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NOTICE OF APPEAL.

New Jersey Supreme Court

ESSEX COUNTY.

SPRINTZE DULBERGER and ABRAM DULBERGER, *Plaintiffs-Appellants,* *vs.* IGNATZ RADLI, *Defendant-Respondent.*	*Action at Law.* *Notice of Appeal.*

PLEASE TAKE NOTICE that the plaintiffs appeal to the Court of Errors and Appeals in the last resort in all causes in New Jersey from the whole of the judgment entered in this cause.

Dated, Newark, N. J., January 31, 1928.

RAYMOND H. COHEN,
Attorneys of Plaintiffs-Appellants.

To Messrs. Wolber & Gilhooly, attorneys for defendant-respondent, 763 Broad street, Newark, N. J.

Service is hereby acknowledged of a copy of the within notice of appeal this 1st day of February, A. D. 1928.

WOLBER & GILHOOLY,
Attorneys for Defendant-Respondent.

GROUNDS OF APPEAL.

New Jersey Court of Errors and Appeals

SPRINTZE DULBERGER and ABRAM DULBERGER, *Plaintiffs-Appellants,*	*Action at Law.*
vs.	*On Appeal.*
IGNATZ RADLI, *Defendant-Respondent.*	*Grounds of Appeal.*

The appellants state the following grounds of appeal:

1. Because the Court, over the objection of the attorney of the appellants, charged the jury as follows:

> "We know that ceilings do not fall solely from water; that there are other causes which ceiling would fall from. A common cause is the big motor trucks that go by and shake houses. If it came down from some other cause and not from this water, then, of course, the plaintiffs cannot recover in this case because they must show negligence on the part of the landlord, and maintaining the ceiling is not a duty of the landlord in this particular case; that is, maintaining it from damage due to some cause other than as I have said."

2. Because the Court, over the objection of the attorney of appellants, charged the jury as follows:

> "If you are satisfied by the evidence that the defendant had no notice that the ceiling

> was in a defective condition, then, and in such event your verdict shall be for the defendant."

3. Because the Court, over the objection of the attorney of appellants, charged the jury as follows:

> "If you find that the ceiling became in a defective condition from a cause not within the control of the defendant, then and in such event the plaintiffs cannot recover."

4. Because the Court, over the objection of the attorney of appellants, failed to charge the plaintiffs' first request to charge as follows:

> "In the absence of any provision in a lease, the burden of making repairs is ordinarily on the tenant, but by the terms of a written lease between Mr. Dulberger and a Jacob Gelber, who owned the property when the lease was entered into, April 27, 1922, and which lease the defendant admits was assigned to him when he bought the property from Gelber, it is provided that in this particular case the landlord shall be permitted to enter the premises to examine and repair the water pipes if any may be broken, and then continues to recite that the landlord shall not be bounden to make any other repairs unless elsewhere in the lease agreed. I therefore charge you that in this particular case the duty of making repairs to the water pipes was expressly placed upon the landlord by the terms of the lease originally entered into by Gelber and subsequently assigned to Radli."

5. Because the Court, over the objection of the attorney of appellants, failed to charge the plaintiffs' second request to charge as follows:

"If you believe from the evidence that the ceiling in this kitchen got into a dangerous and unsafe condition on account of the failure of the landlord to reasonably examine and carefully repair any broken water pipes, after he was charged with knowledge that pipes were leaking and the ceiling becoming damp and cracked, and so much so that water was leaking through the ceiling, and that finally a portion of the ceiling fell as a direct and proximate result of the landlord's failure to make such examination and repairs, I charge you that this would be negligence on the defendant's part."

6. Because the Court, over the objection of the attorney of appellants, failed to charge the plaintiffs' third request to charge as follows:

"Independent of whether or not the lease cast any duty upon the landlord to make repairs of broken water pipes, it is claimed by the plaintiffs in this case that the defendant did undertake to repair the ceiling of the front room and repair this kitchen ceiling, by bringing two colored plasterers to the house in January, 1925, and instructing those men to fix the ceilings of the two rooms, from which it is claimed a piece of plaster had fallen from the kitchen ceiling in December, 1924, and the plaintiffs claim that at the time the defendant came with these plasterers there were large cracks in the kitchen ceiling which extended from one side of the room to the other, but that the plasterers only put in a patch in the kitchen which filled in the hole made by the plaster

which had previously fallen, and that the ceiling was not repaired otherwise, and that these large cracks remained when the plasterers had completed their work, and that the next day the plaintiffs showed these cracks to the defendant and expressed a fear as to the safety of the ceiling, and were assured by the defendant that it was all right and the room safe to use, and on this point I charge you that whether or not the lease imposed a duty on the defendant of repairing this kitchen ceiling, if you believe the story of the plaintiffs, it is clear that the landlord assumed and undertook the duty to repair it, and if this is so I charge you that he was bound to perform it in a reasonably careful manner, and if the ceiling fell in January, 1926, as a result of the landlord's failure to use reasonable and proper care in repairing this ceiling, it would be negligence on his part, the law being that one who undertakes to perform an act and performs it negligently is liable for such negligence if damage to another proximately results therefrom."

7. Because the Court, over the objection of the attorney of appellants, failed to charge the plaintiffs' fourth request to charge as follows:

"In determining whether or not there was any negligence on the defendant's part in the repairing of this ceiling, a definition of negligence may be of assistance to you, and I therefore charge you that it is the failure to do what a reasonably prudent person would ordinarily have done under the circumstances of the situation, or the doing of what such a person under the existing circumstances would not have done."

8. Because the Court, over the objection of the attorney of appellants, failed to charge the plaintiffs' fifth request to charge as follows:

"Not all negligence on the part of a person injured is contributory negligence. Where the defense of contributory negligence is set up, as it is in this case, three things have to concur: (1) the defendant must prove Mrs. Dulberger was negligent; (2) he must prove that that negligence contributed to the injuries in such a way that if she had not been negligent she would have received no injuries at the hands of the defendant; and (3) these things must be proved by the defendant by the greater weight of the evidence. Therefore, unless you find these three elements in this case, I charge you the defense of contributory negligence cannot be sustained. *N. J. Express Co.* v. *Nichols* (E. & A.), 33 N. J. L. 434; *James* v. *D., L. & W.* (E. & A.), 104 Atl. 333; *Donns* v. *P. S. Ry. Co.* (E. & A.), 133 Atl. 196."

9. Because the Court, over the objection of the attorney of appellants, failed to charge the plaintiffs' sixth request to charge as follows:

"On this question of any contributory negligence on the part of the plaintiffs, you also have a right to consider (if you believe it to be a fact) that they were assured by the landlord, whenever they inquired of him as to the safety of this ceiling, that it had been properly repaired and the room was safe for them to use, in addition to which I charge you that they had a right to assume that the defendant would perform the duty which he owed to them; that is, that he would use

reasonable and proper case to have this ceiling in a condition where it was safe for them to use the kitchen, in the absence of some warning to the contrary, and you are instructed that if while in the exercise of reasonable care for her own safety Mrs. Dulberger was injured by the defendant's failure to perform this duty, the plaintiffs are entitled to your verdict."

10. Because the Court, over the objection of the attorney of appellants, failed to charge the plaintiffs' seventh request to charge as follows:

"If you believe that previous to the happening of this accident Mrs. Dulberger had some latent disease or weakness, but suffered no pain, nervousness or discomfort from it, and that as a result of her injuries in this accident she does suffer pain, nervousness and discomfort, I then charge you that the injuries are the proximate cause of her present condition and not the latent disease or weakness, and if you feel she is entitled to your verdict she should be permitted to recover for all the damages shown to have proximately resulted from this accident. *Hahn* v. *D., L. & W.* (E. & A.), 105 Atl. 459."

Dated, March 3, 1928.

Respectfully,

RAYMOND H. COHEN,
Attorney of Plaintiffs-Appellants.

Service is hereby acknowledged as of time of a copy of the within grounds of appeal this 3rd day of March, A. D. 1928.

WOLBER & GILHOOLY,
Attorneys of Defendant-Respondent.

Complaint.

TRANSCRIPT OF PLEADINGS.

New Jersey Supreme Court

SPRINTZE DULBERGER and ABRAM DULBERGER, *Plaintiffs,*	*Judgment Record.*
vs.	*Action at Law.*
IGNATZ (or Ignacy) RADLI, *Defendant.*	*On Postea.*
	Judgment for Defendant.

Wolber & Gilhooly, attorneys.

Ignatz (or Ignacy) Radli, the defendant in this cause, was summoned to answer unto Sprintze Dulberger and Abram Dulberger, the plaintiffs therein, in an action at law upon the following complaint:

(Summons issued December 28, 1926.)

Plaintiffs, Sprintze Dulberger, a resident of Belleville, in the County of Essex and State of New Jersey, says that:

FIRST COUNT.

1. On January 5, 1926, and for some time previous and subsequent thereto, the defendant was the owner of premises known as No. 54 Waverly avenue, in the City of Newark.

2. On said date, and for some time previous and subsequent thereto the plaintiffs were tenants of the defendant at the above address, occupying a store and four rooms in the rear of the same, all on the ground floor of said building.

Complaint.

3. Plaintiffs leased said premises under date of April 27, 1922, by a written lease with one Jacob Gelber, from whom defendant subsequently purchased this property, and by whom the foregoing lease was assigned to this defendant.

4. That some time in December, 1924, a portion of the ceiling in the living room of said premises then occupied by the plaintiffs fell, the repairs to which were undertaken and made by this defendant as landlord of the plaintiffs.

5. In January, 1925, a portion of the ceiling in the kitchen of said apartment fell and the rest of said ceiling was cracked and broken in many places, due largely to leaks and breaks in certain water pipes which the defendant, as owner and landford, had expressly agreed to examine and repair.

6. The plaintiffs had frequently notified the defendant of the condition of the ceiling in said kitchen prior to January, 1925, and he had promised repeatedly to repair the same.

7. After a portion of said ceiling fell in January, 1925, the defendant undertook to repair the same and put it in a condition where it would be reasonably safe for the use of the plaintiffs, which work, however, was negligently and carelessly done and consisted only of patching that portion which fell, whereas said ceiling was cracked, loose and water-soaked in many places, which facts were known to the defendant and which a reasonably careful inspection would have disclosed.

8. In November, 1925, the plaintiffs again called the attention of the defendant to the dangerous condition of said kitchen ceiling, and

threatened to vacate said premises unless the defendant put the same in a reasonably safe condition, whereupon the defendant personally inspected and tested the same and agreed to immediately have the necessary repairs made.

9. Defendant negligently and carelessly neglected and failed to have said ceiling repaired and to mend or repair the leaks and breaks which for a long time existed in the water pipes directly over said ceiling, as a direct and proximate result of which a large portion of said kitchen ceiling fell on this plaintiff on January 5, 1926, while she was engaged in her household duties in said kitchen.

10. Whereby and by means of the premises the plaintiff was struck violently on the head, back and shoulders by said falling ceiling; she was rendered unconscious for a long period of time, her nervous and mental system has been greatly shocked and shattered; she has suffered great physical and mental pain; she has lost a large portion of the hair from her head; she is unable to perform work which she could and did perform previous to receiving her injuries; she has been compelled to undergo medical treatment in an endeavor to be healed and cured of her injuries; her general health has been ruined and she is permanently injured.

Plaintiff Sprintze Dulberger demands of the defendant the sum of $20,000 damages.

Plaintiff Abram Dulberger, a resident of Belleville, in the County of Essex and State of New Jersey, says that:

SECOND COUNT.

1. He here repeats and re-alleges each of the paragraphs of the first count, numbered from 1 to 10, inclusive, with the same force and effect as though fully set forth herein.

11. That he is the husband of the plaintiff Sprintze Dulberger, and as such is entitled to the aid, comfort and society of his said wife, of which he has been deprived by the foregoing acts of the defendant; due to her inability to assist him in the conduct of his business, as she formerly could and did do, he has lost large sums of money, and as her husband he has been compelled to lay out and expend divers large sums in a reasonable effort to have her healed and cured of her injuries as aforesaid.

Plaintiff Abram Dulberger demands of the defendant the sum of $10,000 damages.

Filed January 6, 1927.

RAYMOND H. COHEN,
Attorney of Plaintiffs.

The defendant, Ignatz Radli (erroneously called Ignacy Radli in the complaint), residing in the City of Newark, County of Essex and State of New Jersey, answering the complaint in the above-entitled cause, says that:

1. He admits paragraph 1 of the first count but denies each and every remaining allegation of the first count of the complaint.

2. This defendant at all times has exercised reasonable care and diligence of the maintenance of the premises described in the bill of complaint.

FIRST SEPARATE DEFENSE TO FIRST COUNT.

1. The plaintiff Sprintze Dulberger was guilty of contributory negligence in remaining in the demised premises under the circumstances set forth in the complaint.

SECOND SEPARATE DEFENSE.

1. The said plaintiff Sprintze Dulberger assumed the risk of injury in remaining on the demised premises if the same were in the condition as set forth in the complaint.

ANSWER TO SECOND COUNT.

1. The defendant repeats each and every allegation contained in his answer to the first count and makes the same a part hereof as if recited at length.

2. He repeats the allegations contained in the first and second separate defenses.

SEPARATE DEFENSE TO FIRST AND SECOND COUNTS.

1. Notice is hereby given that at or after the trial of the above-entitled cause the defendant will move to strike out the complaint in that the same discloses no cause of action and in that the said complaint failed to disclose any facts showing any duty owing by the defendant to the plaintiff and upon the further ground that the plaintiffs voluntarily assumed the risk of injury in remaining upon the demised premises under the facts set forth in the bill of complaint.

WOLBER & GILHOOLY,
Attorneys for Defendant.

Filed January 17, 1927.

Plaintiffs deny the matters and things stated and set out in paragraph 2 of the answer of the defendant to the first count of the complaint, and to the matters and things stated and set out in the first and second separate defenses to the first count and the answer of the defendant to the second paragraph of the second count; and the matters and things stated and set out in the separate defense to the first and second counts.

RAYMOND H. COHEN,
Attorney of Plaintiffs.

Filed January 19, 1927.

This case was tried before Judge William A. Smith, to whom the same was referred for trial, with a jury, at the Essex Circuit, on January 11th, 12th and 13th, in the year 1928.

The jury rendered a verdict in favor of the defendant.

Costs $46.00. Whereupon it is adjudged that the complaint of the plaintiffs be dismissed and that the defendant, Ignatz (or Ignacy) Radli, do recover of the said plaintiffs, Sprintze Dulberger and Abram Dulberger, his costs, which have been taxed at the sum of forty-six dollars.

Judgment entered January 17, 1928.

WM. S. GUMMERE,
C. J.

Clerk's Certificate.

I, EDWARD J. KELLEHER, Clerk of the Supreme Court of the State of New Jersey, do certify that the foregoing is a true copy of the judgment entered in the above-stated cause as the same remains of record in my office.

In testimony whereof I have set my hand and the seal of said Court at Trenton this 3rd day of February, A. D. 1928.

EDWARD J. KELLEHER,
Clerk.

(SEAL)

Opening.

TESTIMONY.

NEW JERSEY SUPREME COURT.

ESSEX CIRCUIT.

Friday, January 6, 1928.

SPRINTZE DULBERGER, *et al.*,
vs.
IGNATZ RADLI.
Action at Law.

Before Hon. William A. Smith, *J.*, and a jury.

For the plaintiff appears Raymond H. Cohen (by John W. Palmer).

For the defendant appear Wolber & Gilhooly (by Edward J. Gilhooly).

(Nine jurors are drawn.)

Adjourned until 10 A. M., Monday, January 9, 1928.

SECOND DAY.

Monday, January 9, 1928.

Continued pursuant to adjournment.

Present, counsel as before stated.

(Remaining three jurors are drawn.)

(The jury is sworn.)

(Counsel for the plaintiff being engaged in another court, the case is adjourned to Wednesday, January 11, 1928.)

THIRD DAY.

Wednesday, January 11, 1928.

Continued pursuant to adjournment.

Counsel as before stated.

Mr. Palmer opens for the plaintiffs.

Mr. Gilhooly opens for the defendant.

Mr. Palmer: I offer in evidence the lease and the interrogatories.

The Court: The lease will be received in evidence; you will read the interrogatories you wish to offer.

(The lease is received in evidence and marked Exhibit P. 1.)

Mr. Palmer: These are interrogatories asked of the defendant by the plaintiff, answers to which he had to give, and did under his oath give, as follows:

"1. On what date did you become owner of premises known as 54 Waverly avenue, in the City of Newark? Answer: Conveyance, Gelber *et ux.* to Radli *et ux.*, recorded July 24, 1922.

2. Upon becoming the owner of said premises was there assigned to you, or did you in any other manner, come into possession of a written lease between these plaintiffs and one Jacob Gelber, bearing date April 27, 1922? Answer: Yes.

3. Were said premises purchased by you of one Jacob Gelber? Answer: Yes."

I am reading from the lease, Exhibit P. 1, bottom of page 1, after referring to two or three things Mr. Dulberger must do:

"And will permit the said party of the first part (Jacob Gelber) or his agent, to enter the

said premises at reasonable hours in the daytime to examine and repair the water pipes (only) if any may be broken; the party of the first part not being bounden to make any other repairs unless it be elsewhere in this lease expressly so agreed."

I don't know of anything else in this lease which has any further bearing at this time.

SPRINTZE DULBERGER, one of the plaintiffs, sworn in behalf of the plaintiffs.

Direct examination by Mr. Palmer.

Q How long did you live in the house and store at 54 Waverly avenue? A I don't remember.

Q Don't you know how many years you lived there? A It was over three years.

Q When was it that you and your family moved there? A I think it was after Easter, but I don't remember the month.

Q What year? A I don't remember.

Q Who owned the property when you and your husband moved there? Who was the landlord? A When we moved in?

Q Yes. A Mr. Gelber.

Q How many rooms were there that you and your family used? A Four rooms.

Q Are you bleeding from your lip now? A Yes.

Q What is bleeding, just your lip? A Yes.

Q Did you say there were four rooms? A Four rooms.

Q Is there also a store? A Yes, sir.

Q When you say four rooms, does that mean four rooms counting the store, or the store and four rooms? A The store and four rooms.

Q What kind of business did you and your husband conduct there? A It was dry goods and a little candy and hardware.

Q How old a woman are you? A Forty-five.

Q How long have you been married? A Twenty-nine years.

Q Up until the time you had been hurt, how had your health been? How did you feel? A Very good; I never feel sick in my life.

Q How many children had you had? A I had eleven children and some of them died as soon as they were born.

Q At the time of the accident how many children did you have? A I didn't have no more since then.

Q No. How many children were living at the time you were hurt? A Five were living.

Q Did they live there at the Waverly avenue address with you? A One was married and four of them I had with me.

Q While you were living there and down near the end of the year 1924, what did you notice about the ceiling in the kitchen and in your front room? A Water was leaking; we had to put pails and bottles all over. And then, the ceiling was cracked, and it started to crack a lot more.

Q Did Mr. Radli know that all that was going on? A Yes, sir.

Q How did he come to know? A My husband told him about it.

Q Down near the end of 1924 what happened to the ceiling in the front room? A Half of the ceiling came down.

Q Did Mr. Radli know that? A We let him know.

Q He knew it, did he? A Yes, sir.

Q How do you know he knew it? A My husband told him.

Q At the end of December, 1924, what happened in the kitchen? A A big piece of ceiling over the door came down.

Q Before that piece fell down from the ceiling of the kitchen, tell us what the ceiling of the kitchen looked like? A The ceiling of the kitchen looked like it was cracked and it was like a dark color.

Q How long had it been that way before the piece fell out? A For a long time.

Q About how long? Do you know? A I don't remember exactly.

Q Then you say around the end of December a piece fell out in the kitchen. Did Mr. Radli find out about that piece falling out in the kitchen? A We sent for Mr. Radli.

Q What did he do? A He said he was going to fix it.

Q Whom did he tell that to? A To my husband.

Q Were you there, too? A I was there, too, in the kitchen.

Q What did you show him at that time? Did you show him the kitchen or did you show him the front room, too? A The front room and the kitchen.

Q What next happened around there? A A few days later he came with the two colored masons and they arranged a price and then they fixed it.

Q What did Mr. Radli say to the colored men that you heard him say? What did you hear Mr. Radli say to these colored men? A He told them to fix it and make a good job out of it.

Q How many rooms did he tell them to do the work in? A Just the front room and kitchen.

Q What did these colored men do in the front room? A They tore the whole ceiling down and put a new ceiling in.

Q You say they tore down what was left of the ceiling in the front room and put a whole new ceiling in? A Yes.

Q What did they do in the kitchen? A They only fixed the patch.

Q When they got through with the patch, tell me how the rest of the ceiling looked? A It was cracked from one end to the other.

Q Did Mr. Radli know about this crack and that the men had only put the patch in? A My husband sent for Mr. Radli and asked him why he didn't fix the whole ceiling in the kitchen like he did in the other room.

Q What did Mr. Radli do? A He tapped with a broom on the ceiling and he said the ceiling is perfectly all right.

Q That was early in January of 1925, wasn't it?

Mr. Gilhooly: I don't want to object, but that certainly is leading.

Mr. Palmer: I thought it had already been testified to or I would not have said it, Mr. Gilhooly.

Q After testing the ceiling with the broom handle and telling you it was all right, what did Mr. Radli do? A That's all.

Q He went home, I suppose? A Yes, sir.

Q You have told us that before this patch fell, a lot of water used to leak through the kitchen? A Yes, sir.

Q What did you catch the water in? A We had to put buckets and pails all over.

Q After the patch was put in there did the water then leak through? A Not for about ten months later.

Q And about ten months later, tell us what happened with regard to the water. A In about ten months later the water started to leak again from the cracks. Then my husband sent again for Mr. Radli and he told Mr. Radli about it. Mr. Radli again tested it with the broom and he said the ceiling is all right, only on account of the water pipes, and he is going to fix the water pipes.

Q I believe that the gentlemen who are to try your case can't hear you. Can you talk louder? A I don't feel so good.

Q I know you don't, but for a few minutes just try to talk louder. After Mr. Radli came again and tested it with a broom what happened one night in that kitchen? A It was on the 5th of January; I was in the kitchen getting supper ready—

Q About what time of the night? A It was between 6 o'clock and 7 o'clock, I don't remember exactly the time. So, just as I went over by the wash tub to peel potatoes, and unexpected all of a sudden a piece of the ceiling fell on my head and back. I was put on a chair; my husband was standing near me. I was all shaken. Then he helped me in the bedroom and I went to bed and they sent for the doctor.

Q For about how long did you stay in bed? A For about four or five weeks.

Q Whom did you have taking care of you? What was the name of the doctor? A The first doctor was Dr. Bengelsdorf, then Dr. Levin.

Q You say that was on January 5th that that happened to you? A Yes, sir.

Q January 5th of what year? Do you remember? A 1926.

Q Why did you go to bed and stay there for four or five weeks? Why did you do that? A Because I was very sick; I couldn't stand on my feet.

Q Where were you sick? A I was dizzy—right after the accident I started to vomit about three or four times that night.

Q Was that the same night as the accident or the next night? A The same night.

Q Why didn't you get up sooner instead of staying in bed four or five weeks? A I couldn't because I was dizzy and I had terrible headaches and my heart was beating—I couldn't stand it.

Q Tell us about your heart. What was there about your heart? A It was beating—it was beating fast—I couldn't stand up and my head was getting dizzy and I feel like fainting if I stand up and I had to fall back, so I had to stay in bed.

Q Everybody's heart beats. What do you mean? A It was beating fast—it scared me.

Q Is that what was the matter with you when you were in bed? You were dizzy and you had headaches and your heart beat fast and frightened you? A Yes.

Q Was there anything else the matter with you? A I had to have ice bags on my head for almost a week.

Q Then finally you did get up, didn't you? A About the fifth week.

Q Were you all right when you got up? A No.

Q What was the matter with you? A I still feel dizzy; I can't stand up. I try to get in the kitchen to do something and I feel like falling back in a chair. I had to lay down every once in awhile and I couldn't do anything in the store no more.

Q Before this accident happened, and before this ceiling fell on you, what did you used to do in the store? A I used to take care of the store and the house.

Q Why didn't your husband take care of the store? A He is sickly always. He used to do the buying and I used to be in the store all day.

Q Since the accident happened have you taken care of the store? A No, no more.

Q Why not? A I can't; I have no strength. I don't feel good no more.

Q You have told us you do not feel well. Tell us how it is and where you feel bad down to today. A I feel bad. I feel shaken always. I try to do cooking or something. My daughter is with me because I can't do it myself and sometimes I get dizzy spells and I have headaches and other times I am shaking, and I feel dizzy and I can't help crying. Then I can't do nothing.

Q How often do you get these spells where you shake all over and cry? How often do they come on you? A Sometimes two or three times a day and sometimes once a day, and another time—about once a day and two or three times sometimes.

Q How often do you get weak? A I always feel weak.

Q You are always weak, are you? A Yes.

Q How often is it you notice your heart beating so fast? A Soon after the accident.

Q But how often does it bother you? A As soon as I get nervous my heart starts to beat faster.

Q Do you get nervous very often and does your heart go faster very often? A Yes, sir.

Q Aside from helping your husband in the store, as you used to do before the accident, who used to do the housework up there in your house? A I used to do it and my children used to help me. Sometimes I used to do it myself because I was always strong.

Q Are you able to do the housework now? A No, sir.

Q You have gotten well enough to do a little of it, haven't you? A Just a little sometimes when I feel all right, but my daughter is always helping me. She comes every day since the night of the accident.

Q By your daughter, do you mean your married daughter, Mrs. Kohn? A Yes.

Q What is it your married daughter does? A She helps my husband in the store and helps me in the kitchen.

Q Can you once in awhile get a meal ready for the family?

Mr. Gilhooly: I object on the ground that these questions are all leading. I think he can ask what she can do and what she cannot do.

The Court: Ask her what she does with reference to the meals.

The Witness: Sometimes I start to cook something and just as I start to do something I start to shake all of a sudden and I can't finish no more. I got the shaky feeling and dizzy and I can't possibly stand it in the

kitchen and I have to get out in the air to get over it.

Q In cooking, once in a while, I suppose salt has to be put in the food and seasoning? A Yes, and many times I make mistakes. I wanted to put salt in the soup and I put in coffee, and I spoiled the whole dinner.

Q What did you think you were putting in? A Salt, but I made a mistake and put in coffee.

Q You can read, can't you? A Yes, a little.

Q What do you do sometimes turning on the lights? A I light a match, and early in the morning I press the button, thinking it is nighttime and I light the lights when I want to go in my bedroom.

Q What I want to find out is this: When you put coffee in the food, what is it you think you are putting in? A I think it was salt and then I find I was making a mistake.

Q When you go over and turn the electric light on, what is it you think you are doing? A I think it is night; I forget for the moment.

Q Since this accident happened, how many days have you felt good and felt like you used to before you were hurt? A There isn't one day that I feel good; I always feel something. Either I get headaches over here (indicating) or my ear (indicating) swells out like and I get nervous and can't stand it and I always make mistakes every day I do something.

Q What have you noticed about your hair since the accident happened? A I lost more than half my hair. My hair was past my knees, and now it is all short and coming out in bunches.

Q Did you ever have any trouble like that, about losing your hair and its getting so short

before the accident? A No, I always had nice long hair and thick.

Q How is your weight compared to what it was before you were hurt? I mean are you fatter or thinner? A Before the accident I weighed 225 pounds, now I weigh about 178.

Q Before this accident happened how were you for remembering things? A I could remember everything very well.

Q How are you since you have been hurt? A Now, I can't remember the least thing. I might go to get something and I stay there about ten minutes coming back and I forget what I wanted to get and then if I wait a little while I remember what I wanted to get and I go back.

Q Do you want to get well? A Oh, sure.

Q Do you do what the doctors tell you to do? A Surely.

Cross examination by Mr. Gilhooly.

Q Mrs. Dulberger, how old were you when you got married? A Sixteen?

Q How much did I understand you to say you weighed before this accident? A Two hundred twenty-five.

Q When did you weigh yourself just before this accident to find out that you weighed 225 pounds? A I used to weigh myself every week.

Q When was the time that you remember you weighed 225 pounds? A Just before the accident.

Q On what day was the accident? A The 5th of January.

Q What year? A 1926.

Q What fixes it in your mind that this accident was on January 5, 1926? A That's when it was, that's right.

Q Why isn't it January 6th and not January 5th? A The 5th—one day makes no difference; I don't remember exactly; I know it was the 5th.

Q Was it the 6th? A I think it was the 5th, not the 6th.

Q Do you remember what day you moved into these premises? A I don't remember.

Q Do you remember how many years you lived there? A I don't remember.

Q You do remember how many years you lived there, don't you? A No, sir.

Q You say that your health was very good before the accident? A Yes, sir.

Q You are sure of that, aren't you? A Yes.

Q You are sure of that? A Yes, nobody can tell you different; any of the neighbors can tell you.

Q How old is your youngest child? A Fourteen.

Q And your eldest is how old? A Twenty-five.

Q Have you a daughter that is twenty-nine years old? A No.

Q And after the fourteen-year-old daughter, who comes next in age? A One boy, eighteen.

Q And who comes next to him? A One, twenty-two.

Q When was your last child born? A About seven years ago.

Q That would be in 1920? A Yes, sir.

Q Is that one of the children that died? A Yes.

Q And before that child was born, when was the next child in point of age born? A That was the last one.

Q And the time before that, when was that child born? A I can't remember; that was years back.

Q Of the eleven children you have I understand five were living at the time of the accident? A Yes, sir.

Q And four were living home with you? A Four were home with me and one was married.

Q You had one boy and three girls, is that correct? A Three boys and one girl.

Q Did your boys and girls help your husband in waiting on the customers in the store? A No, sir.

Q How about the eighteen-year-old boy? Did he go to work? A Yes; he is going to work.

Q How about the fourteen-year-old boy, was he going to school? A No; he is working.

Q He didn't work in the store, did he? A He used to help sometimes.

Q Do you know Edward Burell?

Mr. Gilhooly: Will you stand up, Mr. Burell?

Q Do you know that man (indicating)? A I think I do.

Q He lived in the house that you lived in, didn't he? A I don't remember that; there is many colored people that lived there.

Q There were several families of colored people living there, weren't there? A Sure.

Q And he lived there, too, didn't he? A I don't remember that.

Q He dealt with your husband and yourself, didn't he? A I think so, yes.

Q He came into your store quite often, didn't he? A I think so.

Q He used to talk to you in German and Jewish, didn't he? A I don't remember that.

Q Do you know Mrs. Crump?

Mr. Gilhooly: Stand up, Mrs. Crump.

The Witness: Yes.

Q She lived in the house, too, didn't she? A Yes.

Q And you used to talk to her time and time again? A Yes.

Q Before this accident happened did you ever have any headaches? A Never.

Q Did you ever have any headaches in your life? A Never in my life.

Q Were you ever nervous before? A No, sir.

Q Were you ever weak before? A Never.

Q Did you ever feel weak after childbirth? A I used to take care of myself; I was always strong; I was never weak and never anything the matter with me.

Q Just what part of your head did this piece of plaster hit? A Right here and on my back—

Q You are pointing to the top of your head? A Yes, sir.

Q The front or the back? A My whole head, front and back.

Q How big was the piece of plaster that fell? A It was about a yard and a half.

Q Which way; long or wide? A Long.

Q You are sure it is a yard and a half, not a foot and a half? A A yard and a half.

Q You would know what a yard and a half was? A Yes.

Q How wide was this piece? A About a yard.

Q About a yard? A Maybe more—about a yard.

Q What were you doing at the particular time that this plaster struck you? A I was right at the wash tub peeling potatoes.

Q What time did this accident happen? A Between six and seven.

Q It was near seven o'clock, wasn't it? A Between six and seven.

Q I understand you make a lot of mistakes, don't you? A No, sir, I don't; maybe you do, I told the truth.

Q But I mean, you make a lot of misakes. A I make a lot of mistakes, but I remember that.

Q You are not mistaken about January 6th, are you? A No, I think it was the 5th.

Q And you are not mistaken that you were peeling potatoes at the wash tubs and that it was about six or seven? A No, sir.

Q Did you have the wash tub tray up or down? A It was closed.

Q In what part of the room did this piece of plaster fall? A Over the wash tubs.

Q Where? A It was right over the wash tubs.

Q Over the corner of the room, wasn't it? A Right over the wash tubs.

Q The wash tubs were right in the corner of the room, weren't they? A Yes; the floor was covered with ceiling pieces.

Q The wash tubs were in the corner of the room, weren't they? A Yes, sir.

Q And the ceiling that fell was right in the corner of the room? A Yes.

Q When did you first observe that this ceiling was in a defective condition? I want to know the time as nearly as you can remember? A You remember it is months—as soon as it was fixed that patch.

Q It was in a defective condition before it was fixed, wasn't it? A Yes; it was in bad condition since—

Q In what month and what year did the ceiling in the other room fall? A In the other room? It was in November, 1924.

Q Did that ceiling in the living room—do you know what the living room is? A We call it living room, but we had it for a bedroom, it was a front room, really, but we used it for a bedroom.

Q You have two bedrooms, have you not? A Two bedrooms and a kitchen and a dining room.

Q It was not in the dining room that the ceiling fell? A No.

Q But it was in one of the bedrooms? A What we call the front room and use it for a bedroom; that was right next to the kitchen.

Q That was in November, 1924, wasn't it? A Yes, sir.

Q You are sure it was in November, 1924, aren't you? A Yes.

Q What, if anything, fixes the date in your mind that it was in November, 1924, that the ceiling fell in this room? Was there anything that brings it to your mind? A It was that date.

Q What makes you sure of that date? A We all know it; my husband knows it, too.

Q You can't be mistaken about that? A No, sir.

Q You are sure of it? A Yes, sir.

Q How long before November, 1924, was the kitchen ceiling out of repair? A It was December—

Q I am talking of before that period. A I don't remember.

Q Was it a month? A I don't remember. It was always leaking; it was always trouble with water pipes.

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

The Court: Strike it out.

Q Start with November, 1924. A Yes, sir.

Q The ceiling was fixed and no water came through for about ten months? A Yes, sir.

Q That would take us to about September, 1925? A It was in December.

Q Was it all right in September? How do you know it was about ten months before the water started to leak through again? A It leaked before, too, and ten months after that piece was fixed it started to leak again.

Q Did it start to leak at any time before the ten months' period? A I think so.

Q You don't think so or you do think so? A After the patch was fixed and about ten months after it started to leak and the water started to come out.

By the Court.

Q Did it come through by the time of the fixing and the end of the ten months? A I think so; I think it came through once or twice. I don't remember exactly.

By Mr. Gilhooly.

Q Why do you say ten months? Are you guessing at that? A No, it was in December, 1925.

Q Then that would be thirteen months. A Something like that; I figured ten months; I don't remember exactly.

Q You have figured it out, have you? Did you figure it out before you came into court?

Did you figure out that it was ten months? A I know it sure.

Q So I can figure it was about ten months? A Yes.

Q And the water came through very badly? A Yes.

Q Did it bulge in places and look as though the ceiling might fall? A No, it didn't.

Q You were afraid it would fall? A Yes.

Q You sent for Mr. Radli, didn't you? A Yes.

Q Why did you send for him? A I wanted him to fix the ceiling that way; I didn't want the water coming through.

Q You were afraid that the ceiling would fall, weren't you? A No, I wasn't; I had to carry about twenty pails of water all the time.

Q That was ten months after it was fixed the first time? A Yes, sir.

Q From this period of ten months after it was fixed the first time, until January, 1926, you were constantly carrying out water, is that right? A What do you mean?

Q Between the ten months the ceiling was fixed the first time and January, 1926, you had to carry a lot of water from your apartment? A Yes.

Q Did I understand you to say you carried out about twenty buckets of water? A Yes, sir.

Q Did those come from one spot in the room or different places? A Different places.

Q Name the places where the water leaked through in the ceiling. A In different parts.

Q Did it leak over the kitchen range? A Sometimes.

Q And did it leak in the spot where it fell down? A Yes.

Q That was the spot over the tubs? A Yes.

Q Did it leak over the water boiler? A No, not over the water boiler.

Q Mrs. Dulberger, you were in the habit of wearing a towel around your head before the accident, weren't you? A I don't remember.

Q You used to wear a towel around your hair, didn't you? A No.

Q After the accident did you wear a towel around your head? A I did.

Q Before this accident did you ever tell this man, Eddie Burell, that you had headaches? A No, I didn't talk to him about that.

Q Did you ever tell Mrs. Crump you were troubled with headaches? A After the accident.

Q Did you ever tell her before the accident you had headaches? A No, sir.

Q You would remember if you had had such a conversation, wouldn't you? A Yes, sir.

Q These cracks were very noticeable in the kitchen, were they not? A Yes, sir.

Q Anybody could see them, couldn't they? A Yes, sir.

Q And anybody could see the water coming through, couldn't they? A Yes, sir.

Q You didn't have to be an expert to see that, did you? A No, sir.

Q You saw it, didn't you? A Yes, sir.

Q Did your husband send for Mr. Radli in the meantime? A Yes, he did.

Q Did your husband tell him to fix it or it was liable to fall? A I don't know if he said it is liable to fall but he sent him to fix it.

Q And Mr. Radli tested the ceiling and said it would not fall? A Yes, sir.

Q Did you believe him when you said it would not fall? A Yes, sir.

Q You didn't believe it would fall, did you? A No, sir.

Q Did your husband ever fix the ceiling? A No, sir.

Q He never fixed it from the time you were in possession? A No, sir.

Q He never fixed it before Mr. Radli acquired ownership, did he? A No, sir.

Q Can you please tell me what time in the year 1925 your husband sent for Mr. Radli and called his attention to the fact that the ceiling was leaking? What day and what month? A I can't remember the day.

Q You remember this accident happened on January 5, 1926? Can't you tell us what day your husband sent for Mr. Radli? A I don't remember the day.

Q Can you tell us what month in 1925 he sent for him? A In the 5th of January.

Q Your husband sent for Mr. Radli before the accident happened, didn't he? A Oh, yes.

Q Just what day in what month did your husband send for Mr. Radli? A In December; it was in the middle of December.

Q Did he send for him at any time before December, 1925? A He sent for Mr. Radli in December and he sent for Mr. Radli before the ceiling fell down, many times before.

Q What was the first time that he sent for Mr. Radli? A The first time, in November.

Q The first time was in November? A Or in December after the ceiling came off.

Q Was it in November or December? A In December.

Q Had he sent for him before December 25th? A Many times.

Q How long before? A I can't remember.

Q Was it a week before? A I can't tell you exactly.

Q A month before? A I can't remember.

Q Did he send for him in September, 1925? A I think so; I don't remember.

Q What makes you think so? A I don't remember; Mr. Radli used to come in many times.

Q He was around there all the time, wasn't he? A Mr. Frimmer lived next door; that was his cousin.

Q He used to look over the premises? A He used to come and see his cousin, Mr. Frimmer, next door. He was his partner in business.

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

The Court: Strike it out.

Q Did Mr. Radli come around to look over the premises? A Not unless we called him.

Q Mr. Radli came around every month to collect the rent, didn't he? A Mr. Frimmer, his agent, his cousin, used to collect the rent.

Q Mr. Radli was there at least once a month during all that time, wasn't he? A Sometimes.

Q He made purchases in your store, didn't he? A Once in a while.

Q He came around very often and spoke to you, didn't he? A Not very often.

Q Did you ever tell him that repairs had to be made in that house? A Yes, sir.

Q And he fixed them? A Yes, sir.

Q The only thing he would not fix was the ceiling, is that right? A Yes, sir.

Q But he fixed everything else? A Yes, sir.

Q Did he fix the toilets? A Yes, sir, the toilets and the pipes; always trouble with the pipes.

Q And he fixed the boiler where you have your hot water in the kitchen? A Yes.

Q He fixed that? A Yes.

Q Do you know Mr. Young?

Mr. Gilhooly: Will you stand up, Mr. Young?

Q Did you ever see that gentleman before? A Yes, I know him.

Q He is the plumber, isn't he? A Yes, sir.

Q He has been around your house several times, has he not? A Yes, sir.

Mr. Gilhooly: If the Court please, Mr. Palmer advises me he would like to call the doctor out of turn in view of the fact that the doctor has two operations scheduled for tomorrow. If it is satisfactory to the Court I have no objection. I will continue my cross examination afterwards.

AARON BENGELSDORF, sworn in behalf of the plaintiffs.

Direct examination by Mr. Palmer.

Q Dr. Bengelsdorf, are you a practicing physician of the State of New Jersey? A I am.

Q And you have been for how long? A Since 1921.

Q Where is your office located? A 89 Spruce street, Newark.

Q How long have you known Mrs. Dulberger, the lady who has just been on the stand? A I have known the family for the last five years, but I treated her only since the accident. Her husband was my patient and the children once in awhile.

Q Therefore, as I understand it, she never was a patient of yours before the accident, was she? A No.

Q Although you had known her somewhat on account of treating other members of her family? A Yes, sir.

Q Before the accident although you had never treated her, what did her general appearance seem to be?

Mr. Gilhooly: I object.

The Court: If he knows, I will allow it.

By the Court.

Q Fix your observation on general appearance. A I really don't recall her so very well. I used to know the family. She was always calling me and taking the explanations how to treat the patients—how to carry the orders out. She never made any sick impression on me.

By Mr. Palmer.

Q From looking at her as you did, from time to time, what was your opinion as to her general health?

Mr. Gilhooly: I object to that.

Objection sustained.

Q What was her general appearance before the accident?

Mr. Gilhooly: I object because the doctor says he didn't make any observation of her.

The Court: I will allow it.

By the Court.

Q If you recall it, what was her general appearance? A I haven't any answer to that. I remember her husband was sick one time and she had a long talk with me. She seemed to be a strong husky woman without any signs of nervous irritation.

By Mr. Palmer.

Q When did you first begin to treat her? A I have a copy of my record. My first visit—

Mr. Gilhooly: May I cross examine on the record?

The Court: Yes.

By Mr. Gilhooly.

Q Doctor, when did you make the record you are reading from? A The record is in my office.

Q That is not your record? A No, it is a copy I made of the record.

Mr. Gilhooly: I object.

Objection sustained.

The Witness: As my memory serves me, I was called on January 5, 1926, in the evening, sometime between eight and nine. She was lying in bed and had bruises on the head and she told me that the ceiling fell on her head and I had to attend to her. She wasn't very clear in her answers at that time, so I had to ask the family—her hus-

band was there—and I gave orders for her to apply ice to the head and did not treat her much until the next morning until the congestion cleared up. I understood she vomited that evening—

Mr. Gilhooly: I object to what information was given to the doctor.

The Court: I will allow it.

The Witness: Then I saw her next day twice. She had a swelling on the scalp. Near one ear there was a laceration of the skin, so I attended to that and bandaged it up, and treated her since for a few weeks—I think it was six weeks, the whole thing. She was in bed practically the whole time because I didn't allow her to get up. She used to have fainting spells and get dizzy, so I made a diagnosis of a concussion in the beginning and then I changed it to a shock condition.

By Mr. Palmer.

Q For about what period of time altogether since the happening of the accident has she been a patient of yours? A She was last in my office sometime in December. She used to come—

Q What I am trying to arrive at is how many times have you seen her since the accident occurred? Can you tell us how many visits you have made to her house and how many visits she has made to your office? A I just recently looked up my records; I couldn't tell you exactly by memory. I think it was about sixteen or seventeen house visits and eight or nine office visits.

Q Doctor, bearing in mind the services you rendered to her and the number of house visits

and the number of office visits what would be the reasonable charge for the services and the number of visits that were made? A I usually charge $3 for outside calls and $2 in the office, so my bill amounted to $72. I was paid for four times only, $12.

Q The bill amounted to $72, did it? A Yes.

Q You say she last was at your office in December of 1927? A Yes, not long ago; maybe four or five weeks ago.

Q Did you then make an examination of her? A Yes.

Q You knew then that the case was about to be reached before long? A I don't think I knew it before Christmas.

Q What was her condition on the last date you saw her and made an examination of her? What is wrong with her now? A The outstanding symptoms is palpitation of the heart and she cannot bend. As soon as she bends she gets dizzy. In addition to that I found certain signs of nervous irritation. She has dermatographism, that is, you can write on the skin, and she has palpitation of the heart. She has Romberg trouble, that is, she cannot stand straight; and she has definite signs of nervous instability.

Q Assuming before the happening of this accident, which was January 5, 1926, she was a woman who so far as she knew, enjoyed good health and at that time was struck on the head by a piece of plaster which she thought was a yard and a half long and a yard wide and was somewhat dazed at the time, and was found by you to be in the condition you have testified to that you found her on the first night, and whose condition has been as you have found it to be, I ask you what in your estimation is the cause of

that sudden change which took place in that woman on January 5, 1926? A The fright, the scare, maybe, is responsible as much as the pain she had—the sudden shock which she had from the unexpected blow on the head could cause this thing.

Q Would that kind of shock which you say she sustained have anything to do with the rapidity of the beating of the heart? A Absolutely.

Q And would it have anything to do with the condition of her skin on which you say you can write? A Yes.

Q What effect, if any, would the fright and shock have, if, after the accident, she lost about half of her hair and says it comes out? A Shock causes a certain depressive action in some people on the skin nourishment—on the roots of the hair—it isn't a definite—I couldn't give you any definite answer, but it is possible according to the observations that she could lose the strength of her hair especially in the place where she had a blow on the head.

Q Assuming the fact that it happened about two years ago and that she was as you found her in the course of your examination in December, only about five or six weeks ago, that was twenty-three months after the happening of the accident—assuming you found this condition twenty-three months after the accident happened, what effect has that to your mind as to whether these conditions are apt to be permanent or just temporary? A I am inclined to think that it might be permanent because she is not a young child that changes; she is already a person of such age that she is not liable to change, but liable to wear out more. It has lowered her vitality.

Q Has the age of a person who receives an injury anything to do with the ability to throw off the effects? A I don't understand.

Q Who recovers best from injuries, young people or people around the age of forty-five or so? A Young people who have more resistance.

Cross examination by Mr. Gilhooly.

Q Doctor, was Mrs. Dulberger in bed when you came there? A Yes.

Q And you say you got there around eight or nine? A Between eight and nine.

Q They told you what time this had happened? A I think they told me—I am not sure about it—I think they told me it happened the same day or the evening.

Q They told you it happened a short time before you got there? A Yes, they tried to get me and I told them I had office hours. They called some time between six and eight and I have office hours—between six and eight, I couldn't tell exactly just when it was.

Q Was Mrs. Dulberger in bed when you called? A Yes.

Q Did she have a towel around her head when you got there? A I don't recall it. I have seen so many patients in two years.

Q You called there for a period of approximately five or six weeks, did you not? A Yes.

Q Was she in bed every time you called? A She carried out my orders to stay in bed four weeks and then she sat up a little.

Q And if she got out of bed she disobeyed your orders, didn't she? A Yes.

Q Would that have any effect upon her if she had disobeyed your orders? A It would make her uncomfortable; she would get dizzy.

Q She would be uncomfortable if she disoboyed your orders, wouldn't she? A It is possible.

Q For a person suffering from shock, complete rest is the big cure, isn't it? A Yes.

Q And if she were to get up the day following, that would retard her progress, wouldn't it? A I don't think she could do it.

Q If she did, do you think it would have an effect on her health? Answer yes or no. A If it is a physical possibility, I don't think it would do her much harm, but I don't think she could do it. If she would have a fracture or have hemorrhage of the head it would do her harm. If she had organic trouble, physical rest is absolutely necessary. A fractured foot must be kept in a cast; hemorrhage in the brain cannot be cured until the patient is kept in bed. We have a case now in the hospital in which the patient is a month in bed although the patient is absolutely cured, he has a clot on the brain. These organic conditions are that way, but the shaking up might be benefited by increasing the circulation, but my orders were for her to stay in bed. I wasn't sure if she hadn't got any organic condition besides.

Q In these nervous ailments you are required to rely a great deal upon what you know as subjective symptoms, isn't that true? A We account for them.

Q Would you say that the fact that Mrs. Dulberger bore eleven children, six of whom died, would have any effect upon her nervous conditions? A There were a lot of other factors.

Q Please answer my question yes or no. A I can't answer that question.

Q Did Mrs. Dulberger tell you that she bore eleven children? A No, sir.

Q Would that have aided you in treating her had you known that fact? A That might have helped me a little.

Q It would have helped you a whole lot? A I wouldn't say a whole lot; it depends on heredity, too.

Q So when you treated her you didn't know she had borne eleven children? A I had no opportunity to ask her.

Q Did you know how old Mrs. Dulberger was? A She is in the forties.

Q She is forty-five or over, isn't she? A I have it in my records.

Q Just what treatments did you give over this period of two years? A While she was in bed I gave her the usual medication treatment.

Q What was that? A I gave her iodine preparations, bromides, alcohol sponges, physics to regulate her bowels, then she had a little baking with a home baker, then in the office I gave her a little fulguration—

Q What is that? A That is a certain electric treatment—certain shocks on the spine.

Q Did you notice any improvement in her condition from the time in which you treated her— A She gets these spells in waves like—it improves and comes back when she feels bad and she comes back to the office. She gets better once in awhile.

Q And then she will get melancholy again? A She comes to my office when she feels bad. Maybe it has a physchological effect when she comes.

Q If you had treated her regularly and remained continuously under your care instead of

coming around when she felt ill, do you think you could have improved her condition more? A I think I could have improved her after a long time if she had been under medical attention for a long time—she might improve entirely.

Q If you had known that the patient that you were treating had headaches prior to this accident, would that then have taken into consideration by you in forming your diagnosis? A I usually take a short history. She was totally examined by me, anyway, so the subjective complaints noticed under certain kinds of examination, ears, eyes, and so forth—but she didn't complain of headaches before so I really didn't—

Q You didn't take that into consideration in forming your diagnosis? A I had a patient that could not answer questions so I made an objective examination.

Q The age had a great deal to do with the treatment you gave? A In what respect?

Q She had probably had a period of life when she would expect to have a change of life? A She wasn't forty-five at that time.

Q You didn't know what her age was? A I asked her about menstruation and I think the periods were regular, and they are still regular now. There isn't any change of life now even.

Q You don't know whether or not she was menstruating? A I made sure her menstruations are regular and I discarded it.

Q You merely asked her if that was the fact? A I can't do it otherwise.

Q You asked her and she told you? A Yes.

Q This condition happens around forty-five years of age, doesn't it? A Sometimes earlier and sometimes later.

Q If a person were suffering from that condition she would be apt to be highly neurotic? A

Yes, but they have a complex of symptoms which she hasn't got.

Q If a person takes coffee and places it in food preparations, instead of salt, what, if anything, would that indicate, doctor?

Mr. Palmer: I object unless there be incorporated in that question the fact that this person had received a blow on the head and been found in the condition that the doctor found her in.

The Court: Objection sustained.

Q If a person had been struck on the head by the falling of a piece of plaster, followed by illness in bed, and a nervous condition lasting over a period of approximately two years, and then you found that that patient was using coffee instead of salt, on the assumption that it was salt, or in an effort to use salt, to what would you attribute that? A It is a strong stimulant—

The Court: No, the question is, she makes a mistake by putting coffee into food thinking she is putting salt into it.

Q What, if anything, would you attribute that to? A I wouldn't explain it by absent-mindedness; it is a certain lack of orientation.

Q Did Mrs. Dulberger tell you that she put coffee in food instead of salt when you were treating her? A She told me she forgets many things. She didn't tell me especially this part.

Q But she didn't tell you she makes open mistakes by using wrong foodstuffs? A No.

Q That would have helped you in treating her, wouldn't it? A I would try to find out more details about it when it happened and how.

Q If a person did that, would you feel that their mentality was affected? A Certainly.

Q You would feel it was very much affected? A Certainly.

Q Do you think a person who can remember dates back over a period of four years and who can remember incidents such as a ceiling falling down in 1924, would be apt to be making mistakes, such as placing coffee in food in place of salt?

Mr. Palmer: Again, unless the question embodies the injuries—

The Court: I don't think it is the basis of a hypothetical question.

Q Did Mrs. Dulberger tell you that instead of turning on the water she turns on the lights? Did she tell you that in your treatment? A She mentioned something like that.

Q With the knowledge you have of all the facts in the case, to what do you attribute that? A That she is always in a certain state of fear which makes her forget many things and hasten to do things.

Q In your opinion, if a woman who had complained of a blow upon the head and complained of being in a highly neurotic condition for two years thereafter, and who, when she cooks makes mistakes such as putting sugar into the food instead of salt, turns on the lights instead of the water faucets, do you think a person in that state of mind would remember details that happened in 1924, 1925, and 1926, with particular accuracy?

Mr. Palmer: I object to it because I do not think the evidence shows she remembers them with particular accuracy.

The Court: I think I will sustain the objection.

By Mr. Gilhooly.

Q Do you think such a person would remember something with accuracy if it happened on January 5, 1926?

Mr. Palmer: I think the doctor should be told what happened on that day.

The Court: That, of course, will be included.

The Witness: I personally think she remembers this date because she has quite a few impressions from that date which left a certain deeper memory; that was just accidental that she remembers that.

Q You think that it is accidental that she remembers that? A Yes, because—

Q If a person has a faculty of remembering a date of an accident that happened two years ago, would you say her mental state has decreased? A I don't think to remember one thing is a proof that she remembers everything. I wouldn't say her mentality is not impaired.

Q You mean you cannot diagnose it on one fact? A Yes.

Q You came in when I was cross examining Mrs. Dulberger? A Yes.

Q You heard me put question after question to her? A Practically.

Q You could hear, of course; you were sitting in the front seat? A Yes.

Q You heard Mr. Palmer examine her in part, did you not? A Yes.

Q In your opinion, from the observations you made of this woman while on the stand, would you say that she had pretty good control of her nerves? Say yes or no. A Yes.

Q You thought she had pretty good control of her nerves, didn't you? A Yes.

Q And if she were given to hysteria at times when she had no control, she would probably have done it on the stand, wouldn't she? A I think she would.

Re-direct examination by Mr. Palmer.

Q Is it not a fact that with these nervous cases there are times when they have every justification to give way to tears and don't do so, and that there are a great many times when there is no occasion to give way to tears and they do it? A Yes; there are certain periods when they are more susceptible and certain periods when they are more clear.

Re-cross examination by Mr. Gilhooly.

Q Can you imagine a scene more trying for a neurotic than being on the witness stand? A That is a question for an expert.

Q Aren't you an expert? A I am a general practioner.

Adjourned until Thursday, January 12, 1928, at 10 o'clock A. M.

FOURTH DAY.

Thursday, January 12, 1928.

Continued pursuant to adjournment.

Present, counsel as before stated.

SPRINTZE DULBERGER resumes the stand.

Cross examination by Mr. Gilhooly (continued).

Q Mrs. Dulberger, I believe yesterday you said that you weighed, as I recalled it, 225 pounds before the accident? A Yes, sir.

Q And you further said that you weighed yourself every week? A Yes, sir.

Q Will you please tell us why you weighed yourself every week? A I always had a habit of weighing myself.

Q It was not because you were ill, was it? A No, sir.

Q Did you continue to weigh yourself every week since the accident? A Yes, sir.

Q You were treated by Dr. Bengelsdorf, were you not? A Yes.

Q And any other doctor? A Dr. Levin.

Q Did Dr. Levin treat you at the same time Dr. Bengelsdorf treated you? A Yes, sir.

Q Were you dissatisfied with the treatment you were getting from Dr. Bengelsdorf? A I wasn't getting any better.

Q Why did you have two doctors treating you? A They were taking care of my husband.

Q Both doctors? A Yes.

Q Is that why you were having both doctors? A Yes.

Q Did you think they were helping you? A Not much.

Q Did you ever consult any doctor other than those two doctors? A No, sir.

Q Didn't you think that would be wise inasmuch as they were not improving your condition? Did that ever occur to you? A No.

Q You were satisfied to continue with these two doctors despite the fact that you were not improving? A Yes, sir.

Q Did you talk this case over with anybody? A Nobody.

Q Did you ever talk it over with your lawyer? A Yes, sir.

Q And you gave the lawyer the facts upon which he drew his complaint, didn't you? A Yes, sir.

Q You thought the ceiling was perfectly safe, did you? A Yes, sir.

Q What did you mean by this: "In November, 1925"—

Mr. Palmer: Unless that is something which Mrs. Dulberger herself has said, I don't think she should be asked what she means by it.

Q Did you tell your lawyer this: "In November, 1925, plaintiffs again called the attention of the defendant to the dangerous condition of the kitchen ceiling"? Did you tell that to your lawyers? A Yes, sir.

Q What did you mean by "the dangerous condition of the ceiling?" A We didn't say dangerous.

Q You just told me you gave that information to your lawyers. A We told him it was leaking.

Q Didn't you say: "Plaintiffs again called the attention of the defendant to the dangerous condition of the kitchen ceiling"? Didn't you tell that to your lawyer? A I don't remember. We told him that the kitchen ceiling was leaking.

Q Then if he puts that in his complaint, he put it in of his own volition and not on any information given by you?

Mr. Palmer: I object to that.

The Court: I will allow it.

Q You never said anything of that kind, did you? A No, sir; I don't remember that.

Q Did you ever say this to your lawyers: "Plaintiff again called the attention of the defendant to the dangerous condition of the said kitchen ceiling and threatened to vacate premises unless the defendant put the premises in a reasonably safe condition"? A My husband told that to the lawyer.

Q And you were satisfied with the truth of it if your husband said it? A Yes.

Q You were there at the time? A Yes.

Q Of course, you wouldn't let your husband tell anything that was not true.

Mr. Palmer: I object to that.

Objection sustained.

Q It was true, then, what you said, wasn't it?

Mr. Palmer: I object. She said her husband said it.

Objection sustained.

Q Did you ever say it?

Mr. Palmer: I object to whatever she told her lawyer.

The Court: I will allow it.

Q Do you understand the question? A No, sir.

Q Did you ever say to your lawyers that you told Mr. Radli that you would move unless he put the premises in a reasonably safe condition? A No, sir.

Q You never said that? A No, sir.

Q You further say in your complaint—

Mr. Palmer: I object.

Objection sustained.

Q Did you ever tell your lawyer that you were rendered unconscious after the ceiling fell on you? A Yes.

Q How long were you unconscious?

Mr. Palmer: I object because it is impossible for anyone to know how long they were unconscious.

The Court: I will allow it.

Q About how long a time were you unconscious, Mrs. Dulberger?

(The witness has a crying spell and is withdrawn from the stand.)

ABRAHAM DULBERGER, one of the plaintiffs, sworn in behalf of the plaintiffs.

Direct examination by Mr. Palmer.

Q Mr. Dulberger, you are the husband of Mrs. Dulberger, are you not? A Yes, sir.

Q You have been married to her how long? A Twenty-nine years.

Q When was it that you and your family moved into this house on Waverly avenue? A The 27th of April, 1922.

Q And at that time who owned it? A Mr. Gelber.

Q It is in evidence that you and Mr. Gelber entered into a three-year lease—

The Court: I don't think it is disputed about the establishment of the relationship.

Q That lease was for three years? A Three years with privilege.

Q Did you renew it? A Yes, three months before; that has been our arrangement.

Q Then later on Mr. Radli became your landlord, didn't he? A Yes, sir.

Q Will you tell us what you know about the ceiling in the kitchen, and in the front room, as they were, we will say, in the year 1924? What were they like? A It always started to leak from the pipes and put in a patch and always have trouble. It has been trouble from the water used to leaking from the ceiling.

Q Which ceiling? A About 1924 in November it has been too much water, about fifteen or twenty pails full of water to carry and I called Mr. Radli. I said I think it is too much trouble carrying that water—

Q Which room was the water leaking in? A In the front room that we used for a bedroom and the kitchen; that is two rooms altogether. It used to leak water in the front room and in the kitchen.

Q What did you say to Radli? A We said everything got wet and we carry water all day, why not put in a patch and save trouble?

Q Patch what? A The pipes, and it used to stop the water a couple of days and both rooms the ceiling was cracked a little and parts like cement, and sometimes it came down and we couldn't keep the food in the kitchen; little pieces dropped in.

Q When was it you had that talk with Mr. Radli? A In 1924, in November, I called him in to try to stop that water leaking.

Q What did he say? A He say he is going to fix it and it be all right.

Q What happened in December after that? A I been in the store with my wife; we hear a knock, and when we come in the front room a half ceiling dropped down in the front room and if anybody been in that room—

Q About what time in December, 1924, did that happen? A The end of December, before the New Year.

Q What happened in the kitchen? A A few days later, between the wash tubs, and the boiler, just over the door, fall a big piece about a yard and three-quarter yard width; I am not so sure, a yard or a couple of inches less, fell down in the kitchen.

Q When was that? A From the end of December when it falls down in the ceiling in the front room; a few days later it happened.

Q What year was that? A 1925.

Q What month? A January.

Q What, if anything, did you say to Mr. Radli about the ceiling falling in the front room and about a piece of the ceiling falling in the kitchen? A I called him in and I showed him, and he say he is going to fix a day or two later, and he came with two colored people and fixed it.

Q What did he say to the colored people? A He told them to take off the whole ceiling. I never interfered with him; it is none of my business. I showed them to fix it.

Q Which ceiling? A In both rooms; in the front room he showed them the ceiling to take some more down and he say to them in the kitchen—

Q What did the colored men do? A We couldn't stay in that room after they fixed it.

Q What did the colored men do when Mr. Radli told them to fix it? A They took off the whole ceiling and make a new whole ceiling in the front room, and in the kitchen only patched fixed.

Q Before the colored men got there to do any work, and before the patch fell out of the kitchen in 1925, what did the kitchen ceiling look like? A All cracked because the water used to come through the cracks in different parts.

Q How big were these cracks in the kitchen? A All the rooms, all like taking with a pencil and making lines.

Q Did the colored men when they did the work in the kitchen fix all the cracks, or what did they do? A After they fixed, we couldn't stay there. It was in winter. We found when we came in that the front room is all new, and still all the cracks in the kitchen, only the patch fixed.

Q What did you do about that? A I called the landlord in and asked him why he didn't fix the whole thing. I said, "The water will come through again. I think we had enough water. We could get sick from that water."

Q How many times was it after the colored men did this work in the kitchen that you sent for Mr. Radli? A Maybe the next day, because he had a partner with his cousin.

Q You think within a day or two you sent for Mr. Radli? A Yes, sir.

Q What did you say to him about the kitchen ceiling? A I say why didn't he tore off the whole ceiling like in the other room—the whole ceiling is cracked. He took a chair and a broom and with the broomstick he tapped the ceiling and he said it is safe and the water will not come out; and it is all right.

Q That talk you had with him a day or two after the ceiling had fallen in January, 1925? A Yes, sir.

Q After that did the ceiling stay dry or how was it? A It has been dry only ten or eleven months until the end of December, 1925; it has not been much trouble. I don't remember much trouble.

Q Then what happened? A In December it started leaking again in different parts.

Q Did Mr. Radli know that? A Yes, I called him in and he said he would stop it, and he tried it again with the broom handle to see if it is strong. He said it is all right, it is only from the pipes and it is nothing. The water will stop.

Q What is the next thing that happened? A In 1926, the 5th of January, between six and seven, I been in the kitchen sitting near the stove and my wife is just making ready for supper; it

was a small kitchen and she used the washtubs, like for a table, and unexpected, the whole ceiling over the washtub dropped on her head, and I seen she is falling down and I with my boy rushed over. We seen she is unconscious and we make her all wet with water, and it was about ten minutes she didn't know nothing.

Q How big a piece came out of the ceiling on January 5, 1926? A About a yard and a half and a yard wide. It has been so thick pieces, all covered (indicating)—

Mr. Gilhooly: He has answered the question.

Q What was this plaster like that fell down on your wife? A Very thick—very heavy ceiling—they don't make it so thick ceiling. This is very heavy. It has been mended so many times it was very thick.

Q What part of the ceiling fell? You have told us it was over the washtubs, but did the part that fell include the patch they had put in a year before, or didn't it?

Objected to as leading.

Objection overruled.

Q Did the part that fell on January 5, 1926, and hit your wife, take in the patch that the colored men had put in before that, or didn't it? A It left a little space about eight or nine inches from the patch.

By the Court.

Q That is, it came within eight or nine inches of the patch? A It left a little piece in between from the patch.

By Mr. Palmer.

Q That part that fell, what had it been like in the ceiling before it fell? A Long cracks.

Q You kept a little drygoods store— A Like a general store.

Q Who used to run that store before your wife was hurt? A Always my wife because I always been sick—

Q What kind of work was it that your wife used to do in the store with regard to helping you? A Mostly selling.

Q What kind of work did you do? A Fixing and buying—ordering the goods—

Q How often would she be in the store before she was hurt? A All day when it was business time.

Q What happened to your wife after this accident? You say that you threw water on her. Then what did you do? A Got her up on the chair and after she became better she started crying and vomiting and she wanted I should take her to the bed. I said "Sit a little," and I got her ten or fifteen minutes in the chair longer and I took her to bed when she said she couldn't stand it any more, and I took her to bed and sent for the doctor.

Q How long was your wife laid up? A Between five and six weeks.

Q Before this accident happened, how had your wife been? How did she seem to be to you? A She has always been strong because she is coming—

The Court: You have answered the question.

Q How did she used to be with regard to being happy or cheerful? A She always been happy. We never had anything the trouble between us in the last twenty-nine years. She has always been good natured and smiling and everything.

Q Since the happening of this accident, since this plaster fell on her, what difference do you notice in your wife compared to the way she used to be before she was hurt? A She is always like miserable.

Q How do you mean? A She is frightened of everything, no smile like anybody got too much trouble in his head, and is always worrying.

Q What else have you noticed about her? A For a little something excitement she starts screaming and crying and hollering and she shakes like that (indicating).

Q Was she ever like that before? A No, sir.

Q How does she sleep compared with the way she used to sleep before she was hurt? A She sleeps fifteen or twenty minutes and sometimes wakes up with a scare and then sleeps another half hour—five or ten hours like anybody she can never sleep.

Q Does she help you around the store as much as she used to? A No, she cannot do anything. She don't remember what change to give. We let her serve a couple of pennies—children is no secret. They say, "Your wife give from a quarter a nickel change," and they say "this woman is crazy; she don't know what she is doing."

Q I understand that what you are trying to say is that she doesn't give the right change; is that it? A She forgets.

Q In what other ways does your wife seem different? A To do the housework in the kitchen she is not safe to cook anything because she mix up the things. One time she took coffee for salt and she turn out the gas and turn on the water—she blows out the gas instead of turning it off. After she remembers she catches—she forgets, and in a couple of seconds she remembers.

Q Tell us just yes or no. Go on and tell us again about these mistakes. A In the middle of the day she turns on the lights.

Q Why does she do that in the middle of the day? A She forgets; she thinks it is night.

Q Was your wife anything like that before this accident? A No; she has always been strong.

Q What else have you noticed about Mrs. Dulberger aside from these things you have just told us? A (No answer.)

Q Are you afraid of anything about them? A No, I am not afraid—she is frightened, that is what I mean. She was always frightened, everything.

Q What did she talk about a whole lot since she was hurt? A When she is all right she speaks nice, and when the spells come she says, "I am going to kill myself."

Q How often does she threaten to kill herself? A A couple of times a day. When she gets moody she says that.

Q What do you mean when she gets moody? A When her nerves get dizzy she screams and hollers, even when people are in the store, and they ask, "What is the matter with your wife? Is she sick?" It gives her a bad name.

Q How often does she threaten to kill herself? A Two or three times a day, maybe more, maybe less.

Q Before the accident happened did she ever speak about such things as killing herself? A No, sir.

Q How have you managed to get on running the store since your wife has been sick? Do you run it alone? A No, with the children—I got a married daughter. Since been the accident I call her in and she helps me in the store and the house.

Q That daughter, I suppose, is your daughter, Mrs. Kohn? A Mrs. Kohn.

Q How long did Mrs. Kohn come to stay at your house and do work in the store like your wife used to do? A Since the accident right through. Every day she comes and she takes her husband's dinner and cooks it in our place and takes it home, and sometimes—I took the other boy from the post office; he is working general delivery, and we asked the post manager—

Q Mrs. Kohn, as I understand it, has been at your house and store daily since the accident? A Daily, yes.

Q Mrs. Kohn is married? A Yes, sir.

Q And has a home of her own? A Yes, sir.

Q Did you pay her anything for taking care of the store and your wife? A Yes, she gets $10 a week.

Q What does she do aside from taking care of the store? A She helps with the house cooking and in the store.

Q Who does the housework in your house now? A My daughter do it every day.

Q What have you noticed about your wife's weight since the accident? Is she fatter or thinner, or is she about the same weight? A She lost over forty pounds.

Q What is her weight now? A There (handing paper to counsel), here is from Kresge's I took it—178 pounds—she is 178 pounds (indicating).

Cross examination by Mr. Gilhooly.

Q I believe in stating the things that you stated about your wife you neglected to state one thing. Does she turn on the electric light instead of the water faucet? Do you remember that? A I can't answer what counsel don't ask. I don't think he asked me what has been about the electric light—

Q Does she do that with the electric light? A Sure, she do that and make mistakes.

Q Is your daughter going to charge you $10 if you do not obtain a recovery in this case? A No; we paid her.

Q You paid her $10 a week? A Sure.

Q You don't owe her anything? You paid her in full? A Sure; she can go to the factory and earn twice as much.

Q Did you pay your doctor in full? A No.

Q You still owe him about $60? A Yes.

Q But you paid your daughter in full, didn't you? A Sure.

Q How many children have you got living home? A Four and one married daughter is five.

Q How many of the four are boys and how many girls? A Three boys and one girl.

Q How old is the girl? A Fourteen.

Q Does she help with the housework? A Yes.

Q You say Mrs. Dulberger waited on the store while you were sick? A Yes, sir.

Q You did all the buying? A Yes.

Q How much of your time was spent in buying and how much time did you spend selling? A You don't buy every day.

Q You were in the store every day? A Yes, I was in the store, and sometimes once a week and sometimes once in two weeks I used to buy the goods.

Q You would only have to go out for a short time to buy. A Buying took a couple of hours.

Q About how big was the store? A Like two rooms.

Q It wasn't any more than twenty-five feet wide, was it? A I don't know; it been one wide window, the width, and about this size (indicating).

Q It wasn't over twenty-five feet wide, was it? A I think so.

Q It was a small store, wasn't it? A Not a small store; I think it would make three rooms.

Q Were you in the store every day? A Yes.

Q Your illness would not prevent you— A If I go off the step I vomit; if I look only by the ceiling I start vomiting. I can prove it to you by the City Hospital—

Q I didn't ask you about that. Who would do the housework when your wife was in the store? A If she go in ten or fifteen minutes—that is not Broad street—

Q Who did the housework when she waited on the store? A When she is in the store she is not in the kitchen; we don't cook all day.

Q Was your daughter in the house? A When she was married, no.

Q Did your wife do the housework? A It is not Broad street; it is not a busy store—

Q That was not a busy store, was it? A It is not a Broad street store; you have all the time to do the cooking—

Q You don't have to work all day, do you? A No, we just make a living.

Q When the lease expired and you took advantage of the renewal, you had been paying $70 and after that paid $75? A Mr. Radli let a store next door for the same trade and I said to Mr. Radli, we don't make a fortune; we make a living.

Q You asked Mr. Radli to reduce your rent to $70? A Yes.

Q You told him you couldn't pay $75 because you were not making enough to pay the $75? A He let the store next door for the same trade and that is why he allow us $5.

Q Your memory is all right, isn't it? A A little.

Q I understand that in November, 1924, the ceiling in the kitchen was cracked? A Yes, sir.

Q You could put your finger through the cracks, could you? A About a quarter inch.

Q And they ran all along the room? A Like lines in both rooms.

Q Then Mr. Radli had that fixed and taken care of, is that true? A In the front room a new ceiling, and in the kitchen a patch over the door.

Q You didn't think that was the right thing to do. You didn't think he had repaired that properly? A He had to do it because his water from the pipe—

Q You saw water coming through? A Yes.

Q The ceiling was up? A Yes.

Q It had not fallen when the water came through? A No.

Q You saw a lot of water come through, didn't you? A Yes.

Q When Mr. Radli fixed it in November, did you think he did a good job? A Not in November he fixed it; in January, 1925, he fixed it.

Q And you told him you didn't think it was the proper way to fix the ceiling? A Yes.

Q You wanted a whole new ceiling? A Yes, because it was cracked.

Q Was the ceiling in good condition in 1922? A A new house; it was painted and nice.

Q There is no question about its being good when you took the house? A Yes.

Q I understand pieces of plaster fell down in your food? A Yes.

Q Did you ever do any repairing yourself? A No, never.

Q You say it was good for about ten months after it was repaired, that is, when the patch was put on? A Yes, ten months between.

Q Why do you say ten months and not eleven months? A Because January, that month it been a couple of days when he fixed it; in December I complained.

Q In January, 1925, was that the first time you noticed water coming through? A A couple of times it has been a little water, and in December it started again.

Q It was all right in November? A November, 1925?

Q Was it all right then? A Yes, it been only in December.

Q Did you tell your lawyers this: "In November, 1925, the plaintiffs again called the attention of the defendant to the danger condition of

the kitchen ceiling?'' A 1924, I complained in November.

Q Did you say: ''In November, 1925, the plaintiffs again called the attention of the defendant to the dangerous condition of said kitchen ceiling''? Did you tell them that? A That was December, not November.

Q Did that ceiling look to you as if it was liable to fall? A No, only the water is worrying me.

Q You sent for Mr. Radli to fix the ceiling? A No, to fix the water; if the water is fixed the ceiling will be fixed.

Q Did you say to your lawyer: ''In November, 1925, the plaintiffs again called the attention of the defendant to the dangerous condition of the kitchen ceiling?'' Did you tell your lawyer that? A No, we asked for the water.

Q Did you say that to your lawyers? A No.

Q Did you say to your lawyers that you, ''threatened to vacate the said premises unless the defendant (meaning Radli) put the premises in a reasonably safe condition?''

Mr. Palmer: I object to that.

The Court: I will allow it.

The Witness: No.

Q As a matter of fact, didn't that ceiling look to you as though it was going to fall down in December, 1925? A No, it was good and strong.

Q Did it look that way to you? A No, it didn't look as if it was going to fall off; I wouldn't say a second—life is more—

Q Did you put your wife to bed after the ceiling fell? Did your wife go to bed? A Sure we took her to bed.

Q Did she stay in bed continuously four or five or six weeks? A Five or six weeks, and then she said she couldn't stay in bed any more.

Q Did you take her into the kitchen after that? A Yes.

Q The day following January 5th, when part of the ceiling fell, was Mrs. Dulberger up out of bed? Was she out of bed the next day? A Five weeks she has not been out of bed at all.

Q She was in bed all the time? A Yes, all the time.

Q She didn't get out of bed? A No.

Q You are sure of that? A As soon as she got up she is dizzy.

Q There is no mistake in your mind at all about that? A No.

Q When you say she was in bed for a period of five weeks— A Even the sixth week.

Q Did your wife ever complain of headaches before? A No, she was always strong.

Q Did your wife ever complain before of being weak? A No.

Q You says she gets melancholy at times when she fights with you? A She don't fight with me.

Q Every once in so often she gets these spells? A Yes, from a little knock it scares her nervous.

Q When Mr. Radli failed to fix this ceiling in December, 1925, and the water kept coming through, why didn't you move? A Why I have to move?

Q Why didn't you move? A After I got a connection the fourth year I don't want to move; I have to carry rent and he have to fix it.

Q And you didn't want the expense of moving? A Not the expense; I didn't want to leave

the connection, and nothing been injured and the water he could repair it.

Q How old are you? A Fifty-five.

Q At the time that the part of the ceiling over the washtubs fell, who was present? A I been with my boy in the kitchen.

Q And your wife? A And my wife, that's all.

Q Was your little girl there? A No, she was in the store.

Q Do you remember sending for Mr. Frimmer when this happened? A Yes, we sent to call him in.

Q You sent right afterward for Mr. Frimmer? A Yes.

MEYER L. LEVIN, sworn in behalf of the plaintiffs.

Direct examination by Mr. Palmer.

Q Dr. Levin, you are a practicing physician of the State of New Jersey? A I am.

Q And you have been such for how long? A Since 1923.

Q Where is your office? A At present at 209 Avon avenue.

Q Before the 5th of January, 1926, had you known Mr. and Mrs. Dulberger? A I did.

Q Had you ever treated Mrs. Dulberger before that time? A No.

Q Whom had you treated in the family? A Mr. Dulberger and some of the children.

Q From any observation that you ever made of Mrs. Dulberger before the 5th of January, 1926, what can you tell us about the apparent

state of her health? A She was apparently in very good health.

Q When was it that you first called to treat her for an accident which happened on the night of the 5th of January, 1926? A January 6, 1926.

Q Where did you find her? A I found her in bed.

Q What did you observe about her at that time as a result of any examination you made? A I observed that she was suffering from a concussion of the brain as a result of an injury she had sustained the day previous.

Q What made you think there was a concussion of the brain? A The history of the injury and the symptoms that she had given.

Q What did her condition seem to be? Her mentality or her orientation on the day you saw her? A The day I saw her it was all right.

Q What did her condition appear to be with regard to having any strength? Just tell us her whole general condition. A When I saw her she was in bed and complained of a headache and she was very nervous; the pulse was rapid. There wasn't any temperature as I recall it.

Q And from that time on, for how long a period of time did she remain in bed? A She was told to remain in bed for a period of five or six weeks.

Q To the best of yuur knowledge based on the time that you went to see her, how long did she stay in bed? A February 16th, was the last time I was in the house and I still found her in bed.

Q What was there about her condition that made it desirable for her to remain in bed that length of time? A Symptoms she complained of,

and also the fact that she had concussion of the brain, so she had to rest in bed.

Q During the five or six weeks, or up to February 16th, what other symptoms did you notice, if any? A At that time not any.

Q Did you make any examination of the rapidity of the heart beats? A As she progressed she would have palpitation of the heart, probably the second or third week I was attending to her.

Q To what did you ascribe that? A To a nervous condition.

Q Was she in a nervous condition? A Not at first; she developed it later on.

Q About how long after the accident did you first begin to notice nervous manifestations? A I should judge two or three months.

Q After you discontinued calling at the house, which, as you say, was February 16, 1926, did you still continue to treat her? A Yes.

Q Where? A At the office; she used to come up to the office.

Q What had been her general complaint and what had you observed about her since the happening of this accident? A Since the happening of the accident there has been a decided mental change in Mrs. Dulberger. She has developed a neurosis which is a decided change in the nervous system following the accident that she had.

Q In what way does this nervousness manifest itself? A This nervousness has manifested itself in the—

Mr. Gilhooly: I would like to have the doctor testify as to what he saw.

The Witness: Just the objective symptoms?

Mr. Gilhooly: Just what he saw in her condition.

Mr. Palmer: I don't think he has to do that, he is the attending physician.

Mr. Gilhooly: I object to the question unless it is limited to the observations the doctor made.

Objection overruled.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

By Mr. Palmer.

Q In what way has it manifested itself? A In lack of coordination; in the fact that—it is more from her subjective symptoms than her objective symptoms.

Q I don't care how you arrive at it. You are her doctor.

The Court: Just distinguish between the subjective and the objective symptoms.

The Witness: She complained of headaches, dizziness, forgetfulness. Then, I would find occasionally her heart beating very rapidly, and sweating profusely at times. There is a vasomotor disturbance such as the writing on the skin which manifested itself at every examination. She showed an unsteadiness in standing up with her eyes closed. I think that was about all the findings that I had.

Q Do these manifestations, such as headaches, dizziness, and at times rapid heart action, and unsteadiness in standing with the eyes

closed, lack of memory and the breaking out in these profuse sweats—are they the natural and probable consequences of the brain concussion such as you found her suffering from originally? A They are.

Q What bearing, if any, has a person's age on their ability to shake off the effects of injuries such as these are, doctor? A I don't think the age has as much to do with it as the severity of the concussion. A young person with a severe concussion of the brain may find it as staple as with an older person, but with a good, strong blow on the head the age does not make any difference. It depends on the nature of the concussion.

Q When did you last examine Mrs. Dulberger? A About a week ago.

Q Do you find these manifestations still existing? A Absolutely.

Q When consideration is given to the fact that two years after the receipt of a blow you find these manifestations existing with a woman who, previous to the receipt of the injury, had been in good health, and about forty-five years of age, and you found them existing two years after the receipt of the blow, what indication has that, to you, as to their probable duration? Are they permanent or temporary? A In my estimation they are going to be permanent.

Q What does the fact that they persist to this extent for a period of two years indicate to you as to the severity of the concussion which she sustained in the first instance? A She probably had a pretty severe concussion.

Q Are people who suffer from headaches to the extent which she does, and dizziness, and this rapid heart beat at times, this unsteadiness on

standing with her eyes closed, and the failure of memory, and these profuse sweats at times, is it possible for them to be happy and cheerful under those handicaps?

Mr. Gilhooly: I object.

Q Is it probable that they would be? A No, most likely not.

Q What are the probabilities, if any, with regard to the future that this woman—that is, do you think these conditions will improve or stay about the same, or is it within the realm of probabilities that she will get worse as time goes on? A As time goes on I think she will get worse.

Q Can you tell us about the number of times that you have visited and treated her or that she has visited you for treatment? A Approximately twenty-five times.

Q What would be a fair and reasonable charge for the services such as you rendered based on the number of times that she has seen you? A About $75.

Q What, in your estimation, is the cause for the numerous threats which it has been testified she makes from time to time to take her life, doctor, since the happening of this accident? A The neurosis that she has.

Q What, in your estimation, is responsible for the sudden change which began to manifest itself in Mrs. Dulberger from the time she received this blow on the head? What do you feel is responsible for the sudden and pronounced change which has taken place in Mrs. Dulberger from the 5th of January, 1926? A The injury that she has sustained.

Cross examination by Mr. Gilhooly.

Q Doctor, when you visited Mrs. Dulberger on January 3rd last did you find she was still suffering from palpitation of the heart? A No.

Q Her pulse was 78? A Yes.

Q That was normal? A Yes.

Q And you were satisfied with that condition? A It was all right on that day.

Q I understand you to say you were admitted to practice medicine in 1923. A I said I practiced in New Jersey since 1923; I have been practicing since 1921. A man has to serve an interneship and I was interne two years in New York City and then came here to practice.

Q You were licensed to practice in 1923? A Yes.

Q Were you treating Mrs. Dulberger jointly with Dr. Bengelsdorf? A I wouldn't say jointly; we both were treating her.

Q And I understand you were called on the night of the accident? A I was there the day after.

Q Did you know Dr. Bengelsdorf was treating her? A I did.

Q Are you a specialist on nervous ailments? A No, sir; I am a general practitioner, but I have seen plenty of nervous ailments, however.

Q You have testified that in your opinion, with the knowledge of all symptoms observed by you and told to you by Mrs. Dulberger that they probably would be permanent? A Yes.

Q Did you ever have a case similar to hers in your experience? A You see cases come into your office of a neurosis and you can trace back to some nervous disturbance in life they had had previously.

Q Did you ever have a case that was similar to her that was permanent? A Not in my own experience.

Q Then you are relying on what has been told to you and what you have read in your medical books, isn't that true? A Yes.

Q Did you inquire as to the age of Mrs. Dulberger? A I did.

Q Do you know what it is? A At the present time forty-five.

Q It was forty-five in March, 1927, too, wasn't it? A I didn't ask her the date of her birth.

Q Did you inquire as to her age when you started to treat her? A Probably at the third or fourth visit I did.

Q What did she tell you her age was? A Forty-three.

Q Are you sure of that? A Positive.

Q You have to rely a great deal, in basing your diagnosis, on what the patient tells you in these nervous cases, don't you? A You do, yes.

Q There are some you can see, but there are a good many subjective symptoms? A A good many subjective symptoms.

Q If the party giving you this information does not give it accurately, you are likely to form an incorrect diagnosis, that is possible, isn't it? A Yes.

Q So you have to rely on the truth of the patient? A Yes.

Q And you, of course, relied on the information given to you by Mrs. Dulberger? A Naturally we take the patient's statement.

Q This nervousness which you find existing could come also from change of life, couldn't it? Answer yes or no. A What conditions? Be more explicit, please.

Mr. Palmer: I object.

Objection sustained.

Q The nervousness complained of by Mrs. Dulberger could come from a change of life, could it not?

Mr. Palmer: It could come from change of life, I suppose, with Mrs. Dulberger, but the evidence in this case is that she is not having change of life, and that is the only evidence in this case.

The Court: She did not testify to it.

Mr. Palmer: Her attending physician said she did not.

The Court: He said she told him she was menstruating regularly.

Mr. Gilhooly: Will you please read the question?

(The stenographer reads the pending question.)

The Witness: It could come from a change of life. Does that mean in Mrs. Dulberger?

The Court: I think you can ask him whether a condition such as Mrs. Dulberger is in could be attributed to change of life if she had it. I mean would that condition be a similar condition to that produced by change of life.

The Witness: Some of the symptoms could be produced by change of life, but Mrs. Dulberger has not had change of life yet.

By Mr. Gilhooly.

Q While you say she has not had change of life yet, don't the symptoms manifest themselves for a period of three or four or five years before change of life? A Not all these symptoms.

Q But some of the symptoms manifest themselves prior to the change of life? A I wouldn't say; all women have change of life. They may have nervousness and have change of life and have nervous manifestations, but a normal person may go through change of life without the manifestations at all.

Q You took the history of Mrs. Dulberger? A Yes.

Q Did she tell you she had eleven children? A Yes.

Q In your opinion would that fact have any effect on her nerves? A No, not at all.

Q That has no effect— A No, I have seen cases with twenty-three children in perfectly good health.

Q In your opinion a woman who has had eleven children, six of which died, would that have any effect on her condition with respect to melancholy? A It may.

Q And that might be Mrs. Dulberger's trouble in this case? A I wouldn't say so with the history of an injury and when she was perfectly happy-minded before.

Q You said she had a concussion of the brain? A I did.

Q What do you mean by that? A It is theoretically the shaking up of the brain as the result of an injury.

Q Dr. Bengelsdorf said yesterday that while she did not have a concussion of the brain he

feared she might have concussion. Do you disagree with him?

Mr. Palmer: I object to that as immaterial.

Objection sustained.

Q Do you remember meeting Dr. Trainor and Mrs. Dulberger at a conference at which you were present on March 21, 1927? A I recall that, but not the date.

Q Did you at that time in the presence of Mrs. Dulberger say to Dr. Trainor, "She was unconscious for a short time and had symptoms of brain concussions for two weeks." A No, I don't recall it, sir.

Re-direct examination by Mr. Palmer.

Q Whether you said that or whether you didn't, is it a fact that she was unconscious for a short time and for a period of several weeks had evidences of brain concussion? A Of course, she had evidence of concussion of the brain. I didn't see her.

Q What is the name of this condition that she had of the skin? A Dermographia.

Q What does that mean? A It means if you draw your finger nails across the skin there will be a red line showing in a few seconds. It shows that the vasamotor system under the control of the nervous system is deranged.

Q What is the connection between this dermographia and the blow on the head? A There is only an indirect connection.

Q Has she developed it as a result of her injury? A Yes.

Re-cross examination by Mr. Gilhooly.

Q Isn't it a fact that every blow, whether it be slight or heavy, produces a concussion? A Every blow produces a concussion.

Q So there is nothing about the word "concussion" except that it means that a blow has been received? A You can get an indirect concussion by landing on the buttocks.

Q Have you noticed any improvement in Mrs. Dulberger since you have been treating her? A No, I have not.

Q In your opinion is her case one that required the attention of a specialist on nervous ailments? A Everything requires a specialist now-a-days, I suppose, yes.

Q And you think in her case she should have a specialist? A I wouldn't say that.

Q You were bringing about no improvement in the patient, were you? A No.

Q Didn't you think it would be advisable to have someone who specialized in that line treat her? A I have seen them before and they didn't do a particle of good.

Q In other words, you have no confidence in the expert? A I have confidence in some experts, but it depends on who it is.

Q Do you think the reasonable value of your services is $75?

Mr. Palmer: I object to that as not re-cross examination.

(Objection sustained.)

AMELIA KOHN, sworn in behalf of the plaintiffs.

Direct examination by Mr. Palmer.

Q Mrs. Kohn, you are a daughter of Mrs. and Mr. Dulberger, are you not? A Yes, sir.

Q When were you married? A July 17, 1924.

Q And after your marriage did you go to live with your husband in your own home? A Yes, sir.

Q Where was that? A 199 Broome street.

Q After you were married would you from time to time go over to your mother and father's house and visit them? A Maybe once a week or once in two weeks.

Q After early January of 1925, at which time it is testified some colored men did some work on the ceiling of the kitchen of your parents' home did you go over and visit your family from time to time? A About once a week.

Q What did you notice about the condition of the kitchen ceiling after the colored men had put that patch in in January, 1925? What did the ceiling look like? A There was cracks from one end to the other and a white patch not exactly in the center of the kitchen, toward the door.

Q How soon do you think it was that you first got over to your mother's house after the men had put that patch in January? What was the soonest you got over there after that? A I can't remember exactly. It may have been a week or more.

Q But you say you went there every week or two? A Yes, sir.

Q For how long did those cracks stay up there in the ceiling after the colored men had repaired it in January? A I think they were there all the time after it was fixed.

Q When was it that you first got to your mother's house after the night she was hurt on January 5, 1926? A As soon as they sent for me I came right away.

Q When was it? A About 8 o'clock that night, January 5, 1926.

Q When you got there that night what did you notice about the ceiling? A There was on the floor and on the washtubs the ceiling all in pieces, all fell down, about a yard and a half or a yard and three-quarters long and a yard width.

Q Did you notice how thick the pieces were? A I can't say exactly, about that thick (indicating).

Cross examination by Mr. Gilhooly.

Q Are you the daughter who worked around the house after your mother was hurt?

Mr. Palmer: I object to the question because I have only asked Mrs. Kohn about the condition of the ceiling.

The Court: Objection sustained.

Q Prior to your marriage did you live at home? A I had my own home.

Q Before you got married did you live at home? A Oh, sure.

Q Did you observe your mother around the house?

Mr. Palmer: I object on the same grounds.

The Court: Objection sustained. You are confined to the condition of the ceiling with this witness.

Q You started to tell us how thick the piece of plaster was that had fallen and you indicated. Will you please indicate again? A The length and the width?

Q The thickness? A I can't say exactly; it may have been that wide (indicating); it may have been wider and it may have been narrower.

Q Was it as thick as your little finger? A It must have been thicker; I can't say exactly.

The Court: She is indicating about four or five inches.

Q Did the ceiling look to you when you observed it between January, 1925, and January, 1926, that because of the cracks it was liable to fall? A No—

Mr. Palmer: I object to that as immaterial.

The Court: I will allow the answer to stand.

Q Did you see any water dripping from the ceiling on your visits? A Plenty of water. I even helped take out the buckets.

Q During what month did you observe that condition? A I think from about November, 1924, to maybe until January, I think; I can't say exactly.

Q Was it continuous during all that time from 1924 on? A Yes.

Q All during the months of January, February, March, April, May, June, and July—

Mr. Palmer: I object. She said from November to January.

Objection sustained.

Q When you speak of November to January what years have you reference to? A November, 1924, December, and the beginning of January, 1925.

Q Beginning with January, 1925, what was the condition of the ceiling with respect to water? A It was cracked from one end to the other in all places.

Q Was there water dripping from the ceiling in January, 1925, in January, 1926? A 1924, 1925.

Q How about January, 1925, to January, 1926? A Not so much water. The ceiling was just damp—the cracks—just a small dripping would come out.

Q When did you first observe between January, 1925, and January, 1926, that small drops were falling from the ceiling? A Every day I came over there.

Q And you were going once a week or once in two weeks? A Yes, sir.

Q So it is your opinion that from January, 1925, to January, 1926, there was water dripping from the ceiling most every time? A Yes, and from the pipes, too; there was pipes near the ceiling, too.

Q But in your mother's apartment? A Certainly.

Q The pipes ran along the wall, did they? A Yes, sir.

Q Were they leaking, too? A Yes, sir.

PLAINTIFFS REST.

Defendant's counsel moves that plaintiffs be non-suited on the following grounds:

1. That the facts disclosed that there was no duty on the landlord to repair;

2. The proofs do not disclose that the landlord maintained a nuisance;

3. That there is no proof that the ceiling was in the control of the landlord;

4. That even if the proofs do disclose that the landlord maintained a nuisance, a right of recovery would vest in the tenant alone and not in any member of the tenant's family;

5. That the plaintiffs were guilty of contributory negligence;

6. That there is a clause in the lease which is admitted in evidence, which reads as follows: "The party of the first part shall not be held liable for any latent defects or change of conditions in the premises or for any damage to the same or to goods and other things contained therein by any overflow or leakage upon or into the premises from water or any other source, and the rent shall not be withheld or diminished on account of such defect, change or damage."

The Court: (After argument.) It seems to me there is an issue of fact on at least two questions. One is the question of having actually made the repairs, whether he was responsible for the negligent repair. Now, with regard to the leaks, I think there is enough evidence in the case to raise an issue of fact as to whether that came from service pipes or some other place. There is a lot of loose assumption on the part of some of

the witnesses, but still I think there is a question of fact raised as to whether they were service pipes, but if they were service pipes and if the leaks in the service pipes were the cause of the falling of this ceiling and the defendant was negligent in repairing it, I think it is a question for the jury. I will deny the motion.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

IGNATZ RADLI, defendant, sworn in his own behalf.

Direct examination by Mr. Gilhooly.

Q Mr. Radli, you are the defendant in this case, are you not? A Yes, sir.

Q Are you the owner of this property? A Yes, sir.

Q You acquired title in 1922, did you not? A Yes, sir.

Q When you acquired title to this property, did you go around and look it over? A Yes, sir.

Q Did you make an inspection of the stairways?

Mr. Palmer: I object to it as immaterial.

Q When you acquired title did you meet the Dulbergers?

Objected to as immaterial.

Objection overruled.

The Witness: Oh, yes.

Q Did you meet them? A I did meet them, yes.

Q Did you go into the Dulberger apartment in 1922? A I went just in the store; I don't went back in the rooms, except all through.

Q Did you have a talk with Mr. and Mrs. Dulberger or either of them? A Yes.

Q Did you collect the rent for the premises? A From Mr. Dulberger?

Q Yes. A I did collect maybe for five months and after that Mr. Frimmer collected. I give that privilege to him.

Q Where was Mr. Frimmer located? A On the same street, and maybe a year after he moved—in the same year he moved in the same building.

Q Is Mr. Frimmer a cousin of yours? A No, he is not a cousin.

Q When you went in to see Mr. Dulberger, when you acquired title to the property, did he make any complaint to you as to the premises being defective then? A Not a word.

Q How often did you go on the premises after you acquired title? How frequently did you go there? A Well, I went there every week a couple of times.

Q What is your business? A Butcher business.

Q Where were you located? A I was located on West Kinney street.

Q How far is that from the premises in question? A About four blocks away.

Q Did you live on Kinney street for awhile? A Yes, sir, I did.

Q You say you went there every week? A Every week a couple of times; sometimes three or four times.

Q Did you receive a complaint from Mr. Dulberger in December, 1924, about his premises? A No, I don't receive no complaints at all.

Q In December, 1924, did he tell you that the ceiling had fallen in the bedroom?

Mr. Palmer: I object to that as leading.

The Witness: 1924?

The Court: I will allow it.

The Witness: When the ceiling fell down he came to tell me about it.

Q Did you go on the premises then? A Yes.

Q What did you see in December, 1924? A Mr. Dulberger—

Q What did you see? A I see a piece of glass during the bedroom fell down near to the door; it is near to the kitchen.

Q What room? A In the bedroom; they was using it for a bedroom. It was a bed in it and as long as it is a bed in it it is a bedroom and I got to call it a bedroom.

By the Court.

Q But it was not in the kitchen? A No, it was in a bedroom, not the kitchen.

By Mr. Gilhooly.

Q Had any part of the kitchen fallen in 1924? A A small piece near to the door.

Q How big was the piece in the bedroom? A It was in the bedroom—it was, I will say, about two foot broad and two foot long—a corner piece. Maybe it was smaller, but that is the way I seen it. I can get it smaller, but I say larger—

Q Did you have that ceiling in the bedroom repaired? A I had it repaired.

Q Did you have a patch put on it, or did you have the whole thing taken off? A The whole thing taken off and the whole ceiling put on.

Q How about the kitchen? A The kitchen I told the man when he was finished, I told him to look at the kitchen there.

Q When you told him that, were Mr. and Mrs. Dulberger there? A There was a small piece—I had a small piece fixed—

Mr. Gilhooly: I will reframe the question.

Q Whom did you have make the repairs? A A colored man.

Q Were you on the premises when the colored man was making the repairs? A Yes, I was not standing there all the time, but I was there, and I came there—

Q Did you have any conversation with the man making the repairs in the presence of Mr. and Mrs. Dulberger? A (No answer.)

By the Court.

Q When you talked to the colored man about making the repairs were Mr. and Mrs. Dulberger there? A Yes.

By Mr. Gilhooly.

Q What instructions did you give the repair man in the presence of Mr. and Mrs. Dulberger about the kitchen ceiling? What did you tell the man? A I told the man he shall look the ceiling over and if any part of the ceiling loose, or if it is necessary to fix it, and the man examined the whole ceiling. "Why," he said, "The ceiling is solid."

Mr. Palmer: I object to that.

Q Were Mr. and Mrs. Dulberger there? A Yes.

Q What did the repair man say about the ceiling? A He made a small piece of patch.

Q What did the repair man say about the ceiling? A He said the ceiling is good.

Q Did he test it? A He did test it.

Q Did he test it in the presence of Mr. and Mrs. Dulberger? A Yes, he did.

Q Did you get up to the ceiling with a broom at that time? A Not at that time.

Q Were there any cracks in the kitchen ceiling at that particular time in 1924?

Mr. Palmer: I object to that. It is his witness.

The Court: I will allow it.

The Witness: There was no cracks, because if there would be cracks—

Q Yes or no. A No.

Q You spoke about having a patch put on the ceiling in the kitchen in 1924. Was that in 1924? A That was the same time.

Q Where was that patch? A On top of the door that going into the bedroom from the kitchen to the bedroom where the bedroom ceiling came down.

Q How big was that patch in the kitchen? A That was very small, like from a side of a chair.

Q Would you say that would be about a foot and a half by a foot and a half? A Yes.

Q What was the condition after the ceiling had had the patch put on? A It was in good condition.

Q After December, 1924, what if any complaints did you receive from Mr. Dulberger? A I had no complaints at all that I know.

Q Did Mr. Dulberger send for you and point out to you that the ceiling was leaking?

Mr. Palmer: I object to that as leading.

The Court: I will allow it.

The Witness: He didn't because—

Q Just answer the questions. Did you see Mr. Dulberger between December, 1924, and January 6, 1926? A I did see him.

Q Did you go into his store at any time during that period? A I went in every week.

Q What did you go into the store for? A I went in to buy cigars and sometimes little handy things.

Q You had conversations with Mr. Dulberger, did you? A Yes.

Q What complaints, if any, did he make when you visited him between December, 1924, and January, 1926? A He had no complaints—he don't have no complaints at all about it.

Q Did you ever go into his living room between December, 1924, and January, 1926? A No.

Q You had never been in there? A No, only in the store.

Q Who did your plumbing work during that period? A Mr. Young.

Q Did you at any time during November or December, 1925, say to Mr. Dulberger, "I will have the pipes repaired?" A Not as I know of.

Q Did you have such a conversation? A I didn't because Mr. Frimmer any time a pipe was leaking, he was taking care of it—

Q Did you have such a conversation? A No.

Q Did you say you would fix the pipe? A I didn't say it.

Q Did you ever have such a conversation with Mr. Dulberger? A No, sir.

Q What was Mr. Frimmer around that place? A He was janitor to take care of the whole house. He had the privilege if anything is wrong, water damage or anything, he had the privilege to himself—

Q Was your attention called to a portion of the ceiling falling on January 5th? Did you hear about a piece of ceiling falling on January 5th? A I did not; on January 4th I only hear it; I don't know anything about January 5th.

Q Was your attention called to the fact that a portion of the ceiling in the kitchen fell in 1926? A 1926?

Q You heard about that, didn't you? A Yes, about that accident.

Q When did you hear about it? A After the ceiling fell down.

Q How soon after? A On the same evening they let me know and I went down the next morning because I wasn't home; I was away.

Q When you got there the next morning did you look at the ceiling? A I saw the ceiling was down in the corner on top of the washtubs.

Q How big a piece? A About a foot long and a foot and a half broad.

Q Was there any water dripping through the ceiling? A Not a bit; it was all dry.

Q Were there any other cracks in the ceiling? A Not as I know of.

Ignatz Radli, direct.

Q You looked, didn't you?

Mr. Palmer: I object to that as leading.

Q Did you look? A I did look; there was no cracks in it except I told the man—

Q Never mind. A I didn't see no cracks in it.

Q Did you have that ceiling repaired after the accident? A After the accident, yes.

Q Who repaired it? A It is by the name Mr. Parker, but he died.

Q When you went there on the day after the accident did you see Mrs. Dulberger? A Yes, I did.

Q Where was she? A I saw she was in the bed at that time.

Q Did you ever see Mrs. Dulberger in the store before the accident? A Yes, sir, I did; certainly I did.

Q How was she dressed? A Oh, she was dressed like the ladies in the store, like a regular dress.

Q Did you observe whether she had anything on her head or not? A Not before the accident.

Q After the accident happened I understand you went there on January 6th, the day following? A Yes.

Q Did you go on the premises at any time later? A I did after.

Q How soon after? What was your next visit to the premises? A I was there pretty near every second day; I was there pretty near every day when that happened.

Q Did you see Mrs. Dulberger on your visits? A I did see her—

Q Did you see her? A I did see her after, yes.

Ignatz Radli, cross.

Q How soon after the accident did you see Mrs. Dulberger? A I seen Mrs. Dulberger I think about two weeks after.

Q Was she in bed then? A No, she was in the kitchen.

Q Was she dressed? A Why, she was dressed, yes.

Cross examination by Mr. Palmer.

Q Were the repairs which were made to the ceiling in the kitchen and to the ceiling in the front room, I guess they call it the living room, were they made by the colored man all on one day? A Yes, sir.

Q When was that? A That was 1924.

Q What time? About December? A About December, I suppose.

Q How many colored men did you have there? A One.

Q What was his name, the one that first made the repairs? A I can't tell you his name, because I never took notice of it.

Q Have you ever seen him since? A I have seen him since? I have seen him once or twice since; it is now four years ago. I don't know where he lives.

Q In January, 1926, after this piece of ceiling in the kitchen had fallen on Mrs. Dulberger's head, then you had the kitchen ceiling repaired again, didn't you? A Yes, sir.

Q But you had it repaired by different men? A Certainly I did.

Q You didn't call in this first man that had repaired it in December, 1924, to repair it over again, did you? A No.

Q Is this your handwriting (indicating)? A Yes, it is.

Q And you signed it down in your attorney's office, didn't you? A Yes, I signed the papers.

Q And you were told by somebody to raise your hand and you swore that the answers you gave here were true, didn't you? A I signed a piece of paper for Mr. Dulberger; I received all the rent of Mr. Dulberger.

Q I am asking you about this paper. This is your name, isn't it? A Yes, but—

Q That is your handwriting, isn't it? A Yes, that is my handwriting.

Q Now, listen: You were asked here in your— A Excuse me, that wasn't on when I signed that paper.

Q You don't even know what I am going to ask you. A Maybe I am wrong.

Q You were asked by interrogatory No. 4 which was served on you some time in June, 1927: "Did you, during December, 1924, either personally or by means of hired help, make any repairs to the ceiling of the living room of the apartment then occupied by the plaintiffs at 54 Waverly avenue" and you took your oath and said, "No," that you had not made such repairs, didn't you? A There is something wrong against me on that paper. I signed to Mr. Dulberger a piece of paper. I received all the receipts—

Mr. Palmer: I move that the answer be stricken out.

The Court: Strike it out.

The Witness: I don't know that paper.

Q That is your name at the bottom of it, isn't it? A Yes.

Mr. Gilhooly: Is that the original?

Mr. Palmer: I don't know.

Q At the same time, or about the same time, that the colored man made the repairs to the ceiling of the living room you told him also to fix the ceiling in the kitchen, didn't you? A In 1924?

Q Yes, or January, 1925, whenever it was you told him to fix both rooms, didn't you? A I told him if it is necessary—he should look them over and fix them good—if it is necessary to fix them.

Q That is what you told your colored man, isn't it? A Yes.

Q Now, Mr. Radli, when was it that you had that talk with the colored man? Was it in December, 1924, or was it in January, 1925? A When they fixed the ceiling?

Q Yes, the first time. Wasn't it just a couple of days after New Year's? A I am not sure was it before New Year or after the New Year. It was 1924 when I had it fixed.

Q Was it at the very end of 1924 or the beginning of 1925? A I am not sure; I think it was the end of 1924.

Q But you are not exactly sure. A No, but I know it was fixed the ceiling and in the kitchen at the same time.

Q And that might have been a few days before the end of 1924 or a few days after the beginning of 1925? A It was at the end of 1925.

Q How do you know that? A I think, I am not sure.

Q It might have been early in 1925, a few days after the New Year? A No, sir.

Q How do you know it wasn't a few days in the early part of January? A Because I know it was the end of 1924.

Q How do you know it? A He fixed it and it was right the second day that it happened and I had it fixed in December.

Q So you have said. I want you to tell us how you know you had that work done in December instead of January. How do you know that? A Because I know it was fixed and I know January is 1925, and December is 1924, and I had it fixed in December, 1924.

Q How do you know that? A Because I know it.

Q How do you know it? A Because I think I ought to know it.

Q What makes you say so? A It was fixed, that's all I can say, in 1924 in December. That's all I can say. How can I say more?

Q Ever since you owned that property you were having considerable trouble with the water pipes leaking in it, weren't you? A Not much.

Q You did have trouble from time to time, didn't you? A Not much.

Q You did have trouble from tome to time, didn't you? A Once in a while I had trouble; I had to get a plumber.

Q You had trouble with the water pipes in there, didn't you? A Well, yes, I had some trouble, certainly; I don't want to say no.

Q Didn't the water pipes in that house run between the ceiling of the first floor and the floor of the second floor? Is that where some water pipes ran? A The water pipes run straight up.

Q Do any of them run between the ceiling and the upper floor? A No, sir.

Q Where do they run straight up? A From the range stove in the kitchen right up to the top floor from the first floor.

Q Where the ceiling fell in January, that is right near the water pipes, isn't it? A Which year?

Q Which year do you mean? A You tell me which year you mean.

Q Didn't you have trouble in January with the plaster? A No, I told you 1924, in December, and 1926, so I don't know which year.

Q Well, in January, 1926, you said that is the only January in which you had trouble? A Yes, sir.

Q When it did fall in January, 1926, were these water pipes you had told us about near the washtubs? A No, sir.

Q Where were they? A It is a door between the washtubs and the pipes and then they run straight up. There is no water pipes run over the washtubs except what runs in the tubs from the bottom.

Q Wasn't it a wet ceiling that did it? What made part of the ceiling in the living room fall if it was not due to water pipes leaking? A You mean the bedroom or kitchen?

Q What they call the front room? A There was a kitchen and a bedroom. In the living room was no ceiling fall at all and there is no pipes falling through the ceiling.

Q What room do you call it that the ceiling fell down in? A In the bedroom.

Q A piece of ceiling came down in the bedroom and in the kitchen as well at almost the same time? A Yes.

Q If it wasn't due to leaking water pipes making the plaster all wet and cracked up there,

why do you say that the ceilings in two of your rooms fell within a month of each other? A You see, in the bedroom there is no water pipes running at all. The water pipes run on this side of the wall in the kitchen straight up and on the other side of the wall there was that bedroom, so it is impossible. There was no wet in that bedroom at all. Any dry ceiling it happens to fall down. It is not necessary to say it was wet. I don't see no wet there at all.

Q Then your explanation of what happened in that house is that a piece of ceiling fell out of the bedroom and a piece of ceiling fell out of the kitchen within a month of each other, and that is apt to happen around any house at any time? A It was happen to fall down the same time.

Q And you say Mr. Dulberger said to you after the colored man had fixed the kitchen that it was not good? What did you say to Dulberger? Did you tell him the kitchen is perfectly safe? A I asked the man if he fixed it and the ceiling is all right and he said the whole ceiling is solid.

Q Who said that? A The colored man.

Q Mr. Dulberger sent for you a day or two later after the colored man had gotten through and you went to see him? A I went down right away because he wants his money. I want to see the job first before I pay him.

Q And you saw it? A Yes.

Q And it suited you? A It has got to suit; I see it is all right.

Q It suited you all right? A Yes, the man said all solid and good and I won't guarantee for any ceiling.

Q Did you then get on a chair and with a broom tap around the ceiling to make sure it was all sound? A No, sir, not that time. I went around when the ceiling plaster was laying down and I said to the man there is all loose, take all down and make a good job out of it.

Q When was that? A When I gave the man the job to have the ceilings fixed.

Q Was that in December, 1924? A That was January, 1926.

Q You mean after she was hurt? A Yes, sir.

Q Then you say after it had all happened you took a broom and went all around— A Well, I told the man to have it fixed.

By the Court.

Q Did you take a broom and tap around the ceiling? A Yes, sir, I did.

By Mr. Palmer.

Q From the time it was fixed in December, 1925, you came down and paid the colored man and you never tested that ceiling yourself, did you? A No.

Q But then, after the ceiling all fell on Mrs. Dulberger you did take a broom and feel all around after it happened, didn't you? A You got me wrong.

Q I don't want to have you wrong? A I am telling you Mr. Dulberger never came up and told me the wall is cracked. He called me down when the wall was fallen down already.

Q You never knew until the wall fell that the wall was cracked, did you? A I ain't see the wall because nobody told me anything about it.

Q You thought that the kitchen ceiling was fine? A I didn't think anything because if Mr. Dulberger would come up and tell me the ceiling is cracked I would have come down and have it fixed.

Q Yet, you went there a couple of times a week? A Yes.

Q Didn't you ever used to see Mrs. Dulberger when she was out in the store before she was hurt wearing a little dust cap on her head? A I don't want to say that.

Q Didn't she frequently say to you that she had to wear it because the small pieces of plaster were dropping out of your ceiling into her hair and she had to wear this little cap to stop it? A No, sir, she didn't say that to me.

Q Why did you have a different colored man do the job after it fell than you had do it before? A Why, because I can take any experienced man—I know he makes a job—I can go to any experienced mechanic to have the job done.

Q And that is the reason you didn't have the first man come back and do the second job? A This man was a good mechanic just as good like the other man.

Q The fact of the matter is that you got a different man to do it in January, 1926, because you were dissatisfied with the way the man did it in 1924, isn't it? A I was satisfied with both—

Mr. Gilhooly: I object to that.

The Court: Objection sustained. You can ask him if that was the case.

Q The reason that you had a different man—

The Court: Was the reason.

Q Was the reason that you had a different man do it in 1926 from the one that did it in 1924 that you were dissatisfied with the man's work done in 1924? A I was just as satisfied with the work that the man did in 1924.

Q Even after part of the ceiling fell after he got through working on it? A He put up a good ceiling in the bedroom.

Q Were you satisfied with the man's work after you had seen part of the ceiling fall, or were you dissatisfied and concluded to get another man? A I was satisfied; he made a good job.

Q You were not working over the tubs when it fell, were you?

Mr. Gilhooly: I object to that.

The Court: Objection sustained.

Q How many times before this accident did you get back into the Dulberger apartment? A After the accident?

Q Before. A You mean in his living room?

Q Yes. A I don't went in there; I had nothing to do in there.

Q Were you ever in there? A Only when Mr. Dulberger called me in there, but he never called me in there.

Q You say you only went in when he called you in? A Yes, but he don't call me in; I had nothing to do in there.

Q You were in there when the repairs were made to what you now call the living or bedroom? A Yes.

Q And when they were made in the kitchen? A That was the same time.

Ignatz Radli, cross.

Q But before you brought the colored man you went in there and looked at the rooms yourself, didn't you? A Yes, Mr. Dulberger called me that time.

Q Did you go back there in those rooms before you brought the colored man there? A I had to go back when Mr. Dulberger called me and told me that the ceilings need fixing.

Q That was before the colored man came? A I had to go there, certainly.

Q Then you came later on with the colored man? A The next day.

Q Then you came again after the colored man was through? A Yes, sir, I had to.

Q Between then and January, 1926, when the ceiling fell hadn't you been told by both Mr. and Mrs. Dulberger that the ceiling had begun to leak again? A No, sir.

Q You deny that? A Yes.

Q Didn't you come into their kitchen and look at the ceiling and test it and tell them again that it was all right only the water pipes were leaking? A I never went back there again because they didn't call me at all. I only went back when they called me—

The Court: You have answered the question.

Q Do I understand you to say that you never did get up on a chair and test the ceiling with a broom handle? A I did told you that after the accident in 1926, when it came down on the washtubs—I cannot climb up there; I took the broom and I told the man to fix—

James C. Young, direct.

By the Court.

Q That is the time you did it? A That's the time.

By Mr. Palmer.

Q And you say that is the only time you did it? A Yes.

Q And at that time were there any cracks in that ceiling? A Not as I know of.

Q You had a broom up touching it? You could see it, couldn't you? A Not with a broom.

Q What test did you make of it when you tested it in the kitchen? A Before it was fixed after the accident I told the man to take down what is loose on it.

Q Didn't you take a broom and feel around to see what was loose? A Yes.

Q At that time do you deny that when you were up touching this ceiling with the end of a broom that there weren't any cracks in that ceiling? A Not after it was through; I went up when the ceiling was broke down when the plaster was loose.

JAMES C. YOUNG, sworn in behalf of the defendant.

Direct examination by Mr. Gilhooly.

Q Mr. Young, what is your business? A Plumber and heater.

Q You have been a plumber and heater for how long? A Thirty years.

Q Do you know Mr. Radli? A I do.

Q Do you know Mr. and Mrs. Dulberger? A I do.

Q Did you make any repairs for Mr. Radli in premises known as 54 Waverly avenue, Newark? A Off and on, yes.

Q I call your attention to a date around January 5, 1926, and I ask you if you were in the Dulberger apartment around that time? A On January 6th, I believe.

Q What was your purpose in being on the premises? A To examine for leaks.

Q By whom were you summoned? A By Mr. Radli and Mr. Frimmer, both.

Q Did you make an examination of the Dulberger apartment on January 6, 1926? A I did.

Q Will you tell the Court and jury in what condition you found the water pipes? A I found the water pipes perfect. I examined the ceilings and took a piece of the ceiling off and found the lath dry and also the floor beams, no leaks on both.

Q Did you examine the floor beams? A Yes, sir, I did.

Q Did you observe where the portion of the ceiling had fallen? A Well, I should say about eight or ten inches from the corner of the room over the washtubs.

Q What was the size of the hole that you saw in the ceiling? A At that time when I went to examine it, I should judge about two feet by fifteen inches.

Q In which way did the twenty-four inches run and which way the fifteen? A The two feet ran along the same as the washtubs and came out into the room around fifteen inches.

Q It was fifteen inches wide and two feet long? A Yes, sir.

Q How long are the washtubs, do you know? A They were the old style, 46 by 22.

Q Twenty-two inches in width? A Twenty-two wide.

Q This hole that you saw, where was it located in the room? A Over the washtubs.

Q Where are the washtubs? I want to fix exactly what part of the ceiling had fallen? A It fell, I should judge, about four feet from the kitchen range boiler—over the washtubs direct.

Q Is that in the center of the room or where? A In the corner of the room.

Q Was this piece that fell in the corner? A Not exactly, about eight inches away I should judge.

Q How about the side walls? Do you mean eight inches from the side walls? A Yes.

Q How far from the wall that runs at right angles? Was that whole? A Coming clear from the side wall and about eight inches from the other side wall.

Q Was any water pipes at or near the spot in the ceiling that fell? A No, there wasn't.

Q Will you please tell the Court and jury where the water pipes run in that kitchen? A The water pipes go directly straight up through the three floors.

Q Starting from the first floor, where did they go? A Back of the range boiler.

Q How far in back of the spot where the ceiling fell is the range boiler? A I should judge about five feet.

Q Take it from that point right up. A All the same.

Q All straight on up? A Yes.

Q Are there any supply pipes running between the ceiling and the floor over the kitchen? A There is not; they are all above floors.

Q Were there any leaky service pipes on the second floor when you made your examination? A There wasn't.

Q Did you examine it for that purpose? A I did.

Q On January 6, 1925, when you went into the Dulberger apartment, whom did you see? A I seen Mrs. Dulberger; she was in the kitchen at the time.

Q Was she dressed or in bed clothes? A I think she had a bath robe on with a towel around her head.

Q Did you go into that apartment after January 6, 1926? A Yes, sir.

Q When? A About two weeks afterward.

Q What was the purpose then? A To make an inspection with the landlord.

Q Did you see Mrs. Dulberger then? A Yes, sir.

Q Where was she? A In the kitchen peeling potatoes.

Q Was she dressed? A She was dressed with a towel around her head and a bath robe—the same way as before.

Q Did you talk to her then? A I did.

Q Prior to January 6, 1926, did you have any occasion to be in the Dulberger apartment? A I think so; I was there off and on, as I say, but I can't recollect through leaky pipes in that Dulberger apartment.

Q When you speak of leaky pipes in the Dulberger apartment, what do you mean? A Used to freeze in the Dulberger apartment.

Q Where did the pipes freeze? A One side pipes coming over the stove was busted and the next visit the water back in the stove had busted.

Q Was that before or after January 4, 1926? A That was before.

Q How long before? A I can't tell you exactly.

Q Do you remember whether or not you were in the Dulberger apartment in the year 1925? A Maybe.

Q Did you ever observe water dripping from the ceiling at any time that you were in the Dulberger apartment? A I did not.

Q So far as you know, were you doing all of Mr. Radli's repairing? A Well, some at that time.

Q Did you ever repair any of the service pipes that you have described as running straight up to the third floor? A Not on that side.

Q You are familiar with this apartment, are you not? A I am.

Q How many families are there in that property? A There are three families on one side and three families on the other side.

Q On the other side of a hallway? A They have no hallway.

Q With separate entrance? A No, coming in from the same hall, but the halls are twenty feet from the kitchens where the entrance is to the apartment.

Q This is a corner apartment, is it not? A No, it is not.

Q Isn't it on Waverly avenue and Somerset street? A No, you see, there is another family alongside.

Q Did the building itself come to the corner? A Yes.

Q But the apartment occupied by the Dulbergers is not on the corner? A No, it is on the front.

Q Mr. and Mrs. Dulberger have testified that water was leaking in the ceiling from several places in the kitchen. From your examination of the water pipes and the location thereof, would you say it would be possible for water to leak in that manner from the service pipes? A No.

Q If a service pipe had broken or had become out of repair, what portion of the kitchen would have been affected by leaking water? A It would come over the washtubs and the kitchen range.

Q Why would it come over the washtubs and the kitchen range? A Because it would drip underneath the floor beams and go through the plaster into the room.

Q I thought you said that the water pipe ran alongside of the hot water heater? A I did.

Q How far away is that from the tubs? A That is about five feet, as I said.

Q If the water were to leak in a pipe, would that not flow alongside of the service pipe? A Not necessarily.

Q Could it run in another direction? A It would run across the floor, yes.

Q Suppose the leaks were between the floor and the ceiling? A Then it would be the same thing; it would run along the lath and soak through.

Q But you found no water marks indicating that such had been the case here? A No water marks.

Q If the water had been leaking and had flown along the side, would that have been apparent on the lath? A It would.

Q When you observed the condition of the ceiling in the day in question, January 6th, did you see any cracks in the ceiling? A I did not.

Q Were there any large cracks in the ceiling? A I didn't examine for cracks.

Q Did you make an observation of the ceiling? A I did, I pulled a piece off the ceiling that was loose there.

Q Did you see any other cracks in the ceiling? A No, I did not.

Q How thick was the plaster? A I should judge about three-eighths of an inch thick.

Q It wasn't four inches? A No, it wasn't four inches thick.

Cross examination by Mr. Palmer.

Q How long have you been doing work for Mr. Radli? A About two years or more.

Q Do you do much for him? A Not much, no.

Q So far as you know you are the only plumber he employes now? A That's all.

Q But you knew previous to January 6, 1926. he had other plumbers doing work in this house? A That I couldn't say.

Q Then you don't know? A I don't know.

Q When did you first begin to go to this house on Waverly avenue? A I think about 1925.

Q What time in 1925? A That I couldn't say.

Q Between then and the time this ceiling fell in January, 1926, about how many times had you been to this piece of property? A In the Dulberger apartment I had been about three or four times.

Q And in the other apartments? A Not so much.

Q How is that property heated? Has it one big furnace in the cellar? A It is not heated at all, only through the ranges.

Q Kitchen ranges? A Kitchen ranges.

Q And you want to tell us that people having only to depend on their kitchen range for heat, that every time you came to the Dulberger apartment you found the pipes frozen? A Not in the other apartments, but in the Dulberger apartment.

Q And they had the range to depend on for heat and cooking? A Not when they had heat.

Q You did find the pipes frozen, didn't you? A Not in the apartment itself, in the cellar.

Q I thought you found it in the water back? A Yes.

Q Was that in the cellar? A No, the water back is different.

Q The water back comes in the range and you found that frozen, too? A Positively—nothing else.

Q Beginning with the time you began to work for Radli, there was quite a little trouble with water leaking in the pipes in the Radli apartment house? A Not from the upstairs apartments.

Q But there was trouble in that house through the leaking of the water pipes, wasn't there? A No, sir, not in there.

Q Why were you going there very often? A I was up there to fix any leaks in faucets, and so forth, and make inspections.

Q How long do you think, assuming that there had been a leak in the water pipes between the ceiling of the first floor and the floor of the second floor—supposing there had been a leak in there in the past, about how long would it take for all traces of that to dry out? A That I couldn't tell you.

Q It will dry out, though, won't it? A Yes.

Q And leave no trace? A No, it will leave a trace.

Q What kind of a trace? A Why, a rusty color on anything that laid in between there.

Q You mean it would make the laths rusty colored? A And the plaster itself.

Q In this kitchen that you say you looked over in January, 1926, you didn't see any cracks? A I didn't see any cracks.

Q You didn't see the ceiling discolored either, did you? A The ceiling?

Q Yes. A It looked all right to me.

Q Are you familiar at all with the causes that make a ceiling fall? Do you know what makes a ceiling fall? A Sometimes due to water.

Q If you found two ceilings going within one month, a piece dropping out of the bedroom in one month and a piece dropping out of the ceiling in the other month, wouldn't that indicate to you that possibly there was a leakage of water in there? A Not necessarily.

Q But wouldn't it indicate to you that there was a leak somewhere around, or that there was water soaking these ceilings? A It doesn't indicate that to me.

Q When water does leak out of a pipe and untimately wets the ceiling, that, in the course of time, will crack that ceiling, won't it? A That I can't swear to.

Q What is your idea about it?

Mr. Gilhooly: I object.

Objection sustained.

Q If you should happen to see little bubbles of water—the ceiling damp, not necessarily running through—wouldn't that indicate to you that

there were leaking water pipes around? A It would.

Q Aside from water pipes being in that house, there were other pipes, weren't there? A Waste pipes.

Q Where did they all run? A Down about in the same corner.

Q Do they start at the basement and go straight to the third floor? A Positively.

Q Didn't they go to the bathroom? A There were no bathrooms in there.

Q You say when you did go there on January 6, 1926, you were sent there by Mr. Radli to examine for leaks? A Right.

Q He told you to go and look for leaky water pipes? A Yes, to see whether there was any leaky water pipes.

Q And he had been there before you had been there? A The night before, possibly.

Re-direct examination by Mr. Gilhooly.

Q You said something about there being some waste pipes? Did you make an examination for leaks in the waste pipes? A Positively.

Q Were there any leaks? A There wasn't.

Q You spoke about a water back. What did you mean by that? A For heating the range boiler.

Q Where is that located, in the kitchen range? A It is located in the kitchen range.

Q You found that frozen? A Sometime before that; some three or four visits.

Q You say that you were working for Radli about two years? A That I would have to look over my books for.

Q You wouldn't say it was as much as three, though? A Possibly.

Q Did you ever fix any faucets in the Dulberger apartment? A Yes, sir, to put new ones on there.

EDWARD BURELL, sworn in behalf of the defendant.

Direct examination by Mr. Gilhooly.

Q Mr. Burell, where do you live? A 126 Somerset street.

Q With respect to 54 Waverly avenue, where is that located? A The back porch empties on my back porch.

Q So your apartment is in the same building as the Dulberger's? A Yes, sir, but the porches come together.

Q In January, 1926, did you live at the same place? A Yes, sir.

Q Were you acquainted with the Dulbergers? A Yes, sir.

Q In January, 1926, did you live at the same place? A Yes, sir.

Q Were you acquainted with the Dulbergers? A Yes, sir.

Q Do you know Mr. Dulberger? A Yes, sir.

Q Do you know Mrs. Dulberger? A Yes, sir, I do.

Q How long have you known them? A Ever since I lived there, and I lived there about five years now.

Q Did you ever have occasion to go into the Dulberger store prior to January 5, 1926? A In the store? Yes.

Q I am speaking of before January 5, 1926. A Before also, yes, sir.

Q Did you see Mrs. Dulberger in the store? A I never seen her in the store.

Q Did you talk to her? A Yes, I have talked to her.

Q Do you know them very well or were you merely a customer? A I was a customer and a tenant in the house, and we all traded with them.

Q Did you ever have a conversation with Mrs. Dulberger? A Yes, sir.

Q Prior to January 5, 1926, did you ever observe Mrs. Dulberger wearing a towel about her head?

Mr. Palmer: I object to that as leading. The witness should be allowed to tell what he saw her wear.

The Court: I will allow it.

The Witness: I seen her mostly all the time with a towel about her head before that.

Q Did she ever tell you why she wore it? A No, she never did.

Q In your conversations with Mrs. Dulberger did she ever complain of headaches? A Not as I can remember.

Q Do you remember when this accident happened? A I do.

Q How soon after the accident did you see Mrs. Dulberger? A The next morning.

Q Where was she? A I was bringing garbage down and she was in the kitchen with a broom.

Q What was she doing in the kitchen? A Sweeping up some dirt by the door.

Q Was she dressed— A She didn't have no petticoats on. I don't know was she dressed. She had a bathrobe on.

Q What was the occasion for your seeing her? A I came down from the top floor with garbage to take in the trash house in the yard and she was sweeping dirt out and she said, "Oop." She swept dirt on me—and she waited until I passed.

Q After this, when did you next see Mrs. Dulberger? A Well, I couldn't say exactly when I seen her next after that.

Q Was it during that same week? A Well, I couldn't say it was in the same week.

Q Did you see her again during the month of January? A I think I got a glimpse about a month later, but I couldn't swear it was her—from the store part.

Q After this accident did you ever make any purchases at the Dulberger store? A Oh, yes.

Q Did Mrs. Dulberger ever wait on you? A I can't recollect whether she did or not.

Q Did you ever talk to her since the accident? A Never talked to her only when she was getting ready to move from there.

Cross examination by Mr. Palmer.

Q You never saw Mrs. Dulberger in the store before the accident, did you? A Yes, sir, I did.

Q You just got through saying a few minutes ago that you never saw her in the store before this accident, didn't you? A No, I did not.

Q What did you say? A He asked me if I seen her after the accident in the store?

Mr. Palmer: May I ask that the stenographer read back that portion of the testimony on direct examination?

(The stenographer reads as follows:

"By Mr. Gilhooly: Question: Do you know Mr. Dulberger? Answer: Yes, sir, Question: Do you know Mrs. Dulberger? Answer: Yes, sir, I do. Question: How long have you known them? Answer: Ever since I lived there, and I lived there about five years now. Question: Did you ever have occasion to go into the Dulberger store prior to January 5, 1926? Answer: In the store? Yes. Question: I am speaking of before January 5, 1926. Answer: Before also, yes, sir. Question: Did you see Mrs. Dulberger in the store? Answer: I never seen her in the store. Question: Did you talk to her? Answer: Yes, I have talked to her.")

By Mr. Palmer.

Q So you did testify on direct examination that you never saw her in the store before the accident? A She waited on me in the store before the accident all the time. I said I didn't see her after the accident.

At 1 o'clock P. M., the Court takes a recess of one hour.

AFTER RECESS.

KATE CRUMP, sworn in behalf of the defendant.

Direct examination by Mr. Gilhooly.

Q Are you married or single? A Married.

Q Where do you live? A 126 Somerset street.

Q That is a part of the building in which— A Yes, it is the same building, but a different entrance.

Q Do you know Mrs. Dulberger? A Yes, I do.

Q Do you know Mr. Dulberger? A Yes, sir, I do.

Q How long have you known Mr. and Mrs. Dulberger? A About five or six years.

Q How long have you lived at your present address? A It will be five years the 5th of May.

Q Did you have occasion to go into the Dulberger store? A Most every day.

Q What did you go in there for? A To buy charcoal and other things.

Q Prior to January 5, 1926, did you have occasion to go into the Dulberger store? A Yes.

Q Did you have occasion to talk to Mrs. Dulberger? A Yes, we always talked.

Q Prior to January 5, 1926, did Mrs. Dulberger ever complain to you that she was suffering from headaches? A Yes, she did.

Q Did she make any other complaints? A Yes, she always did.

Q How long prior to that? A Ever since I lived in that house, and before I lived in that house I came over there.

Q Did you ever see her wearing a towel around her head? A Yes, most always.

Q What kind of a towel was that? A The same kind of towel you use for your hands.

Q Did she ever say why she suffered with headaches? A She said since she could remember she always had headaches.

Kate Crump, cross.

Cross examination by Mr. Palmer.

Q Do you still live at 126 Somerset street? A Yes, I do.

Q You live, then, in Mr. Radli's house? A Yes.

Q And you have been a tenant of his ever since he owned the house? A Not ever since he owned it; before he moved there.

Q When did you move there? A The 5th of May, 1923.

Q He has been the one landlord of yours since you have lived there? A Yes, he is the only landlord I had.

Q About what Mrs. Dulberger had on when you saw her in the store, was it a towel or a dust cap? A A towel that you fold up and tie around your head.

Q How do you know it was a towel? A Because I seen.

Q And you never saw her with a dust cap on? A No.

Q You have never seen her with a dust cap? A No.

Q Didn't she tell you as an explanation of what she had on her head that small particles of plaster on the ceiling were falling in her hair? A No.

Q How long did you continue to be a customer of the Dulbergers? A Until they moved out.

Q After the happening of this accident, when was it that you next saw Mrs. Dulberger in the store? A Why, I didn't pay much attention to just when it was, but I know I seen her in there.

Q About how long after the accident? A It may have been two weeks and it may have been three; I won't say for sure.

Kate Crump, cross.

Q And she was working in the store then? A She would be standing in the store; she wasn't always waiting on me; sometimes Mr. Dulberger and sometimes the children and sometimes Mrs. Dulberger would wait on me.

Q You know positively that she was standing in the store two or three weeks after the accident? A I said two or three, I don't know whether it was three, it may have been two and it may have been three, because I didn't pay much attention to her.

Q But you are sure it wasn't more than three weeks? A Yes.

Q And at that time she had a towel on? A Yes.

Q In fact, she always had a towel on? A Not all the time.

Q When was it you had seen her without a towel? After the accident or before? A I didn't pay much attention, but I have seen her dressed and going to the movies. Naturally she didn't have a towel on then.

Q When you have seen her in the store, while you and she were living in the store, did you see her wearing a towel before or after the ceiling fell? A Both before and after, because I seen her both before and after.

Q Beginning with two or three weeks after the accident, how often would you see her either working or standing in the store? A We all had to go down the back entrance. She had glass windows in the kitchen—

Q How long after the accident was it you used to see her through the glass windows in the kitchen? A I didn't pay much attention to how long it was.

Q How long do you think? A Maybe two or three weeks; I won't say.

Q What was she doing in the kitchen? A Sometimes she was preparing her meals and sometimes sweeping, and sometimes washing the dishes.

Q You say that was two or three weeks after the accident? A Yes.

Q Beginning with that two or three weeks after the accident, how often did you see her in the store? A I didn't pay much attention how long after.

Q Did you talk this case over with anybody since the accident? A No, only when I was subpoenaed I was told to come.

Q You were just asked questions on the stand without knowing what was going to be asked you? A I really didn't know what was going to be asked me.

Q You didn't talk to Mr. Radli about it? A No.

Q How long have you been here in court? A Every day, pretty nearly.

Q Since when? A Tuesday or Wednesday a week.

Q Was Mr. Radli here, too? A Yes.

Q And you mean to tell us that although you have been here since Tuesday or Wednesday a week and Mr. Radli was here, too, on a suit against Mr. Radli you didn't talk to him about the case? A No.

Q And you haven't talked to anybody else about it? A No.

Q And you haven't talked to Mr. Burell about it, have you? A No, I haven't.

Q Has he been here the same length of time as you? A I think he was here every day I was.

Q And he lives in the same house with you? A Yes.

Q And although you and he have been here since then and in the same lawsuit and lived in the same house you haven't talked to him about the case? A No.

Q And you say the questions were asked you about the facts you knew without your having told anybody of what you knew about the case? A No, they never asked me.

Q At one time you were quite a customer down at the Dulberger store, weren't you? A Most every day I had to go down and get charcoal and different things.

Q There finally came a time before the Dulbergers moved and when this accident happened when the colored people in that house practically stopped dealing with the Dulbergers because the Dulbergers wouldn't give the colored people credit? A I never asked for credit.

Q You say you never tried to get credit from the Dulbergers? A No.

Q And you never were refused credit by the Dulbergers, were you? A No, I was never refused because I never asked for credit.

Q Before the happening of this accident what kind of work was it you used to see Mrs. Dulberger doing in the store? A Why, she waited on the customers.

Q Was she doing the same kind of work within two or three weeks after the accident? A Yes, she gave me charcoal and I bought stockings for my little boy.

Q She was doing the same work two or three weeks after the accident as before? A I don't say she was in the store all the time, but when I happened to go down.

Q Why do you say so positively it was two or three weeks after? Might it not have been seven or eight weeks after? A No, because I didn't miss her that long.

Re-direct examination by Mr. Gilhooly.

Q Prior to this accident did Mr. Dulberger wait on the store? A Yes.

Q Was he in there frequenly or infrequently? A Yes, Mr. Dulberger and Mrs. Dulberger and her sons and her daughters, too.

Q Mrs. Crump, I call your attention to a date on February 7th, and ask you if you remember having an interview with Mr. Walker from my office? A Yes, a gentleman did come to my house.

Q A dark-haired gentleman? A Yes.

Q And he spoke to you about this accident? A Yes.

Q Have you talked it over with anybody since then? A No, I haven't.

Q You were subpoenaed, weren't you? A Yes, I was.

Q And since then you have not been interviewed, is that right? A No, I haven't been interviewed.

JAMES H. TRAINOR, sworn in behalf of the defendant.

Direct examination by Mr. Gilhooly.

Q Doctor, you are a practicing physician of the City of Newark, are you not? A Yes.

Q How long have you been in active practice, doctor? A This is my twenty-fifth year.

Q Prior to commencing the practice of medicine did you graduate from any medical college? A Yes, Columbia University, New York City.

Q Since that time have you been actively engaged in practice? A Yes, except for an interneship in the St. Barnabas Hospital in the City of Newark.

Q Did you make an examination of Mrs. Dulberger? A I made two; I saw her first on March 23rd last year, and the second time the 3rd of January this year.

Q Will you please tell the Court and jury what condition you found when you examined Mrs. Dulberger in March, 1927, and the condition you found in January, 1928? A The only thing that was manifested was extreme nervousness. She had symptoms of nervousness that were present on both occasions. The first time she had tremors of the hands, eyelids, and tongue, exaggerated knee reflexes, and a positive Romberg, and a rapid heart. Her pulse was 96; that dropped to normal at the time of the second examination.

Q What was it the second time? A 78. And her eyelids tremor had dropped; she still has marked hand tremor; her knee reflexes are still highly exaggerated, and she has still a positive Romberg, that is, you have a patient stand with both feet together and the eyes closed and she sways.

Q On the first examination you found a pulse of 76 and the second time 98. What did that indicate to you? A That she was less nervous the second time than the first time.

Q Would you say her nervousness had improved? A Yes, she is still nervous and it has shown some improvement, and the absence of a goiter.

Q Did you find any indications of change of life? A She told me she is forty-five years old, and some of these symptoms are concomitant with meopause. We frequently find those nervous symptoms in change of life.

Q Do these symptoms point to a complete pause?

Mr. Palmer: I object to that as leading.

By the Court.

Q When did those symptoms manifest themselves? A The change of life sometimes lasts five years, and the symptoms start before the cessation of flow. Usually there is some irregularity of flow; sometimes they skip a month and sometimes two or three months; but the symptoms are usually present.

By Mr. Gilhooly.

Q You say the Romberg was positive? A Markedly positive.

Q What do you mean by positive? A If I hadn't caught her she would have fallen to the floor. The ordinary normal person subjected to the same test would not sway at all.

Q Where the Romberg test shows positive, what is that an indication of? A The most common indication—it is a patho-luetic disease due to locomotor ataxia.

Q Would you say it is induced by a traumatic condition? A Never. The Romberg sometimes

is found slightly positive in neurasthenia—in nervous exhaustion—but I have never in twenty-five years seen it as markedly positive as in this woman's case.

Q What do you mean by patho-luetic disease? A I mean lues—a luetic condition.

Q Where there is a luetic condition is the patient liable to be highly nervous? A Sometimes in the latter stages of the highly nervous.

Q Is there a probability that such person would be melancholy? A They frequently become so before the end.

Q You said in your twenty-five years of experience, where the Romberg test was positive, you knew of no case where it was not an indication of locomotor ataxia? A I didn't say that. I said in twenty-five years I have never seen it so positive in a nervous condition.

Q In a case where a woman has borne eleven children and six of them died, and where she had been complaining of headaches, and then there was later a piece of ceiling fell and hit her on the head, producing vomiting, and she thereafter complains of being weak, and nervous and forgetful, would you say whether or not that condition could be caused by a change of life? A Taking that whole thing into consideration, I would imagine that both things had something to do with it. She undoubtedly suffered shock from the striking on the head which may have brought on a neurotic condition. In neuroses or neurasthenia, but frequently we find those same symptoms in change of life.

Cross examination by Mr. Palmer.

Q If it be assumed that Mrs. Dulberger has no skipping of her regular periods and that they

are the same now as they have been since she arrived at the age of life to have such periods, that would tend to negative the idea that she is going through a change of life, wouldn't it? A Not necessarily, because symptoms occur several years before cessation of periods.

Q If you were given a history that this woman had periods as regular as they have ever been, and that she was involved in an accident in which a large section of ceiling fell on her head, with that history and irregularity of her periods, and the facts that she only began after the accident to act abnormally compared with the way she had acted before the accident, would you say that with nothing else to go by and the fact that she was about forty-three years old when she received that injury, that these symptoms are only change of life symptoms? You would have to have more information, wouldn't you? A Any sort of shock might bring it on. The size of the ceiling would not effect it. If she was told that one of her loved ones died, it would be sufficient. Trauma is not sufficient.

Q Assume the case of a woman forty-three years old who had enjoyed good health up until the 5th of January, 1926; that on the evening of that day quite a large section of ceiling fell and struck her on the head and back; that she was rendered unconscious for maybe about ten minutes; that upon being seen by her family physician that night she was found to have bruises on her head and was not clear in her answers; that there was a swelling on the scalp; that near one ear there was a laceration of the skin; that upon being seen the next day by another family physician she was complaining of headaches and dizziness; that within a short time

after the receipt of this blow she vomited three or four times; that she was confined to bed for a period of five or six weeks, complaining of headaches and dizziness; that she was then found to be unsteady on standing with both feet together and her eyes closed; that we find her later on with a lack of memory; that she breaks out in profuse sweats; that she is found by two physicians to have dermographia of the skin; that although the accident happened two years ago she is found even today complaining of headaches and dizziness and fears; that she threatens to do away with her life. With that history, and bearing in mind that these things began to manifest themselves right after she was involved in the accident, wouldn't you say that the headaches and dizziness and the rapid heart at times, and the unsteadiness on standing, and the lack of memory, and the melancholia, and the profuse sweats, and this dermographia of the skin, probably came from the accident that she was involved in? A I would say this: That they undoubtedly come from shock. Whether the shock was due to that I have no knowledge.

Q It will be assumed that up to 6 o'clock that evening, January 5, 1926, and during all her married life of twenty-six years, she had not had any such symptoms, and appeared to be in perfectly good health, and some of the symptoms started within a minute or two after the blow on the head, and that some of these symptoms had continued since. Bearing in mind that the symptoms began a minute or two after the blow, would you say that the accident was responsible? A Yes, that the trauma caused the shock that caused that condition.

Q There isn't any doubt that vomiting immediately after the receipt of a blow on the head is an indication that there has been some injury to the brain? A Yes, it is a concussion symptom.

Q If after the receipt of a blow on the head you find a person complaining of headaches and dizziness, they are the natural and probable consequences of a receipt of a blow on the head, are they not? A Yes, but they seldom last two years; concussion symptoms seldom last two years. Had there been a fracture of the skull, I would say differently, but the X-rays were negative.

Q Isn't it a fact that the measuring stick to be used in determining whether or not a person's brain has been injured, is the effect, more than the fact that the skull has been cracked? In other words, can you not have bad after-effects following a concussion without the breaking of the skull? A It is possible, but the brain is very beautifully protected by a thick skull in most individuals.

Q And you have seen cases where there has been a fracture of the skull, in other words, the bone has been broken, and you have seen recoveries without severe after-effects? A Positively.

Q In other words, depending on the constitution of the person receiving the blow. There are people who have worse after-effects after a concussion of the brain than they have if their skull has been fractured, isn't that so? A That has not been my experience.

Q It is true, isn't it, that the measurement to be applied to the damage which has been done to a person is more by referring to the effects

which they are suffering from the injury than to the extent of skull fracture? A That is possible, but I would rather have a concussion without skull fracture than with skull fracture.

Q But you have seen cases of persons whose after-effects were worse without a fracture than with a fracture? A Yes, but I have never seen the symptoms last that long.

Q You have seen shell-shocked soldiers who have never been touched by a bullet who have been suffering from shell shock, and it lasted years and years? A Yes.

Q And they never have been hurt? A Yes, I have already testified to that.

Q You don't say, do you, doctor, that there has to be an injury to the bone of the skull before there can be serious injuries to the brain? A No, I haven't said that.

Q Then you admit that the brain can be seriously injured without the bone being broken? A Certainly.

Q Isn't loss of consciousness right after the receipt of a blow on the head one of the symptoms to be looked forward to as indicating brain injury? A Yes, but it may not be a very serious brain injury. I have been knocked out myself for four minutes, but I am all right now.

Q Do you say that the extent of the brain injury must automatically be measured by the period of unconsciousness that follows? A Yes, I think so; I think that is a fact.

Q Isn't it a fact that after a blow on the head a man may remain unconscious for several days and finally recover without any further evidences of cerebral trouble, or the coma following a similar accident may be less profound, although permanent paralysis, mental impairment, or death

may be the result? Is that or is that not a fact? A That is probably true.

Q Then the extent to which you remain unconscious after the receipt of a blow on the head is not the only factor in determining how badly the brain has been injured? A It does usually indicate how seriously, but in this case it might be that there was a blood vessel bleeding very slowly and an accumulation inside the skull caused death.

Q Because of a blow on the head? A Yes.

Q You have known of instances in your practice and experience, have you not, of people who, for instance, have been sandbagged, in which case there is not only no bone in their skull broken, but the hair has not even been mussed, but the blow has killed them? A Unfortunately I have never seen a case like that.

Q Did you notice any abnormality in the size of her pupils when you made the examination? A The first time her pupils were enlarged; the second time they were normal and equal.

Q Were they both of the same size? A The second time they were, even when light was applied to them.

Q At the first examination were they both of the same size? A No, they were unequal.

Q I ask you if this is not a fact: That abnormality of the pupils is a very common symptom of brain injuries; usually it exists as inequality, the larger pupil being on the side of the injury. The pupils may be evenly contracted, although they usually dilate before death; there may be alternating dilation and contraction, or the pupils may be immobile. I ask you if the size of the pupils after the receipt of a blow on the head is not an indication of an injury to the brain? A It is one of the symptoms.

Q In your examination of Mrs. Dulberger did you conclude she was suffering from any functional disturbance? A I thought her symptoms were all functional; I didn't consider that she had any organic disease.

Q Then all symptoms that you did find were indications of functional disturbance? A Yes, she had what I determined to be a neurosis due to shock.

Q Well, it is a well-known fact, too, is it not, that blows of any kind, but especially such as fall upon the head or back, are often followed by functional disturbance? Isn't that true? A Yes, but the blow causes the shock which causes the neurotic condition; the blow is not necessary.

Q Did you find anything in Mrs. Dulberger's condition indicative of any hysterical symptoms? A Yes, her whole train of symptoms was nervous.

Q Is it not true that it is essential, for purposes of justice as well as for correctness of diagnosis, that it be generally recognized that very startling hysterical symptoms can follow accidents which have caused only slight physical commotion or bruises? A There was no evidence at the first time, or any history of it, but the second time it was manifest.

Q Isn't it true that it is generally recognized that very startling hysterical symptoms can follow accidents which have caused slight physical commotion or bruises? A Coming so late in this case it happens to be only one of the symptoms.

Q Forgetfulness is also one of the after-effects usually found after a blow on the head of some severity, is it not? A It is a nervous symptom. The symptoms are legion. You can

pick out several hundred and I would have to say yes to you.

Re-direct examination by Mr. Gilhooly.

Q The hysterical symptoms of which Mr. Palmer spoke, are they usual or unusual to have come about in this manner? A It is unusual; it is only one of the train of symptoms. Sometimes it is brought on by pending litigation and being in court, and things of that kind.

Q Is this neurotic condition curable? A That is the reason I mention this. I have no doubt that this woman will be improved as soon as this case is over and with appropriate treatment I see no reason why she should not get well. Her troubles are functional. If she had an organic disease it would be different. She should get well with appropriate treatment.

Q What is your opinion as to the permanency of this condition? A I already said that—

Mr. Palmer: I object to that as not re-direct examination.

Mr. Gilhooly: There is one question I neglected to ask the doctor on direct examination, that is pertaining to a conversation with Dr. Levin. I have already laid the foundation.

The Court: Ask the question.

Q At the time that you made an examination of Mrs. Dulberger in the presence of Dr. Levin did Dr. Levin say to you that she had symptoms of brain concussion? A I think he did.

Q Did he say she had concussion of the brain? A I think he did, Mr. Gilhooly. He told me about her vomiting and having been unconscious.

Re-cross examination by Mr. Palmer.

Q I understood you to say just now that you figured she will get better when the case is over? A I say that she should be markedly improved, and in my opinion there is no reason why she should not be cured.

Q Is it not a fact that there are few cases of traumatic hysteria, and that is what this woman has, of which it can be truthfully said that the symptoms would not have appeared except for the question of damages? In other words, isn't it rare, indeed, that you find a recovery after a case is over? A That has not been my experience. Usually they improve almost immediately after the fear is removed of having to appear in court.

Q Have you followed up cases after the law case is over where a person did not get better at all but continued to get worse? A I don't know of one.

Q How many of them have you followed up which, by treatment after the case was over have all gotten better? A I probably haven't seen any to the end, because usually patients would not come back when they started to feel better and we lose track of them.

Q And the fact that you do not happen to see them after the case is over makes you say that they have recovered? A That is a pretty good indication.

Q That is the basis you use? A That is good enough for me.

EDWARD BURELL, witness previously sworn in behalf of the defendant, resumes the stand.

Cross examination (continued) by Mr. Palmer.

Q How long have you been a tenant of Mr. Radli's? A Five years, maybe a month or so more.

Q Are you still one of his tenants? A I am.

Q Have you talked this case over with anybody? A No, sir.

Q You have not talked it over with a soul, have you? A No, sir.

Q When I asked you if you had talked it over with anybody, I am asking you to charge your memory with whether you ever talked it over with anybody whatsoever? A I don't remember talking it over with anybody at all until a man come up a couple of nights before and asked me if I seen Mrs. Dulberger at a certain date. I don't know who he was. I came to find out a day or so after. He brought me a subpoena back, or another man brought me a subpoena back.

Q So when you began to talk to somebody about it it was because somebody came to you, asked you whether you could tell whether you had seen Mrs. Dulberger on a certain day or not? A Yes.

Q What certain day did he ask you about? Did he say January 6, 1926? A He said 1926, but just what date I can't remember.

Q Do you say somebody came to you and asked you whether you had seen Mrs. Dulberger on a certain day in 1926? Is that what the conversation was?

Objected to.
Objection sustained.

Q Tell us what the man said to you.

Objected to.
Objection sustained.

Q Tell us what you told the man.

Objected to.
Objection sustained.

Q Have you talked it over with anyone else? A No, sir—

Objected to.
The Court: I will let it stand.

Q How many days have you been here? A I imagine I have been here five or six days; I don't know.

Q Has Mr. Radli been here? A I have seen him out in the corridor.

Q You haven't said anything to him about the case? A Nothing at all.

Q Although you and he have been here together on the case five or six days? A I never came with him; I came from my boss' office.

Q Have you ever talked to Mrs. Crump about it? A No, sir, never.

Q Although you live in the same house? A Yes, sir.

Q And you have been here together on the same case five or six days and you haven't talked about it? A It didn't concern me to talk about it.

Q You were asked on direct examination if before January 5, 1926, you had ever seen Mrs. Dulberger in the store and you testified that you had not, didn't you? You testified that you had not seen her in the store before the time of this accident? A Maybe the way you worded it, but the way I understood it was after the accident, but I couldn't say I didn't see her, but I traded with her over three years.

Q I didn't ask you about that. A Whoever asked me.

Q When you were asked the question whether you had seen her before the accident in the store and you said, "No," you meant had you seen her in the store after the accident? A That is what I understood.

Q Had you ever seen her in the store after the accident? A I don't remember. I seen her form, but I couldn't say whether it was her or not because I wasn't near enough.

Q But you testified here this morning that you did see her in the store after the accident? A I testified I seen her in the kitchen where her back porch joins my back porch.

Q Did you used to see her in the store before the accident? A I did.

Q And you haven't seen her in the store after the accident? A No, sir, not as I can remember.

Q What did she do in the store before the accident? A She waited on me, whatever I needed, charcoal for my wife or cigars or cigarettes.

Q Did you see her often? A Every night and every morning getting cigarettes and cigars on the way out in the morning or in the evening, and charcoal for the house.

Q You are positive you saw Mrs. Dulberger right along before the accident? A I did.

Q And you didn't see her in the store after the accident? A I don't remember having seen her after the accident; I can't be positive.

Q When was it after this accident, and where was it, that you say you first saw Mrs. Dulberger? A I seen her the next morning after the accident. She was sweeping some lime—I started out with a pail of ashes and a pail of garbage. She was sweeping there and she said "Oop," and she stopped sweeping until I went out.

Q Do you know Mrs. Kohn, Mrs. Dulberger's daughter? A I have seen her.

Q Are you positive that the woman you passed and who was sweeping and stopped her sweeping when you went by, are you real positive it wasn't Mrs. Kohn? A I know it was Mrs. Dulberger.

Q And you are sure it was Mrs. Dulberger? A I know it was.

Q How was she dressed? A I know she had clothes on; I didn't take that much notice to her.

Q She was fully dressed, wasn't she? A As far as I could see she had clothes on, that's all.

Q What time of the day was it? A That was about 7:30 or a quarter of eight in the morning.

Q That is the first time you saw her after the accident. When did you next see her after the accident? A I didn't see her no more after the accident because I went to Hot Springs, Arkansas. I made the trip with my boss every winter.

Q When did you go? A The 7th of December.

Q Although this accident happened on the 5th of January you are telling us— A Whether

it was December or January—I know I went with my boss James R. Nugent, to Hot Springs, Arkansas every year.

Q You have had no difficulty whatsoever in telling us this accident happened in January and that you saw her the day after it happened? A It happened in December, didn't it?

Q Maybe you are right. When did you go to Hot Springs with Mr. Nugent? A I went to Hot Springs—I go with Mr. Nugent and Mr. Franz on the 7th of December, I am pretty sure.

Q How long did you stay there? A I came back—no, it was—well, I couldn't say—I came back about three weeks afterwards.

Q When did you come back? A I couldn't exactly tell you the date I came back, but I can get a record of Mr. Paul Nugent, and give it to you, if you wish it.

Q When did you see Mrs. Dulberger sweeping when you went down for the ashes, was it before or after? A It was before we went to Hot Springs.

Q Are you positive? A I am positive.

Q Why are you so sure? A Because the following day at 5 o'clock we was in, I think it was, St. Louis, Mr. Franz and Mr. Nugent and myself.

Q Did you go by automobile? A No, sir, by train.

Q Are you positive? A Yes, the next day; I am positive.

Q And the fact is that an accident which happened on the 5th of January, 1926, you know that the day after that accident happened this lady who was hurt was doing some sweeping, and the reason you know it is that it happened just before you went to Hot Springs? A Just

before I was getting ready to go away I went to the office and I know it was the next morning.

Q Although you also say that you went to Hot Springs on the 7th of December? A I can't exactly recall the date I went to Hot Springs, but I know I went to Hot Springs the next day after the accident.

Q You have told us here that you know without any doubt that you went to Hot Springs on the 7th of December with Mr. Nugent and Mr. Franz. Why did you tell us that? A Yes, because I had my clothes packed to go away.

Q You have told us that you know you went with Mr. Nugent and the other man on the 7th of December and I asked you why you told us that. A Because I didn't exactly know what day it was. I know it was the next morning after the accident that I went away—the morning of the accident that I went away.

Q What time did you leave Newark? When did you go? What time did your train go? A 5:50 from the Transfer.

Q 5:50 in the morning? A The evening.

Q When was it you were telling us about your being in St. Louis? A The next night.

Q I am asking you now if you know yet when you went to Hot Springs with Mr. Nugent? A I can't tell you—I can't remember exactly the date; all I know I went with him—right after the accident—the next day.

Re-direct examination by Mr. Gilhooly.

Q How did you know there was an accident? A Mr. Frimmer told me when I went to get some meat that the wall fell down.

Q Did you see the spot on the ceiling where the plaster had come from? A Yes, I seen the ceiling had fall on the washtubs.

Q What was the size of the piece that fell? A About fifteen or eighteen inches and about two feet long.

Q Did you have occasion to go into the Dulbergers' before the accident happened? A I go in there to buy cigarettes pretty near every day to the store, not to the house.

Q Did you see Mr. Dulberger there? A Yes.

Q Did he wait on the trade? A Yes.

Q Did Mrs. Dulberger wait on the trade? A Yes, sir.

Q What were your duties around the place? Did you have any? A I don't get you.

Q Are you related to Mr. Radli? A No.

Q You are not his cousin, are you? A No.

Q Were you engaged by Mr. Radli to do anything in connection with this apartment? A I staying like janitor for Mr. Radli.

Q Did you act as janitor in 1925? A Yes, sir.

Q During the year 1925 did Mr. Dulberger ever complain to you that water was leaking from the ceiling? A I don't know; I don't remember.

Q Did he ever speak to you and say to you that there was water coming down? A No, sir.

Q Did you ever have any repairs made at his plant? A Yes, in 1924 that ceiling in the bedroom was fall off.

Q And after 1924 did you have any repairs made to the plumbing—in 1925, rather? A I don't know.

Q After this accident did you ever see Mrs. Dulberger in the store? A After the accident?

Q Yes. A I don't see her for a long time.

Cross examination by Mr. Palmer.

Q You now live in Mr. Radli's house, don't you? A Yes, sir.

Q And you work for him? A I work for the janitor job.

Q Before you moved into his house you lived in the house next door to where the Dulbergers lived, didn't you? A Yes, I was living there next hall.

Q And at that time you used to collect the rent in this house, didn't you? A Yes.

Q And do you say that before this ceiling fell on January 5, 1926, that Mr. Dulberger did not quite frequently complain to you about the conditions that the ceiling was in and in both the bedroom and the kitchen? A 1924.

Q Yes. A I am not remember.

Q You don't remember? A No.

Q Don't you remember that after Mr. Dulberger had spoken to you about it that you said you would get Mr. Radli and that you did have Mr. Radli come to the house and look at the ceiling? A On the accident time?

Q Before the accident. A Every time I do that; if anybody got something wrong I get Mr. Radli right away and he bring the mechanic.

Q So that if a complaint was made to you about the conditions of those ceilings around there you would tell it to Mr. Radli, wouldn't you? A Yes.

Q Were you there in December of 1924 or early in January of 1925? Were you in the Dulberger apartment when the ceiling was fixed in the bedroom and the ceiling was fixed in the kitchen? A In 1924 I was; I seen men working on it.

Q Did you see it before the men worked on it? A Yes, I seen it when he was on the job.

Q That was a colored man, wasn't it? A Yes.

Q You saw the man while he was on the job? A Yes.

Q Was Mr. Radli there? A Not at that time I was there. He was after.

Q How many times did you see Mr. Radli in the Dulbergers' house? A In the room?

Q Yes. A Well, I don't meet him in the house. Sometimes I see him in the store. I don't see him in the rooms. I know I go to the store to buy cigars and cigarettes, sometimes, and when he get the rent he buy cigar from Mr. Dulberger.

Q Were you in the Dulbergers' rooms with Mr. Radli? A I was myself; I don't remember if I was with Mr. Radli.

Q So you know you were in there a few times in the Dulberger rooms? You were there, weren't you? A I was—I as in there one time in 1924 and the second time there was the accident when they call me to look over it.

Q Do you know Mr. Young, the plumber? A Yes, I know him.

Q Before this ceiling fell on January 5, 1926, Mr. Radli used to have another plumber do the work in that house, didn't he? A He had another plumber before Young started work. As soon as we got Young he always do the job for us.

Q In 1924 Mr. Radli had another plumber around the house, didn't he? A I don't remember that time. I remember the first time Mr. Radli bought the property he had another plumber.

Q And after that he got Young? A That was right after he bought the property, I think.

JOHN FEE, sworn in behalf of the defendant.

Direct examination by Mr. Gilhooly.

Q Mr. Fee, what was your business in January, 1926? A Carpenter and builder.

Q And you have been such for how long? A Thirty-five years.

Q Did you have occasion to do some work for Mr. Radli in the apartment occupied by the Dulbergers? A Yes, sir.

Q Was that after January 5, 1926? A Yes, sir.

Q Do you know when it was? A I am pretty sure—according to my book it was from March 12th to March 17th.

Q In what part of the Dulberger apartment were you working? A I was just off the store in a little room used as a kind of storage room, I suppose, and had previously been some kind of urinal or something similar to that.

Q Would you walk through the Dulberger kitchen to get outside? A Yes, sir; I had some stuff in the rear.

Q When you were in the premises did you see Mrs. Dulberger? A Yes, I did.

Q Was she in bed or up and around? A She was up and around when I was there.

Q Did you ever see her in the store? A I had seen her bring some tea out to Mr. Dulberger in the store.

Q Did you have any conversation with Mr. Dulberger? A Very little; just when I went in or out and would buy a cigar.

Q Did he ever say anything about business? A He said it wasn't very good there; he used to jest with me about it and so on.

Cross examination by Mr. Palmer.

Q As I understand it, you did some work around there between the 12th and the 17th of March, 1926? A Yes, sir.

Q That would be about nine weeks after the 5th of January, 1926, wouldn't it? A I suppose about that.

Q And at the time you were there you say that you remember once seeing Mrs. Dulberger come from the house part of the premises with a cup of tea to Mr. Dulberger in the store? A I don't think it was in a cup; I think it was a glass.

Q You have a clear recollection of that, haven't you? A Oh, yes.

Q Did you ever see her do anything else when you were there? A Occasionally she would peek in and see what I was doing there, and my man.

DEFENDANT RESTS.

AMELIA KOHN, recalled for the plaintiffs in rebuttal.

Direct examination by Mr. Palmer.

Q Mrs. Kohn, Mr. Radli has testified that the day after this accident happened when he was in the kitchen he saw your mother up in the kitchen dressed in a bathrobe. I ask you whether or not that is so. A It is not true.

Q How do you know that? A Because I came early in the morning the next morning and I stayed there and I helped my mother to this very day every day.

Q How long after the happening of this accident was it that you began to stay at your mother's store every day? A I came the same evening and from that day on to this.

Q In fact, the day after this accident happened, at any time that day was your mother up in the kitchen dressed in a bathrobe? A She was in bed about five or six weeks.

Q I am asking you whether on that day after the accident your mother was up in the kitchen dressed in a bathrobe? A No, not at all.

Q Mr. Young, the plumber, says when he got there the day after the accident he saw your mother in the kitchen, and I ask you whether or not he did. A No, that is not true.

Q Mrs. Kate Crump says that two or three weeks after the accident your mother was standing in the store, and she doesn't know whether she was waiting on people, but she was standing in the store. I ask you whether or not that is a fact to your knowledge.

Mr. Gilhooly: I object on the ground that that is not proper rebuttal.

Objection sustained.

Mr. Palmer: This girl testified only about the ceiling.

The Court: How does this girl know whether she was there or not unless she was there all the time?

Q What time of the day would you get to your mother's house in the morning? A About

eight or half-past eight, and I would stay until eleven in the evening, because my husband would come home twelve o'clock at night.

Q Were you at your mother's house that way all the time your mother was in bed? A Until this very day.

Q I ask you if two or three weeks after this accident Mrs. Crump saw your mother standing in the store. A Maybe she saw me, not my mother.

Q I ask you whether or not it is a fact, as Mrs. Crump testified, two or three weeks after the accident she saw your mother working in the kitchen. A No, sir.

Mr. Gilhooly: I object to that as not proper rebuttal.

Objection sustained.

Q Is it or is it not a fact that before the accident your mother always wore a towel around her head? A She sometimes wore a dustcap.

Q I am asking you whether it is a fact that before the accident your mother wore a towel around her head all the time? A No, not a towel; a dustcap.

Q Why? A Because pieces of plaster would fall down from the ceiling and all over the food and in her hair and all over the floor.

Cross examination by Mr. Gilhooly.

Q What time did you prepare your husband's breakfast? A He never ate breakfast.

Q Who prepared the dinner? A He would buy lunch.

Q Do I understand that you have been at your mother's continuously from the time of this accident from eight or half-past eight in the morning to eleven at night every day? A Yes, sir.

Q Do I understand your husband has bought his own meals during at that period? A No, sir. I would sometimes cook it at my mother's and by the time I got it home he would have something to eat.

Q At what time? A After eleven when I started out.

Q And then your husband would have supper when he came home at eleven-thirty? A Yes, or twelve o'clock.

Q And he had no meals at your home except that one meal he would have occasionally with you at midnight? A Yes.

Q What time did your husband go to work in the morning? A About half-past seven or a quarter to eight.

Q He would work from half-past seven to eleven o'clock, too? A Yes, sir.

Q You are positive you never saw you mother wear a towel around her head? A Yes, sir.

Q You are positive she never complained of headaches? A No, sir; she was a strong woman.

Q She didn't wear the towel because of headaches? A No; dust was falling in her hair.

Q And that was in the year 1925 before the accident happened? A I can't say exactly.

Q It happened during the year 1925 that dust was falling in her hair? A Yes.

Q How long before 1925 did she wear this dustcap to keep dust from falling in her hair? A Not so very often.

Q Only occasionally? A When she did cleaning around the house.

Q And not for keeping plaster from falling in her hair? A Certainly.

Q For both purposes? A Yes.

Q How often did you see her during 1925? A About once a week or once in two weeks.

Q So, she could have worn a towel around her head when you weren't there? A She didn't.

Q How did you know? A She would tell me.

Q She would tell you, too, if she had a headache when you weren't there? A Certainly.

Q Are you the lady who charged $10 a week? A Yes, sir.

Q Working from eight-thirty to eleven? A Yes.

Q And the reason you charged so little was that it was your mother; is that right? A Yes, sir.

Q Before you got married did you work around the house? A I was working when I came home; I used to help her.

Q You didn't charge her for working around the house before the accident? A I used to support them.

Q You didn't make any charges for the housework before getting married? A I don't understand.

Q Did you charge your parents for your services in working around the house before you got married? A Didn't I give them my pay?

Q No. Did you make them pay you for working around the house before you got married? A Of course not.

Q You did it as a matter of filial devotion? A For duty as a daughter.

Q But after the accident you felt it was no longer necessary to carry out the devotion to your parents? A That wasn't the question; I could have earned $30 or $40 a week working outside.

Q But you were married at the time, weren't you? A It makes no difference.

Q And I understand, you gave up a $40-a-week job to get $10 a week? A For my parents.

Q You got no practical nurse, did you? A No; I used to help them in the store and in the house and cooking.

Q Did you ever do any nursing before you got married? A No; my mother was a healthy woman.

Q You didn't do any nursing outside? A No; I wasn't a nurse.

Q And you had no trained or practical nurse for your mother after the accident, did you? A No.

Re-direct examination by Mr. Palmer.

Q While you were home and before you were married, where did you work? A At the Hilton Company.

Q When you say you used to help your mother, do you mean after you got home evenings? A Yes, after I got home, in the house.

Q Of course, you would make no charge for that? A Of course not; I was her daughter.

Q After you were married, Mr. Kohn and you got your own home somewhere? A Yes, sir.

Q Did you still continue to work after you were married? A Yes, sir, at the Hilton Company.

Q How much did they pay you? A I was getting, I think, $35.50 or $37.50.

Q And was it work of that kind that you gave up doing to go to your mother's and take care of her? Is that right? A Yes, I was—yes, I had to quit on account of that; that's right.

Q And you only made your father a charge of $10 a week for what you did up at the house? A Yes, sir.

MANDLE DULBERGER, sworn in behalf of the plaintiffs in rebuttal.

Direct examination by Mr. Palmer.

Q Whom were you working for in the early part of January, 1926? A I was working in the Newark Post Office.

Q As what? A As special delivery messenger.

Q You are a son of Mr. and Mrs. Dulberger, aren't you? A Yes, sir.

Q As a result of your mother being hurt what did you do with regard to your job at the post office?

Mr. Gilhooly: I object to that as not proper rebuttal.

Objection sustained.

Mr. Palmer: It is to prove why he was home.

The Court: That is going around the back way.

Q Under what circumstances did you stop working at the post office?

Objected to on the same ground.

Objection sustained.

Q How long did you continue to work at the post office?

Objected to on the same ground.

Objection sustained.

Q Were you home and did you stay home after the happening of this accident?

Objected to.

Objection overruled.

A About two weeks after the accident I resigned.

By the Court.

Q That isn't the question. Were you home and did you stay home after the accident? A No, sir; I went to school during the day.

By Mr. Palmer.

Q When you stopped at the post office and began to stay home, did you stay at home all through the day or did you go to school?

Mr. Gilhooly: I object to that on the same grounds.

Objection sustained.

Cross examination waived.

PLAINTIFFS REST.

Mr. Gilhooly: I move for the direction of a verdict on the same grounds as those urged on the motion for a non-suit.

The Court: I will deny it on the same grounds.

Mr. Gilhooly: There is one additional ground, and that is, even though there is testimony in the case coming from the plaintiffs that water

appeared upon the ceiling in the kitchen before this accident, and, therefore, there may be some grounds for compelling the defendant to explain that the water did not come from the water supply, and in view of the fact that the defendant has by his testimony and the testimony of witnesses produced by him shown clearly that the water did not come from the water pipes in his control, we have met any presumption which may have been raised in the plaintiffs' proof, and, therefore, the doctrine applies that the landlord is not liable for the maintenance of a nuisance.

The Court: I understand, but it seems to me there is some testimony in the case that the water came from the service pipes. The jury will recall the testimony. If there is any such testimony it raises a question of fact.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Mr. Gilhooly sums up for the defendant.

Mr. Palmer sums up for the plaintiffs.

Adjourned to Friday, January 13, 1928, at ten o'clock A. M.

FOURTH DAY.

Friday, January 13, 1928.

Continued pursuant to adjournment.

Present, counsel as before stated.

CHARGE OF THE COURT.

The Court charges the jury as follows:

SMITH, *J.*

Members of the Jury: This is an action brought by husband and wife, the husband being the tenant of an apartment in the house at 54 Waverly avenue, this city. It is brought against the owner of that house to recover damages for injuries which the wife sustained and the loss which the husband claims to have sustained through that injury, by reason of a part of the ceiling in the kitchen of the apartment falling on the wife while she was working over the tubs on the evening of January 5, 1926.

It is claimed that this piece of plaster fell through the negligence of the defendant and damages are asked at your hands. The plaintiffs claim that the service water pipe ran through the kitchen, and which, they claim, ran between the ceiling and the floor above, caused this ceiling to fall. They also claim that a previous condition of the ceiling had been repaired and that that repair was negligently made, and that the landlord had knowledge of these facts; that is, of the leaking and the bad condition of the ceiling.

The defendant, on the other hand, claims no obligation to repair the ceiling; that the repairs he did make were properly made; that the second

falling of this ceiling was not due to any negligence on the part of the landlord in the repair and was not due to any leaking in the water pipe; that he had no knowledge of any condition which would require him to repair, and that he was not put upon any notice to repair such defect.

These are disputed questions of fact, and it is for you to determine the true facts in the case. You are jurors in the case and you are required to find the true facts. You must rely on your own recollection of the testimony as you have heard it on the witness stand and not as I may recite it to you. As I say, the obligation is on you to determine the facts in the case; my duty is to charge you the rules of law which should govern you in your determination of the case.

The burden of proof is upon the plaintiffs. They must establish their case by a fair preponderance of the evidence; that is, it must weigh in their favor; and if they fail in this they are not entitled to your verdict.

The landlord in this case is not obligated to repair ceilings in an apartment; that is not part of his duty. He leases the apartment to the plaintiff here and then he is through insofar as that ceiling is concerned and insofar as his obligation to maintain it and keep it in repair is concerned. He has, however, a duty with regard to parts of the building which he retains control of, and in this case he has expressly retained the right to enter this apartment to maintain water pipes; and he is obligated to maintain the service water pipe which carries the water to this and other apartments, because that is not covered by the tenant's lease and is one of the things that the landlord reserves to himself, and, therefore, one that he is under a duty with reference to. He must not, therefore, permit a nuisance from such water pipe, and must not be guilty of negligence in reference thereto which would be a proximate cause of the plaintiffs' loss in this case.

The duty of the landlord is this: He must exercise reasonable care to repair or remedy any dangerous condition, if known to him, and that within a reasonable time after knowledge of it. I say this as applied to the water pipe. He is also charged with the duty to make reasonable inspection to ascertain its condition. He is liable as negligent for failure to remedy a dangerous condition that a reasonable inspection would show. He, however, is not obliged, as I said, to repair, but he is under a duty if he does repair, not to be negligent in that repair. In other words, it is a different duty where he actually makes the repair than when he doesn't make it.

I might quote to you Chancellor Kent's opinion which is referred to in a New Jersey case. He says: "By the common law a mandatary or one who undertakes to do an act for another without reward, is not answerable for omitting to do the act, and is only responsible when he attempts to do it, and does it amiss. In other words, he is responsible for a malfeasance, but not for a nonfeasance."

He was not under obligation to repair, but if he did repair and was negligent, and that negligence was the proximate cause of the plaintiff's injury, then, of course, he would be liable. He is not liable for simply permitting a leak to be there and continue in the water pipes. But he must be negligent in reference to that at that time.

As I say, negligence is the keynote of the right to recover in this case; and negligence is the failure to observe for the protection of another that degree of care, precaution and vigilance which the circumstances justly demand, namely, reasonable care. Where, by reason of such failure, such other person suffers injury or damage, negligence must be the natural and proximate cause of the injury or damage.

Reasonable care is such care as a reasonable person exercises in view of all the circumstances presented to him; such care as an ordinarily prudent person woud exercise under the conditions at the time he is called upon to act.

Proximate cause is that cause which naturally and probably led to, and which might have been expected to produce the result, namely, the efficient cause; the one which necessarily sets the other causes in operation.

Proximate cause in this case is important because we know the ceiling fell; I don't think that is disputed, but it must be proximately caused by some act or failure to act on the part of the landlord which was negligent; and in passing on the question of negligence you should consider the proposition of reasonable cause; that is, did he have reasonable cause to believe that there was a leak there, or that it would produce the result which it is said it did produce. Therefore, I say, it is important to consider the question of the proximate cause of this particular falling.

The defendant here charges the plaintiffs with contributory negligence; that is, that by their own negligence they exposed themselves to this injury and loss. To preclude the plaintiffs from maintaining their action, the plaintiff wife's conduct must have been negligent, and her negligence must have contributed to the accident in such a way that if she had not been negligent she must have received no injury from the negligence of the defendant. Ordinary care is required which a prudent person would take under the existing circumstances.

And you see, gentlemen, that the mere cooking or working under cracks in the ceiling would not necessarily be negligence. Ordinary care would not require that she abstain from this. I think we have cracks in this ceiling above us and we do not feel that it is dangerous. There must be some dangerous condition brought home to her which, if she were an ordinarily prudent person, would prevent her or stop her from taking a risk in working under a ceiling which she had notice was apt to fall or was dangerous.

Now, gentlemen, as I have said before, you are the judges of the facts, and that means you are the judges of the credibility of the witnesses in this case. You determine the weight that you are going to give their testimony, and in that you are entitled to consider the interest of the witnesses in the outcome of this case. In this case they produce the husband and wife, and the only other witnesses to the conditions as they existed are the daughter, who testifies to the thickness of the plaster as being three or four inches; another witness testifies that it was three-eighths of an inch thick. As I say, you pass on the credibility of the witnesses.

On the defendant's behalf there are witnesses who have some connection with the defendant in business or otherwise. There is also called a witness by the name of Young, who is a plumber. He gave evidence that there was no sign of water

where this plaster fell; that it was dry; and that there was no evidence that he could ascertain that water had been there or caused the ceiling to fall.

We know that ceilings do not fall solely from water; that there are other causes which ceilings would fall from. A common cause is the big motor trucks that go by and shake houses. If it came down from some other cause and not from this water, then, of course, the plaintiffs cannot recover in this case because they must show negligence on the part of the landlord, and maintaining the ceiling is not a duty of the landlord in this particular case, that is, maintaining it from damage due to some cause other than as I have said.

After you consider this case, if you come to the conclusion that the defendant was not negligent, your verdict will be in his favor; if you come to the conclusion that he was, and that that negligence was the proximate cause of the plaintiff's injury, but that the plaintiff herself was guilty of contributory negligence, then your verdict will still be for the defendant; but if you come to the conclusion that the plaintiffs are not chargeable with contributory negligence, and that the defendant was guilty of negligence, and that that negligence was the proximate cause of the plaintiff's injury, then your verdict will be in favor of the plaintiffs.

If you come to that conclusion you will then, and not until then, take up and consider the question of what damages you will award the plaintiffs. You will not take up the question of damages until you have decided the question of liability.

If you decide in favor of the plaintiffs you should render two verdicts: One for the husband and one for the wife.

The wife, if entitled to your verdict, would be entitled to compensation in money damages, insofar as money can compensate, for the bodily injuries she sustained; the pain and suffering she underwent; and for the effect upon her health according to its degree and probable duration. She was struck on the head and back by this plaster. She had some lacerations on the side of her head, as I recall it; she was in bed for some weeks and claims to have been rendered nervous by this injury.

The husband, if entitled to your verdict, would be entitled to compensation for the expenses incident to the cure and treatment of his wife both in the past and future, also for the expenses in hiring help to do work that his wife had done. It is testified that they are indebted to Doctor Bengelsdorf for some $72.00, and have paid part of it; and that they are indebted to Doctor Levin for $75.00. I do not understand why two doctors are treating the same patient at the same time, and evidently independently, and neither of them is a nerve specialist. The husband is not entitled to recover expenses for doctors' bills unless they are reasonable.

The plaintiffs have asked me to charge a request with regard to the husband's right to compensation, which is the eighth request and which I will charge you: "If you conclude the plaintiffs are entitled to your verdict, then in assessing the amount of damages which would compensate the husband, it is proper for you to consider the loss of the society and the services

of his wife during the period of her disability and sickness; also all sums of money he may have expended in the proper care and attendance upon her during her sickness, and the Court instructs the jury in this connection that a wife's services to her husband are not to be valued as the services of a mere hireling. The frugality, industry, usefulness, attention and tender solicitude of a wife make her services greater than those of an ordinary servant, and therefore worth more, and these elements should be considered by you, so far as the evidence discloses them, in making a money estimate of the value of her services.''

I have been requested by the plaintiffs to charge some other requests, all of which I will deny except as I may have covered them in my charge.

The defendant has asked me to charge certain requests. The first I have charged; the second I will deny.

The third I will charge: ''Included in the demise to the tenant was the ceiling and under the terms of the lease in this case the landlord was under no duty to repair the ceiling.''

The fourth I will charge: ''If you are satisfied by the evidence that the defendant had no notice that the ceiling was in a defective condition, then, and in such event your verdict shall be for the defendant.''

The fifth I have covered.

The sixth I will charge: ''If you find that the ceiling became in a defective condition from a cause not within the control of the defendant then and in such event the plaintiffs cannot recover.''

The seventh I have covered.

Plaintiffs' counsel prays an exception to that portion of the Court's charge wherein the Court stated that if the ceiling had come down from some other cause than water the plaintiffs cannot recover. Exception requested on the ground that this overlooks the fact that it might have fallen due to the negligent manner in which the defendant had had the ceiling repaired in December, 1924, and January, 1925.

Exception noted as ground of appeal.

Plaintiffs' counsel prays an exception to that portion of the Court's charge wherein the Court stated that the plaintiffs' claim was based on leaking service pipes.

Exception noted as ground of appeal.

Plaintiffs' counsel prays an exception to the Court's charging the defendant's fourth and sixth requests to charge.

Exception noted as ground of appeal.

Plaintiffs' counsel prays an exception to the Court's refusal to charge the plaintiffs' first, second, third, fourth, fifth, sixth and seventh requests to charge.

Exception noted as ground of appeal.

Defendant's counsel prays an exception to that portion of the Court's charge wherein the Court stated that if the defendant did repair and repaired in a negligent manner, and that was the proximate cause of the plaintiff's injury, then the defendant is liable. Exception requested on the ground that the landlord was under no duty to repair the ceiling.

Exception noted as ground of appeal.

Defendant's counsel prays an exception to the Court's refusal to charge the defendant's second request to charge.

Exception noted as ground of appeal.

PLAINTIFFS' REQUESTS TO CHARGE.

1. In the absence of any provision in a lease, the burden of making repairs is ordinarily on the tenant, but by the terms of a written lease between Mr. Dulberger and a Jacob Gelber, who owned the property when the lease was entered into, April 27, 1922, and which lease the defendant admits was assigned to him when he bought the property from Gelber, it is provided that in this particular case the landlord shall be permitted to enter the premises to examine and repair the water pipes if any may be broken, and then continues to recite that the landlord shall not be bounden to make any other repairs unless elsewhere in the lease agreed. I therefore charge you that in this particular case the duty of making repairs to the water pipes was expressly placed upon the landlord by the terms of the lease originally entered into by Gelber and subsequently assigned to Radli.

2. If you believe from the evidence that the ceiling in this kitchen got into a dangerous and unsafe condition on account of the failure of the landlord to reasonably examine and carefully repair any broken water pipes, after he was charged with knowledge that pipes were leaking and the ceiling becoming damp and cracked, and so much so that water was leaking through the ceiling, and that finally a portion of the ceiling fell as a direct and proximate result of the landlord's failure to make such examination and repairs, I charge you that this would be negligence on the defendant's part.

3. Independent of whether or not the lease cast any duty upon the landlord to make repairs

of broken water pipes, it is claimed by the plaintiffs in this case that the defendant did undertake to repair the ceiling of the front room and repair this kitchen ceiling, by bringing two colored plasterers to the house in January, 1925, and instructing those men to fix the ceilings of the two rooms, from which it is claimed a piece of plaster had fallen from the kitchen ceiling in December, 1924, and the plaintiffs claim that at the time the defendant came with these plasterers there were large cracks in the kitchen ceiling which extended from one side of the room to the other, but that the plasterers only put in a patch in the kitchen which filled in the hole made by the plaster which had previously fallen, and that the ceiling was not repaired otherwise, and that these large cracks remained when the plasterers had completed their work, and that the next day the plaintiffs showed these cracks to the defendant and expressed a fear as to the safety of the ceiling, and were assured by the defendant that it was all right and the room safe to use, and on this point I charge you that whether or not the lease imposed a duty on the defendant of repairing this kitchen ceiling, if you believe the story of the plaintiffs it is clear that the landlord assumed and undertook the duty to repair it, and if this is so, I charge you that he was bound to perform it in a reasonably careful manner, and if the ceiling fell in January of 1926, as a result of the landlord's failure to use reasonable and proper care in repairing this ceiling, it would be negligence on his part, the law being that one who undertakes to perform an act and performs it negligently is liable for such negligence if damage to another proximately results therefrom.

4. In determining whether or not there was any negligence on the defendant's part in the repairing of this ceiling a definition of negligence may be of assistance to you, and I therefore charge you that it is the failure to do what a reasonably prudent person would ordinarily have done under the circumstances of the situation, or the doing of what such a person under the existing circumstances would not have done.

5. Not all negligence on the part of a person injured is contributory negligence. Where the defense of contributory negligence is set up, as it is in this case, three things have to concur: (1) the defendant must prove Mrs. Dulberger was negligent; (2) he must prove that that negligence contributed to the injuries in such a way that if she had not been negligent she would have received no injuries at the hands of the defendant; and (3) these things must be proved by the defendant by the greater weight of the evidence. Therefore, unless you find these three elements in this case, I charge you the defense of contributory negligence cannot be sustained. *N. J. Express Co.* v. *Nichols,* (E. & A.) 33 N. J. L. 434; *James* v. *D. L. & W.,* (E. & A.) 104 Atl. 333; *Donns* v. *P. S. Ry. Co.,* (E. & A.) 133 Atl. 196.

6. On this question of any contributory negligence on the part of the plaintiffs, you also have a right to consider (if you believe it to be a fact) that they were assured by the landlord, whenever they inquired of him as to the safety of this ceiling, that it had been properly repaired and the room was safe for them to use, in addition to which I charge you that they had a right to assume that the defendant would perform the duty which he owed to them, that is, that he

would use reasonable and proper care to have this ceiling in a condition where it was safe for them to use the kitchen, in the absence of some warning to the contrary, and you are instructed that if while in the exercise of reasonable care for her own safety Mrs. Dulberger was injured by the defendant's failure to perform this duty, the plaintiffs are entitled to your verdict.

7. If you believe that previous to the happening of this accident Mrs. Dulberger had some latent disease or weakness, but suffered no pain, nervousness or discomfort from it, and that as a result of her injuries in this accident she does suffer pain, nervousness and discomfort, I then charge you that the injuries are the proximate cause of her present condition and not the latent disease or weakness, and if you feel she is entitled to your verdict she should be permitted to recover for all the damages shown to have proximately resulted from this accident. *Hahn* v. *D. L. & W.,* (E. & A.) 105 Atl. 459.

8. If you conclude the plaintiffs are entitled to your verdict, then in assessing the amount of damages which would compensate the husband, it is proper for you to consider the loss of the society and the services of his wife during the period of her disability and sickness; also all sums of money he may have expended in the proper care and attendance upon her during her sickness, and the Court instructs the jury in this connection that a wife's services to her husband are not to be valued as the services of a mere hireling. The frugality, industry, usefulness, attention and tender solicitude of a wife make her services greater than those of an ordinary servant, and therefore worth more, and these elements

should be considered by you, so far as the evidence discloses them, in making a money estimate of the value of her services.

DEFENDANT'S REQUESTS TO CHARGE.

1. The burden of proving negligence is upon the plaintiffs and before the plaintiffs can recover they must satisfy you by a preponderance of the evidence that the defendant was negligent.

2. If you find that the defendant exercised reasonable care in keeping that portion of the apartment house which he retained in his own control in good repair then there can be no recovery against him.

3. Included in the demise to the tenant was the ceiling and under the terms of the lease in this case the landlord was under no duty to repair the ceiling.

4. If you are satisfied by the evidence that the defendant had no notice that the ceiling was in a defective condition, then and in such event your verdict shall be for the defendant.

5. If you find that the ceiling in the premises demised to Abram Dulberger was in a defective condition and a part thereof was in danger of falling and that it was apparent to Sprintze Dulberger that the ceiling was in such a state of disrepair that the same or part thereof was liable to fall and that this condition was observed by the said Sprintze Dulberger and the condition existed for such a length of time that the said Sprintze Dulberger could have removed herself from said premises, then and in such event, the plaintiff,

Sprintze Dulberger is guilty of contributory negligence and she cannot recover against the defendant.

6. If you find that the ceiling became in a defective condition from a cause not within the control of the defendant then and in such event the plaintiffs can not recover.

7. When, in any action brought for damages, it appears from the evidence that the plaintiff has been guilty of great imprudence, which was, to say the least, one of the proximate causes of the evil which befell her, the law does not afford any compensation for the damages which have resulted. In such cases the question of the existence of negligence in the conduct of the defendant becomes wholly immaterial.

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

New Jersey Court of Errors and Appeals

SPRINTZE DULBERGER and ABRAM DULBERGER, *Plaintiffs-Appellants,* *vs.* IGNATZ RADLI, *Defendant-Respondent.*	*Action at Law.* *On Appeal from Supreme Court, Essex Circuit.*

BRIEF OF PLAINTIFFS-APPELLANTS.

Statement of Facts.

The plaintiffs on April 27, 1922, entered into possession of a store and living quarters at 54 Waverly avenue, in the City of Newark, under a written lease of that date with one Jacob Gelber, who then owned the property, and who thereafter, in July of that year, sold the same to Ignatz Radli, the defendant in this case, and assigned to Radli the plaintiffs' lease, which lease contained the following provision:

> "And will permit the said party of the first part [the landlord] or his agent, to enter the said premises at reasonable hours in the daytime to examine and repair the water pipes (only) if any may be broken; the party of the first part not being bounden to make any other repairs unless it be elsewhere in this lease expressly so agreed."

The Dulbergers continued to occupy the premises for three or four years, and, according to the evidence, there was a frequent leakage from water pipes in the region of the ceiling of their apartment, so much so that they would at times have to put pails and pans around the kitchen floor in order to catch the water as it came

through the kitchen ceiling. For quite a period of time that ceiling was cracked in a great many places and was stained a dark color through having been watersoaked so often. Similar conditions prevailed in the front room. The landlord (Mr. Radli) was frequently told about this, but he did nothing about it, and towards the end of 1924 half the ceiling of the front room fell. The latter part of December, 1924, a big piece of plaster fell from the kitchen ceiling. The landlord was sent for and promised to make repairs, and in a day or two came with some colored men and told them to fix the ceilings in both rooms. These colored plasterers took down the whole ceiling in the front room and put in an entirely new one, but in the kitchen they only put in a patch to cover the place where the plaster had fallen from, and did nothing whatever about the numerous large cracks which had existed for a long time in the kitchen, so that when the plasterers had finished in the latter room there was a patch near the middle of the ceiling from which on each side many large cracks radiated. Water did not leak through for quite a few months thereafter, but towards the end of 1925 the leakage started again, and the landlord was sent for. He stood on a chair and with the handle of a broom tapped around the ceiling of the kitchen and assured the plaintiffs that everything was all right, and that he would fix the water pipes. He failed to have this done and on January 5, 1926, while Mrs. Dulberger was preparing supper for her family, a large piece of plaster fell from the kitchen ceiling and struck her on the head and severely injured her, nervously and physically. The premises in question are part of a tenement house, accommodating six families, and it was in evidence that the water pipes for

the side of the house the plaintiffs lived on ran through their kitchen up into the upper stories of the house, and most of the leaks which developed in the kitchen ceiling were referred to as being over the washtubs, which are in the same corner of the kitchen as where the water pipes are located in the various apartments.

The case was tried at the Essex Circuit of the Supreme Court on January 11, 1928, and resulted in a verdict in favor of the defendant.

I.

THE TRIAL COURT ERRED IN CHARGING THE JURY:

"We know that ceilings do not fall solely from water; that there are other causes which ceilings would fall from. A common cause is the big motor trucks that go by and shake houses. If it came down from some other cause and not from this water, then, of course, the plaintiffs cannot recover in this case because they must show negligence on the part of the landlord, and maintaining the ceiling is not a duty of the landlord in this particular case; that is, maintaining it from damage due to some cause other than as I have said."

In order to make clear the plaintiffs' objection to the foregoing part of the charge, I should point out to the Court that the defendant introduced as a witness one James C. Young, who is a plumber, and who testified that on the day after this ceiling fell on Mrs. Dulberger he went to the premises and found the water pipes to be all right; that he examined the ceiling and took a piece of the ceiling off and found the lath to be dry, as well as the floor beams. In referring

to the evidence, in the course of his charge, the Trial Court said, immediately before charging as above:

> "There is also called a witness by the name of Young, who is a plumber. He gave evidence that there was no sign of water where this plaster fell; that it was dry, and that there was no evidence that he could ascertain that water had been there or caused the ceiling to fall."

The plaintiffs claim that in charging the jury as contained in the first ground of appeal, the Trial Court not only failed to properly state the law, but did in effect remove from the consideration of the jury one-half of the plaintiffs' case. A reference to the complaint, found on page 8 of the state of the case, clearly shows that this action was brought against the defendant on the ground that the landlord had undertaken and had made certain repairs to the kitchen ceiling but that the work was negligently and carelessly done, and that in addition thereto the defendant negligently and carelessly neglected and failed to mend or repair the leaks and breaks which for a long time existed in the water pipes directly over the ceiling which fell on Mrs. Dulberger on January 5, 1926. I would like to repeat that the complaint was based (1) not only on his failure to mend or repair the leaks which for a long time existed in these water pipes, but (2) also on the manner in which the landlord had made the repairs which he did make. The entire case was tried on that theory by the plaintiffs, also. It will, therefore, be seen that when the Trial Court informs the jury that:

> "We know that ceilings do not fall solely from water; that there are other causes which ceilings would fall from. A common cause is the big motor trucks that go by and shake houses. If it came down from some other cause and not from this water, then, of course, the plaintiffs cannot recover in this case because they must show negligence on the part of the landlord, and maintaining the ceiling is not a duty of the landlord in this particular case; that is, maintaining it from damage due to some cause other than as I have said,"

that he is completely taking away from their consideration the fact that one of the grounds on which this landlord can be held liable is for the negligent manner in which he had previously repaired the kitchen ceiling, and in effect informs the jury that unless the plaintiffs proved that the ceiling came down as a result of being wet that "then, of course, the plaintiffs cannot recover in this case."

There was no claim made by the plaintiffs that this ceiling was soaking wet the day it fell, and therefore the fact that the defendant's plumber found it to be dry the day after the accident is of no moment, because the facts are, that if this ceiling fell on January 5, 1926, as a result of the negligent manner in which the landlord had had that ceiling repaired a year previously, the plaintiffs would be entitled to a verdict if water had never been an element in the case. When it came time to charge the jury, however, the Court informs them along the following lines, although not in these exact words:

> "The defendant introduced a plumber who says that there were no signs of water at all where this plaster fell, and that he could not ascertain that water had been there or caused the ceiling to fall, and I charge you that if it came down from some other cause and not from water, then, of course, the plaintiffs cannot recover in this case."

It is respectfully submitted that this charge absolutely withdrew from the consideration of

the jury one-half of the plaintiffs' case, and left it solely for the jury to say whether or not the ceiling was wet at the time it fell, and informed them if it was not wet that then the plaintiffs cannot recover.

Not one iota of proof had been introduced throughout the case that this ceiling had been caused to fall by any motor trucks, but the Court told the jury, although as we have said, the case is absolutely devoid of any evidence of motor trucks or anything else jarring this ceiling, that a common cause of falling ceilings is passing motor trucks. Now, as a matter of fact, if in December of 1924, Mr. Radli so negligently and carelessly put a patch in this ceiling that passing motor trucks would jar it down and permit it to fall on Mrs. Dulberger's head, we claim that that of itself presents a jury question, but the Court did not leave *this* to the jury and expressly told them, in effect, that if it fell because motor trucks shook it down that then the defendant is not liable, and that unless we prove that it came down from water, and unless we disprove that it came down from some cause other than water, *"then, of course, the plaintiffs cannot recover in this case."*

It is respectfully submitted that the above portion of the charge entirely overlooked paragraph seven of the complaint and at least fifty per cent. of the proof at the trial. It more than overlooked it, for it instructed the jury to *disregard* it.

It is a well-known fact that landlords at times voluntarily assume to make repairs. If they make them negligently, and someone is injured by a falling ceiling negligently repaired, the injured person can recover upon showing that the re-

pairs actually were negligently made. This is exactly one of those cases, in addition to which the proof showed that from time to time, both before and after the repairs were made, the ceiling became water soaked on account of some leaking pipes. The fact that it did, however, at times become water soaked is no ground for withdrawing from the jury's consideration the fact that the repairs might have been negligently and carelessly made, but in this case, the Trial Court did that, and informed the jury that unless we had satisfied them that the ceiling fell because it was water soaked (and that in this connection a witness for the defendant had said it was not water soaked, but perfectly dry) that then the plaintiffs cannot recover, and it is respectfully submitted that this element of the charge is very prejudicial indeed to the plaintiffs.

II.

THE COURT ERRED IN CHARGING THE JURY:

"If you are satisfied by the evidence that the defendant had no notice that the ceiling was in a defective condition, then, and in such event, your verdict shall be for the defendant."

It is claimed by the plaintiffs that this statement of the law does not cover the situation as it existed between these parties and as the evidence showed it to be, because it entirely disregards that provision of the lease which gave to the landlord the right to "enter the said premises at reasonable hours in the daytime to examine and repair the water pipes (only) if any may be broken; the party of the first part not being bounden to make any other repairs un-

less it be elsewhere in this lease expressly so agreed.''

To charge the jury that unless the defendant had notice that the ceiling was in a defective condition that then, and in such event, their verdict should be for the defendant overlooks entirely the duty which was assumed by the landlord upon the assignment to him of this lease from Gelber to make an examination of these water pipes to ascertain their condition. He was under the burden of examining and repairing, and his examinations would have to be reasonably careful and reasonably frequent. The water pipes, under this portion of the charge, could have been in a defective condition for a very long period of time, as a matter of fact, due to the defendant's failure to make proper inspection and proper repairs, but the jury were instructed that unless they were satisfied that the defendant *had notice* of the defective condition, that then the plaintiffs could not recover.

IV.

THE COURT ERRED IN FAILING TO CHARGE PLAINTIFFS' FIRST REQUEST TO CHARGE AS FOLLOWS:

''In the absence of any provision in a lease, the burden of making repairs is ordinarily on the tenant, but by the terms of a written lease between Mr. Dulberger and a Jacob Gelber, who owned the property when the lease was entered into, April 27, 1922, and which lease the defendant admits was assigned to him when he bought the property from Gelber, it is provided that in this particular case the landlord shall be permitted to enter the premises to examine and repair the water pipes if any may be broken, and then continues to recite that the landlord shall not be bounden to make any other repairs unless elsewhere in the lease agreed. I therefore charge you that in this particular case the duty of making repairs to the water pipes was expressly placed upon the landlord by the terms of the lease originally entered into by Gelber and subsequently assigned to Radli.''

We respectfully submit that the above is a correct exposition of the law concerning a case of this kind, and should have been charged by the Trial Court. It was the landlord's duty to inspect and repair water pipes in the apartment of the plaintiffs, and that this duty was expressly placed upon him by the terms of the lease was a fact which the jury should have known.

V.

IT WAS ERROR TO FAIL TO CHARGE THE PLAINTIFFS' SECOND REQUEST TO CHARGE AS FOLLOWS:

''If you believe from the evidence that the ceiling in this kitchen got into a dangerous and unsafe condition on account of the failure of the landlord to reasonably examine and carefully repair any broken water pipes, after he was charged with knowledge that pipes were leaking and the ceiling becoming damp and cracked, and so much so that water was leaking through the ceiling, and that finally a portion of the ceiling fell as a direct and proximate result of the landlord's failure to make such examination and repairs, I charge you that this would be negligence on the defendant's part.''

This request to charge informed the jury of the duty of the landlord to make reasonable examination and careful repairs to any such pipes as might have been broken. This the Court refused to charge, and in contra-distinction to it did charge that unless the plaintiffs showed that the defendant had notice that the ceiling was in a defective condition, that then the verdict should be for the defendant.

VI.

IT WAS ERROR TO REFUSE TO CHARGE THE PLAINTIFFS' THIRD REQUEST TO CHARGE AS FOLLOWS:

"Independent of whether or not the lease cast any duty upon the landlord to make repairs of broken water pipes, it is claimed by the plaintiffs in this case that the defendant did undertake to repair the ceiling of the front room and repair this kitchen ceiling, by bringing two colored plasterers to the house in January, 1925, and instructing those men to fix the ceilings of the two rooms, from which it is claimed a piece of plaster had fallen from the kitchen ceiling in December, 1924, and the plaintiffs claim that at the time the defendant came with these plasterers there were large cracks in the kitchen ceiling which extended from one side of the room to the other, but that the plasterers only put in a patch in the kitchen which filled in the hole made by the plaster which had previously fallen, and that the ceiling was not repaired otherwise, and that these large cracks remained when the plasterers had completed their work, and that the next day the plaintiffs showed these cracks to the defendant and expressed a fear as to the safety of the ceiling, and were assured by the defendant that it was all right and the room safe to use, and on

this point I charge you that whether or not the lease imposed a duty on the defendant of repairing this kitchen ceiling, if you believe the story of the plaintiffs, it is clear that the landlord assumed and undertook the duty to repair it, and if this is so I charge you that he was bound to perform it in a reasonably careful manner, and if the ceiling fell in January, 1926, as a result of the landlord's failure to use reasonable and proper care in repairing this ceiling, it would be negligence on his part, the law being that one who undertakes to perform an act and performs it negligently is liable for such negligence if damage to another proximately results therefrom."

It is respectfully submitted that this was a proper request to charge, because it informed the jury of the contention of the plaintiffs and furthermore instructed them that whether or not the lease imposed a duty on the defendant of repairing the ceiling, that if the jury believed the plaintiffs it was clear that the landlord had assumed and undertook the duty of repairing it, and that if he did this he was bound to do it in a reasonably careful manner, and that if the ceiling finally fell as a result of the landlord's negligence and carelessness in making those repairs that this would be negligence on his part. Instead of charging anything like this, the Trial Court charged as stated and set out in the first ground of appeal, and expressly instructed the jury that if the ceiling fell from anything else than being water soaked, that then the plaintiffs could not recover.

VIII.

IT WAS ERROR TO FAIL TO CHARGE PLAINTIFFS' FIFTH REQUEST TO CHARGE AS FOLLOWS:

"Not all negligence on the part of a person injured is contributory negligence. Where the defense of contributory negligence is set up, as it is in this case, three things have to concur: (1) The defendant must prove Mrs. Dulberger was negligent; (2) He must prove that that negligence contributed to the injuries in such a way that if she had not been negligent she would have received no injuries at the hands of the defendant, and (3) These things must be proved by the defendant by the greater weight of the evidence. Therefore, unless you find these three elements in this case, I charge you the defense of contributory negligence cannot be sustained."

N. J. Express Co. v. *Nichols* (E. & A.) 33 N. J. L. 434; *James* v. *D. L. & W.* (E. & A.) 104 Atl. 333; *Donns* v. *P. S. Ry. Co.* (E. & A.) 133 Atl. 196.

The above request to charge has been approved by this Honorable Court times without number, and to indicate to the Trial Court that it had received this court's approbation I had noted (as is my custom) that fact by citing three of those cases at the end of the request to charge. Instead of charging on contributory negligence as requested, the Court charged "to preclude the plaintiffs from maintaining their action, the plaintiff's wife's conduct must have been negligent, and her negligence must have contributed to the accident in such a way that if she had not been negligent she must have received no injury from the negligence of the defendant. Ordinary care

is required which a prudent person would take under the existing circumstances." It is to be noted that under the Trial Court's charge the jury were never informed that the burden of proving his definition of contributory negligence rested upon the defendant, and that it was a matter which the defense had to prove by the greater weight of the evidence, and I do respectfully submit that the charge as given by the Court is defective and is contrary to what this Court has so frequently approved. Time and again this Honorable Court has stated that the burden of proving contributory negligence rests upon the defendant, and it is as much an element as is the point of proving a plaintiff was negligent, and that that negligence contributed to the accident in such a way that if the plaintiff had not been negligent she would have received no injury from the negligence of the defendant.

In informing the jury as to what the plaintiff had to prove in order to establish negligence, the Court distinctly informed them (p. 158, l. 20) that "the burden of proof is upon the plaintiffs. They must establish their case by a fair preponderance of the evidence; that is, it must weigh in their favor; and if they fail in this they are not entitled to your verdict." Exactly the same burden is on the defendant when he undertakes to set up the defense of contributory negligence, and the Court was requested to so inform the jury, but refused to comply with the request.

Respectfully submitted,

RAYMOND H. COHEN,
Attorney of Plaintiffs-Appellants.

PALMER & COOPER,
Of Counsel.

New Jersey Court of Errors and Appeals

SPINTZE DULBERGER and ABRAM DULBERGER, Plaintiffs-Appellants, vs. IGNATZ RADLI, Defendant-Respondent.	Action at Law. On Appeal from the Supreme Court, Essex Circuit.

BRIEF OF DEFENDANT-RESPONDENT.

Statement of Facts.

The plaintiffs were in possession of a store and living quarters at #54 Waverly Avenue, Newark, New Jersey, under a written lease which they had made with one Jacob Gelber, a predecessor in title of the defendant. The plaintiffs claim that while in possession of the premises of the defendant that a portion of the ceiling in the kitchen directly over the wash trays fell and struck the plaintiff sought to recover on two separate and distinct grounds. The first was that the defendant had undertook to repair the ceiling in the kitchen on a previous occasion about one year prior to the time the accident was alleged to have happened and that the defendant made the repairs in a negligent and careless manner. The second theory of plaintiffs' was that the ceiling in the kitchen became in disrepair due to the defendant's failure to repair the water pipes which were under his control and which, because of the leaky condition caused the

New Jersey State Library

ceiling to crack in part, with the result that a small portion thereof fell on the date in question. The plaintiff testified that they observed that the ceiling was cracked for a considerable time prior to the accident and that they continuously called the defendant's attention to this condition. The plaintiffs further testified that the pipes leaked so badly that it was necessary for them at times to place receptacles about the kitchen to receive the water which was falling from the ceiling. The defendant denied any negligence on his part or any knowledge of the alleged defective condition of the ceiling and produced witnesses who had been on the premises during the period complained of to corroborate him in his defense that the ceiling was not in a defective condition. The defense was predicated upon a claim that there was no negligence on the part of the defendant; that he made reasonable inspection of the premises; that the water pipes were not in a defective condition and that they did not leak; that no repairs in fact were made in a negligent manner, and that if all that the plaintiffs contended for was true then the plaintiff, Sprintze Dulberger, was guilty of contributory negligence.

The evidence disclosed that the water pipes complained of did not run between the ceiling of the demised premises and the floor above in a horizontal manner but that the water supply pipe ran longitudinally through the demised premises up to the floor above. The defendant produced a plumber who was called immediately after the plaintiffs claimed that she was injured and the plumber testified that there was no leak in the water supply system. He further testified that he examined the ceiling and that he could find no evidence of the fact that the water had previously leaked from any pipes. He testified that there

was no discoloration of either the laths or the plaster.

The trial resulted in a verdict in favor of the defendant.

Appellant raised six causes for reversal but it appears that the printed brief has been erroneously numbered. We will take up the points raised in their brief in the order in which the appellant has urged them.

POINT ONE.

Complaint is made that the trial court erred in charging the jury that ceilings do not fall solely from water; that there are other causes which ceilings would fall from. A common cause is the big motor trucks that go by and shake houses.

The appellant contends that the trial court not only failed to properly state the law but did in effect remove from the consideration of the jury one half of the plaintiffs' case in that it removed from the jury's consideration any liability on the part of the defendant for having made repairs to the kitchen in a defective manner. It is the contention of the respondent that the court made no error in making the comment which it did and further that the jury was expressly charged on the liability of the defendant if in fact the defendant had made repairs and did so in a careless manner.

The trial court was clearly justified in making the comment on the evidence which it did. In the case of *Merklinger* vs. *Lambert,* decided in this court in 1909, appearing in 76 New Jersey Law, 806, (72 Atl. 119), it was held as follows:

> "It can not be disputed that the trial judge has an undoubted right to make such

> comments and expressions upon the testimony as he thinks necessary for the direction of the jury, so long as he leaves the jury to determine the facts and draw their own conclusions therefrom."

An examination of the State of the Case will disclose (page 157) that the trial judge made the following statement to the jury.

> "These are disputed questions of fact, and it is for you to determine the true facts in the case. You are jurors in the case and you are required to find the true facts. You must rely on your own recollection of the testimony as you have heard it on the witness stand and not as I may recite it to you. As I say, the obligation is on you to determine the facts in the case; my duty is to charge you the rules of law which should govern you in your determination of the case."

Again at page 160 of the State of the Case the trial judge said:

> "Proximate cause in this case is important because we know the ceiling fell; I don't think that is disputed, but it must be proximately caused by some act or failure to act on the part of the landlord which was negligent."

Again on page 161 of the State of the Case the trial judge stated to the jury:

> "Now gentlemen, as I have said before, you are the judges of the facts, and that means you are the judges of the credibility of the witnesses in this case."

There can be no question after reading the charge of the learned trial judge that he left the determination of the facts and the conclusions to be

drawn therefrom to the jury. We can not conceive of any clearer language that the court could have used to bring home to the jury that all questions of fact were to be determined by it and not by the court. In addition it seems to us that there could not be any prejudicial injury suffered by the appellant by reason of the comment made by the court because the comment of the court was on a matter which would reasonably occur to any person. In addition the plaintiff had alleged two specific reasons why a portion of the ceiling fell. The trial judge directed the jury's attention to both of the reasons alleged by the plaintiffs and it certainly would have been proper for the judge to have charged the jury that if a portion of the ceiling fell due to the vibration caused by passing motor trucks and not from any negligence on the part of the defendant then there could be no recovery. If the trial judge had made this statement no possible ground of error could be alleged and it is respectfully submitted that the language which was used by the trial judge had no more harmful effect nor could it have had any prejudicial effect upon the minds of the jurors.

The appellant contends that by making this comment as well as the remainder of that portion of the charge complained of the trial judge removed from the consideration of the jury the question of the negligence of the plaintiffs' in repairing the ceiling. The respondent's answer to this is twofold. In the first place it is submitted the trial judge expressly placed before the jury this contention of the plaintiffs. On page 157 of the State of the Case the jury was charged as follows:

> "It is claimed that this piece of plaster fell through the negligence of the defendant and damages are asked at your hands. The

> plaintiffs claim that the service water pipe ran through the kitchen, and which, they claim, ran between the ceiling and the floor above, caused this ceiling to fall."

They (referring to plaintiffs) also claimed that a previous condition of the ceiling had been repaired and that that portion was negligently made, and that the landlord had knowledge of these facts; that is, of the leaking and the bad condition of the ceiling.

On page 159 the court further charged the jury as follows:

> "He, however, is not obliged, as I said, to repair, but he is under a duty if he does repair, not to be negligent in that repair. In other words, it is a different duty where he actually makes the repair than when he doesn't make it.
>
> I might quote to you Chancellor Kent's opinion which is referred to in a New Jersey case. He says 'By the common law a mandatary or one who undertakes to do an act for another without reward, is not answerable for omitting to do the act, and is only responsible when he attempts to do it, and does it amiss. In other words, he is responsible for a malfeasance, but not for a nonfeasance.'
>
> He was not under obligation to repair, but if he did repair and was negligent, and that negligence was the proximate cause of the plaintiff's injury, then, of course, he would be liable. He is not liable for simply permitting a leak to be there and continue in the water pipes. But he must be negligent in reference to that at that time."

The appellants can not take a single portion of the charge and complain of error because it does not embrace all factors in the case. At this particular point the court was merely passing on the causes which might have resulted in a portion of the ceiling falling. Instructions must be construed together, as a whole, and if, when so construed, they properly state the law, it is sufficient. *Sullivan* vs. *North Hudson County R. Co.*, 51 N. J. Law, 518.

The second reason urged by respondent that no error was committed in this respect is that there was no evidence before the jury that repairs were made in a defective manner. On page 19 the plaintiff, Sprintze Dulbeger, testified that a portion of the ceiling fell down around December, 1924, and that the defendant told the workman called to repair the ceiling to fix it and make a good job of it, and on page 20 she testified that they only fixed the patch. She further testified that the rest of the ceiling was cracked from one end to the other. There was absolutely no evidence in the case that the patch which was repaired by the defendant fell, but the portion of the ceiling that did fall was in a different part of the room. If the ceiling was in a defective condition it was incumbent upon the tenant to make repairs as the ceiling is a part of the demised premises, unless, of course, the defendant could show that the defect was caused by something which was retained within the control of the landlord. There was no evidence produced by the plaintiff to show that the patch which was fixed in the ceiling was done negligently. No person with any skill in plastering was called by the plaintiffs to give any information whatsoever to to the jury that it was negligent on the part of the defendant to have only repaired a small patch in the ceiling and not to have taken down the entire ceiling.

POINT TWO.

Reversal is urged on the ground that the court charged the jury as follows:

> "If you are satisfied by the evidence that the defendant had no notice that the ceiling was in a defective condition, then, and in such event, your verdict shall be for the defendant."

The appellant urges that inasmuch as the lease gave the landlord the right to "enter the said premises at reasonable hours of the daytime to examine and repair the water pipes (only) if any may be broken; the party of the first part not being bounden to make any other repairs unless it be elsewhere in this lease expressly so agreed;" placed an affirmative duty on the landlord to make an examination of the water pipes to ascertain their condition. It is respectfully urged that this provision of the lease created no such obligation upon the landlord. It is apparent that this clause was inserted in the lease in order to permit the landlord to enter the premises to repair such parts thereof as were retained in his control of which the water supply pipe was one. If water pipes running through the demised premises became in a leaky condition the landlord would have been liable to any other tenant who might have suffered damage thereby for a nuisance and it was to relieve himself of any such liability that the landlord obtained this right of re-entry. The appellant further urges that it was incumbent upon the landlord to make reasonable examination to ascertain whether or not the water pipes were in a defective condition. The court charged the jury (State of Case, page 159) as follows:

> "The duty of the landlord is this: He must exercise reasonable care to repair or remedy any dangerous condition, if known to him, and that within a reasonable time after knowledge of it. I say this as applied to the water pipe. He is also charged with the duty to make reasonable inspection to ascertain its condition. He is liable as negligent for failure to remedy a dangerous condition that a reasonable inspection would show."

It is respectfully urged that the court properly charged the jury in this respect and committed no legal error in charging the fourth request of the defendant which is herein complained of.

POINT THREE.

The third ground urged for reversal is set forth in appellants brief as No. 4 and it is claimed that the court erred in failing to charge the plaintiffs' first request.

The court was requested to charge that the duty of making repairs to the water pipes was expressly placed upon the landlord by the terms of the lease originally entered into by Gelber and subsequently assigned to Radli. The appellant does not set forth the terms of the lease in full in the State of the Case and consequently this court can not refer thereto to ascertain all of its terms. There is no evidence whatsoever in the case that there was any express term in the lease which required the landlord to repair water pipes. There was a duty, fixed by law, upon the landlord to keep the water pipes in repair to the end that no nuisance would be created or maintained by the landlord by reason of defective pipes, but this was

not a term of the lease, but was a requirement of law. The court could not, without having committed prejudicial error to the defendant, have charged this request because it was not in accord with the facts of the case.

POINT FOUR.

The next cause for reversal is that the learned trial judge failed to charge the plaintiffs' second request. This is referred to as point five in the appellants' brief. The court in effect charged the second request of the plaintiff. This appears on page 159. From an examination of the court's charge it will appear that this request was, in effect, acceded to by the trial judge. This court has held that a party has no just cause of complaint, where, although all requests for instruction have been refused, the court embraced them in its charge, so far as they stated correct the propositions of law. *Daggett* vs. *North Jersey St. Ry. Co.*, 75 N. J. Law, 630, (68 Atl. 179)

POINT FIVE.

The fifth ground for reversal and which is stated to be No. 6 in appellants brief is based upon the refusal of the trial judge to charge the third request of the plaintiffs. It is respectfully urged that the trial judge fully charged the jury as to the law on the subject-matter of the request. This appears on page 159 of the State of the Case. In addition it will appear on page 157 of the State of the Case the trial judge expressly called the at-

tention of the jury to the claim being made by the plaintiffs and having instructed the jury as to the nature of plaintiffs' claim and the legal obligation upon the defendant it was not necessary for him to charge the jury in the form requested by the plaintiffs. It is sufficient if the court points out the claim being made by the plaintiff and the legal principles applicable thereto.

POINT SIX.

The appellant urges that it was error to fail to charge the plaintiffs' fifth request. This is argued by appellant under point eight of their brief. It is respectfully submitted that the trial court did not commit legal error in refusing to thus charge the request. It will be noted that the learned trial judge (State of Case 164) stated to the jury as follows:

> "I have been requested by the plaintiffs to charge some other requests, all of which I will deny except as I may have covered them in my charge."

It is apparent from reading the court's charge that the court did in effect charge all of the requests of the plaintiffs.

An analysis of the plaintiffs' fifth request will disclose that three separate and distinct legal points are contained in the request. In fact, it might be said that there were four separate points involved. If any part of the request is improper the court may exclude all of it. It is not incumbent upon the trial judge to single out that which is good and that which is bad. In the first place the statement that "Not all negligence on the part

of a person injured is contributory negligence." This statement standing by itself would have been improper and we do not think that the remainder of the charge as requested cures this erroneous statement. If the trial judge had charged the jury to the effect that not all negligence on the part of a person is contributory negligence, it is possible that the jury might have misconstrued the court's meaning. It would have been necessary to qualify this remark by some other appropriate language to clearly indicate to the jury the meaning of the court. No language is used by the plaintiffs to clarify such a statement. As stated above the requests contains three distinct legal propositions. The first legal point is that the defendant must prove Mrs. Dulberger was negligent. In any event the court so charged the jury. (State of Case 160.) The trial judge said that to preclude the plaintiffs' from maintaining their action the plaintiff's wife's conduct must have been negligent, and her negligence must have contributed to the accident. The second legal point explains what is contributory negligence. The court charged the jury practically in the same language as plaintiffs request when it said that the plaintiff's negligence must have contributed to the accident in such a way that if she had not been negligent she must have received no injury from the negligence of the defendant. The third legal point is that the negligence of the plaintiff must be proved by the defendant by the greater weight of the evidence. So it appears that the three legal propositions were that the plaintiff had to establish that the defendant was negligent; a statement as to what was contributory negligence and third, the burden of establishing contributory negligence. There is no question but that the court expressly charged the

first two points involved and complaint is made that the court refused to charge the third part of the request. We respectfully submit that inasmuch as the request contained several distinct legal propositions that it would be manifestly unfair to allege legal error unless the plaintiffs specifically pointed out to the trial judge the fact that he had omitted the third part of the request. The trial judge made it clear that he was refusing to charge the plaintiff's request except in so far as he had covered these requests in his charge. The exception taken by the plaintiffs to the court's refusal to charge the fifth request was a general exception. In this connection we think the case of *Noyes* vs. *State,* 41 N. J. Law, 418, is analagous. Chief Justice Beasley who wrote the opinion in the Supreme Court said in part:

> "No rule regulating the trial of cases is more valuable or more settled than the requirement that an exception to a judicial charge, to be legal, must be explicit. If the exception embraces several legal propositions, and any one of them be unexceptionable the objection fails. Counsel must put his finger on the erroneous proposition and thus point the mind of the judge to it; if he challenges any of the charge in bulk, assigning no reason for such challenge and a bill is allowed on the point, the risk of any legal ingredient be found in such bulk, is that of the party so excepting."

This doctrine has been approved of in this court in the case of *Thibodeau* vs. *Hamley,* 95 N. J. Law, 180 (112 Atl. 320) Mr. Justice Kalish writing the opinion for this court said in part:

> "In the present case the statement, by the court, that it is not negligence in itself for

> a passenger to extend his or her arm or elbow from the window of a jitney, and that it was for the jury to determine whether, under all the facts and circumstances of the case, the plaintiff was guilty of negligence in doing so, if he did so, as a correct legal proposition is unassailable. The other distinct legal proposition in the charge of the jury was as to what he said was the measure of duty resting upon the operator of the jitney upon the public highway; and, even if it had appeared that the judge erred in his statement of the law in that respect, and that has not been made to appear to us, it would not have availed the appellants, since there was no specific objection made to the charge upon that ground."

The error complained of here by appellant is one of omission and not of commission. If the trial judge had incorrectly charged a legal proposition which was one of several points embraced in one request then it might be said that some consideration had been given to the request by the trial judge. However, where a request contains several distinct legal points, and the trial judge should fail to charge any one of them, although he did charge the remaining portions of the request, it would be manifestly unfair to the trial judge, as well as to the adverse party, to declare that prejudicial legal error had been committed, unless, the party requesting the charge specifically points out to the court that part which was omitted. To be true the fifth request herein embraced three or possibly four distinct legal propositions. Suppose it had contained fifteen or twenty. The number of legal points contained in one request should not alter the rule. If the plaintiff felt that each point was of importance he should have listed each

separately or, not having done so, should have called the attention of the trial judge to that which was inadvertently omitted.

For the foregoing reasons it is respectfully submitted that the learned trial judge committed no legal error prejudicial to the plaintiffs and that the judgment in the court below should be affirmed.

Respectfully submitted,

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with Respondent.