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# New Jersey Supreme Court.

Filed April 24, 1928.

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WILLIAM IONIN and EDNA IONIN, his wife, Plaintiffs,	} Judgment Record. 10
vs.	
FERNLOT, INC., a corporation, Defendant.	} Action at Law. On Postea. William A. Lord, Attorney.

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Fernlot, Inc., a corporation the defendant in this cause was summoned to answer unto William Ionin and Edna Ionin, his wife, the plaintiffs therein in an action at law upon the following complaint: 20

(Summons issued April 21, 1928).

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## Complaint.

Plaintiffs, residing at Newark, N. J., say that: 30

1. At the times hereinafter mentioned the defendants were the owners, proprietors and landlords of a certain building, lands and tenements located at and known and designated as No. 476 South Seventeenth Street, in the said City of Newark, County of Essex and State of New Jersey. which building consisted of numerous apartments covered by a common roof. 40

*Complaint.*

2. On or about September 20, 1927, plaintiffs were tenants of the said defendants, occupying one of the apartments in said building, consisting of five rooms on the first floor thereof, by virtue of a certain letting of said apartment by the defendants to the plaintiff, William Ionin.

10

3. The defendants were, on said day and date, in possession, control and charge of the halls, roof and stairways of said building, whereby it became and was their duty to use due and proper care to keep and maintain the same and said building, which was arranged for several apartments as aforesaid, in proper condition so that the same should not become dangerous to the tenants of said building.

20

4. On September 20, 1927, and for sometime prior thereto, the roof of said building became and was out of order and delapidated and in a dangerous condition and out of repair, of all of which the defendants had notice, and it thereby became and was their duty to keep and maintain the said building and the roof thereof in proper condition and not permit same to become unsafe so as to put the tenants and occupants in danger.

30

5. On said September 20, 1927, and for sometime prior thereto, they, the said defendants, disregarding their duty as aforesaid, entirely failed to keep and maintain said building in proper condition so that same should not become dangerous to the tenants of said building, but, on the contrary, allowed same to be and remain in such unsafe and dangerous condition and out of repair that, by reason thereof, through its carelessness and negligence

40

*Complaint.*

in neglecting to repair said roof as aforesaid, the rain came through the said roof and thereby came through the ceiling of the apartment occupied by plaintiffs as tenants as aforesaid, and thereby the said ceiling came down, striking plaintiff, Edna Ionin, on the head, breast, arms, stomach and other parts of her body, thereby greatly and permanently wounding and injuring her and causing her prematurely to give birth to a child, and causing her to undergo and suffer great pain and agony, and will, in the future, cause her to suffer still further great pain and agony, all through the negligence and carelessness of the defendants as aforesaid, the owners and landlords of said building and premises, and, by reason thereof, she has been prevented and unable to attend to her necessary domestic affairs as she otherwise could and would have done. 10  
20

6. Thereby the said plaintiff, William Ionin, her husband, by reason of said carelessness and negligence on the part of the defendants, was obliged to and did expend divers large sums of money in and about endeavoring to cure plaintiff, Edna Ionin, his wife, of her said injuries, bruises and wounds sustained by her as aforesaid, and will in the future be compelled to expend large sums of money in an endeavor to cure his said wife of her said wounds and injuries sustained by her as aforesaid, and, by reason of the injuries sustained by her, the plaintiff, William Ionin, was deprived of her society and comfort which he would otherwise have enjoyed and will in the future be deprived of her society and comfort, through the carelessness and negligence of defendants as aforesaid. 30  
40

*Complaint.*

Plaintiff William Ionin demands as damages  
\$5,000.00.

Plaintiff Edna Ionin demands as damages \$10,-  
000.00.

WILLIAM A. LORD,  
Attorney of Plaintiffs.

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**Answer.**

Filed May 22, 1928.

Defendants, corporations of the State of New  
Jersey, with their principal offices in the City of  
Newark, County of Essex and State of New Jer-  
sey, answering the complaint herein, say that:

20

They deny all the allegations contained in the  
complaint filed herein.

**SEPARATE DEFENSES.**

Whatever injuries were sustained by the plain-  
tiff Edna Ionin at the time and place of the alleg-  
ed accident, were caused and contributed to by the  
negligence of the said plaintiff, in that she con-  
ducted herself in a careless and reckless manner,  
and negligently exposed herself to the risk of such  
an accident, and neglected to take precaution and  
exercise care to guard and protect herself against  
such an accident, and the injuries which she may  
have sustained by reason thereof; that as a result  
of her contributory negligence, she has no cause  
of action against the defendants.

30

COHEN & KLEIN,  
Attorneys of Defendants.

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**Reply.**

Filed June 7, 1928.

The plaintiffs deny every allegation contained in the answer.

WILLIAM A. LORD,  
Attorney of Plaintiffs.

10

**Judgment.**

This case was tried before Judge Worrall F. Mountain, to whom it had been duly referred, and a jury in the Essex Circuit, on June 5 and 6, 1929.

A non-suit was ordered as to the defendant, E. D. & M. Corporation.

The jury returned a general verdict against the defendant, Fernlot, Inc., a corporation, in favor of the plaintiff, William Ionin, for Three Hundred Dollars (\$300.00), and in favor of the plaintiff, Edna Ionin, for Twelve Hundred Dollars (\$1200.00).

20

Whereupon it is adjudged that the plaintiff William Ionin do recover of the said defendant Fernlot Inc., Three hundred dollars damages and that the plaintiff Edna Ionin do recover of the said defendant Fernlot Inc., a corporation the sum of One thousand two hundred dollars damages together with their costs which have been taxed at the sum of Seventy-five dollars and seventy-eight cents costs, making in the whole the sum of Fifteen

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*Judgment.*

hundred and seventy-five dollars and seventy-eight cents.

\$ 300.00 W.I.  
1200.00 E.I.

\$1500.00  
75.78

10

\$1575.78

Judgment signed and entered June 8, 1929.

WILLIAM S. GUMMERE,  
C. J.

**Clerk's Certificate.**

20 I, Fred L. Bloodgood, Clerk of the Supreme Court of the State of New Jersey, do certify that the foregoing is a true copy of the judgment entered in the above stated cause as the same remains of record in my office.

In testimony whereof I have set my hand and the seal of said Court at Trenton, this ninth day of January A. D. nineteen hundred and thirty.

(Seal) FRED L. BLOODGOOD,  
Clerk.

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**Notice of Appeal.**

NEW JERSEY SUPREME COURT,

ESSEX COUNTY.

<p>WILLIAM IONIN and EDNA IONIN, his wife, Plaintiffs, vs. E. D. &amp; M. CORPORATION, a corporation, and FERNLOT, INC., a corporation, Defendants.</p>	}	<p>Action at Law 10</p> <p>Notice of Appeal.</p>
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To WILLIAM A. LORD, Esq., Attorney of Plaintiffs,  
or to whom it may concern: 20

Sir:

Please Take Notice that the defendant in the above entitled cause, Fernlot, Inc., appeals to the Court of Errors and Appeals in the last resort in all causes in New Jersey from the whole of the judgment entered in this cause.

Respectfully yours,

NATHAN G. KRASNER,  
Attorney of Defendant.

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**Clerk's Certificate.**

I, Fred L. Bloodgood, Clerk of the Supreme Court of the State of New Jersey, do certify that the foregoing is a true copy of Notice of Appeal in the above-stated cause as the same remains on file in my office.

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(Seal)

In testimony whereof I have set my hand and the seal of said Court at Trenton, this Thirteenth day of January A. D. nineteen hundred and thirty.

FRED L. BLOODGOOD,  
Clerk.

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*Grounds of Appeal.*

contributory negligence, and therefore have no claim of liability against the landlord."

The court denied the defendant's motion for a non-suit, and defendant prayed an exception which was granted.

10        2. At the close of the plaintiffs' case the attorney for the defendant moved for a non-suit upon the following ground: "Under the rule of law that the landlord is not obligated or in any way in duty bound to make repairs to the inside of the premises of the demised building, and that there is no direct proof that the injuries sustained were caused by any leakage from any other part except the ceiling of the premises where the plaintiffs lived, and therefore there is no direct connection between the control of the landlord over the roof and the injuries sustained by the plaintiff."

20

The court denied the defendant's motion for a non-suit and defendant prayed an exception which was granted.

3. Because the court sustained plaintiffs' objection to the following question put to the witness, Edward Michel, on direct-examination: "Did you start suit against Mrs. Ionin for the rent before she started her suit against you for the damages?"

30

Defendant prayed an exception which was granted.

4. Because the court sustained the plaintiffs' objection to the following question put by the defendant to Edward Michel on direct-examination: "Do you know whether the suit you started in the District Court against Mrs. Ionin for the rent preceded the suit started by her in this court for the damages?"

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*Grounds of Appeal.*

Defendant excepted to the ruling of the court on this objection and the exception was granted.

5. Because the court sustained the plaintiffs' objection to the following question put by the court to the witness, William A. Ennis, on direct-examination: "You can tell what you saw in the pantry, January, 1928."

10

Defendant took exception to the court's ruling on this objection which exception was granted.

6. Because the court overruled an objection made by the defendant to the following question put by the plaintiffs' attorney to the witness William A. Ennis, on cross-examination: "For whom?" (the question before this was as follows: "What was your business at that time; the answer was "Claim investigator").

20

The defendant prayed an exception to the ruling of the court on this question, and an exception was granted.

7. Because the court sustained an objection made by the plaintiff to the following question put by the defendant to the witness, Edward Michel, on direct-examination: "Was Mr. Shulman a tenant in your house?"

The defendant prayed an exception to the ruling of this court, which was granted.

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8. Because the court refused to charge request No. 1 of the defendant's request to charge, which request was as follows:

"The rule of law in this class of cases is that the plaintiff must establish by a preponderance of evidence that the landlord not only was guilty of negligence in permitting the disrepair to continue, but also that he had notice of the condition of disre-

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*Grounds of Appeal.*

pair. If you find that the landlord did not receive such notice prior to the accident, then you must find for the defendant."

Defendant excepted to the court's refusal to charge as requested, and the exception was granted.

- 10 9. Because the court refused to charge request No. 3 of the defendant's request to charge, which request is as follows:

"The landlord is under no legal duty to keep in repair any portion of demised premises in the absence of any express agreement between the landlord and the tenant."

Defendant excepted to the court's refusal to charge as requested, and the exception was granted.

- 20 10. Because the court refused to charge request No. 4 of the defendant's request to charge, which request is as follows:

"Where a tenant with full knowledge that part of demised premises are in a dangerous condition and liable or apt to cause injury, and such tenant subjects himself or herself to the possibility of the injury, there can be no recovery."

- 30 Defendant excepted to the court's refusal to charge as requested, and the exception was granted.

11. Because the court refused to charge request No. 6 of the defendant's request to charge, which request is as follows:

"If the jury finds that before the accident the plaintiff was afflicted with an ailment, the jury should make due allowance for any aggravation of such ailment by the passing of time and should

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*Grounds of Appeal.*

also make due allowance for the general deterioration of her physical condition brought on by the ailment which she had before the accident, and all these items which are the natural result of her ailment should be deducted from her present condition.

Defendant excepted to the court's refusal to charge as requested, and the exception was granted. 10

NATHAN G. KRASNER,  
Attorney for Defendant.

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**Testimony.**

NEW JERSEY SUPREME COURT,  
ESSEX COUNTY CIRCUIT.

June 5, 1929.

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WILLIAM IONIN, *et al*,  
Plaintiffs,

vs.

E. D. & M. CORPORATION,  
Defendant.

Action at Law.

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Before HON. WORRALL F. MOUNTAIN, *J.*, and a jury.

APPEARANCES:

For the Plaintiff appears WILLIAM A.  
LORD, ESQ.

For the Defendant appears NATHAN G.  
KRASNER, ESQ.

30

A jury was called and sworn.  
Mr. Lord opens for plaintiff.  
Mr. Krasner opens for defendant.

Mr. Lord: I find that the date of this ac-  
cident was erroneously stated as 1927. I  
want to amend it to 1926.

The Court: All right.

40

*Edna Ionin—Direct.*

EDNA IONIN, sworn in behalf of plaintiff, testified as follows:

*Direct-examination by Mr. Lord:*

Q. Mrs. Ionin, you were a tenant in the premises where? A. I can't understand.

Q. What place did you live at? A. 476 South 17th Street. 10

Q. Where? A. 1925 to 1926.

Q. Were you there in 1926? A. I was there in 1926.

Q. Something happened while you were there, yes or no? A. Yes.

Q. When was it? A. 1926.

Q. Do you know the date? A. 26th of September.

Q. What happened? A. I was in the pantry, and was going to put everything away— 20

Q. Please speak louder? A. I went in the pantry, and suddenly it started to come down on me, and I don't remember no more.

Q. What started? A. The dishes started and fell in, the dishes started to fall down. I don't remember anything more.

Q. Did anything fall on you?

Mr. Krasner: I object to that as leading. 30

A. The ceiling came down on me and I don't remember.

Q. What did it do? A. I was in the doctor's—

Q. Where were you when you got up? A. In bed.

Q. From the time the ceiling struck you? A. I didn't know what happened at all, and I fell down on the floor. 40

*Edna Ionin—Direct.*

Q. When you came to you were in bed? A. In bed.

Q. Did you get a doctor? A. Doctor Nash.

Q. How soon did he come? A. Right away I think.

10 Q. Soon after you found yourself in bed did the doctor come? A. Yes.

Q. How soon? A. When I was in bed the doctor was near me.

Q. Dr. Nash was there when you came to? A. When I came to, yes, sir.

Q. What condition were you in at the time of the accident? A. I was ready—

Q. Before the accident, at the time of the accident, what condition, physically? A. I was in pregnancy.

20 Q. How many months? A. I was about four months.

Q. Four months? A. Yes, sir.

Q. Did Dr. Nash come to see you very often? A. Yes.

Q. When you came to in bed how did you feel? A. I had hemorrhages.

30 Q. Where were the hemorrhages from? A. I had from my nose, and it showed up the baby—it showed up—

Q. Was there any other mark on your body? A. On my head.

Q. Whereabouts on your head? A. Right over here (indicating on top).

Q. What marks were there on your head? A. I was sick in bed. I can't remember.

Q. Do you know whether there were any marks on your head? A. I don't remember.

40 Q. How did you feel; feel pain? A. Very sick in bed.

*Edna Ionin—Direct.*

- Q. Where was the pain? A. All over me.
- Q. Where was the special place; where did it pain you most; what part of your body was the most pain? A. My head, and all over.
- Q. Any other place besides your head? A. In my stomach.
- Q. Any other place? A. My head, my shoulders. 10
- Q. How often did Dr. Nash come to see you? A. I was in bed.
- Q. How often? A. Every other day.
- Q. For how long? A. Two months.
- Q. What? A. About a couple of months.
- Q. Did he stop at the end of two months? A. He stopped the hemorrhages, and stopped the baby from coming naturally.
- Q. What? A. Stopped the hemorrhages. 20
- Q. How soon after the accident? A. Six weeks.
- Q. Then he came how long after that? A. He came all that time.
- Q. When did you give birth to a child? A. I gave birth to a child before time.
- Q. When? A. The 5th of December.
- Q. When was the child due? A. In February.
- Q. What was it, a 7 months baby? A. Yes, sir, it was a 7 months baby.
- Q. How is the baby's health? A. It is sick all the time. 30
- Q. What was she sick with? A. Always vomiting.
- Q. Even now? A. Even now.
- Q. You have some other children? A. I have four.
- Q. Four other children? A. Yes.
- Q. They are older? A. Yes.
- Q. Are they healthy? A. All of them, healthy and strong. 40

*Edna Ionin—Direct.*

Q. How was your health before this happened?  
A. Never sick a day in bed.

Q. Is anything the matter now? A. I am under the doctor's care now.

Q. How often do you see the doctor now? A. Every week. He was going to take me to the hospital.

10 Q. Did you go anywhere after this happened?  
A. I went to a vacation.

Q. Whereabouts? A. Thompsonville, to Sullivan County.

Q. When did you go there, how long after this happened? A. The baby was a few months old. After it was born.

Q. How old was the baby? A. About three months old.

20 Q. Where? A. I couldn't take care of this baby; I couldn't do anything.

Q. Did you board there? A. Yes.

Q. Did you have a nurse? A. Yes.

Q. When? A. Thompsonville.

Q. How long were you there? A. All summer.

Q. Did you have a nurse then? A. I had a nurse watching me, yes.

Q. Was she paid anything? A. Yes.

30 Q. How much? A. \$25 a week.

Q. How many weeks did you have her? A. She was almost all that time, about 18 months, then went away, couldn't take care of me.

Q. Did you have any nurse when you were home, before you went to Sullivan County? A. Yes.

Q. After the accident? A. Yes.

Q. Who did you have? A. I had a Polish woman.

40 Q. What was her name? A. Elizabeth. Lizzie.

*Edna Ionin—Direct.*

Q. What was her last name? A. I forget the name.

Q. How much did you pay her? A. \$30.

Q. Is she the one who went to Sullivan County with you? A. No, sir.

Q. That was another one? A. Then I had a colored woman.

Q. The one you had in Sullivan County was a colored woman? A. That is the colored woman. 10

Q. Did you take her with you? A. I took her with me, yes, sir.

Q. Then you came back at the end of the summer? A. Yes.

Q. What did you do then; did you do your housework then? A. I can't do my housework, no.

Q. Why not? A. I am always sick in bed.

Q. Where are you sick now? A. Always under the doctor's care. 26

Q. Where is your pain; any pain now? A. All over me.

Q. Where? A. My head.

Q. Anywhere else? A. My head.

Q. Do you have anybody to do your housework now? A. Yes.

Q. Who? A. I have a Jewish woman.

Q. Do you pay her anything? A. Yes. 30

Q. How much? A. \$30.

Q. \$30 a week? (no answer)

Q. Take it easy, we will try and go a little slower. Mrs. Ionin, do you know what caused the plaster to fall? A. Yes, sir.

Q. Why? A. It was always leaking.

Q. Leaking from where? A. From the roof.

Q. The roof of the house? A. Yes.

Q. You were on the first floor? A. Yes.

Q. How did the water get from the roof to the 40

*Edna Ionin—Direct.*

first floor? A. Came down on the top floor, and then came on my floor.

Q. How did it come from the roof to the second floor? A. From the top floor, and then it leaks down on the first.

10 Mr. Krasner: I move to strike that out on the ground she doesn't know what happened to the water from the time it leaves the top floor.

Q. Do you know how the water got from the roof down to your apartment; how did it get down there? A. From the roof to my apartment?

Q. Yes? A. I cannot tell you the roof.

20 Q. Did you ever see the water come from the roof? A. Yes.

Q. Where did it come down? A. In the pantry.

Q. Where from the roof; where was the hole in the roof, what part of the roof? A. The roof was always broken.

Q. Did you see it? A. Yes.

Q. Did you ever go up on the roof? A. Yes.

Q. Where was it broken? A. It was broken before I moved in.

30 Q. What kind of a roof was it? A. I couldn't tell you—

Q. What was it made out of, wood? A. I couldn't tell. I used to go up—

Q. I understood you to say a minute ago you had been up on the roof? A. No.

Q. You haven't? A. No.

Q. You never went? A. I didn't get you.

40 Q. How did you know the water came from the roof? A. There was a man. He sent a man after the accident.

*Edna Ionin—Direct.*

Q. I don't mean after the accident. I mean before the accident, when there was anything the matter with the roof before? A. I know it was cracked in the pantry.

Q. Did you know where the water came from? Did the water ever come down in the pantry before the accident? A. All the time.

Q. When it rained, you mean? A. All the time. When it rained, yes, sir.

Q. Do you know of your own knowledge where that water came from that came down over the pantry? A. I know it came down in the pantry.

Q. It loosened the pantry ceiling? A. Yes.

Q. Do you know where the water came from? A. How could I tell?

Q. I understood you to say a minute ago it came from the roof? A. That was the man told me.

Q. I don't want to know what any man told you. I want to know what you know of your own knowledge. Did you ever see the water come from the roof? You, yourself? A. I wasn't on the roof.

Q. I didn't ask you if you were on the roof. I am asking you if you ever saw any water come from the roof. Did you, when it rained, any time? A. When it rained it came down in my place.

Q. Did you see it? A. Yes.

Q. Did you see where it came from? A. No, sir.

Q. Where did it come; where did you see it? A. It was always wet, the ceiling.

Q. What? A. The ceiling was always wet.

Q. I say don't you know how the ceiling came to be wet? A. Well, I don't—

Q. Do you know whether the water came from that wet the ceiling? Did you ever see any water,

*Edna Iovin—Direct.*

did you ever look up and see any water come on your ceiling? A. Yes, sir.

Q. Where did you see it coming through the ceiling? The roof isn't in the pantry, you are on the second floor; isn't there a floor above the pantry? A. I told you that. I went up and my place

10 was always wet.

Q. Did you ever see any water come from the roof; did you ever see the roof? A. No, sir.

Q. Were you ever up on the second floor? A. Yes.

Q. Did you ever see any water coming through on the second floor from the roof? A. Yes.

Q. Tell us where you saw it, and when? A. I told you that before.

Q. What? A. I told you that before.

20 Q. What did you say before? A. I said I went up to her place and the water leaks out and—

Q. I don't want to know— A. I seen it myself.

Q. What did you see? A. It came from her place, then it came to mine.

Q. You saw it come from the roof? A. Yes.

Q. Where did it come when it came from the roof? A. On the floor.

30 Q. What course did it take, down the chimney, or what? A. From the ceiling.

Q. From the second to your floor; how did it get from the second floor to your floor? A. From the roof. It was broken.

Q. When it got to the roof it went on the second floor? A. Yes.

Q. How did it get on the second floor from the roof? Did it go down a pipe, or what? A. It was leaking down on the second floor.

40 Q. I thought you saw it? A. I saw—

*Edna Ionin—Direct.*

Q. Did you see the water coming on the second floor? A. Yes.

Q. Where did it get on the second floor? A. On my floor.

Q. Was it in the second floor apartment; did it come through the second floor apartment? A. Yes.

Q. Why don't you say so? A. I did, in the beginning. 10

Q. Where were you? A. In the pantry.

Q. No. On the second floor I am talking about. You said you saw it on the second floor? A. I did.

Q. Who lives on the second floor? A. Another lady.

Q. What? A. Another tenant.

Q. What is her name? A. Wendloff. 20

Q. Do you know where he is now? A. No.

Q. Who else lived in the house? A. I don't know.

Q. Who were any other tenants? A. Mrs. Schulman.

Q. Who else? A. I can't tell.

Q. Mrs. Schulman, and Wendloff, and who else? A. I can't tell.

Q. Do you know this gentleman with the glasses in the back of the room? A. Yes. 30

Q. Was he a tenant? A. I don't know.

Q. Does he live there? A. No, sir.

Q. What is his name, do you know; the gentleman with the glasses. Can you see him? Come up here? A. Yes, I see him now.

Q. What is his name? A. Terry.

Q. Does he live there? A. With me.

Q. He is a boarder with you? A. Yes. 40

*Edna Ionin—Cross.**Cross-examination by Mr. Krasner:*

Q. Where are your glasses, Mrs. Ionin; do you wear glasses? A. No, sir.

Q. You couldn't see that fellow in the back of the room? A. I am nervous.

10 Q. Are you always that way? A. Nervous.

Q. You never were that way before? A. Never, no.

Q. How long has Mr. Wendloff lived in the flat above you? A. A year.

Q. Are you feeling better now? A. Yes.

Q. Feeling all right now? A. Better—yes.

Q. When you moved into this house did the Bancrofts live there already? A. I can't remember.

20 Q. Did they move out before you moved out? A. No, sir.

Q. When did you move into this flat on South 17th Street? A. May 1924.

The Court: What was your answer?

The Witness: 1924.

Q. Do you remember what month? A. May.

30 Q. May 1924 when you moved into this apartment. When did you move out of this apartment? A. I don't remember.

Q. Do you know why you moved out of this apartment? A. 1925 I moved. I moved in.

Q. You moved in 1925 instead of 1924? A. Yes.

Q. Do you know why you moved out of the apartment? A. Why?

40 Q. I am asking you? A. Because the ceiling were coming down in the childrens' room. I told Mrs. Schulman and she said all the ceiling will come down, and move.

*Edna Ionin—Cross.*

Q. This was after the accident? A. After the accident, in the children's room.

Q. About how many months did you stay in the apartment after the accident? A. I don't remember.

Q. Did you stay a whole year? A. I can't remember.

10

Q. How soon after the accident did you go to the mountains? A. When the baby was three months old.

Q. You went to the mountains when the baby was three months old? A. Yes.

Q. And the accident happened September 26, 1926? A. Yes.

Q. And the baby was born December 5, 1926? (no answer)

Q. Did you go to the mountains about March, 1927? A. I can't remember.

20

Q. Was it summer or winter when you went to the mountains? A. I can't remember.

Q. Do you remember the name of the hotel you went to? A. A fellow's farm house.

Q. Where is this fellow's farm house? A. Thompsonville.

Q. New York? A. Yes.

Q. How much did you pay a week there for board? A. I can't remember.

30

Q. Were there a lot of people there besides you? A. Yes, sir.

Q. You went to the mountains three months after the baby was three months old? A. Yes.

Q. That was in the winter time? A. I can't remember.

Q. You don't remember. How did you get to the mountains, by train or automobile? A. By machine.

40

*Edna Ionin—Cross.*

Q. By automobile? A. Yes.

Q. Who took you up there? A. The man with the glasses.

Q. The man with the glasses? A. Yes, sir.

Q. When did you leave, in the morning or in the afternoon? A. In the morning.

10 Q. Did you have the baby with you? A. Yes, sir.

Q. Who else was in the car with you besides you, the baby and the driver? A. And the nurse.

Q. The colored nurse? A. Yes, sir.

Q. Lizzie? A. Elizabeth.

Q. Is that the same one you called Lizzie before? A. Elizabeth, the colored woman.

Q. What was the name of the other nurse? A. Lizzie.

20 Q. Lizzie was the white nurse, and Elizabeth was the colored nurse? A. Elizabeth.

Q. Was the colored nurse? A. Yes.

Q. How long did you have the colored nurse before you went to the mountains? A. I can't remember.

Q. Was there snow on the ground when you went up to the mountains? A. I can't remember.

30 Q. How long did it take you to get up there? A. Four or five hours.

Q. Have you tried to find these Wendloff people? A. No, sir.

Q. When you moved out of this house where the accident happened the Wendloffs were still living there, weren't they? A. I can't remember.

Q. Are they still living there now? A. I don't know.

40 Q. Where did you ever look for these people the Wendloffs? A. I don't know.

*Edna Ionin—Cross.*

Q. You never looked for them? Did you look for them? A. I don't know.

Q. Before, on direct examination, when you were asked as to whether you knew where these people were you said you didn't know? A. I didn't know, I said I didn't look for them.

Q. They might be living in the same house and same flat yet for all you know? A. I don't know. 10

Q. When did this accident happen, Mrs. Ionin? A. The 26th of September.

Q. 1926? A. 1926.

Q. Do you remember, Mrs. Ionin, whether on October—do you remember whether on or about November the 2nd, 1926, a man by the name of W. A. Ennis came to your house to talk to you about this accident—who was there? A. I can't remember. One man was there. 20

Q. Did you talk with him at all about this accident? A. I don't remember.

Q. But he was there, wasn't he? A. I know he made me sign. That is all I remember.

Q. But he was there at your house? A. I told you a man came.

Q. I am asking you whether he was there? A. Yes, sir, I told you.

Q. Were you in bed when this man was there, or were you walking around the house? 30

The Court: What has that to do with it?

Mr. Krasner: To show you in this respect the lady testified on direct-examination she was in bed two months. We have testimony to the effect this visit was made considerably before the two months were up, and this lady was out and around the house.

Mr. Lord: I don't suppose she stayed in bed all the time. 40

*Edna Ionin—Cross.*

Q. Do you remember how long you were in bed after the accident? A. Yes, sir, I am always in bed.

Q. How long? A. I am always in bed.

Q. I mean how long did you have to be in bed? A. Until the hemorrhages stopped.

10 Q. How long did you stay in bed? A. I stayed all the time in bed.

Q. How long did it take before the hemorrhages stopped? A. About three or four weeks.

Q. You were in bed three or four weeks? A. Yes.

Q. Did you get out of bed when the hemorrhages stopped? A. I tried to walk around a little, but had to lay in bed all that time.

20 Q. Didn't you say before on direct examination — A. Oh—

Q. Are you all right now; feel better? Mrs. Ionin, when this man came to you that wanted you to sign some paper, did you tell him that at the time the accident happened you were six and a half months pregnant? A. I don't remember.

Q. Would you say that that was true, that you were six and a half months pregnant? A. I don't remember.

30 Q. You don't know whether it was. Was it four months you were pregnant when the accident happened? A. Four or five months.

Q. It wasn't six and a half? A. I don't remember.

Q. Mrs. Ionin, you remembered very distinctly on direct examination that it was four months, didn't you; why do you forget now? A. I know I gave birth to the baby, it was four months and stayed in bed.

40 Q. The baby was four months pregnant when the

*Edna Ionin—Cross.*

accident happened, that was September 26, 1926. The baby was born February 5, 1927, is that right?

A. What do you say?

Q. I asked you whether when the accident happened were you four months pregnant? A. Yes.

Q. And that was on September 26, 1926, and the baby was born on February 5, 1927? A. I don't know that. Three months later the baby came. 10

Q. You testified before that the baby was born February 5, 1927?

The Court: She said December 5th.

Q. You testified before that the baby was born December 5th; you were four months pregnant when the accident happened, is that right? A. Yes, sir.

Q. And this accident happened September 26, 1926, and the baby was born December 5, 1926. It took about two and a half months from the accident until the time when the baby was born, is that right? 20

The Court: Why go over the same thing again and again.

Mr. Krasner: She doesn't give us any satisfaction.

The Witness: I don't remember, it is so long ago. I was always sick in bed. 30

Mr. Krasner: She seemed to be able to answer very well on direct, but on cross doesn't feel well enough to give satisfactory answers.

The Court: I don't mind your asking her a question once, but I think after her own counsel has asked her the same thing four or five times, and both of you have asked 40

*Edna Ionin—Cross.*

her questions over and over again if you do not stop it I will have to stop you. I have other cases to try.

- 10 Q. Mrs. Ionin, how many rooms did you have in this apartment where you were living, on 17th Street? A. Five.
- Q. Was there a bath room too? A. Yes.
- Q. And a pantry besides? A. Yes.
- Q. Where did you keep your dishes? A. In the pantry.
- Q. Have you got a closet in the kitchen? A. I can't remember.
- Q. What part of your body was hit by this ceiling? A. All over. All over. Why don't you go to the hospital and find out everything?
- 20 Q. Were you hit by more than one piece of ceiling? A. I don't remember.
- Q. Did you see the ceiling before it hit you? A. It fell. Do you think I would go over to the ceiling? I know it was leaking and I warned him all the time.
- Q. Do you know whether it broke, the ceiling broke into pieces after it struck you? A. Oh—
- 30 Q. Mrs. Ionin, when you were struck by the ceiling were you in a standing position or in a stooping position? A. I was unconscious.
- Q. When the ceiling hit you were you standing up or stooping? A. I don't remember what position I was.
- Q. Did you have anything in your hand when you were hit by the ceiling? A. I can't remember. Something I was going to put away.
- Q. You don't remember whether you went to put away dishes? A. I can't remember. I remember
- 40 the boarder picked everything up.

*Edna Ionin—Cross.*

Q. Was everything on the floor? A. Everything on the floor.

Q. Did anybody call on you, any doctor call on you besides Dr. Nash? A. I had Doctor Delmonte.

Q. I mean before you went to the mountains? A. No.

Q. Did Dr. Nash pay you any other visits except the twenty visits you testified on direct-examination? A. I am all the time in bed. 10

Q. How often did Dr. Nash come to see you before you went to the mountains? A. Every week. Every other week, according to how I feel. If I couldn't go to him, if I feel worse I couldn't.

Q. During the time you had the hemorrhages how often did Dr. Nash come? A. Every day.

Q. Every day? A. Yes, sir.

Q. Have you ever had any heart trouble, Mrs. Ionin? A. Not that I remember. 20

Q. Do you remember being examined by a Dr. Lowenstein? A. I don't remember.

Q. Were you ever told by any other doctor that you were not in a physical condition to give birth to any more children? A. I never was sick in bed.

Q. Never told by a doctor? A. Never been to a doctor.

Q. Have you heart trouble now; how is your heart now? A. I am very nervous. 30

Q. Does anything hurt you now? A. Oh, yes.

Q. What? A. Hurts all my body and my head when I get that nervous condition.

Q. Do you often get this nervous condition? A. Yes, sir.

Q. How often do you get it now? A. Every other day.

Q. It is all from the accident, Mrs. Ionin? A. 40

*Edna Ionin—Cross.*

Well, I want—you ask me, you will have to believe me. Go to the hospital and find out.

Q. Do you ever have any faint spells? A. Yes. I never had any trouble before.

Q. Do you lose your balance when you faint? A. Yes, sir.

10 Q. Who picks you up; do you ever faint in the presence of your husband? A. Yes.

Q. Were you ever in court before? A. No, sir, never was in court.

Q. Did you ever have any doctor while you were up in the mountains? A. Yes.

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

20 Q. Do you remember one doctor you had while you were in the mountains? A. No, I don't. Bernstein, Goldberg, something like that. I can't tell you.

Q. Did you ever get any doctor from New York while in the mountains? A. Yes, sir, from New York too.

Q. Do you remember the name of any doctor you had from New York while in the mountains? A. I can't remember.

30 Q. Who went for the doctor? A. My friends where I was, where I stayed.

Q. Did you bring any of your friends here? A. I could bring everybody that is necessary. I could bring more.

Q. How many weeks did you have this nurse in Newark after the accident? A. I have the nurse now.

Q. What is the name of the nurse now? A. Chekerofski.

40 Q. Does she do any work besides nursing? A. Takes care of the children.

*Edna Ionin—Cross.*

- Q. Did you have any nurse before this accident?  
 A. Before the accident, no.
- Q. Never had any? A. Never.
- Q. How many times were you up to this floor above, to the Bancrofts to look at the ceiling where water leaked in; how many times was this? A. I couldn't remember. 10
- Q. When you knew the roof was leaking all the time? A. I knew that the roof was broke.
- Q. And that the water was coming down from the roof in the Bancroft's house? A. Yes.
- Q. And down into your apartment? A. Yes.
- Q. You thought that the ceiling might fall down? A. I saw it before, and in the children's room it was leaking water down. He said, "Have the ceiling come down. We will move."
- Q. Did you ever while working in the pantry look up to the ceiling to see if it would come down? 20  
 A. That was weeks before. It was leaking down once and I called the superintendent and notified the landlord and he didn't come.
- Q. On the day this accident happened— A. I called the landlord. He never came.
- Q. —did you look up to the ceiling to see how it looked? A. No.
- Q. On the day the accident happened were you upstairs in the Bancroft's to see where the water came from? A. I was there. 30
- Q. When were you there? A. I can't remember.
- Q. What time of the day; morning or afternoon?  
 A. It was coming down. I can't remember.
- Q. On the day the accident happened you remember all right, don't you? A. I remember that, yes.
- Q. Were you upstairs to the Bancroft's on the day the accident happened to look at the ceiling?  
 A. I told you I don't remember. 40

*Edna Ionin—Cross.*

Q. This what you were telling us before about having been up there might have happened before the day of the accident? A. It was always leaking, and I used to complain and still that accident happened, and he never called. He came up once later, and—he came later.

10 Q. Did you ever speak to Mr. Michaels after the accident? A. Yes, sir, I told him the children's room, and he came very soon. He said, "You can go in the children's room. You can move."

Q. When did you see Mr. Michaels after the accident; at his office? A. No, sir, he came about six weeks later.

Q. After the accident happened? A. Yes.

20 Mr. Lord: If my adversary will permit I would like to put the doctor on now.

Mr. Krasner: I am not through.

The Court: How much longer will you need?

Mr. Krasner: Not more than ten minutes.

(Witness suspended)

30 HERMAN S. NASH, sworn in behalf of plaintiff, testified as follows:

*Direct-examination by Mr. Lord:*

Q. You are a practicing physician in the City of Newark?

Mr. Krasner: We admit his qualifications.

Q. Do you know Mrs. Ionin, who was just on the stand? A. Yes, sir.

40 Q. About September 1926 did you attend her after some accident she had? A. Yes, sir.

*Herman S. Nash—Direct.*

Q. Had you attended her before that? A. Yes, sir.

Q. You were the family physician? A. Yes, sir.

Q. When this accident happened and you attended her in September what did you find her condition to be? A. After the accident?

Q. Yes? A. She had abrasions of the face. 10

Q. Abrasions? A. Yes, and she had a hemorrhage from the nose.

Q. Yes? A. And also started to develop a slight uterine hemorrhage.

Q. Yes; anything else? A. That is all. Nervous, excitable, shock.

Q. Did she stay in bed; did you find her in bed? A. Yes.

Q. You were there soon after the accident? A. Yes. 20

Q. You were advised as to the nature of the accident? A. Yes, sir.

Q. How often did you attend her right after the accident? A. I attended her quite frequently for the first two weeks.

Q. Every day? A. The first two weeks.

Q. Did she have hemorrhages during that time? A. Yes. 30

Q. She was pregnant? A. Oh yes.

Q. How far pregnant? A. She engaged me for the maternity about two months before. I think she was about four months pregnant.

Q. At the time of the accident? A. Yes.

Q. Then during the next two weeks when you attended her you say she had a hemorrhage from the womb? A. She was bleeding slightly; I wouldn't say a hemorrhage. 40

*Herman S. Nash—Direct.*

Q. Every day? A. Most every day.

Q. It was necessary for you to be there every day? A. Yes.

Q. Could you say what was the cause of the hemorrhage? A. The injury, or the shock.

10 Q. What was the injury? A. Well, the hemorrhage from the nose, the abrasions, and the shock from the accident.

Q. Did she give birth to this child? A. Yes.

Q. Was it a normal birth? A. I didn't deliver her. She went to the hospital.

Q. Do you know when she was delivered? A. I have an idea, but I didn't deliver her. She went to the hospital.

Q. Was it the full period of the child?

20 Mr. Krasner: I object. He says he doesn't know.

Mr. Lord: He didn't say he doesn't know.

Q. Did she tell you—when was she in the hospital? A. About three months I think after the accident. I am not sure of that.

Q. And when she came from the hospital did you attend her? A. Yes.

30 Q. When you attended her after she came from the hospital had nine months expired from the time that she became pregnant? A. No, sir.

Q. It hadn't? A. No.

Q. Then did she have a child then when she came from the hospital? A. Yes.

Q. Was the child prematurely born or not? A. Yes.

40 Q. It was. Could you say what in your opinion caused that child to be prematurely born? A. I

*Herman S. Nash—Direct.*

think that the accident had something to do with the premature birth.

Q. You knew she had four other children? A. Yes, sir.

Q. Did you deliver any of them? A. No, sir.

Q. You don't know whether she had any trouble with the other children or not? A. Only from her history. 10

Q. Well, you had seen the children? A. Yes.

Q. They appeared to be well and strong? A. Yes.

Q. How about the last child? A. The child is delicate, under-weight, under-nourished.

Q. Under weight and under nourished? A. Yes.

Q. What is the cause of that? A. It may have a lot to do with the premature birth. 20

Q. What is the condition of Mrs. Ionin today? A. She is a very sick woman.

Q. What is the trouble now? A. She has heart trouble. She is very anemic and she is very nervous.

Q. Was she that way before this accident? A. What condition?

Q. I say before the accident did she have the same trouble? A. Mrs. Ionin had heart trouble before the accident. 30

Q. I mean her present condition today is attributable in any measure to this accident? A. I think she is much worse today than she was before this accident.

Q. I want to know whether her condition today is due to the accident? A. It is hard for me to tell. I can merely tell you since the accident she has been suffering that way. 40

*Herman S. Nash—Direct.*

Q. More than before? A. More than before.

Q. You saw her actions on the stand here? A. Yes.

Q. Before you were called to the stand? A. Yes.

10 Q. What did that mean? A. It may be due to a lot of things.

Q. Nervous? A. Nervous heart, yes.

Q. Could you say whether her heart trouble is any different now than immediately after the accident, than it was before? A. What was that again?

Q. Her trouble with the heart? A. I think her heart condition right now is worse than it was before.

20 Q. Was it worse directly after the accident than it was before the accident? A. It was worse after the accident.

Q. Than before? A. Yes.

Q. And then in addition to the heart trouble what else; the nervousness, did she have the nervousness before the accident? A. No, sir.

Q. She did not? A. No.

Q. The nervous condition today came since the accident? A. Yes.

30 Q. Is that attributable to the accident? A. I think so.

Q. Are you treating her now? A. Yes.

Q. What are you treating her for? A. Treating her for her nervous condition, heart trouble, and aenemia.

Q. How often do you treat her? A. Every now and then.

Q. What does that mean; every week? A. Once every two weeks; sometimes every week.

40 Q. Do you prescribe medicine for her? A. Yes.

*Herman S. Nash—Direct.*

Q. What is your bill for services since the accident? A. I have no record of it.

Q. Don't you know how much it will amount to?  
A. I can give you an approximate idea.

Q. How much? A. Between \$150 and \$200.

Q. Has that all been paid? A. Some has been paid and some not.

Q. Has it been paid within \$200? A. In between \$150 and \$200. 10

Q. When you prescribed medicines for her did she pay for them? A. Yes.

Q. You don't know what the medicines cost? A. No, sir.

Q. Do you think she will ever recover from her present condition? A. Altogether? Everything I mentioned?

Q. Well, outside of the heart trouble she had before the accident; the nervous condition that she is in, is that curable? A. She may recover, yes. 20

Q. She may not? A. She may not.

Q. You couldn't predict? A. No, sir.

*Cross-examination by Mr. Krasner:*

Q. Doctor, before the accident did you ever examine this Mrs. Ionin? A. Yes.

Q. What did you find; what was the trouble at that time, before the accident? A. She was pregnant and had heart trouble. 30

Q. Did she have any rheumatism? A. I never treated her for rheumatism.

Q. Did she ever complain of having any rheumatic trouble? A. No, sir.

Q. Do you know whether she ever suffered from rheumatism at any time during her life? A. I 40

*Herman S. Nash—Cross.*

think from her history. I have seen the history.

Q. From her history? A. Yes, I think so. I am not sure about it.

Q. In what condition was the heart? A. Her heart condition was not very good.

Q. Was it bad? A. Rather bad, yes.

10 Q. Do you believe that a woman with the heart she had before the accident, if she happens to have any accident would her heart be any better now than it is? A. Better now?

Q. Yes? A. No, I don't think pregnancy has anything to do with the heart.

Mr. Lord: What is that?

The Witness: I said I don't think labor, pregnancy has anything to do with the heart.

20 Q. Isn't it a natural course for a woman with a bad heart, after going through a condition of pregnancy that her heart should be in the condition that it is now? A. Not necessarily.

Q. It is probable, though, Doctor? A. Yes.

Q. Did you ever examine her tonsils, Doctor?  
A. Yes.

Q. Were they bad before the accident? A. They are not very healthy tonsils.

30 Q. Do you think these things contribute to the trouble of the heart? A. It may.

Q. The condition of the bad tonsils contribute in any way to the aggravation of the heart condition as it is now? A. Yes, it may.

40 Q. Did you ever tell Mrs. Ionin that with the condition of the heart as it was it was very dangerous for her to go through a pregnancy? A. I didn't make it as strong as you did because it is not advisable to tell a patient.

*Herman S. Nash—Cross.*

Q. You did tell her it is dangerous? A. I told her she had to be quiet, no excitement.

Q. Before that accident. Could you tell us from your experience whether an ordinary condition of pregnancy is brought on sooner by the condition of the heart? A. What is that?

Q. I am trying to find out whether the pregnancy previous to the birth could have been caused by the condition of the heart? A. It might have been caused by anything. 10

Q. By the condition of her heart? A. It might. It is rather remote. I have delivered many cases with a bad heart at full term.

Q. In your experience where an accident occurred and a premature birth, how long generally elapses, what is the limit of time that elapses after the accident before the birth? A. There is a question about it. Sometimes it takes place immediately, and other times, I have seen many cases which I think are caused by the accident and it may take place later on, because after all the woman is suffering from shock, and nervous, and so on. 20

Q. Are you sure that this premature birth was brought on by the accident? A. It is possible, but I couldn't say it is probable.

Q. It is very improbable, Doctor? A. It is very probable. 30

Q. You said before on direct-examination that her uterine hemorrhages were very slight. Did you find any abrasions on her head, on the crest of her head? A. I couldn't see abrasions on the head very well, but she did have a few on the face.

Q. Nothing on the top of her head? A. She was very tender. Nothing I could see.

Q. No cut; no break of the skin? A. No.

Q. Doctor, this aenemic condition of the lady is 40

*Hans Lowenstein—Direct.*

very common when it is accompanied by a bad heart such as you found in this case? A. Yes.

Q. Do you believe her anemic condition is due to the bad heart? A. Not altogether.

Q. Was she anemic before the accident happened? A. Yes, but not as much as now.

10 Mr. Krasner: I should like to put my doctor on the stand, your Honor.  
The Court: All right.

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HANS LOWENSTEIN, sworn on behalf of the defendant, testified as follows:

*Direct-examination by Mr. Krasner:*

20 Q. Did you examine the plaintiff in this case?  
A. I did, December 28, 1926.

Q. Have you your records with you? A. I have.

30 Q. Will you tell the Court and jury what you found to be the condition of this lady? A. I examined her December 28, 1926. She gave a history of having been injured in September, not knowing the exact date of the year, by a ceiling falling on her left shoulder and back. She stated to me that both these parts were severely bruised. She gave no history about any injury to the head or face. She stated to me she was confined to bed ten days. Dr. Nash called to see her a few times during the ten days. On January 15 she gave birth to a baby in Newark Memorial Hospital, which was about 10 weeks premature. According to the history of her case that baby was exactly ten weeks premature. I found nothing at all as far as injuries to the back and left shoulder were

40

*Hans Lowenstein—Direct.*

concerned, nor anything on the face at the time I examined her, but I did find an extremely bad heart which must have been of a year's standing and she was aware of this heart condition because she herself told me that physicians had advised her not to have any children. I looked at the baby. The baby at that time was—I do not know how many weeks old—but from the condition of the navel it was evident this was a premature child. The baby but for the fact it was premature seemed to be thriving at that time. No tremor of the tongue or hand, no exaggerated knee jerks and nothing in the demeanor to denote nervousness at that time. 10

Q. Did she say anything to you about the condition of her heart? A. Yes, she knew she had a bad heart. She had bad tonsils, which I took out. 20

Q. Did she say she was told anything about the heart by any other physician? A. Yes, I told her she ought not to have any more babies. She had been told by other doctors she could have babies.

Q. Did you find anything in the condition of this woman besides the heart trouble you found that might have been caused by any accident? A. No. No, I did not find any injuries at the time I saw her, which would almost be a month after the accident. 30

Q. Did you examine her shoulder? A. Yes.

Q. Was there any indication of any injury? A. No signs of an injury to the shoulder or back.

Q. Did she complain of any other place? A. Those are the only two places she told me were injured.

Q. This premature child was normal in all respects except for the fact it was premature? A. Premature. 40

*Hans Lowenstein—Direct.*

10 Q. Would you say that the premature birth was brought on by the accident in view of the fact that the accident occurred September 26, 1926 and the birth occurred December 5, 1926? A. Any prematurity occurring as a result of fright, without any actual injury, or occurring as a result of injury will come on within a few days, and rarely later, never more than a week after the accident, certainly not ten weeks. It is so far stretched as to be impossible.

Q. Her aenemic condition, would you say that is in any way due to the accident? A. Nobody with a heart like hers but would suffer from aenemia.

Q. Was there any history of rheumatism? A. I don't remember.

20 Q. Did you examine her tonsils? A. Yes.

Q. In conclusion we apparently find that the only injuries she might have had at the time you examined her, the only physical disability at the time of your examination, was the heart trouble, and that was a condition of old standing? A. I said I found nothing in the shoulder or in the back, which she claimed had been injured, and the principal conditions that were abnormal I found were aenemia, a bad heart and bad tonsils, the bad heart and tonsils not being attributable to the accident.

30

*Cross-examination by Mr. Lord:*

Q. You said the child was born January 15th. How do you know? A. She told me the baby was born January 15th in Newark Memorial Hospital.

Q. Who told you? A. Mrs. Ionin.

Q. If you were told the baby was born December

40

*Hans Lowenstein—Cross.*

5, 1926 would it make any difference with your testimony? A. I was told that the baby—

Q. I am asking you the question if you were told the baby was born on December 5, 1926 would it make any difference with your testimony? A. What difference, in what testimony?

Q. As to the prematurity of the birth? A. You mean as to the fact that the child is premature, or to the fact that the cause of the prematurity— 10

Q. You figured from the date that the child was ten weeks premature? A. Yes.

Q. If it was born December 5th it would be a good deal more than that? A. Any time prior to the date really is premature, whether December 5 or January 5 or December 31.

Q. If the child was born two months before the normal period it would be weaker than a normal child? A. Any premature baby is weaker than a normal baby. 20

(Adjourned to June 6, 1929, 10 A. M.)

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Thursday, June 6, 1929,  
10 o'clock, A. M.

Present: The Court, jury, and counsel as before. 30

Mr. Krasner: With the consent of the plaintiff I would like to put on a doctor who will take no more than a minute or two on the stand.

*David N. Shack—Direct.*

DAVID N. SHACK, sworn on behalf of the defendant, testified as follows:

*Direct-examination by Mr. Krasner:*

Q. You are a practising physician of the State of New Jersey? A. Yes, sir.

10 Q. How long have you practiced? A. Since 1910.

Q. Have you in your experience had cases of premature birth? A. Yes.

Q. Under your experience, Doctor, would you say that a woman who had an accident on September 26, 1926, and who had a premature birth on December 5, 1926, what probability would there be of a causal relationship between the accident and the premature birth?

20 Mr. Lord: I object to that.  
The Court: Sustained.

Q. Will you tell us what is the limit of time within which a premature birth might be caused by an accident, after the accident?

Mr. Lord: I object.

The Court: Sustained.

30 Mr. Krasner: I think a hypothetical question is proper. The testimony is to establish whether the birth might have occurred because of the accident.

40 The Court: I agree with you if you ask it correctly. I think you ought to recite when prior to this date the accident happened, this woman was in good health, that is, giving an idea of what her condition of health was before the accident; then tell him how the accident happened and what happened at that time, and then describe her condition as of that time, and then ask

*David N. Shack—Direct.*

him whether it was probable or with an assumed state of facts whether the accident would have caused this premature birth.

Q. Assuming a situation where a woman had bad tonsils and a bad heart before an accident occurred, and that an accident occurred by the falling of some plaster from a ceiling on to the lady's head and shoulder and arms, and assuming that the accident happened September 26, 1926, and that on December 5, 1926— 10

The Court: No; and that at that time she was pregnant four months.

Q. (Continuing) —she was four months pregnant, and that on December 5, 1926 gave birth to a premature child, what would be your opinion as to the causal relationship and probabilities between the accident and the premature birth? 20

Mr. Lord: I object to that question on the ground that I do not think it embodies all the facts. Immediately after the falling of the plaster, that the plaster falling on her knocked her unconscious and caused the appearance of blood or hemorrhages from the nose and from the uterous. 30

The Court: If I may amend the question: that after this accident she had hemorrhages from the nose and slight hemorrhages from the uterous; that there were abrasions of her face and she was nervous and shocked. Adding that to the question will you answer, Doctor? There was also testimony that there was no cut or break on her head, as I understand. You may assume the plaster fell from above. 40

*Edna Ionin—Recalled—Cross.*

A. It would be a miscarriage, but not a premature birth. She would have a miscarriage usually within twenty-four hours at least, it would have caused a contraction of the uterus, the foetus would have been expelled within a week at least, usually twenty-four hours.

10 Mr. Lord: No questions.

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EDNA IONIN, recalled for further cross-examination.

*By Mr. Krasner:*

20 Q. Mrs. Ionin, after the accident did you engage any nurse or help for your house? A. Yes, I did.

Q. How soon after the accident was it you engaged this nurse or help? A. It was the same day.

Q. The same day. Where did you get this nurse from? A. New York.

Q. Who ordered her for you? A. My husband.

Q. Do you know from what address this nurse came from New York? A. I know.

Q. What was the address? A. I can't remember the address.

30 Q. Do you know her name? A. Lizzie Blazer.

Q. Was that the white or the colored nurse? A. White.

Q. How much did you pay her a week? A. \$30 or \$35, I don't remember.

Q. Who paid the money to her, you or your husband? A. My husband.

Q. Do you know whether this nurse was a trained nurse from the hospital? A. No; a practical nurse.

40

*Edna Ionin—Recalled—Cross.*

Q. What did this nurse do for you while she was there? A. Wash the children.

Q. Do the dishes? A. Yes, I have a girl did the dishes. She helped my girl.

Q. Who did the washing of the clothes for you? A. My laundry.

Q. Didn't you have any washing done in the house? A. No. 10

Q. Who gave you the medicine? A. The woman.

Q. The woman that came from New York, Lizzie? A. Yes.

Q. How long did you have Lizzie? A. Two or three months, I can't remember.

Q. When Lizzie went away did you get anybody else? A. I felt stronger. I had Elizabeth.

Q. How long after Lizzie went away did you get Elizabeth? A. I don't remember. 20

Q. How much did you pay Elizabeth? A. \$30 first, and then \$25.

Q. Was Elizabeth the colored lady? A. Yes.

Q. Where did you get Elizabeth from? A. I can't remember.

Q. Do you know Elizabeth's second name? A. I can't remember.

Q. Don't you know where Elizabeth lives while working for you? A. No, sir. 30

Q. Do you remember who sent Elizabeth to you? A. A friend of mine.

Q. You don't remember who it was? A. No.

Q. Was Elizabeth a trained or a practical nurse? A. She took care of the children.

Q. She didn't give you any medicine, did she; did she do the same housework Lizzie did? A. No more and no less.

Q. Did you pay Elizabeth or your husband? A. My husband. 40

*Edna Ionin—Recalled—Cross.*

Q. Did she ever get less than \$25 a week? A. I can't remember.

Q. Do you know how long Elizabeth stayed with you? A. About three months.

10 Q. Did you have anybody after Elizabeth? A. Just for week ends. When I feel better I do everything myself, and my husband and my big boy.

Q. Did you ever take in anybody for week ends before you had the accident? A. No.

Q. This Mrs. Wendruff who lived upstairs, did you ever make any attempt to find her to come to court and testify for you?

Mr. Lord: She has already been—

The Court: Objection sustained. You ought to cross-examine, not ask all these questions.

20

Q. Have you seen Mrs. Wendruff in the last week or two?

The Court: It doesn't make any difference.

Mr. Krasner: No further questions.

30

JULIUS SHULMAN, sworn in behalf of plaintiff, testified as follows:

*Direct-examination by Mr. Lord:*

Q. Where do you live? A. 659—18th Avenue.

Q. Did you ever live at 476 South 17th? A. Yes.

Q. How long did you live there? A. Two years.

Q. What year? A. I don't remember the years, 1925, 1926.

40 Q. What apartment did you have; what rooms did you live in? A. 474.

*Julius Shulman—Direct.*

- Q. Is that part of 476? A. The top floor.
- Q. 474-476 is one building? A. Yes, two houses together under one roof.
- Q. You are married? A. Yes, sir.
- Q. You live with your family? A. Absolutely.
- Q. You know the Ionins downstairs? A. They lived at 476, under the same roof. 10
- Q. Do you remember when Mrs. Ionin had an accident? A. Well, I remember that.
- Q. Did you go in to see her? A. They called me in.
- Q. At the time of the accident? A. Yes.
- Q. You don't remember the day or the month? A. I remember the day all right, September 20, 1926, between 9 and 10.
- Q. In the evening? A. Yes.
- Q. Who called you in? A. Mr. Ionin, himself. 20
- Q. Did you see Mrs. Ionin there? A. Yes.
- Q. Did you notice anything about her head? A. was lying in the bed and bleeding from the nose, bleeding from the shoulders. If I hadn't been—
- Q. Did you notice anything about her head? A. There was a towel on the head. The towel was wet with blood. I didn't take it off. It was full of blood.
- Q. Did you look at the pantry? A. Yes, the ceiling was gone. 30
- Q. Very much of it? A. Well, about five or six feet.
- Q. Five or six feet. Do you know what caused the ceiling to fall? A. Well, the roof was leaking

Mr. Krasner: I object to the question, unless he has some basis for his knowledge. It is conjecture.

The Court: Sustained. 40

*Julius Shulman—Direct.*

Mr. Lord: I am asking of his own knowledge what caused the ceiling to fall.

The Court: Objection sustained.

Q. Did you notice anything about the roof? A. Yes.

10 Q. What? A. The roof was leaking for seven or eight months before the accident happened. I warned the landlord to fix it.

Q. You warned him? A. The landlord, Mr. Michaels himself, right here in court.

Q. Is he here? A. Yes.

The Court: Who did you warn?

The Witness: Mr. Michaels.

Q. That is the man who rented your apartment?  
20 A. Yes.

Q. What did you tell him? A. I told him I had been over to his office and I told him he should fix the roof, and while he asked me to look it over and see what is the matter I didn't hear nothing. But in the middle of the summer sometime, I don't remember when, he sent down the Waverly Roofing Company to figure the roof. September happened the accident and couldn't fix the roof—

30 Q. You mean after the accident? A. Yes.

Q. It was fixed then? A. Yes, during the summer, I don't remember when.

Q. Before the accident, how long before the accident did you speak to him about it? A. Oh, several months; over half a year.

Q. What did he say then? A. He said "Well, we will see about fixing the roof and send around the Waverly Roofing Company."

40 Q. No; before the accident? A. Before the accident the roof was leaking always.

*Julius Shulman—Direct.*

Q. What did he say about it; you spoke to him?

A. He is going to see about it. That is what he said.

Q. You say the roof leaked; how do you know it leaked? A. Because I was on the roof. I was the super then taking care of the building.

Q. You were the superintendent taking care of the building? A. Yes. 10

Q. You didn't pay rent? A. I pay rent.

Q. Besides? A. Surely.

Q. And then you are allowed something? A. \$15 I get allowed every month for taking care of the property.

Q. Did you ever see any water come through the roof? A. Yes, always.

Q. Where did it go? A. Right on the wall and on the ceiling. I seen the water many times myself. 20

Q. Do you know whether the water found its way down to the lower apartment? A. Up on the first floor and the ceilings fall down, because I fixed them myself.

Q. What is that? A. I fixed the ceilings my own self.

Q. After the accident? A. Yes, I plastered it.

Q. The point is, when the water came though the roof did it find its way down to the first floor apartment? A. First on the top floor. The top floor the water was running— 30

The Court: Listen to the question.

The Witness: Did it find its way to the lower apartment.

Q. How did it get there? A. Because the water came from the top floor where the roof was always 40

*Julius Shulman—Direct.*

leaking, and on the first floor. The water landed on the top floor and came to the first floor. It means it comes down—

Q. Did you investigate? A. I warned him many times.

10 Q. Did you know the apartment immediately over Mr. Ionin's apartment; you had been in there? A. Many times. Because—

Q. What room of the apartment over Mrs. Ionin's—directly above the pantry? A. I don't remember, because it is over a year.

Q. Did you report it? A. I think it is the pantry also.

Q. Did you ever see any water in the apartment? A. I saw it myself on the floor many times, I seen it myself on the floor.

20 Q. At the time this accident occurred do you remember whether it rained before that? A. Always it was raining the water came down on the roof generally. Everybody understands that, and the water went through from the roof to the top floor and the first floor.

Q. Do you know whether it rained about the time of the accident or a few days before; do you know; do you remember? A. Yes.

30 Q. Did it, or did it not? A. Well, it always—

Q. I am not talking about always. The time of the accident do you remember whether it rained that day or the day before? A. I don't remember whether it rained that day or not.

Q. When you say you were superintendent of the building was it your duty to go around and inspect that apartment? A. Absolutely.

40 Q. Did you ever notice anything about the pantry ceiling before the accident? A. Well, I was up there before. I warned them before.

*Julius Shulman—Direct.*

Q. Did you notice anything about the pantry ceiling? A. Never noticed anything until the accident came.

Q. Did you ever notice whether the water wet the ceiling in the pantry? A. Yes.

Q. You have seen it before? A. Yes.

Q. How often? A. I called him up and go myself. 10

Q. How often did you speak to Mr. Michaels about it before the accident; how many times, about? A. I don't remember. I couldn't see him once a week or twice a week.

Q. No, I mean how many times did you speak about it, about the roof leaking? A. I don't remember. Several times. I don't remember how many.

Q. What was his answer each time? A. Well, he would have to fix it. 20

Q. Did he ever say when he was going to fix it? A. No.

Q. Now you knew the Ionins pretty well before the accident? A. Well, I know Edna lived there, she was always a healthy woman.

Q. How many children did she have? A. At that time she had four children.

Q. I don't suppose you know whether at the time of the accident she was in a pregnant condition or not? 30

Mr. Krasner: I object.

The Court: Sustained.

Q. Do you remember when the last child was born after the accident? A. I wasn't at home. I was at work. When I came home they told me she had a child.

*Julius Shulman—Direct.*

Mr. Krasner: I move to strike that out on the ground it is hearsay.

The Court: Sustained.

Q. Did you see the new born baby? A. Yes, sir.

10 Q. Do you know when it was? A. I don't remember.

Q. How long did you live there after that? A. Well, I have forgotten, I can't remember.

Q. About how many weeks or months did you live there after the accident? A. I moved out in 1928, April 1st.

Q. Then you were there when the Ionins left? A. Yes, I was still there, and knew the Ionins moved out.

20 Q. How long did the Ionins live there after the accident? A. I couldn't tell you that.

Q. A few months? A. I couldn't tell you that.

Q. Do you know whether Mrs. Ionin before the accident had any woman to help her with the housework? A. Before the accident? No, I never noticed anybody.

Q. After the accident did you notice anybody? A. Yes, there was a girl, a white girl and a colored girl sometime there, but believe me I don't know how long.

30 Q. Do you know what nationality? A. No, I never asked nobody.

Q. Can you tell whether she was a foreigner or an American or what? A. The white woman?

Q. Yes. A. I couldn't tell.

Mr. Krasner: I object to it as immaterial.

40 Q. For how long a period of time did you see her there? A. I saw her, the white girl probably two or three months, and the colored girl—

*Julius Shulman—Direct.*

Q. How long did you see her? A. Of course I didn't always see her in the house, but on the outside very often.

Q. On the average how long did you see her? A. Three months.

Q. I mean during the week; once a week? A. Once a week, twice a week, then I seen her—

Q. Did you visit the Ionins very often in their apartment? A. When they called me in to fix it. 10

Q. I didn't ask you that. Did you visit them often? A. At the time they had to fix it.

Q. How often were you in their apartment? A. Well, several times. I went in and out myself, and several times—

Q. Once a week? A. Once a week, twice a week, whenever I had something.

Q. This colored woman, when did you see her there? A. After the white woman. 20

Q. Do you know whether Mrs. Ionin went away? A. I don't remember that.

Q. Do you remember that she did go away? A. Yes, she went to the country, but I don't remember when.

Q. Do you remember how long she was gone? A. She was once in the winter time and once in the summer. 30

Q. Do you know whether the colored woman went with her? A. I think so. There was another fellow riding in the machine.

Q. After she came back from the country; after the baby was born? A. Yes, she was away after the baby was born.

Q. When she came back did you notice anything about her condition? A. She was sickly.

Q. Before the accident, before, did she appear to be sick? A. I never noticed anything. 40

*Julius Shulman—Direct.*

Q. You never noticed any woman around there before the accident? A. Before the accident?

Q. Did she have a woman there? A. No, she didn't have no woman there.

10 Q. Up to the time she went away and left the apartment altogether, did she have any woman there? A. I don't remember that. You mean when she moved out?

Q. Yes, after she came back from going away did she have the colored woman with her when she came back? A. I don't remember that.

Q. Do you remember after she came back if you saw any woman around there? A. I don't remember that.

*Cross-examination by Mr. Krasner:*

20

Q. When did you move into the house, Mr. Shulman? A. March 13, 1925.

Q. When did Mrs. Ionin move into the house? A. I don't remember.

Q. Who rented the flat to her? A. Mr. Michaels himself.

Q. Did you have anything to do with the renting of the flat to Mrs. Ionin? A. No.

30 Q. Did you recommend Mrs. Ionin to Mr. Michaels? A. Well I told her to call up the landlord. I had nothing to do with the renting.

Q. You had no authority? A. No money collected and no rent.

Q. What was your job in the house if not for the collecting of rents, if not for the renting of flats? A. My job was just simply taking care—cleaning the sidewalk, and taking out ash cans and like that.

40

*Julius Shulman—Cross.*

Q. Was it part of your job to make repairs if found necessary? A. No.

Q. Did you charge Mr. Michels anything for making repairs? A. Sure, charged if I worked for him.

Q. How much rent did you pay? A. \$40—\$55 for the flat, and \$40 was rent. I got \$15 for salary. 10

Q. When did Mrs. Ionin rent the flat from Mr. Michaels? A. I don't remember.

Q. Do you know when she moved in? A. I don't remember.

Q. How many rooms did Mrs. Ionin have in this flat? A. Five.

Q. Who lived above Mrs. Ionin? A. Mr. and Mrs. Wendloff.

Q. Were the Wendloffs living there when Mrs. Ionin moved in? A. I don't remember. 20

Q. Did Mrs. Ionin move out before the Wendloffs or after the Wendloffs? A. Yes, sir, before.

Q. Who lived on the other side of the house with Mrs. Ionin? A. Mr. and Mrs. Capell, Mr. and Mrs. Julius Shulman, and child.

Q. All lived above? A. Over Mrs. Capell.

Q. Were you ever on the roof? A. Several times.

Q. How did you get up? A. Opened the door. 30

Q. What made you go up? A. Because the roof is always leaking.

Q. Did it ever leak in your apartment? A. Absolutely.

Q. What was the first time you were aware of any leak in the roof? A. When the rain came down it was leaking.

Q. Do you remember when that was? A. I don't remember.

Q. Was it leaking into your flat that time? A. 40

*Julius Shulman—Cross.*

The roof was leaking in my flat, the top floor down to the front.

Q. How did you get down in the Capell's flat?

A. From the roof beyond my flat, and the ceiling.

10 Q. What part in relation to the rooms in your apartment, what point was leaking? A. All over, the center room, all over, the room was wet all the time through there.

Q. Did the water collect on the floor? A. Absolutely.

Q. Did you know about it? A. I knew about it all right.

Q. Did you know the water collected on the floor leaking down from the ceiling? A. I know it was leaking, I told Mr. Michels. He don't never pay no attention.

20 Q. Did you know water was collecting on the floor where it was leaking from the roof? A. What do you mean?

Q. Where the water leaked in from the roof did it collect on your floor before it leaked in to Mrs. Capell's flat? A. Sure.

30 Q. Did you know water was in your flat; did you make any attempt or effort to sweep it up before it leaked through? A. Absolutely, as soon as the water came through I swept all the time.

Q. You swept all that water off the floor? A. All the time.

Q. How did it get through to Mrs. Chapman? A. I don't know.

Q. Don't you know that the water leaking into Mrs. Chapman's flat was the same water that came from yours? A. Probably the same water.

40 Q. Don't you know from your own knowledge? A. Probably the same water came through, you know.

*Julius Shulman—Cross.*

Q. What kind of a house is this in construction, what is it made of? A. Well, bricks, cement, metal, wood.

Q. What is the front made out of, what material? A. Bricks.

Q. What are the side walls made out of? A. Bricks.

10

Q. All bricks? A. All bricks.

Q. What kind of a roof? A. Flat roof, metal.

Q. How old is the house? A. I don't know. You will have to ask Mr. Michaels.

Q. Was it a new house when you moved in? A. I couldn't tell you that. I don't know. I paid rent when I moved in.

Q. Do you know whether your flat was occupied by anybody before you moved in? A. I found an idle flat, and before it was fixed I moved in and also the pipe was busted, and I waited—

20

Q. I asked you whether you knew the flat you moved in had been occupied by anybody else before you moved in? A. I don't know that.

Q. Was there any paper wrapper around the toilet covers or did the fixtures show signs of never having been used before? A. I don't know that.

Q. Coming back to the time of this accident, what time in the night was it Mr. Ionin called you down? A. Between nine and ten.

30

Q. What did he say to you when he came up to your house? A. He didn't come to my house. He called me from the yard. He says "Come on Shulman, there is an accident in my house." I didn't know about it.

Q. He called you to the window? A. Yes.

Q. How soon after he called you did you go downstairs? A. Right away.

40

*Julius Shulman—Cross.*

Q. Did you talk to Mrs. Ionin? A. I couldn't talk to her. She was unconscious.

Q. When you came down where was Mrs. Ionin?

A. In the bed.

Q. She was unconscious in bed? A. Yes.

10 Q. Did you see the doctor there? A. I don't know how long. The doctor came immediately after, but I don't know how long.

Q. Did you see the doctor there that night? A. Yes, Dr. Nash.

Q. What makes you sure it was September 26, 1926? A. It wasn't the 26th. It was September 20, 1926. ?

Q. September 20, 1926? A. Counsellor, if you say it is the 26th you are making a mistake yourself.

20 Q. What makes you sure it was September 20, 1926? A. Because I saw the days. I know the days. The 20th of September, 1926.

Q. You seem to remember very well the date of the accident? A. Yes.

Q. Exactly. Why don't you remember when Mrs. Ionin moved out? A. I don't remember that.

Q. Why did you take special note of the exact date? A. Mr. Michaels himself—

30 Q. Answer the question? A. I don't remember. I don't know.

Q. Did Mr. Ionin ask you to make a memorandum of the date? A. Never. I never seen Mr. Ionin until I saw him in court.

Q. You never spoke to him after the accident? A. No.

Q. You made no memorandum of the date the accident happened? A. No. I just know myself.

40 Q. You are sure it wasn't October 20, 1926? A. I know it wasn't.

*Julius Shulman—Cross.*

Q. Do you know what day of the week it was?  
A. I don't remember that.

Q. Were you working that day? A. That day I don't remember if I was working that day.

Q. What business were you in at that time? A. I was working, but I don't remember what.

Q. What? A. Smoking pipes.

10

Q. What kind of work? A. Smoking pipes.

The Court: I have told you before several times than on cross-examining a witness you are not supposed to ask all the questions you can think of. That is not only not a part of the cross-examination, but it is improper. There is only one issue in this case. It has been prolonged unduly, and I would suggest you think of that.

20

Q. Did you notice Mrs. Ionin's head when she was lying in bed? A. She had a towel over her head.

Q. Was she covered? A. Covered with a towel.

Q. Her body covered? A. Of course I wouldn't come near if it wasn't.

Q. What made you go into the pantry after you looked at Mrs. Ionin? A. I seen what has happened there.

30

Q. What did you see there? A. I seen the ceiling pulled down five or six feet.

Q. About how large is the pantry? A. Well, I couldn't tell you. I never measured it exactly.

Q. Was the icebox standing by the pantry window? A. The icebox, and the ceiling was on the floor.

Q. Was more than half of the ceiling down? A. That I don't remember.

40

*Julius Shulman—Cross.*

Q. Did you ever see any white nurse around the house after Mrs. Ionin came back from the mountains?

Mr. Lord: I object to that as immaterial.

A. I don't remember.

The Court: It is admitted.

10

Q. After the accident when was it Mrs. Ionin went to the mountains? A. I don't remember.

Q. Summer and winter? A. Winter and summer.

Q. She went winter and summer. The first time, when did she go to the mountains? A. Winter and summer. I don't remember the dates.

20

Q. I am asking you when it was after the accident the first time she went to the mountains? A. I don't remember. It was in the winter time. Then she went in the summer.

Q. Did she take along with her the colored nurse to the mountains? A. Yes, and her boy with her.

Q. She said she had the colored nurse only about two months? A. What do you ask me, counsellor?

Q. I asked how long she had a colored nurse, if you know? A. Two or three months. I never asked her anything about that.

30

Q. How long do you know Mr. Michaels? A. Ever since I moved in.

Q. Did you ever have any arguments or quarrels with him? A. Never.

Q. Did you owe him any rent when you moved out? A. Never. He got a check every month.

40

*Theodore Stullich—Direct.*

THEODORE STULLICH, sworn in behalf of plaintiff, testified as follows:

*Direct-examination by Mr. Lord:*

Q. Mr. Stullich, where do you live? A. At present 26 Bloomfield Avenue, Newark.

Q. Did you ever live at 476 South 17th Street? A. Yes. 10

Q. You lived there while the Ionins lived there? A. Yes, sir, the whole family.

Q. Who with? A. Mr. and Mrs. Ionin.

Q. You boarded there? A. Yes.

Q. Paid board there? A. Yes.

Q. Do you remember when Mrs. Ionin was hurt? A. Yes.

Q. Do you remember when it was? A. Well, September 20. 20

Q. What year? A. 1926.

Q. Were you there when she was hurt? A. Yes.

Q. Did you see it? A. Yes.

Q. What did you see? A. Sitting in the kitchen after supper we had a habit of talking, and were talking quite a bit. Finally she made up her mind to put away some of the things and went in the icebox and I heard a crash and she was laying on the floor when I went in. We carried her to bed and her husband went out and called the doctor, and she was sick. 30

Q. You heard the crash? A. Yes.

Q. Was the pantry door open? A. There was no door there.

Q. You didn't see the accident? A. I didn't exactly see it fall down, no.

Q. When you went in there what did you see? A. I saw her laying on the floor and the dishes on 40

*Theodore Stullich—Direct.*

the side of the wall they all fell down and they were laying on top of her.

Q. How much plaster? A. Oh, from there, that corner up to there (indicating), and quite a bit, I should say about half the ceiling fell down.

Q. Was she conscious? A. No she wasn't.

10 Q. You took her into the bed? A. Yes.

Q. How long was it before she recovered consciousness? A. It was about ten minutes.

Q. When she recovered consciousness who was there? A. She recovered consciousness, the neighbor, Mrs. Shulman, and we were all around her.

Q. Did you see the doctor? A. We called him. He hadn't arrived just then. I don't remember exactly. He came very soon.

20 Q. When you picked her up what did you notice about her? A. The first thing I noticed about her was the nose. Blood came from the nose.

Q. Did you notice anything else? A. Yes, her head. She had a bruise on her head when we examined her.

Q. Anything else? A. Well, when she became conscious we asked her how she felt. She complained of headaches. She was holding her head and said her shoulders hurt awful.

30 Q. You didn't feel her head? A. No, I didn't.

Q. You don't know whether—you didn't see any examination made of her below her belt? A. No, sir.

Q. Did she complain of anything else? A. She was complaining all the time. She didn't seem to be the same. She was very nervous. I don't know. She was quite sick.

Q. How long had you boarded with her? A. I have boarded with the Ionins since 1920.

40 Q. 1920? A. About nine years.

*Theodore Stullich—Direct.*

Q. Then you were with them when they moved to this place? A. Yes.

Q. She had how many children? A. Four children.

Q. Before this? A. At the time of the accident she had four.

Q. What do you say about them? A. They are all very nice children, all very healthy. 10

Q. Do they have any sickness? A. Minor sickness, colds, something like that.

Q. You don't live with them now? A. Yes, I do.

Q. Then how about the youngest child?

Mr. Krasner: There has been no claim for anything concerning the new child.

The Court: I wish you would stick to the issues. 20

Q. Do you remember when the youngest child was born? A. I don't remember the day.

Q. The month; how long after the accident? A. I don't remember the month either.

Q. Did Mrs. Ionin, up to the time of the accident, did she ever have any help in to do housework? A. No. I know that for sure, never had any help. 30

Q. After the accident did she have anyone come in? A. Yes.

Q. Who? A. First of all a colored girl from New York.

Q. What was her name? A. Lizzie Glaser.

Q. How long was she there? A. I should say about two or three months.

Q. What did she do? A. Took care of the child- 40

*Theodore Stullich—Direct.*

ren and attended the house in general, and also take care of Mrs. Ionin.

Q. Do you know her profession? A. No.

Q. And after that did she have any one? A. After a while she felt better and she managed to do her work herself. We helped a lot. Of course she couldn't afford to have help.

10 Q. Did she have anyone before the Jewish woman from New York? A. Yes, later on a colored girl.

Q. How long after? A. After the other woman left it was about two or three months after that.

Q. What was the name of the colored woman?  
A. I knew her first name was Elizabeth, that is all.

Q. You didn't know her name? A. No.

20 Q. Did she go away then? A. To the country.

Q. When? A. It was either in April or May.

Q. Following the accident? A. Yes.

Q. After the child was born? A. Yes.

Q. Where did she go? A. To Sullivan County, Thompsonville.

Q. Where did she go? A. There was a private farm house.

Q. What is the name? A. The people who took care of the house, Seller.

30 Q. How did she go? A. I drove her up there.

Q. In a car? A. Yes.

Q. Your car? A. It wasn't my car, no.

Q. What is your business? A. After I brought her up there—

Q. At the time? A. Nothing, except I went up there.

Q. You had a car? A. Yes.

Q. Do you know how long she stayed there? A.

40

*Theodore Stullich—Direct.*

She was there practically the whole summer.

Q. Do you know how she came home? A. I brought her home again.

Q. You went up and got her? A. Yes. I was in Montecello, New York. She was in Thompsonville. I wasn't there. I was gone practically most of the summer. I went there to visit now and then, and then I took her home.

10

Q. In your car? A. Yes.

Q. Did she have the colored woman with her then? A. I don't remember.

Q. Do you remember how many people were in the car? A. Mr. Ionin and his family were in the car. Yes, I think I did take him back.

Q. After you brought her home did she have any woman to help her after that? A. Not for a short time after.

20

Q. After that? A. After that they brought in a woman from New York, came in Friday and Saturday.

Q. What was her name? A. Slutsky. (?)

Q. How often did she come? A. I should say almost every week she came for the week end.

Q. What did you notice about Mrs. Ionin now, if anything that you didn't notice before the accident? A. A whole lot.

30

Q. What? A. She isn't the same woman.

Q. In what way? A. I know her so long I considered her more like a sister than anything else. She was always very healthy and always happy. Now she is very irritable and very nervous, seemed to be a very sick woman. I don't think we ought to keep her. I think we ought to send her to a hospital or something.

40

*Theodore Stullich—Cross.**Cross-examination by Mr. Krasner:*

- Q. Are you related in any way? A. No, sir.
- Q. Either by blood or marriage? A. No, sir.
- Q. This lady that came from New York week ends, do you know whether she was related to Mrs. Ionin in any way? A. I don't think she is; not that I know of.
- 10 Q. Did you know Mrs. Ionin had heart trouble before the accident? A. I never heard her complain of it.
- Q. Did you hear the doctor say she had heart trouble, before the accident? A. No. I am all the time in the house, I didn't know it.
- Q. What was it Mrs. Ionin was carrying in the pantry when she went there? A. I don't remember now.
- 20 Q. How long before the accident had you been in the pantry? A. I very seldom ever went in the pantry.
- Q. Do you remember how long it was before the accident since you had been in the pantry? A. No.
- Q. Do you know whether the plaster was lying on the floor before the accident? A. No.
- 30 Q. You don't know? A. I know it didn't lay on the floor.
- Q. The plaster might have fallen down three or four days before the accident? A. Well, I would have known about it.
- Q. Do you know how long it was before the accident since you had been in the pantry? A. No, I don't recall.
- Q. Was it two or three weeks? A. I may have been in there every night. I don't remember that.
- 40

*Theodore Stullich—Cross.*

Q. Did you hear the crash of the falling substance? A. Yes.

Q. Do you know whether that crash might have been the falling of the plaster on top of the icebox?  
A. It didn't sound that way. It would have more of a hollow sound.

Q. Where was Lizzie during the time Mrs. Ionin was confined at the hospital with her birth? A. In New York, I suppose. 10

Q. Was that after Lizzie had been sent away?  
A. That was after Mrs. Ionin gave birth to the child before she had sent her away.

Q. How soon after Mrs. Ionin came back from the hospital did you get some other help in? A. I don't remember exactly.

Q. The next woman that came to the house was the colored lady, Elizabeth? A. Yes. 20

Q. You are sure Lizzie came before the colored lady? A. Yes, I am sure of it.

Q. Which one was the one you took up to the mountains? A. The colored lady.

Q. During the occasional visits you made to Mrs. Ionin at the mountains did you see Elizabeth there? I don't remember exactly. I didn't stay there for the day. It was only a trip in there.

Q. Did you ever see Elizabeth there at the time you were there? A. Yes. 30

Q. How many times did you see Elizabeth there during the visits you made to Mrs. Ionin? A. I don't remember.

Q. You are not sure you brought Elizabeth back in the car with you? A. Yes, I am quite sure.

Q. What make of a car was it? A. Studebaker.

Q. Open or closed? A. The open model.

Q. Who was in the car going up to the moun- 40

*Theodore Stullich—Redirect.*

tains? A. The whole family except Mr. Ionin. I brought him there the following day.

Q. The first trip was without Mr. Ionin? A. Yes.

Q. And you had Mrs. Ionin and the five children? A. Yes.

10 Q. And who else was in the car? A. Myself.

Q. That is all; nobody else? A. No.

Q. When was it you brought Mrs. Ionin back from the mountains? A. The latter part of August.

Q. Did you ever take her up to the mountains after that? A. Yes, she did go with her husband. I didn't take her there.

*Redirect-examination by Mr. Lord:*

20

Q. Did you notice the cracking of the ceiling before the accident? A. Yes. They called my attention to it. I heard them talk about it, and she would say "Look at the ceiling". They were kind of scared if it came down some day.

Q. What do you mean? A. The water dripped through and the ceiling looked badly.

Q. When did the water drip through? A. Whenever it rained.

30 Q. Do you know where it came from? A. No.

Q. Did you ever see the roof? A. No.

*Recross-examination by Mr. Krasner:*

Q. On the day of the accident was it raining?  
A. I don't remember.

40 Q. Did you ever take Mrs. Ionin to the mountains before the accident? A. We were there the year previous, on vacation.

*Theodore Stullich—Recross.*

Q. You took her up to the mountains? A. I met her there, yes.

Q. Do you recall what day of the week this accident occurred? A. I don't remember. I think it was on a Saturday or Friday. I really couldn't say. I don't remember.

Q. You are sure it was on the 20th? A. I am sure of that. 10

Q. Did you make any written memorandum of the date of this accident? A. No.

Q. What makes you sure of the date? A. Mr. Ionin wrote down the date of the accident

Q. The date you know now is the date he told you it happened? A. That is the date, yes.

Q. That is the only way you have of knowing the exact date? A. I remember myself it was in September, and I am almost sure it was the 20th. 20

Q. You are not sure what day of the week it was? A. No.

Q. It wasn't on Sunday? A. I don't remember. It was on a week day.

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WILLIAM IONIN, sworn on behalf of plaintiff, testified as follows: 30

*Direct-examination by Mr. Lord:*

Q. Where do you live? A. 26 Bloomfield Avenue.

Q. You formerly lived at 476 South 17th Street? A. Yes.

Q. When? A. We moved the first of May, 1926, and we moved out the 20th of May, 1927.

Q. While you were there your wife had an accident? A. Yes. 40

*William Ionin—Direct.*

Q. You were there? A. Yes.

10 Q. Tell us what happened? A. Between nine-thirty and ten we were sitting, we have a habit of sitting after supper hour. My wife cleaned up the dishes. I don't remember what she was putting in the pantry. All of a sudden she screamed and I heard the crash and when I went in I found my wife laying on the floor. We put her in the bed. I called Mr. Shulman and he was in the house, and I called my doctor. I brought her around and it took between half an hour and an hour before the doctor came.

20 Q. What was the matter with her? A. Well, her nose was bleeding. She had a cut over her left eye, and her shoulder was all scratched, and it seemed to me she was in terrible agony. Later on she told me privately, her husband—I can't express myself—she was—bleeding—I can't express myself very well.

Q. Where from? A. From her womb.

Q. Do you know anything about her head? A. Yes, she had a slight bump on her head and I brought in a towel.

Q. Do you know how the plaster came to fall? A. The ceiling was always leaking in the pantry.

30 Q. From where? A. From the top into the pantry, the ceiling—water was always coming down.

Q. When? A. Every time after a rain.

Q. Do you know where it came from? A. It seemed to be coming from the second floor. I went to the janitor. He looked it over and told me—

40 Q. Never mind what the janitor told you. Did you ever look at the roof? A. I never looked at the roof.

*William Ionin—Direct.*

Q. Do you know whether there were any repairs made when you were there? A. No, sir.

Q. There weren't? A. No.

Q. Did you ever speak— A. Yes, I spoke to the landlord himself. He is sitting over there. He says, "It will be taken care of."

Q. Do you know whether it was ever taken care of? A. It was never taken care of. 10

Q. Was that before the accident? A. Before the accident, yes, sir.

Q. Now was your wife before the accident—how was her health? A. My wife she isn't a very strong woman. I have been married 30 years but she has never been sick a day, always took care of the house.

Q. Do you know she had a weak heart? A. I do know she had a weak heart, but her heart never bothered her. 20

Q. You knew that before the accident? A. Yes, sir, I do.

Q. Did anybody ever tell you and her in her presence she should not have any more children? A. Nobody ever told me.

Q. Right after the accident how long did she stay in bed? A. She was in and out. About two or three weeks in bed. 30

Q. What do you mean, in and out of bed during the three weeks? A. No, she was about ten days in bed. Later on she used to come out.

Q. Did she get a woman in to help her? A. After that, yes, I took a colored woman in the house for the week end. The first woman was a white woman.

Q. What was her name? A. Lizzie Glaser.

Q. Where from? A. 169 East Broadway, New York City. 40

*William Ionin—Direct.*

Q. Do you know where she is now? A. She lives now at 86 Essex Street, New York City.

Q. Did you try to get her here for the trial? A. I presume I could.

Q. Did you try to get her here? A. Yes, I did. She is a mid-wife. She has a job and couldn't come.

10 Q. She was a mid-wife? A. She is a mid-wife. Not registered to take care of babies. She does general housework. When they have a baby—

Q. She is a nurse? A. Not a registered nurse.

Q. Is she any kind of a nurse? A. No—well she is an elderly lady.

Q. When did you get her? A. I got her when my wife came from the hospital. I had her in the house already.

20 Q. What do you mean? The hospital when the baby was born? A. Yes.

Q. After the accident? A. Miss Smith, a Polish woman, I could produce her, a young lady.

Q. How long did you have her? A. She used to come in once in a while to take care of things.

Q. After the ten days she was in bed who did the housework? A. The Polish woman.

Q. What was her name? A. Miss Smith.

30 Q. Did you have to pay her? A. Yes I paid her.

Q. How much? A. \$35 a week.

Q. Miss Smith? A. Yes.

Q. How long did you have her? A. A few weeks.

Q. She was Polish and her name was Smith? A. She was Polish and she married a German-American.

40 Q. How long did you have her? A. Between two and three weeks.

*William Ionin—Direct.*

Q. Then what? A. Then I let her go.

Q. Why? A. My wife, she says we couldn't afford to pay so much. She was trying to do the best she could around the house. At the end of the week, Friday and Saturday—

Q. After two or three weeks you and the wife did her own housework? A. Whatever she could do. 10

Q. What she couldn't do who did that? A. I had a woman in the house.

Q. Besides Miss Smith? A. Yes, there was Miss Smith.

Q. I mean after the two or three weeks Miss Smith was there who did the work for you? A. I didn't get nobody.

Q. Did your wife do it? A. Yes.

Q. Did you have any help? A. I used to help her, and my friends. 20

Q. How long did that continue—before she went to the hospital? A. Yes.

Q. When did she go to the hospital? A. December 5, 1926.

Q. The same day the baby was born? A. The same day the baby was born.

Q. When did she come back? A. She came back—I don't remember. Two weeks later. 30

Q. Did you have anybody then? A. Then I had a lady from New York.

Q. How did you come to go to New York? A. I went up and got her. We know her a long time.

Q. Then she was there how long? A. She was there between two and a half and three months.

Q. How much did you pay her? A. \$30 a week.

Q. After she went then what? A. Then I hired a colored woman.

Q. What was her name? A. Elizabeth Taylor. 40

*William Ionin—Direct.*

Q. Where did she come from? A. I went to the City Hall and hired her from an employment office. I picked her up over there.

Q. Do you know where she lives? A. I haven't the slightest idea now.

10 Q. How long was she with you? A. She was there around the whole summer, about three months.

Q. Did your wife go away? A. Yes, sir, my wife went away.

Q. When? A. May 20, 1926.

Q. Where? A. Thompsonville, Sullivan County.

Q. Where did she go there? A. The gentleman had a farm—Seller.

Q. Did you board there? A. Yes.

20 Q. Did you go up with her? A. Not right away but in a few days, yes.

Q. Did the colored woman go with her? A. Yes.

Q. In the same car? A. No, I took her up myself.

Q. On the train? A. No, in my own car.

Q. You had a car? A. Yes.

30 Q. You took her up? A. Yes, my wife went away on Friday.

Q. Who took her up? A. My boarder, Mr. Stullich.

Q. How long was she up there? A. She was there until after Labor Day. I don't remember the date.

Q. You paid board? A. Yes, \$30 a week, each week.

40 Q. For her and the children? A. For her and the children, yes.

*William Ionin—Direct.*

Q. Did you go up to see her? A. Yes, I used to get up week ends.

Q. When did she come home? A. After Labor Day.

Q. Who brought her home? A. Well, my friend brought her, the boarder.

Q. Were you with him? A. No.

Q. I understood him to say you were with him?  
A. No, I used to come week ends.

Q. You were not in the car when she came home?  
A. No.

Q. Do you know whether the colored woman was with her? A. No, I paid off the colored woman myself. He brought her home with him.

Q. Who brought her home, Stulich? A. Stulich, yes.

Q. How is your wife now? A. She is a very weak woman.

Q. Wasn't she weak before the accident? A. Never. She wasn't a strong woman. I don't think she was very strong. She did all the hard work. Never hired anybody.

Q. Do you know whether she had anything besides a weak heart before the accident? A. No.

Q. Do you know anything about the tonsils? A. The doctor made a false statement. He never examined her tonsils.

Q. What doctor? A. The doctor that went over from the company.

Q. Just answer my questions. How much did you pay—are you paid up to date? A. I paid some bills and some I owe.

Q. How much did you pay? A. I don't exactly remember. Every time I have the money.

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*William Ionin—Direct.*

Q. Did you keep any record? A. I owe him between \$150 and \$200.

Q. How much did you pay? A. I really don't remember.

Q. Do you have anybody now to help your wife? A. Yes, I am helping her all the time.

10 Q. Do you have? A. I have a lady, Mrs. Sofsky.

Q. How many days a week? A. Every time I need her. She comes from New York, and I call her up.

Q. Did you have her last week? A. I had her last week. I have her now in the house.

Q. What do you pay her? A. Five dollars a day now.

20 *Cross-examination by Mr. Krasner:*

Q. You say you paid off Elizabeth in the mountains? A. Yes.

Q. How many days was that before your wife came home? A. Just about two or three days before.

30 Q. What did Elizabeth do from the time you paid her off until your wife came home? A. Didn't do anything. She was there in the country, but didn't do anything.

Q. Didn't you say on direct-examination you took her to New York and paid her off? A. I didn't say that.

Q. Who paid the board for Elizabeth from the time you paid her off until she went home? A. I paid her myself.

40 Q. You are sure you brought Elizabeth up to the mountains? A. Yes, sir, I brought her on Sunday.

*William Ionin—Cross.*

Q. Did you hear Mr. Stullich say he brought her up to the mountains? A. Oh yes, he brought her up to the mountains, yes.

Q. Then you didn't bring her up to the mountains on Sunday? A. Well, I don't remember.

Q. You are not sure who brought her up to the mountains? A. I believe I brought her up to the mountains. 10

Q. You think he is mistaken when he said he brought her up? A. Yes.

Q. What was the name of the first lady you got in to help your wife in the house after the accident? A. Smith.

Q. That was the Polish, German-American woman? A. Yes.

Q. How long did she stay in the house? A. Two or three weeks. 20

Q. How long was your wife in bed after the accident? A. Around ten days, in and out of bed.

Q. After Miss Smith went away who did you have in? A. The same woman, during the week end.

Q. What was her name? A. The same Miss Smith.

Q. How long did she come in for the week ends? A. Every Friday and Saturday. 30

Q. How many weeks? A. I don't exactly remember.

Q. What was the name of the next one? A. After that my wife gave birth to the baby, Lizzie Glaser, 169 East Broadway, New York City.

Q. You heard Mr. Stullich testify that this Lizzie Glaser, the Jewish lady from New York, was there right after the accident occurred? A. No.

Q. She was kept there three months? A. No. 40

Q. He didn't say that? A. No.

*William Ionin—Cross.*

- Q. Miss Glaser wasn't there after the accident?  
A. No.
- Q. She wasn't hired until after Mrs. Ionin came back from the hospital? A. Yes.
- Q. How long did you keep Miss Glaser at the house? A. Around three months.
- 10 Q. How long did you keep this Elizabeth Taylor? A. I kept her the whole summer in the country.
- Q. Didn't you say on direct-examination you kept Elizabeth Taylor two or three months? A. I did. The same thing now.
- Q. Didn't you get Elizabeth Taylor in January 1927? A. No, sir.
- Q. Miss Glaser was hired right after the birth?  
A. Yes.
- 20 Q. That was the latter part of December, 1926?  
A. Yes.
- Q. Didn't you keep her between two and a half and three months? A. Yes.
- Q. Didn't Miss Glaser go away in March, 1927?  
A. Yes, and I hired the woman—
- Q. Miss Glaser left in March, 1927? A. Yes, about two or three months.
- Q. Then you took on Elizabeth Taylor? A.  
30 Yes.
- Q. You kept her two or three months? A. No, I kept her in the country two or three months but hired her to come in the house and do the hard work during week ends.
- Q. What makes you remember the date of the accident so exactly? A. Well, I have a reason.
- Q. Tell us the reason? A. Well, it happened to be after the holidays, and I remember it was Sep-  
40 tember 20.

*William Ionin—Cross.*

Q. Did you make any memorandum? A. I have a good memory.

Mr. Lord: What holidays?

The Witness: The Jewish holidays.

Q. You have a good memory? A. Yes.

Q. Did you hear your wife say on direct-examination that the accident occurred on September 26, 1926? A. My wife is never responsible for the things she says. 10

Q. The exact date is September 20th? A. Yes, sir, the exact date is September 20th.

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

Q. About how much money did you spend altogether for Dr. Nash from the time of the accident until the present day? A. Three or four hundred dollars, with the money I owe him about three or four hundred dollars. 20

Q. Did you spend any money for medicine? A. Yes, each medicine I give at night \$3 a bottle.

Q. A total of how much? A. She has had the same medicine quite a long time.

Q. How much did you pay in the hospital? A. Well, \$25—

Q. How much did you pay altogether for nurses? A. I don't remember. 30

Q. I show you a paper and ask you if that is your signature? A. Yes, sir.

Q. It is sworn to? A. Yes.

Q. Did you read the things written in here before you signed it? A. Yes.

Q. I show you a question and ask you did you spend anything for medicine in your endeavor to cure your wife from aenemia, if so how much? A. I don't know. The medicine was given to me. I didn't understand the question. 40

*William Ionin—Cross.*

Q. Did you pay for the medicine yourself? A. Yes, sir.

Q. At the time you answered this you might have misunderstood it? A. Yes.

Q. This was the truth at that time? A. Well, probably I didn't understand.

10 Q. Did you hear Dr. Nash testify that he examined your wife's tonsils and had told her at one time her tonsils were diseased? A. I don't know that. She has never told me that.

Q. Did you hear the doctor say he had told her that? A. I didn't quite hear him say that.

Q. Would you say he was a liar? A. No I would not.

Q. Were you present when Dr. Lowenstein examined your wife? A. No, sir.

20 Q. You don't know what he told her? A. No, my wife told me that the doctor couldn't—

Q. Never mind. Do you know what your wife told you at the time the doctor examined her? A. Why, I don't know.

Q. You don't know what the doctor told your wife? A. I always take her word.

Q. Do you believe Dr. Lowenstein was perjuring himself? A. I wouldn't say that.

30 Q. Do you remember whether you heard your wife scream first or hear the plaster strike first? A. I heard a noise. I couldn't definitely say. It is three years ago.

Q. Her shoulder was scratched? A. Her shoulder was scratched and her left eye cut.

40 Q. Were you aware of the fact that the water was always coming down and leaking through that ceiling? A. Not only there but in every room, even in the bedroom, and I notified Mr. Michaels and

*William Ionin—Cross.*

he says to me "If you think every room is going to leak why don't you move out." So I moved.

Q. When did you move? A. May 20.

Q. Was your rent paid up entirely? A. My rent was paid for the month previous but not for that month.

Q. Didn't Mr. Michaels— A. We had court. He sued me. 10

Q. What time of the day did you move out? A. Six o'clock in the morning.

Q. Was it light? A. It was daylight.

Q. Did Mrs. Ionin ever go away for the summer before the accident? A. We had our own car. We used to make trips once in a while when we had a vacation—week ends.

Q. Would she stay more than the week end? A. Yes. 20

Q. The whole summer? A. No.

Q. A great while? A. No, a week or two.

Q. She never stayed a longer period of time than the vacation lasted? A. Yes.

Q. Did she take anybody to help take care of the children? A. No.

Q. Was your wife ever treated by a doctor before the accident? A. Never.

Q. Did Dr. Nash ever examine her before the accident? A. Well, she engaged him you know for the baby, but as far as I know he never treated her for anything. 30

Q. Never gave her any medicine? A. I don't know. She never told me. It wasn't my affair to inquire.

Q. Was Dr. Nash your family physician? A. Yes.

Q. How long was he? A. Since we were living in Newark. 40

*William Ionin—Cross.*

Q. When was the first time? A. I had a little baby with tonsilitis. He cured her. I took quite a liking to him.

Q. When before the accident did Dr. Nash examine your wife, if you know? A. Before the accident? He must. She went up there.

10 Q. Did Dr. Nash tell her she ought not to have any children? A. Not that I know.

Q. Did you know she had a bad heart? A. I did.

Q. Who told you? A. I knew she wasn't a strong woman.

Q. Who told you your wife had a bad heart, before the accident? A. Well, I don't remember who told me that.

20 Q. Was it Dr. Nash? A. Probably it was he. I don't remember.

Q. Didn't Dr. Nash warn her not to have any more children? A. If he did she was already in pregnancy.

Q. When Dr. Nash told you before the accident your wife had a bad heart didn't he warn you she shouldn't have any more children? A. You don't expect she would have an abortion, do you?

30 Q. Who carried your wife from the pantry to the bedroom? A. Me and my boarder.

Q. How long have you known this boarder? A. He has been with me since 1920. I can say I brought him up from a young lad on.

Q. How old was he? A. He is 23 now; nine years before, sixteen.

Q. He is a good friend of yours? A. Well, he is a good boy.

Mr. Lord: That is admitted.

40 Q. Did your wife ever have any heart attacks

*William Ionin—Cross.*

since the time she became pregnant? A. Never.

Q. Did she ever have any faint spells? A. Never.

Q. Did she ever vomit before the accident? A. Never.

Q. Did she ever vomit from the time she became pregnant before the accident? A. I don't know. I have never seen her. 10

Q. During the first two or three weeks after the accident did your wife get on and off the bed to do the necessary housework? A. She was able to do some work, to take care of the children.

Q. You had Miss Smith there right after the accident? A. Yes.

Q. Why didn't you bring this Miss Smith here to testify if you could have done so? A. Well I had my testimony of the physician. 20

Q. Who paid the colored woman while she was up in the mountains for the week's wages? A. I used to send her money all the time.

Q. You used to go up there every week end? A. Yes.

Q. How much did you pay this colored lady wages per week, how much? A. I didn't pay her very much; around \$15 a week.

Q. Did you hear your wife say she never got less than \$25? A. Well, she is not responsible. 30

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EDWARD MICHAELS, sworn in behalf of plaintiff, testified as follows:

*Direct-examination by Mr. Lord:*

Q. Mr. Michaels you had the renting of the property 476 South 17th Street, Newark, in 1926? A. Yes. 40

*Edward Michaels—Direct.*

Q. Who is the owner of that property? A. Fermac, Inc.

Q. Who is the E D M Corporation? A. That is another corporation that has nothing to do with it.

10 Q. Didn't you bring a suit in the name of the E D M Corporation against Mr. Ionin, for rent? A. Yes, the attorney made a mistake. That corporation is in another matter and he thought that covered Ionin.

Q. When the Fermac Corporation was the owner of the property? A. Yes.

Q. You were their representative in the running of the premises? A. I am their representative.

20 Q. What is your position? A. Secretary and Treasurer.

Q. They were the owners at the time the Ionins lived there? A. They were the owners.

Mr. Krasner: No questions. We agree to have the E D & M. Corporation struck out and the Fermac Corporation substituted.

30 I move for a non-suit on the following grounds: first, that the evidence is replete with testimony to the effect that the plaintiffs both were aware of the dangerous condition of the ceiling, and not only that but "we have been up there a number of times" and they testified a number of times they felt the ceiling might fall down any time and notified defendant to that effect. I claim it comes under the doctrine of incurring the risk, these people having known of the dangerous condition. If they went there in  
40 spite of that and with knowledge of the dan-

*Motion for Non-Suit.*

ger they are thereby charged with contributory negligence, and therefore have no claim of liability against the landlord.

Second under the rule of law that the landlord is not obligated or in any way in duty bound to make repairs to the inside of the premises of the demised building, and that there is no direct proof that the injuries sustained were caused by any leakage from any other part except the ceiling of the premises where the plaintiffs lived, and therefore there is no direct connection between the control of the landlord over the roof and the injuries sustained by the plaintiff. 10

The Court: The first ground, whether or not there is contributory negligence is a question for the jury. On the second ground there is evidence indicating that when it rained the roof leaked and the water ran down between the walls from the ceiling in the pantry and that it was raining on that day and leaking and the ceiling came down. 20

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

Exception noted as ground of appeal.

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SAMUEL WENDLOFF, sworn in behalf of defendant, testified as follows:

*Direct-examination by Mr. Krasner:*

Q. Mr. Wendloff are you living at 476 South 17th Street? A. I used to live there.

Q. Do you recall the time Mrs. Ionin claims the plaster fell on her head? A. I don't remember. Several years ago. 40

*Samuel Wendloff—Direct.*

Q. Did she come up to you any time before the alleged accident and find your floor wet? A. Not as I know of.

10 Q. Did the ceiling in your apartment before the accident leak in such a way as to let the water drip down on the floor of your apartment? A. No.

Q. Did you ever make any complaint to the landlord that your apartment was wet? A. No.

Q. Do you ever recall any water leaking from the roof into your apartment? A. I can't recall that.

Mr. Lord: What is that?

The Witness: I can't recall.

20 Q. Did you have an icebox in the pantry at that time? A. Yes.

Q. Was your pantry directly above Mrs. Ionin's pantry? A. Yes.

*Cross-examination by Mr. Lord:*

Q. Mr. Michaels saw you last night? A. No.

Q. When did he see you? A. I didn't see Mr. Michaels since I moved out from there.

Q. Didn't he see you last night? A. No.

30 Q. Are you sure? A. Absolutely.

Q. You didn't know that the roof leaked while you were in the building? A. I didn't know that.

Q. You didn't know that? A. No.

Q. Have you noticed any water coming in? A. No.

Q. From the roof? A. No.

Q. What? A. No.

Q. When did you leave there? A. When?

40 Q. When, yes? A. A couple of years ago.

*Samuel Wendloff—Cross.*

Q. From when to when? A. I can't remember that. I lived there about a year I think.

Q. Do you remember when the accident happened? A. I remember there was an accident, but I don't know the details of it.

Q. Did you go down and see Mrs. Ionin after the accident? A. No.

Q. Weren't you friends of theirs? A. We were friends, just tenants, neighbors.

Q. Did they ever come up to your apartment—Mrs. Ionin? A. She used to come up to my wife many times.

Q. She what? A. She would come up to my wife many times. She used to come up.

Q. How often are you at home? A. Well, never in the daytime.

Q. At the time the accident happened were you home then? A. I can't remember that. I don't remember.

Q. Did you hear any crash then? A. No.

Q. How did you know about the accident? A. Because I heard the women talking about it.

Q. When; the same day, the same night? A. I can't tell that. I don't remember that.

Q. Do you remember Mr. Ionin going out to his yard and calling up when the accident happened? A. No.

Q. You don't remember that? A. No.

Q. When did you hear about it; the next day? A. No, I can't tell that. I don't remember that.

Q. Did you hear about it the next week? A. No.

Q. Or the next month? A. I can't tell.

Q. How do you know you heard about it at all? A. My wife told me that there was an accident.

Q. You don't know when she told you about it? A. No.

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*Samuel Wendloff—Cross.*

Q. Was it in the winter or the summer? A. No, I don't know.

Q. You don't know whether it was hot weather or cold weather? A. I don't know.

Q. You don't know whether it was this year or last year or the year before? A. A couple of years ago.

10 Q. When did you leave that house? A. About two years, I think.

Q. You think; you are not sure? A. Yes, I think I am sure.

Q. You never went in to see Mrs. Ionin after she was hurt? A. I saw her once, but not when she was hurt.

Q. Where did you see her? A. We were at a party together.

20 Q. When was that? A. About a year ago.

Q. That is the only time you have seen her since the accident, is that right? A. Yes.

*By Mr. Krasner:*

Q. Where are you living now?

The Court: I won't allow that question.

Q. Were you subpoenaed for this case?

30 The Court: I won't allow that. I am saying this in an attempt to shorten this case, because in my opinion it takes too long a time. It isn't necessary to ask so many questions.

*Edward Michaels—Recalled—Direct.*

EDWARD MICHAELS, recalled by defendant, testified as follows:

*Direct-examination by Mr. Krasner:*

Q. Mr. Michels, were you aware of any defective condition in the roof of your house above the pantry of Mrs. Wendloff? A. Not above the pantry.

10

Q. Do you know Mr. Shulman? A. I know him.

Q. Did he ever inform you that the ceiling in Mrs. Ionin's apartment was cracked before the accident happened? A. No.

Q. Were you told by anybody else that Mrs. Ionin's ceiling was cracked, before the accident? A. Nobody.

Mr. Lord: What is the answer?

The Witness: Nobody.

Q. Is Mrs. Wendloff's pantry directly above Mrs. Ionin's pantry? A. Directly above.

20

Q. And did Mr. Wendloff keep his icebox in the pantry directly above Mrs. Ionin's pantry? A. The pantry was directly above.

Q. Was the icebox directly above the pantry of Mrs. Ionin? A. It had to be there.

Q. When did Mrs. Ionin move in? A. Pardon me, if I go to my records (referring to a book). Apparently she moved in in May, 1926.

30

Q. When did she move out? A. In August, 1927.

Q. Has all her rent been paid?

Mr. Lord: I object.

The Court: You mean when she moved out?

Mr. Krasner: Yes.

The Court: Did she move out?

Mr. Michaels: She moved out between two suns, owing four months rent.

40

*Edward Michaels—Recalled—Direct.*

Mr. Lord: I ask that be stricken out as not responsive to the question. It is not material.

The Court: I will not strike it out.

Plaintiff's counsel prays an exception to this ruling of the court.

10      Exception noted as ground of appeal.

Q. Did you subsequently have to sue Mrs. Ionin?

Mr. Lord: I object to that question.

Mr. Krasner: It is to discredit the testimony of the witness in the motive he might have in testifying. It certainly is material.

Mr. Lord: It is not material whether they started suit or not.

20      The Court: I am not sure that the question is proper on direct-examination; are you?

Mr. Krasner: There is evidence in rebuttal of the testimony of the plaintiff.

The Court: You mean to contradict the plaintiff.

Mr. Krasner: That is the idea.

Mr. Lord: The plaintiff hasn't testified she owed any rent when she moved out.

30      Mr. Krasner: Perhaps I will withdraw it.

Q. Did you start a suit against Mrs. Ionin for the rent before she started her suit against you for the damages?

Mr. Lord: I object to that. He hasn't testified yet he did start a suit, and I object to the question as to whether or not he did or did not on the ground it is immaterial.

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*Edward Michaels—Recalled—Direct.*

Mr. Krasner: You brought it out yourself.

Mr. Lord: I did not. It was in the question of the ownership of the property.

The Court: I will sustain the objection at this time, but I may let you ask it a little later. I mean I will remind you of it.

Mr. Krasner: No further questions. 10

Mr. Lord: I have no further questions.

The Court: Is there any testimony that either one of the plaintiffs have made a statement, that you remember?

Mr. Krasner: No, not yet.

The Court: Then I don't think he has been asked that question. I think you could have asked Mr. and Mrs. Ionin all about whether they were not either ejected or served with a 30 day notice. 20

Mr. Krasner: I think the question was put when she moved and Mr. Ionin said he moved at 7 o'clock in the morning, first 6 and then 7, and when Mrs. Ionin was asked why she moved she said she didn't remember.

Mr. Lord: She said because he wouldn't fix the roof.

(Argument). 30

The Court: I don't think you can ask this question on direct-examination. I will ask this question—you may have an exception—

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

Exception noted as ground of appeal.

The Court: When she moved out, when the people moved out, did they move out of their own accord? There has been no tes- 40

*Edward Michaels—Recalled—Direct.*

timony that they moved out because the roof wasn't fixed.

The Witness: They left without giving me notice.

Mr. Lord: He puts that in every time.

The Court: I will leave it in.

10 Q. How old was the house, Mr. Michaels, when Mrs. Ionin's accident happened? A. I believe—I didn't go to the house—from my knowledge and belief—

The Court: That wouldn't make any difference. It might be a brand new house and leak.

20 Q. Do you know whether the suit you started in the District Court against Mrs. Ionin for the rent preceded the suit started by her in this court for the damages?

Mr. Lord: I object to that.

The Court: Sustained.

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

Exception noted as ground of appeal.

*By Mr. Lord:*

30 Q. When they moved out they were four months in arrears for rent? A. Yes.

Q. You put that claim for rent in the hands of the law firm of Levitan, Levitan & Auerbach, in Jersey City? A. I think Auerbach.

Q. Don't you know? A. I never got any money.

Q. They paid them didn't they this rent? A. I don't know.

*William A. Ennis—Direct.*

WILLIAM A. ENNIS, sworn for defendant, testified as follows:

*Direct-examination by Mr. Krasner:*

Q. Mr. Ennis, did you ever interview Mrs. Ionin, the plaintiff in this case, after the accident? A. I did. 10

Q. Did you also inspect the pantry where the accident is alleged to have happened? A. Yes.

Q. Soon after the accident did you inspect the building? A. About the beginning of January.

Mr. Lord: What year?

The Witness: 1927.

Q. Did you notice whether at the time you made the inspection the ceiling had been repaired, or whether it had not been repaired? 20

Mr. Lord: I object. What difference does it make? It was January, four months.

The Court: Sustained.

Q. Did you notice whether the plaster had fallen down in the pantry when you were there?

Mr. Lord: The same objection.

The Court: Sustained.

Mr. Krasner: The crux of the question is to contradict the testimony showing the size of the surface which had fallen down, whether the testimony would indicate that the size was much smaller than the testimony of the plaintiff. 30

The Court: That was not the question.

Mr. Krasner: I am not asking it directly. If I did it would be objected to on the ground it is leading. 40

*William A. Ennis—Direct.*

The Court: I will have to rule on each question.

Q. Did you notice about how much the repair was in the pantry when you were there?

Mr. Lord: I object to that.

10 The Court: You can tell what you saw in the pantry January, 1927.

Mr. Lord: I will object to that, if I may, four months after the accident occurred. The condition of the pantry is no indication as to what it was four months before that.

The Court: I will sustain the objection.

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

20 Exception noted as ground of appeal.

Q. What was the conversation with Mrs. Ionin regarding the accident? A. At the time she stated she had had an accident on or about October 26, 1926, being approximately the last of the Jewish holidays. At that time she alleged that the ceiling, a piece about 2 by 2 feet had fallen and struck her on the shoulder. That is the only thing she claimed at that time.

30 Q. Did she say anything to you about having been injured in the head? A. She did not.

Q. Did she say anything—show you anything indicating that any wound had not healed yet from the falling of this plaster? A. No, sir.

Q. Did she tell you what she was carrying into the pantry?

Mr. Lord: I object to that as leading.

The Court: Sustained.

40

*William A. Ennis—Direct.*

Q. Did she tell you about her condition of pregnancy at the time?

Mr. Lord: I object.

The Court: Sustained.

Q. Tell the court and jury what else she told you besides what you have told before? A. She said at the time of the alleged accident she had been pregnant about six and a half months; that the child was born on December 5, 1926. 10

Q. Did she complain to you about any uterine hemorrhages? A. She said she had the hemorrhages about, I believe, it was two months or a month after the accident.

Q. Did she speak to you about help—

Mr. Lord: I object to that as leading. 20

The Court: You cannot on direct-examination lead your witness. He will have to tell us the whole conversation.

Mr. Krasner: It seems to me there was quite a conversation. He can hardly tell the whole from memory. I will have to guide him.

The Court: You have got to exhaust his memory. After you have done that if he can't remember it is discretionary to allow it. 30

Q. Did Mrs. Ionin say anything else to you about the accident other than what you have told before? A. I recall no further conversation.

Q. Did she say anything about having required any assistance?

Mr. Lord: I object to that. He says he doesn't recall any further conversation. 40

*William A. Ennis—Cross.*

The Court: I will admit it.  
Plaintiff's counsel prays an exception to  
this ruling of the court.  
Exception noted as ground of appeal.

A. Never.

10 Q. Did she say anything about requiring any  
help in the house?

Mr. Lord: I object to that. That certainly  
is incompetent.

The Court: I will admit it.  
Plaintiff's counsel prays an exception to  
this ruling of the court.  
Exception noted as ground of appeal.

A. She did.

20 Q. What did she say about the help she required?

Mr. Lord: I object. He just said she  
didn't say anything about it.

The Court: Go ahead. I don't believe you  
heard it.

A. She said she had had a colored maid after the  
accident for a short time, but didn't have any help  
at that time I was there.

30

*Cross-examination by Mr. Lord:*

Q. What was your business at that time? A.  
Claim investigator.

Q. For whom?

Mr. Krasner: I object. I don't think it  
is material as to who this man was employ-  
ed by.

40

The Court: I will admit it.

*Edna Ionin—Rebuttal—Direct.*

Q. Who were you employed by? A. The Union Indemnity Company.

Q. And you were employed by whom on this particular occasion; who were you acting for? A. For the defendant.

Q. For the defendant in this case? A. Absolutely.

Q. And you were paid for the investigation? A. Yes. 10

Mr. Lord: That is all.

Mr. Krasner: Defendant rests.

EDNA IONIN, recalled in rebuttal, testified as follows:

*Direct-examination by Mr. Lord:* 20

Q. Do you know Mr. Ennis who has just testified; do you remember him coming to your house? A. Yes.

Q. He says you told him that at that time a piece of plaster 2 by 2 had fallen and struck you on the shoulder. Did you tell him that? A. I never.

*By Mr. Krasner:*

Q. How long was Mr. Ennis there? 30

Mr. Lord: I object to that.

Mr. Krasner: All right. That is all.

EDWARD MICHAELS, recalled by defendant, testified as follows:

*Direct-examination by Mr. Krasner:*

Q. Was Mr. Shulman a tenant in your house? 40

*Edward Michaels—Recalled—Direct.*

Mr. Lord: I object.

The Court: Sustained. The only thing you can rebut is the statement just made by Mrs. Ionin.

Mr. Krasner: Mr. Michaels may give testimony he should have given before.

10 The Court: What do you want to rebut?

Mr. Krasner: The veracity of Mr. Ionin and his motive to testify, nothing else.

Mr. Lord: Of course I object to that.

The Court: Sustained.

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

Exception noted as ground of appeal.

20 Defendant's counsel then summed up to the jury.  
Plaintiff's counsel then summed up to the jury.

Recess to 2:15 o'clock, P. M.

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#### CHARGE OF THE COURT.

MOUNTAIN, J.:

30 Gentlemen of the jury, there are two plaintiffs in this case, a husband and wife. When you return to the court room you should by your verdict dispose of the claims of each of these plaintiffs. The husband cannot recover unless the wife can. They have brought this action against an incorporated company known as the Fermloc, Incorporated, and have based their action upon the alleged neg- and have based their action upon the alleged negligence of that corporation. They allege  
40 that the negligence consisted of the fact that it owned an apartment house at 476 South 17th

*Charge of the Court.*

Street in this city; that it allowed the roof to become in a state of disrepair after it had notice of that fact, and that water leaked from this roof through the building until it reached the ceiling of the pantry of the apartment of the plaintiffs; that then on September 20, 1926 the ceiling fell because of this moisture and water which had leaked from the roof. 10

The defense, among other things, is that the plaintiff, Mrs. Ionin, was guilty of contributory negligence, and in addition to that that the defendant did not know the defective condition above the pantry, as one of the witnesses expressed it.

Negligence is never presumed. It must be proved. When the accident happened on the night in question about half past nine, one of the plaintiffs, the wife of the other, went into the pantry, and the ceiling fell. As to whether or not the landlord had notice it was alleged on behalf of the plaintiffs that the attention of its agent had been called to the fact that the roof was in a state of disrepair and had leaked for some time. Of course you must connect the leak in the roof with the falling of the ceiling. There must be some causal connection between the ceiling falling and the leak. 0

The plaintiffs have alleged that because of this condition, and because of the negligence of the defendant, that this ceiling in the pantry fell, and as I understand it if the roof had been fixed in accordance with the notice given to the landlord—this is what the plaintiff claims—the moisture would not have seeped through or come through from outside and have caused this ceiling to fall. 0

As I say, the defendant denies that it received 0

*Charge of the Court.*

notice, or that the ceiling fell, as I understand it, from that cause.

10 Now what right have the plaintiffs in this case to sue the landlord, and upon what do they predicate this suit? If they allege negligence what do they mean by negligence? Negligence in what? It is the law of this State that where a landlord reserves certain parts of the building to himself for the use not only of the landlord himself but the ingress and egress of tenants, such as stairways and floors and roofs that he must exercise care. In this particular instance I charge you that it was the duty of this defendant corporation, the landlord in this case, to have exercised care to have had its roof reasonably stiff and secure for the purpose for which it was constructed.

20 The burden of proof is upon the plaintiffs to prove by a greater weight of evidence that that was not done. Of course before you can find there was negligence you must be satisfied that the negligence in not repairing the roof or not keeping it reasonably fit was the cause of this leak which in turn caused the ceiling to fall. You must see a causal connection of some kind between the falling of the ceiling and the leaking roof.

30 Defendant has alleged contributory negligence. The burden is upon the defendant to prove that. If the woman plaintiff in this case is guilty of contributory negligence she cannot recover.

40 When we come to the question of damages if you find for the plaintiff, one of the elements of the damages to which the separate plaintiffs are entitled—in the first place, gentlemen of the jury you cannot assess damages for the plaintiff which are not proximately and naturally the result of the defendant's negligence. The elements of dam-

*Charge of the Court.*

ages accruing to the woman plaintiff in this case, if you find she is entitled to recover, are these: She may recover for the bodily injury she has sustained, the effect of that injury upon her health, the degree and probable duration and the pain and suffering which she has had as a result of the negligence of the defendant. She cannot recover for damages not proximately and naturally caused by the defendant's negligence. 10

There is testimony indicating that before this accident she was well, healthy, able to do her housework; and there is testimony also to the effect that at the time of the accident she had some affliction of her heart, and that, if I remember it, she had bad tonsils. And then the accident happened. 20

We were not told how thick the ceiling was, how much of the ceiling fell—I mean as to area or as to thickness—how far it fell, or anything else to give us an idea of the weight which might have fallen. We were told that after the accident by one witness, who said her head was bruised and blood was on the towel. Others said there were no bruises or scratches on her head. As I recall her face was bruised, another said her shoulders were scratched, another said that she had a hemorrhage of the nose, and that a uterine hemorrhage followed. There was testimony that at the time of the accident she was with child four months. There was also testimony that she had told one of the witness of the defendant she had been pregnant six and a half months. There was testimony that following the accident she was shocked and nervous, and that on December 5th she gave birth to a child. The accident happened September 20th. The claim of the plaintiffs, as I understand 40

*Charge of the Court.*

10 it, is that the child was a prematurely born child and that the proximate cause or perhaps the contributing cause of the premature birth was the fall of this plaster on the woman's head. One of the doctors called by the plaintiff said that the premature birth was probably brought on by the accident. Another doctor called by the defendant said the premature birth would never come at such a remote date as ten weeks, after the accident, and another doctor called by the defendant said that it was impossible, as I understand him, to call this a premature birth. That the woman had had a miscarriage and not a premature birth and that in this case it was not caused by the accident.

20 The husband in this case, if you find that he is entitled to recover, can recover for the loss of his wife's services and society. He can also recover any reasonable amount that he has advanced or is obligated to spend to cure or alleviate his wife's injuries.

30 I have been asked to charge you a few requests. I charge the respective requests of the plaintiff. The tenant had no control over the roof. The landlord was the only one who had such control. It was his duty to exercise such reasonable care to keep the roof in such repair that its condition would not be a source of injury to the tenants underneath. I charge that.

Defendant has made several requests to charge. The first I will deny.

40 The second, I will charge. The notice to the landlord need not be personal, but it may be to an agent at least of the defendant; but where given to an agent it must be to such an agent whose duty it would be to report the condition to the landlord.

*Charge of the Court.*

The fifth I will charge. The jury should disregard absolutely from its consideration any damages for the condition of the child after its birth, there being no claim made for such damages in the complaint.

The sixth I will deny. It brings me to one thing I had entirely forgotten to say to you. As I understand, one of the defenses in this action is that there was not any notice. The plaintiff says there was. The plaintiff has put witnesses on who have testified to a notice given to the landlord or its agent. 10

On the question of notice you can appreciate that sometimes a landlord who does not know of the existence of a thing cannot be charged. Take a case entirely different from this case: consider the stairways in a building, where a hall and stairways are reserved for the landlord, and imagine, if you please, that he has a carpet on the stairway, and that he makes reasonably careful and diligent examination of the halls and stairways to see that everything is all right. Suppose at night, at nine o'clock, a tenant moves in with a trunk that has a broken half and tears up a piece of the carpet, and twenty minutes later somebody comes down and falls over the carpet. Probably the landlord would not have been held liable because he would not have known about it nor had the opportunity to know about it, because not such a length of time had elapsed since the nuisance started, that the carpet was in the condition that it was, to charge him with notice. On the other hand, if the torn carpet was there for a month, to take an extreme illustration of course, the jury might find that the landlord was chargeable with it, and on the ground perhaps that even if he didn't know anything 20 30 40

*Charge of the Court.*

about it, in the exercise of reasonable care in making an examination of the place he should have discovered it. So that is the reason that in these cases we dwell on what might be known as the doctrine of notice. Plaintiff said there was actual notice. So that gets that out of the way, so far as plaintiff's contention is concerned, if you please.

10 Defendant denies it. Well, if there wasn't actual notice then of course you come to a consideration of whether or not this leak, with its seeping water through the building could not have been discovered within a reasonable length of time and in the exercise of reasonable care by the landlord, if he had looked for it. Both those of course are questions of fact which will have to be resolved by you. Take the case.

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Mr. Krasner: Defendant prays an exception to your Honor's refusal to charge requests 1, 3, 4 and 6.

Exceptions noted as grounds of appeal.

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Mr. Lord: I except to that part of your Honor's charge on the question of contributory negligence, to be submitted to the jury, in which you said that if guilty of contributory negligence plaintiffs cannot recover. Also that part of your Honor's charge in which you said that one of the witnesses testified especially after the accident that there were no bruises or scratches on plaintiff's head. Also to that part of your Honor's charge in regard to notice, in which you stated that defendant denied actual notice. My recollection of the testimony is all my witnesses testified to was that he had no notice of the condition in the pantry. He

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*Plaintiff's Requests to Charge.*

didn't deny that he had notice of the leak in the roof, as testified to by Mr. Shulman and others.

Also I wish to except to your Honor's refusal to charge plaintiff's requests 1st and 3d, which I believe you did not charge.

Exceptions noted as grounds of appeal.

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 PLAINTIFF'S REQUESTS TO CHARGE:

1. The roof of an apartment house, which is divided into separate apartments, stands upon the same basis as the passageways, staircases and the like, so far as the landlord's liability for negligence extends. (Perry vs. Levy, 87 N. J. L. 670)

2. The tenant had no control over the roof; the landlord was the only one who had such control, and it was his duty to exercise reasonable care to keep the roof in such repair that its condition would not be a source of injury to the tenants underneath. (Ibid p. 671)

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3. If because of the landlord's neglect of such duty the plaintiff, Mrs. Ionin, was injured, the defendants are liable to respond in damages for her injuries, and your verdict should be for plaintiffs.

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 DEFENDANT'S REQUESTS TO CHARGE.

1. The rule of law in this class of cases is that the plaintiff must establish by a preponderance of evidence that the landlord not only was guilty of negligence in permitting the disrepair to continue, but also that he had notice of the condition of dis-

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*Defendant's Requests to Charge.*

repair. If you find that the landlord did not receive such notice prior to the accident, then you must find for the defendant.

10 2. The notice to the landlord need not be personal, but it may be to an agent at least of the defendant; but where given to an agent it must be to such an agent whose duty it would be to report the condition to the landlord.

3. The landlord is under no legal duty to keep in repair any portion of demised premises in the absence of any express agreement between the landlord and the tenant.

20 4. Where a tenant with full knowledge that part of demised premises are in a dangerous condition and liable or apt to cause injury, and such tenant subjects himself or herself to the possibility of the injury, there can be no recovery.

5. The jury should disregard absolutely from its consideration any damages for the condition of the child after its birth, there being no claim made for such damages in the complaint.

30 6. If the jury finds that before the accident the plaintiff was afflicted with an ailment, the jury should make due allowance for any aggravation of such ailment by the passing of time and should also make due allowance for the general deterioration of her physical condition brought on by the ailment which she had before the accident, and all these items which are the natural result of her ailment should be deducted from her present condition.

## New Jersey Court of Errors and Appeals

WILLIAM IONIN and EDNA IONIN,  
his wife,  
Plaintiffs-Respondents,  
vs.

E. D. & M. CORPORATION, a cor-  
poration, and FERNLOT, INC.,  
a corporation,  
Defendant-Appellant.

On Appeal  
from the  
Supreme  
Court.

### BRIEF OF DEFENDANT-APPELLANT.

#### I. Facts.

This is an appeal from a Judgment entered in the Supreme Court at the Essex Circuit in favor of the Plaintiff-Respondent William Ionin in the sum of Three hundred dollars (\$300.00) and the Plaintiff-Respondent Edna Ionin in the sum of Twelve hundred dollars (\$1200.00), and against Fernlot, Inc., the Defendant-Appellant. A judgment of non-suit was entered as to the Defendant, E. D. & M. Corporation.

The Plaintiff William Ionin on and for some time prior to September 20th, 1926 was a monthly tenant occupying the middle floor of premises commonly known as No. 476 South 17th Street, Newark, New Jersey. The tenant occupied these premises together with his family, consisting of his wife and several children. The Defendant, Fernlot, Inc. was on the aforesaid date admittedly the owner of the premises.

The Plaintiffs allege that the roof of the building was in a state of disrepair, and that every time

it rained the water leaked through the roof into the apartment above the Plaintiffs, through that apartment, which is the third floor, into the apartment of the Plaintiffs, and that on September 20th, 1926 this condition culminated in the falling of plaster on to the Plaintiff, Edna Ionin, while she was putting away some articles in her pantry. The Defendant denies the leaking condition of the roof, denies that any water passed through the third floor apartment into the Plaintiff's apartment; denies notice of any defective condition in the plaintiffs' apartment. The Plaintiff Edna Ionin testified a number of times to the effect that she was aware of the fact that the roof leaked; of the fact that the water came through the third floor and settled in her ceiling; of the fact that the ceiling of her pantry was cracked, always wet, and in a precarious condition and that it might fall down at any time. The defense urged by the Respondent was that the Plaintiff, Edna Ionin was guilty of contributory negligence, that she did not take reasonable precaution to protect herself against such an accident, and that having gone into the pantry with knowledge of the danger, she thereby assumed the risk of using the pantry under these circumstances.

The Plaintiffs proved personal injuries, and during the proof of these injuries it developed from the Plaintiffs' testimony given by the Plaintiffs' witness, Dr. Herman S. Nash, and corroborated by William Ionin, the plaintiff, that, prior to the time of the accident the Plaintiff Edna Ionin was suffering from heart trouble, diseased tonsils and anemia. Plaintiff also testified that at the time of the accident she was pregnant with child and had been so for about four and one-half months. The plaintiff Edna Ionin gave birth on December 5th, 1927, (ten weeks after the accident) to a seven month

baby which is premature, but which child was normal in all other respects. The Plaintiff, Edna Ionin, testified further to minor injuries, but which are of no particular consequence or importance in this appeal.

The defendant produced evidence to the effect that no actual notice was ever received by the defendant of any defective condition in the roof or in the ceiling of the premises in question. The defendant further produced the occupant of the apartment above the apartment occupied by the Plaintiff William Ionin. This witness testified that he never at any time saw any water leaking from the roof into his apartment. There was further testimony introduced by the defendant as to the approximate size of the fallen plaster, which is stated to be two feet by two feet.

The facts are not materially at issue with a few exceptions and the appeal involves substantially error in the admission and rejection of testimony, error in the refusal to grant a motion for a non-suit on the part of the Defendant, and error in refusing to charge certain requests of the Defendant.

The Defendant-Appellant alleges error in

1. The rejection of testimony with respect to the question as to whether the suit started by the Defendant against the Plaintiffs in the District Court for rent, preceded the present suit.
2. The rejection of testimony as to what an investigator found in the pantry in January, 1927, which was a period of about four months after the accident.
3. The refusal of the Court to non-suit the Plaintiffs at the close of the Plaintiffs' case on the following grounds:

a. The Plaintiff, Edna Ionin, was aware of the dangerous condition of the ceiling of her pantry and nevertheless went in and exposed herself to the danger and thereby assumed the risk of use.

b. The Plaintiff, Edna Ionin, was guilty of contributory negligence in not taking precaution when entering the pantry, under the circumstances.

c. The landlord was in no way legally obligated or duty bound to make repairs to the inside of demised premises in the absence of an express agreement to do so.

d. There was no causal connection shown between the defective roof, if any, and the falling of the ceiling in the pantry.

4. The refusal of the Court to charge as requested by the defendant:

a. That a landlord must have notice of a defective condition of demised premises.

b. That a landlord is not under any legal duty or obligation to repair any portion of demised premises in the absence of an express agreement.

c. That a tenant cannot recover for injuries sustained where the tenant is aware of the dangerous condition and subjects herself to the possibility of injury.

d. That if the jury found that the Plaintiff, Edna Ionin, was afflicted with an ailment or ailments before the accident, aggravation of the ailment or ailments naturally caused by the passing of time should not be charged to the defendant nor should the general deterioration of her physical condition caused by these ailments in the natural course of their progress be charged up to the defendant.

## II. Grounds of Appeal.

1. At the close of the plaintiffs' case the attorney for the defendant moved for a non-suit upon the following ground: "The evidence is replete with testimony to the effect that the plaintiffs both were aware of the dangerous condition of the ceiling, and not only that but 'we have been up there a number of times' and they testified a number of times they felt the ceiling might fall down any time and notified defendant to that effect. I claim it comes under the doctrine of incurring the risk, these people having known of the dangerous condition. If they went there in spite of that and with knowledge of the danger they are thereby charged with contributory negligence, and therefore have no claim of liability against the landlord."

The court denied the defendants' motion for a non-suit, and defendant prayed an exception which was granted. (Page 88, line 27)

2. At the close of the plaintiffs' case the attorney for the defendant moved for a non-suit upon the following ground: "Under the rule of law that the landlord is not obligated or in any way in duty bound to make repairs to the inside of the premises of the demised building, and that there is no direct proof that the injuries sustained were caused by any leakage from any other part except the ceiling of the premises where the plaintiffs lived, and therefore there is no direct connection between the control of the landlord over the roof and the injuries sustained by the plaintiff."

The court denied the defendant's motion for a

non-suit and defendant prayed an exception which was granted. (Page 89, line 7)

3. Because the court sustained the plaintiffs' objection to the following question put to the witness, Edward Michel, on direct examination: "Did you start suit against Mrs. Ionin for the rent before she started her suit against you for the damages?"

Defendant prayed an exception which was granted. (Page 94, line 32)

4. Because the court sustained the plaintiffs' objection to the following question put by the defendant to Edward Michel on direct examination: "Do you know whether the suit you started in the District Court against Mrs. Ionin for the rent preceded the suit started by her in this court for damages?"

Defendant excepted to the ruling of the court on this objection and the exception was granted. (Page 96, line 18)

5. Because the court sustained the plaintiffs' objection to the following question put by the court to the witness, William A. Ennis, on direct examination: "You can tell what you saw in the pantry, January, 1927."

Defendant took exception to the court's ruling on this objection which exception was granted. (Page 98, line 10).

6. Because the court overruled an objection made by the defendant to the following question put by the plaintiffs' attorney to the witness William A. Ennis, on cross examination: "For whom?"

(the question before this was as follows: "What was your business at that time?" the answer was "Claim investigator")

The defendant prayed an exception to the ruling of the court on this question, and an exception was granted. (Page 100, line 33)

7. Because the court sustained an objection made by the plaintiff to the following question put by the defendant to the witness, Edward Michel, on direct examination: "Was Mr. Shulman a tenant in your house?"

The defendant prayed an exception to the ruling of this court, which was granted. (Page 101, line 40)

8. Because the court refused to charge request No. 1 of the defendant's request to charge, which request was as follows:

"The rule of law in this class of cases is that the plaintiff must establish by a preponderance of evidence that the landlord not only was guilty of negligence in permitting the disrepair to continue, but also that he had notice of the condition of disrepair. If you find that the landlord did not receive such notice prior to the accident, then you must find for the defendant."

Defendant excepted to the court's refusal to charge as requested, and the exception was granted. (Page 106, line 34)

9. Because the court refused to charge request No. 3 of the defendant's request to charge, which request is as follows:

"The landlord is under no legal duty to keep in

repair any portion of the demised premises in the absence of any express agreement between the landlord and the tenant.”

Defendant excepted to the court’s refusal to charge as requested, and the exception was granted. (Page 108, line 22)

10. Because the court refused to charge request No. 4 of the defendant’s request to charge, which request is as follows:

“Where a tenant with full knowledge that part of demised premises are in a dangerous condition and liable or apt to cause injury, and such tenant subjects himself or herself to the possibility of the injury, there can be no recovery.”

Defendant excepted to the court’s refusal to charge as requested, and the exception was granted. (Page 108, line 22)

11. Because the court refused to charge request No. 6 of the defendant’s request to charge, which request is as follows:

“If the jury finds that before the accident the plaintiff was afflicted with an ailment, the jury should make due allowance for any aggravation of such ailment by the passing of time and should also make due allowance for the general deterioration of her physical condition brought on by the ailment which she had before the accident, and all these items which are the natural result of her ailment should be deducted from her present condition.

Defendant excepted to the court’s refusal to charge as requested, and the exception was granted. (Page 107, line 8)

### III. ARGUMENT.

#### Point No. 1.

The case of *Rooney v. Siletti*, 96 N. J. Law, p. 312, is a case in which a judgment in favor of the plaintiff entered in the Common Pleas Court was reversed by the Supreme Court for a failure to non-suit the plaintiff on the ground that the plaintiff deliberately assumed what risk there was and that consequently there could be no recovery against the landlord. The case held that a landlord is bound to use reasonable care to keep premises belonging to him, and of which several tenants have the use, in a safe condition. But where a tenant with full knowledge of the dangerous condition of the premises attempts to make use of them while in that condition, there can be no recovery against the landlord for injuries resulting from such user. In this case the suit was brought by a husband and wife for injuries sustained by the wife while going into a cellar of an apartment house where the plaintiff was a tenant. The wife admitted that she was aware of the dangerous condition of the steps and justified her use of them by her present need for coal. This case is almost parallel with the case at bar. In the case at bar Mrs. Ionin said that she was aware of the dangerous condition of the ceiling. (Page 20, line 22). (Mrs. Ionin refers here to the roof; it is apparent that she meant "ceiling" because the questions and answers immediately thereafter indicate that her

impression of the word "roof" corresponded to the word "ceiling".

P. 21 line 4	P. 21 line 34	P. 33 line 11
P. 21 line 7	P. 21 line 36	P. 33 line 16
P. 21 line 16	P. 21 line 39	P. 33 line 28
P. 21 line 26	P. 22 line 6	P. 34 line 4
P. 21 line 33	P. 30 line 22	

There was testimony produced by the plaintiff to the effect that the defective condition existed at the time the tenancy arose between the plaintiff and the defendant, (Page 20, line 27) and also to the effect that the landlord told the plaintiffs to move if they weren't satisfied with the condition of the premises.

P. 33 line 16  
 P. 34 line 10  
 P. 84 line 36

"Where a tenant accepted and occupied the premises as she found them devoid of the very protective essentials of which she complained, presenting a deficiency in construction as conspicuous and apparent to her as it was to the landlord, and with this knowledge chose to occupy and use the premises, a legal status of knowledge and consent tantamount to estoppel in pais was created which operated as an insuperable barrier to the recovery of damages alleged to have been caused by such deficiency." *Barthemess v. Bergamo, et al*, 103 N. J. Law 397.

In the case of *Vorrath v. Burke*, 63 N. J. Law 188 at p. 190, Justice Collins in his opinion said: "If we assume negligence in the landlord, still no right to recover against him was established. Knowledge of the danger compels the assumption

of the risk of use in such a case" *Mullen v. Rainear*, 45 N. J. Law, p. 520; *Frank v. Conradi*, 50 N. J. Law, p. 23. In the case of *Saunders v. Smith*, 84 N. J. Law, p. 276 at page 280 the court said: "He was sui juris, and when he undertook to use the passageway with full knowledge of the danger he ran in doing so, he assumed the risk of such injury as might result to him from such use, and cannot now charge it upon the defendant."

"The further element of contributory negligence bars the plaintiff in this suit from recovery. It is essential that a plaintiff who shows that she knew of the existence of a defect must show that she was proceeding with due care in view of this condition. She cannot leave the jury to speculate as to what care she was exercising when making such use of the premises." In the case at bar no testimony was adduced by the plaintiff to indicate the exercise of reasonable care on her part when entering the pantry. On the contrary she testified that she did not look up when she entered the pantry on the occasion just before the accident had happened. (Page 33, line 28). The authority for this rule of law will be found in *Gleason v. Boehm*, 58 N. J. Law, p. 475, and *McKinley v. Niederst*, 160 N. E. p. 850).

Therefore in view of the fact that the defective condition of the ceiling of Mrs. Ionin's pantry existed at the time the tenancy was entered into, in view of the fact that Mrs. Ionin was aware of this condition and of its dangerous possibility from the time of the beginning of her tenancy until the accident; in view of the fact that she was told to move on several occasions but continued to occupy the premises; and in view of the fact that Mrs. Ionin exercised no care in entering the pantry under the circumstances, the motion for a non-suit should have been granted. Also request No. 4 of

the defendant's requests to charge should have been charged as requested.

### Point No. 2.

The rule of law is so well established as to require no citations, that in the absence of an express agreement to make such repairs, there is no obligation or duty on the part of a landlord to make repairs to demised premises except to such parts as the landlord reserves for his use or for the use of other tenants in the same building. *Mullen v. Rainear*, 45 N. J. Law 520. In the case at bar there is no evidence whatsoever of any express agreement to make repairs to the pantry ceiling of the plaintiffs, and therefore we will take it to be conceded on both sides that there was no obligation on the part of the landlord in this case to make any repairs to the pantry ceiling. The defendant-appellant concedes, however, that in this case there was a duty on the part of the landlord to keep the roof of the building in repair. The theory advanced by the plaintiffs in this suit is that the roof leaked and that the water which came from the roof somehow got into the ceiling of the plaintiffs' pantry, although there was an apartment intervening between the apartment of the plaintiffs and the roof. No direct proof was adduced by the plaintiffs to prove that the water which leaked from the roof got into the plaintiffs' apartment. Taking the plaintiffs' testimony and that of the plaintiffs' witnesses to be true for the purposes of this argument, the place of the leakage in the roof was not proven to be in such a position as to be directly over the place where the plaintiffs' ceiling fell. Neither was any proof ad-

duced by the plaintiff to indicate that the water coming from above came from the corresponding room of the apartment above. No proof was offered indicating the course which the water took from the time it entered the third floor apartment until the time it entered the plaintiffs' apartment. Such a situation left it to the jury to speculate or guess as to the cause of the falling of the plaintiffs' ceiling. To add to this there is further no direct proof as to the course the water took from the roof to the ceiling of the third floor apartment. The roof might be leaking at its northwest corner, and water might have entered the third floor apartment at its southeast corner, from some other cause not chargeable to the landlord. For instance, there may have been a window left open by one of the tenants the night before, this window leading into the garret between the ceiling of the third floor and the roof of the building. The water entering this window would naturally collect on the floor of the garret and leak into the third floor apartment. This leakage (still for the sake of the argument admitting the truth of the testimony of the plaintiffs' witnesses) might be the water which the testimony indicates leaked into the third floor apartment and thence into the plaintiffs' apartment. There was no proof as to the location either of the leak in the roof, and the leak in the third floor apartment ceiling, neither is there any connection established as to the location (except the conjecture of the witnesses) of the leak in the roof, the leak in the third floor ceiling, and the falling of the plaintiffs' pantry ceiling. The question is immediately presented as to what did cause the pantry ceiling to fall. The answer is that any number of reasons, none of which are chargeable to the defendant landlord might have caused the

pantry ceiling to fall, among which might be the following:

a. The water might have been permitted to overflow underneath the ice box of the third floor tenant, and this water might have been the water which caused the ceiling of the plaintiffs' pantry to fall. The fact is undisputed that the pantry of the second floor is exactly under the pantry of the third floor. (Page 54, line 15)

b. There was testimony on the part of witnesses to the effect that the ceiling in the children's room on the second floor leaked. (P. 33, line 16) There is no assertion made that the ceiling in the children's room injured anybody. The jury was left therefore to speculate as to whether the water leaking from the roof caused the pantry ceiling on the second floor to fall or whether the leaking water was the water that leaked in the children's room. This would leave the situation of the defendant being chargeable for injuries to a tenant caused by the falling of plaster from some extraneous source, even though the leaking roof affected another portion of the demised premises

c. The tenants of the third floor might have dropped some heavy object on to their floor just above the cracked ceiling of the plaintiffs' pantry and in that manner caused the plaster to fall (there is testimony that the ceiling on the second floor was cracked before the accident) (Page 21, line 4)

Therefore in view of these circumstances the trial judge should not have passed the case on to the jury, and should have granted the motion for a non-suit.

### Point No. 3.

Testimony offered by one party tending to show malice or ill-feeling on the part of a witness of the adversary towards the party offering the testimony is admissible for the purpose of qualifying the effect of the testimony given by the witness charged with malice. The questions put by the defendant to the witness Edward Michel on direct examination, if the answer were in the affirmative would indicate to the jury that a state of hostility existed between Mrs. Ionin and the defendant. Such testimony should have been admitted by the trial Judge and the failure to admit is prejudicial to the defendant, in that the jury might have given less weight and credence to the testimony of Mrs. Ionin if they were in possession of the information sought in the questions. (Page 94, line 33; page 96, line 18)

Furthermore the subject matter of the questions was brought up by the plaintiff himself (page 88, line 8); it was therefore competent and proper for the defendant to continue into the matter when entering the defense outside of the question argued as the possible malice or hostility of the witness.

### Point No. 4.

The issue in this point is whether it was competent for the witness William A. Ennis to testify as to what condition he found in the plaintiffs' pantry in January, 1927, which was approximately four months after the accident. The theory of the objection seems to be that the lapse of four

months is so long a time as to render the question and answer immaterial. Although it is admitted on our side that it is true that the ceiling may have undergone repairs between the time of the accident and the date of the inspection by the witness, still the repair would indicate to a normal observer how much of the ceiling had been repaired. The jury was entitled to the benefit of all available information as to the size of the fallen plaster so as to indicate the degree of probable injuries sustained by the plaintiff.

#### **Point No. 5.**

The only basis upon which the plaintiffs can charge the defendant in this case with liability, is the doctrine of nuisance. The general well settled rule is that the landlord, in order to be held liable must either have created the nuisance, have actual notice of the nuisance, or such circumstances must exist as to charge the landlord with constructive notice. The evidence indicates and admittedly so that the landlord did not create the condition in the pantry ceiling which resulted in the injuries. Actual notice was alleged and testimony was introduced by the plaintiffs indicating actual notice. This testimony was emphatically controverted by the defendant. (Page 93, line 12). (Page 93, line 15). If the jury should have chosen to believe the defendants' witnesses then the last situation should have been left open to the jury; to wit, that circumstances must be proven to indicate constructive notice. This the court was requested to do in the defendants' request to charge No. 1, which request the

court refused to grant. It is also admitted that the rule of law is that a tenant has the exclusive right to occupy the premises demised to him and that he may even bar the landlord from entering the demised premises during the term of the demise. It can also be conceded that the pantry ceiling was not available to the inspection of the landlord, and therefore no notice of the defective condition of the pantry ceiling can be chargeable to the landlord. Since this angle of the situation was not left open to the jury but was taken from them, the judgment should be reversed and a venire de novo granted.

#### Point No. 6.

Although in contract actions the defaulting party is liable to the party injured for the damages within the contemplation of the parties, the rule of law in tort actions is that the wrongdoer is liable for all the natural and probable consequences of his act. In the case at bar the testimony was in accord on both sides that Mrs. Ionin was afflicted with a bad heart, bad tonsils and anemia. The natural consequence of a bad heart is that it grows worse with the passing of time, and this statement also applies to the tonsil condition. The defendants' request to charge No. 6 merely asked the court to instruct the jury to make due allowance for the general deterioration brought on by the effect of the passing of time on the heart and tonsil condition, and after making due allowance for this natural result to deduct this condition from her condition at the trial. (The trial was held about three years after the accident) The rule of law as to the charge of the court in these cases is

succinctly stated in 17 Corpus Juris page 1074, Section 378 as follows:

“Where plaintiff in a personal injury case has been suffering from a previous disability or infirmity, the court should take care to state clearly and fully the rule of recovery in such cases, and a refusal to so instruct is error. Such instruction is proper where there is evidence of the infirmity, altho plaintiff himself testifies that he had none, altho of course properly refused in the absence of evidence of such infirmity.”

The defendant should not be compelled to pay any damages for the heart ailment, tonsil ailment, or anemic condition of the plaintiff Edna Ionin, nor any aggravation thereof brought on by the passing of time, and the passing through of a state of pregnancy and child birth, and in no way aggravated by the happening of the accident, although the plaintiff Mrs. Ionin denied knowledge of her bad heart.

Page 31, line 20

Page, 31, line 29

Her own witness Dr. Nash testified that she had heart trouble before the accident

Page 37, line 28

Page 40, line 6

Page 40, line 8

This is corroborated by William Ionin, the husband of Mrs. Ionin.

Page 75, line 19

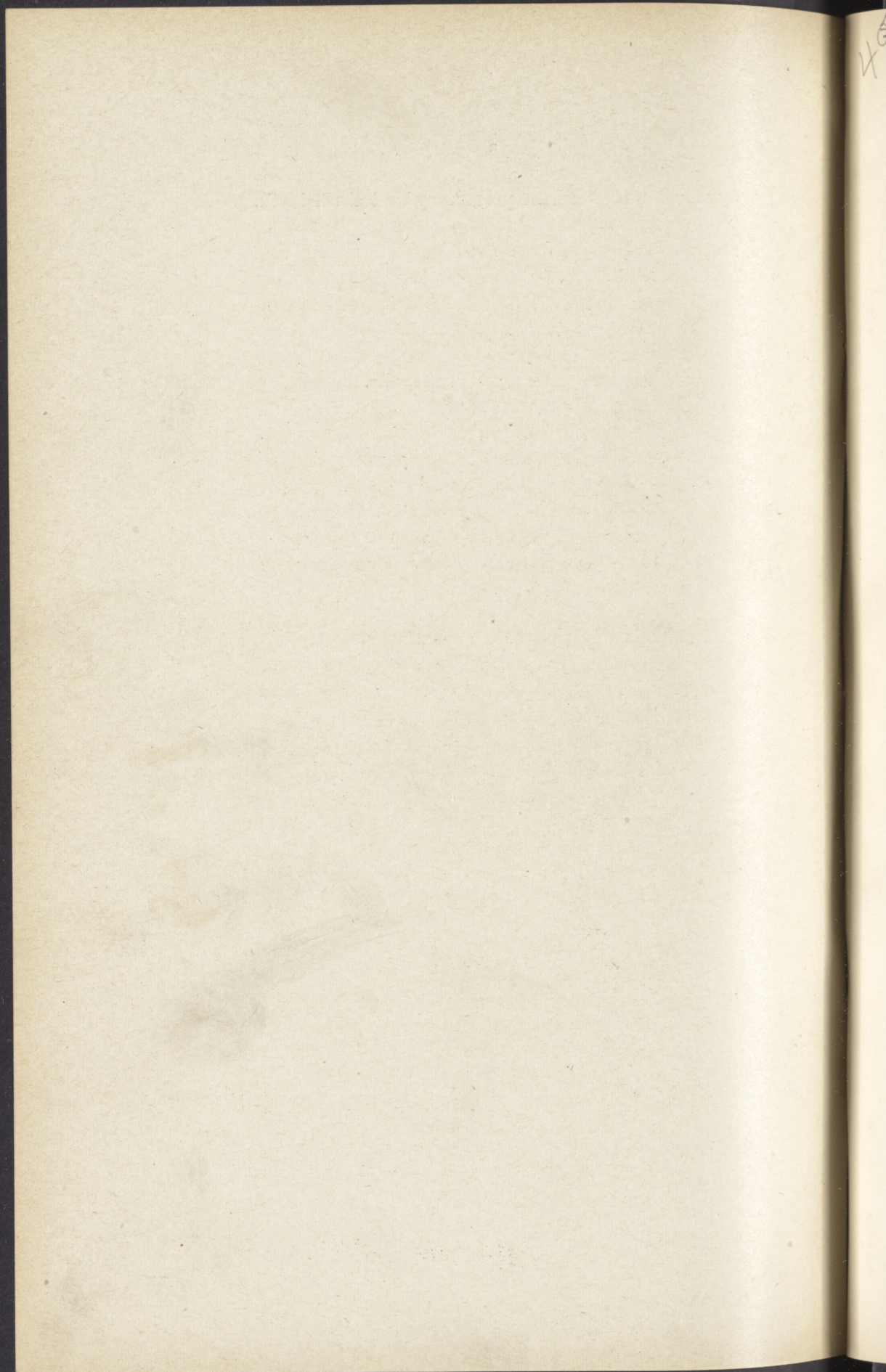
Page 86, lines 12-18

and by a witness of the defendant (Page 43, line 18) It is also common observation that a bad heart is affected by the exertion and strain which

a woman undergoes in pregnancy and child birth. This proposition seems to be agreed to by the witness for the plaintiff, Dr. Nash. (Page 40, line 36) Summing up generally it will be seen that the greater, if not the greatest portion of the condition of the plaintiff at the time of the trial was the result not of the accident, but naturally aggravated by the passing of time and her going through a state of pregnancy and child birth. The trial Judge by refusing to charge request No. 6 took away from the jury the opportunity of considering this angle of the matter in the proper light, and also deprived them of the instruction on this phase of the case to which they were entitled in order to arrive at the proper amount of the damages.

**Therefore I respectfully submit and urge that upon one or more of the above grounds error was committed in the conduct of the case and either judgment rendered for the defendant or a new trial awarded.**

NATHAN G. KRASNER,  
Attorney for Defendant-Appellant.



## New Jersey Court of Errors and Appeals

WILLIAM IONIN and EDNA IONIN,  
his wife,  
*Plaintiffs-Respondents,*

*v.*

FERNLOT, INC., a corporation,  
*Defendant-Appellant.*

Action at Law.  
On Appeal from  
Supreme Court.

### BRIEF OF PLAINTIFFS-RESPONDENTS.

This is an action for damages sought to be recovered by the plaintiffs due to the falling of the ceiling in their apartment upon Mrs. Ionin and due to a leaky roof, said apartment being one of several under the same roof and over which the tenant had no control, but which was under the control of the landlord, the defendant in this case, and is practically on all fours with the case of *Perry v. Levy*, 87 N. J. L. 670, where a similar judgment in favor of the plaintiff tenant was affirmed by this Court.

The first of appellant's grounds of appeal [erroneously entitled in the New Jersey Supreme Court instead of in the Court of Errors and Appeals] and which seems to be its main point, is the failure of the trial judge to grant its motion for non-suit because, it is contended, the plaintiffs had assumed any risk incident to the leaky roof, and the case of *Rooney v. Siletti*, 96 N. J. L.

312, is cited, but, in that case, the plaintiff deliberately descended the cellar stairs covered with frozen snow and ice, which she had observed before she attempted their descent, and admitted that she knew it was dangerous for her to do so, while in the case at bar there was no evidence that Mrs. Ionin knew that her pantry ceiling was in a precarious condition and liable to fall, but simply knew that the roof leaked and that the ceiling became damp at times when it rained and that the ceiling was cracked, which condition the landlord had repeatedly promised to remedy.

It is not true, as asserted by counsel for appellant, that plaintiffs knew of the defective condition of the roof at the time of the commencement of the tenancy (p. 20, line 27), as Mrs. Ionin simply said, in answer to a question as to where the roof was broken, "It was broken before I moved in," but she did not say how she got this information, or that she got it before she moved in. Counsel refers to page 33, line 16, but there she apparently referred to the ceiling in the children's room after the accident in the pantry with which we are concerned, when the landlord, instead of promising to fix the roof as he had repeatedly promised before, told them to move out if they did not like it, or words to that effect (p. 34, line 10, and p. 34, line 36).

Reference is made to the case of *Barthemess v. Bergano*, 103 N. J. L. 397, but in that case the tenant took the premises "devoid of the very protectory essentials of which she complained," and in the cited case of *Vorath v. Burke*, 63 N. J. L. 188, the condition of the cellar door was known to the daughter of the tenant at the very time she used it, and in the cited case of *Mullen v. Rainear*, 45 N. J. L. 520, there was evidence that the weak condition of the balcony to the premises there in ques-

tion was known to the tenant, and the trial judge was held to have erred in refusing to instruct the jury that if such negligence were made out plaintiff could not recover, while, in our case, the question of whether or not the plaintiffs were guilty of contributory negligence was properly left to the jury; and in the case of *Saunders v. Smith Realty Co.*, 84 N. J. L. 276, the plaintiff had no right to the use of the cellar passageway in question as it was not included in the demised premises and, it was held, he undertook to use same, known to him to be dangerous, at his own risk, especially when he found the lights turned off in such passageway, which, of course, has no analogy to our case.

The case of *Gleason v. Boehm*, 58 N. J. L. 475, cited in appellant's brief as authority for its assertion that the plaintiff should have shown that she "was proceeding with due care" is not in point for, as was pointed out in that case (p. 476), had the plaintiff there been a tenant of the house the defendant's duty would have been as declared by the court in *Gillvon v. Reilly*, 50 N. J. L. 26, but such duty was not imposed upon the landlord in favor of one who was not a tenant but the visitor of a tenant.

Furthermore, it has been held that, where a landlord promises his tenant to repair, after his attention has been called to a defective condition in the premises, the tenant is released from assuming the risk, at least during such time as would reasonably appear proper for the repairs to be made (36 C. J. 244 and cases cited), and I assume that this is all the more so when the repairs are needed to a roof which is common to several apartments and forms no part of the demised premises. There was repeated testimony in this case that the defendant, through its principal officer and agent,

upon notice, had promised to make the necessary repairs to the roof (p. 52, lines 10-20, and line 35; p. 53, line 2; p. 55, line 20; p. 75, line 8), and even Mr. Michaels, who had the renting of the premises (p. 87, line 40) and was the representative, secretary and treasurer of the defendant company (p. 88, lines 16-20) did not deny that he had notice of the leak in the roof or that he had promised to have same repaired. He simply denied that he had been informed that the ceiling in Mrs. Ionin's apartment was cracked before the accident happened but did not deny that he had notice of the leak in the roof nor did he deny that he promised to have same fixed.

It cannot be successfully argued that because the roof leaked when it rained and the water came through the ceiling, Mrs. Ionin should refrain from going into her pantry because of the mere chance that the ceiling might fall, nor can it be successfully argued that she and her husband should have moved out of the premises in face of the fact that their landlord repeatedly promised to fix the roof until after the accident when he changed his attitude and told them to move out if they were not satisfied, and the question of whether Mrs. Ionin, by going into the pantry at the time the accident occurred, was guilty of contributory negligence was properly left to the jury. In this respect the case is again like that of *Perry v. Levy*, before cited, where Judge BLACK, in delivering the opinion of this Court, said:

“Both the tenant and the agent of the landlord observed and knew of the condition of the ceiling and that the roof was out of order. The tenant asked to have the ceiling and roof repaired, otherwise she would move out. The agent of the landlord requested the tenant to stay and not to move and promised that the roof and ceiling would be fixed.”

Such a state of facts is almost identical with that of the case at bar.

Appellant's second exception is not in point, as the cases cited refer to the duty of repairs to demised premises, and there is no contention here that it was the landlord's duty to repair the ceiling in the Ionin apartment, but that it was its duty to repair the roof, which was no part of the demised premises, and that the ceiling in their apartment would not have fallen if that duty had been performed.

Appellant's third and fourth exceptions are to the ruling of the Court sustaining objections to questions as to when a suit for the rent of the premises was begun against the plaintiffs which were clearly irrelevant and the possible answers to which could not show malice on the part of the plaintiffs.

Appellant's fifth exception is to the overruling of a question as to what a witness found to be the condition of the premises four months after the accident, which was clearly irrelevant.

Appellant's sixth exception is to the overruling of an objection to a question as to who a witness was employed by, but the record (p. 101), does not disclose that any exception was taken to this ruling at the time and, if it was, it certainly was not prejudicial to the defendant.

Appellant's seventh exception seems to have been abandoned, and its eighth exception covering defendant's first request to charge is not tenable, as it is not the law that the landlord cannot be guilty of negligence unless he has notice, as he might be chargeable with knowledge without any actual notice, as pointed out by the Court in its charge.

The ninth exception is answered by the argument as to the second exception, and the tenth ex-

ception is covered by the argument on the first exception, and as to the eleventh exception it is only necessary to say that the request to charge contained therein did not apply to the facts in this case.

The Court's charge properly covered all the issues involved in this case which were properly left to the jury to decide, and the judgment below should be affirmed.

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