under these conditions would be to get out of the contaminated gas room; isn't that true? 30

A. No; not necessarily. The patient might not be able to get out of the room. I would stop the leak if it were practicable.

Q. Well, now, if you find that day after day the patient was being subjected to gas poisoning would you or would you not tell that patient to get out if it were possible for her to get out?

A. No; I think the most practical solution of that would be to stop the leak. You cannot drive people out of their homes.

10 Q. If the choice were between the patient remaining there and becoming chronically poisoned from gas, or leaving and finding another apartment, would your advice to the patient be to stay and become chronically poisoned and perhaps permanently injured? Would that be your advice as a doctor?

A. I think I would say stop the leak.

Q. I ask you to answer my question.

A. Well, if you want me to answer it just as you want to hear it you probably will be disappointed. I am telling you what I think.

20 Q. Well, assuming that you had been unable to get the leak stopped, assuming that you had no control over the heating apparatus, assuming that you had complained week after week and the gas was still coming, would you still remain or have your patient remain in the contaminated air?

A. In that case I would very likely suggest getting into some different quarters, but I can hardly conceive of it.

Q. You are not sure whether you would or not?

30 A. I would stop the leak.

Q. Well, if you were unsuccessful in stopping the leak would you still stay or tell your patient to stay?

A. No.

Q. Tell them to get out, wouldn't you?

A. I would, yes, after I had done everything else but that.

Q. And if you breathed it for a month and they had not stopped the leak, how much longer would you wait at the peril of your life?

A. I would say get out—get out, if you can't fix it get out.

Q. That is a sensible thing to do, isn't it, Doctor?

A. Yes, but not right away. I go in houses every day and smell gas.

Q. When you see a condition of peril to human life, isn't it time yet to get out?

10

A. No; the thing to do is to fix the leak. If I have a leak in my own house I would not think of getting out of that house. I would fix the leak.

Q. Well, if you were in some place, in somebody else's house where you couldn't fix the leak, couldn't get them to fix the leak, would you still stay on and breathe the gas?

A. No.

Q. You would get out?

A. Yes; because I know the toxic effect of the gas: but my patient might not believe that no matter how hard I tried to drive it into her head.

20

Q. Then if the patient does not get out it would be because the patient would not follow your advice; isn't that so?

A. Not necessarily. They might not be able to get out. They might not be able to go somewhere else.

Q. But your advice, anyway, would be to get out; wouldn't it?

30

A. Yes, if it could not be fixed.

By Mr. Cole:

Q. Now, Doctor, you started to explain when you were stopped as to why you might not be convinced that certain symptoms evidently showed the pre-

sence of carbon-monoxide. Now, will you explain that?

10 A. That is very easy to explain. There are a number of things that give the symptoms of carbon-monoxide poisoning. For example, if I went into a sick room and saw the patient comatose, the chances are I would think of apoplexy, even though I smelled gas: I would think of opium poisoning, of an overdose of veronal; of a lot of things before I thought of gas poisoning, even though I smelled it. That would be one of the last things to figure. I would throw up the windows, but I would think of apoplexy, veronal poisoning, a crack on the head by a hammer, which, after all is not unlike monoxide poisoning, concussion of the brain; and no doctor is sagacious enough to make up his mind on the spot, because he smells gas on the spot, that a patient is suffering from gas poisoning. No such man lives.

20

By Mr. Carr:

Q. Doctor, I ask whether, assuming all the conditions stated by Judge Cole in his hypothetical question, whether you had any doubt at this time as to whether the conditions described accounted for gas poisoning. You understood that, didn't you?

A. Yes.

30 Q. And you have had time for reflection about this case, haven't you?

A. Yes.

Q. You have been consulted sometime ago; haven't you?

A. Yes, sometime in November.

Q. Sometime last November?

A. I think so.

Q. And you have had the facts before you, haven't you, that length of time?

A. Yes; some of them.

Q. So that you had ample time for mature reflection before you answered my question?

A. Absolutely.

Q. And even with that time and mature reflection you are still in doubt as to the proper answer when I asked you my question a few minutes ago; were you not?

10

A. I am waiting for you to repeat the question.

Q. And even with that time and mature reflection you were still in doubt as to the proper answer when I asked you my question a few minutes ago; were you not?

The Witness: Your Honor, I do not get that. I think that the subject and predicate are involved in that question to such an extent that I cannot answer it, and yet I feel I am reasonably intelligent.

20

The Court: Well, the question is based on a previous question; in other words, it is a question in two parts.

(The testimony, being the question and answer upon this last examination by Mr. Carr, are read by the stenographer.)

The Witness: I don't get that last question, Judge.

30

The Court: It seems perfectly simple to me, Doctor. Mr. Carr wants to know from you whether or not, notwithstanding your opportunity for reflection and information, you were still in doubt when he asked you the question whether or not the symp-

toms described by Judge Cole in his hypothetical question were the symptoms of gas poisoning.

The Witness: I have already answered that; that they are typical of gas poisoning.

The Court: Well, he wants to know whether you had any doubt about at the time he asked you the question.

10

The Witness: I had no doubt about it. I had no doubt about it since I heard the first of the case, your Honor—no doubt in my mind about being gas poisoning, and I thought I had settled that by the word “typical.”

The Court: You had on direct examination, but there is also cress-examination in a lawsuit.

20 Q. Now, is your answer “Yes” or “No,” Doctor?

A. My answer is yes; that the symptoms were typical of gas poisoning.

Q. (Repeated by the stenographer.) And even with that time and mature reflection you were still in doubt as to the proper answer when I asked you my question a few minutes ago; were you not?

A. No doubt in my mind —

Q. Please tell me whether you were in doubt then or whether you were not in doubt. That is all I want to know.

30

A. Not in doubt.

Q. Not in doubt?

A. Not in doubt.

Mr. Carr: That is all.

(Witness excused.)

WARD SCANLAN, called as a witness on behalf of the plaintiff, being duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Cole:

- Q. Are you practicing medicine? 10
A. Yes, sir.
Q. How long have you been practicing?
A. Since 1911; fourteen years.
Q. Where did you practice?
A. Atlantic City.
Q. Do you know Mrs. Jenkins?
A. I know her as a patient that I consulted about.
Q. When was she your patient?
A. I saw her once in consultation with Dr. Dunlap; she was not my patient. 20
Q. When was that?
A. About a week or ten days ago.
Q. And where was it?
A. At Kenapac Court.
Q. At that time did you make any examination of her to ascertain her then physical condition?
A. I did.
Q. Tell us what you saw and what you found?
A. I found a patient that was pale in color, looked weak and acted weak; showed evidence of her heart—of heart weakness, and I inquired of her doctor 30

Mr. Carr: I object to that.

Q. You are not permitted to state the conversation.

A. All right; all right. Slight edema of the legs

By Mr. Carr: I didn't get that.

The Witness: Slight edema of the legs; paleness of the mucous membrane of the mouth.

Mr. Carr: Paleness, did you say?

The Witness: Paleness, yes.

10

Q. Anything more that you can think of?

A. No; that is about all.

Q. Do you know the effect of the inhalation of carbon-monoxide on the system?

A. I do.

Q. What is its effect?

20

A. In an acute attack it produces nausea and vomiting, and carried on further it produces unconsciousness. Its chronic effect is the effect on the nervous system, central nervous system, and on all the organs of the body and on the blood that produces a form of anemia.

Q. Might the condition in which you found Mrs. Jenkins —

Mr. Carr: I object to "might."

Q. Could the condition —

30

Mr. Carr: I object to "could."

Mr. Cole: I will finish my question first.

Mr. Carr: All right.

Q. Might the condition in which you found Mrs. Jenkins be due to poison from carbon-monoxide?

Mr. Carr: I object, if your Honor pleases. It deals with possibility. I think we are entitled to his opinion as to whether it was or was not, but whether it could, or might I think is objectionable.

The Court: Yes; I think it is too remote.

Mr. Cole: Your Honor will allow me an exception.

Q. In your opinion, Doctor, was the condition in which you found Mrs. Jenkins due to ——— 10

Mr. Carr: I object to it as leading.

The Court: Yes; I think it is leading, Judge Cole. If you put it in the alternative I think it will be all right.

Mr. Cole: Your Honor will allow me an exception? 20

The Court: Yes.

Q. In your opinion could or could not the condition in which you found Mrs. Jenkins be due to the inhalation of coal gas?

Mr. Carr: I object, if your Honor pleases. It is simply speculative, whether it could or could not. 30

The Court: Objection sustained.

Mr. Cole: Allow me an exception.

The Court: Yes.

Q. To what did you ascribe the condition in which you found Mrs. Jenkins?

A. I considered her condition due to inhalation of a gas over a long period of time and I came to that conclusion because of the condition in which I found her and the history of the case. The history of the case was given me, of course, by herself and by her attending physician. The laboratory data which he had had performed was given to me by him. I in-
10 quired into the question of anemia. I said: "Are you sure ——"

Mr. Carr: I object to that.

Mr. Cole: You cannot tell that.

The Witness: Beg pardon.

Mr. Cole: I cannot offer that.

20

The Witness: All right; then that is all I can tell you. I came to the conclusion that she was suffering from a chronic form of anemia due to chronic gas poisoning.

Cross-examination.

By Mr. Carr:

30

Q. Independently of the history of the case you could not have reached a positive conclusion from the symptoms you have described; could you?

A. No, not without the history of the case; no.

Q. The symptoms you have described might be accounted for by a number of other things; might they not?

A. Yes; they could, independently of the history of the case.

Q. And what was this lady's age?

A. She was in middle life; I don't remember her exact age.

Q. Did you know her age?

A. Somewhere above fifty; not far from fifty one way or another.

Q. Do you know whether she had reached the menopause, Doctor?

10

A. Yes; she had.

Q. That is a disturbing factor, isn't it, with ladies?

A. It doesn't produce anemia; it disturbs the nervous system, yes, but it doesn't produce anemia.

Q. It does not?

A. No.

Q. Has she passed the menopause?

A. From her age she should have passed it. If she was —

20

Q. You didn't inquire?

A. Yes, I did. I don't remember the answer. I would have to look it up.

Q. Did you take any blood count?

A. No; I didn't take any blood count. I asked the Doctor —

Q. That is quite an important factor in determining anemia?

A. Yes; I presumed that Dr. Dunlap was telling me the truth when he gave me the blood count.

30

Mr. Carr: Well, I ask that that be stricken out.

Q. You took no blood count yourself?

A. No; I took no blood count myself. I took Dr. Dunlap's word for the report.

Mr. Carr: I ask that that be stricken out as volunteered.

The Court: It will be stricken.

Mr. Cole: Allow me an exception.

The Court: But I am not so sure that I agree with counsel.

10

Q. Did you take the pulse rate at the time, doctor?

A. Yes, I did.

Q. What was it?

A. It was about eighty; somewhere about eighty.

Q. Did you make any memorandum of it?

A. I did, but I haven't got the memorandum here.

Q. Did you take the blood pressure?

A. No; I didn't take the blood pressure.

Q. You don't know what that was?

20

A. I don't know what it was, no.

Q. Did you notice that the arteries were soft and easily compressible?

A. The arteries were fair, yes. I didn't suspect arterio-sclerosis.

Q. Did you notice the cardiac action was regular and free from murmurs? Did you notice that?

A. I noticed that the heart was regular.

Q. Beg pardon?

30

A. I noticed that the heart was regular; but the systoli, or first count of the heart, were not up to normal.

Q. Did you think it important enough to take the blood pressure and determine just what —

A. Mr. Carr, I told you a minute ago that I have taken Dr. Dunlap's word for many of these things.

Q. You were called in the case in order to testify, weren't you, doctor?

A. Well, I presume so. I didn't know so at the time.

Q. You weren't called in to treat this lady?

A. I didn't know I was called to testify at the time; no, I didn't know that.

Q. You weren't called in to treat her at all?

A. I was called in by Dr. Dunlap to see if I agreed with him or did not agree with him, one or the other.

Q. And, of course, you agreed with him?

A. Now, not in that way, Judge.

10

Q. But you did agree with him?

A. Not in that way, my boy. I don't like your insinuation.

Q. Pardon me.

A. I will pardon you, but don't make that insinuation again.

Q. Now may I have an answer?

A. Yes, you may have an answer. I agreed with him; yes.

Q. You found no trouble with legs?

20

A. No.

Q. You found no trouble with the heart?

A. I found trouble with the heart, yes.

Q. What did you find?

A. Myocarditis.

Q. What?

A. A myocarditis.

Q. What is that?

A. A heart weakness, heart weakness.

Q. Now, wouldn't that be an evidence—wouldn't that be evidenced in the pulse rate and the blood pressure, Doctor? 30

A. It would be evidenced in the pulse rate if the patient were under exertion; but this patient was quiet; she was not undergoing any exertion.

Q. Still, a good, careful doctor would take the pulse rate and the blood pressure —

A. I took the pulse rate.

Q. Pardon me—if he suspected anything wrong with the heart; wouldn't he?

A. I took the pulse rate.

Q. Won't you answer my question?

A. Yes.

Q. Do you say yes?

A. I say yes.

10 Q. So you didn't come here prepared to testify as to the details about which I have been asking you?

A. Yes; I think I have testified about them, if you will grant the entire history and Dr. Dunlap's records.

Q. I mean so far as your personal knowledge is concerned?

A. Yes, so far as my personal knowledge is concerned; so far as I have given it to you.

Q. I think you found the lady was normal; didn't you?

20 A. That is what I say.

Q. And the pupil reactions were normal; weren't they?

A. Yes.

Q. Were they, doctor?

A. Beg pardon?

Q. The pupil reactions were normal weren't they?

A. I should say the reaction to light was slightly sluggish.

Q. Now, are you sure, doctor?

30 A. Yes; I am sure.

Q. Did you make a memorandum at the time?

A. I think so.

Q. Where is it?

A. In my office, if I have any.

Q. Not here?

A. No; it is not here, Judge.

Q. Did you find the throat normal too?

A. Yes; I found the throat normal.

Q. And the teeth were in good condition?

A. Yes; the teeth were in good condition.

Mr. Carr: I think that is all, Doctor.

Re-direct examination.

By Mr. Cole:

Q. You spoke of Dr. Dunlap giving you a history. 10
What history did he give you?

Mr. Carr: I object to that. It is entirely hearsay.

The Witness: It is not hearsay.

The Court: I think the history of the case is important in a doctor's diagnosis. There are two classes or characters of symptoms that he expresses his opinion from; one is objective symptoms, that he 20
can see, and the other is subjective symptoms which he must be told. I can readily see that if a patient had a headache and also a deformed foot, if the doctor were obliged to pay no attention to anything he might be told, he could very readily treat the patient for his foot that was deformed, but not for a headache which the patient might be suffering from.

Mr. Carr: I think that is very true; but — 30

The Court: Subjective symptoms are just as much a part of the doctor's diagnosis as objective symptoms are.

Mr. Carr: But the difficulty is this, as I see it, if your Honor pleases; Judge Cole may submit to him,

if he chooses, a hypothetical question embracing that and get his opinion, whatever it is, but he is passing his opinion on something that we don't know what the doctor told him, and we have no way of checking up on it. He is now testifying as an expert that this was probably caused by gas poisoning, and he says: "I know this partly from what I saw and partly from what Dr. Dunlap told me." My objection is to his testifying as an expert based upon Dr. Dunlap's
10 history of the case, and not the patient's history.

The Court: Well, I think perhaps the objection is good if it is based on Dr. Dunlap's statement rather than on the statement of the patient.

Mr. Carr: Yes. He says much of this data he got from Dr. Dunlap and he assumed Dr. Dunlap told him the truth.

20 The Witness: May I ask a question, your Honor?

The Court: You may ask a question of me, but I do not think you can ask anybody else a question.

The Witness: Then I will ask you a question: if I got the complete blood report, the Wassermann report, the blood pressure report, from Dr. Dunlap, and the time that those reports were made, and asked him had he had some of these examinations made
30 prior to this accident, I do not see why I am not allowed —

The Court: Well, Doctor, the reason is that that comes within the hearsay rule; that is hearsay testimony.

The Witness: Then we would have to put the

patient to the expense of those things over again when they are already done. Why, that is foolishness to me; that is a crazy idea.

Mr. Cole: That was developed in this case by counsel on his cross-examination, that the history of this case was given to him. Now, in that situation I think we have a right to have him state what history was given to him.

10

Mr. Carr: If your Honor please, that was brought out as an effect of what he had testified to on direct examination. It is quite customary to find out the source of knowledge. I find out now it is hearsay.

The Court: I think so far as the doctor can go is to give his opinion based upon what he saw or did and what he was told, without again repeating what somebody else was told. He has already given his opinion, using the history of the case as it was given to him by Dr. Dunlap, but I do not think it is proper testimony for him now to repeat what Dr. Dunlap told him. I will sustain the objection.

20

Mr. Cole: Exeception. That is all, Doctor.

(Witness excused.)

30

SARAH MARTIN, called as a witness on behalf of the plaintiff, being duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Cole:

- 10 Q. Mrs. Martin, where do you live?
A. In Kenapac Court.
Q. Atlantic City?
A. Atlantic City.
Q. How long have you lived in Atlantic City?
A. Three years.
Q. Do you know Mrs. Jenkins?
A. I have known her for twenty years.
Q. Did you visit her apartment when she lived in
103 South Virginia Avenue, Atlantic City?
20 A. Very often.
Q. Were you there sometimes during the spring
of 1923?
A. Yes. I went there on Sunday after Decoration
Day and found her then worse than I had ever found
her.
- Mr. Carr: I object to the voluntary part and ask
it be stricken out.
- 30 Mr. Cole: Strike it out.
- Q. Was she then lying down?
A. She was then lying down on the davenport in
the living room.
Q. Now, did you on that occasion discover any-
think unusual about that apartment?
A. Yes.

Q. What did you discover?

A. More than I noticed at any time; because I was worried about her —

Mr. Carr: I object to that and move that it be stricken out.

Q. Don't tell us that. Tell us what you discovered on that particular occasion.

A. Well, I drew—I pointed Mr. Jenkins' attention

10

Mr. Carr: I ask that that be stricken out.

Q. Can't you tell us what you discovered? Never mind about the talk.

A. I discovered the coal gas, because it was in my eyes to begin with.

Q. Did you get it in your eyes while you were there?

A. Yes; because I went through the house.

20

Q. Did it seem to be worse in one part of the house than another?

A. Yes; I went back through the house to talk to Mr. Jenkins and I got it worse going out of the living room.

Q. In what room was she lying down?

A. In the living room, the front room.

Mr. Cole: Cross-examine.

Mr. Carr: No question.

30

(Witness excused.)

PLAINTIFF RESTS.

DEFENDANT'S MOTION FOR A NON-SUIT.

Mr. Carr: If the Court please I make a motion for a non-suit at this time, first, because there has been no evidence of negligence chargeable against the defendant; secondly, because by the application of the doctrine of assumed hazard the plaintiffs knew of
10 the hazard of which they complain and voluntarily assumed it. (Citing 63 New Jersey Law, 188; 84 New Jersey Law, 276, at page 280; 96 New Jersey Law, 312; 76 New Jersey Law, 153; 53 New Jersey Law, 233.)

The Court: (After discussion by both counsel) Well, I think I will deny the motion for a non-suit solely for the reason that I am in so much doubt about it that I think it ought not to be allowed un-
20 less I were clear in my own mind at least as to the propriety of allowing it.

Mr. Carr: May I have an exception to the refusal to non-suit?

The Court: Yes.

Mr. Carr: If your Honor please, the defendant rests and moves for a directed verdict for the same
30 reasons advanced in support of the motion for non-suit.

The Court: The motion will be denied.

Mr. Carr: Exception. I will say to your Honor as to the damages of the husband, there is no legal proof in the shape of bills as to what he has ex-

pended. The attempted proof with regard to the total amount expended by him and brought out in the examination before trial deals with a lump sum which covers a period both before and after the beginning of the cause of action and for that reason cannot be used. There is no apportionment of it and the jury has no means of apportioning it, and, therefore, it is unavailable as evidence.

(Mr. Cole opened the plaintiff's case to the jury.) 10

(Mr. Carr summed up to the jury for the defendant.)

(Mr. Cole summed up to the jury for the plaintiffs.)

20

30

COURT'S CHARGE TO THE JURY.

SCHIMPF, J.:

Ladies and gentlemen of the jury: A landlord is bound to use reasonable care to keep premises belonging to him and of which several tenants have the common use in a safe condition. Reasonable
10 care is that degree of care which may reasonably be expected from a person in the plaintiff's situation or the defendant's situation, which is synonymous with ordinary care; and reasonable care requires that in all cases the precaution be proportionate to the danger of injury, and may vary with the circumstances of every case.

It is the allegation of the plaintiffs in this suit that as the result of the negligence of the defendant, the landlord, Mrs. Jenkins, one of the plaintiffs, was seriously injured in her health through the inhalation
20 of gas which the landlord permitted to escape into their apartment.

Negligence is the failure to observe for the protection of the interests of another person that degree of care, precaution and vigilance which the circumstances justly demand, whereby such other person suffers injury, and it is the theory of the plaintiff that the defendant neglected to observe that degree of care under the circumstances of this case.

30 The proof of negligence on the part of the defendant is of a very limited character. I might perhaps be almost justified in saying to you that there is no definite proof of the landlord's negligence, and negligence is a thing that must be proved. It cannot be assumed. But it is the theory of the plaintiff that because the landlord was in possession and control of the heat plant in this apartment, if coal gas did come

up from the heater room or go into the apartment and through the apartment, negligence can be inferred from the happening of the act itself; and the principle is that when through any instrumentality or agency under the management or control of a defendant or his servants there is an occurrence injurious to the plaintiff which in the ordinary course of things would not take place if the person in control were exercising due care, the occurrence in itself in the absence of explanation by the defendant affords 10
prima facie evidence that there was want of due care. That is the doctrine of *res ipsa loquitur*—that the thing speak for itself.

In the case before you there is no proof that the appliances used in this apartment house were in any respect defective in design and construction, condition or operation; but the plaintiff relies upon the doctrine which I have just expressed to you and avers that you are entitled to infer from the fact that there was an escape of gas, that there was neg- 20
ligence on his part.

The plaintiff in her complaint says that she leased the apartment—or, rather, her husband leased the apartment and she and her husband went there to live about the fifth of November, 1922, and that the defendant, the landlord, had exclusive control of the plant in the basement of said premises designed to heat the apartment demised to plaintiff and to supply hot water to said apartment, and he attempted to use and control said heater for the purpose of pro- 30
viding heat and hot water for the plaintiff, Daniel Jenkins, as he agreed to do; that for at least three or four months prior to said September twenty-eighth, 1923, said heating plant when in operation emitted coal gas to a considerable extent and the same found its way through the entire apartment building and especially in that demised to and oc-

cupied by plaintiffs; that plaintiffs called defendant's attention to the existence of said coal gas; that the defendant on a number of occasions before the twenty-eighth day of September, 1923, promised to eliminate the same, but neglected to do so; and then follows an allegation that as a result of the coal gas Mrs. Jenkins was taken ill.

10 There is a principle of pleadings that requires an allegation in a pleading to be definite and certain, and in this case counsel's attention was called to the fact that the Court construed the allegation "at least three or four months prior" to be not more than four months prior; that is, that the definiteness and certainty of the pleadings required the Court to construe the allegation as beginning on May twenty-eighth, and the whole case, therefore, rests before you upon what happened between May twenty-eighth and September twenty-eighth, so far as the plaintiff's damages are concerned. If there
20 was a desire to charge this defendant with any damages occurring at any other time it could have been done by amending the pleadings; but as the case stands before you the only damages for which these plaintiffs can recover are damages which accrued between May twenty-eighth and September twenty-eighth.

It is the duty of the plaintiffs to prove the allegation, or to prove their case in accordance with the allegations they make.

30 That brings you, then, to what I regard as a most important question before you in this case, and that is whether or not the plaintiffs in this case assumed the hazard and risk of being injured by remaining in that apartment with full knowledge not only of the existence of gas, but of the poisonous nature of it and the danger to her health.

I have quoted from one of the decisions of the New

Jersey Courts with respect to a landlord's duty. I will quote to you further from the same decision with respect to the tenant. I think perhaps I had better repeat to you what I quoted to you before. It has applicability to that part of the charge I have already delivered:

"A landlord is bound to use reasonable care to keep premises belonging to him and of which several tenants have the common use, in a safe condition; but where a tenant has full knowledge of the dangerous condition of the premises and assumes to make use of them while in that condition, there can be no recovery against the landlord for injuries resulting from such use." 10

I am leaving to you, therefore whether or not under all the circumstances the plaintiff in this case did not assume the risk of injury. In that respect the testimony, which is undoubtedly very clear in your memory, is to the effect that in the early part of November when Mr. and Mrs. Jenkins took possession of this apartment they smelled this coal gas and they smelled it continuously; that in the latter part of November Mrs. Jenkins was taken ill and was in bed for four or five days and Dr. Dunlap told her then: "You must either get out of here or get that gas out of here. That gas is dangerous. It will injure your health and it may endanger your life. You cannot stay in the presence of that gas and your condition is entirely due to poisoning from that gas." Her reply to that, as I recall it, was: "I cannot move out. I just moved in." 20 30

If a tenant sees fit to weigh the danger to her health against her own convenience and sees fit to choose her own convenience and risk the danger she cannot recover against her landlord when she had full knowledge of the danger to which she was subjecting herself and preferred to risk the danger

rather than to inconvenience herself in moving. That is the principle of law which applies to this case. The facts are for you. You will first determine whether or not you should infer negligence from the mere fact that gas was present in the apartment. You will next determine whether or not the tenant under all the circumstances in this case did not assume the hazard and risk of the injury that she received and preferred to assume them rather than to
10 inconvenience herself by moving. She occupied that apartment for a period of ten months during which time, according to her testimony, as I recall it, the gas was constantly present. She was under the doctor's care during all of that time, and the doctor's testimony and her own was to the effect that he warned her of the danger of remaining in that place.

If you find that she did assume the risk, then your verdict would be for the defendant for no cause of action. If you find that she did not and that the
20 landlord was negligent and that the landlord's negligence was the sole cause of her injury then she would be entitled to recover such sum as in your judgment would compensate her for the effect upon her health and for such suffering as she has undergone and for the bodily injuries sustained.

With respect to your calculation of damages you must exclude from your consideration all the injury and damage which occurred to her prior to May twenty-eighth. I do not know just how under the
30 testimony you can determine that, whether all of this damage occurred to her prior to the time she alleges in her complaint, as of May twenty-eighth, or whether any of it occurred to her since that time, and you will have to deal with respect to the husband's claim for moneys expended in the care and cure of his wife, which under the complaint is all he can recover, by determining whether or not he spent

that money before May twenty-eighth or afterwards; because in this case you are bound by the allegation made in the complaint. The only damages sought here are the damages which have occurred between May twenty-eighth and September twenty-eighth. If you can determine just how much damage this plaintiff suffered during that time when you can compensate her if you find she is entitled to compensation, for the injuries she sustained after May twenty-eighth, and the same rule would apply to the husband's claim for expenses in her care and cure. 10

You may retire and consider your verdict.

(The jury retired.)

Mr. Carr: I except to where your Honor said from the fact that there was an escape of gas the jury can infer negligence. It seems to me it is subject to the criticism that while there was evidence of gas there was no evidence of escaping gas, if it means an escape from the appliances of the defendant. 20

Secondly, that the husband's expenditures have been taken from the examination before trial and that clearly relates, much of it, to a period beginning in 1922. The thousand dollars which he expended covered the entire period from the latter part of 1922.

Mr. Cole: Plaintiff excepts to the statement by the Court limiting the recovery to the period between May and September. 30

Also to what the Court said, in substance, that there was no definite proof of negligence on the part of the defendant as to what caused the gas to escape.

Also to the reference to the doctrine of *res ipsa loquitur*, because it has no application.

Also to what the Court said concerning the com-

plaint, because there was no objection made to the complaint and the case was tried throughout upon the theory of a failure on the part of the defendant to discharge the duty owed to his tenant.

Also to the quotation that the Court made from a case touching a tenant's risk, on the ground that it has no application to the instant case.

Also that there is no such thing in a case of this character as the assumption of risk.

- 10 Also that the Court entirely overlooked in charging the jury on the question of the tenants remaining, the fact of the repeated promises that were made by the landlord to remove the cause, and plaintiff excepts to all that the Court said to the jury limiting the proof both as to the failure to discharge duty, the presence of gas, and the damage to the plaintiff and his wife between May twenty-eighth and September twenty-eighth; our contention being that we have a right to have the jury told, particularly in
- 20 the light of the proof offered by the defendant himself on the examination of the two plaintiffs under the statute—to take all the proof through the whole period; that there was no right under the statute to take testimony that may be unfavorable and then ask that it be limited, after it had been taken. In this case the Court clearly limited the testimony and its effect as taken by the defendant in this cause, availing himself of the right under the statute; and the plaintiff had the right to assume that that testimony
- 30 was to be binding in its full effect.

EXHIBIT P1.

THIS INDENTURE, MADE THIS Eighth day of November A. D. Nineteen Hundred and twenty-two BETWEEN Julius Schneidman, of the City of Atlantic City, New Jersey, party of the first part, and Daniel Jenkins, of the same place, party of the second part, WITNESSETH, that the said party of the first part has let, and by these presents does grant, grant, demise and to farm let unto the said party of the second part all that apartment known as number 1 consisting of four rooms and bath and situated on the second floor of premises 103 South Virginia Avenue, Atlantic City, New Jersey with the appurtenances from November 10, 1922 to November 10, 1923, being a term of one year at the rent or sum of Eight Hundred and Forty Dollars (\$840.00) for said term to be paid as follows: Seventy Dollars (\$70.00) on the tenth of each and every month in advance

PROVIDED, that if any rent shall be due and unpaid; or if default be made in any of the covenants herein contained, then this lease shall immediately cease and become void, and it shall be lawful for the said party of the first part, without notice and without any demand for said rent, to re-enter the said premises and remove all persons therefrom, or to proceed by action for the recovery of the possession thereof, or otherwise however.

AND, the said party of the second part does hereby covenant and agree, to and with the said party of the first part, to pay the said rent in the proportions and upon the conditions aforesaid; and not to assign this lease, and not to underlet said premises, or any part thereof, nor permit any person or persons to occupy the same, or any part

thereof, nor use or permit any part thereof to be used for any other purpose than a private dwelling nor make or suffer to be made any alteration therein, without the written consent of the said party of the first part; and also at the expiration of said term, to yield up and surrender the possession thereof, with the appurtenances in as good state and condition as the same now are; or may be put into by the said party of the first part, reasonable wear and tear and accidents happening by fire or other casualties excepted.

AND the said party of the first part does covenant that the said party of the second part, on paying the said rent, and performing the covenants aforesaid, shall and may peaceably and quietly have, hold and enjoy the said demised premises for the term aforesaid.

IN WITNESS WHEREOF the said parties have interchangeably set their hands and seals hereto the day and year first written.

Julius Schneidman (SEAL)

Daniel Jenkins (SEAL)

Signed, Sealed and Delivered

In the Presence of

Meyer Levy

Exhibit

171

(Endorsed)

LEASE
Julius Schneidman
to
Daniel Jenkins
Expires November 10, 1923
Exhibit P1
Wm. C. Risley
Clerk
11/17/23
GORSON & GORSON
Counsellors-at-Law
404-7 Guarantee Trust Bldg.
Atlantic City, N. J.

(See page 70.)

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NEW JERSEY COURT OF ERRORS AND
APPEALS.

DANIEL JENKINS and IVIE L. JENKINS,
Plaintiffs-Appellees,

v.

JULIUS SCHNEIDMAN,
Defendant-Appellant.

ACTION AT LAW.

BRIEF FOR DEFENDANT-APPELLANT.

SUMMARIZED STATEMENT OF FACT.

This is an appeal from two separate judgments in favor of a husband and wife respectively against the defendant, based upon the following facts:

The plaintiffs were tenants of the defendant under a lease for certain apartments in a small apartment house in Atlantic City. The plaintiffs claim that the female plaintiff was injured as the result of carbon monoxide poisoning due to the presence of coal gas escaping from the heating device of the defendant, and located in a furnace room upon the ground floor of the apartment building, the plaintiffs occupying apartments on the second floor thereof. The plaintiffs remained in the occupation of the

apartments from November 10, 1922, until September 28, 1923, during practically all of which time the plaintiffs alleged that coal gas was permitted to escape into the plaintiffs' apartments, the female plaintiff having been rendered seriously ill by the gas as early as November, 1922, when she was under the charge of a physician (page 64). The physician advised her of the dangerous character of the gas. She was rendered seriously ill and claimed that she was almost constantly under the doctor's care, and was fully cognizant of the danger of remaining in the apartment and breathing the gas laden air. Detailed reference will be later made in this brief to the facts supporting the above.

For some reason, not entirely clear to the defendant, the complaint limited its charge that the defendant was responsible by reason of negligence for the escape of the coal gas to a period of "at least three or four months prior to September 28, 1923." The trial Judge, therefore, limited the proof of negligence and damages to a period commencing May 28, 1923, and ending September 28, 1923, although the defendant offered to consent to an amendment of the complaint so as to embody the whole period of the plaintiffs' occupancy. Plaintiffs, however, declined to amend and stood upon the complaint as filed.

The defendant, by a rule amending the answer (page 4), set up that the rights of the plaintiff, Daniel Jenkins, were adjudicated in a certain suit lately pending in the Atlantic City District Court in an action wherein Julius Schneidman was plaintiff and Daniel Jenkins was defendant, said action being based upon a claim for rental due from the said Daniel Jenkins to the said Julius Schneidman under a lease for the apartment referred to in the complaint in this case, and resulted in a judgment in

favor of the said Julius Schneidman, the plaintiff therein; that the matters and things set forth in the complaint were available to said Daniel Jenkins as a defense in bar of said suit, and said plaintiff, Daniel Jenkins, is thereby concluded, and that the matter, so far as the said plaintiff is concerned, is *res adjudicata*, and cannot again be litigated in this cause.

**SUMMARIZED STATEMENT OF LEGAL
QUESTIONS INVOLVED.**

The grounds of appeal are substantially as follows:

1. That the Court erred in striking out the defense of *res adjudicata*.
2. That the Court erred in overruling the defendant's motion for a non-suit.
3. Because on the whole case there was no proof of negligence on the part of the defendant, nor is the doctrine of *res ipsa loquitur* applicable to the facts in this case.
4. Because the Court overruled the defendant's motion for a directed verdict.
5. Because the Court in its charge permitted the jury to infer negligence from the mere fact that gas was present in the apartment, thus applying the doctrine of *res ipsa loquitur* to the facts in this case.

STATEMENT OF FACT.

In amplification of the summarized statement of fact appearing at the head of this brief:

Both of the plaintiffs knew as early as November, 1922, of the presence of coal gas in the apartment. The female plaintiff was rendered seriously ill in November, 1922, and in her own language said, "I hadn't lived there very long when I had a terrible headache and I could hardly walk. I staggered around and I just got really too sick to call the doctor. * * * I was sitting there, I was just almost wild by the time the doctor came there. I was just about unconscious."

"Q. How long was this after you had moved in?

A. Well, I should judge about a month.

Q. That would be sometime in December, 1922?

A. It was before Christmas, I know that because I was sick Christmas time.

Q. Were you sick in bed?

A. At that time, yes, sir. Oh yes, I was all night. The doctor stayed until 12 o'clock that night.

* * * * *

Q. How long did he treat you on that occasion?

A. Constantly ever since. I have never been out of his care since, but on that case called for about four days" (pages 92 and 93).

* * * * *

"Q. Now after those four days' attendance by Dr. Dunlap I presume you got better then?

A. Yes, I got better.

Q. And then did you have another attack?

A. About two weeks afterwards I had a bad attack and I was about a month getting over that, a month before I left the house.

Q. In the bed would you be all the time?

A. In bed off and on, lie down, get up, use to do a little, but I was in bed a week at that time, didn't get up at all" (page 94).

* * * * *

"Q. When you were being treated the first time were you satisfied it was from gas?

A. Oh, my, yes, the other reason I was just overcome when the doctor came in, the house was just full of it.

Q. Doctor tell you it was gas?

A. Yes, he opened the windows right away.

Q. Did he tell you your trouble was due to gas?

A. When he first came in he said to move out right away. I said, 'I can't move out of here, we just moved in.' He said, 'I wouldn't go on and finish any fixing up with the curtains or anything.'

* * * * *

Q. Why did he tell you to move out, did he say?

A. Because he said in time that would kill you if that kept up" (page 95).

On page 65 Dr. Dunlap, on the occasion of the visit in 1922, pointed out to the female plaintiff "that it was dangerous to her health and life to constantly inhale those fumes."

Daniel Jenkins, the husband, noticed the odor of gas when he first went into the occupancy of the apartments, and would detect it every evening when he would come home from work. He was familiar

with the smell of coal gas and recognized it as such (page 101), and that it was practically continuous during his entire occupancy of the apartments.

Dr. Woolbert, after testifying as to the dangerous character of carbon monoxide gas, said in response to a question of the Court:

“The Court: Then would you get them out of the gas?”

“The Witness: Yes, or I would get the gas out of the room; that would be the most logical thing” (page 139).

It was, therefore, apparent that both of the plaintiffs knew of the existence of gas as early as November, 1922, and knew of its dangerous character, and as early as that date Mrs. Jenkins had been rendered seriously ill thereby.

The cause of action is laid as commencing May 28, 1923, so that for six months prior thereto the plaintiffs knew of the danger of remaining in the gas laden atmosphere of the apartments, and must, therefore, be held to have assumed the hazard arising out of such a situation.

There was no proof whatever that the appliances used in the apartment house were defective in design, construction, condition or operation, nor was there any direct proof that the gas escaped from the defendant's heating device. The language of the trial Judge in his charge to the jury dealing with this phase of the matter is as follows:

“The proof of negligence on the part of the defendant is of a very limited character. I might perhaps be almost justified in saying to you that there is no definite proof of the landlord's negligence, and negligence is a thing that must be proved; it cannot be assumed. But it is the theory of the plaintiff that because the

landlord was in possession and control of the heating plant in this apartment, if coal gas did come up from the heater room or go into the apartment and through the apartment, negligence can be inferred from the happening of the thing itself. (Then follows a statement that the doctrine of *res ipsa loquitur* is applicable.) In the case before you there is no proof that the appliances used in this apartment house were in any respect defective in design and construction, condition or operation; but the plaintiff relies upon the doctrine that I have just expressed to you, and avers that you are entitled to infer from the fact that there was an escape of gas, that there was negligence on his part" (pages 162 and 163).

The plaintiffs, however, utterly repudiated the theory that *res ipsa loquitur* was applicable, and took an exception to the Judge's charge upon several grounds, one of which was:

"Also to the reference to the doctrine of *res ipsa loquitur* because it has no obligation."

So we here have a case in which the Court in his charge to the jury says there was no evidence of negligence, but the jury may be permitted to infer negligence under the doctrine of *res ipsa loquitur*, while counsel for the plaintiffs stoutly maintains that that doctrine has no applicability; and we quite agree with the Court that there was no proof of negligence, and with counsel for the plaintiffs that the doctrine of *res ipsa loquitur* has no application.

RES ADJUDICATA

Was the judgment recovered in the Atlantic City District Court by Schneidman against Daniel Jenkins *res adjudicata* as to the claim of Daniel Jenkins in this suit? Could he have set up in the Atlantic City District Court in defense to the action for rent, and in bar thereof, that the premises had been rendered uninhabitable by the wrongful act or default of the landlord? If he could then the doctrine of *res adjudicata* bars him in this action.

“A judgment if rendered upon the merits constitutes an absolute bar to a subsequent action. Parties and those in privity with them are concluded, not only as to every matter offered and received to sustain or defeat the demand, but as to any other admissible matter which might have been offered for that purpose.”

Cromwell v. County of Sac, 94 U. S. 351;

Patterson v. Baker, 51 N. J. Eq. 49 (Ch. 1893);

Clark Thread Co. v. Wm. Clark Co., 55 N. J. Eq. 658;

In re Walsh's Est., 80 N. J. Eq. 565 (E. & A. 1912);

McMichael v. Horay, 90 N. J. L. 142 (E. & A. 1917);

Sarson v. Maccia, 90 N. J. Eq. 433 (Ch. 1919).

While the general doctrine of the law is that on a demise there is no implied contract that the property is fit for the use for which the lessee requires it, and consequently its unfitness for such a purpose will not justify the tenant in abandoning the

premises, and on such grounds making a defense to an action for rent (*Naumberg v. Young*, 44 N. J. L. 331), there is, however, an exception to this rule as follows:

“On a demise of a house or lands there is no contract or condition implied that the premises shall be fit and suitable for the use for which the lessee requires them. Consequently their unfitness for such a purpose will not justify the tenant in abandoning the premises and on such grounds make a defense to an action for rent, unless there has been a fraudulent misrepresentation or concealment by the lessor as to the state or condition of the premises, *or the premises are uninhabitable by reason of some wrongful act or default of the lessor.*”

Murray v. Albertson, 50 N. J. L. 167 (E. & A. 1887).

“If a landlrd who has rented an apartment in his apartment house permits the main drain pipe of the building to become and remain clogged with offensive matter dangerous to the health of the tenant of such apartment, and fails after notice to remedy this condition, wherefore the tenant moves out, proof of such facts will be evidence of an eviction that may relieve the tenant from the payment of rent accruing after his removal.”

McCurdy v. Wyckoff, 73 N. J. L. 368 (N. J. Sup. Ct. 1906).

(The italics are ours.)

See also *Goldberg v. Reed*, 97 N. J. L. 170 (E. & A. 1921); *Gunther v. Oliver*, 97 N. J. L. 376 (Sup. Ct. 1922).

The negligence charged against Schneidman in this suit was equally available to Jenkins as defendant in the suit in the Atlantic City District Court, not only in bar of the action but by way of set-off or counter-claim, and if it be urged that Daniel Jenkins' claim by way of counter-claim exceeded the jurisdiction of that Court, the answer is that he could either have waived the excess or could have had the cause transferred to the Circuit Court, under the provisions of P. L. 1922, Ch. 208, p. 357, 1 Cum. Suppl. to C. S. p. 964.

The defendant was entitled to a non-suit at the close of the plaintiffs' case, and to a directed verdict at the close of the whole case, because:

A. The plaintiffs assumed the hazard incident to the situation because they had knowledge of the escaping of gas into the apartments for a period of nearly six months prior to the date charged in the complaint. They both knew of the dangerous character of the gas, and Mrs. Jenkins had been rendered seriously ill as a result of gas poisoning.

B. There was no proof of negligence on the part of the defendant.

C. The doctrine of res adjudicata had no application to the facts in this case.

ASSUMED HAZARD.

In *Vorrath v. Burke*, 63 N. J. L. 188 (Sup. Ct. 1899), the Court says, at page 190:

“If we assume negligence in the landlord still no right of recovery against him was established. Knowledge of the danger compels the assumption of the risk of use in such a case.

Mullin v. Raine, 16 Vr. 520; *Frank v. Conradi*, 26 Id. 23. The plaintiff's daughter was fully aware of the condition of the door when she attempted to hold it on her return down the stairway. She knew that the weights were off and deliberately assumed what risk there was in descending. An adult, of course, would be without remedy, and we think that this girl was old enough to be held guilty of contributory negligence in a case with such simple elements."

The case of *Vorrath v. Burke*, *supra*, was cited with approval by the Court of Errors and Appeals in *Saunders v. Smith Realty Co.*, 84 N. J. L. 276, 280.

In *Saunders v. Smith Realty Co.*, *supra*, the Court of Errors says:

"A person, being *sui juris*, who undertakes to use a dangerous way, with full knowledge of its unsafe condition, assumes the risk of injuries which may result to him from such user."

The Supreme Court in *Rooney v. Silletti*, 96 N. J. L. 312 (1921), makes use of the following language:

"A landlord is bound to use reasonable care to keep premises belonging to him, and of which several tenants have the common use, in a safe condition. But where a tenant has full knowledge of the dangerous condition of the premises, and attempts to make use of them while in that condition, there can be no recovery against the landlord for injuries resulting from such user."

Also in point is the case of *Davis v. Smith* (Sup. Ct. R. I. 1904), 58 Atl. Rep. 630, where the Court says:

"The existence of foul, noxious, and unwhole-

some odors in demised premises and the stopping up of a water-closet are facts incapable of concealment, to the consequences of which a tenant has no right to continue to expose his family.”

It may be urged that the plaintiffs were entitled to rely upon alleged promises of the defendant to remedy the condition. This proposition is answered in the case last cited as follows:

“A landlord who has agreed with his tenant to make repairs, is not liable in tort to a member of the tenant’s family who receives personal injuries from the landlord’s neglect to repair.”

In support of the above proposition the Supreme Court of Rhode Island cites a number of authorities in 58 Atl. Rep. at page 632.

NO PROOF OF NEGLIGENCE.

The trial Judge in his charge, at page 163, says:

“In the case before you there is no proof that the appliances used in this apartment house were in any way defective in design and construction, condition or operation; but the plaintiff relies upon the doctrine that I have just expressed to you (*res ipsa loquitur*) and avers that you are entitled to infer from the fact that there was an escape of gas that there was negligence on his part.”

Our own examination of the case has not disclosed any situation different from that stated by the trial Judge in his charge, to wit, that there was no direct proof of negligence, and unless the case is controlled by the doctrine of *res ipsa loquitur* the plaintiffs have wholly failed to prove negligence, either directly or inferentially.

RES IPSA LOQUITUR.

Is this doctrine applicable to the facts proved in this case? It is significant that the experienced attorney for the plaintiff denies that the doctrine of *res ipsa loquitur* has any application to the facts in this case. Following the Judge's charge the following exception was noted by Mr. Cole:

“Also to the reference to the doctrine of *res ipsa loquitur* because it has no application” (page 167).

This was in the form of an exception to the Judge's charge, and specifically to that portion of the Judge's charge which we have cited above. Clearly then if there was no direct proof of negligence as stated by the Court, and *res ipsa loquitur* does not apply, as stated by Mr. Cole, there can be no recovery.

The doctrine of *res ipsa loquitur* is fully and comprehensively discussed in the case of *Bahr v. Lombard, Ayres & Co.*, 53 N. J. L. 233 (E. & A. 1890), where the Court says, among other things:

“If, however, there is no proof of any fact by which the conduct of the defendant can be ascertained there is nothing for a jury to pass upon” (page 236).

The above case quotes from Smith on Negligence, in part, as follows:

“If something unusual happens with respect to the defendant's property, or something over which he has control, which injures the plaintiff, and the natural inference on the evidence

is that the unusual occurrence is owing to the defendant's act, the occurrence, being unusual, is said to speak for itself that such act was negligent."

In the same case the Court uses the following language, at page 239:

"In any aspect of the law, therefore, it must be conceded that unless a plaintiff has presented the testimony which was reasonably within his power he can derive no benefit from the proposed doctrine."

It was reasonably within the power of the plaintiffs to have gone to the heater room in the apartment house and to have learned for themselves whether the gas was escaping from that source, and whether there was any defect in the design, construction, or operation of the heating device. It was within the power of the plaintiffs to have subpoenaed the janitor or attendant and to have produced direct testimony of the existence of the defect, if any there was. Other reasonable means of investigation will readily occur to the Court.

There was no proof whatever that the gas escaped from the heating plant under the control of the defendant.

"The doctrine of *res ipsa loquitur*, as tending to show *prima facie* negligence is only applied where there is an essential element present, that is proof of the existence of the cause or thing which was alleged to have been the negligent act which produced the injury, or proof of such facts from which the existence of such cause or thing constituting the alleged negligent act is the only reasonable inference that can be properly drawn, and that such negligent

cause or thing producing the injury is in the possession of and under the control or management of the person charged with negligence or of his servant."

Conover v. Del., Lack. & W. R. R. Co., 92 N. J. L. 602 (E. & A. 1918).

See also *Stumpf v. D. L. & W. R. R. Co.*, 76 N. J. L. 153 (Sup. Ct. 1908), where the Court says, at page 154:

"One exception to this general and familiar rule is the doctrine or principle known as *res ipsa loquitur*, which is frequently applied to cases involving falling objects, especially parts of a structure falling upon a public highway, *but in all the cases where this principle has been properly applied the proof was clear as to the source of the falling object*, and the inference legitimate that the object would have remained in its place if the owner of the premises had performed the duty which he owed to the public of maintaining his premises in such a manner as to prevent injury to those lawfully passing the same."

(The italics are ours.)

In the case *sub judice* there was no proof showing from where the escaping gas came. Hence on this ground, and on the further ground that the plaintiffs had not presented testimony which was reasonably within their power to indicate the source of the escaping gas, and the nature of the defect claimed by them to constitute the defendant's negligence, the doctrine of *res ipsa loquitur* cannot properly be applied to the facts in this case.

In conclusion, it is respectfully submitted that as to the male plaintiff the suit in the Atlantic City District Court was *res adjudicata* and is a bar to any recovery in this action, and that as to both plaintiffs there can be no recovery because no negligence on the part of the defendant has been proved, because, even though there were negligence, the continued occupancy of the premises with knowledge of the hazard incident thereto was an assumption of hazard by the plaintiffs barring a right of recovery, and because the doctrine of *res ipsa loquitur* does not apply to the facts of this case.

CARR & CARROLL,
*Counsel for Defendant-
Appellant.*



