INDEX

TESTIMONY.

Plaintiffs' Witnesses.

EXHIBITS.

NOTICE OF APPEAL.

Filed February 14, 1930.

PASSAIC COUNTY CIRCUIT COURT.

AGNES STATHOS and JAMES STATHOS, *Plaintiffs,* vs. MORRIS BUNEVICH and SAMUEL A. JAFFE, *Defendants.*	*Action at Law.* *Notice of Appeal.*

To Milton M. Richmond, attorney of plaintiffs, or to Whom It May Concern:

PLEASE TAKE NOTICE, that the defendants in the above-entitled cause, appeal to the Court of Errors and Appeals in the last resort in all cases in New Jersey from the whole of the judgment entered in this cause.

Dated February 13, 1930.

Respectfully yours,

COHEN & KLEIN,
Attorneys of Defendants.

Service of a copy of the within notice is hereby acknowledged this 13th day of February, 1930.

MILTON M. RICHMOND,
Attorney of Plaintiffs.

GROUNDS OF APPEAL.

Filed March 8, 1930.

New Jersey Court of Errors and Appeals

AGNES STATHOS and JAMES STATHOS, *Plaintiffs-Appellees,* *vs.* MORRIS BUNEVICH and SAMUEL A. JAFFE, *Defendants-Appellants.*	*On Appeal.* *Grounds of Appeal.*

To Milton M. Richmond, Esq., attorney of plaintiffs:

The appellants state the following grounds of appeal in this cause:

1. The trial court erred in its refusal to grant the motion of counsel for the defendants for a non-suit on the opening of counsel for the plaintiffs.

2. The trial court erred in granting counsel for the plaintiffs the right to amend plaintiffs' complaint.

3. The trial court erred in admitting into evidence photograph marked "Exhibit P. 1."

4. The trial court erred in refusing to permit the plaintiff Agnes Stathos to answer the following question on cross examination:

"Q You personally never signed a lease or made any agreement with either Mr. Jaffe or Mr. Bunevich, did you?"

Grounds of Appeal.

5. The trial court erred in its refusal to grant defendants' motion for a non-suit.

6. The trial court erred in its refusal to grant defendants' motion for a direction of a verdict.

7. The trial court erred in charging the jury as follows:

> "She says that there was a common hallway, used by herself and other tenants, where the duty was the landlords' to keep illuminated, and that they failed to do that, and their failure to do so was negligence and the proximate cause of her accident was that negligent act, in his failure to light the hall, and, as a consequence of that negligent act, on the part of the landlord, by reason of the failure on his part to perform the duty that he owed to her, she fell downstairs and received hurts."

8. The Court erred in charging the jury as follows:

> "Where a landlord lets out portions of a building to several tenants, retaining in his own possession or control the passageways and stairways for the common use of the tenants, and those having occasion to visit them, he is under the responsibility of a general owner of land who holds out an invitation to enter upon and use his property, and is bound to see that reasonable care is exercised to have the passageways and stairways reasonably fit and safe for such use, to use reasonable care to have the stairways and hallways reasonably fit for such use, not only to the tenant but to those who may be invited to come upon the premises, people that come to see the tenants, to those peo-

ple, or anyone, that might have business there, or have occasion to come. That is the duty that the law imposes upon the landlord, under those circumstances, if it be true, as the plaintiff says, that this was a common stairway and that he did either agree to keep the light lighted or assumed that obligation, even though he did not agree to do it."

9. The trial court erred in refusing to charge the jury defendants' third request to charge.

10. The trial court erred in refusing to charge the jury defendants' fourth request to charge.

11. The trial court erred in refusing to charge the jury defendants' sixth request to charge.

12. The trial court erred in refusing to charge the jury defendants' eighth request to charge.

13. The trial court erred in refusing to charge the defendants' ninth request to charge.

14. The trial court erred in refusing to charge the defendants' tenth request to charge.

15. The trial court erred in refusing to charge the defendants' eleventh request to charge.

16. The trial court erred in refusing to charge the defendants' twelfth request to charge.

17. The trial court erred in refusing to charge the defendants' fourteenth request to charge.

18. The trial court erred in refusing to charge the defendants' sixteenth request to charge.

Grounds of Appeal.

19. The trial court erred in refusing to charge the defendants' seventeenth request to charge.

COHEN & KLEIN,
Attorneys for Defendants-Appellants.

3/6/30

Service of a copy of the within grounds of appeal is hereby acknowledged this 7th day of March, 1930.

MILTON M. RICHMOND,
Attorney for Plaintiffs.

SUMMONS.

The State of New Jersey to Morris Bunevich and Samuel A. Jaffe. You (SEAL) ARE SUMMONED to answer the annexed complaint of Agnes Stathos, in an action at law in the Passaic County Circuit Court. AND TAKE NOTICE that unless you file your answer to the said complaint with the Clerk of the Passaic County Circuit Court at Paterson, within twenty days after the service upon you of this writ and the annexed complaint, the plaintiff may proceed in said suit and judgment may be entered against you.

WITNESS, NEWTON H. PORTER, Esq., Judge of the Passaic County Circuit Court at Paterson, this 4th day of April, nineteen hundred and twenty-nine.

LLOYD B. MARSH,
Clerk.

MILTON M. RICHMOND,
Attorney.

Complaint.

JUDGMENT RECORD.

IN THE

PASSAIC COUNTY CIRCUIT COURT.

AGNES STATHOS and JAMES STATHOS, *vs.* MORRIS BUNEVICH and SAMUEL A. JAFFE.	*Judgment Record.*

Complaint.

The plaintiff, Agnes Stathos, a resident of the City of Passaic, County of Passaic, State of New Jersey says:

FIRST COUNT.

1. That the defendants, Morris Bunevich and Samuel A. Jaffe, at the times hereinafter mentioned were the owners and had control of a building and premises known as 246 Madison street, in the City of Passaic, County of Passaic, State of New Jersey, portion of which building consisting of separate apartments were rented out by the defendants to various persons as place of abode; That defendants, reserved to themselves control of the hallways, lobbies, stairways and staircases of said building and used in common as the sole means of access to and egress from the upper apartments in said building from and to the adjoining street.

2. That the said building was a tenement house having a store on the ground floor and

having one apartment respectively on the second and third floors and at the times hereinafter mentioned was rented, leased, let or hired out to be occupied and was occupied as the homes or residences of at least two families living independent of each other and doing their washing and cooking upon the premises.

3. That the said defendants, Morris Bunevich and Samuel A. Jaffe, were bound to keep a proper light burning in the public hallways, near the stairs, upon the entrance floor, and to keep a light burning upon the second floor above the entrance floor of such houses, every night throughout the entire year and upon all other floors of such tenement houses from sunset each day until ten o'clock each evening.

4. That the defendants, assumed the duty of providing necessary and sufficient light in said hallway with his tenants, in order that they might be permitted to pass along said stairs safely.

5. That, in the times hereinafter mentioned the defendants negligently and carelessly maintained said hallway in a darkened and unlighted condition, and failed and wholly omitted to and did not provide and maintain any lights in said hallway.

6. That, on or about January 22, 1929, Agnes Stathos, one of the plaintiffs herein, while passing down the said stairs in the public hallway leading to the street was caused to fall and did fall while passing down said stairs, by reason of the absence of any lights therein and its darkened and unlighted condition, and this without any fault or neglect on the part of the said Agnes Stathos.

Complaint.

7. That as a result of the said fall, the said Agnes Stathos, was severely wounded, bruised, and injured in and about her body, arms and limbs, her entire nervous system shocked, and is suffering continually from other serious internal and external injuries some of which may be permanent, and is suffering continually from dizzy spells and headaches, and she is sick, sore and disabled, and was confined to her bed and her house for some time and was obliged to and did employ medical aid and attendance of a physician.

Wherefore, plaintiff, Agnes Stathos, demands damages on the first count in the sum of Ten Thousand Dollars ($10,000.00).

SECOND COUNT.

Plaintiff, James Stathos, resident of the City of Passaic, County of Passaic, State of New Jersey, says that:

1. He is the husband of Agnes Stathos, one of the plaintiffs in the above-entitled cause.

2. All of the allegations contained in the first count are made a part of this count.

3. Because of the grievances and premises mentioned in the first count, the plaintiff, James Stathos, has been deprived of the services of the said wife, who assisted him in his store and as a result of her failure to work in the said store, was obliged to hire other help during the period of her illness, and also has been deprived of his right of consortium with the said, Agnes Stathos, his wife, and will be for a long time in the future.

4. By reason of the premises and the injuries which the plaintiff, Agnes Stathos, sustained, the

said plaintiff, James Stathos, was obliged to lay out and to expend large sums of money for medical and surgical aid and treatment in an effort to cure his wife of her aforesaid injuries.

Wherefore, plaintiff, James Stathos, demands damages in the sum of two thousand dollars ($2,000.00), in the second count.

Judgment will be asked on both counts in the sum of twelve thousand dollars ($12,000.00), together with cost of suit.

MILTON M. RICHMOND,
Attorney of Plaintiffs.

Answer.

Defendants, residing in the City of Passaic, County of Passaic and State of New Jersey, answering the complaint filed herein, say:

FIRST COUNT.

They deny each and every allegation contained in the first count.

SECOND COUNT.

1. The defendants have not sufficient information or belief as to the truth of the allegations contained in paragraph 1, and therefore deny the same.

2. They deny paragraphs 2, 3 and 4.

SEPARATE DEFENSES.

Whatever injuries were sustained by the plaintiffs at the time and place of the accident alleged in their complaint, were caused and con-

tributed to by the negligence of the plaintiffs, in that they conducted themselves in a careless and reckless manner, and negligently exposed themselves to the risk of such an accident, and neglected to take precaution and exercise care to guard and protect themselves against such an accident and the injuries which they may have sustained by reason thereof.

COHEN & KLEIN,
Attorneys of Defendants.

5/24/29

Reply.

The plaintiffs, Agnes Stathos and James Stathos, replying to the answer filed by the defendants, Morris Bunevich and Samuel A. Jaffe, say:

AS TO THE SEPARATE DEFENSES.

Plaintiffs deny each and every allegation set forth in said defenses.

MILTON M. RICHMOND,
Attorney of Plaintiffs.

Notice of Trial.

PASSAIC COUNTY CIRCUIT COURT.

AGNES STATHOS and JAMES STATHOS, *Plaintiffs,*	*Action at Law.*
vs.	
MORRIS BUNEVICH and SAMUEL A. JAFFE, *Defendants.*	*Notice of Trial.*

SIR: PLEASE TO TAKE NOTICE, that the trial of the issue joined in this cause will be moved before said Court, in the presence of such Judge or Justice thereof, as shall then be holding said Court, on the fourth Tuesday of September, A. D. 1929, at the Court House, in Paterson, N. J., in and for the County of Passaic at ten o'clock in the forenoon, or as soon thereafter as the said Court can attend to the same.

Dated April 27th, A. D. 1929.

MILTON M. RICHMOND,
Attorney of Plaintiffs.

To: COHEN & KLEIN, Esqs.,
Attorneys of Defendants.

Service of the within Notice of Trial is hereby acknowledged this 24th day of May, A. D. 1929.

COHEN & KLEIN,
Attorneys for Defendants.

Judgment.

This action was tried before Judge Newton H. Porter, with a jury, in the presence of the counsel of the respective parties, at the Passaic County Circuit Court, on January 31st and February 4th, A. D. 1930.

The cause having been heard and submitted to the jury, they returned their verdict as follows: One thousand dollars, ($1,000.00), in favor of the plaintiff, Agnes Stathos, and one thousand dollars, ($1,000.00), in favor of the plaintiff, James Stathos.

Whereupon, it is adjudged that the plaintiff, Agnes Stathos, recover of the defendants, Morris Bunevich and Samuel A. Jaffe, the sum of one thousand dollars, ($1,000.00), and that the plaintiff, James Stathos, recover of the defendants, Morris Bunevich and Samuel A. Jaffe, the sum of one thousand dollars, ($1,000.00), and their costs, which are taxed at the sum of seventy dollars and ninety-four cents, ($70.94), making in the whole the sum of two thousand and seventy dollars and ninety-four cents, ($2,070.94).

Judgment entered and signed February 6th, A. D. 1930, at 12:38 P. M.

Action No. 12920, Docket L, page 199.

NEWTON H. PORTER,
Judge.

Clerk's Certificate.

STATE OF NEW JERSEY,
COUNTY OF PASSAIC. } *ss.*

I, LLOYD B. MARSH, Clerk of said County and Clerk of the County Courts thereof, Do HEREBY CERTIFY, that the foregoing is a transcript of the Judgment Record, in re: Agnes Stathos and James Stathos, plaintiffs, *vs.* Morris Bunevich and Samuel A. Jaffe, defendants, as the same is taken from and compared with the original entry thereof in Book "B. 2" of Circuit Court Judgments, for said County and now remaining of record in my office.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the (SEAL) seal of the said Courts and County, at Paterson, this twenty-fourth day of February, A. D., nineteen hundred and thirty.

LLOYD B. MARSH,
Clerk.

By FLOYD E. JONES,
Deputy Clerk.

TESTIMONY.

PASSAIC COUNTY CIRCUIT COURT.

AGNES STATHOS and JAMES STATHOS, *Plaintiffs,* *vs.* MORRIS BUNEVICH and SAMUEL A. JAFFE, *Defendants.*	*Action at Law.*

Paterson, N. J., Jan. 31, 1930.

Tried before Hon. NEWTON H. PORTER, Judge, and a Jury.

Appearances:

Milton M. Richmond, Esq., (Alex. M. MacLeod, Esq., of counsel), for plaintiffs;

Messrs. Cohen & Klein (by Mr. Cohen), for defendants.

A jury was duly empaneled and sworn.

OPENING ON BEHALF OF PLAINTIFFS.

Mr. MacLeod: This is a case of an accident —not an automobile accident—an accident which happened on January 22, last year—a year ago this month—of Agnes Stathos, who is the plaintiff in this suit and who is suing—and also her husband suing for loss of services of his wife, which is under the act, suing the owner of the premises in which they lived—Morris Bunevich and Samuel A. Jaffe—premises located at 246 Madison street, City of Passaic, County of

Passaic—the first floor of which contained a store and the second and third floor contained dwellings.

In this building, we will show you, there is hallways which are necessarily used by the tenants of the apartments for their use; that there was, as it was agreed, a system of lighting these hallways, and that because of the arrangement that a gas pipe—pipe of gas—was erected for the purpose of shedding light on the stairs, so that people may come up and go down in the night season in safety; that on this date, on this occasion, Mrs. Stathos, being a tenant of the second floor, while coming downstairs, fell and was injured severely—injuring a woman of her shape—her size—which you will see on the stand—not very heavy but of robust appearance —stout, I may be permitted to say—a woman who has grown one child, who is now about seventeen or eighteen years of age—and who has used those stairs before and prior to that, which was lighted, but for a period of about two or three months the landlord of the place failed to have lights there, and was repeatedly requested and repeatedly notified the gas light that was there became constantly out of order, that he was notified to correct it, to fix it, and he failed to do it, although he had repeatedly promised to do it. We will show you that he deliberately—not deliberately—but he forgot about it, neglected to do so. And through his negligence in failing to keep his property in shape and in a condition so that it may be used by the tenants that he has there. She was injured, because of that negligence, in going down those stairs—because the landlord failed to keep the premises in the condition which he had agreed that he would do.

We will show you that she received a very severe injury—internal injury—to her body. I do not want to explain it—it is of such a nature that I am going to let the medical men do that—the doctors; that she has suffered steadily since that time, been under medical care practically ever since, still under medical care, still suffering from the pain that she has, which is extreme from the situation, and that she suffers from pains in the back, as a result of which she suffers from dizziness, that she sustained injuries to her body and that she has received a very severe injury as a result of this negligence, because of this landlord.

Since the accident, we will show you, the very next day after this affair, we will show you that she fell once before, about which there is no claim for, I think, and there was no injury as a result of not having a light there; at that time he was again notified as a result of this situation, and he checked it up after the accident, and he again constructed or constructed an electric light in there, gas light having become obsolete, I suppose, and that it is being properly taken care of.

If we show you these facts and conditions, we will ask you for a verdict for a substantial sum to recompense her for these injuries, as you see them, and as testified to by the doctor as well, and we shall ask a verdict in a substantial sum.

(Stenographic Note: The foregoing transcript of Mr. MacLeod's opening is as accurate as possible, taking into consideration manner of delivery.)

Motions for Non-suit on Opening and to Amend Complaint.

Mr. Cohen: May it please your Honor, I should like to make application or a motion for a non-suit on the opening of counsel. Has your Honor the complaint before you?

The Court: No, but I do not need it; I never look at them, if I can help it.

Mr. Cohen: In this case, between the plaintiffs and the defendants, there is alleged an agreement of a contractual relationship between the landlord and the tenant. There is no allegation anywhere, in the complaint, that these plaintiffs were tenants. And it is elementary law that, in the absence of an averment of the existence of a material fact, the presumption is that it does not exist. Nowheres in the complaint is there allegation that the plaintiff, the injured party, was a tenant, and they rely upon an assumption or an implied contract between the plaintiff and the defendant; there being no allegation in the complaint, and he is relying upon that, I most respectfully submit that there should be a non-suit.

The Court: Is there such an allegation?

Mr. MacLeod: I move to amend, if there is not. Mr. Richmond may have neglected—

The Court: Motion is granted.

Mr. MacLeod: In addition to that, I neglected to say to the jury that there was a direct agreement between the parties that this would be kept lighted. I will show that in the testimony. I did not think that was very important, but I desire to say that now in view of the motion.

Mr. Cohen: Does your Honor grant the motion?

The Court: Granted the motion to amend.

Motions for Non-suit on Opening and to Amend Complaint.

Mr. Cohen: Oh, I understood that you were ruling upon my application.

The Court: No, he may amend. You never thought it to be questioned, as they do, that it was not there—the allegation of landlord and tenant relationship.

Mr. MacLeod: There is no dispute about that.

The Court: I do not see how there can be any question about it.

Mr. Cohen: Very well. Then, I think, counsel, in his opening, stated to the jury that the premises in question constituted a tenement house, therefore the duty existed under the statute.

The Court: If he did, he meant that, he says, that it was a relationship of landlord and tenant existing, and that there was an obligation on the part of the landlord to light the hall, which was one hall, used by all the tenants.

Mr. Cohen: Do I understand counsel to amend the complaint to read that the relationship of landlord and tenant existed between the defendants Bunevich and Jaffe and Agnes Stathos?

The Court: Agnes or James, I do not know which.

Mr. Cohen: It is very essential, I think.

The Court: Which is it?

Mr. MacLeod: They were the tenants; the defendants were the owners, and the man and wife were tenants, and the relationship of man and wife existed between the two of them.

Mr. Cohen: I should like, if your Honor please, so that I may be able to defend the suit, on the proper theory, for counsel to make the

allegation on the record. It is not in the record.

Mr. MacLeod: What allegation?

Mr. Cohen: Your amendment.

The Court: He only amends to the effect that there was the landlord and tenant relationship existing between the parties, and that there was a duty on the part of the landlord to keep the halls lighted, because they were used in common. I think that is sufficient.

Mr. Cohen: I ask an exception, sir.

The Court: You may open to the jury.

Thereupon Mr. Cohen opened the case to the jury on behalf of the defendants.

PLAINTIFFS' CASE.

MRS. AGNES STATHOS, sworn.

Direct examination by Mr. MacLeod.

Q Mrs. Stathos, where do you live? A When, before?

Q No, at the time of this accident? A 246 Madison street.

The Court: January 27, 1929.

Q What city? A Passaic.

Q How long had you lived there? A Two years and a half.

Q Who owned the premises you lived in?

Mr. Cohen: We admit ownership.

Mr. MacLeod: Ownership is admitted, in the premises in question, by Morris Bunevich and Samuel Jaffe, defendants.

Q You now say you lived there two years and a half? A Two years and a half.

Q What kind of a building is it—frame or brick? A Brick.

Q Is it one story, two stories or what? A It was a big building.

Q What is there on the first floor? A Store.

Q Is there a second floor? A Second, a family lives there.

Q Where did you live there? A I lived in the second floor.

Q There was a floor above that? A And another family.

Q Was there another family besides that lived on that floor? A Yes.

Q Where was that? Above you? A Huh-huh (affimative inflection).

Q Was that all that were there? A Yes.

Q Did another family live there, up there? A Yes.

Q How many were in your family? A How many people in my family?

Q How many people were in your family when you lived there? A Three.

Q Now, after the accident—withdraw that. Are you living there now? A No.

Q When did you move out? A I don't remember exactly.

Q How long after the accident, about? A Oh, about, I think it is, about after (?).

Q Cannot hear you. A I don't remember.

Q A few months or a year or what? A I think, about a year.

Q About a year after? A Yes, sir.

Q Now, then, do you remember the hall— A Yes, sir.

Q —where the accident happened? A Yes, sir.

Q Where was the hall, in the front or the back or the side or where? A Well, inside.

Q Well, was it in the front? Talk up loud, so that Juror No. 12 may hear you. Miss Summers wants to hear you, too. Whereabouts was this stairway inside your house—in the front or the back or on the side? A Inside.

Q Well, in the front? A In the front, but inside.

Q Well, that is what we want to know. A Yes.

Q It was the front stairway, wasn't it? A In the front stairs, yes.

Q Now, I show you here, three pictures, and ask you whether these are correct representations of the stairway or the walls, showing the stairway in the house where you fell? Are they or are they not?

Mr. Cohen: Do you state as of when? What time?

Q At the time of the accident.

Mr. Cohen: Very well.

A It was different, the lights; it was a light before—gas light.

The Court: No, the question is: Are these a picture of the stairs?

A Yes.

The Court: All right. Show them to counsel.

Mr. MacLeod: Any objection to these? I offer these in evidence.

Mr. Cohen: I object to the offer of the picture in evidence, because it does not show the light. That is all they rely upon, the lights, and this does not show them. There is no allegation in the complaint that they rely upon the condition of the stairway.

The Court: It may be important to see how far she fell, if she fell.

Mr. MacLeod: I think we ought to show the stairs.

The Court: Yes, if that is the purpose.

Mr. Cohen: I think we ought to know the purpose of it.

The Court: Well, it is to show where she fell.

Mr. MacLeod: That is right.

Mr. Cohen: I ask an exception.

The Court: Let them be marked.

(Marked Plaintiff's Exhibit P. 1 in evidence.)

Mr. Cohen: Have you referred these pictures—

The Court: Yes, she said they were correct pictures.

Mr. MacLeod: Excepting the lights.

The Court: Yes.

The Witness: Yes.

The Court: Excepting the light; all right.

The Witness: Yes.

Mr. MacLeod: Any objection now, Mr. Richmond?

(No audible response.)

(Marked Plaintiff's Exhibits P. 2 and P. 3 in evidence.)

Q I am showing you P. 2 and P. 3, and ask you to tell us what this black mark is here? Do you know? A Here was a pipe that was lit in the jet gas that pipe there (indicating).

Q Is that the ceiling or the wall? A That is ceiling (indicating).

Q That is a pipe that came down from the ceiling? A Yes.

Q Was that there before the accident happened? A Yes.

Q Now, this here, over here, that looks like an electric bulb; was that there before the accident? A No, after the accident.

Mr. Cohen: I respectfully object, because the very thing they rely upon is the question of the light, if she has excepted that in her testimony from these pictures.

The Court: She says that the pictures are the same as the hall was at the time of the accident, excepting that the gas jet is now gone and in its place is an electric light; otherwise the pictures correctly represent the condition, and they will be admitted on that theory, with that understanding by the jury. You may have an exception, if you wish.

Mr. Cohen: I shall pray an exception.

The Court: All right.

Q These electric bulbs, were they there before the accident? A No.

Q When were they put there?

Mr. Cohen: Just a minute. I object, if your Honor please.

The Court: If you know.

Mr. MacLeod: Withdrawn, Judge.

Q Do you know when the electric bulb was put there?

Mr. Cohen: I object, if your Honor please; that is not a point in issue. They spoke of gas, that is—

The Court: Objection sustained. It doesn't matter when they were put there. They were not there at the time of the accident. I understand, that is all we are interested in.

Mr. MacLeod: That is right.

Q You said you were there about two years and a half, did you not? A Yes, sir.

Q When you first went there, was there a light in the hall—when you first went there? A Yes.

Q Where did that light on these pictures, 2 and 3, come from? A Right here (indicating).

Q This black mark that is on these pictures here? A Huh-huh, yes.

Mr. Cohen: Indicating what?

The Court: Indicating the hole.

Mr. MacLeod: Indicating two black pipes, as she said they were.

The Court: It looks like a hole to me.

Mr. Cohen: It seems to me that they show something that does not exist in these pictures, whereas they rely, in their com-

plaint, upon that which existed at the time of the accident.

The Court: She does not say that these were there at the time; she said that is where the lights was. Isn't that right?

Mr. MacLeod: Yes, she said that is where the light was, when she first moved there, and at the time of the accident.

The Court: That is what I understood her to say.

Q That was what you call a gas jet, wasn't it, that came out there? A Yes.

Q What kind of a light was it you had in the hall before the accident—I don't mean the day before—I mean, when you first went to live there? A Just the plain pipe.

Q What kind of a light was it—electric light? A Gas.

Q Gas light? A Gas light.

Q How long did you have this light in the hall? A Well, before the accident, I had three months without a light.

Q Who took care of the light which was used in the hall? A Well, the lady who was to move, she said she was going to take care—janitor.

Q (By the Court) Who did take care of it? A Janitor.

The Court: The janitor.

Q (By Mr. MacLeod) Who was the janitor? Where did he live? A Well, I guess, here somewhere—

Q Did he live in the same house? A No, he don't live but he take care of the building.

Q How often did he come to take care of the lights—to light the lights? A Well, sometimes come, sometimes not.

Q Was there anything wrong with the light —do you know—or the gas jet? A Well, yes, no gas come out from the pipe, you know, no gas at all come.

Q How long did that exist? A About two or three months, I guess.

Q What did you do about it? A Well, I told the landlord so many times—

Q Which one did you talk to? A Well, to Mr. Jaffe.

Q Mr. Jaffe? A Yes, sir.

Q How about the other fellow, the other defendant, Mr. Bunevich? A Yes, I talk to him, too.

Q What did you tell him? A Well, I told him, "No light, maybe somebody in fall." He said—Mr. Jaffe said to me, "If you fall, I have insurance—"

Q Now—

Mr. Cohen: I move that be stricken out, not responsive.

Mr. MacLeod: All right, I consent, strike it out, your Honor.

The Court: Strike it out.

Q Don't tell us anything, only what he said about the light, Mrs. Stathos, please—what about the light that you did not have? A Well, he just—

Q Did he say anything about it? A Well, he said, he is going to fix it, but he didn't fix it.

Q For how long a period was it in the condition without being fixed, so you had no light? A About three months.

Q Who else used the stairway besides you, that front stairway? A Well, another family upstairs.

Q On the third floor? A Yes.

Q It was you and your husband and daughter —was it? —or son? A No, my daughter, my husband and I.

Q Now, do you remember on the 22nd day of January, when you fell—right—what time was it? A Well, it was nine-thirty.

Q In the evening? A Yes, sir.

Q Were you alone? A Yes, sir.

Q Tell us how you came to fall. A Well, it just come out off the house, coming downstairs, and I fell down, and I was, you know, I don't remember who was picking me up.

Q How far did you fall? A Well, I fell about second floor down to the first floor.

Q These lights, or this gas, which had been here, where was that located in the building? On the first floor or on the second floor? A Well, it is two flights, no light.

Q It is two flights no light, but where was this light supposed to be, that was consumed in the gas jet? A In the first floor.

Q That was right at your door, where you come out? A Yes.

Q It throws the light where? A Throws down to the steps.

Q Throws down to the steps? A Yes.

The Court: Was the light lighted that night?

The Witness: No.

Q What was the condition in there, when you came out? Was it dark? A Dark, very dark.

Q Was there any window you could use— A No windows at all.

Q —where the light came from there? A No windows at all.

Q How far did you go down the steps before you fell? A Well, it begin at the first step.

Q What step did you say?

The Court: First, I think she said.

A There is a turn—

Q That is indicated up at the top of P. 1, is it not? A Yes.

Q How near to that turn was it, where you fell, on these steps, do you know? A I don't remember.

Q How far did you go down the steps after you fell, do you know? Do you know how many steps you fell down? A Well, I think I didn't miss no step at all.

Q Didn't what? A I didn't miss no one step; I went all of the way down.

Q Went all of the way down? A Yes.

Q What was your condition when you got down to the bottom, if you know? A I don't remember; somebody picked me up, I don't remember exactly.

Q When did you next remember anything after that? A Well, I remember my body—all of my body was sore.

Q Where were you then? A I was in bed.

Q Whereabouts? Home? Where? A Yes, home.

Q Who was with you then? A Well, he was my husband and my daughter.

Q Was that the same night? A Same night.

Q What did you do, if anything, after that? A Well, I called the doctor.

Q Who is the doctor? A There is my doctor, right there.

Q What is his name? A Mr. Levy.

Q Dr. Levy? How long did you stay in bed? A Stay eight weeks.

Q You didn't work or anything, did you? A No.

Q You just took care of your husband's home? A Yes, sir.

Q Anybody else take care of your husband's home? A No.

Q Who took care of your home while you were in bed? A I have a lady.

Q Who is the lady? A Well, the lady has moved to Connecticut now.

The Court: Who is she?

Q What is her name? A Her name is Mary Cococrash.

Q She was a friend of yours? A (No answer.)

Q Was she a friend of yours? A Well, just to come to see me, you know; you know, she is a friend.

Q What did she do for you, when she was a friend of yours? A Well, they come to see me; then after they saw I was fall, and they stay—took care of me.

Q How long did she stay to take care of you? A Stay about seven weeks.

Q How about your daughter, how old is she? A She is fifteen years old.

Q Did she help also? A She was in the school.

Q She goes to school? A Yes, sir.

Q Your husband, he went to work, did he? A My husband had business.

Q Did you pay this woman anything? A Yes, sir.

Q What did you pay her? A Fifteen dollars a week.

Q To take care of your house? A Yes, sir.

Q How often did the doctor come to see you, during these eight weeks? A Well, he come every day.

Q How long, since then, did he come to see you? Are you still under the doctor's care, or not? A Yes, sir; I am.

Q Still under the doctor's care? What seems to be the trouble with you? What is the trouble with you? Tell the jury. A Well, I hurt in my back, my head, and my stomach.

Q Now, has any of these pains disappeared since the fall? A No.

Q Which ones, if any, have remained? Which pains, if any, remain? A Well, all of my stomach.

Q All right, your stomach; the doctor has examined you, has he? A Yes, sir.

Q Has he been treating you? A Yes, sir.

Q Where has he been treating you, for your stomach? A Yes, sir.

Q How is your head now? Is that practically cleared up? A Well, sometimes all right, sometimes not. You know, I get dizzy, I can't sleep in the night after that happened, and I done feel well to working.

Q Was there ever anything wrong with your stomach before this fall you had downstairs? A No.

Q How many children have you had? A Only one.

Q How long ago was it, prior to January, 1929, did you have your first child and only child? A Well, that was about—

Q How old is the girl? A She is fifteen years.

Q Fifteen years, and you had no other children since, have you? A No.

Q Tell the jury, in your way, how it affects you personally, in your stomach? How are you affected, if you can tell that? A Well, it is my stomach is very bad condition.

Q Do you have any pains? A Pains? Yes, and I have to have operation.

Mr. Cohen: I don't get that.

A I have to have operation—

The Court: "I have to have operation."

A —to be well.

Mr. MacLeod: I believe she means the doctor told her that.

The Court: Strike it out.

Q Don't tell us what the doctor told you. Of course, you wouldn't know; you are not a doctor. Did you ever feel any pains down there, in that region, before this fall? Did you ever have a fall before this on those stairs? Do you understand me? A Yes, I have once again.

Q Before? A Same one, same steps.

Q But you were not hurt that time, were you? A Well, I didn't hurt that time; I don't feel it—

Q As a result of that— A —it feel little bit, but—

Q How long ago was that, before this last fall? Do you remember? A I can't remember;

it was about a year and about fourteen months, something like that.

Q You had no doctor then? It wasn't necessary to do anything? A (No audible response.)

Q Did you feel any effects of your first fall, I mean? A No.

Q Have you paid the doctor any money? A Yes.

Q What have you paid Dr. Levy? A A hundred dollars.

Q Two hundred dollars—

Mr. Cohen: Just a moment, I don't—

A (Simultaneously.) Yes, sir.

Mr. MacLeod: I beg pardon; I didn't hear it.

Mr. Cohen: —suggesting the correct answer.

By the Court.

Q How much did you pay the doctor? A A hundred dollars.

Q All right, speak up.

The Court: Next question. "A hundred dollars."

Mr. MacLeod: Cross examine.

Cross examination by Mr. Cohen.

Q Mrs. Stathos, can you tell us about when you first moved into your apartment? A I don't remember exactly.

Q Can you tell us when you first moved into that property? A I don't remember exaction when I move there.

Q I don't want to know exactly. About when? A Well, around, I think, April.

Q What is that? A April.

Q April, of what year, Mrs. Stathos? A 1927.

Q 1927? A Yes, sir.

Q I see. So that, at the time of the accident, you had been living there about a little over a year and a half; is that correct? A Yes.

Q Your husband rented the store before he rented the apartment, did he not? A Yes.

Q And then he paid the rent for both the store and the apartment, didn't he? A Yes, sir.

Q Now, how long did you say that you were in bed? A Eight weeks.

Q Eight weeks exactly, or a little more, or a little less; which is it? A Well, I don't remember very well, but I am sure eight weeks.

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

Q No less? A (No audible response.)

Q I see. Do you remember having signed some papers, in your lawyer's office, which we call "interrogatories"? Is this your signature? A Yes, sir.

Q And you swore to these answers before your attorney, Mr. Richmond? A Yes, sir.

Q Now, you were asked in one of these interrogatories: "Was plaintiff (referring to you) confined to her bed? If so, for how long?" And your answer then, and I suppose your memory was better then than it is now, was "About seven or eight weeks." That was correct, wasn't it? You see, we want to know whether it was seven weeks or eight weeks? A I don't remember.

Q You are sure, you say it was eight weeks; is that correct? A I don't remember exactly.

Q Well, you told the jury eight weeks; they are going to depend on what you tell them? A Well, it was seven to eight weeks.

Q What is that? A It was seven to eight weeks.

Q Now, do you want us to believe it was seven or eight weeks?

Mr. MacLeod: I object to what she wants you to believe.

The Court: Objection sustained.

Q What is your answer in response to that question: How long were you confined to your bed? How long were you actually in bed as a result of this accident? Can you tell us? A (No answer.)

Q We are waiting for an answer; can you tell us? A I can't tell you, I don't remember very exactly.

Q You do not remember? A Seven to eight, I don't remember exact.

Q All right. Will you tell us how long you were confined to your home? That is, to your home. Can you tell us how long you were in your home because of this accident? What is it? A Well, I think, about a year.

The Court: No, the question was: How long was it before you were able to go out?

Q That is right? A Well, about eight—about nine or ten weeks, I didn't go out at all.

The Court: But after that, you went out?

The Witness: Yes, I was out but no work.

Q All right. Now, in these interrogatories, you were asked this question, Mrs. Stathos: "How long was plaintiff (meaning yourself) confined to her home?" and your answer was, "Three months." A Yes.

Q Now, can you tell us why you told the Court and jury that you were out eight or nine or ten weeks, and why did you tell us, in these interrogatories, that it was three months before you went out?

Mr. MacLeod: I object to that as argumentative.

Mr. Cohen: I will reframe it.

The Court: Which is correct—

Q Which is correct?

The Court: —three months or eight weeks?

Q Which is correct, Mrs. Stathos, the answer you gave us before, or was it the answer you gave in your interrogatories, "Three months"? A Well, three months I was stay in the house, but while I have to go out, you know, just go down, I have something, I don't go no place, for three months out only to go downstairs to get something, after I left the lady out of the house.

Q Where? Do you mean downstairs in the store, Mrs. Stathos? A Yes, in the store, yes, to get something for downstairs; I don't have anybody to bring stuff.

Q You had a daughter, hadn't you? A Yes, daughter go to school.

Q Then the age of fourteen? A Daughter go to school.

Q What is that? A My daughter goes to the school.

Q Well, did you relieve your husband any during those three months, in the store? A Yes, sir.

Q You did relieve him. I see. A My husband had a boy to help for the store.

Q Now, what time did you say this accident happened, Mrs. Stathos? A 1929.

Q What time? A Oh, nighttime, nine-thirty.

Q What hour of the day? A Nine-thirty.

Q Of the night or— A Yes, evening.

Q How do you know it was nine-thirty? A Because I know.

Q How do you know it was nine-thirty when this accident happened? A Because I saw the clock before I go downstairs.

Q I see. Now, you say that you paid the doctor a hundred dollars; is that right? A Yes, sir.

Q When did you pay the hundred dollars, Mrs. Stathos? A I—I don't know—my husband paid; I don't know, I don't pay myself, my husband paid.

Q Now, then, were you sick before this accident happened, Mrs. Stathos? A No.

Q Not at all, were you? A Not at all.

Q Were you ever operated on before? A Well, yes; I 'ust to have operate about seven years ago.

Q Well, then, why did you tell us when I asked you, "Were you ever sick before?" why did you tell us, "No"? A Well, I don't know was sick; I was just operate.

Q Just operated? A For the appendix.

Q Appendicitis? A Yes.

Q That was how long before? A About seven years ago.

Q Seven years. What hospital were you operated on, for appendicitis? Can you tell us? A Dr. Korchet.

Q What hospital? A Dr. Korchet's office.

Q You don't mean to tell us, you were operated on in the doctor's office, do you? A Yes, sir.

Q For appendicitis? A Yes, for Dr. Korchet; you remember Dr. Korchet.

Q I don't remember him. A Oh!

Q Then you want us to understand that you were operated on for appendicitis— A Yes, sir.

Q —in the doctor's office? A Huh-huh; yes, sir.

Mr. MacLeod: I object to the form of us, "you want us"—

The Court: She wants you to understand everything she says, so don't put all of that in the record.

Mr. Cohen: That is not my intention.

Q After the operation, where were you? I mean, were you confined at the doctor's office? A Yes; you can find, Lexington avenue.

Q No, I mean: Did you have to stay in bed after the operation? A Yes.

Q Where— A To the doctor's office.

Mr. MacLeod: May I object, unless counsel is going to show, or attempt to show, by medical testimony, that seven years ago, this appendicitis, was the result of her pain—I have no objection; otherwise, we are just wasting time.

The Court: I suppose, it may be admitted on the theory of the credibility of the witness.

Mr. Cohen: Credibility, that is the purpose.

Mr. MacLeod: I have no objection, if that is his theory.

The Court: All right.

Q You had to stay in bed after the operation, did you not, Mrs. Stathos? A Yes.

Q Where? A Where? To the doctor's.

Q Where, at whose home, or what hospital, or whose office, did you have to stay in bed after that appendicitis operation? A Well, I stay two days to the hospital, to the doctor's hospital, and then after take me home.

Q How did you go home, Mrs. Stathos? A How I get home? Well, with taxis, of course.

The Court: Taxis?

The Witness: Yes, sir.

The Court: All right.

Q Did you have to walk downstairs? A No.

Q Just merely walked from the doctor's office into the street; is that correct? and then into the taxi? A Yes.

Q Now, can you tell us, Mrs. Stathos, from what step that is, counting from the second floor down, where it was you first fell or dropped, or whatever it was?

Mr. MacLeod: Do you want her to count the exhibit? You ought to give it to her. You have asked her to count them.

Mr. Cohen: I haven't yet.

Q Yes, all right. I show you P. 1; can you tell us from which one of the stairs you fell? A Right here (indicating).

Q Which one? A Right here (indicating), right at the corner.

Q You mean, where the stairs make a turn? A Yes.

Q Can you tell us how many steps there are from the place where you fell to the floor where you fell? A Well, I don't remember how many.

Q About how many steps? A About fifteen steps.

Q You are referring— A About fifteen steps.

Q You think it was fifteen steps from that turn downstairs? A Yes.

Q All right. Did you always see the janitors turn the light on? A Not always.

Q Not always? A No.

Q Sometimes you did? A Yes.

Q Can you tell us what hour of the day he put the light on, or when he put the light on? A Well, they come around six o'clock—

Q Yes? A —to put them on.

Q Yes? A And sometimes come around to ten o'clock, to take them out, but sometimes not.

Q You mean, they left them burn all night? A Yes.

Q Then they would put them out in the morning? A (No audible response.)

Q I see.

Mr. MacLeod: Say "yes"; don't shake your head. Is that all? May I ask one question?

Mrs. Agnes Stathos, for Plaintiffs, cross.

By Mr. MacLeod.

Q Dr. Korchet, he had a private hospital, didn't he? A Yes.

Q That is where you were when you had your appendix taken out seven years ago? A Yes, sir.

By Mr. Cohen.

Q Did you say these steps lead to Main street—or to Main avenue, in Passaic? Or was it around the corner? A To Madison street.

Q Well, now, the janitors could come in the back way to put the light on, couldn't they, Mrs. Stathos? A Well, I don't know.

Q Where do you live, Mrs. Stathos? Where do you live? A Where I living?

Q Yes. A Now?

Q Yes. A Newark.

Q Now, Mrs. Stathos, you told us, on your direct examination, that you fell from the second floor to the first floor. Is that correct? A Yes, sir.

Q You also told us that there is a turn in these stairs; first you go down straight, toward the turn, and then there is a turn; that is correct, isn't it? A Yes.

Q Then, you didn't fall from the second floor to the first floor, did you? A Yes, sir.

Mr. MacLeod: Of course, your Honor please, I don't want to object; I know cross examination has wide latitude, but I do not think counsel ought to assume all of these things and then start to argue in the question.

The Court: I will allow it.

Mr. MacLeod: But I do not want to object.

The Court: Next question. Don't argue with her, of course.

Mr. Cohen: I certainly do not intend to.

The Court: All right.

Q Did you, or did you not, fall from the second floor to the first floor? A Yes.

Q You did? A I did, all except I missed a few steps.

Q You missed a few steps? A Yes, for the second floor.

Q Can you tell us about how many steps from the second floor to the place where the stairs take a turn? A Two steps.

Q Two steps, from the second floor, before it makes the turn; is that correct? A Yes, sir.

Q I show you a photograph, Mrs. Stathos—

The Court: Is that in evidence?

Mr. Cohen: No, merely mark it for identification.

The Court: All right.

(Paper not marked.)

Q —and ask you if that represents the step from the second floor down? A Well, here is steps, goes up to that, and then turn around this way (illustrating).

Q Well, there are more than two steps; count them, will you? Before there is a turn? A No, only two steps.

Q All right. A Only two steps.

Q All right.

Mr. MacLeod: I have no objection to its going in evidence.

Mr. Cohen: No, that will go in on my case.

Q When was the last time you saw Dr. Levy? A I don't remember.

Q Can you tell us about when? A I don't remember.

Q Can you tell us about how long after the accident, last time he saw you? A Pardon me. I think, about four months.

Q Four months? A Yes.

Q After the accident? A After the accident, yes.

Q You, personally, never signed a lease or made any agreement with either Mr. Jaffe or Mr. Bunevich, did you?

Mr. MacLeod: I object to that.

The Court: Immaterial and irrelevant. All that need be shown was that she had a right to be there, as a member of the family or visiting a tenant.

Mr. Cohen: May I have an exception, your Honor?

The Court: You may.

Mr. Cohen: That is all.

HERMAN LEVY, M. D., sworn.

Direct examination by Mr. MacLeod.

Q You are a practicing physician of the State of New Jersey?

Mr. Cohen: I will admit the doctor's qualifications.

Q Is that right? A Yes.

Q How long have you been practicing medicine in New Jersey, doctor? A About seventeen or eighteen years.

Q What institution did you graduate? A Bellevue Hospital Medical College.

Q Connected with any institutions—hospitals—now? A Well, I have been connected in the Department of Women's Diseases, at the Passaic General Hospital; I am in charge of the Women's Diseases at the Beth Israel Hospital, in Passaic; and I was connected with the Hospital, in New York.

Q What is the medical term for that kind of work? A Gynecology.

Q Did you examine this woman, who was just on the stand, the plaintiff in this suit? A I have, yes.

Q How long have you known her? A Well, I have known her for about six or seven years.

Q Was she a patient of yours prior to the time of this accident? A Yes.

Q You were called in as a result of the accident, were you not? A Yes.

Q Where did you see her, first time? A At her home, in bed.

Q When was that, do you remember? A About a year ago.

Q In January? A In January; yes, sir.

Q You, of course, got her history, result of her falling downstairs? A Yes.

Mr. Cohen: Don't lead the doctor.

Q That is so, isn't it, doctor? A That is so, yes.

Q What did you find, when you examined her, was wrong with her? A She was unable to move or to raise her right arm, pain in the left knee, bruises about the abdomen, bruises certain spots about the back.

Q Did you treat her? A I did treat her, yes.

Q For how long a period did you treat her for these injuries? A Well, all in all, I looked after her, for the first couple of months after the accident, and then at occasional times after that.

Q Did you charge her for your services? A I did; yes.

Q How much did you charge her? A Well, it was three dollars a call—five dollars, if there was something specially done.

Q How many calls did you make altogether? A I cannot recall that.

Q Over the period of how many months? A Over a period of about two months, continually, at first, daily; then, after that, at occasional times.

Q Dr. Levy, as a result of your treatment and your examination, from the first time you saw her, has anything disturbed her, in your opinion, as a result of that accident? A Why, yes; she has the falling of her womb—the neck of her womb is only about an inch and a half from the outlet of the vagina.

Q What effect does that have upon her health, if any? A Well, there is a constant feeling of weight in the lower abdomen; there is pain; there is a tendency—there is a profuseness on menstruation, with tendency to con-

stipation; there is a white leuchorreal discharge; there is a natural inability to go about customary work of her household duties, when she has a certain amount of nervousness, backache, headache.

Q Is that her condition now? A Yes.

Q Would you say, from your internal examination, that you made of her, at the time immediately after the accident, the condition she is in now was the result of that accident? A I examined her before—

Q I mean— A —and I would say it was due to the accident, yes.

Q When you examined her before, you were her physician? A I was her physician; I had occasion to examine her before, yes.

Q Did she ever complain to you, before the accident, as a result of her stomach condition there? A No.

Q You know her children? A She has only one, about fifteen—sixteen years old.

Q What have you to say as to the permanence of this condition that she has now? A Well, that is a condition that, unless it is corrected, it will be permanent, and the correction —of course, I have tried to correct it, by packing her vagina with gauze; I have tried that for sometime, but there is no improvement, and I would say the only way to improve that would be to operate upon her, and sew that womb in place, at a higher level.

Q How far did you say it was from the lip? A The neck of the womb is just an inch and a half from the outlet of the vagina, instead of about four and a half, which is normal.

Q That condition will exist— A It will exist—

Mr. Cohen: I object—

The Court: Don't lead.

Q Will it, or will it not? A It will exist, unless it is corrected.

Q What is the normal position that it should be in? A About four and a half inches away from the outlet.

Q What will be necessary to correct that condition? A Well, to go into the abdomen, lift that womb up, sewing it up at a higher level, sewing it permanently in place.

Q What would you call that—an operation? A Operation, yes.

Q Would that be expensive? A Well, it will run to a few hundred dollars.

The Court: How much is a few hundred dollars?

A Well, before she is through, it will probably cost her about five hundred dollars.

Q That including hospital— A Hospital.

Q Would she have to go to the hospital? A Certainly.

Q How long would she be confined? A She would be confined two or three weeks in the hospital; then several months recuperaton.

Q Need an operation, don't they? A Naturally.

Q Is there pain? A Yes, there is.

Q Severe or slight, in your opinion? A Well, it is a major operation.

Q In your opinion, doctor, from the condition in which you found her, is she suffering from any pain in the region of her abdomen, as a result of this condition now? A She is, yes.

Q There is only one way to correct it, is by the operation? A That is right, yes.

Q What effect does that have upon her, in reference to her nerves, at the present time? A Well, like any constant annoyance, it renders the patient nervous, irritable, unable to go about one's work, here, when there is discomfort, of the discharge.

Q You have attempted to treat this, to avoid the operation, have you not, doctor? A I have, yes.

Q You believe now, in your opinion, that you cannot treat it, or cure it, without the operation? A I believe, if she wants the thing corrected, she will have to be operated on, yes.

Q The other marks that you found on her were, you said, I believe—what did you say? A They have all gone away.

Q They have all disappeared? A They have all gone away.

Q She complains of dizziness—she said, sometimes—she said, at times she is dizzy; can you tell us, doctor, whether that is attributable to the condition of the abdomen, is it, to the one that you found? A It is part of the general nervousness that she complains of.

Mr. MacLeod: Cross examine.

Cross examination by Mr. Cohen.

Q Doctor, you mentioned several institutions with which you are connected. Are you still connected with those? A There is only one that I was connected with for a number of years which I am not connected with now.

Q What was the cause of the severance of your relationship with that institution?

Mr. MacLeod: Object—

The Court: Objection sustained.

Mr. MacLeod: He admitted the doctor's qualification.

The Witness: I will tell you.

Mr. Cohen: I know, but you went into it.

Mr. MacLeod: Sure, but I want my record to show.

Mr. Cohen: All right.

Q You say you had examined Mrs. Stathos for six or seven years prior to the accident, had occasion to treat her? A Yes.

Q For what, doctor? A She had asked me to examine her. She had complained of constipation, and in the course of the routine examination, I examined her internally.

Q Doctor, you say that she had complained of constipation. Doesn't prolapsus of the womb or uterus often cause constipation? In fact, a common cause of constipation? A Why, where the wombs are prolapsed (?), they have no constipation.

Q I am speaking, with reference to women where they have prolapsus of a womb or uterus, doesn't that cause constipation? A I think not. Retroversion of the uterus will cause constipation, but not prolapsus.

Q Doesn't a prolapsus, such as you have described to the Court and jury, often cause such a condition, because of the inability to carry the weight in order to properly function? A A prolapsus means—

Q —a falling down, isn't it? A Prolapsus is a straight falling down, but retroversion is a backward tilting. Now, a prolapsus doesn't necessarily have to have backward tilting.

Q Do you know what caused that constipation? A Constipation?

Q Yes. A Nothing attributable to the womb; it is ordinarily due to the method of living, improper food, in all probability.

Q I see. Can you tell us what you prescribed for that condition, at that time? A Well, now, I couldn't say accurately, by recollection, but it was, in all probability, laxative, probably correction of diet.

By the Court.

Q Did you say, doctor, that you made a vaginal examination, at that time? A I made the vaginal examination at that time.

Q Was there a prolapsus? A There was no prolapsus, no.

Q How long ago was that? How long before the accident? A I should think, that was about two years before the accident.

By Mr. Cohen.

Q Now, doctor, prolapsus of the womb or uterus is a very common thing after the birth of children, is it not? A Well, I would not say that there is anything in the birth of a child, which will cause prolapsus of a uterus.

Q No, but if there is laceration by reason of the birth, and it is not properly taken care of, that will cause prolapsus, will it not? A Why, no.

Q You think it would not? A It would not, not unless certain conditions were present.

Q What would those conditions be—certain conditions? A Well, there would have to be a subinvolution of the womb.

Q Will you tell us what that is? A Yes. That is permanent enlargement of the womb, in other words, looks—like the normal size of the womb, becomes enlarged—and, furthermore, that would appear much sooner than sixteen or seventeen years after the birth of a child.

Q You heard Mrs. Stathos say that her daughter was fifteen years of age? A Fifteen years of age?

Q Why did you tell us sixteen or seventeen years, when you examined her two years before the accident, and the accident happened a year ago? A Yes; well, that would make it about thirteen years after the birth of the child—it would have to appear sooner than that.

Q Now, doctor, isn't prolapsus often caused by reason of lifting anything that may be a little heavy, such as may be done in a store, such as her husband had? A Well, you mean a sudden lifting of a very heavy object of several hundred pounds? Is that what you mean?

Q No, I mean something substantially heavy, say fifty pounds or thirty-five pounds? A Thirty-five pounds—no.

Q How about a hundred pounds, a case of fruit? Would that cause it? A Lifting a case of fruit of 100 lbs.?

Q Yes. A Well, a very heavy object could cause a sort of prolapse, but this is extreme prolapsus. The neck of the womb is only an inch and a half away from the vulvar orifice. In fact, you could put her down, see the neck of the womb just my spreading her vulva apart.

Q Isn't that because of the obese condition? A You mean, because the woman is fat?

Q Yes. A Oh, no.

Q That doesn't affect it at all? A There is no fat in the vagina; there is no fat in the uterus—

Q I don't say that— A —that wouldn't cause it.

Q Now, all of the bruises or contusions disappeared when after your first examination? A Well, in the course of four or five weeks, some sooner, some later.

Q Do you recall having been present at the examination conducted by Dr. Rubacky? A Yes, sir; I do.

Q Did you and Dr. Rubacky discuss the case during the examination? A We probably did.

Q Did you give Dr. Rubacky the history of the case? A I assume that I did; I presume that I did.

Q Now, doctor, where—you haven't your records with you, at all, have you? A Why, I have no records. I was not asked to bring any records.

Q You do, however, have records, number of calls that you make? A Not on patients that pay cash.

Q Did she pay cash? A Well, if she didn't have for one visit, she would pay for two at a time or three at a time.

Q Can you give us some idea as to when you last made your call? A What is that?

Q Can you tell us when you last saw Mrs. Stathos, for the purpose of making an examination? A For the purpose of treating her?

Q For the purpose of treating her for this condition? A Well, I would say, about six months ago.

Q Six months ago? A Yes, approximately.

Q Can you tell us about how many visits you made, doctor? A House—

Q Well, both house—did she make any visits to your office? A No.

Q How many visits did you make at her home? A I should say, about thirty-five.

Q Thirty-five. You called upon her daily for how long, doctor? A Well, for the first two weeks.

Q First two weeks? A Yes.

Q Then your calls were how often after that? A Then they were at intervals of several days.

Q Do you know? Two or three or more? A Two or three or four or five, depending upon whether I was in the neighborhood or out of it, or whether I thought I ought to make this call sooner than usual, depending on whether I had packed her and the packing should come out; it was at an interval of days.

Q How long did you keep up that packing treatment, doctor? A Well, I believe that I packed her up about eight or nine times.

Q Now, who paid you, doctor? A Why, either Mrs. Stathos or her husband.

Q You do not know who paid it? You think it might have been either? A Certainly, either she or her husband.

Q You testified that operation, such as you described, to correct this prolapse— A Yes?

Q —which, as I understand, would be lifting and the suturing— A It would be suturing the womb to the abdominal wall, so that it couldn't get prolapsed to such a degree.

Q Is that the only method employed, where there is no necessity for removing the appendix or something—either of the ovaries or the bladder or anything else? A I don't quite understand your question.

Q Is that the only method employed, such as that you have described? A Well, do you want me to go into the description first?

The Court: No; he wants to know whether there is anything else which could be done.

The Witness: That is, something, that the womb could be put up to the side, permanently in place?

The Court: Yes.

A That is the only way, yes. There are methods of temporary relief, but that would not—

The Court: No operation of the mouth?

The Witness: There is no operation of the mouth.

The Court: And sewing it fast?

The Witness: Yes.

Q Sewing it where? A Sewing it to the front abdominal wall or, either—yes, sewing it to the front of the abdominal wall.

Mr. Cohen: That is all.

The Court: I think we will quit now, until Tuesday morning, at ten o'clock.

Recess.

SECOND DAY.

February 4, 1930, 10:00 A. M.

JAMES STATHOS, sworn.

Direct examination by Mr. MacLeod.

Q You are the husband of the plaintiff in this suit, are you not? A Yes.

Q Where do you live— A 46—

Q —or where did you live at the time of the accident? A 245 Madison street.

Q Who owned the premises there? Who was your landlord? A Mr. Bunevich and Mr. Jaffe.

Q That is, the defendants in this suit? A Yes.

Q Did you have any conversation with them? Did you ever talk to them about it? A Talk to them?

Q Did you ever talk to the landlord? A Yes.

Q Who rented the premises, you or your wife? A I did.

Q When you talked to them, when was it you first began to rent? What month was it, when you bgan to live there? A You mean, the store or my house, where I live?

Q Well, the store first. A Store? August 1, 1927, I think.

Q When did you— A Or '26, something like that; I don't remember exactly.

Q When did you rent the house? A April '27.

Q After that August? A After a few months, after the store.

Q Where did you live in the building? First, second or third floor? A Second floor.

Q Were there any other places in the building, that is, any other floor and family living up there? A Yes.

Q Your wife had an accident while living there, did she not? A Yes.

Q Where did this accident happen? A Well, at first, we complained about the lights—

Mr. Cohen: I object.

The Court: Strike it out. He asked you where the accident—

A When the—

Q Where? Do you know where it happened? You didn't see the accident, did you? A No, I guess—

Q You were not there, were you? It happened in your front stairway—

Mr. MacLeod: I will withdraw that.

Q You heard that it happened in the front stairway? A (Not audible to stenographer.)

Mr. Cohen: I move that be stricken out.

The Court: Strike it out.

Q Do you know where the front stair is in your house? A Yes, Madison street.

Q When you first went to live there, was there any light provided? A Yes—gas lamp.

Q Gas light lamp? A Yes, old wall fixture.

Q I show you here Exhibits P. 1, P. 2 and P. 3, and ask you if these pictures show where this gas lamp, old fixture, was located in this house when you first went to live there? A This first fixture.

Q Indicating the black mark on the two exhibits, there, P. 2 and P. 3? A Yes, sir.

Q I show you here Exhibit P. 1; is that a correct representation of the stairway in the front part of your house? A Yes.

Q Does the gas fixture show in this? A No.

Q Where is it? Above, the fixture, or below it, this gas fixture? Is it on the top of the stairs or the bottom? A Yes.

Q On the bottom, located on what floor—on the first or second floor? A Second floor.

Q Is it located in the wall or the ceiling? A In the wall.

Q In the wall. When was it that your wife was hurt on these stairs? Do you remember the date, when it was? A January 22, 1929.

Q That is, a year ago? A About a year ago.

Q About a year ago last month? A Yes.

Q When did you first hear of the accident? When did you first learn she was hurt? A What do you mean?

Q How did you know she was hurt? A Well, I will tell you, because the store we have, if this is the front of the store from Main avenue; they have another door on Madison street—

Q Do you understand me? When did you first find out? A I find down on the steps, away down at the bottom place.

Q You found whom? A My wife.

Q Right after the accident? A Yes, right after the accident.

Q How did you come to go to find her there? A I hear the noise, and I go outside, and I see the accident, and I carry my wife, and there was another man by me there; we picked her up, took her to the room.

Q Who was the other man? A I don't know.

Q Why did you call the other man? A Well, to have help.

Q To help what? A To help my wife.

Q Where were you at the time of this noise? A In the back of the room, in the back of the store.

Q In your own store? A Yes.

Q That was on the first floor? A That was on the first floor.

Q How did you find your wife— A Well, she isn't very well in here.

Q What did you do when you found her downstairs? What did you do with her? Let her lay there? A No, I went up the stair.

The Court: You took her upstairs, carried her upstairs, put her in bed, called the doctor?

The Witness: Yes.

Q What doctor did you call? A Mr. Levy—Dr. Levy.

Q Doctor who? A Dr. Levy.

Q How long was your wife confined to bed as a result of that? A Eight weeks.

Q Did you continue to work in your store, the store that is downstairs? A Yes.

Q You were all right, weren't you? A Yes.

Q Did your wife help you in the store before this accident? A Yes.

Q How much did she help you? A Not much.

Q Huh? A She helped me—not too much.

Q I mean, before the accident? A Yes, before the accident—not too much.

Q Not too much, just helped a little bit? A Just go around—no give her heavy stuff at all,

and sometime gave them foods, no heavy things; we don't have do it.

Q But she was in the store, was she? A Yes, some but not all of the time.

Q As a result of the injury, was it necessary for you to get anybody else to help in the store? A After, yes.

Q After the accident? A Yes.

Q Whom did you get, if anybody? A (Witness makes unintelligible response.)

Q Was it just a man or a boy? A (Witness makes unintelligible response.)

Q What was the name? A I don't remember exactly.

Q Don't know his name? A No.

Q How long did he stay there? A Eight weeks.

Q What did you pay him? A $15.00 a week.

Q Did you have anybody upstairs? A Yes.

Q To help your wife? A Yes.

Q Whom? A A woman.

Q What is her name? A Mary Cocolach—something like that.

Q You don't know her very well, either, do you? A Yes, I don't know her very well.

Q How long did she stay with your wife? A Eight weeks.

Q Did you pay her? A Yes, I did.

Q How much did you pay her? A Fifteen dollars.

Q Fifteen dollars—a week or a year? A No, a week.

The Court: For how long?

The Witness: Eight weeks.

The Court: Eight weeks at $15.00, is that right?

The Witness: That is right.

The Court: Are you sure about that?

The Witness: Yes, I am sure.

The Court: How do you know it was eight weeks? Did you pay her yourself?

The Witness: Yes, I did.

Q How do you know it was eight weeks, the judge asked you? A Because I know I paid her for it.

Q How do you know your wife was sick for eight weeks, the lady helped for eight weeks? A How I know?

Q Yes. A I guess, I have to know.

Q Well, why? Wasn't it only six or seven? A Because I find what I paid, $120.00, to pay that was working there.

Q How much did you pay? A $120.00, eight weeks, and I know how much I paid out.

The Court: You paid the woman a hundred and twenty, the boy—

The Witness: Each the same, a hundred and twenty.

The Court: —the same thing?

The Witness: Yes, sir.

The Court: The sum of two hundred and forty for the two of them?

The Witness: Yes, sir.

The Court: Next question.

Q How much did you pay Dr. Levy? A $100.00.

Q Did you ever have any trouble with that light in the front stairs? A You mean, before the accident, you mean?

Q Yes. A Yes, that is right, yes, no light.

Q How long before the accident was there there was no light? A It was over two months.

Q What do you remember doing about it, if anything? A I told the landlord about it.

Q What did he say? A He said, he is going to fix it.

Q Did he fix it? A No—after the accident, he fixed it.

Mr. Cohen: I move that be stricken out.

Mr. MacLeod: I think that is proper.

The Court: What was the objection?

Mr. Cohen: He merely was asked if he fixed it. He said he fixed it after the accident.

The Court: I will allow that.

Mr. Cohen: Very well.

Q I show you here Exhibits P. 2 and 3, and ask you if the bulb or light shown in these pictures are the fixing that he did, after the accident, or not? A Yes, they fix them after.

Q This light they put in? A Yes, sir.

Mr. MacLeod: Cross examine.

Cross examination by Mr. Cohen.

Q Mr. Stathos, you rented and occupied the first floor; that is correct, isn't it? A That is right.

Q You also rented and occupied the second floor; that is correct? A Yes, that is right.

Q Then, there was another family on top of that; that is correct, isn't it? A That is right.

Q Did I understand you to say that there were both gas and electric lights in the hall? A That is right.

Q Before you actually moved in? A That is right.

Q I see, all right. Now, you did not see the accident, did you? A No.

Q When it happened, as I understood you, you said that you heard the noise of a fall? A That is right.

Q Now, your store is on Main street, isn't it? A That is right.

Q And the entrance to the apartment is around the corner, isn't it? A That is right.

Q It is a brick building, is it not? A That is right.

Q You say you heard this noise when she fell; is that right? A Yes, time of the fall I heard the noise; yes, sir.

Q Can you tell us what time of the day it happened, Mr. Stathos? A Half-past nine.

Q Half-past nine? A Half-past nine.

Q I see. Now, when did you first hire the boys for the store? A When?

Q Yes. A After the accident.

Q Can you tell us when, after the accident? A After the night 22nd January, 1929.

Q Is that when you hired him? A Yes.

Q I see; that was the day of the accident, wasn't it? A Well, after, I can say, after one day.

Q One day, you mean the 23rd? A 23rd.

Q 23rd? A 22nd and 23rd.

Q You paid the boy $15.00 a week? A Yes.

Q Do you know where the boy is now? A I don't know.

Q Did you try to find him? A I can't; I don't know where he is.

Q Do you remember his name? A I don't.

Q Do you remember his first name? A First name?

Q Yes. A James.

Q You called him, "Jim," I suppose? A That is right.

Q Now, when did you first hire Mary, the lady from Connecticut? A Same day, what I hired the boy after the accident.

Q Same day you hired the boy? A Yes.

Q How long did you keep her? A Eight weeks.

Q Now, during the eight weeks, Mr. Stathos, did your wife get out of bed at all? A Well, of course, she has got to get out of the bed, and take walk around the home.

Q Did she go downstairs at all? A No at all, can't.

Q Were you here when your wife testified that she went downstairs to relieve you during those eight weeks? A I didn't—

Q Never mind; I will withdraw the question. How did you pay the boy, Mr. Stathos? A How did I pay him?

Q Yes; in what money—I mean, check or cash or what? A I gives money, cash.

Q What kind of money did you pay Mary, the lady who helped you? A By cash, too.

Q By cash, too? A Yes.

Q I see. She is not related to you at all? A Not at all.

Q Just a friend? A No, sir.

Q Lived in Passaic at the time of the accident? A No.

Q Where did she live? A She lived in New York at that time.

Q When did you first call her? A She was before in my home, in my house, she come to see some people; ask people to come to see sometimes, they do the same thing.

Q You called her up by telephone? A I call her up by telephone, she come over to take care of my people.

Q When was the last time Dr. Levy ever came to see Mrs. Stathos? Can you tell us? A He come during the eight weeks.

Q I mean, when was the last time? A Last time?

Q Yes, sir. A First time after the accident, you mean, or what?

The Court: Last time, not the first time.

A Last time after the accident, from the eight weeks? Of course, he come steady three or four or five weeks, then he come two or three times—I can say three weeks, then he come last eight weeks.

Q When was the last time—last call he made to see your wife—can you tell us? A Last week of the eight weeks.

Q Oh, I see; that was the last time? A Besides the first time he come the last time, of course.

Q But, I mean, the last visit he made to your wife was after the eight weeks? A Eight weeks.

Q That was the last visit he made to your wife? A That is it.

Q I see; did you pay Dr. Levy? A Yes, I did.

Q How much did you pay him altogether? A $100.00.

Q $100.00—can you—did you pay him all at one time? A No, by little each.

Q When was the last time you paid him? When he came last? A Yes, that is last time of the eight weeks, I give him balance of twenty dollars.

Q Is this your signature, Mr. Stathos? A Certainly.

Q You swore to that affidavit? A That is right.

Q All right. Now, in the interrogatories, on the items of expense incurred by plaintiff, James Stathos, for medical and surgical treatment, you said, "Doctor, eighty dollars." Which is correct, Mr. Stathos, the hundred dollars which you talk of now, the increase, or which is correct? A All right, I can say eighty dollars and twenty dollars for medicines.

Q Now, then, you say you—which was it? You just testified a minute ago you paid Dr. Levy $100.00, did you not? A Yes, that is right.

Q In your interrogatories you swore that you paid the doctor $80.00—

Mr. MacLeod: Wait a moment. I object; the answer in the interrogatory does not specifically say what counsel says it says.

The Court: He is asking him what he said, and is reading, if there is any doubt about it.

Mr. Cohen: "Items of expense incurred by plaintiff, James Stathos, for medical and surgical treatment; answer—'Doctor, $80.00, and $15.00 or $20.00 for medicines—medical expense.'"

The Court: All right.

Q Now, did you pay Dr. Levy $100.00 or did you pay him $80.00? A Well, eighty and twenty is a hundred.

Mr. Cohen: I move to strike that out.

The Court: The question is: How much did you pay Dr. Levy? A $80.00.

Q Then, why did you tell us a few minutes ago that you paid $100.00 to Dr. Levy? A Well, of course, I have to pay the doctor some out of eighty dollars.

Mr. Cohen: I move to strike it out.

The Court: Oh, I will allow it. You didn't pay the $20.00 to the doctor for medicine, did you?

The Witness: Why, of course, he give me a little bit and I take some money out of it and I pay the drug man.

The Court: I asked you, whether you paid the $20.00 to the doctor or the drug store?

The Witness: No, I pay the drug store.

The Court: Do you owe anything to Dr. Levy?

The Witness: No.

The Court: All right.

Q You say your wife didn't work too much —not much, is that right? A Yes, sir.

Mr. Cohen: That is all.

Re-direct examination by Mr. MacLeod.

Q Did you have a conversation at all with the landlord at the time you rented the place regarding any lights in your place? A Yes.

Q What was it? A On what?

The Court: What was the conversation?

Q What was the conversation?

The Court: With the landlord, when you had rented the place?

A To keep the lights in good condition.

Q In where? A In the hallway.

Q Did he take care of the lights during the time that you were there, at the beginning of your tenancy? A Yes, he did.

Q When were they lit and when were they put out, do you know, what time? A Put up around six o'clock, I can say, sometimes around five o'clock; then he take them out at ten.

Q Took them out what?

The Court: Took them out at ten.

Re-cross examination by Mr. Cohen.

Q Mr. Stathos, did you really tell the landlord to keep the lights in good condition? A Yes.

Q When did you tell him? A Same time when I took the premises upstairs.

Q Is that the time you told him? A Yes.

Q Which one was it—which landlord? A Both together when they—I signed the—before that I signed the lease; then after we are talk-

ing about the flat that I took that time, I meant to rent the place, and I told them all about it.

The Court: Which one did you tell?

The Witness: Both together.

The Court: Both of them.

Q Will you tell me, Mr. Stathos, why it was that you told the landlord to keep the lights in good condition when you first rented the apartment? Why did you tell him that? A Why?

Q Yes. A Because I live some other room —some other house where I have got to do that.

Q Sir? A I have little experience with somebody else, that is the reason, and I make the complaints with the other.

Q You mean, that you fell before? A No.

Q What do you mean by "we had experience"? A It means, for one thing, in where I have resided, I have got to complain about the lights, and I know what is what.

Q You knew the light was up near the second floor, on your floor? A Yes.

Q Then there was a turn, after you walk down? A That is right.

Q This light, when it worked at the beginning, did it reflect any lights on the second stairs? A Not at all.

Q Not at all? A No.

Q When it was working? I see. A (No answer.)

Q Now, am I to understand you, Mr. Stathos, that the time you had the conversation about the lights was when you signed the lease for the store? A That is right.

Mr. Cohen: All right; that is all.

Nick Furris, for Plaintiffs, direct.

NICK FURRIS, sworn.

Direct examination by Mr. MacLeod.

Q Mr. Furris, you know the plaintiffs in this suit, do you? A Yes, sir.
Q Friends of yours? A Yes, sir.
Q Have you visited them? A Yes, I used to visit them.
Q At their home? A Yes, sir.
Q Prior to January, 1929, have you been there? A Yes, sir.
Q Where did you visit—what house? A House over to the Madison street and Main street.
Q Where they have their store downstairs? A In this store, too. I used to visit them in both of their places, in the store and the house, too.
Q You have known them for how long, about? A About three years.
Q How long, before this accident, had you been there? A Oh, about over a year, I guess, pretty near a year.
Q About how often would you go there? A I used to visit them almost twice a week.
Q Did you ever have occasion to use the stairway in those premises? A Yes, sir.
Q The front stairway? A Yes, sir.
Q Do you know anything about the lighting condition in that hallway when you were there, at that time?

Mr. Cohen: Just a minute—
The Court: Fix the time.

Q Well, say, within a month or so before this accident?

The Court: Do you know about this accident?

The Witness: Yes, sir.

The Court: When did it happen?

The Witness: I don't know exactly when.

Mr. MacLeod: He didn't see the accident, your Honor.

The Court: Do you know when it happened?

The Witness: It happened in January, but I don't remember exactly date.

The Court: What year?

The Witness: Of 1929.

The Court: What were the conditions—how long, or how long before that, was it that you called there? Can you recall?

The Witness: Yes, sir. I used—I was in his house about a week before the accident.

The Court: All right. Now, what were the lighting conditions then?

A The light condition was no light in there, gas happens to go out—special lights it is—and I used to carry match in my pocket to go up the banister.

The Court: You didn't go up and light this that night?

The Witness: I used to go up there a lot of times.

Q The Court means, the same night. A No, I wasn't there that night.

The Court: You said the week before you went there, you had to go upstairs with

matches. Now, I am asking you whether you had to go up a lot of times that night a week before?

The Witness: No, a lot of times; I used to go up one time and come upstairs and then went out, to come downstairs.

The Court: Two times?

The Witness: Yes, sir.

The Court: Two matches, eh?

The Witness: Yes, sir.

The Court: All right.

Q There was no light there that night? A No—

Q What can you say, what the condition—the lighting apparatus was? A The light in the store was gas.

Q What floor was that? A Right on the step of the first floor, to go upstairs on the second floor.

Q Second floor? A Yes, sir.

Q Tell us about the condition of the gas—you didn't see any lights there? A I don't know, but it happens to be no lights there.

The Court: Did you light the lights?

The Witness: No, I asked Mr. Stathos lot of times—

Q Never mind saying what he said.

The Witness: No, I never tried any lights there.

The Court: Why didn't you light the lights when you went downstairs? Why did you burn your finger or the match?

The Witness: I ask him, Mr. Stathos, a lot of times.

The Court: No, I am not asking you anything about that; I am asking you this simple question—

The Witness: Yes, sir.

The Court: —why did you—wait a minute; you are like a race horse. Why did you strike a match and go right upstairs and all of the way down on a match?

The Witness: Yes, sir.

The Court: Why didn't you turn on the gas light and light the light before you went down?

The Witness: Because there was no light in it.

Q What do you mean by, "because there was no light in it"? A Put a match in, make no light there.

Q How do you know that? A I tried a lot of times that.

Q That is what we are trying to ask you. A Yes, sir.

The Court: It is hard work; took two of us to get it out.

Mr. MacLeod: Yes, sir; cross examine.

Cross examination by Mr. Cohen.

Q What did you mean when you said, "never tried any lights"? What did you mean by that, when you testified that you never tried any lights? A Tried this to see but you couldn't get no light out of the gas.

Q When did you try the first time? A But I try a lot of times.

Q When did you try the first time? A But I don't remember exactly when.

Q Can you give us some idea? A It was about over two or three weeks before the accident, I always try a lot of times before the accident to get a light out of it.

Q Did you ever try two or three weeks before the accident? A Yes, that is what I say, two or three weeks before.

Q Did you ever try before that? A Before that?

Q Yes. A I don't remember exactly if I try, because I wasn't expecting to have—

Q What were you not expecting? A Because I don't—if I was somebody else's house, I don't have to try the lights in somebody else's house.

Q Why did you try two or three weeks before the accident? A Because I just try a lot of times because I was trying to go upstairs and I found no light; so long as I had matches in my pocket, I used to try same place to get light.

Q Now, Mr. Furris, you had known these people for some time; that is correct, isn't it? A Yes, sir.

Q You visited them for some time, did you? A Yes.

Q Now, why was it that two or three weeks, for the first time, you tried to light the jet or the gas; why was that? A Because happened to try the light.

Q Why didn't you try it before that? A I used to try a lot of times—I don't remember exactly no two or three weeks—one month, two months before.

Q Was it more than once you tried it? A Because a lot of times I used to go upstairs with Mr. Stathos along.

The Court: He asked you whether it was more than once you tried it.

A I did try the lights.

The Court: How many times?

A I used to try a lot of times.

The Court: How many times?

A About three or four times I try the light, if I couldn't—

Q Same night? A No, not the same night, because as long as I don't get light once—

The Court: You had, you said you tried three or four times?

Mr. MacLeod: Different nights, your Honor.

The Witness: On different times.

The Court: How many different times altogether on different nights?

The Witness: About three or four times.

The Court: Why did you try it the second time? Why did you try it the third time and the fourth time, when it wouldn't light the first time?

The Witness: Maybe it would get light; I don't know they got any light there, and they may do something like fix it, you see.

The Court: Was it gas?

The Witness: It was gas, on the first step there.

The Court: That was the place you tried to light it?

The Witness: Yes, sir.

The Court: Did you turn it?

The Witness: Yes, sir.

The Court: Would it turn?

The Witness: It would turn.

The Court: But it wouldn't light?

The Witness: But it wouldn't light.

The Court: All right.

Q Are you related to Mrs. Stathos or Mr. Stathos? A No.

Q Not related at all? A No.

Q Just friends? A Just friends, I know them.

Mr. Cohen: That is all.

MRS. MARY KAKELARAS, sworn.

Direct examination by Mr. MacLeod.

Q Mrs. Kakelaras, where do you live? A I live in New York.

Q Do you know the plaintiff, Mrs. Stathos? A Yes, sir.

Q You have known her for some time? A (No audible response.)

Q How did you come to come over to her house on this occasion? A Why, she called up time she fall down.

Q When was that? Do you remember when that was? A Down in Passaic.

Q When? Do you remember when it was? A Well, I don't remember, no.

Q What did you do when she called you up? A Come to go to work.

Q Huh? A She said, we worked together.

Q Whereabouts? A When she is sick in bed.

Q Where did you go when she called you up? Coney Island? A To her house.

Q Where is that? A Passaic.

Q How was Mrs. Stathos when you got there? Where was she? Where was she when you got there? A Well, in Passaic—I don't know where.

By the Court.

Q Was she in bed? A Sure.

Q All right. What was the matter with her? A She fall down on the steps.

Q You didn't see her fall down, did you? A No.

Q How long was she in bed? A She is about three months.

Q How long did you stay there? A I stayed about eight weeks.

Q About or exactly—which? A Eight weeks.

Q How much did you get? A $15.00 a week.

Q What did you do after the eight weeks? A Well, I should go home and I should go to Connecticut.

Q How do you know she was in bed for three months? A (Partly unintelligible.) —after get up, go home, after three months.

Q You were there eight weeks? A Yes, three months.

Q That is only two months? A Well, I don't know—about eight weeks.

Q Maybe the eight weeks is two months; is that what you mean?

Mr. MacLeod: That is what she means, eight weeks (?)

A I don't know, I was there eight weeks.

Q Then you don't know after that, do you? A No.

Q How much did you get altogether? A A week, I have every week paid.

Q How much a week? A Fifteen.

Q How much? Eight times fifteen? A That, I don't know.

The Court: All right; anything more?

Mr. MacLeod: Cross examine.

Q Did Mrs. Stathos get up during that time and go out? A No. Did Mrs. Stathos go out?

Q Yes. A No, just get up after I left, the eight weeks.

Q You were only there eight weeks. I am only asking you—while you were there, did she go out? A Who? Me?

Q No, Mrs. Stathos? A I don't—I just know myself after eight week—

Q No, while you were there, was she in bed all of the time? A No, because she is sick; I don't know.

The Court: Don't know.

Mrs. Mary Kakelaras, for Plaintiffs, cross.

Cross examination by Mr. Cohen.

Q Can you tell us what month you went back to New York or to Connecticut? A No, I don't remember that.

Q Do you remember the month when you came? A When I come back from Connecticut?

Q No, do you remember when you went to Mrs. Stathos' house? A I think was sometime January or February—I don't know—time she fall down.

Q What is that?

The Court: Time she fell down, January or February.

Q Can you remember when you went back, what month? A No.

Q This only happened last year, Mrs. Kakelares? A Well, I don't remember.

Q You do not remember? A No.

Q Where did you get this time about three months, when you said she was in bed three months? Where did you get that time? A Because I stayed January, February, March, but I don't know—first of March I live in the house, see?

Q Do you remember how often Dr. Levy came to the house? A No.

Mr. Cohen: All right.

The Court: Is that your case?

Mr. MacLeod: Yes, sir.

PLAINTIFFS REST.

DEFENDANTS' MOTION FOR NON-SUIT.

Mr. Cohen: If your Honor please, I move for a non-suit, on the ground that there is no evidence of a contractual relationship between the defendants and the plaintiff, Agnes Stathos.

The Court: Motion denied.

Mr. Cohen: May I have an exception?

The Court: You may have it.

DEFENDANTS' CASE.

JOSEPH F. A. RUBACKY, M. D., sworn.

Direct examination by Mr. Cohen.

Q Dr. Rubacky, are you a practicing physician, licensed to practice in the State of New Jersey? A Yes, sir.

Q Have been for how long? A Between twelve and thirteen years.

Q Of what university or medical college are you a graduate? A New York University, Fordham University.

Q With what institutions are you connected, or have you been connected, during the time of your admission to practice as a physician? A You mean, hospital institutions?

Q Yes. A Well, after I graduated, I served with the U. S. Army and subsequently came to Passaic, where I began my practice.

The Court: He did not ask you that, doctor. He asked you "institutions." The

Army is not any institution—medical institution.

A Well, I was connected with Army hospitals.

The Court: Just tell us that. What institution—Army hospitals?

A Army Hospitals.

The Court: What else?

A I am—I have been—and am now—connected with the hospitals in Passaic—

Mr. MacLeod: What hospitals?

A —St. Mary's Hospital, Passaic General Hospital, and at the present moment, I am president of the associate staff of the St. Mary's Hospital.

Q Now, doctor, did you, at my request, have occasion to examine Mrs. Stathos, the plaintiff in this case? A I did.

Q She gave you, I suppose, a history of the case? A She did.

Q What was that? A She said that she had fallen down a flight of stairs.

Mr. MacLeod: This witness is a practicing physician, but he did not treat this plaintiff, your Honor.

The Court: Of course, the rule is that no history that he might get is admissible.

Mr. MacLeod: That is right.

The Court: All he can testify to is with respect to what he found, strictly speaking, of course; if Mr. MacLeod doesn't object, I do not.

Mr. MacLeod: I do not object, no, but I just want to find out what position he was holding there.

Q Doctor, when did you make your examination? A On the 22nd of March, I believe it was, 1929.

Q Where did you find Mrs. Stathos? A When I first came, I had an appointment with Dr. Levy; I was to meet him at that house at eleven o'clock. When I first came there, I found Mrs. Stathos was in the back of the store.

Q What was she doing there? A I suppose, waiting upon customers; she was behind the count—

Mr. MacLeod: I object—

The Court: Strike it out; objection sustained.

Q What was your observation? A That she was behind one of the counters, in back of the store.

The Court: What date was that?

The Witness: March 22nd.

Q Now, doctor, will you tell us what you found as a result of your examination, what your examination revealed? A I found nothing whatsoever regarding the subjective symptoms which she complained of.

Q What were those? A She complained of aches and pains all over the body.

Q All right— A She had a slight ecchymosis, a , due to a congestion of blood in the—to the right calf of the leg. Her both legs were with a number of very varicose veins.

Subsequently, and during Dr. Levy's presence, I examined her gynecologically, and found an infantile uterus—a uterus that is more or less abnormal in a woman of her age—more or less abnormal in any one who bears one or two children, such as she has had. The cervix was firm. There were no no . The bed—the perineal floor was intact. She had good muscular tone. The ovaries and the tubes were perfectly normal. Pathologically, I found absolutely nothing wrong.

The Court: Doctor, is an infantile uterus anything wrong?

The Witness: No, it is infantile, which is such as you would find a person that is a virgin, or, such as a dwarf, and, of course, is abnormal in that sense.

The Court: You mean, it was a small uterus?

The Witness: Yes.

The Court: All right.

Q Does that, doctor, point to the fact that there is a fallen womb? A She absolutely had no prolapse.

Q That prolapse means just what, doctor? A Prolapse means a dropping of the fundus and cervix of the uterus, commonly called "womb," into the vaginal orifice. With that falling, you get relaxation of all of the ligaments and muscles adjacent thereto and attached thereto, and no such relaxation and no such dropping was evident.

Q By reason of that absence of a relaxation, you concluded, did you, doctor, that there was no prolapsus or falling of the womb? A All

of these various objective gynecological signs would indicate that there would be no prolapse.

Q What is the common cause, doctor, for varicose veins? A Well, usually, you will find them in—

The Court: What difference does that make? She is not complaining about varicose veins.

Mr. Cohen: Except that I want to show, the doctor did testify, I think, that there was a congestion, and then I want to lay a foundation for that.

The Court: All right. What is the cause of varicose veins?

A Usually, you will find varicose veins in any woman who has borne children. You will also find it particularly in women who are accustomed to doing store work, floor work, or standing in for any length of time.

Q Now, doctor, you heard Dr. Levy testify that she complained of being tired, generally? A Yes, sir.

Q With that condition which you have just described, viz., the varicose veins, will that cause any such a condition? A Certainly.

Q You heard the doctor testify that there was a leucorrheal condition. What is the common cause for such a condition? A Leucorrheal condition—most common cause is a change in the blood picture of the individual. You get usually an anaemic condition of the blood evident when you take a blood count or do a differential.

Q Now, doctor, with respect to childbirth, did she tell you, when you examined her, how many

children she had? A She did. She told me that she bore one child and a miscarriage with another.

Q Now, would that, referring to the matter of miscarriage, be a cause for prolapse, if one existed? A I do not understand your question.

Q I mean, the—I will withdraw that. What was her general condition when you examined her, doctor—here general physical condition? A She apparently was in a very healthy state.

Q You heard Dr. Levy testify, did you not, that he resorted to packing of the uterus— A Yes.

Q —with gauze? A Yes.

Q And that he had continued it for about eight weeks? A Yes.

Q Is that the common remedy for— A It is not a common remedy; it is employed only in cases of emergency.

Q Did you find that packing, when you examined Mrs. Stathos? A She had no packing whatsoever.

Q Does the weight of Mrs. Stathos in any way affect the conditions described by Dr. Levy on his direct examination? A Well, if you would consider her obese, then she probably would bear a tendency toward such a pathology as she describes, but the fact that the muscular tone, the fact that the ligaments were in good position, and not relaxed, would negative any such idea.

Q Now, you heard Dr. Levy testify he had treated her for constipation before the accident. What is the usual result of—

Mr. MacLeod: Of course, your Honor please, that would be on history and would be comparison of testimony.

The Court: Objection sustained. What difference does it make? She is not complaining of this constipation but falling downstairs, isn't she? * * * If you think it is important, I will allow him to answer.

Mr. MacLeod: I will withdraw my objection.

The Court: It is not part of the history; it is a technical, hypothetical question. What is the cause of constipation, and what may cause it, in her case; is that it?

Mr. Cohen: What I want to bring out, if your Honor please, is that Dr. Levy testified, while I don't want to characterize him, and my effort is not impeaching the credibility of Dr. Levy, yet I should like to know —to have our witness' views on that point.

The Court: How can this witness tell anything about what might have caused constipation in this woman, before her accident? That is the point. That is hardly relevant.

Mr. Cohen: I will withdraw it.

The Court: If he knows, all right. * * * I have no objection to the question, if you think it is important, if you think it will throw any light on this question.

Q Doctor, does a prolapsus of the uterus, or the womb, cause constipation? A Almost invariably.

Mr. Cohen: That is all. Cross examine.

Cross examination by Mr. MacLeod.

Q There is no prolapsus here, is there? A I beg pardon?

Q There is no prolapsus of the womb? A I can't hear you.

Q There is no prolapsus of the womb, in your examination, in this case? A No.

Q So that couldn't cause any constipation in this case, could it? A I don't think so.

Q You don't think so? A No.

Q You are certain about that, aren't you? A I am, absolutely.

Q You say, there is no prolapsus here? A There absolutely is no prolapse.

Q In other words, you say there is nothing wrong with this woman at all; is that right? A I do not know of anything else, except, if I am allowed, her complaints; that is all.

Q Only what she tells you? A No.

The Court: No, you told us that she had varicose veins.

A No, except her complaints.

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

Q But, so far as her abdomen is concerned, or the around through her, there is nothing wrong with her at all; that is right? A Absolutely.

Q But, if there is something wrong with her there, then, it is the result of imagination? A I said, that might be a case—

Q You seen the infantile uterus that you found? A Yes.

Q Can a person have children, if they have an infantile uterus? A Absolutely.

Q That means small, doesn't it? A Absolutely.

Q What did you mean, if he used packing only in emergency? What did you mean? What

emergency? A Well, suppose you had a or a woman that carried ten or twelve children, miscarriage, she has a profuse hemorrhage along with this miscarriage, and you get prolapse; in order to control the hemorrhage, in order to control the relaxation, and overcome the result of the hemorrhage, you would use packing in such instances like that.

Q When it prolapses, then you would do packing? A In an instance like that.

Q So that if Dr. Levy used packing in the prolapsus, doctor, it was the proper thing to do, wasn't it? A Not for eight weeks.

Q Well, for one week, would you say that was all right? A I don't think I would employ it for one week.

Q An emergency? A I don't think I would employ it for one week.

Q You wouldn't do that? A No.

Q That wouldn't be your way of doing it; is that what you mean? A No.

Q Would you criticise Dr. Levy if he did packing for eight weeks? A He may come from a different school; it wouldn't be my business to criticise him.

Q You have been practicing how long? A About thirteen years, all told.

Q Continuously? A Yes, more or less.

Q Without interruption? A Oh, I wouldn't say that.

Q Were you interrupted in your practice during that thirteen years? A I don't know just how you would call that.

Q Well, did you cease practicing during that thirteen years for a period? A I did, for a while.

Q For how long? A Oh, a period of about a year and a half.

Q That last year and a half or before that? A I can't recall exactly.

Q What year and a half was it you stopped practicing a year and a half prior to today or six months or at any time? A No, it was about from '28 to '29, somewhere in that—I don't know what eighteen months that would—

Q Had you ceased practicing during the time you made this examination? A I had not.

Q Any part of that time? A I had not.

Q When did you make this examination, daytime or night? A I made it daytime, morning of March 22nd, eleven o'clock.

Q 1929? A '29.

Q That was about eight weeks after the accident, wasn't it? A Seven or eight weeks.

Q Yes, if the accident happened on January 22nd, March 22nd would be just two months exactly? A Absolutely.

Q You were practicing then, weren't you? A I was.

Q Weren't you serving a clerkship at that time in a law office? A I was.

Q Don't you know that you are required to serve six hours—

Mr. Cohen: I object—

Mr. MacLeod: Credibility.

Mr. Cohen: He may not have complied with the rules of some court for practicing, but I think that is immaterial.

The Court: I will allow it.

Mr. Cohen: Exception.

Mr. MacLeod: You say he did not comply with the rules of some court?

Mr. Cohen: I say, he may not have complied with the rules for admission to the practice of some other profession.

Mr. MacLeod: I am going to ask him about that, if your Honor please.

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

The Court: I will allow it.

Mr. MacLeod: I have a right—

Q Didn't you make an affidavit to the Supreme Court that you would serve six hours during the daytime, not at night, but during the daytime, during March of 1929? A I did.

Q That you served six hours in a law office? A I did.

Q As a clerk? A I did.

Q Then, you were not practicing medicine at eleven o'clock on March 22, 1929, were you, doctor? A That may have been a recess of fifteen or twenty minutes; I do not recall.

The Court: Didn't the affidavit also say that you had no other employment incompatible with a fellow that was seeking a lawship?

The Witness: I was doing that.

The Court: You made that affidavit, too, didn't you?

The Witness: I did.

Mr. MacLeod: That is all.

MORRIS BUNEVICH, sworn.

Direct examination by Mr. Cohen.

Q Mr. Bunevich, you reside where? Where do you live? A Passaic—170 Passaic avenue.

Q How long have you lived there? A Thirty years.

Q Do you recall having rented the store to Mr. Stathos? A Yes, sir.

Q Do you remember when? A 1926.

Q Is this—I show you what purports to be a lease between you and your partner—Mr. Stathos—and ask you if this Mr. Stathos is on that lease? A Yes, sir.

Mr. Cohen: Any objection to my offering it in evidence?

Mr. MacLeod: No. That is the store?

Mr. Cohen: That is the store.

(Marked Defendants' Exhibit D. 1.)

Q How soon after you rented the store to Mr. Stathos did you rent the apartment to Mr. Stathos? A Three or four months later.

Q At the time that you entered into that lease, D. 1, was there any conversation had between you and Mr. Stathos regarding any lights? A No, sir.

Q Did he, at the time of signing that lease, say anything to you regarding the apartment, that he wanted it lighted, or anything of that character? A Yes, he did.

Q Now, did you ever talk with Mrs. Stathos at all about the lease? A No, I didn't even know her at all.

Q Did you ever receive any notice of any kind whatsoever— A I didn't—

Q —about any lights or absence of lights? A No, sir.

Q Suppose you tell us about your house, Mr. Bunevich? What is there on the first floor? I am referring, of course, to the tenants? A A store.

Q A store? Who lived on the second floor? A Mr. Stathos.

Q Who lived on the third floor? A Mr. Brasser.

Q So that there is a store and two apartments above that? A Two apartments; yes, sir.

Q Did you have a janitor employed for that house? A Yes, sir.

Q Who was he? Who was the superintendent, or janitor? A Janitor, he is right here.

Q What is the name? A Something—I have forgot it—Clarence—

Q You mean that gentleman over there? A Yes, sir.

Q Mr. Higby? A Mr. Higby. Pardon me.

Q What were his duties—duties in that house? What was he supposed to do for you? A To take care of the steam heat and to take care of the lights.

Q By the way, was there any electric lights in the hall, when you rented that apartment, as Mr. Stathos testified? A No.

Q There were not? A No.

Q When did you put in that light—the electric lights? A We did about couple of months ago, five months ago.

Q But you had no electric lights in the hall? A No, I didn't, at all, nothing but gas.

Q Did you pay the gas bills for the use of that gas? A Yes, sir.

Q Was there ever any indication that gas was not being used by your gas bill? A Never notified me.

Mr. Cohen: I see. Cross examine.

Cross examination by Mr. MacLeod.

Q Your Mr. Higby was to light the lights, was he, and put them out in the morning? A Yes, sir.

Q What was the time he lit them? A Well, in the evening he usually lit them about dark; in the morning, turn them out.

Q And he also took care of the furnace? A He did.

Q Did you ever go around to see that the lights were lit? A Quite often.

Q How often, before the accident, did you go? A Well, quite often.

Q When was the last time you went? A Well, I couldn't say the date; I don't remember.

Q Did you go any Saturdays or Mondays? Do you remember? A Well, I couldn't say exactly how, quite often I was there.

Q How many times did you go there the two and a half years they were there and see if those lights were lit? A Well, I never watched it.

Q You put a man there to take care of it? A I had a man there to take care of it, yes.

Q Did you know that Mrs. Stathos had fallen before? A I didn't, until I got—

Q Did she tell you about it? A No, sir; until I got notice from Mr. Richmond.

Q Did she tell you to get it fixed? A She never mentioned anything to me.

Q Did you go there after she had fallen? A I didn't know she had fallen, after I know the fall was, was time when I got papers from Mr. Richmond.

Q Never knew it before? A No.

Q You never did— A Nothing wrong with it at all.

Q You changed it, though, didn't you? A I did—I had it made new by electric light.

Q Why did you put the electric light in? A They are moderner.

Q If there was nothing wrong with it, why did you change it? A Tenants wanted me to do it; they often wanted light changed, to put electric light in.

Q Who wanted you to do it? A Mr. Stathos—all said we ought to have modern lights in there, a few months ago.

Q Afterwards, he told you—after the accident—when did he tell you? A No, he didn't; he say most of time, on another matter, we ought to have the modern lights.

Q He was mentioning right along to you? A Yes, about have modern lights.

Q Before the accident? A Before the accident?

Q Yes. A He mentioned to me, right along, he said, "Mr. Bunevich, we ought to have modern lights."

Q Was this before the accident, too? A No—after accident, we never spoke nothing at all about it.

Q But after the accident, he did mention the lights to you, didn't he? A Sure, all of the time we talk, when I see him, about the modern lights.

Q Did he mention that to you before the accident? A Well, I can't remember exactly when.

Q He may have, but you don't remember; is that right? A Maybe he did said it, and I was intended to do it anyhow.

Q This is a picture of the light, showing you P. 2 and P. 3, that you put in afterwards? A Yes.

Q This black mark is the point where the old gas jet was; is that right? A Yes, in the wall, in the wall.

Q This is a picture of the stairway, is it not? A Yes, sir.

Mr. MacLeod: That is all.

Re-direct examination by Mr. Cohen.

Q Just one question. Did I understand you to say that the first notice you had of this accident was when you first received a letter from the lawyer? A Yes, sir.

SAMUEL JAFFE, sworn.

Direct examination by Mr. Cohen.

Q Mr. Jaffe, you are one of the owners of that house? A Yes, sir.

Q Where an accident is supposed to have happened? A Yes, sir.

Q On the corner of Madison and Main, is it? A Yes, sir.

Q Now, will you describe this house to us, what there was on the first floor, who occupied the first floor? A Mr. Stathos.

Q Who? A Mr. Stathos.

Q Who occupied the second floor? A Mr. Stathos also.

Q Who occupied the third floor? A Brasser.

Q Did you, at the time the lease for the store was signed, have any conversation with Mr. Stathos relative or regarding any light? A No, never.

Q Did he mention anything about any light at all at the time that lease was signed? A No, sir, nothing more than it was in good condition; never mentioned it.

Q Did Mr. Stathos ever complain to you that there were no lights at all on the second floor of that house at any time prior to January 22nd? A Never.

Q When was the first notice you ever received of this supposed accident? A Mr. Bunevich let me know about it from the letter that he received.

The Court: Louder.

A Mr. Bunevich let me know he received a letter from a lawyer, so that is the time I find it out.

Q Did you ever go to the property or the premises to examine the— A Yes, sir.

Q I see; you had occasion to go to the house, did you not? A Oh, yes.

Q Did you go there evenings, at any time? A Sometimes, yes.

Q Was there any time that you went there that you didn't see a light? A Always a light.

Q What do you mean—gas or electric? A Gas light.

Q Was there any electric lights or fixtures at the time you rented the property to Mr. Stathos? A No, not in the hall.

Q Was there any electric lights or fixtures at the time or on January 22, 1926? A It was.

Q Were there electric lights on the day that she fell? Were there any fixtures there in the hall? A There was the fixtures for the gas only.

Q No electric? A No electric that time.

Mr. Cohen: Cross examine.

Cross examination by Mr. MacLeod.

Q You went there and inspected the gas jet before the accident, did you? A I didn't inspect nothing.

Q Huh? A I didn't inspect nothing, but always knew that there was light there.

Q Did you go in and see? Did you go in and see if the lights were lit? A I didn't go in, specially; I used to pass and see that everything is in good shape.

Q Where did you pass? On the sidewalk? A I suppose so.

Q I don't want you to suppose. A I should say, on the sidewalk, I pass, of course.

Q You could see the light on the second floor from the sidewalk? A There was light on the first entrance, one fixture; on the second floor, another; on the third floor, another.

Q Did you go up and see the one on the second floor at any time? A I used to go up there.

Q Who did you go to see? A To see Mr. Brasser.

Q Third floor people? A Yes, sir.

Q How often, before the accident, were you there? A I don't remember exactly; I used to come there often.

Q You had a janitor there to take care of the lights, didn't you? A Yes, sir.

Q He had to relight them in the morning—relit them in the morning? A He turned them all off.

Q I mean, he put them out in the morning? A Yes.

Q When was the first notice or this accident you had? A As soon as he got notice from the lawyer.

Q How long was that ago? A I couldn't recall it.

Q How long was it after that that you put the new light? A Well, they are supposed to put in before—a year and a half ago—year or two—but we thought, well, we could get along for a while, we will leave it go, because it has been we have to put in new motors and so that is why.

Q You were supposed to put in a year and a half? A We wanted to put in modern lights.

Q A year and a half ago? A Yes, sir.

Q You thought you could get along with what you had for a while yet? A Yes.

Q Then, after the accident, when you learned of the accident— A Then we put in electric, before the accident, that is.

Q You put in what? A Electric—we installed purposely modern lights.

Q Did you put in these lights before the accident?

Mr. Cohen: I think we ought to fix the time as to when these photographs were taken.

The Witness: I left outlet for gas, even, in case something happen.

Mr. Cohen: This witness apparently doesn't know if Mr. MacLeod is referring to them. I think we ought to have the date, when these pictures were taken.

The Court: What is there? When were they taken?

Mr. MacLeod: I agree, they were taken after the accident.

The Court: What is the date, when they were taken?

Q Is this a picture of the lights put in after the accident? A Yes, sir.

The Court: I don't think that it makes much difference, as to when they were taken then. It is understood and agreed that the electric light was installed afterwards, so what difference does it make, whether taken a month after or two months after? Next question.

Mr. MacLeod: No further questions.

Re-direct examination by Mr. Cohen.

Q You collected the rent from the lady upstairs, didn't you? A Mr. Brasser.

Q That is why you had occasion to go into the house? A Yes, sir.

Mr. Cohen: That is all.

CLARENCE HIGBY, sworn.

Direct examination by Mr. Cohen.

Q Mr. Higby, were you on or before January 22nd of 1929 employed as general superintendent of the property on the corner of Madison and Main? A Yes, sir.

Q What were your duties as superintendent? A To look after the lights.

Q What else? A And take care of the steam.

Q Did you look out after the lights? A I went every day there.

Q When did you light the lights? A Nighttime.

Q What time, about? A About half-past five.

Q Do you remember when Mr. Stathos moved in the apartment, about when he moved in? A No, I don't remember that at all.

Q But you remember that he did move in? A He moved in, yes.

Q Now, was there any time between their moving into the apartment and January 22nd that you did not light these lights on the second floor? A Them lights was always lit; I made that my business to see that they were lit.

Q Did you inspect the property daily? A Yes, sir.

Q Did you inspect the light burning? A Yes, sir.

Q At night? A I used to go five o'clock in the morning and eleven o'clock at night.

Q I see. Now, before this—before January 22nd—did you have occasion to go into Mrs. Stathos' apartment? A Yes, I went there many a time.

Q What did you go in there for? A Look after the steam, to see if the steam is in good order.

Q Did you see Mrs. Stathos in the house? A I was talking to her, when she was sick in bed, yes.

Q Was that before the accident? A Before the accident, yes.

Q How long had she been in bed? A I don't know exactly how long she had been in bed.

Q Was she in bed a few days? A Yes, more than a few days.

Q Now, did you talk with Mrs. Stathos before this accident—or after it happened? A No, she come outside, told me she fell downstairs.

Q Did she tell you what hour of the day she fell? A No, she didn't tell me that at all.

Q I mean, did she tell you about what time at day or in the nighttime? A Supposed to fall in the nighttime.

Q In the nighttime? A Yes.

Q I see.

By the Court:

Q When did she tell you that? A There was one time, I think it was on a Thursday or Friday, in the afternoon, I was standing out in front.

Q Downstairs? A Downstairs, outside, yes.

Q She came out and told you? A Came outside and told me, yes.

Q When did she tell you? How long before that had she fallen? What did she say about it? A She said she fell down the stairs; she said, "Why didn't you have

the lights lit?" I said, "The lights was lit."

Q Did she tell you when she fell down? A No.

Q You don't know how long before it was? A No.

Q Did she tell you anything more than that? A No.

Q That is all she told you? A That is all she told me, yes.

Q What did you say? A I said, "If you fall down, steps was in perfect order."

Q Is that all? A Yes.

Q Didn't you say, "Did you hurt yourself"? A No, I didn't ask her that question.

Q You did not? A No.

Q Then she didn't tell you she had hurt herself? A No.

Q You didn't ask whether she had been hurt? A I didn't know whether she was hurt or not.

Q She didn't tell you? A She didn't tell me, about hurt.

Q When did you first learn that she was hurt? A I don't know, but I know that when she came downstairs, she said that she had fallen downstairs.

Q How did you know that, when you saw her in bed, it was before the accident, if she didn't tell you when the accident was? A I was in her room when she told me she fall downstairs.

Q No, that was outside, on the sidewalk? A No, that was in front of the door.

Q You said another time you were in, and saw her in bed? A I was there, when

I was looking for the steam pipe, when I had the steam on.

Q I am trying to find out how you knew that was before she fell? A I don't know.

Q I don't see how you know; she didn't tell you, did she? A I didn't know anything about it.

Q You said, it was before she fell. Now, why did you say that? A Well, she told me outside she fell down; that is all I know.

Q Well, I know, but you say that she was in bed, and you said that was before the accident. Why did you say that? A Why did I say that?

Q Yes; you don't know whether that is true, or not; do you? A Well, I was up in her room; I asked, "What is the matter?" She said, she fell downstairs; that is all I know.

The Court: Cross examine.

Mr. MacLeod: No questions.

The Court: That is all.

By Mr. Cohen.

Q Now, Mr. Higby, let's get this straight.

Mr. MacLeod: I don't think you ought to.

The Court: I didn't mix him up purposely.

Mr. Cohen: I don't suggest that, your Honor.

The Court: I was trying to straighten him out myself.

Q Mr. Higby, you were asked whether or not you saw Mrs. Stathos in bed sick, before the date of the accident, which was on January 22nd. Now, is that correct?

Mr. MacLeod: Just a minute.

A Yes, that is correct.

Mr. MacLeod: I object to that.

A Because I was upstairs.

Mr. MacLeod: How is that direct examination?

A I was in the room there; I went in the room upstairs.

Mr. Cohen: I want to get the real facts.

A To see the steam, and I went over to her; that is all.

Q All right. Now, after you saw her in bed, as you have described it, she was sick; did you see her downstairs, at a later date? A Later on; yes.

Q When? A I don't know exactly what day it was.

Q How many days after you saw her sick in bed did you see her outside? A I don't know how many days it was, but I know I have seen her downstairs; she was talking to me, that is all I know.

Q Had she been sick during the time that she lived there, before the accident? A Yes, before the accident.

Q Are you positive about that? A Yes, I am positive about that.

Mr. Cohen: That is all.

Cross examination by Mr. MacLeod.

Q Were you in her room when she told you she fell downstairs? A Yes, I was in her room many a time, more than once.

Q She told you she had fallen downstairs when you were in her room one time; is that right? A She was sick in bed, don't you forget it.

Q Did she tell you one of those times that she had fallen downstairs while you were in her room? A No, she didn't tell me she had fallen down, while in her room, no.

Q Didn't you say a little while ago that she did? A (No answer.)

Q Is that right, Mr. Higby? A (No answer.)

Q You are a good friend of the people that own the building there, aren't you? A Yes, I am far away.

Q You work there, don't you? A Far away.

Q What? A Far away.

The Court: Next question.

Mr. MacLeod: That is all; no questions.

Mr. Cohen: I want to offer in evidence these interrogatories.

Mr. MacLeod: Are they filed? If they are filed, I have no objection. I have not seen them.

Mr. Cohen: I do not understand that we are obliged, under the law, to file interrogatories.

Mr. MacLeod: Now, I object; they have got to be filed.

The Court: Have they been filed?

Mr. Cohen: No, sir; they have not been filed.

The Court: This is a Circuit issue?

Mr. Cohen: Yes, sir.

The Court: I will allow them to be introduced in evidence, filed at the same time.

Mr. MacLeod: No objection.

(Marked in evidence Defendants' Exhibits D. 2 and D. 3.)

Mr. Cohen: We rest.

DEFENDANTS REST.

The Court: Any rebuttal?

Mr. MacLeod: No, sir.

BOTH SIDES REST.

DEFENDANTS' MOTION FOR DIRECTION OF VERDICT.

Mr. Cohen: May it please your Honor, I should like to move for a direction of a verdict, in favor of the defendants, on the same grounds that I advanced for a non-suit. Does your Honor regard it as a repetition.

The Court: Yes. Motion denied; exception allowed.

Mr. Cohen: Exception.

The Court: Sum up.

Mr. Cohen summed the case to the jury on behalf of the defendants.

Mr. MacLeod summed the case to the jury on behalf of the plaintiffs.

CHARGE.

Thereupon, the Court charged the jury as follows:

Ladies and Gentlemen of the Jury:

This is an action brought by Agnes and James Stathos against Morris Bunevich and Samuel A. Jaffe, for damages, which the plaintiffs claim to have received because of Mrs. Stathos falling downstairs and receiving certain hurts, in a building which she was occupying with her family and which was owned by the defendants.

She says that there was a common hallway, used by herself and other tenants, where the duty was the landlords to keep illuminated, and that they failed to do that, and their failure to do so was negligence and the proximate cause of her accident was that negligent act, in his failure to light the hall, and, as a consequence of that negligent act, on the part of the landlord, by reason of the failure on his part to perform the duty that he owed to her, she fell downstairs and received hurts.

Her husband asks that he be compensated for damages, for the amount of money that he was obliged to lay out and expend to effect his wife's cure of her hurts, and such further sum as you think proper to compensate him for the loss of his wife's society during the time that she was incapacitated.

The plaintiffs say that there was an understanding, or an agreement, between the landlord, the owner of this building, the defendants here, and Mr. Stathos, who rented this property for his family, as a residence, that the lights would be kept lighted, and that, as a matter of fact, he did—or they did—keep the halls lighted,

but that, for some little time, they were not lighted, and that notice of that fact was brought to the attention of both of the defendant landlords, and it was while that condition existed that this accident happened.

The defendant says that that is not true, "that we had a man that was hired for the purpose of taking care of that property, to keep it heated and to keep the lights lighted in the hall, and he did, and we had no notice that he did not; we supposed that he was doing it, as he was hired, and that he did it every day, that we had no knowledge that he had not, or that he was remiss in that duty, or that he neglected it, nor were we ever told anything about it, and the first we knew about this accident was when we were sued." Now, you see, that is quite a different story.

Now, let me tell you what the law is with respect to the duty of the landlord. Where a landlord lets out portions of a building to several tenants, retaining in his own possession or control the passageways and stairways for the common use of the tenants, and those having occasion to visit them, he is under the responsibility of a general owner of land who holds out an invitation to enter upon and use his property, and is bound to see that reasonable care is exercised to have the passageways and stairways reasonably fit and safe for such use, to use reasonable care to have the stairways and hallways reasonably fit for such use, not only to the tenant but to those who may be invited to come upon the premises, people that come to see the tenants, to those people, or anyone, that might have business there, or have occasion to come. That is the duty that the law imposes upon the landlord, under

those circumstances, if it be true, as the plaintiff says, that this was a common stairway and that he did either agree to keep the light lighted or assumed that obligation, even though he did not agree to do it.

There seems to be no dispute about that, because the landlord says, "I did have the lights burning, and I kept them burning; it was my job, and I had a man to do it, and he did it." So the man comes here and says, "I did it, and I did it every day, and I didn't know about this accident until afterwards, when I was told about it by the plaintiff."

Now, of course, negligence is never presumed in any case, in the law. It is a matter that must be proven, and it must be proven by the clear weight of the testimony by that person who alleges negligence. Here the plaintiffs say that there was negligence, and they are obliged, under the law, to establish that fact to your satisfaction by the clear weight of the testimony.

The mere fact that there was an accident, the mere fact that there was some one hurt is not sufficient; it must be proven to your satisfaction that there was negligence on the part of the defendant and that that was the proximate cause of this accident. Unless that is done, there must be no cause for action. If that be done, and you are so satisfied, then the next question is whether there was negligence also on the part of Mrs. Stathos, whether she herself was guilty of an act of negligence which act of negligence contributed in any way to the accident, and, if so, she cannot recover, and if she cannot recover neither can her husband.

That is what the defendant says, that this accident happened, not by our negligence but by hers.

Negligence is the omission or commission of something that a reasonably prudent person would not do or refrain from doing. The test is what would a reasonably prudent person do or not do, that tells you whether or not there was negligence.

Now, did the landlords fail in their duty? Did they have knowledge of this fixture being out of repair, if it was? Or, if they had no knowledge of it, was it an act of negligence on their part not to have known of it, because they are under a duty to exercise reasonable care to see that the premises are reasonably fit? That means that they must pay attention. So that it may be that a light may be out, in a case where a landlord has the duty of lighting, one night, and if an accident happens, then you may say, "Well, the landlord kept it lighted for ten years every night, he came there personally, and this night he came and something happened—may have been failure of the gas, or something happened —and the light went out, we will say he is not responsible for that, because he used every care that a reasonably prudent person would use to keep it lighted, and just because it was out this once, we cannot say that that was negligence on his part."

Here the question is whether or not it was negligence. Was it out? They say it was not out at all, the landlords; the plaintiff says it was out. The landlords say, "We had no notice of it." The plaintiff says, "Yes, we have complained." Now, you see, if the tenant complained to the landlord that it was out of "kelter," and was not lighted, and had not been for some time, then he had notice and he was under a duty to fix it.

He says that never happened, that he never had such notice and never had any knowledge of it. The tenant says it was not an isolated case, that it was not just one night when it was out, but it was one of a long series of nights when it was out.

The defendants bring the man here that was hired for that purpose, Mr. Higby, who says, "No, I lighted it every night, put it out every morning; never was told it was not lighted, never was told there was an accident, until I met the lady on the sidewalk sometime afterwards, or outside somewhere."

You see, those are all questions of fact, and in order for you to bring in a verdict for the plaintiff here, you must find that there was a duty owing by the landlord which was not performed, that there was a negligent act on the part of the landlord, or somebody representing the landlord, his agents or his employees, that he failed to perform this duty that the law imposed upon him, to use reasonable care to see that the premises were reasonably fit; and as I have previously told you, that is a question of fact for you to decide.

If you should find a verdict in favor of the plaintiffs and against the defendants, then there is another question of fact which you must decide, which is, what is the nature and what are the injuries suffered, and there is a dispute with respect to that.

But before I go to that, let me say that Mrs. Stathos says that she had to hire Mary Kakelaras for seven weeks at $105.00, and her husband says eight weeks at $120.00—$15.00 a week; and Mrs. Stathos says that Dr. Levy's bill was $100.00, and Mr. Stathos said it was $100.00, and then he said it was $80.00 and $20.00 for medi-

cines. Mr. Stathos says that he hired a boy at $15.00 a week, named James, whose last name he does not remember, and that was $120.00. Dr. Levy may have been asked what his bill was; if he was, I do not recall it, and I made no note. You may recall what he said, with respect to whether it was $80.00 or a $100.00, whichever he does say.

So that the husband's measure of damage, if there be a verdict in favor of the plaintiffs, will be the doctor's bill, the expense that he had to pay for the woman that came there and took care of the house, and the boy that he had to hire in the store to do the work that his wife previously did, and such further expenses as may have been testified to. That is all that I have in mind.

Now, with respect to the damage that Mrs. Stathos is entitled to, if there should be a verdict for the plaintiffs here, she is entitled to receive such sum as you think proper to compensate her for the pain and suffering that she has endured as a result of this accident and may endure in the future, and that raises a question as to what is the matter with her.

Dr. Levy, who examined her and who treated her, says that she has a prolapsed womb, that it is visible upon visual examination, the neck of the womb is within a short distance from the exterior, or something—I have forgotten what he said, but it was visible. You heard what he said. He says that this is a dropping of the womb. That is what a prolapsed womb is, that it is out of place. He says that it is due to trauma, that it is due to this fall; that he treated her before and she had no such condition, that he has been treating her since and she

has this condition; that he treated her for two months, I think, and that the only relief that she can get is an operation, that the operation is—well, I don't know whether he said major operation, but I will say it; I think perhaps he did—at any rate, it is an operation that would require the raising of the womb and sewing it to the wall of the abdomen, to keep it in place, and an operation of that kind would cost about $500.00. and in his judgment that is necessary. If that be so, that is another item of expense that the husband would have, and to which he would be entitled. Now, in addition to that, there were bruises, perhaps, and other minor injuries, but that was the main condition I think, that was spoken of.

Now, Dr. Rubacky says that he examined this woman, I think, in the presence of Dr. Levy, but I am not sure, on March 22nd, two months to the day of the date of this accident; that he found her in the store, behind the counter; that he examined her and he found her genital organs normal; that there was no prolapsed womb and there was no indication of any such trouble; that he did find an infantile uterus, that he found nothing at all wrong, except some ecchymosis on the calf of one leg and varicose veins; that she is heavy and that varicose veins might come from her weight or excessive standing or child bearing, I think.

But the things that Dr. Levy says were present, Dr. Rubacky says were not present. There is a direct contradiction between the two medical men as to her condition. Dr. Levy says that it is apparent, that a most casual examination would observe it, as I understood his testimony; that it is visible without any aid—

well, I won't repeat, because I am not sure, but, as I understood it, it was visible to the eye, it was so prolapsed. I may be wrong about that. Dr. Rubacky says, on the contrary, he examined her and found nothing abnormal, excepting an infantile uterus, which, perhaps, is quite the reverse of a prolapsed uterus or womb.

Now, that raises a question of fact as to what her injuries were, what the extent of them is, and it is for you to say what the answer is to that question, as is your duty to say what the answer is to all questions of fact, as you have heard me repeatedly say during the last two or three weeks.

The sole duty of the jury is to find questions of fact, to find the facts—not the questions, but the answers. The duty of the Court is to explain the law, and I have explained the law to you that governs this situation.

If there be a recovery here in favor of the plaintiffs, you will say how much there will be in favor of the husband and how much in favor of the wife, as you find the facts to be with respect to the questions of liability of the defendants, because there must be liability of the defendant and no liability on the part of Mrs. Stathos for there to be a recovery, and then what the verdict should be according to the proofs, according to the testimony. If you find there was no negligence on the part of the landlords, as I have defined their responsibility, and their duty, that ends the case, and your verdict must be no cause for action.

If you find there was negligence, a violation of the duty owing to the tenant by the landlord, as I have defined it to you, but there was also an act of negligence on the part of this plaintiff which contributed to the accident, then

again there must be no cause for action. But if you find there was negligence on the part of the landlord and no negligence on the part of Mrs. Stathos that contributed in any way to the accident, then and only in that case will you find a verdict, and then you must say what the verdict is. You must say what the facts are, with respect to the damages, with respect to the injuries, and you decide those questions of fact from your own recollection of what the testimony was, rather than from mine.

You take into consideration the likelihood of the stories being true that have been told you. You should take into consideration the manner in which the testimony has been given, by the demeanor of the witnesses, by the likelihood of their stories, as I say, being true, whether or not they contradicted themselves or otherwise, whether or not their stories appeal to your common sense and to your knowledge of affairs. In other words, you say what the truth is. You separate the true from the untrue. You take into consideration the expert testimony that has been given, with respect to its reliability, with respect to the likelihood of its being true, with respect to the opportunities for observation on which that testimony is predicated.

Here you have an attending physician and you have a physician who examined the patient. Their stories are diametrically opposed. You may say that if this condition is as Dr. Levy says it was, Dr. Rubacky must have found it there, and if he did not find it, so it could not have been as Dr. Levy said; or, you may find that Dr. Rubacky is mistaken and Dr. Levy is correct. You may find them both to be correct. You may find that Dr. Levy said he was not present on the day of Dr. Rubacky's examina-

tion, but I think you cannot come to that conclusion, or that theory, in reconciling their testimony, because Dr. Levy's testimony was that this was a permanent condition and could only be corrected by an operation. Where you have two professional men, where you have two doctors who come here and tell you what they found, it is for you to say which is correct.

This is not a case where two doctors are giving their opinion on how long a person may be sick or a diagnosis of something that cannot be seen. Dr. Levy told you the mechanics of this proposition. He told you what a prolapsed womb was, and he has described it, and, I repeat, he said that he could see it. Now, Dr. Rubacky in detail described what would be present, with respect to other organs and conditions, in that part of the body, if there was a prolapsed womb, and he said he found none of those conditions. So, I repeat, it is the kind of an injury that an examination should disclose, and yet we have two medical men, one of whom says one thing and the other says another thing. I differentiate their opinions with respect to this case from the opinion of two doctors just giving their opinion from symptoms that they are told about, rather than from objective symptoms.

There are objective symptoms of disease and subjective. Subjective symptoms are what the doctor is told. He cannot see pain. You may have stomach ache, and he cannot tell it, except that you tell him you have got it. If you have a broken bone, you may tell him you have no broken bones, but he can see that you have, because it is all out of shape. Now, if a woman tells a doctor she has no prolapsed womb, and he can see that she has got it, he knows that

she has it. She may not, and probably does not, know what is the matter with her. It would seem to the Court that the nature of these injuries are not subjective but objective, and if they are objective, it is hard to know why one doctor sees what another doctor does not. So that is one of the big things in this case, if you find for the plaintiff.

If you find for the defendant, of course, you are not concerned with the extent of the injuries, because if you find for the defendant, your verdict is no cause for action. But if you find for the plaintiff, then you have got to say how much damage has been shown, and then you have got to decide what is the matter with the lady, whether it comes from this accident or not.

You, of course, decide this case from your recollection of what the testimony is, and not from mine. I may have misstated it. You consider all of the testimony, whether it is facts that I have discussed or whether it is some that I have not touched on. You are the sole judges of the facts, and this is a fact case. I have explained to you what the law is that governs this situation. The facts are in your hands for your decision, under the instructions of the Court with respect to the law governing it.

You may retire and consider the case. I cannot dismiss you for that purpose, without expressing the appreciation of the Court because of the service that you have rendered, and your coming back after your services should have been over, to finish this case, that began last week. It is only the desire of the Court to expedite public business and to do all of the work that can be done. That is the reason that you

were asked to sit overtime. The only way that we can get the work done is to use all of the time that is available, and if we knock off, in consideration of the jury, in not asking them to come back to finish their work, we cannot get done. You may retire.

THE JURY RETIRED.

DEFENDANTS' EXCEPTIONS TO CHARGE.

Mr. Cohen: I want to take exceptions to your Honor's failure or refusal to charge the following requests to charge: 3, 4, 6, 8, 9, 10, 11, 12, 14, 15, 16, 17.

I take exception to that portion of the charge in which the Court refers to the duty of the landlord to keep illuminated the halls and stairways in the words therein.

DEFENDANTS' REQUESTS TO CHARGE.

The defendants' requests to charge, to which exception was taken to the Court's refusal or failure to charge, as stated, are as follows:

2. Negligence by these defendants is not to be presumed; it must be proved affirmatively by the parties alleging it, who, in this case, are the plaintiffs.

3. In order for the plaintiffs to recover against the defendants it is necessary that the plaintiffs prove their allegations to your satisfaction by a preponderance of the evidence. By this is meant, not by the number of witnesses, but by the greater weight of the credible testimony before you.

4. If you find as a fact that the accident was unavoidable, then I charge you that your verdict must be in favor of the defendants.

6. If you find from the evidence that the defendants assumed the duty of providing necessary light for the tenants of the premises in question, then that duty amounts to an implied contract with said tenants, in which event that duty is due and owing only to the parties to the contract, who, in this case, would be the parties to the lease or agreement of letting.

8. Where liability is made to depend at all upon notice to a party, the adverse party must establish a notice before the other is called upon to contest it.

9. Unless the plaintiffs prove to your satisfaction that the lights in the hallways were unlit for such a period before the accident that

the defendants should have known of it, there can be no recovery by the plaintiffs.

10. If you find from the evidence that no notice of the fact that there were no lights in and about the premises in question was given to the defendants, or that the unlighted condition did not exist for such a length of time as to charge the defendant with knowledge of said condition, then the plaintiffs cannot recover.

11. It is for the plaintiffs to make out that the defendants have been guilty of the breach of some duty which they owed to them, the plaintiffs, and that thereby the accident was occasioned.

12. In order for the plaintiff, Agnes Stathos, to recover damages for the aggravation of a pre-existing disease, she must prove, by a preponderance of the evidence, that the injury was the proximate cause of the aggravated condition.

14. In the absence of (1) any agreement upon the part of a landlord to keep the hallway of a building lighted at night for use of the tenants and invitees of the tenants, or (2) the assumption by a landlord of the duty of providing and maintaining lights in the hallway, the landlord is not responsible to one who enters or leaves the building as an invitee, finds the hallway and stairway in darkness, and is injured by a fall on the stairway.

15. Where the landlord retains control of the halls and stairway, he is required to take reasonable care to have the common halls and stairway reasonably fit for use for the passage of the tenants, but he is under no obligation to

furnish means for their safe use. He is, therefore, under no duty, (unless assumed by contract), to furnish light at night although such light may be necessary for safe use. If the stairway was fit for use in ascending and descending, the responsibility of safely using it was upon the person using it. If to use it safely at night a light was requisite, the tenant must provide it, and not the landlord.

16. The denial of an application to strike out the complaint for legal reasons, and application for non-suit or application for a direction of a verdict in behalf of one party or the other, is not to be construed by the jury as a favorable decision in favor of one or the other as to the liability in the case, but is merely to be construed as a decision on the part of the Court that the case should go to the jury for determination. The Court was merely deciding that there was some conflicting evidence here dealing with the question of liability which would have to be submitted to you for your determination.

17. Under the facts adduced in this case, I charge you, as a matter of law, that the house in which the accident happened, was not a tenement house, and, therefore, the defendants were not obliged, under any existing law, to furnish any lights.

Exhibit D. 1.

EXHIBIT D. 1.

THIS AGREEMENT

Made the first day of August in the year of our Lord, One Thousand Nine Hundred and Twenty-six,

BETWEEN SAMUEL JAFFE, and MORRIS BUNEVICH, of the City of Passaic, in the County of Passaic, and State of New Jersey party of the first part,

AND JAMES STATHOS, of the City of Passaic, in the County of Passaic and State of New Jersey, of the second part.

WITNESSETH, that the said party of the first part, has hereby let, and rented to the said party of the second part, and the said party of the second part, has hereby hired and taken from the said party of the first part,

ALL the store and part of the cellar underneath said store, situate at #735 Main Avenue, Passaic, New Jersey, for the term of one (1) year, to commence on the first day of August, A. D., 1926, at the yearly rent of Fifteen Hundred ($1500.00) Dollars, payable in equal monthly installments of One Hundred Twenty-five ($125.00) Dollars on the first of each and every month in advance.

The party of the second part hereby has the right and privilege to renew the within lease for a further period of four (4) years at the yearly rental of Eighteen Hundred ($1800.00) Dollars, payable in equal monthly installments of One Hundred Fifty ($150.00) Dollars on the first of each and every month in advance.

The parties of the first part agree to and with the party of the second part that they will make all the necessary repairs for the preservation of

Exhibit D. 1.

the said building and premises during the term of the within lease, or the renewed term thereof.

It is further agreed by and between the parties hereto that the said party of the second part shall have the right to assign, sublet or underlet the whole or any part of the said premises upon obtaining the consent of the parties of the first part.

And it is agreed that if any rent shall be due and unpaid, or if default shall be made in any of the covenants herein contained, then it shall be lawful for the said party of the first part to re-enter the said premises, and to remove all persons therefrom.

The parties hereto agree that the said store shall be used for the sale of cigars, cigarettes, nuts, fruits, candies, sodas, light lunch, newspapers, magazines and the like.

It is further understood and agreed by and between the parties hereto that the said parties of the first part shall have the right to rent any other store in the same building in which the demised premises are located, for a cigar store, restaurant and any other business, but not as a confectionery, ice cream parlor or such business which would materially interfere with the business conducted by the party of the second part.

The parties hereto further agree that the party of the second part shall not be liable for any breakage or damage of the front store windows; and that the parties of the first part will insure all plate glass windows in front of said premises.

And the said party of the second part covenants to pay to the said party of the first part, the said rent as herein specified, to wit: as hereinbefore set forth.

Exhibit D. 1.

It is further understood and agreed between the parties hereto that the said party of the second part will remove all the ice and snow from in front of the said premises within the time required by the ordinances of the City of Passaic pertaining thereto.

It is further understood and agreed between the parties hereto that the said party of the second part will keep said premises in a good and sanitary condition and in compliance with all the rules and regulations of the City of Passaic and State of New Jersey regarding same.

It is further understood between the parties hereto that the parties of the first part shall supply all the necessary heat to the premises during the fall and winter months of each year during the term of the within lease.

And at the expiration of the said term, or the termination of this lease, the said party of the second part will quit and surrender the premises hereby demised, in as good a state and condition as reasonable use and wear thereof will permit, damages by the elements excepted.

It is further understood between the parties hereto that the said parties of the first part shall not be responsible for any damage caused by water leakage.

And the said party of the first part covenant, that the said party of the second part, on paying the said rent, and performing the covenants aforesaid, shall and may peaceably and quietly have, hold and enjoy the said demised premises for the term aforesaid.

Exhibit D. 1.

In Witness Whereof, the said parties hereto have hereunto set their hands and seals the day and year first above written.

SAMUEL JAFFE (L. S.)
MORRIS BUNEVICH (L. S.)
JAMES STATHOS (L. S.)

Signed, sealed and Delivered in the presence of

Edward Feld.

State of New Jersey, } *ss.*
County of Passaic. }

Be It Remembered, that on this twenty-fifth day of October in the year of our Lord One Thousand Nine Hundred and Twenty-six, before me the subscriber, A Master in Chancery of New Jersey, personally appeared Samuel Jaffe, and Morris Bunevich, who, I am satisfied, are the lessors mentioned in the within Instrument to whom I first made known the contents thereof, and thereupon they acknowledged that they signed sealed and delivered the same as their voluntary act and deed, for the uses and purposes therein expressed.

EDWARD FELD,
A Master in Chancery of New Jersey.

Exhibit D. 1.

LEASE

SAMUEL JAFFE, and MORRIS BUNEVICH,

To

JAMES STATHOS.

Dated 1926
Rent $ per
Payable,
Received in the Office of
the County of on
the day of A. D.,
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New Jersey Court of Errors and Appeals

AGNES STATHOS and JAMES STATHOS,
Plaintiffs-Respondents,
vs.
MORRIS BUNEVICH and SAMUEL A. JAFFE,
Defendants-Appellants.

On Appeal.

BRIEF OF DEFENDANTS-APPELLANTS.

Introductory Statement.

This is an appeal from a judgment entered on the verdict of a jury in the Passaic County Circuit Court rendered on February 4, 1930, in favor of the plaintiffs-respondents and against the defendants-appellants.

Statement of Facts.

This was an action at law in tort for negligence, based on a complaint containing two counts. The first count sets forth that the defendants were the owners of a certain building in the City of Passaic; that said building was a tenement house occupied by at least two families living independently of each other; that the defendants rented out the two apartments to various persons reserving control over the stairways; that the defendants were bound to keep a light burning on said stairway during certain hours of the night; that defendants assumed the duty of providing necessary light in said hallway with their tenants; that the defendants negligently failed in that duty; that Agnes Stathos, one of

the plaintiffs, fell on said stairs by reason of the absence of any light; and that she was injured as a result thereof, and demands damages (State of Case, pp. 7, 8 and 9, l. 18).

The second count sets forth that James Stathos is the husband of the plaintiff Agnes Stathos; then repeats the allegations of the first count aforementioned; that this plaintiff was deprived of the services and consortium of his wife and was forced to expend sums of money to cure her of her alleged injuries and demands damages (State of Case, p. 9, l. 26, to p. 10, l. 14).

The defendants denied generally the complaint and set up contributory negligence and issue was joined thereon (State of Case, p. 10, l. 20, to p. 11, l. 30).

After opening of counsel for the plaintiffs, and over objection by the defendants, the Court permitted the plaintiffs to amend the complaint in that there existed between the parties to the action the relationship of Tenant and Landlord (State of Case, pp. 18, 19 and 20, to l. 18).

At the trial it was shown that the defendants had agreed to lease the premises to the plaintiff, James Stathos, and a lease between the defendants as landlords and James Stathos as tenant was introduced into evidence (State of Case, pp. 122 to 125, Exhibit D. 1). It was proved that the building contained a store on the first floor (which was leased to James Stathos), and an apartment on the second floor (also leased to James Stathos), and an apartment on the third floor (State of Case, p. 21, ll. 10 to 24, and p. 55, l. 25, to p. 56, l. 6). It was proved that at the time the lease for the apartment was entered into between James Stathos and the defendants, it

was expressly agreed between the defendants and James Stathos that the defendants would maintain a light in the hallway (State of Case, p. 67, ll. 3 to 18, and ll. 32, to p. 68, l. 9), and that the landlords employed a janitor for that purpose (State of Case, p. 91, ll. 18 to 29), and, in addition, themselves made frequent inspections (State of Case, pp. 92, ll. 20 to 23, and p. 95, ll. 31 to 40).

By the plaintiff Agnes Stathos' own testimony it was shown that on the night in question the light was out and that she fell down the stairs (State of Case, p. 28, ll. 11 to 37). The plaintiffs' case disclosed that the light in question was in disrepair for some months (State of Case, p. 27, ll. 7 to 12), and that the defendants had received notice of the fact (State of Case, p. 27, ll. 13 to 30). All of which was denied by the defendants (State of Case, p. 90, l. 39, to p. 91, l. 5, and p. 95, ll. 17 to 20, and p. 99, ll. 15 to 34).

POINTS.

The points of law that the appellants will argue in endeavoring to reverse the judgment below may be classified in the following order:

I. The trial court erred in overruling appellants' motion for non-suit.

II. The trial court erred in overruling appellants' motion for a directed verdict in favor of the defendants.

III. The trial court erred in charging the jury as set forth in Grounds of Appeal No. 8 on State of Case p. 3.

IV. The trial court erred in refusing to charge certain Requests to Charge hereinafter set forth, submitted by appellants.

ARGUMENT.

POINT I.

The Trial Court erred in refusing to grant motion for non-suit.

It is elementary that

> "in every case before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can *properly* proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed."

Baldwin v. *Shannon,* 43 N. J. L. 596, at p. 603. (Italics ours.) This specific passage was referred to by the Court of Errors and Appeals in *Timlan* v. *Dilworth,* 76 N. J. L. 568, the Court adding this significant language:

> "This decision has been often cited in this court, and always with approval."

Applying that rule to this case it will be necessary to briefly review the important facts adduced by the plaintiffs before they rested, in order to ascertain whether there was sufficient evidence from which the jury could "properly proceed to find a verdict for the" plaintiff. The plaintiff James Stathos on direct examination (State of Case, p. 55, ll. 12 and 13 and 25 and 26), admitted that he was the husband of the co-plaintiff and that he was the lessee of the premises and not his wife. On further direct examination this plaintiff (State of Case, p. 60, l. 38, to p. 61, l. 10) related that the light in question was not working for a period of two months before the accident, and that he told the landlord. On direct examination of this same plaintiff (State of Case, p. 67, ll. 4 to 18) and on his re-cross examination (State of Case, p. 67, ll. 31 to 40, and p. 68, ll. 4 to 24), it was brought out that at the time

James Stathos entered into his lease for the apartment it was expressly agreed by and between him and the landlord that the latter would supply a light in the hallway.

At the close of plaintiffs' case this was the state of the proofs; (a) with reference to the tenancy of the plaintiffs—that the plaintiff James Stathos was the tenant, and the plaintiff Agnes Stathos was his wife and lived with him on the premises in question and (b) with reference to the light in the hallway—that the plaintiff James Stathos and the defendants had entered into and become parties to an agreement to keep the hallways lighted at night. Throughout the entire case the plaintiffs relied upon an express contract and the case was tried by the defendants upon that theory solely.

It is upon this situation that the defendants elect to stand or fall on this appeal with reference to Point I and rely chiefly on the case of *Clyne* v. *Helmes*, 61 N. J. L., p. 358. Before discussing the applicability of that case to this one, it will first be better to eliminate all grounds of liability other than on contract upon which the defendants can be held in this action.

As the appellants view the law there are only three bases of liability upon which a landlord can be held for negligence because of a fall of a plaintiff upon a part of the demised premises over which the landlord retains control, viz: (1) the common law as laid down in *Siggins* v. *McGill*, 72 N. J. L. 263; (2) under any existing statutory provisions, as the Tenement House Act (4 Comp. St. 1910, 5323, as amended); (3a) under an express contract, or (3b) one implied by law. The Court of Errors and Appeals in effect so held in *Leech* v. *Atlantic Delicatessen Co.*, 140

Atl., p. 423 (not officially reported). The appellants respectfully submit that each of the above three bases is separate and distinct from the other, and if one exists, that one governs the facts of the case to the exclusion of the others, particularly with reference to number 3a above where an express contract exists.

Proceeding to eliminate the grounds of liability above set forth it must first be practically conceded that the premises in question did not constitute a tenement house within the meaning of the Tenement House Act. A tenement house is defined in Chapter 337 of the Laws of 1927 at p. 789, as

> "Any house or building, or portion thereof, which is rented, leased, let or hired out to be occupied, as the home or residence of *three* families or more living independently of each other and doing their cooking upon the premises" (italics ours),

and then follows a proviso specifically referring to cities bordering on the Atlantic Ocean which obviously does not affect the dwelling herein. Turning to the evidence with reference to the type of this building, it will be noted that Agnes Stathos, on her direct examination (State of Case, p. 21, ll. 10 to 24), testified as follows:

> "Q What is there on the first floor? A A store.
>
> Q Is there a second floor? A Second, a family lives there.
>
> Q Where did you live there? A I lived in the second floor.
>
> Q There was a floor above that? A And another family.
>
> Q Was there another family besides that lived on that floor? A Yes.
>
> Q Where was that? Above you? A Huh-huh (affirmative inflection).
>
> Q Was that all that were there? A Yes.

Q Did another family live there, up there? A Yes."

And Morris Bunevich, on direct examination (State of Case, p. 91, ll. 6 to 16), testified as follows:

"Q Suppose you tell us about your house, Mr. Bunevich? What is there on the first floor? I am referring, of course, to the tenants? A A store.

Q A store? Who lived on the second floor? A Mr. Stathos.

Q Who lived on the third floor? A Mr. Brasser.

Q So that there is a store and two apartments above that? A Two apartments; yes, sir."

And James Stathos, on direct examination (State of Case, p. 55, l. 25, to p. 56, l. 6), testified as follows:

"Q Who rented the premises you or your wife? A I did.

Q When you talked to them, when was it you first began to rent? What month was it, when you began to live there? A You mean, the store or my house, where I live?

Q Well, the store first. A Store? August 1, 1927, I think.

Q When did you— A Or '26, something like that; I don't remember exactly.

Q When did you rent the house? A April '27.

Q After that August? A After a few months, after the store.

Q Where did you live in the building? First, second or third floor? A Second floor.

Q Were there any other places in the building, that is, any other floor and family living up there? A Yes."

It was uncontroverted, therefore, that the building consisted of a store on the first floor, and an apartment on the second and third floors,

and further that the plaintiff James Stathos rented both the store and the second floor apartments. Obviously the dwelling was not a "tenement house" within the statutory definition (*supra*). There were only two families living independently of each other, and the building was neither intended nor designed for any other purpose, nor was there any testimony that three families at least were doing their cooking independently on the premises. *Strell* v. *Zisman*, 5 N. J. Mis. R. 427, 136 Atl. 801. There was, then, no statutory duty imposed upon the defendants to keep the premises lighted.

As to the probable ground of liability arising from express contract, the defendants admitted for the purposes of the non-suit motion, a contract entered into with James Stathos at the time of the letting to keep the hallway lighted. They contend, however, as indicated above, that the duty flowing from and by virtue of said contract ran only to James Stathos—a party to the contract. He was prompted to secure the benefits of such a contract to himself by reason of his prior experience with reference to unlighted hallways (State of Case, p. 68, ll. 10 to 24). There was no evidence of the terms of said contract comprehending any other person except the contractee James Stathos, and in the absence of such evidence, the contract must be construed to have been without such terms. A person not a party to a contract cannot sue in respect of a breach of duty arising out of the contract. *Clyne* v. *Helmes, supra.* In that case, the facts of which were peculiarly like those in the case at bar, the plaintiff was the sister of the defendant's lessee. She brought suit against the defendant landlord for damages for injuries sustained by her because of the defective condition of the de-

mised premises. The landlord had agreed with the tenant, plaintiff's brother, to fix the faulty condition, but failed to repair. The Supreme Court held there could be no recovery because of the absence of privity between the parties to the action upon which a duty could be predicated. The Court said, at p. 368 of 61 N. J. L.:

> "There is privity of estate and of contract between the landlord and his tenant arising from the letting, but there is neither privity of estate nor privity of contract between the owner of premises and the persons whom the tenant may choose to make members of his family in any capacity. Such persons dwell in the premises demised neither by license nor by invitation of the owner. Where there is neither privity of estate nor privity of contract, the owner of premises is not liable for injuries sustained by third persons by reason of the condition of the premises, unless by invitation, express or implied, the owner induces them to come upon the premises." Phillips *v.* Library Company, 26 Vroom 307.

The appellants believe that that case is dispositive of the issues raised at the trial of the case *sub judice*. Throughout the trial the plaintiffs had established an express contract as the basis of liability (State of Case, p. 18, ll. 31 to 37, and p. 107, ll. 34 to 38½), and it was upon that ground that the appellants conceived that a non-suit should have been proper.

Keeping in mind the fact that the respondents submitted their case on the theory of a contractual duty, the appellants wish to call the Court's attention to the cases of *Cochran* v. *Public Service Electric Co.*, 97 N. J. L. 480, and *Styles* v. *The F. R. Long Co.*, 70 N. J. L. 301, both of which were decided in the Court of Errors and Appeals. In the former case the

plaintiff sued the defendant to recover damages for injuries sustained by reason of the negligent failure of the defendant to keep a certain contract made with the City of Newark to light a safety isle standard. Mr. Justice Swayze, delivering the opinion unanimously affirming the lower court's disposal of the case by a non-suit, said, at p. 481:

> "A liability in tort may arise out of a contract * * *. But when the only complaint is of a failure to perform a contract, as in the present case, the right of action is a right of the promisee under the contract unless it clearly appears that the parties intended that a third party should have a right of action on the contract. In determining whether it was meant to give a third party that right an important consideration is that in a contract the parties select for themselves to whom they will incur liability; in a tort there is a general liability to anyone to whom a duty may be owing who may be injured. Whether there is a breach of contract and a right of action in a third party is a question of intent."

Did the parties to the contract in the case at bar intend that a third party should have a right of action on the contract? For a negative answer we need only refer to the testimony of James Stathos, in which he said that he wanted the defendants to contract to light because of *his own* prior experience (State of Case, p. 68, ll. 10 to 24):

> "Q Will you tell me, Mr. Stathos, why it was that you told the landlord to keep the lights in good condition when you first rented the apartment? Why did you tell him that? A Why?
>
> Q Yes. A Because I live some other room—some other house where I have got to do that.

> Q Sir? A I have little experience with somebody else, that is the reason, and I make the complaints with the other.
>
> Q You mean, that you fell before? A No.
>
> Q What do you mean by 'We had experience'? A It means, for one thing, in ..... where I have resided I have got to complain about the lights, and I know what is what."

It is elementary law that the plaintiffs having failed to prove that the contract was drawn with the intent to benefit third parties, it must be conclusively presumed that no such intent was present. *Liebeck* v. *Bennis,* 4 N. J. Mis. R. 422, affirmed 103 N. J. L. 700. And as ~~the same~~ Mr. Justice Swayze said in the *Styles* case, *supra,* at p. 305 of 70 N. J. L.:

> "Neither the cases above cited nor the statute go so far as to permit a suit upon a contract to be maintained by persons with whom the defendant never meant to enter into contractual relations. It is not enough that the plaintic may be benefited by the performance of the contract; he can only maintain the action when the contract is made for him."

Clyne v. *Helmes, Cochran* v. *Public Service* and *Styles* v. *The Long Co., supra,* were all followed in *Reilly* v. *Feldman,* 103 N. J. L. 517, a comparatively late case in which the facts were somewhat analagous to those in the case at bar. The appellants therefore believe that the fact that the suit was tried upon a contractual basis and theory is all-decisive of the issues raised herein.

Are the defendants liable to Agnes Stathos by reason of having assumed the duty of lighting the hallway? There is no disputing the fact that a landlord, though under no duty to keep a hall-

way lighted, may by course of conduct assume that duty and be charged by law therewith. The Supreme Court, in *Gleason* v. *Boehm*, 58 N. J. L. 475, at p. 478, said:

> "The landlord doubtless may, and probably usually does, assume the duty of providing necessary light in such cases by contract with his tenants. There was evidence that defendant had usually provided a light in the lower hall and had employed a person to light it. Upon this evidence the court might have been requested to direct the jury to determine whether an implied contract to maintain such light, at least until notice of its discontinuance had been given, might not be inferred and a corresponding duty to maintain it. But no such request was made and we cannot consider now, whether, if made, it could have been properly granted."

It will be noted from this passage that when a landlord does assume the duty an implied *contract* arises. A contract with whom? Naturally with one to whom he owes a duty or to one whom he has impliedly invited on the premises. And the Supreme Court said in *Clyne* v. *Helmes, supra*, that a landlord does not invite the members of the families of his tenants to use the premises, and in fact, said they were not even licensees. Further, if the defendants had assumed the duty of providing necessary lights for the tenants on the premises in question, then that duty would have amounted to an implied contract with said tenants, in which event that duty would have been due and owing only to the parties to the contract, who, in this case, would have been only James Stathos.

But the plaintiffs doubtlessly will assert that once having assumed the duty the doctrine of *LaBrasca* v. *Hinchman*, 81 N. J. L. 367, applies.

The appellants contend that that case is distinguishable. In that case a landlord, being under no duty to repair the demised premises, upon notice of the defective condition of a barn thereon agreed to repair the premises. *He did so repair*, but in such a negligent manner that the plaintiff's property was injured as a result. The Supreme Court in discharging a rule to show cause why a verdict rendered for the plaintiff below should not be set aside, held, in reliance upon *Gregor* v. *Cady*, 82 Maine 131, that where a party engages to perform a gratuitous and voluntary act, and while in the performance of that duty commits a positive act of misfeasance, he is liable to an action for misfeasance. It is the general rule that a volunteer is liable only for a misfeasance and not a nonfeasance. *Gregor* v. *Cady, supra.*

> "Misfeasance is the performance of an act which might lawfully be done, in an improper manner, resulting in injury to another; while nonfeasance is the nonperformance of an act which should be performed."

3 Words and Phrases, 2nd Series, 409. Applying that distinction it is to be noted that in both the LaBrasca case and in the case of Gregor *v.* Cady, the landlord had engaged to repair and *actually* repaired in a negligent manner. However, in the case at bar the landlords did nothing. They permitted the light to fall into disrepair, thereby merely doing an act of nonfeasance. It is self-evident, therefore, that the plaintiffs must fail on this ground also. The difference between the LaBrasca case and the case at bar is pointed out in *Kimmons* v. *Crawford*, 109 Southern 585, in which the Supreme Court of Florida, in re-

viewing all the authorities in point, said at p. 587:

> "The authorities are almost unanimous that it is the duty of the landlord, when he attempts in fact to make repairs or improvements upon the demised premises, whether the work be done gratuitously or under a covenant to repair, to exercise reasonable care that no injury results to the occupying tenant. If, therefore, repairs are made by the landlord in a careless and negligent manner, the tenant may recover for resulting injuries of which the negligence of the landlord in making the repairs was the proximate cause,"

citing *LaBrasca* v. *Hinchman, supra, Broame* v. *N. J. Conference Association*, 83 N. J. L. 621, and *Charney* v *Cohen*, 94 N. J. L 381 In each of those New Jersey cases it is significant that actual work had been entered into by the landlord, and therefore, the resultant negligence brought those cases within the misfeasance rule as stated above, and consequently are distinguishable from the case at bar. The Supreme Court has recognized the contention the appellants have just raised in the case of *Liebeck* v. *Bennis*, 4 N. J. Mis. R. 422, affirmed by the Court of Errors and Appeals 700, for the reasons expressed in the Supreme Court's opinion. The appellants take the liberty to quote from that opinion at page 423:

> "This principle of law does not apply where a landlord undertakes to make repairs to the leased premises during the continuance of the lease, and *performs* the work of repair so negligently that injury results to the tenant, or a member of his family, by reason of such negligence."

(Italics ours.) Negligence in the actual *performance* of the work is requisite—a pure misfeasance.

Furthermore, having assumed a gratuitous duty, the defendants were under no obligation to continue the performance thereof indefinitely, but could abandon that duty at their own will without further obligation to third parties who had knowledge or notice of such abandonment. *Cavanagh, et al.* v. *Hoboken Land Co.*, 93 N. J. L. 163; *Rhodes* v. *Fuller Land & Improvement Co.*, 92 N. J. L. 569, at p. 572. The instant case presents an even stronger one for the application of that rule than the Cavanagh case itself, because in the latter case the fact of the abandonment had come to the knowledge of the injured plaintiff only one day before the accident, whereas in this case both plaintiffs knew at least two or three months before the accident that the defendants had abandoned the aforesaid gratuitous duty. Intention is the primary element of an abandonment, and is to be derived from all the facts and circumstances of the case. 1 *Corpus Juris* 7. The testimony for the plaintiffs was that during all that period of two months, at least, gas did not even come through the pipe when turned on for that purpose (State of Case, p. 72, ll. 16 to 29, and ll. 36 to 40). The case of *Zwickl* v. *Broadway Theatre Co.*, 103 N. J. L. 604 is distinguishable. Although the Court of Errors and Appeals followed the Cavanagh case, *supra*, it, in applying the rule stated therein, held that the plaintiff in that case in fact had no knowledge or notice of the abandonment, and therefore was allowed to recover In the case at bar, however, the plaintiffs had actual knowledge of the abandonment (State of Case, p. 27, ll. 7 to 12).

The remaining ground of liability upon which the defendants may be held is the common law duty as laid down in *Siggins* v. *McGill, supra.*

It is true that where a landlord lets out premises to tenants but retains control over certain common stairways, he is under a duty as imposed in this State by that case, to exercise reasonable care to have those common ways in a reasonably fit condition for the uses for which he holds them out. That doctrine has been qualified somewhat by *Gleason* v. *Boehm*, 58 N. J. L. 475, wherein the Supreme Court held that although a landlord is under a duty as above set forth he is under no duty to provide or furnish means for the safe use of the stairways, and consequently is not bound to furnish lights, even though a light should be necessary for safe use (25 A. L. R. 1312). That case has been followed in the Court of Errors and Appeals in *Rhodes* v. *Fuller L. & I. Co., supra.*, and in the comparatively recent case of *Leech* v. *The Atlantic Delicatessen Co., supra.*

The plaintiffs having proved a set of facts from which no legal liability upon the part of the defendants existed, it is therefore respectfully submitted that a question for the Court had been presented within the meaning of *Timlan* v. *Dilworth, supra*, and that the trial court in overruling defendants' motion for a non-suit committed reversible error. The appellants respectfully submit that the verdict rendered below should be set aside.

POINT II.

The Trial Court erred in overruling appellants' motion for a directed verdict in favor of the defendants.

The appellants, with the Court's permission, desire to reiterate the argument urged under Point I, with this additional statement as to the facts adduced by the defendants before the trial

court before the motion to direct a verdict in their favor was made: that further proof that the plaintiff James Stathos was the sole tenant was shown by the introduction of a lease Exhibit D. 1 (State of Case, pp. 122 to 125).

POINT III.

The Trial Court erred in charging the jury as set forth in Grounds of Appeal #8 on State of Case, p. 3.

For convenience the instructions of the trial court objected to are now fully set forth:

> "Where a landlord lets out portions of a building to several tenants, retaining in his own possession or control the passageways and stairways for the common use of the tenants, and those having occasion to visit them, he is under the responsibility of a general owner of land who holds out an invitation to enter upon and use his property, and is bound to see that reasonable care is exercised to have the passageways and stairways reasonably fit and safe for such use, to use reasonable care to have the stairways and hallways reasonably fit for such use, not only to the tenant but to those who may be invited to come upon the premises, people that come to see the tenants, to those people, or anyone, that might have business there, or have occasion to come. That is the duty that the law imposes upon the landlord, under those circumstances, if it be true, as the plaintiff says, that this was a common stairway and that he did either agree to keep the light lighted or assumed that obligation, even though he did not agree to do it."

The appellants respectfully urge that that passage is not a correct statement of the law of this State applicable to the facts adduced at the trial. The first sentence may truly define the duty of a landlord to keep a stairway free from defects of

unreasonable ~~fitness~~ disrepair, for instance, where the steps are torn up, but the appellants respectfully submit that the law imposes no duty upon a landlord to *light* those common portions of a dwelling of the type herein over which he retains control. *Gleason* v. *Boehm, supra, Rhodes* v. *Fuller Land & Improvement Co., supra,* and *Leech* v. *Atlantic Delicatessen Co., supra.* The Court, however, in the second sentence quoted above, instructed the jury that the duty charged in the first sentence included the duty to light. The cases just cited, the latter two of which were decided in the Court of Errors and Appeals, all hold contra. The plaintiffs relied solely upon the absence of a light as the only evidence of negligence throughout the entire case. The complaint itself charged only the failure to light. There was no evidence as to any defective condition on the stairway. It seems, therefore, that it became the duty of the trial court to charge the law as laid down in the cited cases above, and more especially so by reason of the fact that the defendants had requested such a charge to be made (State of Case, p. 120, l. 36, to p. 121, l. 12—*Defendants' Request to Charge No. 15*).

The appellants say further that the quoted portion of the charge was erroneous, with more particular reference now to the second sentence of the passage repeated above. The Court there instructed in effect that the duty to keep the stairway reasonably fit was the same no matter whether there had been an express contract or an assumption of the duty to light. This is incorrect, we respectfully submit, because if there had been an express contract the rule of *Clyne* v. *Helmes, supra,* would apply and there could be no recovery as to the wife, whereas if there had been an assumption, the landlords might have

been liable to the wife. As the case was tried on the express contractual theory this instruction was greatly harmful to the appellant.

POINT IV.

The Trial Court erred in refusing to charge certain requests to charge hereinafter set forth, submitted by appellants.

In endeavoring to show that the judgment below should be reversed for the failure of the trial court to charge certain following requests, the appellants will attempt to show that those requests contained:

(a) A true statement of the actual or hypothetical facts adduced;

(b) A true statement of the law governing those facts; and

(c) In addition, that the refusal to so charge was harmful error.

> "A party in framing his request need only present the law applicable to his theory of the case as supported by the evidence." 38 Cyc. 1702.

The requests that follow were all submitted to the trial court before summation of counsel and on the Court's refusal to charge as requested, exceptions were duly taken (State of Case, p. 118, ll. 15 to 19). The Supreme Court said in *Franklin* v. *Friehofer Vienna Baking Co.*, 71 N. J. L. 112 at p. 114:

> "Where requests to charge upon points of law applicable to a case are made prior to the commencement of the summing up of counsel, it is the duty of the court to charge, or to refuse to charge, such requests. A failure to charge a request amounts to a refusal to charge if such failure is brought to

the attention of the court at the conclusion of the charge, and such failure to so charge is not corrected."

Now follows a copy of Request No. 3.

"In order for the plaintiffs to recover against the defendants it is necessary that the plaintiffs prove their allegations to your satisfaction by a preponderance of the evidence. *By this is meant not by the number of witnesses, but by the greater weight of the credible testimony before you.*"

The Court, in charging the jury, did in effect, charge the first sentence of the above request, but failed, however, to charge the second sentence. It will be seen that the plaintiffs did produce more witnesses than the defendants produced at the trial (State of Case Index). The Supreme Court has passed upon the fact that the number of witnesses does not necessarily fix the preponderance of the evidence in the case of *Marzulli* v. *Metropolitan Life Ins. Co.*, 81 N. J. L. 166, where Mr. Justice Minturn, in discussing this phase of the case, said, at pp. 168 and 169:

"The testimony above referred to, however, does not stand alone, but is directly contradicted by witnesses for the plaintiff who, though they may not outnumber the defendant's witnesses, are entitled to be believed by a jury unless we lay down the rule that the number of witnesses must be the controlling factor to the exclusion of other elements of credibility which the jury have a right to consider. The rule is directly to the contrary. The maxim is '*Ponderantur testes non numerantur*'; and so it is laid down by writers of distinction that there may be cases where the testimony of one witness may be more trustworthy than the opposing testimony of many. 2 Best Ev. 596; Stark. Ev. 832."

With respect to charging a jury upon the law above cited, the Court of Errors and Appeals,

in *O'Connor* v. *Clawans,* 102 N. J. L. 624, said at p. 626:

> "* * * the court properly called the attention of the jury to the fact that their verdict should not be determined by the number of witnesses, but entirely by the weight of the evidence, which comprehended the credit to be given to the testimony in view of the intelligence and interests of the witnesses, rather than by the number testifying to the given fact. That direction manifestly was in accord with the settled rule of evidence, and was unexceptionable. Marzulli *v.* Metropolitan Insurance Co., 81 N. J. L. 166."

It is respectfully submitted that the refusal to charge that second sentence set forth above, was harmful to the defendants-appellants.

A copy of request No. 4 now follows:

> "If you find as a fact that the accident was unavoidable, then I charge you that your verdict must be in favor of the defendants."

The appellants contend that the Court should have charged the above request, and rely upon the cases of *Scott* v. *Mitchell,* 41 N. J. L. 346, and *Garino* v. *Walker,* 7 N. J. Mis. R. 903, 147 Atl. 779, in which the above request was approved by the Supreme Court.

The appellants submit upon the strength of those cases that they had a right to have the request made charged, and that the refusal to so charge was harmful.

Copies of requests No. 8, No. 9 and No. 10 now follow:

> (8) "Where liability is made to depend at all upon notice to a party, the adversary party must establish a notice before the other is called upon to contest it."

(9) "Unless the plaintiffs prove to your satisfaction that the lights in the hallways were unlit for such a period before the accident that the defendants should have known of it, there can be no recovery by the plaintiffs."

(10) "If you find from the evidence that no notice of the fact that there were no lights in and about the premises in question was given to the defendants, or that the unlighted condition did not exist for such a length of time as to charge the defendants with knowledge of said condition, then the plaintiffs cannot recover."

These three requests will be argued together, with the Court's permission. The appellants wish to call the Court's attention to the fact that the evidence was conflicting with respect to whether there had been any notice or knowledge of the fact that the lights were unlit (State of Case, p. 27, ll. 13 to 30, p. 61, ll. 5 to 8, p. 90, l. 39, to p. 91, l. 4, p. 94, ll. 22 to 26, and p. 95, ll. 17 to 30).

We rely upon the cases of *Garland* v. *Furst Store*, 93 N. J. L. 127 and *Schnatterer* v. *L. Bamberger & Co.*, 81 N. J. L. 558. The above three requests are combined statements of the syllabae approved by the Court of Errors and Appeals in these cases. That the refusal to charge either requests No. 8 and 9 and/or request No. 10 was harmful is evidenced from the fact that the gist of the plaintiffs' case depended upon notice or knowledge of the unlighted condition to or of the landlord.

A copy of request No. 12 now follows:

"In order for the plaintiff Agnes Stathos to recover damages for the aggravation of a pre-existing disease, she must prove, by a preponderance of the evidence, that the in-

jury was the proximate cause of the aggravated condition."

There was evidence in the case that the plaintiff Agnes Stathos had prior to the time of sustaining the alleged injuries been ill from other causes (State of Case, p. 37, ll. 32 to 38, p. 83, l. 39, to p. 84, l. 7, and p. 100, ll. 7 to 15). The Court of Errors and Appeals remarked in *Kelson* v. *Public Service Railroad Co.*, 94 N. J. L. 527, at p. 529:

> "It is common knowledge that the negligence of the defendant must be the proximate cause of the plaintiff's injuries—the proximate cause is the efficient cause—the one that necessarily sets the other causes in operation. Batton *v.* Public Service Corporation, 75 *Id.* 857. There must be an unbroken causal connection."

In *Houston* v. *Traphagen*, 47 N. J. L. 23, it was held that to recover damages for an excited disease claimed to have been aggravated by a fall that the circumstances should be such as to leave a reasonable inference that the fall was the actual cause of the aggravation. *Hahn* v. *Delaware, Lackawanna & Western R. R. Co.*, 92 N. J. L. 277 holds also that a plaintiff may recover for the excitement of a latent disease when it is proved that the fall was the proximate cause of the new pain and suffering.

How much the present injuries were enlarged or aggravated by the existence of the prior injuries or illness, was, of course, a question of fact for the jury, and the appellants had the right, upon due request, to have the law governing recovery of damages for the aggravation of a preexisting disease, charged to the jury. How much the jury depended upon the aggravation in arriving at a verdict is, of course, unknown, and how much less their verdict might have been if they

had been properly instructed on this branch of the damages, cannot be ascertained.

It is, therefore, respectfully submitted that the refusal to charge this request was also harmful.

A copy of request No. 14 now follows:

> "In the absence of (1) any agreement upon the part of a landlord to keep the hallway of a building lighted at night for use of the tenants and invitees of the tenants, or (2) the assumption by a landlord of the duty of providing and maintaining lights in the hallway, the landlord is not responsible to one who enters or leaves the building as an invitee, finds the hallway and stairway in darkness, and is injured by a fall on the stairway."

This request embodied the gist of the plaintiffs' case. They could only recover, as above remarked, either upon a contract, express or implied. The request now under consideration is almost a verbatim copy of the syllabus approved by the Court of Errors and Appeals in *Leech* v. *Atlantic Delicatessen Co.*, 140 Atl. 423 (not officially reported), and is, therefore, the law of this State upon that subject, never having been distinguished or qualified.

That it was harmful for the Court not to charge this request is self-evident because it would show the jury just upon what state of facts, if any, the plaintiffs could recover. It was also harmful because the trial court had been informed by the appellants by their express conduct throughout the trial that they were defending the case upon an express contractual theory.

A copy of request No. 15 follows:

> "Where the landlord retains control of the halls and stairway, he is required to take

reasonable care to have the common halls and stairway reasonably fit for use for the passage of the tenants, but he is under no obligation to furnish means for their safe use. He is, therefore, under no duty (unless assumed by contract), to furnish light at night although such light may be necessary for safe use. If the stairway was fit for use in ascending and descending, the responsibility of safely using it was upon the person using it. If to use it safely at night a light was requisite, the tenant must provide it, and not the landlord."

The argument urged under Point III is applicable to the argument to be urged here. It was there pointed out that although a landlord's duty may be to keep the stairways over which he retains control in a reasonably fit condition, that it is unnecessary, however, to supply lights to enable persons to safely use those stairs, citing *Leech* v. *Atlantic Delicatessen Co., supra,* and *Gleason* v. *Boehm, supra.* The first and second sentences of this request are also almost verbatim copies of a passage from the case of *Rhodes* v. *Fuller Land Improvement Co.*, 92 N. J. L. 569, at p. 571. The last two sentences are taken from *Gleason* v. *Boehm,* 58 N. J. L. 475, at p. 477, at the bottom, to p. 478, with a change of one word to make it applicable to the case at bar.

It was greatly harmful to refuse to charge this request because the Court had charged the law as set forth in *Siggins* v. *McGill,* (State of Case, p. 108, ll. 23 to 39), and the appellants were therefore entitled to have that portion qualified according to the law as it exists today in this State.

A copy of request No. 16 follows:

"The denial of an application to strike out the complaint for legal reasons, and applica-

> tion for non-suit or application for a direction of a verdict in behalf of one party or the other, is not to be construed by the jury as a favorable decision in favor of one or the other as to the liability in the case, but is merely to be construed as a decision on the part of the court that the case should go to the jury for determination. The court was merely deciding that there was some conflicting evidence here dealing with the question of liability which would have to be submitted to you for your determination."

During the trial of the case at bar, the appellants, by their attorneys, had made a motion for a non-suit at the close of the plaintiffs' opening (State of Case, p. 18, ll. 3 to 27), and had moved for a non-suit at the close of the plaintiffs' case (State of Case, p. 79, ll. 3 to 10), and had moved for a direction of a verdict in favor of the defendants (State of Case, p. 106, ll. 3 to 11). Each of these motions was overruled by the Court in the presence of the jury. The request contained an exact statement of the facts, and it became the duty of the trial court, therefore, to charge as requested. The appellants were entitled to have the jury informed as to any extrinsic matters raised at the trial, which might have swayed their opinion. It is impossible to state at this stage of the proceedings how much the jury was swayed in arriving at their conclusion by the fact that the trial court had overruled each of the defendants' motions, which, if granted, would have been dispositive of the case. It was, therefore, harmful to refuse to so charge.

A copy of request No. 17 follows:

> "Under the facts adduced in this case I charge you as a matter of law that the house in which the accident happened was not a tenement house, and, therefore, the defendants were not obliged under any existing law to furnish any lights."

To avoid unnecessary repetition, the Court is referred to the argument under Point I, with reference to the type of dwelling in which the plaintiff fell. The construction of a statute is, of course, a matter of law for the Court, and it therefore became the duty of the trial court to charge that the plaintiffs had not proved the type of dwelling intended by the Tenement House Act. How much weight the jury might have given the fact that the house might have been a tenement house, in their determination, is, of course, unknown, and it is respectfully submitted that the trial court committed harmful error in refusing to charge request No. 17.

It is, therefore, respectfully submitted that the judgment entered below be set aside and a new trial granted.

Respectfully submitted,

COHEN & KLEIN,
Attorneys for and of Counsel
with Defendants-Appellants.

New Jersey Court of Errors and Appeals

AGNES STATHOS and JAMES STATHOS, Plaintiffs-Respondents, vs. MORRIS BUNEVICH and SAMUEL A. JAFFE, Defendants-Appellants.	On Appeal.

BRIEF OF PLAINTIFFS-RESPONDENTS.

Statement of Facts.

This is an action-at-law for negligence caused by the defendants.

The defendants were the owners of a certain building in the City of Passaic; which building is three stories in height and occupied at least by two families living independently of each other; which the defendants rented out, reserving to themselves the control over the halls and stairways; where the defendants agreed and assumed to keep a light burning in said halls and stairways during certain hours of the night; that the defendants negligently failed to keep the light burning in the hallways and on the stairways in accordance with the agreement, as a result of which, Agnes Stathos, one of the plaintiffs, fell down said stairway and suffered injuries as a result thereof, for which she seeks compensation.

Another plaintiff to this action is James Stathos, who is the husband of Agnes Stathos. He

seeks to recover damages because he was deprived of the services and consortion of his wife and for various sums of money expended for medical aid and attention to cure his wife of her aforesaid injuries. There was a verdict rendered in favor of the plaintiff, Agnes Stathos, for One thousand ($1000.) dollars, and a verdict in favor of the plaintiff, James Stathos, for One Thousand ($1000.) dollars, against both defendants.

POINT I.

The Trial Court was correct in refusing to grant motion for non-suit.

The Trial Court did not err in refusing to grant a motion for non-suit since there was sufficient evidence from the testimony of Agnes Stathos on direct and cross-examination (State of Case, p. 20, ll. 26 to p. 43, l. 3); James Stathos (State of Case, p. 55, l. 11 to p. 68, l. 40); and Nick Furries (State of Case, p. 69, l. 8 to p. 75, l. 16) to submit the case to the jury; the plaintiffs having established a prima facie case.

The defendants were under a contractual and legal duty to keep the light burning over the stairway.

To support this contention, plaintiffs cite the case of Siggins vs. McGill, 72 N. J. L., p. 263, where the court held that "When a landlord lets out portions of a building to several tenants, *retaining in his own possession or control the passageways and stairways* for the common use of the tenants and those having occasion to visit them, he is under the responsibility of a general owner of land who holds out an invitation to enter upon

and use his property, and is bound to see that reasonable care is exercised to have the passageways reasonably fit and safe for such use."

The question to be decided is whether or not the defendants who were the landlords of the premises in question, retained possession or control of the passageways and stairways, prior to and at the time of the accident.

The testimony of Clarence Higby, the janitor of the premises, clearly shows that on the date of the accident and prior thereto, he was the superintendent of the defendants for the purpose of keeping the passageways reasonably safe and fit for use and to keep the stairways lighted (State of Case, p. 99, ll. 8 to 29).

The defendant, Morris Bunevich, testified at the trial that Clarence Higby was the janitor whose duties were to keep the lights lit in the hallways and stairways (State of Case, p. 91, ll. 17 to 29), and he further testified that they (the defendants) paid the bills for gas used in keeping the lights lit over the stairways (State of Case, p. 91, ll. 30 to 40).

The other defendant, Samuel A. Jaffe, also testified at the trial that they (the defendants) had a janitor to keep the lights lit in the halls and over the stairways (State of Case, p. 97, ll. 7 and 8).

To further substantiate the plaintiffs' contention, the plaintiffs cite the case of Ryan vs. Delaware, Lackawanna & Western Railroad Company, reported in 62 Atl. Rep. p. 412. In that case there was a judgment in favor of the plaintiff, who was a sister of the tenant. She visited the premises of her brother for the purpose of doing some washing. The floor gave way and she fell into a vault below.

Counsel for the defendant in error in that case argued that there was no privity of contract or

estate between the owner of property and servant or visitor of one of the tenants, and cited the case of Clyne vs. Helmes, 61 N. J. L., p. 358.

The court, however, held that that exemption does not apply to cases where liability of landlord rests upon invitation.

Counsel for the defendants admitted that there was a contract entered into between James Stathos and the defendants, Morris Bunevich and Samuel A. Jaffe, (defendants-appellants' brief, p. 8).

As to whether or not there was privity in contract for the beneficiary under it between Agnes Stathos and defendants, let us look into the testimony submitted into evidence.

The plaintiff, James Stathos, says that the defendants agreed with him to keep the lights burning in the hallway (State of Case, p. 67, ll. 6 to 26).

Defendants' counsel contends that the benefit of having the light lit in the hallway was exclusively for the plaintiff, James Stathos.

To get the true and correct intention of the parties, what are the uncontroverted and uncontradicted facts submitted at the trial of this issue?

James Stathos says that he rented the store first and rented the apartment directly above his store some time later (State of Case, p. 55, ll. 30 to 40, inclusive).

That at the time he rented the apartment he made an agreement with the defendants, that the defendants were to keep the lights lit in the hallway (State of Case, p. 67, ll. 6 to 26).

At the time the agreement concerning the light in the hallway was made, the defendants knew that the apartment above the store was to be occupied as a dwelling by the plaintiff, Agnes Stat-

hos, wife of the plaintiff, James Stathos, and also their child.

Then was it not the intention of the parties that the hallways and stairways were to be kept in reasonably safe condition for the benefit of the plaintiff, Agnes Stathos?

Agnes Stathos, one of the plaintiffs, testified:

"Q. That was what you call a gas jet, wasn't it, that came out there? A. Yes.

Q. What kind of a light was it you had in the hall before the accident—I don't mean the day before—I mean, when you first went to live there? A. Just a plain pipe.

Q. What kind of a light was it—electric light? A. Gas.

Q. Gas light? A. Gas light.

Q. How long did you have this light in the hall? A. Well, before the accident, I had three months without a light.

Q. Who took care of the light which was used in the hall? A. Well, the lady who was to move, she said she was going to take care—janitor.

Q. (By the Court) Who did take care of it? A. Janitor.

The Court: The janitor.

Q. (By Mr. MacLeod) Who was the janitor? Where did he live? A. Well, I guess, here somewhere—

Q. Did he live in the same house? A. No, he don't live but he take care of the building.

Q. How often did he come to take care of the lights—to light the lights? A. Well, sometimes come, sometimes not.

Q. Was there anything wrong with the light—do you know—or the gas jet? A. Well, yes, no gas come out from the pipe, you know, no gas at all come.

Q. How long did that exist? A. About two or three months, I guess.

Q. What did you do about it? A. Well, I told the landlord so many times—

Q. Which one did you talk to? A. Well, to Mr. Jaffe.

Q. Mr. Jaffe? A. Yes, sir.

Q. How about the other fellow, the other defendant, Mr. Bunevich? A. Yes, I talk to him, too.

Q. What did you tell him? A. Well, I told him, "No light, maybe somebody in fall." He said—Mr. Jaffe said to me, "If you fall, I have insurance—"

Q. Now—

Mr. Cohen: I move that be stricken out, not responsive.

Mr. MacLeod: All right, I consent, strike it out your Honor.

The Court: Strike it out.

Q. Don't tell us anything, only what he said about the light, Mrs. Stathos, please—what about the light that you did not have? A. Well, he just —

Q. Did he say anything about it? A. Well, he said he is going to fix it, but he didn't fix it.

Q. For how long a period was it in the condition without being fixed, so you had no light? A. About three months.

Q. Who else used the stairway besides you, that front stairway? A. Well, another family upstairs.

Q. On the third floor? A. Yes.

Q. It was you and your husband and daughter—was it?—or son? A. No, my daughter, my husband and I.

Q. Now, do you remember on the 22nd day of January, when you fell—right—what time was it? A. Well, it was nine-thirty.

Q. In the evening? A. Yes, sir.

Q. Were you alone? A. Yes, sir.

Q. Tell us how you came to fall. A. Well, it just come out off the house, coming downstairs, and I fell down, and I was, you

know, I don't remember who was picking me up.

Q. How far did you fall? A. Well, I fell about second floor down to the first floor.

Q. These lights, or this gas, which had been here, where was that located in the building? On the first floor or on the second floor? A. Well, it is two flights, no lights.

Q. It is two flights no light, but where was this light supposed to be, that was consumed in the gas jet? A. In the first floor.

Q. That was right at your door, where you come out? A. Yes.

Q. It throws the light where? A. Throws down to the steps.

Q. Throws down to the steps? A. Yes.

The Court: Was the light lighted that night?

The Witness: No.

Q. What was the condition in there, when you came out? Was it dark? A. Dark, very dark.

Q. Was there any window you could use— A. No windows at all.

Q. —where the light came from there? A. No windows at all."

The testimony of this plaintiff clearly shows that the landlord had agreed expressly to repair the gas light and jet as he had been informed by this plaintiff, Agnes Stathos, that there was no light in the hall and over the stairway for a period of at least three months prior to the accident, and that the defendants had informed *this plaintiff* that they would fix the light.

There can be no question from the testimony in the case that the defendants agreed and assumed the duty to keep the hallways and stairway properly lighted.

In the case of Charney vs. Cohen, reported in 94 N. J. L., p. 381, the court said that where a

landlord undertook to repair a guard railing on the roof used by his tenants for hanging out washing, the landlord is liable although he was under no obligation or duty to make the repairs if reasonable care was not exercised, and it was a question for the jury as to whether due care was used to maintain the railing in a reasonably safe condition.

In the case of Rhodes vs. Fuller Land & Improvement Co., reported in 106 Atl. Rep. p. 400, (Court of Errors and Appeals), the court held that if a landlord assumes the duty of providing and maintaining a light on the common stairway, it continues thereafter to be his duty to exercise reasonable care to maintain a light there, until a notice of its discontinuance has been given; and failure to perform such duty is negligence whilst himself in the exercise of due care is entitled to recover.

The court cites with approval Andre vs. Mertens, 88 N. J. L., p. 626; Kargman vs. Carroll, 85 N. J. L., p. 632; and LaBrasca vs. Hinchman, 81 N. J. L., p. 367.

We contend that the evidence clearly showed that the defendants assumed a duty owing to the plaintiffs, Agnes Stathos and James Stathos, and that the defendants were negligent in the performance of that duty, and it was for the jury to find if they see fit from the evidence, that the defendants assumed the duty of providing and maintaining a light on the stairs, and further that their failure to do so was the proximate cause of the plaintiffs' injuries.

The respondents respectfully submit that the verdict rendered below should be affirmed.

POINT II.

The Trial Court was correct in overruling appellants' motion for a directed verdict in favor of defendants.

The evidence of the defendants and their witnesses, raised a fact question for the jury.

The defendant, Samuel A. Jaffe, testified that he never received notice that there were no lights (State of Case, p. 95, ll. 14 to 20).

The plaintiff, Agnes Stathos, testified that there were no lights, and that she notified the defendants, and that they, the defendants, agreed to repair the same (State of Case, p. 27, ll. 7 to 20).

This clearly raises a factual question to be determined by the jury as to whether or not the defendants knew that the lights were not in working order and that they had ample time to repair them, and whether or not the defendants disregarded their duty which they had assumed. Buda vs. Dzuretzko, reported in 87 N. J. L., p. 34, and Timlan vs. Dillworth, reported in 76 N. J. L., p. 568.

We respectfully submit that the Trial Court was correct in denying the motion for a direction of a verdict in favor of the defendants.

POINT III.

The Trial Court was correct in charging as it did Grounds of Appeal No. 8 on State of Case.

The respondents respectfully urge that the court's charge was correctly stated according to the testimony adduced at the trial. In the second sentence of this charge, the court said "That is the duty that the law imposed upon the landlord under those circumstances, if it be true, as the plaintiff says, that this was a common stairway, and that he either did agree to keep the light lighted or assumed that obligation, even though he did not agree to do it."

The Trial Court attempted to show by comparison that where a landlord lets out portions of a building to tenants, and retains possession or control over the passageways and stairways for the use of the tenants, and impliedly holds out an invitation to enter and use, the landlord is under a duty to keep the premises in repair, and so in the case at bar where the landlord agreed to keep the lights lighted or assumed that obligation, the defendants were under a duty to exercise reasonable care that the hallways were lighted. Siggins vs. McGill, (*supra*), and Rhodes vs. Fuller Land & Improvement Co., (*supra*).

The respondents rely not only upon the absence of lights, but the failure to maintain lights, once having assumed the duty.

The defendants-appellants' contention as to this point is predicated on the theory that the court should have directed a verdict. We believe that from the testimony in this case and the cases to which we have adverted establishing the principle

or liability or non-liability; the question whether or not the landlords retained control of the passage ways and maintaining of lights in passageways, hallways and stairs for the general use of the plaintiffs and the tenants, and whether he used due care under the facts in maintaining lights in said passageways and stairs were jury questions, where the testimony, as in this case, were of a controverted character; we cite the case of More-Jonas Glass Co. vs. West Jersey & Sea Shore R. R. Co., reported in 76 N. J. L., p. 708, where the court said:

> "A trial judge cannot direct a verdict when the testimony that the parties have been permitted to introduce leaves any fact material to the issue in substantial dispute."

There was the landlord and tenant relationship existing between the parties, and that there was a duty upon the landlord to keep the halls lighted because they were used in common.

In the case of Kargman, *et al.* vs. Carlo, reported in 85 N. J. L., p. 632, (Court of Errors and Appeals), Justice Trenchard stated:

> "So long as the law is stated correctly and intelligently the ultimate test of the soundness of instructions to the jury is not what the ingenuity of counsel can, at leisure, work out of the instructions to mean, but how and in what sense, under the evidence before them, and the circumstances of the trial, with ordinary men and jurors understand the instructions as a whole."

We respectfully submit that the Trial Court was correct in charging as it did Grounds of Appeal No. 8 of State of Case.

POINT IV.

The Trial Court was correct in refusing to charge certain requests to charge hereinafter set forth, submitted by the appellants.

With respect to Request No. 3.

> "In order for the plaintiffs to recover against the defendants it is necessary that the plaintiffs prove their allegations to your satisfaction by a preponderance of the evidence. By this is meant not by the number of witnesses, but by the greater weight of the credible testimony before you."

The Trial Court covered the entire request in his charge. The Trial Court said:

> "You take into consideration the likelihood of the stories being true that have been told you. You should take into consideration the manner in which the testimony has been given, by the demeanor of the witnesses, by the likelihood of their stories, as I say, being true, whether or not they contradicted themselves or otherwise, whether or not their stories appeal to your common sense and to your knowledge of affairs. In other words, you say what the truth is. You separate the true from the untrue. (State of Case, p. 115, ll. 15 to 25).
>
> You, of course, decide this case from your recollection of what the testimony is, and not from mine. I may have misstated it. You consider all of the testimony, whether it is facts that I have discussed or whether it is some that I have not touched on. You are the sole judges of the facts, and this is a fact case. (State of Case, p. 117, ll. 20 to 25)."

The plaintiff-appellees contend that it is not error for a court to refuse a request of charge which was substantially covered by the instructions given. Daggett vs. North Jersey Street Railway Co., reported in 75 N. J. L., p. 630, and Pavan vs. Worthen & Aldrich Co., reported in 80 N. J. L., p. 567, affirmed in 82 N. J. L., p. 615.

The plaintiff-appellees respectfully submit that the refusal to charge Request No. 3 was proper and not harmful to the defendant-appellants.

With respect to Request No. 4.

> "If you find as a fact that the accident was unavoidable, then I charge you that your verdict must be in favor of the defendants."

The Trial Court covered Request No. 4. The Trial Court in its charge said:

> "The mere fact that there was an accident, the mere fact that there was someone hurt is not sufficient; it must be proven to your satisfaction that there was negligence on the part of the defendant and that that was the proximate cause of this accident. Unless that is done there must be no cause for action." (State of Case, p. 109, ll. 24 to 30).

The Trial Court charged this request with the proper modification and in its own language.

The plaintiff-appellees respectfully submit that the refusal to charge Request No. 4 was proper and not harmful to the defendant-appellants.

With respect to Requests No. 8, No. 9 and No. 10.

> (8) "Where liability is made to depend at all upon notice to a party, the adversary party must establish a notice before the other is called upon to contest it."

(9) "Unless the plaintiffs prove to your satisfaction that the lights in the hallways were unlit for such a period before the accident that the defendants should have known of it, there can be no recovery by the plaintiffs."

(10) "If you find from the evidence that no notice of the fact that there were no lights in and about the premises in question was given to the defendants, or that the unlighted condition did not exist for such a length of time as to charge the defendants with knowledge of said condition, then the plaintiffs cannot recover."

These three Requests will be argued together with the court's permission.

The Court charged in general the above requests:

"The plaintiff says that there was an understanding, or an agreement, between the landlord, the owner of this building, the defendants here, and Mr. Stathos, who rented this property for his family, as a residence, that the lights would be kept lighted, and that, as a matter of fact, he did, or they did, keep the halls lighted, but that for some little time, they were not lighted, and that notice of that fact was brought to the attention of both the defendant landlords, and it was while that condition existed that this accident happened." (State of Case, p. 107, ll. 35 to 40.)

The Trial Court went further in its charge and charged the following:

"The defendant says that that is not true, 'that we had a man that was hired for the purpose of taking care of that property, to keep it heated and to keep the lights lighted in the hall, and he did, and we had no notice

> that he did not; we supposed that he was doing it, as he was hired, and that he did it every day, that we had no knowledge that he had not, or that he was remiss in that duty, or that he neglected it, nor were we ever told anything about it, and the first we knew about this accident was when we were sued'." (State of Case, p. 108, ll. 9 to 20.)

These three requests were covered by the court as stated above, and the Trial Court in its charge particularly covered these points.

In the case of Geyer vs. Public Service Railway Company, reported in 98 N. J. L., p. 470, the court stated:

> "A trial judge is not required to adopt the precise word of a request to charge, and is justified in modifying it in order to accurately express the legal rule called for and charging it in such modified form."

We respectfully submit that the refusal to charge Requests No. 8, No. 9 and No. 10, was proper.

With respect to Request No. 12.

> "In order for the plaintiff, Agnes Stathos, to recover damages for the aggravation of a pre-existing disease, she must prove, by a preponderance of the evidence, that the injury was the proximate cause of the aggravated condition."

There was no evidence in this case that the plaintiff, Agnes Stathos' condition was an aggravation of a pre-existing disease, and the court was perfectly proper in refusing to charge the above request.

The testimony of Dr. J. F. A. Rubacky for defendants, stated that there was nothing the matter with this woman. (State of Case, p. 86, ll. 16 to 18.)

There was not a scintilla of evidence in the entire case which showed that this woman's condition was aggravated by a pre-existing disease.

Dr. Rubacky, when asked (State of Case, p. 84, ll. 10 to 14):

> "Q. I mean, the—I will withdraw that. What was her general condition when you examined her, doctor—her general physical condition? A. She apparently was in a very healthy state."

The testimony of Dr. Rubacky, called for the defendant-appellants, showed that this woman had no pre-existing disease and this request was an imposition upon the court to charge a fact that did not exist, and the Trial Court was correct in refusing this request.

It is, therefore, respectfully submitted that the refusal to charge this request was proper.

With respect to Requests No. 14 and No. 15.

> (14) "In the absence of (1) any agreement upon the part of a landlord to keep the hallway of a building lighted at night for use of the tenants and invitees of the tenants, or (2) the assumption by a landlord of the duty of providing and maintaining lights in the hallway, the landlord is not responsible to one who enters or leaves the building as an invitee, finds the hallway and stairway in darkness, and is injured by a fall on the stairway."

> (15) "Where the landlord retains control of the halls and stairway, he is required to take reasonable care to have the common halls and stairways reasonably fit for use for the passage of the tenants, but he is under no obligation to furnish means for their safe use. He is, therefore, under no

> duty (unless assumed by contract), to furnish light at night although such light may be necessary for safe use. If the stairway was fit for use in ascending and descending, the responsibility of safely using it was upon the person using it. If to use it safely at night a light was requisite, the tenant must provide it, and not the landlord."

These two Requests will be argued together with the court's permission.

The plaintiff-appellees wish to call to the court's attention the fact that the above requests were covered generally by the Trial Court.

> "The plaintiffs say that there was an understanding, or an agreement, between the landlord, the owner of this building, the defendants here, and Mr. Stathos, who rented this property for his family, as a residence, that the lights would be kept lighted, and that, as a matter of fact, he did—or they did—keep the halls lighted, but that, for some little time, they were not lighted, and that notice of that fact was brought to the attention of both of the defendant landlords, and it was while that condition existed that this accident happened.
>
> The defendant says that that is not true, 'that we had a man that was hired for the purpose of taking care of that property, to keep it heated and to keep the lights lighted in the hall, and he did, and we had no notice that he did not; we supposed that he was doing it, as he was hired, and that he did it every day, that we had no knowledge that he had not, or that he was remiss in that duty, or that he neglected it, nor were we ever told anything about it, and the first we knew about this accident was when we were sued.' Now, you see, that is quite a different story." (State of Case, p. 107, l. 35, to p. 108, l. 21.)

The argument urged under Point No. 3 is applicable to the argument urged here.

In the case of Daggett vs. North Jersey Street Railway Company, (supra), the Trial Court held that a party has no just complaint where although his request for instruction has been refused, the court embraced them in his charge so far as they stated correct propositions of law. (Thompson on Trial, section 2351.)

The plaintiff-appellees respectfully submit that the refusal to charge Requests No. 14 and No. 15 was proper and not harmful to the defendant-appellants.

With respect to Requests No. 16 and No. 17.

> (16) "The denial of an application to strike out the complaint for legal reasons, and application for non-suit or application for a direction of a verdict in behalf of one party or the other, is not to be construed by the jury as a favorable decision in favor of one or the other as to the liability in the case, but is merely to be construed as a decision on the part of the court that the case should go to the jury for determination. The court was merely deciding that there was some conflicting evidence here dealing with the question of liability which would have to be submitted to you for your determination."
>
> (17) "Under the facts adduced in this case I charge you as a matter of law that the house in which the accident happened was not a tenement house, and, therefore, the defendants were not obliged under any existing law to furnish any lights."

These two Requests will be urged together with the court's permission.

The plaintiff-appellees contend that the refusal

to charge the above requests were not harmful nor prejudicial to the defendant-appellants, particularly with respect to Request No. 17. The Trial Court in its charge stated that the plaintiff, Mr. Stathos, rented this property for his family as a residence (State of Case, p. 107, ll. 37 to 39).

We respectfully refer the court to the Practice Act of 1912, (Pamphlet Laws, page 382—Rule 27) which states:

> "No judgment shall be reversed or a new trial granted on the ground of misdirection, or exclusion of evidence, or for error as to matters of pleading or procedure, unless after examination of the whole case it shall appear that the error injuriously affected the substantial rights of the other party."

The plaintiff-appellees contend that the refusal of the Trial Court to charge Request No. 17 was proper as it was an incorrect statement of law relating to the facts in this case, since the defendants were obliged to furnish lights in accordance with the agreement made with Mr. Stathos, and further that the defendants assumed the obligation to furnish lights which is analogous to the case of Charney vs. Cohen (supra).

It is, therefore, respectfully submitted that the judgment entered below be affirmed, with costs, and that the verdict be sustained.

Respectfully submitted,

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