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**Notice of Appeal.**

(Filed June 22, 1926.)

10

**New Jersey Court of Errors and Appeals**

*Bergen County Circuit Court*

CATHERINE BARTHELMESS,  
Plaintiff,

v.

LIBERALE BERGAMO and TERESA  
BERGAMO,  
Defendants.

Action  
at Law.

20

*to the Court of Errors and Appeals*

The defendants appeal from the whole of the judgment entered in this cause on the following grounds:

1. Because the Court refused to non-suit the plaintiff.
2. Because the Court refused to direct a verdict for the defendants.

30

E. J. LUCE & W. A. KIPP,  
Defendants' Attorneys.

To

ELY & ELY, Attys. of Plaintiff.

*Due service of the within notice is  
hereby acknowledged*

40

*Ely & Ely*

*Attorneys of plaintiff*

**Complaint.**

(Filed .)

BERGEN COUNTY CIRCUIT COURT.

10

CATHERINE BARTHELMESS,  
Plaintiff,

*v.*

LIBERALE BERGAMO and TERESA  
BERGAMO,  
Defendants.

Action  
at Law.

The plaintiff residing in the Borough of Carlstadt, County of Bergen and State of New Jersey, says that:

20

1. Defendants, Liberale Bergamo and Teresa Bergamo, on November 19th, 1923, were the owners of the building and lot known as No. 518 Central Avenue, Carlstadt, N. J., and on or before said date the said defendants leased part of said premises to the plaintiff, Catherine Barthelmess, and her family, and part of said premises was in possession of the said Catherine Barthelmess on November 19th, 1923.

30

2. In the rear of said building and forming a part thereof, there was on Nov. 19th, 1923, a covered porch with appliances for hanging out clothes, which were under the custody and care of defendants.

40

3. On November 19th, 1923, the said defendants carelessly and negligently permitted and allowed said porch, roof and appliances to become worn and out of repair and due to said careless and

*Complaint.*

negligent conduct plaintiff while hanging clothes from said porch and appliances, was dragged and precipitated to the ground with great force and violence. As a result thereof, plaintiff's leg was severely injured, fractured, punctured and otherwise disordered, which said injuries will necessitate a severe and painful operation for the purpose of curing said injuries and thereafter and up to the time of bringing this suit, the plaintiff has undergone and is undergoing great pain and suffering and will in the future suffer great pain from said injuries resulting from said fall; said injury is permanent and plaintiff will always suffer from the same. 10

4. Plaintiff has been obliged to spend and will be obliged in the future to spend large sums of money for medicines and medical attention and because of the permanent character of said injury she will be obliged to continue for a long time to pay for medicines and for medical attention. 20

Plaintiff demands as damages the sum of twenty-five thousand dollars.

ELY & ELY,  
Attorneys of Plaintiff. 30

**Answer.**

(Filed December 5, 1925.)

## BERGEN COUNTY CIRCUIT COURT.

10

CATHERINE BARTHELMESS,  
Plaintiff,

*v.*

LIBERALE BERGAMO and TERESA  
BERGAMO,  
Defendants.

} Action at Law.

The defendants above named who reside in New York City at No. 3 Van Nest Place, answering say:

20

## FIRST DEFENSE.

1. They deny that at any time in the rear of the building mentioned in the complaint, or forming a part thereof, there was a covered porch with appliances for hanging out clothes; or that there were any appliances there for hanging out clothes which were in defendants' custody or care.

30

2. They deny that they were at any time negligent or careless in any particular mentioned in the third paragraph of the complaint.

3. They have no knowledge as to character or severity of the injuries complained of, or of the expenditures or damages claimed in paragraphs 3 and 4, sufficient to enable them to form a belief as to the same.

## SECOND DEFENSE.

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1. The injuries complained of were sustained

*Reply.*

by the plaintiff by reason of her own negligence and carelessness.

E. J. LUCE & W. A. KIPP,  
Defendants' Attorneys.

**Reply.**

10

(Filed December 7, 1925.)

BERGEN COUNTY CIRCUIT COURT.

<p>CATHERINE BARTHELMESS, Plaintiff,</p> <p style="text-align: center;"><i>v.</i></p> <p>LIBERALE BERGAMO and TERESA BERGAMO, Defendants.</p>	}	<p>Action at Law.</p>	20
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The plaintiff replying to the answer filed in the above entitled matter says that she denies each and every defense set forth in the answer filed by the defendants.

ELY AND ELY,  
Attorneys of Plaintiff.

30

**Rule for Judgment.**

(Filed .)

Therefore let the jury come thereupon before the Judge of the Circuit Court on the first Tuesday of April, A. D. one thousand nine hundred and twenty-six, by whom, etc., and the same day is given to the parties aforesaid at the place aforesaid.

And whereas on the nineteenth day of April,

40

*Rule for Judgment.*

10 A. D. nineteen hundred and twenty-six, this cause being regularly on the list for trial at the April Term aforesaid being called and both parties appearing and the case moved for trial by the plaintiff and a jury being empanelled and sworn and the evidence of the respective parties offered and the respective parties by their counsel being heard and the case submitted upon charge of the Court. The jury retired to consider of their verdict having an officer sworn to attend them. The jury came again into Court and returned a verdict in favor of the plaintiff and against the defendant for the sum of six thousand five hundred dollars (\$6,500).

20 It is therefore ordered that judgment final be entered in favor of the plaintiff and against the defendants for the sum of six thousand five hundred dollars besides the costs of suit to be taxed.

30 Therefore, it is considered that the said Catherine Barthelmess, plaintiff, do recover against the said Liberale Bergamo and Teresa Bergamo the said sum of six thousand five hundred dollars damages and fifty-six dollars and eighty-five cents costs by the Clerk now here taxed in favor of the plaintiff and with her assent, which said damages and costs in the whole amount to the sum of six thousand five hundred fifty-six dollars and eighty-five cents.

Judgment signed and entered June 8, 1926.

**Rule to Show Cause Why A New Trial  
Should Not Be Granted.**

(Filed May 21, 1926.)

BERGEN COUNTY CIRCUIT COURT.

<p>CATHERINE BARTHELMESS, Plaintiff,</p> <p style="text-align: center;"><i>v.</i></p> <p>LIBERALE BERGAMO and TERESA BERGAMO, Defendants.</p>	}	<p>10</p> <p>Action at Law.</p>
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On application made within six days after the rendering of the verdict in the above entitled cause it is on this 25th day of May, 1926, ordered that the plaintiff show cause before this Court on Friday, the 28th day of May, nineteen hundred and twenty-six, why the verdict in this case should not be set aside and a new trial granted because the damages awarded by the verdict are excessive, and It is further ordered that the defendants be permitted to reserve all the exceptions by them taken at the trial whereupon the said verdict was rendered.

NEWTON H. PORTER,  
J. 30

Rule entered May 21, 1926,  
On Motion of  
E. J. LUCE & W. A. KIPP,  
Attorneys of Defendants.

40

**Rule Dismissing Rule to Show Cause.**

(Filed June 8, 1926.)

## BERGEN COUNTY CIRCUIT COURT.

10	CATHERINE BARTHELMESS, <div style="text-align: right;">Plaintiff,</div>	}	Action at Law.
	<i>v.</i>		
	LIBERALE BERGAMO and TERESA BERGAMO, <div style="text-align: right;">Defendants.</div>		

20 A rule to show cause having been entered in this cause on the 21st day of May, 1926, and the same having been argued by John Ward, of counsel for the plaintiff, and Edward J. Luce, of counsel for the defendants, and the Court having considered the same and finding no cause for making the rule absolute,

It is thereupon on this twenty-eighth day of May, nineteen hundred and twenty-six ordered that the said rule to show cause be and the same is hereby dismissed with costs and the judgment is hereby confirmed.

30

NEWTON H. PORTER,  
Judge.

**Clerk's Certificate.**

State of New Jersey, )  
 County of Bergen,    ) ss. :

I, IRVING T. BRICKELL, Clerk of the County of Bergen and also Clerk of the Circuit Court for

40

*Transcript.*

said County do hereby certify that the foregoing is a true copy of the judgment roll in said case and the notice of appeal as the same remains of record and on file in my office at Hackensack.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said County and Court at Hackensack this [SEAL] twenty-seventh day of July A. D. one thousand nine hundred and twenty-six. 10

IRVING T. BRICKELL,  
Clerk.

By WILLIAM S. DOREMUS,  
D. 20

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BERGEN COUNTY CIRCUIT COURT.

Before—Hon. NEWTON H. PORTER, Judge, and a Jury.

<p>CATHERINE BARTHELMESS, Plaintiff,</p> <p style="text-align: center;"><i>v.</i></p> <p>LIBERALE BERGAMO and TERESA BERGAMO, Defendants.</p>	}	Action at Law.	30
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Hackensack, N. J., May 19, 1926.

APPEARANCES:

For the Plaintiff, ELY & ELY.  
JOHN M. WARD, Esq., and PETER MCGINNIS,  
Esq., of Counsel. 40

For the Defendant, LUCE & KIPP.  
EDWARD J. LUCE, Esq., and HARRY L. TOWE,  
Esq., of Counsel.

*Amendment of Pleadings.*

Mr. Ward: If your Honor please, in this case, we have told counsel that we would like to amend. I believe Judge Ely has the pleadings.

The Court: You are for the plaintiff, Mr. Ward?

10 Mr. Ward: Yes, sir. The second paragraph states, "In rear of said building, forming a part thereof, there was, on November 19, 1923, a covered porch, with appliances for hanging out clothes, which were under the custody and care of the defendant." As a matter of fact, the space there was not covered.

The Court: You wish to amend, then, by striking out the word "covered"?

20 Mr. Ward: Yes, sir. And the next paragraph, "On November 19, 1923, the said defendant carelessly, negligently permitted and allowed the said porch roof and appliances to become worn and out of repair, and due to said careless and negligent conduct, the plaintiff, while hanging clothes on said porch and appliances, was dragged and thrown to the ground." As a matter of fact, they were not permitted to become out of repair, but they were not properly—the porch or roof, which we term porch, was not protected by any railing, and it is that that we wish to make, that the de-

30 defendant did not properly protect.

The Court: Strike out "out of repair," and add that "the defendant did not properly protect"—

Mr. Ward: Yes, sir.

The Court: —"that part of the premises."

Mr. Ward: Yes, sir.

The Court: Any objection to those amendments?

Mr. Luce: I think not.

40 The Court: Very well. Let the amendments be made.

*Catherine Barthelmess, direct.*

Mr. Luce: At this moment, it does not occur to me that any amendment of the answer would be necessary, but, if so, corresponding denials may be understood as included in the answer.

The Court: Let the answer be considered as amended in that particular. 10

Mr. Luce: Yes, sir.

A jury was empanelled, accepted and sworn.

Mr. Ward opens the case to the jury on behalf of of the plaintiff.

Mr. Towe opens the case to the jury on behalf of the defendants.

CATHERINE BARTHELMESS, the plaintiff, sworn as a witness on her own behalf, testified as follows: 20

*Direct examination by Mr. Ward:*

Q. Mrs. Barthelmess, you are the plaintiff in this case? A. Yes.

Q. You are the person who is bringing this suit against the owners of this property? A. Yes, sir.

Q. Liberale Bergamo and Teresa Bergamo? A. Yes, sir.

Q. How old are you? A. 31. 30

Q. Are you married or single? A. Married.

Q. And how long have you been married? A. 11 years.

Q. How many children have you? A. Two.

Q. At the time of the accident, what was your work or business? A. Housework.

Q. Pardon? A. Housework; took care of the house.

Q. That is, at your home? A. Took care of my children. 40

*Catherine Barthelmess, direct.*

Q. And before the time of your accident in November, 1923, had you any arrangement with your husband with reference to the money? A. Yes, sir.

Q. What was that arrangement? A. Well, I used to do the managing.

10

Mr. Luce: I object. I do not see that that is material, if the Court please.

The Court: What is the materiality of that?

Mr. Ward: Why, this, sir: In view of the peculiar situation here, Judge Ely, the counsel, did not sue to recover the expense that was laid out, which ordinarily might be laid out by the husband which, in reality, was laid out by the wife; she paid the bills from her own fund, the fund that was given to her and that was hers, that was distinctly hers.

20

The Court: I will allow it. Answer the question. Do you know the question?

The Witness: Yes, sir.

The Court: Answer it, please.

A. (Continuing.) I used to do all the managing. He used to give me the salary of \$30.00 a week.

30

Q. And how much was he making at that time, do you recall? A. Thirty-four, thirty-five, thirty-six, according to how he worked, but I had to manage my children and attend to the house and do everything.

Q. And you got how much? A. \$30 a week, for sure.

Q. And that was yours, or not? A. Yes, sir; that was mine.

Q. And out of that, what were you to do? A. I done everything with it. I paid gas, I paid—

40

*Catherine Barthelmess, direct.*

Q. If there was anything left over, what did you do with that? A. Well, I saved it; that was miné.

Q. Was it or not yours, the amount that was left over? A. Yes, sir; that was mine; that is mine.

Q. And when was this arrangement entered into between you and your husband? A. Well, that is quite a while ago. 10

Q. And did you, or not, as a matter of fact, do the housework there? A. Yes, sir; I done everything.

Q. What about the washing? A. I done my own washing every day or every week, whenever it was to be done.

Q. And the housework, the cooking, and so forth? A. And the housework, and took care of my children; yes, sir. 20

Q. Now, prior to November, 1923, November the 19th,— A. The 19th.

Q. —did you make any arrangement with reference to these rooms on Central Avenue? A. In August, the first, I rented these rooms on Central Avenue.

Q. And about how long before the accident did you rent the rooms? A. Well, November was my accident, and August the first—on November 19th was my accident, so I was three months and nineteen days when my accident happened. I washed my clothes, and— 30

Q. Three months and nineteen days? A. And nineteen days; yes, sir.

Q. Where did you go to rent the rooms? A. Well, I heard of these rooms first, and I went in the afternoon, and I went to Miss Perretti; there was a woman in the house.

Q. Who is Miss Perretti? A. Well, she is the daughter of the owner. 40

*Catherine Barthelmess, direct.*

Q. And who are the owners? A. Mr. Bergamo and Mrs. Bergamo.

Q. And they are the defendants in this case?

A. Yes, sir.

Q. And you went to their daughter where? A. She lived downstairs, where the floor was empty upstairs.

The Court: In the same premises that you rented?

The Witness: Yes, sir.

The Court: Very well.

Q. How many apartments or places were there to be occupied by tenants? A. There was four families, and an attic.

Q. Four families and an attic? A. Yes, sir.

Q. And how many families lived downstairs? A. Two families downstairs, and two families upstairs, and there was empty attic rooms upstairs, at times taken, and at times idle.

Q. At times occupied, at times not occupied? A. Yes, sir.

Q. But there were two families on the second floor, were there, or apartments, at least, for two families? A. Two families on the first floor, and two families on the second; yes, sir.

Q. Now, will you please tell us just what happened when you went with Miss Perretti to the house, and when you saw these apartments? A. Well, I heard of them, and I went in the afternoon myself, and there was lots of repairing to be done. I thought it was pretty reasonable rent. I says I would come into the evening with my husband.

Q. Did you go with your husband? A. Yes, sir. I went in the evening, and my husband and I went. I have two children, and I took the children. Well, of course, we had to go for Miss Perretti.

*Catherine Barthelmess, direct.*

Q. Did you see Miss Perretti? A. Yes, sir. I went downstairs, and I asked Miss Perretti to show my husband the rooms, with myself and my husband.

Q. And what did you do when you— A. I knocked on her door, and I asked her—

10

Q. No. After you saw her and asked her to show you the rooms, what did you do? A. I went upstairs to look at the floor.

Q. Just tell the Court and jury, if you will, please, just what happened? A. I took the floor.

Mr. Luce: I object.

A. (Continuing.) First, Miss Peretti—

The Court: Just a moment. When an objection is made, do not answer. What is the ground of the objection?

20

Mr. Luce: The ground is, what took place between her and Miss Perretti, as yet, it does not appear to be binding upon the defendants.

The Court: She has said that Miss Perretti was the person who showed her the rooms, who lived in the house, and was the daughter of the owner, and I assume from that, that counsel contends that that shows an agency in the daughter for the owner. You may pursue that a little further, if there is any question about it.

30

Mr. Ward: I will proceed out of order, sir. I may have, perhaps, jumped ahead.

Q. Did you, afterwards, thereafter, after you rented rooms, ever see Mr. Liberale Bergamo? A. Well, there was one time—

Q. Did you or not? A. Yes, sir.

40

Q. Ever see him? A. Yes, sir.

*Catherine Barthelmess, direct.*

Q. And about how long after you occupied the premises was that? A. Well, I was in about a month, three weeks, about a month.

Q. Where did you see him? A. Downstairs.

Q. Did you have any talk with him? A. Yes, sir.

10 Q. And what did he say to you? A. I asked him to put gas in my bed room. There wasn't any gas in my bed room. And he says, "Whatever is to be done, you will have to tell my daughter. She takes the rent, and you will have to tell her everything. Whatever she says, I will do for you."

The Court: And did you pay the rent to the daughter?

20 The Witness: I paid the rent to the daughter; yes, sir.

The Court: By cash?

The Witness: Yes, sir. Every day, on the first.

The Court: Did you get receipts for it?

The Witness: Yes, sir.

The Court: In whose handwriting were the receipts?

The Witness: In my husband's name, but I brought her the rent.

30 The Court: No. Who signed the receipts?

The Witness: Miss Perretti.

The Court: In her own name?

The Witness: No, sir. In Mrs. Teresa Bergamo, or Mr. Bergamo, I don't know, but I have some of the receipts. First, I got Mrs. and after I had started action, I got Miss, so I don't know who done it, but I got it through Miss Perretti.

40 Q. But the daughter actually wrote out and signed the receipts? A. Yes, sir; the daughter wrote out at times in my presence the receipts.

*Catherine Barthelmess, direct.*

Q. Now, at the time you had this talk—

The Court: I think that makes her an agent.

Mr. Luce: I do not object.

The Court: Very well. Proceed.

Mr. Ward: I will put these receipts in evidence.

The Court: It is not necessary, unless you wish to enter objection now to her agency.

Q. Now, getting back to the time when you rented these premises from Miss Perretti,— A. Perretti.

Q. —when you rented the premises from Miss Perretti, when you went there in the evening, will you just tell us what conversation you had with Miss Perretti? A. Well, I had a sister there, she was living in the same place. But I went to Miss Perretti, and I knocked on the door, and I said, "Would you please let my husband see the floor?" So Miss Perretti took us upstairs and showed us. There was four rooms, a kitchen and a bedroom and a dining rom and a bedroom. So Miss Perretti,—there wasn't any gas in the bedroom. So I says to Miss Perretti, "There isn't any gas in the bedroom." She says, "Well, that will all be fixed." There was painting to be done, and paper come off the dining room, and just painted. So I decided I would take the floor. So I gave Miss Perretti a deposit. When I went outside, there was a little hall, and by that hall there was a window, and it was about that high (indicating); you had to climb through. And she pointed out; she says, "There is where you are to hang your clothes. There is your pole, and there is your hooks."

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30

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*Catherine Barthelmess, direct.*

10 Q. She pointed out what? A. She pointed out of the window. She says, "Here is where you are to go." I don't know if you call it a roof or you would call it the porch, but it was—I had to go out, not only I, but the neighbor on the same floor had to use that window.

Mr. Luce: I am not sure whether the witness is now saying what her own understanding is.

The Court: I am not, either. Just tell us, please, what you were saying, what instructions you received with respect to the use of the pulley line. Was there a pulley line there at that time?

20 The Witness: There wasn't a pulley. There was hooks, and there was a pole, and Miss Perretti pointed out the window, and says, "You are supposed to go there and hang your clothes." Anybody knows, I had to wash; I wasn't rich.

The Court: We are not concerned with what people may suppose, but only with what took place, please.

30 Q. Now, you say Miss Perretti pointed out a pole. What did she say about that? A. There was a window there, and the window was open, it was in August, and it was hot; and she said, "You are supposed to go out there and hang your clothes. There is the pole and there is the hooks." I had to supply my own line.

Q. Where was the pole?

The Court: Did she say you had to supply your own line?

40 The Witness: Yes, sir.

The Court: All right.

*Catherine Barthelmess, direct.*

Q. Whereabouts was the pole? A. In the back yard.

Q. Well, about how far from the back of the building? A. Well, about thirty feet, anyhow.

Q. And whereabouts was the hook she pointed out to you? A. On the back of the building, on the top window, there was hooks. 10

Q. Well, the hook, did she point out any particular hook that was yours? A. Well, that was the only hook was there. I only had the one line.

Q. Did she point out any hook? A. Well, yes; there was the hook on the house.

Q. And where was that hook on the house? A. Where was it?

Q. Yes. A. On the window, on the top part of the window, in the woodwork of the building. 20

Mr. Luce: Pardon me, Mr. Ward. Would you like to make use of that (handing photograph to counsel)?

Mr. Ward: I would be very glad to.

Q. Is this a picture that shows the— A. This is the house, yes.

Q. It does not show the pole, does it? A. No, sir; that doesn't show the pole.

Q. Out of which window were you supposed to come, or did she indicate to you you were to come? A. Well, here is the window, and through this I walked to here (indicating), and here is where my hooks was to hang the clothes on, from this hook out to the pole. 30

Q. Will you mark that, please, the window where that hook was that she pointed out to you?

A. Yes, sir. Shall I make a cross or just a mark?

Q. Why, make a "B." A. (Witness marks on photograph.) 40

*Catherine Barthelmess, direct.*

Mr. Ward: With your Honor's permission.

The Court: Very well.

Mr. Ward: And I will offer this in evidence.

10 The Court: Let it be received and marked.

(Photograph marked Exhibit P-1 in evidence.)

Q. Now, the apartment occupied by you, will you just draw a line over the rooms, or the rear of the rooms, occupied by you? A. Yes. Here (indicating), these rooms was mine (drawing lines on photograph).

20 Q. Now, do you remember the chimney there? A. Yes, sir.

Q. Was that chimney nearest or furthest away from the rooms occupied by you? A. That wasn't by me. This chimney was by me (indicating).

Q. The other chimney? A. Yes, sir.

Q. You are sure of that? A. Yes, sir. Wait, now; I will see.

30 Q. Now, look, and be sure; that is looking at the rear of the building. A. That is a—this is my side, and this Perretti's side (indicating). This is Mrs. Michaels there on the upper side of Miss Perretti, and Miss York, a sister of mine, was upstairs above Mrs. Michaels.

Q. Do you remember the roof? A. Yes, sir.

Q. Do you remember the gable? You know what I mean by gable? I mean the point in the roof. You see the point there (indicating)? A. Yes, sir. That was more on that side.

40 Q. That was on the other side; that was not over your apartment? A. No, sir; my apartment was a different side.

*Catherine Barthelmess, direct.*

Q. It was on the other side where you have marked the long line? A. Yes, sir. Then, the three back windows.

Q. With my pen. The window that you have mentioned, I believe, you said she indicated that you were to go through that window on the roof? 10  
A. Yes, sir.

Q. Into what did that open? A. Onto the roof, or a porch, whatever you would call it.

Q. And what was the other side of it, the inside of it? A. The hall was on the inside.

Q. Was that a common hallway or not? When I say common hallway, was that used by anyone else but you? A. Used by the people next door, as well as myself; yes, sir.

Q. And the pole is not shown in the picture, is it? A. No, sir. 20

Q. When did you go to live there? A. October the first, 1923.

Mr. Luce: October?

The Court: October first, 1923, is that right?

The Witness: Yes, sir. One of them days; I really won't say.

The Court: You only gave one date. 30

The Witness: Well, I went and I took the floor, and I won't say if it was the first, second, or what day. The rooms wasn't really empty; they had repairing to do; but I know from the receipts, from one first to the other first.

Q. Now, one moment, Mrs. Barthelmess. In court you must be accurate, or as accurate as you can,—with your Honor's permission.

Q. And you have said something about August, 40

*Catherine Barthelmess, direct.*

that you rented these rooms? A. August the first; yes, sir.

Q. How long after you rented the rooms did you go in? A. No. I rented the rooms three or four days before that.

10 Q. Three or four days? A. Yes, sir; before that. But I—

Q. Now, you have mentioned October, and October,— A. Oh, not October. August. No.

The Court: I understood you to say October.

Q. Was it October? A. No. August.

Q. So it was in August you went in, was it? A. August I went in, and November I had my accident. I was only three months in.

Q. Do you remember what day in August you went in? A. Well, I believe it was the first.

Q. Did you or not use this pole? A. Yes, sir.

Q. What did you do with reference to that? A. Well,—

Q. With reference to the pole and your washing? A. I had to use it all the time.

Q. What did you do before you used the pole? You didn't use it without any rope, did you? A. No, sir. My husband put the rope up.

Q. And to what did he attach the rope? A. To the hook on the pole, on the pulley.

Q. And the other end of it? A. There was a hook in the house, and he attached it.

Q. And was that or not the hook that Miss Perretti had shown you? A. Yes, sir.

Q. That was to be used? A. That was in the building, yes, sir.

Q. And was it the same hook— A. Yes, sir.

40 Q. —that Miss Perretti had shown you? A. Yes, sir.

*Catherine Barthelmess, direct.*

Q. Now, for how long a period of time did you use this, or for how long a time did you use this pole and this rope that was up there? A. Well, sometimes once and sometimes twice a week, for them three months and nineteen days.

Q. And was Miss Perretti ever present when you were using this porch or roof, whatever it may be, and the pole and the line? A. Why, of course, she knew it; yes, sir. 10

The Court: No. He asked you if she was ever present when you used it, not whether she knew it.

The Witness: Well, I won't say she was out on the porch when I used it.

The Court: Well, was she in the yard? 20

The Witness: Yes, sir. She was in the yard more than once; yes, sir.

Q. And did you ever see her out in the yard? A. Yes, sir; I saw her.

Q. When you were using this pole? A. Yes, I saw her, and everybody else was in the house.

Q. Did anyone else ever use that pole? A. Yes, sir; the neighbors next door used the same pole for washing.

Q. Well, the neighbors, by whom do you mean, the neighbors? A. Well, I had a sister lived next door, and she used the same pole and used the same window and used the same porch or roof, whatever you would call it. 30

The Court: And the same line?

The Witness: No, sir; her own line.

The Court: And what part of the window frame or house was the hook that she used?

The Witness: To her own side. 40

*Catherine Barthelmess, direct.*

The Court: Well, is it the same window?

The Witness: Not my window, no, sir; her own window.

10 The Court: Well, this window, I understood, near where this hook was, to which the pulley was attached, was a window that led from the hall to the roof?

The Witness: No, sir; she went—

The Court: I am wrong about that. It was from your own rooms, was it?

The Witness: Yes, sir.

The Court: And then the hook that she used was a hook attached to a window in her own rooms?

The Witness: Yes, sir.

20 The Court: I see.

The Witness: To keep the lines apart.

Q. Now Mrs. Barthelmess, will you please tell us,— A. Yes, sir.

&. —the window that you used that was indicated to you— A. Yes, sir.

Q. —by Miss Perretti, where was that window, into what did it open? A. It was in the hall.

Q. On the inside? A. Into a hall.

30 Q. You have just answered his Honor, into your own apartment. A. No, sir. I did not say into my own apartment.

Q. Well, you said it, whether you meant it or not.

The Court: That is what I was trying to find out, whether the window that you previously described was one leading from the hall to the roof or porch.

40 The Witness: This window we really used (indicating).

*Catherine Barthelmess, direct.*

The Court: So that the window that you used to go out on the roof—

The Witness: Yes, sir.

The Court: —was near which the pulley was attached, and it was the window that went from the roof to the hall? 10

The Witness: Yes, sir.

The Court: And not from the roof to your own room?

The Witness: No, sir. It was a hall.

The Court: Now, the pulley that your sister used was attached to the house near what window, the same window?

The Witness: No, sir; the opposite window, to keep the lines apart.

The Court: And that window, did that go into the hall, or did that go into her apartment? 20

The Witness: That goes into her apartment.

The Court: So the window you used did not go into your apartment?

The Witness: No, sir.

The Court: You had to go out of your apartment and into the hall? 30

The Witness: I had to go out; that was like a door; instead of a door, it was a window.

Q. And that window opened out upon the porch?

A. That window opened out upon the porch.

Q. And right near that window which was, as you say, like a door, was this hook? A. Yes, sir.

The Court: Well, how was it like a door?

The Witness: Well, when I went there, she showed me I was to go there to hang my clothes there. 40

*Catherine Barthelmess, direct.*

The Court: Was it any different window from the other windows?

The Witness: It was my windows in my room, but I never went out of that window.

10 The Court: No. I say, was this window any different—

The Witness: No, sir.

The Court: —from the other windows?

The Witness: No, sir.

The Court: Then why do you describe it as like a door?

The Witness: Because I had to go out there. That was all.

The Court: Only because it was used to go out?

20 The Witness: Yes, sir.

The Court: And not because it was any lower toward the—

The Witness: No, sir.

The Court: —floor?

The Witness: No, sir.

The Court: It was just the same?

The Witness: Yes, sir.

The Court: Two sashes in it?

30 The Witness: Yes, sir.

The Court: An upper and a lower sash?

The Witness: Yes, sir.

The Court: And you had to step up to get out?

The Witness: I really didn't have to step up; I just stepped out.

The Court: Well, how far from the floor was the sill of that window?

The Witness: About that high (indicating).

40

*Catherine Barthelmess, direct.*

The Court: Indicating about three feet from the floor?

The Witness: Yes, sir.

The Court: And then you had to step up?

The Witness: I had to step out with my foot; yes, sir. 10

The Court: Yes. Up and out?

The Witness: Well, not just really up.

The Court: Well, how did you step out of that window without stepping up?

The Witness: Yes, sir. With my foot.

The Court: And when you raised your foot, you raised it up?

The Witness: Yes, sir.

The Court: All right. 20

Q. Now, you have never seen this picture before today? A. No, sir.

Q. Have you? And you have marked a "B" there? A. That is my kitchen.

Q. That was your kitchen? A. And this was my kitchen, and this was my bedroom (indicating).

Q. Well, where was the window that you had to step out of? A. This was the hall window (indicating), and the woman next door had only two windows. 30

Q. Well now, you have never seen this picture before; it was just shown to you? A. No, sir.

Q. Where you have "B" and the long mark, that was over your—the two windows were over your kitchen, and one over your bedroom? A. This was my kitchen, and this was my bedroom (indicating).

Q. And the one to the right of the picture was 40

*Catherine Barthelmess, direct.*

over your bedroom? A. This one was my bedroom (indicating).

Q. To the right of the picture, that is, to the right? A. Yes, sir.

10 Q. And the others were over your kitchen? A. That was my kitchen; yes, sir.

Q. Now, you have indicated this room, or window, rather, as the window out of which you stepped? A. Yes, sir.

Q. Will you make an "X" on that? A. (Witness marks on photograph).

20 Q. You had three windows, did you? A. I have a bedroom, and I had one window in that bedroom; I have two windows in my kitchen. There was a hall window. And the woman next door had two windows.

Q. Now, just show us, if you will, where the window was you stepped out? A. This is the window (indicating).

The Court: Then this window marked "B," is what?

30 The Witness: That is my two kitchen windows, and then my bedroom window, and this is the window I went out to the hall, that is the hall, right there is the hall, your Honor.

The Court: And that picture does not show the hook, does it, Mrs.—

The Witness: No. It is up—about up there (indicating). I really don't see the hook.

The Court: Well, what are you looking at your kitchen window for, for the hook?

40 The Witness: Because there is where it was, through my kitchen window.

Q. So that you went out through the hall window

*Catherine Barthelmess, direct.*

and then went by your kitchen? A. I walked there, yes, sir; to my kitchen window, and hung my clothes on my line.

The Court: Then the hook wasn't at the hall window at all, was it?

10

The Witness: No, sir.

The Court: All right.

The Witness: No. This hook was at the hall window (indicating).

The Court: Very well.

Q. And the hall window through which you went is marked "X," and the hook was at the window marked "B"? A. Yes, sir.

The Court: And then the daughter of the landlord took you to the hall window, and showed you the hook at your kitchen window?

20

The Witness: No, no. She just took me to the window, to the window—

The Court: Which window?

The Witness: To the hall window.

The Court: Yes.

The Witness: And she pointed out, and she says, "There is the pole, and there is your hooks," and—and the hooks was onto the window.

30

The Court: And she pointed then to the hook that was at your kitchen window?

The Witness: Yes, sir. There was a hook to my kitchen window. I didn't know it then, but—

Mr. Ward: Please listen to the questions, what his Honor asks you. Now, listen before answering, please, Madam.

40

The Court: Before, you indicated that the

*Catherine Barthelmess, direct.*

hook was at the hall window. That is why we were mixed up; at least, I was.

Mr. Ward: So was I, sir.

The Court: Now, I understand that the hook was at your kitchen window?

10

The Witness: Yes, sir.

The Court: And that the only use of the hall window that you have indicated—

The Witness: Yes, sir; was to go out.

The Court: —was to go out to the kitchen window?

The Witness: Yes, sir.

The Court: From which you manipulated your pulley?

The Witness: Yes, sir.

20

The Court: That is correct?

The Witness: Yes, sir.

The Court: And the landlady explained that to you?

The Witness: Yes, sir.

The Court: And showed you this window in the hall out of which you must go to get to your line?

The Witness: Yes, sir.

30

The Court: Is that correct?

The Witness: Yes, sir.

The Court: All right.

Q. Now, the position of the hook in the building, by the window, where was that? A. On the top window, there was two windows.

Q. The top window? What do you mean by the top window? A. What do you mean?

Q. Well, the top window,— A. There is two windows; two panes to a window.

40

Q. Two sashes, is that right? A. Two sashes to a window.

*Catherine Barthelmess, direct.*

Q. Yes. A. And if I was to go from the inside, I couldn't do it; I really had to go there.

Q. Could you reach that hook— A. No, sir.

Q. —from your kitchen window? A. No, sir.

Q. By standing on the inside? A. No, sir; I could not.

10

Q. And in order to use that hook that was indicated to you by Miss Perretti, did you or not have to go outside? A. I had to go outside.

Q. And it was on the top of the window that you have marked in the picture, "B"? A. Yes, sir; on the top of the two sashes, whatever you would call it.

Q. I believe you have said that you used that right along during the period of time, or during the time that you lived there? A. Yes, sir; I used that one line; yes, sir.

20

Q. Now, on the 19th of November, 1923, did you do any washing? A. Yes, sir. It was a Monday, and I always washed on Monday.

The Court: Except when it rained?

The Witness: Except when it rained; yes, sir.

The Court: And did it not rain that Monday?

30

The Witness: No.

The Court: Is that right?

The Witness: Yes, sir.

The Court: All right.

Q. Now, what kind of surface was there on this roof or porch, or whatever you might call it? A. Tar paper.

Q. And that you used in putting out your wash, or upon which you walked in putting out your wash? A. It was a tar paper porch.

40

*Catherine Barthelmess, direct.*

Q. And on the 19th of November, in the morning, did you do any washing? A. Yes, sir; I washed in the morning.

Q. Did you put any clothes out? A. Yes, sir; I put all the clothes out what I had finished. Then  
10 I had to—

Q. Then did you do anything else? A. Why, I washed my clothes, and I hung them out. I had a line full, and I finished the rest, and I had some more to hang, but at dinner time I pulled them in and put the others out, when my accident was.

Q. So at noon time you started to take in some clothes? A. Yes, sir.

Q. And you started to put out other clothes? A. Yes, sir.

Q. And when you were putting out these other  
20 clothes, what was your position on the roof? A. Well, I was about five or six or seven feet, I really don't know, from—

Q. From what? A. From the end.

Q. When you say the end, what do you mean? A. The end of the porch, to hang my clothes up.

Q. Do you mean the edge or the end? A. The edge.

Q. The edge. And along the edge of this porch  
30 or roof, whatever you might term it, what was there, if anything? A. What was there? There wasn't anything, only the gutter.

Q. There was a gutter up there? A. Yes, sir.

Q. And how high was that gutter? A. Well, here is the gutter, in between there (indicating).

Q. And how high was that gutter? A. Well, it wasn't much higher than the roof.

Q. Well, about how much higher than the surface upon which you stood was it? A. Well, I  
40 don't believe it was much.

*Catherine Barthelmess, direct.*

Q. Well, tell us, Mrs.— A. Only about like that (indicating).

The Court: Indicating about three inches?

The Witness: Three inches.

10

Q. And you were standing, you say,—I think you said six or seven feet from the edge? A. Five or six, anyhow; yes, sir.

Q. From what edge? Can you show us on the picture? A. Yes, sir. From this edge (indicating).

Q. And you are indicating just below the "B"? A. Yes, sir.

Q. Five or six feet in toward your window? A. Window; yes, sir.

Q. About how wide was this porch or roof, whatever you might term it? How far was it from the edge to the building? A. Well, there was—

20

Q. Where your apartment was? A. It was about eighteen—seventeen feet. They had a room downstairs.

Q. And while you were standing—

Mr. Ward: Have you a map there? We might use that.

Mr. Luce: No, I have not.

30

Q. While you were standing at noon time, putting out your second installment, or putting out the— A. Finishing.

Q. —wash— A. Yes, sir.

Q. —the second part of your wash, what happened? A. Well, I pulled them all in, and I put the next bunch out, and I was nearly all finished, when—I don't know, like a gush, or something, I don't know, something.

Q. Like a what? A. A tug, or something, some-

40

*Catherine Barthelmess, direct.*

thing happened to me, and all I know, I was over. But if there was any railing, or any way, I would have been saved.

Mr. Luce: Well,—

10 The Court: Strike that out.

Q. There was a tug, you say, or a gush? A. Or something.

Q. And what was the effect of that tug upon you? What happened when that tug came? A. I don't know. I was pulled down. I don't know if the line—

Q. Well, were you or not pulled towards the edge? A. I was pulled off to the edge, and to the basement.

20 Q. Did you have time to let go? A. No, sir; it went so quick, I couldn't let go; or whatever it was, I don't know.

*By the Court:*

Q. Well, what did you have hold of? A. I really don't know. I was pulling the line.

Q. Well, then, if you were pulling the line, you had ahold of the line, didn't you? A. I suppose I did.

30 Q. All right. A. I was finishing up the wash.

*By Mr. Ward:*

Q. And you fell over? A. Yes, sir. I must have fell over.

Q. What caused you to fall over there? A. I don't know. Wind, or something; pulled, or something.

40 Q. And there was at that time no railing, or any protection of any kind? A. No, sir; no railing or no protection; no, sir.

*Catherine Barthelmess, direct.*

Q. And when you fell, where did you fall? A. Well, I didn't know, then, I fell down; all I knew, I fell.

Q. Well, I only want to know what you know now. A. To the basement.

Q. Not from what you heard, but from what you saw. A. No. I fell down a story into the basement, one story, and then down into the basement. 10

Q. Were you conscious? A. Yes, sir.

Q. When you fell into the basement, what happened? A. They says, "Get up"; I said, "I can't."

Q. Well, something was said, anyway; and you couldn't get up? A. No, sir.

Q. Why not? A. I don't know. I couldn't get up. I had injuries. Something hurted me in my leg. 20

Q. Were you in pain at all? A. Yes, sir; severe pain. I didn't know what was the matter, but I knew I was hurted in my leg. They says, "Get up." I said, "I can't get up." I called for help, and the people next door come out; and there was a young man down there, and he saw me when I came down, and he was the first to my aid. He says, "What is the matter?" I said, "I don't know."

Q. Not what he said, Madam, please. A. He says, "Get up." I said, "I can't." 30

The Court: No, no. It is not proper for you to give conversations. We cannot allow that. But you had a conversation with him. He came to your aid, didn't he?

The Witness: He came to my aid, and he got other aid.

The Court: Then what happened?

The Witness: He got other aid.

The Court: And then what happened? 40

The Witness: They carried me into a

*Catherine Barthelmess, direct.*

house downstairs, to Mrs. Michaels. They called for my husband, and they called for the doctor. So the doctor said, "A broken leg."

10 Q. Well, your leg was broken, was it? A. Yes, sir.

Q. And where were you taken? A. To the General—to the Hackensack Hospital.

*By the Court:*

Q. At the same time? A. By Doctor Cooper.

Q. Very soon after that the doctor came, and you were taken to the hospital, were you? A. Yes, sir. They sent for the ambulance, and sent for my husband; and he says there was nothing to be done.

20

Q. Well, do not tell us what was said, please. You were sent to the hospital? A. Yes, sir. Hackensack Hospital.

*By Mr. Ward:*

Q. Were you suffering any pain? A. Yes, sir. All the while, I suffered, and suffer yet.

Q. And you were taken to the hospital? A. Yes, sir.

30

Q. And attended by whom? A. Doctor Cooper.

Q. Anybody else? A. Well, when Doctor Cooper had me four days, there was nothing to be done; he said he couldn't handle the case.

Q. Now, please,—not what he said. A. Yes, sir. They got another doctor. Doctor Cooper couldn't handle the case, and they got another doctor.

Q. And what was done to your leg? A. Well, when I come to, I was in—

40 Q. When you came to? Were you unconscious at any time? A. No. They gave me ether, and they fixed my leg up.

*Catherine Barthelmess, direct.*

Q. Well, there was four days of that; and then something was done, and you were given ether?

A. Not four days, no; Doctor Cooper give me ether as soon as I went to the hospital, about two o'clock that afternoon. I had an X-ray taken. Doctor Cooper put me in the cast, and I was four days, and they got an X-ray, and the leg laid there just like it wasn't nothing done with it. So Doctor Cooper couldn't do anything for me any more.

10

Q. Well, four days after, you came out of the ether, you say? A. No. Not four days. I came out of the ether that afternoon.

Q. Well, there was something that happened four days after, Mrs. Barthelmess? A. Yes, sir. Doctor Cooper got another doctor.

Q. Now, what was done then? A. Well, I don't know. They took me upstairs and they gave me ether, and they set my leg. They said—

20

The Court: That is the second time they gave you ether?

The Witness: That is the second time; yes, sir.

The Court: All right.

Q. And then, of course, you were taken back to your rooms? A. I was in a private room; but I couldn't afford it. He said I ought to stay a long time. And then I was taken to the ward.

30

Q. Well, what happened to you in the ward? What was your position? What happened to your leg? A. Well, when I come to, there was a bed with bars on the top, and they had pins in here (indicating), and in that position, with this foot up like that to pull the bone and set it into its place.

Q. Your leg was up, was it? A. Up like this (indicating); yes, sir.

40

*Catherine Barthelmess, direct.*

Q. And how long did it remain up in that position? A. Three and a half weeks.

10 Q. Then what was done? A. Then they took X-rays again to see how everything was. Then they took the things off; they took them weights off and watched how it was. They put it in some kind of a board in this form (indicating), and to set the leg right. That form didn't go. Then they put it on a board, straight like this (indicating), and then, in that position, I laid for about two months.

Q. So, first, with the pins on, with your leg up in the air, you were three weeks? A. Three and a half weeks; yes, sir.

20 Q. And then, afterwards, there was something else done with the board, and you remained in that condition or position for two months? A. Yes, sir.

Q. In the hospital? A. Yes, sir.

30 Q. And then, after that, what happened? A. Well, I was there for that while, and they took pictures and watched it all the time. Then they went and they took the board off. I think I was—they took the board off, and they bandaged it up good and tight. And, in the end, they left me to go out with crutches. First, they put me in the wheel chair to get—to put my leg—that it could go down. Then they took me in—they says I ought to get crutches. And all total, I was there just five months.

Q. You were in the hospital five months? A. Yes, sir. And I walked with the crutches.

Q. Did you pay the hospital bill? A. Yes, sir.

Q. How much was it? A. \$225.

40 Q. And Doctor Fink, I believe you have not paid? A. No, sir. Doctor Fink.

*Catherine Barthelmess, direct.*

Q. Doctor Cooper, have you paid him? A. I paid him \$20; but I owe him four more dollars; as I get it, I pay him.

Q. And you went out on crutches then, did you?  
A. Well, part, I was on the—

Q. Did you, or not? A. Yes, sir. 10

Q. Get out on crutches? A. Yes, sir. I went out of the hospital with crutches.

Q. Where did you go? A. I went home.

Q. To Carlstadt? A. Carlstadt. 518 Central Avenue; yes, sir.

Q. No other place? A. No. The same place.

Q. And after you got home, were you able to do your housework? A. No, sir.

Q. Before this accident, aside from doing your washing and doing your housework, what was your health? A. Number one-A; I never had a doctor, unless I had my children. 20

Q. Unless you had your children? A. Yes, sir. I never was sick; no, sir.

Q. And were you active, or not? A. Yes, sir. I always was active.

Q. And I think you said after you got out of the hospital, you used crutches? A. I used crutches, and then, after that, I used a cane.

Q. Well, while you were using crutches, were you able to do your housework? A. No, sir. 30

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

Q. Why not? A. I was on the crutches. I couldn't. I was in pain all the time.

Q. Was that because of your leg, or not? A. Because of my leg; yes, sir.

Q. And did you get anyone in? A. I had a woman to come on Tuesday to wash, and another woman used to come and clean.

Q. Well, first, did you have anyone to do the work, your general work? A. Well, the five 40

*Catherine Barthelmess, direct.*

months I was in the hospital, I paid a woman's rent, \$20 a month, and I had to feed her. I paid her \$5, easy, to eat in my house too, besides paying her rent, because she had an apartment of her own.

10 Q. You paid her \$20 a month, as I understand it? A. I paid her to pay her rent, because she had an apartment.

Q. And then you paid her what she ate? A. What she ate; yes, sir.

Q. And the rent was \$20 a month? A. Yes, sir.

Q. Have you any idea what the feeding cost, in a general way? A. Well, it cost me about a hundred, easy, for five months.

Q. For five months? A. Yes, sir.

20

The Court: You mean \$100. just for food?

The Witness: Yes, sir. For five months.

Q. For this woman? A. Yes, sir.

The Court: And after that, another hundred dollars for her rent?

The Witness: Yes. I paid her rent, because she left her rooms idle.

30 Q. And after you got off of the crutches, could you get along all right? A. No, I couldn't. I had to go with the cane to take weight off that side.

Q. How long did you go with the cane? A. Well, at times I would take it, and at times, I didn't; but it was a year, easy, before I ever got rid of either one of the two, the cane and the crutches.

40 Q. You have talked about the five months when you employed this woman. Now, after you got out of the hospital, after the five months, did you get anyone to help you do the work? A. I had a woman to come on Tuesdays to wash and iron, and a woman to come on Thursdays to clean.

*Catherine Barthelmess, direct.*

Q. How much did you pay them? A. Well, they really didn't take anything. They was a relation of mine.

Q. They were relations of yours? A. Yes, sir.

Q. Not Mrs. York? A. No, sir; not Mrs. York.

Q. Is there any shortening in your leg? A. Yes, sir. 10

Q. Will you just stand down, please, or stand where the jury can see you? A. (The witness leaves the stand.)

Q. Just, first, please, walk here so that they may see. A. (The witness walks before the jury.)

Q. Now, if you can do it, will you stand right here? A. Yes, sir.

Q. And just stand on your good leg, so that your good leg is straight. A. I really can't. I can't put the balance on that foot. 20

Q. Well, when you stand on your good leg,—  
A. This does not touch.

Q. The bad leg does not touch? A. No, sir.

Q. The bad leg is which side? A. This side (indicating.)

Q. The right side? A. Yes, sir.

Q. Go back on the stand, if you will, please. A. (The witness resumes the stand). 30

Q. Do you suffer any pain, now, Mrs. Barthelmess? A. Well, I am never done suffering with the pain. I cannot bend. I cannot do nothing with it. When I—as soon as I bend, it hurts me, and I have to stop doing it.

The Court: Bending it where?

The Witness: In here (indicating).

The Court: Where do you mean, at the knee?

The Witness: Yes, sir. 40

*Catherine Barthelmess, direct.*

The Court: All right. Where was the break?

The Witness: Right there (indicating).

The Court: At the knee?

The Witness: Yes, sir.

10

The Court: It wasn't in the hip?

The Witness: No, sir. But it went up to there, or something. I don't know. But it is right there, the pains is there, and everything.

The Court: Just above the knee?

The Witness: Just about that much above the knee (indicating).

The Court: Indicating two inches above the knee, gentlemen.

20

Q. You can bend it all right? A. I can bend it, but I can't stand it to go on the floor much with it; as soon as I walk, I get tired.

Q. And that pain, you say, you suffer all the time? A. In my knee; yes, sir.

*By the Court:*

Q. You spoke of another doctor; Doctor Cooper and another doctor? A. Well, Doctor Cooper got another doctor.

30

Q. What is that other doctor's name? A. Doctor Knapp.

Q. And what did you pay him, if anything? A. Well, I really didn't pay him.

Q. He is the hospital doctor? A. I believe he is. Doctor Knapp got another specialist.

Q. So the only money you paid was \$225 for the hospital, and \$24 to Doctor Cooper? A. And then the \$200 I paid for—

40

Q. I know. But I mean, for the medical? A. Yes, sir.

*Catherine Barthelmess, cross.*

Q. Doctor Knapp, you paid nothing? A. No, sir.

Q. All right. A. But I suppose—

Q. Did you buy a wheel chair, or was that wheel chair the hospital's? A. No, sir; that was the hospital's chair.

Q. Very well.

10

*By Mr. Ward:*

Q. You also mentioned some other doctor. Doctor Fink? A. Well, Doctor Knapp and Doctor Fink. I believe Doctor Fink is a specialist on broken legs.

Q. But you did not pay him anything, either? A. No.

Mr. Ward: That is all.

20

*Cross examination by Mr. Luce:*

Q. As I understand it, you went into occupancy of this tenement or apartment on or about the first of August, 1923? A. Yes, sir.

Q. And are you living there, still? A. No, sir.

Q. How long did you continue to occupy it? A. Well, I occupied them rooms two years.

Q. And when did you cease to occupy them? A. August the first, I occupied them, 1923.

30

The Court: Until when?

The Witness: Two years later.

Q. August the first, 1925, then? A. No. Not August. I really don't know what month. November, I believe, November.

Q. November, 1925? A. 1925, I believe it was; yes, sir. And then they gave me a dispossess to go out.

Q. And this injury took place November 19, 1923? A. 1923; yes, sir.

40

*Catherine Barthelmess, cross.*

Q. Now, will you describe, as clearly as you can, what the apartment that you occupied consisted of? A. I had four rooms.

The Court: What were they?

10 The Witness: Two in the back, and two in the front.

The Court: Well, what were they used for?

The Witness: A kitchen and a bed room and a dining room and a bedroom.

The Court: Two bedrooms, a dining room and a kitchen?

The Witness: Yes, sir; four rooms.

20 Q. Now, what were the two rooms that were at the rear of the house? A. A kitchen and a bedroom.

Q. Yes. And which was nearest this hall window that you have spoken of, the kitchen or the bedroom? A. The kitchen.

Q. And there was one window, I understand, in the bedroom, then, on the rear of the house? A. In the bedroom; yes, sir.

Q. And in the kitchen on the rear of the house, there were two? A. Two windows.

30 Q. Windows? A. Yes, sir.

Q. Then came the hall window? A. Yes, sir.

Q. And you say you made the bargain under which you occupied with whom? A. Miss Perretti.

Q. Mrs. Perretti? A. Mrs. Perretti; yes, sir.

Q. Miss or Mrs.? A. M-r-s.

Q. Mrs. I understood you to say that at the time you rented the premises from her and while they were being shown to you by her, she took you to this hall window? A. Yes, sir.

40 Q. And pointed out this hook? A. Yes, sir.

*Catherine Barthelmess, cross.*

Q. And pointed out the pole in the rear of the yard? A. Yes, sir.

Q. And said, "That is where you hang your clothes"? A. Yes, sir.

Q. Now, is that exactly what she said? A. Yes, sir. 10

Q. Did she say anything else but that? A. No. She showed me my rooms first.

Q. Yes. But did she say anything else but just simply that "That is where you hang your clothes"?

A. No. She says I had to go out there to hang my clothes.

Q. You are sure she said that to you? A. Yes, sir.

Q. Indicating, by there— A. Out through the window. 20

Q. Did she point to the roof? A. Yes, sir. Out through that window to the roof. There is where I had to go to hang my clothes.

Q. Well, you say, there is where you had to go? A. No. She pointed out of the window.

Q. That is what I wanted to know. She pointed to that roof, did she? A. Yes, sir.

Q. Out of the hall window? A. Yes, sir.

Q. And said, "That is where you go to hang your clothes"? A. Yes, sir. 30

Q. Now, the hook that you speak of, that was on the side of the kitchen window, was it not? A. What do you mean, the side.

Q. Well, the window has a— A. Yes, sir.

Q. —top and a bottom and two sides? A. Yes, sir.

Q. And the hook— A. Was on one side.

Q. On one side of the window? A. Yes, sir.

Q. Which side? A. That side (indicating).

Q. Toward the hall, or toward the bedroom? A. Toward the bed room; yes, sir. 40

*Catherine Barthelmess, cross.*

Q. And it was about how far up that side of that window? A. Well, quite high.

Q. Well,— A. It was to the top sash.

Q. About the middle of the sash? A. No, sir. The top part of the middle window; there is two  
10 sashes.

Q. It was above the middle of that sash, was it?

A. Yes, sir.

Q. How how far above the middle of that sash, was it? A. If I stood like that, I had to reach like that to get that, to get the rope (indicating).

The Court: Standing where?

The Witness: If I stood on the roof or the porch, whatever you call it, the line was this high, and the hook was that high (indicating), and then when you put it there,  
20 you had to reach like that; it wasn't down here (indicating).

Q. If you stood on the roof, the hook wasn't too high for you? A. No. The hook wasn't too high.

Mr. Ward: May I have it indicated that she stood erect, with her hand extended?

A. (Continuing.) I had to do this to reach the  
30 line; it wasn't down here (indicating).

Q. If you stood on the roof, standing erect, you had to reach your hand up to get to the hook, did you? A. Not the hook; the line.

Q. To the line? A. Yes, sir.

Q. And the hook was even above that? A. The hook couldn't be even; it wasn't even.

The Court: No. He says, the hook was even above the line, was it?

The Witness: The hook was even above  
40 the line.

*Catherine Barthelmess, cross.*

Q. That is, the line sagged a little from the hook, didn't it? A. Yes, sir.

The Court: Could you reach the hook from the roof, standing on the roof?

The Witness: Could I reach it? Of course, I could reach the hook. 10

The Court: You could hook your pulley with the line in it over the hook, could you not?

The Witness: Oh, yes, sir.

The Court: Without standing on anything?

The Witness: Yes, sir; without standing on anything.

Q. That is, standing on the roof? A. Only on— 20

Q. You could reach up higher and reach the pulley? A. Yes, sir.

Q. Readily? A. Yes, sir.

Q. Readily. How tall are you, Mrs.— A. I do not know.

Q. —Barthelmess? A. I believe I am five feet,—

Q. Five feet tall? A. Five feet, six inches, I believe. Something like that. I am five feet, four, anyhow.

Q. Well, will you stand— A. No. Then I am five feet. 30

Q. —down here, please? A. I never measured myself. You can see how high I am.

Q. (Counsel measures the height of the witness.)

The Court: Do not do it to the top of her hat.

Q. Will you hold your hand up about that high (indicating)? A. Just like that (indicating)?

Q. Yes. Was it about that distance that you would reach to that hook? A. Yes, sir. 40

*Catherine Barthelmess, cross.*

Mr. Luce: I will have that measured.

The Court: Very well.

Mr. Luce (measuring height of the witness on the wall): Five feet, ten, isn't it?

10 The Court: It is more than that. How tall are you, Mr. Ward?

Mr. Ward: About five feet, nine.

The Court: It is six feet and more. You better measure it again.

Mr. Luce (again measures the height of the witness): 70 inches and a half, which would be five feet, ten inches and a half.

The Court: Does the measurement extend to the end of the tape?

20 Mr. Ward: Yes, sir. I beg your pardon. I didn't—I held it at the end of the tape.

Mr. Luce: I would like to have it appear in the stenographer's book—

Mr. Ward: No, sir. There is about two inches before the measurement begins.

Mr. Luce: Then, you did not hold it right.

Mr. Ward: I held it right, but I didn't hold it—

Mr. Luce: Well, let us get it exact.

The Court: Now, measure it again.

30 Mr. Luce (measuring): Seventy-two inches; just six feet.

The Witness: Could I say something?

Mr. Luce: I would like to have it appear on the stenographer's minutes, by consent of counsel,—

The Witness: Could I say something?

Mr. Luce: —that the distance reached by the witness proves to be six feet.

40 The Court: Correct. Now, you may speak.

*Catherine Barthelmess, cross.*

The Witness: You know, after my accident, there was another hook. He might be referring to that.

The Court: Well, we are talking about the hook on which this pulley line was at the time of the accident.

10

The Witness: Yes, sir.

The Court: Six feet from the roof.

The Witness: All right.

The Court: Proceed.

Q. Now, how long was it after your accident before you got back to your home? A. I was five months in the Hackensack Hospital.

Q. That would be in April of 1924? A. Yes, sir.

Q. And after that time, it was some time, as I understand it, before you could do work like washing? A. Yes, sir.

20

Q. But after a while, did you then do washing? A. Yes, sir; quite a while after.

Q. Yes. And what did you use? Where did you hang your washing out, then? A. I had to wash every day to hang out, then.

Q. Where did you hang it out, then? A. From the bottom window of my own kitchen.

Q. Did you use a line running from that window to this pole in the rear of the yard there? A. Yes, sir; from my own; yes, sir.

30

Q. And let me get that clearly in my mind. As I understand it, from this pole, on this pole at the rear of the yard, there was what you call a pulley? A. A hook was there.

Q. Well, a hook? A. (Witness nods head in the affirmative.)

Q. And then the hook at the other end. Now then, between those two hooks there was a line which ran through a pulley, didn't it? A. Yes, sir.

40

*Catherine Barthelmess, cross.*

Q. It was an endless line, you pulled it in? A. Yes, sir.

Q. And it went back and forth? A. Yes, sir.

Q. So that there was a pulley at either end? A. Yes, sir.

10 Q. Through which the line ran? A. Yes, sir.

Q. That was the idea of the operation. And to operate the line, you would normally—perhaps, you do not understand what I mean,—but normally, you would ordinarily stand and pull the line in to you? A. Yes, sir; pull it in, and pull it out.

Q. And put your clothes on? A. And push it out.

Q. And then push it out? A. Yes, sir.

Q. Pull a new piece in, and so on? A. Yes, sir.

20 Q. Now, after you went back from this accident, you did that, after a while, you did that sort of thing, standing inside of your kitchen window, did you not? A. Well, yes; but I only could put two or three pieces out every day.

Q. Very good. But after you got back home from this accident, you never attempted to hang clothes out on the roof again, did you? A. No, sir.

30 Q. And for months you did continue to do your washing and to hang them out on this line, standing inside of your kitchen window?

Mr. Ward: I object.

Q. That is right, is it?

40 Mr. Ward: I object on the ground it is not cross examination as to what she did afterwards. If she had the right to go where she went and was directed to go where she went at the time of the accident and prior to the accident, it seems to me this is not proper cross examination.

*Catherine Barthelmess, cross.*

The Court: It may be relevant with respect to what she did before the accident, and why she did it before the accident. I will allow it on that theory.

Q. (Question read.) A. No, sir. I never went on the roof again. 10

Q. Now, when you subsequently hung clothes there, didn't you use this same hook that was there before? A. No, sir. I couldn't use that same hook.

The Court: "I couldn't use that same hook"?

The Witness: No, sir.

Q. How far did you say it was from your kitchen window to the rear of this roof? A. About eighteen or seventeen feet; something like that. 20

Q. And it had a tar cover, did it? A. Yes, sir.

Q. A tar paper cover? A. Tar paper; yes, sir.

Q. Did the roof have a slope to it, a slant to it? A. Yes, sir; is that tight.

The Court: No. A slant?

The Witness: No.

The Court: Was it perfectly level, or did it slant toward the gutter or toward the house? 30

The Witness: Well, it—as soon as the clothes got on, it sloped down.

The Court: No. The roof would not change its position because of the clothes.

The Witness: No. The roof didn't change its position; no, sir.

The Court: Well, was it flat?

The Witness: Yes, sir.

The Court: Perfectly flat? 40

*Catherine Barthelmess, cross.*

The Witness: Over to the edge where the gutter was, it wasn't quite as flat as the others; there was a gutter there to let the water go.

10 The Court: Yes. I understand. But how did the water get to the gutter?

The Witness: It went down the roof.

The Court: If it was flat, didn't some of it go toward the house?

The Witness: No, sir; it must have been a slope or something to it.

The Court: Well, that is what we are asking, was there a slope toward the gutter?

20 Q. It was higher close up to the house than it was down towards the edge? A. It must have been, or it wouldn't have run.

Q. Well, it was, wasn't it? A. I suppose it must have been.

Q. You saw it, didn't you? A. There wasn't much of a slope. There was a slight slope.

The Court: "There was a slight slope." Is that your answer?

The Witness: Yes, sir.

30 Q. Now, you say that at the time you fell over the edge of this roof, you were standing how far from the edge? A. About 6 feet.

Q. And that was six feet from the rear edge? A. That was from that part of the roof.

Q. Yes. From the rear edge?

The Court: From the edge?

Q. You fell over the rear edge of the roof? A. I fell over the edge of the roof; yes, sir.

40 Q. At the rear? A. Yes, sir.

Q. So that you were standing at that time some-

*Catherine Barthelmess, cross.*

thing like 12 feet away from the wall of the house?

A. Yes, sir; I had to, or drag—

Q. Why did you have to stand that far from the house? A. The clothes would go onto the roof and get all dirty again.

Q. Would that be the reason? A. Yes, sir; that is the reason I had to go on the roof, or otherwise, I suppose— 10

Q. Now, you have testified already that this line upon which you hung your clothes ran from this hook which was six feet above the level of the roof at the wall of the house, and that the line ran without much sag to the pole in the rear? A. Yes.

Q. That the roof sloped from the wall of the house towards its rear by what you call a slight slope, so that it was at least six feet from the roof up to the line? A. Yes, sir. 20

Q. Wasn't that enough room for the clothes to clear? A. No, sir. They couldn't—

Q. Well, was there any less room close to, than far down to the edge? A. No. But as more clothes goes on, the line got slacker, and they would go onto the roof.

Q. You saw, of course, that there was no rail to that roof? A. Yes, sir. 30

Q. You never asked to have any rail put there? A. Well, I wasn't there long enough. I just went—

Q. You did not ask, did you? A. No, sir.

Q. Now, isn't it true that you were told by Mr. Bergamo, or Mrs. Bergamo, either one or both of them, not to use that roof, to get off of it, to keep off of it? A. No, sir. I very seldom see them. Only on one occasion, and Mrs., I never seen, no time, I might say, before my accident. 40

Q. Who was it that you saw on the one occasion

*Catherine Barthelmess, cross.*

in which you were told that his daughter, Miss Perretti, was the one you should see about the gas pipe? A. Mr. Bergamo.

Q. That was Mrs. Bergamo? A. Mr. Bergamo.

10 Q. Mr. Bergamo. Was that the only time when you ever saw him? A. Well, before my accident, I wasn't home long enough. After, when I was there later on, I seen him.

The Court: No. Before the accident, was that the only time you ever saw—

The Witness: Yes, sir.

The Court: —Mr. Bergamo?

The Witness: Yes, sir. I never had dealings—

20 The Court: And you never saw Mrs. during that period?

The Witness: Mrs., I never seen her.

The Court: Before the accident?

The Witness: Never; no, sir.

The Court: Very well.

Q. Were you not told by Mrs. Perretti not to go on the roof? A. Mrs. Perretti? No, sir. She told me I was to go there to hang my clothes there.

30 The Court: And after that, did she ever tell you that you must not go on the roof?

The Witness: Well, I couldn't go on.

The Court: No. After she told you you must go on the roof, when you rented the rooms, between that time and the 14th of November, when you had your accident, did she ever have any conversation with you in the meantime?

The Witness: No, sir.

40 The Court: About going on the roof, or not going on the roof?

*Catherine Barthelmess, cross.*

The Witness: No, sir.

The Court: Very well.

Q. You say that your sister occupied an apartment on the same floor of the same house? A. Yes, sir.

10

Q. What is her name? A. Mrs. York.

Q. Mrs. York. She was living there at the time this accident happened? A. She lived there a year before that; yes, sir.

Q. A year before that? A. Yes, sir.

Q. Isn't it a fact, Mrs. Barthelmess, that it was your sister, Mrs. York, that showed you these rooms? A. She told me of them; she didn't show me them.

Q. She did not? A. She came to my house and told me there was a floor empty, yes, sir; but she didn't take me and show me the rooms; no, sir; and I didn't give her the money for my rooms.

20

Q. Did I understand you to say that your sister, Mrs. York, went out on this roof to hang out her clothes? A. Yes, sir.

Q. Did you ever see her do it? A. Yes, sir. She went out that same window as I did.

Q. I understood you to say that the line, the clothes line that you used on the day of the accident, that your husband put that up, got the line and put it up? A. Yes, sir.

30

Q. Is that right? A. Yes, sir.

Q. Now, after the accident, you do not know, I suppose, whether that line was broken or not? A. I didn't know until they told me.

Q. You wasn't in a condition to know? A. I was in no condition to know; no, sir. All I know, I had to get relief.

Mr. Ward: One moment.

40

*Catherine Barthelmess, cross.*

Q. You cannot tell us or, at least, I did not get a very clear idea, if you did undertake to do so, just how you happened to fall off of the roof. Were you leaning upon the line at the time? A. No, sir. Leaning? What do you mean, leaning?

10 Q. Well, were you holding on the line and balancing yourself with it? A. No, sir; no, sir.

Q. But I understood you to say that a sudden gust, or something,— A. Something; yes, sir.

Q. —came, and gave you a sudden pull? A. Yes, sir.

Q. Didn't you? A. Yes, sir.

Q. Well, how could the gust have given you a sudden pull unless you had told of the line? A. Well, I told you I was hanging my clothes on the line.

20 Q. Yes. And didn't you have hold of the line? A. I suppose I did.

Q. Yes. A. Hanging your clothes, you got to touch the line; yes, sir.

Q. At the same time, were you standing up on tip-toe, reaching up? A. No, sir.

Q. You do not think you were? A. No, sir.

Q. Do you know whether you were or not? A. Well, surely, I know I was not.

30 Q. You think you were standing securely on your feet? A. Yes, sir.

Q. And yet, you were precipitated a distance of six feet you were standing from the edge, before you fell over the edge? A. Yes, sir; what done it, I don't know. All I know, that I was down.

Q. On the roof where you were, I suppose you had a clothes basket with the clothes in it? A. Yes, sir.

40 Q. And clothes pins, and things like that? A. Yes, sir.

*Catherine Barthelmess, cross.*

Q. And you do not remember whether you were standing up at the time or stooping down, do you?

A. Well, I really—I must have been standing up, surely, hanging the clothes on my line.

Q. You say you must have been; but do you remember? A. Why, of course, I was hanging the clothes on my line. 10

Q. You were hanging up some articles of clothes? A. Yes, sir.

Q. That is, you had stooped down and got this article out of the basket and a clothes pin in one hand? A. Yes, sir.

Q. And this hand holding up on the line, and put the clothes pin there? A. Yes, sir.

Q. And that line, as you say, was about six feet above the roof where you were standing? A. Well, as the clothes go on it, it was less than six feet. 20

Q. Well, how much would it sag there? A. Well, it would sag a foot, easy.

Q. That would make it five feet? A. Yes, sir.

Q. So that the line would be about to here? A. Yes, sir.

Q. The line would sag more, of course, out to the edge of the roof? A. Yes, surely.

Q. Than it would close in to the pulley? A. Yes, sir; surely. 30

Q. Close in to the pulley, it would be six feet from the roof, wouldn't it? A. Yes, sir.

Q. And out toward the edge of the roof, it would have been considerably lower? A. That is why you had to go out there.

Q. You have said a while ago that you went out toward the edge of the roof because there was some clothes that would drag on the roof? A. If I went to window, all of them would sag onto the roof.

Q. Well, now,— A. So I had to go— 40

*Catherine Barthelmess, cross.*

Q. —what articles of clothing did you have that would sag, that would hang down more than five feet? A. Well, union suits and overalls.

Q. Would they hang down more than five feet? A. Well, I believe—yes, they would, too; as they are wet, they are all heavier than when they are dry. When they are dry, the line is more tighter, but as I put them out they were—

Q. Now, then, your husband had put that rope up, hadn't he? A. Yes, sir.

Q. And if the rope had been tighter, it would not have sagged so much, would it? A. What do you mean?

Q. I mean it would not have sagged so far down if the rope had been tighter? A. Well, it couldn't be tighter. It was tighter when I started; as the clothes went on, it sagged it.

Q. Do you know how high up this pole in the back of the yard was? A. How high?

Q. Yes. A. Well, it is a real wash line pole; how high I do not know.

Q. Do you know how high the hook on the pole was from the ground, do you? A. No, I do not; but it is high up.

30 The Court: Was it about level with the hook on your window?

The Witness: Yes, sir.

The Court: All right.

The Witness: No. I believe it was even higher than that; it was—

Q. Wasn't it a good deal higher than the hook on the window? A. Yes, I guess it was about six—oh, about five feet from the top.

40 Q. So that from the hook on the pole to the hook on the window, the line ran down hill, didn't it? A. Yes, sir.

*Howard M. Cooper, direct.*

Q. Perceptibly so? A. Why, of course. That didn't do me no good way out there, though.

Mr. Luce: I think that is all.

*Redirect examination by Mr. Ward:*

Q. You have stated you felt a clutch or a pull? 10  
A. Something.

Q. And then you went over? A. Yes, sir.

Q. Now, aside from the clutch or the pull, did you do anything such as stumbling or walking, to throw yourself off that roof? A. I really wouldn't say I did, and I wouldn't say I didn't. All I knew, that something—I don't know if it was a pull.

Q. What I mean, did you walk off the roof? A. No, sir.

Q. Or did you do anything to throw yourself off the roof? A. No, sir. 20

Q. Or precipitate yourself off the roof? A. No, sir.

Q. All you know, there was a clutch or a pull? A. That pulled me off.

Q. That pulled you off your feet, off the side of the roof? A. Yes, sir.

Mr. Ward: That is all.

The Witness: That would be nice, to walk off, wouldn't it? 30

The Court: That is all.

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HOWARD M. COOPER, sworn as a witness on behalf of the plaintiff, testified as follows:

*Direct examination by Mr. Ward:*

Q. Doctor, you are a practicing physician and surgeon of this State? A. Yes, I am.

Q. And you have been for how long? A. Sixteen years. 40

*Howard M. Cooper, direct.*

Mr. Luce: Qualified, the doctor.

Mr. Ward: I thought, for the purpose of the record, your Honor please, so that they might know—

Mr. Luce: Unless your Honor wishes any—

10 The Court: I do not wish it. He has been a practicing physician for sixteen years, he has said, and counsel admits his qualifications.

Q. You have specialized in surgery, I think? A. No, I have not.

Q. You have not? Do you know Mrs. Barthelmess, the plaintiff in this case? A. I do.

20 Q. And when did you first see her? A. Well, I do not recall. I have treated—I treated the family for some time before this accident happened.

Q. But you do recall having seen her? A. Oh, yes.

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

Q. Shortly thereafter? A. Yes, sir.

Q. And what was her condition at that time? A. She had a fracture of the right leg just above the knee.

30 Q. Can you indicate, please, to the Court and jury about where that fracture was? A. I should say, about as I remember—about that far above the knee (indicating).

Q. About three inches? A. Perhaps, about three inches.

Q. Where was she taken, Doctor? A. Hackensack Hospital.

Q. Were there any complications of any kind? A. Well, I turned her over to the ward service, and I had nothing more to do with it after that.

40 Q. Who was the ward surgeon? A. I believe

*Howard M. Cooper, cross.*

Doctor Fink and Doctor Knapp were on service at the time, or Doctor—

Q. Doctor Knapp and Doctor Fink? A. I believe Doctor Knapp, and Doctor Fink was called in consultation, I believe.

Q. And you turned her over after that? A. I had nothing more to do with the case. 10

Q. I see. Did you know the woman before the accident? A. Yes, sir.

Q. You had treated her, I believe? A. Yes, sir.

Q. Do you know whether or not she was a good, healthy, active woman? A. She appeared to be.

Mr. Ward: Cross examine.

*Cross examination by Mr. Luce:*

Q. Which leg was it that was injured, Doctor? 20

A. I believe it was her right leg.

Q. And can you describe what the injury was?

A. As I remember, it was the lower third of the shaft of the femur was rather badly shattered.

Q. The femur, as I understand it, is the bone which runs from the hip to the knee, is it? A. From the hip to the knee.

Q. And that was fractured in the lower third of it? A. Yes, sir. 30

Q. About how high above the knee cap? A. Well, I do not remember just the—I should say perhaps about two or three inches.

Q. Was the knee cap itself all right, and the knee joint? A. As far as I know.

Q. Yes. Was the break of such a kind that the leg could be set in a plaster cast as usual, or not?

A. No, sir.

Q. It had to be how treated? A. Special treatment, very special. 40

*Howard M. Cooper, cross.*

Mr. Ward: What was that last?

The Witness: Very special treatment.

Q. Yes. By putting the patient in bed, elevating the leg, and using tension; am I getting it about right? A. Yes, sir.

10

Q. To keep the leg straight while it is knitting? A. Yes, sir.

Q. After the operation was performed, did you examine the leg? A. No, sir.

Q. Have you since, at any time, examined it? A. No, sir.

The Court: Did you perform the operation, Doctor?

The Witness: I did not.

20

Q. You do not know, then, how successful the operation of setting the leg was? A. No. Except that—just as I see it.

Q. In the case of a break such as the plaintiff sustained as a result of this accident, assuming that it was treated normally and that the patient responded normally to treatment, what would be the permanent result after the leg had been set and so treated?

30

Mr. Ward: I object on the ground that it is not what could ordinarily occur, sir. It is what would occur in this case. I do not think counsel contends she received improper treatment.

Mr. Luce: No.

Mr. Ward: And so long as she went to the proper person, such as Doctor Cooper and Doctor Knapp, why, of course, the result was the result for which she is recovering and is entitled to recover in this case,

40

*Howard M. Cooper, cross.*

unless there was malpractice, and I do not think counsel will go so far as to say that there was malpractice.

Mr. Luce: Oh, no. I am assuming there was not. There is no evidence of any such thing as that. 10

The Court: I think it is a proper question, I will allow it.

A. Will you ask the question again?

Q. (Question read.) A. Shortening.

Q. Can you say, as to this particular case, how much shortening of the leg was to be expected?

A. No. That is a variable amount. You never can determine that.

Q. Did you see the plaintiff when she stood here, and walked to show? A. I did. 20

Q. And could you say from her appearance here about how much shortening has happened in her case? A. No, I couldn't. I would have to measure it.

Q. Otherwise than the shortening, would the leg, after it has been reset and treated properly, be, for other purposes, normally as strong as before?

A. There is a question about that.

Q. Is there a— A. The break was so low, as I remember it,—well, I couldn't say, because I did not follow the case. I did not examine her since then. 30

Q. Well, but isn't it true that a bone that was broken like the femur, a bone that was broken, when it has been properly set and knit again, it is practically as good as it ever was? A. Yes. Depending in what part of the bone is broken; but this was too close to the joint.

Q. Too close? What do you mean by too close? 40

A. Well, it was too close to the knee. Your lower

*Howard M. Cooper, cross.*

fragment was so short that you couldn't splint or put in a cast a fracture of that type.

10 Q. No. I understand you could not treat it the same way, but after it was treated properly and the fracture had knitted, then the whole bone was again as solid as it was before, wasn't it? A. No. Not necessarily; no, sir. It doesn't always heal properly when one fragment is short, when the one extremity is short, because you have a number of muscular attachments there that have a tendency to pull a fragment out of place, and absolutely prevent a bone from knitting perfectly and in the same alignment it had been before the fracture.

20 Q. You say there you have not examined the plaintiff to see whether or not this had successfully knitted in this case? A. No, sir.

Q. Could you tell by examination now whether that is so? A. No. Not without X-ray pictures.

Q. If it had not knitted properly, would the plaintiff be able to walk back and forth, as she did, on the floor? A. Yes.

30 Q. She would be? A. Yes. For instance, your bone, in the case of a fracture, does not always knit perfectly straight. It may be an over-riding anteriorly or posteriorly or laterally or, if the lower fragment or the upper fragment is splintered somewhat, you do not get a perfect alignment of the fracture.

Q. Well, there is not perfect alignment? I understand that after the knitting, there might be a shortening and, therefore, a consequent limp? A. Yes.

40 Q. But with that defect understood, isn't the bone in other respects just as sturdy and strong as it was before the fracture occurred? A. Well,

*Howard M. Cooper, cross.*

there is a question there too. A great many matters or features are involved in a fracture such as Mrs. Barthelmeß has had, and the treatment, the necessary treatment that she had to have for the reduction was of such a complicated and intricate nature, that it made the possibility of infection, or made the possibility of infection; it might have happened; a very difficult case to treat. 10

Q. Was there any evidence in this case that it did happen? A. I do not know about that. I am simply saying, in a case of this nature, it is a very difficult one to treat.

Q. Well, where there is no infection, isn't it true that the bone is just as sturdy for other purposes with a shortening as it was before? A. Well, there are so many elements to be considered. As I remember, indistinctly now, I think I saw the pictures. The lower fragment, or the lower end, was pretty badly broken. Now, that bone will never heal to be as good as it was before. It might in the middle of the shaft, but not toward the end. That is my experience. I am not qualifying as an expert on bone surgery. 20

Q. You say this fracture was how far above the knee cap? A. Well, as I remember, perhaps two or three inches. 30

Q. Did you treat her at all after she returned from the hospital to her home? A. No, sir.

Q. Did you treat her while she was in the hospital? A. No, sir.

Q. Do you know who did treat her? A. I turned her over to the ward service, and I believe Doctor Knapp was on service at that time.

Q. What examination did you make of her? A. Just a cursory examination at the time of the accident. I realized we had a fracture of the lower 40

*Howard M. Cooper, cross.*

extremity of the bone, and it meant hospitalization, of course, hospital treatment; it could not be taken care of at home.

Q. You did not see any X-ray pictures? A. Well, if I did, I do not remember.

10 Q. Is your estimate that the bone was broken about three inches above the knee an accurate one, or would you say that it is merely an approximate one? A. An approximate one.

Q. It might have been more or less? A. It might have been.

Q. I understand you to say, then, that if the bone, if the femur, for instance, were broken in the center of it, and then properly set, it would then be as strong as it was before? A. Yes.

20 Q. And after a bone is broken, such a bone as the femur is broken and properly set, is there any liability, on account of the previous fracture, to rheumatic pains or other pains? A. Yes, sir.

Q. Afterwards? A. Yes, sir; there is.

Q. What nerve centers are involved in the fracture of a bone? A. Well, there is a branch of the femoral, and the popliteal plexus, I believe, pretty good sized nerves involved.

30 Q. In the fracture of a bone? A. Yes. I mean in that neighborhood, supplying them nutrition and sensation and motion.

Q. Well, aren't the nerves that are in that neighborhood injured by the fracture of the bone? A. Sometimes, if you have the sharp spicules.

Q. Well, are they permanently injured? A. Rarely.

Q. The injury to them is temporary, is it not? A. Very frequently; yes, sir.

40 Q. And when the bone has well healed and knit,

*Richard E. Knapp, direct.*

why, the nerves recover their normal condition?

A. They frequently do.

Q. Well, don't they, almost always? A. Almost always.

Q. And if there are rheumatic pains that the patient suffers, they are more likely to be due to something else after that than to the mere fact that they had a fracture, are they not? And you say, then, that anyone who has had broken bones will have pains about that neighborhood, especially with a change of weather,— A. Or with fatigue. 10

Q. —for how long after the— A. Years.

Mr. Luce: That is all.

The Court: Sort of a barometer?

The Witness: Barometer is right, your Honor. 20

The Court: That is all.

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RICHARD E. KNAPP, sworn as a witness on behalf of the plaintiff, testified as follows:

*Direct examination by Mr. Ward:*

Q. Doctor, where do you practice? A. Hackensack.

Q. And how long have you been practicing? A. About 18 years. 30

Q. You are a graduate of what institution? A. Columbia University.

Mr. Luce: You do not need to qualify him, either.

The Court: The qualifications are admitted.

Q. Have you specialized in any particular— A. Yes, sir. 40

Q. —respect? A. In X-ray work and bone work.

*Richard E. Knapp, direct.*

Q. And by bone work, what do you mean? A. Fractures.

Q. Do you know Mrs. Barthelmess? A. Yes, sir.

Q. And do you remember her case? A. Yes, sir.

10 Q. Do you remember the X-ray pictures that were taken of her? A. Yes, sir.

Q. Have you them in your possession? A. Yes, sir.

Q. How soon after the case came to your attention was it that the X-rays were taken? A. Immediately upon admission to the hospital.

Q. Will you produce the X-rays, please? A. (Witness produces X-rays.)

20 Mr. Luce: Perhaps the jury can see something on it. I cannot.

The Witness: That one does not show.

Mr. Luce: I guess we will have to rely on what the doctor has to say.

Q. Now, Doctor, producing the first X-ray, will you show us what it discloses, please, if you can? A. This—I think, your Honor, please, might we light this light?

30 The Court: I understand we have got a machine here that I do not know anything about. If anybody knows how to work it, we can do that.

The Witness: I would suggest the daylight over there would give us—

The Court: Do you know anything about this machine under the counter, Doctor? There is a machine here that I am told is used for the purpose of showing X-rays. If you know how to use that and think it will be of any help, why, there it is.

40 The Witness: Yes. That is all right.

*Richard E. Knapp, direct.*

(X-ray illuminator produced and used by the witness.)

Q. Now, the first picture, Doctor, will you tell us what that is? A. This is a film showing two views of an X-ray taken of the leg of Mrs. Barthel-  
mess, and it shows evidence of a shattered fracture  
of the lower third of the shaft of the thigh bone,  
the right thigh bone, with considerable amount of  
displacement of what we call the lower and the  
intermediary fragments. We speak of the prin-  
cipal fragments, the lower fragment and the upper  
fragment, and these small shattered fragments be-  
tween the two bones, between the two fragments.

10

Q. Now, the other thing that counsel could not see, will you indicate that to the jury, please? A.  
This is a picture taken higher up, to exclude any  
fracture higher up, and it shows again this same  
fracture, as shown in this view.

20

Q. What kind of a fracture would you call that, or term it, Doctor? A. The technical term is a comminuted fracture.

The Court: A what?

The Witness: A comminuted.

Q. What? A. Of the lower third of the shaft of the right femur.

30

Q. What treatment was given, Doctor, to this woman? A. This is always a very difficult fracture to treat, and at first we tried to treat it in the simplest way. And that is by means of traction on a special table by which the limb is stretched out and the fragments placed in position, and then a plaster of paris cast applied enveloping the pelvis, the fractured limb, and also the other limb, down to the knee, so that there is no possibility of these fragments moving.

40

*Richard E. Knapp, direct.*

Q. Was there any effort made to reduce—when I say reduce, of course, we mean to place in apposition these two bones, to reduce the fracture?

A. Yes.

10 Q. What was that? A. By means of traction. Well, we did use traction on a—what we call the Holley table; that is a specially devised traction table.

Q. And traction is weight, is it not, which causes extension? A. No. We can apply traction in more than one way. We can apply it by means of stretching the limb and then placing—enveloping that limb in plaster and holding the foot down, holding the limb in absolute position. And then we can also use traction by means of weights.

20 Q. And what was done in this case, Doctor? A. In this case, we applied traction by means of the plaster of paris method, which failed; and then we used the—what we call skeletal traction. By that, I mean an instrument similar to ice tongs was inserted in the lower end of the lower fragment, and to the ends of these tongs were applied weights.

30 Q. And these tongs were actually inserted in the leg, were they? A. Actually inserted into the—in to the lower fragment for the distance, we will say, of half an inch.

Q. And then weight was applied to the end? A. Weight applied to the end of the tongs.

Q. Now, when was that done, Doctor? A. That was done about four days afterward.

Q. And have you any other picture that was taken about that time?

40 The Court: Let the first picture be introduced in evidence and marked.

Mr. Luce: May I ask if the jury would like to come closer to see that?

*Richard E. Knapp, direct.*

The Court: If the jury would like to come closer, they may do so.

Mr. Ward: Can you all see, or do you wish to come closer?

(No response.)

The Court: Very well. If none of the jury wish to come forward, have it marked at this time. 10

(X-ray film marked Exhibit P-2 in evidence.)

Q. Now, the second plate that you are showing us, when was that taken, Doctor? A. That was taken on the 26th.

Q. Of what? A. Of November.

Q. And, of course, was taken of this woman's— A. Yes, sir. 20

Q. —limb? And what did that disclose? A. That showed the ice tongs that I described, in place.

Q. And whereabouts are the ice tongs, will you show us? A. Here is one hook, and here is the other (indicating).

Q. Hooked into the bone? A. Hooked into the bone.

Q. And what does it show with reference to the fracture itself? Will you indicate, first, please, on the picture where the fracture is? A. It shows the fracture in the same position described in the previous film. 30

Q. But it shows some reduction, does it not? A. It shows some reduction.

*By the Court:*

Q. That was after the plaster cast was taken off? A. Yes, sir. 40

Q. And I suppose, after the plaster cast was

*Richard E. Knapp, direct.*

taken off the bone slipped from the position you had it in when the cast was on, did it not? A. Yes, sir.

Q. In other words, when you had the cast on, you got the two bones in apposition, did you not?

10 A. No, sir. The result was not satisfactory with the plaster method.

Q. But you got them nearer together than they are indicated on this? A. No. I did not get them as good as that, the position in the previous one was not as good as that.

Q. Yes. But that P-1, or whatever it is, was before any cast was put on, was it not? A. Yes, sir.

20 Mr. Ward: P-2, I think it is. The photograph was P-1.

A. (Continuing.) This is—this was taken immediately after the accident; but it is never a true condition, a true position on that, it never shows a true position of the fragments that we would get in 24 hours. Due to the injury, the muscles are somewhat injured and traumatised and partially paralyzed, and when they regain their power there is more over-riding of the fragments; so that after 24 hours we get more displacement, and that is our reason for reducing a fracture immediately.

30 Q. And you are referring to Exhibit P-2? A. Yes, sir.

Q. Just now. Doctor, what muscles are there in the— A. This is also—

Q. You are referring—

Mr. Ward: I withdraw the last question.

40 Q. You also have another plate, which is another view taken at the same time immediately after the accident? A. No, sir.

*Richard E. Knapp, direct.*

Q. It is not? All right. What muscles are there, Doctor, that cause drawing together or the overlapping of a bone in the thigh, or from the thigh down to the knee? A. The group of quadriceps extensor muscles.

Q. And they are, or not, strong muscles? A. 10  
They are very strong muscles.

Q. And tense? A. Tense.

Q. Now, after having put in this appliance that you term,—or that you said was similar to an ice tong, you also referred to a Holley table. What was that, Doctor? A. A Holley table is a table to which is attached a device by means of which the foot is—or the limb is stretched out, lengthened.

Q. And that was part of the extension— A. Yes, 20  
sir.

Q. —that was used? A. Yes, sir.

Q. You say on the 26th, that you took another, or another X-ray was taken? A. This was a picture of the apparatus.

Q. And does that show the patient? A. It shows the patient, with the appliances.

Mr. Ward: I ask to have that marked.

The Court: Let it be received and marked 30  
in evidence.

Q. All three of those are the same? A. Yes, sir.

Mr. Ward: Now, I ask all three of them be marked.

(Three X-ray films marked Exhibits P-3, P-4 and P-5 in evidence.)

Q. Now, will you please show us the next X-ray plate that was taken? A. November 26th.

The Court: Has that one been marked? 40

Mr. Ward: No, sir. This has not been

*Richard E. Knapp, direct.*

marked as yet. There are four marked, two showing the apparatus and the patient and one of the—

10 Q. Now, you referred to one of the 26th, showing— A. Yes, sir. That is another view.

Q. —the tongs? A. That is another view, taken at the same time.

Q. Taken when? A. This is another view.

Q. Now, two that were taken on the 26th, will you—first, please,— A. This is one. Have you the other one? Did I say there were two taken?

Q. You just said there were two. A. I thought the other one was already in your possession.

20 Q. Well, this taken on the 26th of November, you have indicated that that indicates the fracture? A. Yes, sir.

Q. And the tongs, as applied? A. Yes, sir.

Q. Does it show any other condition at all? A. Any fracture?

Q. Well, with reference to the muscles, or any complications of any kind? A. No.

Mr. Ward: I offer this in evidence.

30 The Court: Let it be received and marked.

(X-ray film marked Exhibit P-6 in evidence.)

A. (Continuing.) Here is one taken on the 28th.

Q. Pardon me. Now, you say there was another one taken on the 28th of November? A. Yes, sir.

Q. Does that show any changed condition? A. Practically the same.

40 Q. It shows the fracture and the tongs, as applied? A. Yes, sir.

Q. Is that correct?

*Richard E. Knapp, direct.*

Mr. Ward: I offer that in evidence.

Mr. Luce: No objection.

The Court: Let it be received and marked.

(X-ray film marked Exhibit P-7 in evidence.)

10

A. That was 28th (indicating).

Q. 28th? A. This is also 28th.

Q. Does that show the same condition? A. Yes, sir.

Mr. Ward: I will offer that one.

(X-ray film marked Exhibit P-8 in evidence.)

Q. The next picture, when was that taken, Doctor? A. That was taken on the 29th.

20

Q. And what does that disclose? A. That shows more traction on the lower fragment.

Q. That shows greater reduction, in other words, doesn't it? A. Yes, sir.

Q. The bones are more in apposition here. Was there any complication there of any kind? A. No, sir.

Mr. Ward: I offer that in evidence.

(X-ray film marked Exhibit P-9 in evidence.)

30

A. (Continuing.) This is the same; this was 29th.

Mr. Ward: I offer both of them. They are the same, Mr. Luce.

Mr. Luce: Well, what is the use of the other one?

Mr. Ward: Well, that is quite true.

Q. The picture that was taken after the 29th,

40

*Richard E. Knapp, direct.*

when was that taken? A. The following day; the 30th of November.

Q. And that shows the condition that existed, that is, the fracture? A. Yes, sir.

Q. And the appliances? A. Yes, sir.

10 Q. Being used.

Mr. Ward: I offer that.

(X-ray film marked Exhibit P-10 in evidence.)

Q. The next picture, when was that taken? A. December first, the following day.

Q. And does that show— A. That shows—

Q. —the gradual reduction? A. Yes, sir.

20 Q. The fragments and the bone being brought down, is that correct? A. Yes, sir.

Mr. Ward: I offer that in evidence.

(X-ray film marked Exhibit P-11 in evidence.)

Mr. Luce: He might go right on describing these other pictures.

Q. The next picture, when was that taken? A. December 3rd.

Q. That is two days later? A. Yes, sir.

30 Q. And that shows the fracture and the— A. Tongs in position.

Q. —tongs in position?

(X-ray film marked Exhibit P-12 in evidence.)

Q. And the next picture? A. This was taken on December the 7th.

Q. And that shows the— A. The fragments in position, in contact, and the tongs in position.

40 (X-ray film marked Exhibit P-13 in evidence.)

*Richard E. Knapp, direct.*

A. (Continuing.) This was taken one week later, December—

Q. Pardon me a moment. A. Excuse me.

Q. The next picture was taken one week later. That was December the— A. 14th.

Q. —14th? It shows the condition that existed there? A. Yes, sir. 10

(X-ray film marked Exhibit P-14 in evidence.)

Q. The next picture that you have was taken when? A. Taken on December 17th.

Q. And what does that disclose? A. It shows the position of the fragments, and the tongs removed.

Mr. Luce: That is what date? 20

The Witness: December 17th.

A. (Continuing.) This is the same.

(X-ray film marked Exhibit P-15 in evidence.)

A. (Continuing.) This is January 2nd.

Q. The next was January the 2nd? A. Yes, sir.

Q. And what does that show, Doctor? A. It shows the position of the fragments, tongs removed, and a callus formation. 30

Q. The shadow here (indicating), is— A. Callus.

Q. The callus which is thrown out by nature?

A. From the ends of the bones. This is looking at the limb sideways. This (indicating) is looking at it from the front.

Q. Now, those bones were not in apposition, were they, Doctor? A. They are in contact.

Q. But not in apposition, that is, not directly joined together? A. Well, did you say a position? 40

*Richard E. Knapp, direct.*

Q. Apposition. A. Not in true alignment.

Q. Not in true alignment, perhaps I should say. And was that a result as shown in this exhibit that was a permanent one, then? A. That is a permanent result.

10

*By the Court:*

Q. Is that the way it is now, Doctor? A. Yes, sir. Well, it is—there is more callus than that now; but this is where—what was the beginning of the callus formation, this smoky appearance on the film.

Q. And you cannot get this bone in better alignment than that? A. No, sir.

20

Q. You could not force this bone over here (indicating)? A. No, sir.

Q. So that there is a little over-lapping? A. Yes, sir.

Q. And that is what causes the shortening of the limb? A. A slight shortening of the limb.

Q. And this, now, I suppose, is filled up with callus here (indicating)? A. And down there (indicating).

Q. And down there (indicating)? A. Yes, sir.

30

Mr. Ward: And that is Exhibit P—

(X-ray film marked Exhibit P-16 in evidence.)

Q. So that Exhibit P-16 shows the permanent condition, and the condition that exists with reference to the shortening of the leg, and the position of the bones as they are today?

Mr. Luce: I object to that as leading.

Mr. Ward: I beg your pardon.

40

Q. Does or does not the picture, Exhibit P-16,

*Richard E. Knapp, direct.*

show the bones as they are to day, with relation to their position, their general position? A. Yes. Provided there has been nothing to interfere with the position since I saw it.

Q. In other words, it might grow worse since you have seen it? A. No. I do not believe it will grow worse. 10

Q. But the— A. I think it will grow better.

Q. That is, the callus would fill up there? A. The callus would fill up there.

Q. And make it stronger, is that correct? A. Yes.

Q. Now, Doctor, when did you last see the patient? A. I believe I saw her sometime in 1925. I do not recall the exact date.

Q. At the time that she was discharged by you, so far as your care was concerned, what was her condition then? A. She was able to be up and about on crutches. She was admitted to the hospital on November 19th, 1924, and discharged on April 19th, 1925. 20

Q. So that she was in the hospital exactly five months? A. And during the last week of her stay at the hospital, she was able to be up and about on crutches.

Q. Was her condition a painful one, or not? A. Very painful. 30

Q. And after her discharge from the hospital, did she, in your opinion, suffer pain or not? A. I do believe she suffered.

Q. And now, do you think that she is suffering pain? A. I do not know.

Q. Did you ascertain what shortening, if any, there was when she left the hospital? A. There was about three-quarters to seven-eighths of an inch. 40

*Richard E. Knapp, cross.*

Q. And everything had been done for her that you could do? A. Yes, sir.

Q. And that time? A. Yes, sir.

10 Q. Well, the bones as they were as shown in Exhibit P-16, not in alignment, with the callus thrown out, what effect would the callus, at least, filling in the space there and strengthening the bone itself—what effect, if any, does that have upon the muscles? A. I do not believe it has much effect on the muscles. I think that is largely overrated. I think there is a lot of absorption of that callus subsequently, and that there is a firm union of the bones resulting; and this exuberant callus that you probably have reference to—

Q. Yes. A. —is absorbed at that time.

20 Q. So that there is a shortening there at this time, is that it? A. There is a shortening.

Q. And the bones are not in alignment? A. Yes, sir.

Q. That shortening, Doctor, in your opinion, is that permanent or not? A. Yes, sir.

Mr. Ward: Cross examine.

*Cross examination by Mr. Luce:*

30 Q. Of course, this operation was a painful one for the patient, and when she was discharged from the hospital in April, do I understand you to say that she was still suffering pain? A. Yes, sir.

Q. What was the nature of the pain she was suffering then? A. Pain on walking, and pain on limited motion of the knee of the affected side.

40 Q. And what would that be due to at that time? A. That would be—pain in the knee would be due largely to the non-use and traction and trauma, injury, at the time of the accident. Disuse, stiffness, all those things have to be considered.

*Richard E. Knapp, cross.*

Q. And that pain, would it be true to say that that pain would normally be a diminishing thing after that? A. Yes, sir.

Q. And finally be eliminated entirely, as a consequence? A. I do not know. I would not say that.

Q. No. There might be traces of it today? A. 10  
Yes, there would be traces of pain.

Q. For how long a time? A. Maybe permanent.

Q. And pain is felt by the nerves, of course? A.  
Yes, sir.

Q. And is there much likelihood of any permanent pain? A. There is.

Q. As I understand it, when all had been done that could be done for the patient, the bone had been brought into alignment when viewed from front to rear, but not when viewed sideways; is that right? Which way was it in alignment? A. 20  
The axes of the two fragments were in alignment; they were in alignment, the axes of the fragments; but there was a slight over-riding of the lower fragment on the upper fragment.

Q. That is what I thought. A. In other words, a slight over-lapping.

Q. As I looked at the picture, it seemed to me that in one of the views the two bones seemed to be in the same general line. A. Yes. 30

Q. Whereas, in the other one, it seemed to be—  
A. No. It was pushed slightly forward, but, nevertheless, in the same line, in the same axis.

Q. I do not know as I make myself clear to you, but I mean, when viewed from front to rear,—  
A. Yes, sir.

Q. —one bone did not appear to offset from the other, one part did not; is that right? A. No. It did not offset.

Q. Yes. But when viewed sideways,— A. Yes, 40  
sir.

*Richard E. Knapp, cross.*

Q. —then there was an offset? A. Yes, sir.

Q. And that is a permanent condition? A. Yes, sir.

10 Q. And the result is that the leg is shortened for about three-quarters of an inch. This callosity that you speak of, is that a bone-forming process?  
A. Callus?

Q. Yes. A. Yes.

Q. Does some of it become absorbed, and other of it finally becomes new bone? A. Yes.

Q. Is that about the size of it, sort of a welding about the break? A. Yes, sir; exactly.

Q. And when that has been done, is the bone then as strong as before? A. Yes.

20 Q. And whatever is not needed for the formation of the new bone, or what I call the welding bandage, will then be absorbed in the course of time? A. Yes, sir.

Q. And how about any injury to the nerves that has happened meanwhile? Is that, in the course of time, remedied in the case of a normal patient?  
A. It is remedied, and then, again, in some cases, it is permanent.

30 Q. What likelihood is there of it being a permanent injury? A. There is a strong likelihood here of being a permanent injury.

Q. Was this patient a normal, healthy woman?  
A. A normally healthy woman.

Q. And I think you said that you saw her sometime after she was discharged from the hospital in April? A. Yes, sir.

Q. Of 1924? How much after, how long after that, was it? A. It would be only guesswork on my part.

40 Q. Well, some considerable time? A. I would say it was a period of months, three months.

*Pauline Hageman, direct.*

Q. Did she call on you at the hospital? A. No. She called me to her home, and then I referred her again to her family physician, Doctor Cooper.

Q. Was she at that time using crutches, or don't you know? A. I don't know.

Mr. Luce: I think that is all.

10

PAULINE HAGEMAN, sworn as a witness on behalf of the plaintiff, testified as follows:

*Direct examination by Mr. Ward:*

Q. Mrs. Hageman, you live where? A. I live now in Monroe Street, but at the time of the accident I lived right in the rear of this lady.

Q. That is, at the rear of 518— A. Central Avenue.

20

Q. —Central Avenue? A. I lived in Division Avenue, 523.

Q. And did you know Mrs. Barthelmess? A. Not to speak to.

Q. Did you know her by sight? A. By sight, I knew her.

Q. How long had you known her? A. Well, I knew her ever since she lived there. I lived in that house six years.

30

Q. Do you remember the time of the accident? I do not mean the date, but I mean the occurrence of the accident? A. Yes, sir.

Q. To her? A. Yes, sir.

Q. And before that time, had you seen her? A. I have seen her on the porch, on the roof, but I have never spoken to neither one of them.

Q. Had you ever seen any other tenants in that building on that roof? A. I saw her sister on the roof.

40

*Pauline Hageman, direct.*

Q. And do you know what apartment her sister occupied? A. Right opposite her.

Q. So that you saw both of those who occupied the second floor of those premises on the roof?

A. Yes, sir.

10 Q. Is that correct? A. Yes, sir.

Q. How often? A. Well, as often as they washed their clothes.

Q. And did you ever see them hanging out their clothes? A. Yes, sir.

Q. With reference to the other person who occupied the premises other than Mrs. Barthelness, do you know where the clothes were hung? A. Every one that occupied them two floors hung their clothes until after the accident.

20 Q. How long did you live there before the accident? A. Six years.

Q. Six years? A. Six years.

The Court: In the same building?

The Witness: In the same building, right opposite. I lived in Division Avenue, right in the rear.

The Court: Oh, in the rear?

The Witness: In the rear.

30 The Court: Not in that building?

The Witness: Not in that building. My rooms and her place backed together.

Q. Before Mrs. Barthelness occupied the premises where the accident occurred, had you seen other persons who occupied them? A. Everyone that occupied that building.

Q. Did they or not use the roof? A. They always did, until after the accident.

40 Q. And the persons who occupied the premises that were occupied by Mrs. Barthelness' sister

*Pauline Hageman, cross.*

before she occupied them, did they hang their clothes out there? A. They always hung them there until after the accident.

Q. And from the roof, whereabouts did the lines extend? A. Well, from the roof?

Q. Yes. A. I couldn't tell you. I never was near the building. 10

Q. A pole, or— A. There was a pole in the rear of the yard.

Q. And did the lines extend from that pole? A. Extended from there to some of the windows. I don't know which windows; I never noticed that.

Mr. Ward: Cross examine.

*Cross examination by Mr. Luce:*

Q. As I understand it, the house that you are now living in, you have lived in for the last six years? A. No. The house I now live in I lived in only two years and three months; but I lived in the rear of them for six years. 20

Q. Oh, yes. You moved away from there two years ago? A. I am living there two years.

Q. So that your observation ended in 1924? A. It ended after that lady was into the hospital.

Q. Yes. When did you move away from there? A. And I moved into that house. 30

Q. When did you move away from there? A. Away from there, I moved the 17th of March.

Q. 1924? A. Two years ago; 1924.

Q. And you occupied that house for six years before that? A. Yes, sir.

Q. Now, that house was situated with its front on another street, and its rear toward the back yard of this house, was it? A. Yes, sir.

Q. Is that right? A. Yes, sir. 40

*Pauline Hageman, cross.*

Q. And you occupied the whole of the house, did you? A. No, sir. It was a six-family house. I occupied the top floor.

Q. The lower or the upper tenement? A. I was the top tenant.

10 Q. The top tenant? A. The top floor.

Q. And from your windows, I suppose, then, you could see into this back yard? A. I could see into the yard.

Q. And see the rear of this house? A. I could.

Q. And see this extension roof there? A. I could.

Q. I see. And you frequently did— A. Certainly.

Q. —look at it, did you? A. Well, I couldn't help it.

20

The Court: Well, we do not care whether you could help it or not. The question is, did you?

The Witness: Yes, sir.

The Court: All right.

Q. How frequently, do you think, during the six years that you lived there, did you notice what was going on? A. Well, I looked out of that window every day a dozen times.

30

Q. But my question is, how often do you think you noticed what was going on? A. Oh, I couldn't say.

Q. On that roof? A. How often? I would look out of the kitchen window every day, and my kitchen—I had to look out of that kitchen window, and my kitchen window faces their yard.

Q. Yes. And occasionally you would notice that there was somebody on the roof? A. Certainly.

40

Q. How far from your kitchen window, based

*Pauline Hageman, cross.*

on your observation, would it be to the person that you would see on the roof? A. I should judge it is about 100 feet distance between.

Q. 160 feet? A. I should judge there was. I do not know.

Q. What did you say the distance was? A. I should judge it was 100 feet, because there was a yard in between; not a yard, but— 10

Q. It was your back yard and this other back—  
A. Back yard, but there was a very small strip of land between it.

Q. Isn't it about 200 feet? A. I couldn't tell you.

Q. And you say you did not know Mrs. Barthelmess? A. No, sir. I knew none of my neighbors.

Q. You never had seen her that you know of before she moved in that other house, had you? 20  
A. No, sir.

Q. And how do you know her now? A. Well, I don't know her now, only that I got this summons to appear in court; that is all. And I have known her from seeing her on the street; but I never spoke to her.

Q. You are not acquainted with her? A. No, sir.

Q. From seeing her in Court now, would you recognize her as the person that you saw on that roof? A. Yes, sir. 30

Q. You could, at that distance? A. What is that?

Q. Could you, at that distance? A. Why, I used to see her, and when I passed by and went around the block, with the child I used to see her and her sister and the child on the yard there, and I would see her on the front porch, and I see her walk to the store; but I never spoke to her.

Q. You mean, you have known her by sight a 40

*Pauline Hageman, cross.*

number of years? A. By sight, but I have never spoken to the woman, never.

Q. But you do mean that you have known her by sight for a number of years? A. By sight. I have seen her by the window, but I have never  
10 bid her the time of day.

Q. You have known her by sight for a number of years; is that right? A. Well, as long as she has lived there.

Q. Well, I understood you to say that you knew her before she lived there? A. No, sir. I never said I knew her before she lived there.

Q. Well then, how did you know her by sight when she came to live there? A. Oh, when she came there, I didn't know her. I didn't know her  
20 before she lived there.

Q. Well then, how have you known her since she lived there? A. Well, I have just told you, by seeing her there. I didn't know her name or anything until I got this summons.

Q. Well, how do you know now that the person you saw on the roof was— A. If you see her face every day dozens of times for months and for a couple of years, you are sure going to know the party; I know I did.

30 Q. Did you see her face every day during that time? A. Well, I haven't seen it every day; no, sir.

Q. Did you, then? A. No, sir; I haven't seen it every day.

Q. Was she there three months before this accident took place? A. I do not know how long she was there.

Q. And then, did you see her face during that time? A. That I couldn't tell you.

40 Q. Did you see it once? A. Yes, sir; I did.

*Rosie Herold, direct.*

- Q. During that time? A. Yes, sir.
- Q. Where? A. Where? When she was in the yard, or when she was going to the store.
- Q. Where would you be when she was— A. I would be in the street somewheres with my child.
- Q. If you were in the street, you could not see her when she was in her yard, could you? A. If I passed her yard, I could see her standing there. 10
- Q. In the back yard? A. Why, certainly.
- Q. From the street? A. Why, certainly.
- Q. Wouldn't the house be in the way? A. Not if I would go along the side there, along Madison Street, it wouldn't.
- Q. Now, isn't it true that all you know about it is that you had occasionally seen people on that roof? A. That is all I know about the case, that I have seen people on that roof hanging up their clothes. 20
- Q. Without knowing who they were? A. No. But I do know that this party did hang her clothes on the roof, and I can tell you almost everybody that did hang their clothes on the roof.
- Q. That is your inference from the fact that you occasionally saw people hanging clothes there? A. I saw them hanging clothes there.
- Q. You did not make it your business to find out who the people were? A. No; certainly not. 30

Mr. Luce: That is all.

ROSIE HEROLD, sworn as a witness on behalf of the plaintiff, testified as follows:

*Direct examination by Mr. Ward:*

- Q. Mrs. Herold, where do you live? A. The same address what Mrs. Hageman. 40
- Q. And did you live at the same place as Mrs.

*Rosie Herold, direct.*

Hageman in November, 1923, at the time—I am not particularly concerned with the date—but the time this accident happened? A. Yes. I was there that year.

10 Q. How long did you live there before that? A. Well, I altogether lived there only one year.

Q. And how long before the accident had you lived there? A. No. I moved in there in October.

Q. In October? A. Yes.

Q. Now, from October, up to the time of the accident,— A. The accident,—well, all the time.

Q. Did you move away before the accident happened? A. No; after that accident.

Q. After the accident happened? A. Yes.

20 Q. But from the time you moved in there, up to the time Mrs. Barthelmess was hurt, did you ever see anybody upon this extension or the porch or roof that we have mentioned? A. Yes, sir.

Q. Where Mrs. Barthelmess lived? A. Yes, sir.

Q. And whom have you seen there? A. Well, whoever lived in that apartment has to go on that roof.

Q. To do what? A. Hanging clothes.

30 Q. Did you see other people than Mrs. Barthelmess there hanging the clothes? A. Yes, I did.

Q. Did you see from where the clothes were hung, or upon what the clothes were hung? A. I did.

Q. What? A. From the window, where the hook was, on the line, way to the pole.

Q. And the hook, where was that? A. It was right on top of the window.

Q. On the top of the window? A. Yes.

40 Q. And the line extended from that hook to what? A. To the wash pole in the yard.

*Rosie Herold, cross.*

Q. The pole in the yard? A. In the yard.

Mr. Ward: Cross examine.

*Cross examination by Mr. Luce:*

Q. Did I understand you to say that this hook that the line ran from was at the top of the window? A. Well, on top of the window. 10

Q. You do not mean way up on the top of the window frame, do you? A. Well,—

Q. How near to that hook—

Mr. Ward: One moment. There is one question pending, Mr. Luce, before you ask another. If you want to withdraw it—I submit to your Honor, there is a question pending. 20

The Court: I have not heard her answer the first question, Mr. Luce.

Please repeat the question.

(Question repeated as follows):

“Q. You do not mean way up on the top of the window frame, do you?” A. Well, that is why I couldn't see from my window that far, but I see that it was up.

Q. You never went to the rear of the house? A. No, I did not. 30

Q. And looked at that? A. No, I did not.

Q. So that all you know about the position is what you could see from your kitchen window? A. Yes.

Q. Your kitchen window was on the ground floor, was it? A. Up on the top floor.

Q. The upper floor of the house, the rear of which looked toward the rear of this house? A. Yes, sir. 40

Q. And this line seemed to run pretty well up toward the top of the window? A. Yes.

*De Witt Treat, direct.*

Q. But just where, you could not say? A. (No response.)

Q. And you, occasionally, from your kitchen window, saw women on that roof? A. Well, yes, I did.

10 Q. Apparently hanging out their clothes? A. Yes.

Q. That is about all you know about it? A. That is all I know about it.

Mr. Luce: That is all.

DE WITT TREAT, sworn as a witness on behalf of the plaintiff, testified as follows:

*Direct examination by Mr. Ward:*

20 Q. You live in Carlstadt, do you? A. Yes, sir.

Q. And I believe you occupy some official position there? A. Yes, sir.

Q. What position is it? A. Recorder.

Q. And you have occupied the position for how long? A. Two years.

Q. And you are still Recorder— A. Yes, sir.

Q. —of Carlstadt? Do you know Mrs. Barthelmess? A. Not personally, no.

30 Q. Do you know her by sight? A. By sight.

Q. And do you know the premises, the house, occupied by her at 518 Central Avenue, Carlstadt? A. I do.

Q. I show you this picture which has been marked Exhibit P-1. That is a picture of the premises, is it not, taken from the rear? A. (Referring.) That is the rear.

Q. Now, were you familiar with that house? A. Very. It is visible from the rear of our house.

40 Q. From the rear of your house. And prior to the time of the accident when Mrs. Barthelmess

*De Witt Treat, direct.*

was injured, do you recall whether or not the roof or the porch, whatever we might term it, which extends along above the upper floor and beyond the second floor as you face the picture, was used?

A. I do.

Q. Was it or not used? A. It was used. 10

Q. And how common—

Mr. Luce: Let him state what he saw.

The Court: Proceed.

Q. How commonly was it used, Judge? A. Quite frequently.

Q. By whom? A. By the tenants.

*By the Court:*

Q. For what purpose? A. To hang out their wash. 20

Q. And how did they use it? A. By climbing through a window.

*By Mr. Ward:*

Q. What window? Do you know through what window they climbed? A. Why, I believe it is the window—

Mr. Luce: Do not lead. I object to that. 30

A. (Continuing.) In fact, it was the window to the apartment which they occupied.

Q. I show you the window marked "X." Can you tell us whether or not they climbed through that window? A. Yes.

Q. And for how long a period of time before this accident happened did you see these tenants climbing through the window and using the porch or roof, whatever we may term it, for the purposes for which you have stated? A. As long as I have lived there. 40

*De Witt Treat, cross.*

Q. And for how long have you lived there, Judge? A. Nearly four years.

*By the Court:*

10 Q. You mean four years prior to this date, today? A. Well, it is nearly four years; it will be in about three months, four years that I lived at that place.

Q. And you have seen them using that roof for that purpose all of that time? A. Yes, sir.

Q. Before the accident, or since the accident? A. Not since the accident.

Q. Oh, not since the accident? A. No, sir; not since the accident.

20 Q. But you have lived there for four years, and since you have been there, until the accident, you saw people going out on the roof, hanging up their clothes; is that right? A. Yes, sir.

Q. But not since? A. But not since.

*By Mr. Ward:*

Q. On the edge of the porch or roof, whatever you might term it, was there, prior to the accident, any railing or any guard of any kind along there?

A. No, sir.

30 Q. And was it or not as shown in the picture?

A. No, sir.

Q. Was it or not as shown in the picture? A. As shown in the picture.

Mr. Ward: Cross examine.

*Cross examination by Mr. Luce:*

40 Q. I understand you to say you have seen all these things while you have been living where you now live? A. Yes, sir.

Q. Whatever you have seen, is while you have been living where you now live? A. Yes, sir.

*De Witt Treat, cross.*

Q. And you have not seen anybody on that roof since this accident happened? A. No, sir.

Q. And that was in November, 1923? A. Yes, sir.

Q. So that that would be 1924, 1925, two years, two months,—for two years and seven months, you have seen nothing there? A. No, sir. 10

Q. And that would leave, then, a year and five months during which you had an opportunity to see, isn't it? A. Yes, sir.

Q. And during that time, what was your occupation? A. I am a salesman.

Q. And what does your occupation require of you as to your hours? When did you go to your work at that time, during that term, I am now speaking of? A. I had my own office. 20

Q. Well, what were they? A. I could go away at 9 if I wanted to. I could go away at noon, if I had wished.

Q. When did you go? A. Sometimes at nine, sometimes at noon, sometimes at ten.

Q. And where did you go? A. Jersey City, New York, different places.

Q. And when would you ordinarily return home? A. Around four or five o'clock in the afternoon; sometimes later. 30

Q. And was it your usual custom to go in the morning as early as nine o'clock, or was it more usual for you to go later? A. More usual around ten and eleven.

Q. Was that your usual custom, to go at about ten? A. Just about.

Q. So that from ten o'clock in the morning until five o'clock in the afternoon, you were away? A. I was away. 40

Q. And had no opportunity for observation during that time? A. No, sir; not within that time.

*De Witt Treat, cross.*

Q. Excepting only on Sundays, I suppose; then you would be home for all day? A. Yes, sir.

Q. You never saw anybody there on the roof on a Sunday, did you? A. Yes, I have.

10 Q. Yes. But they weren't doing washing then, were they? A. Yes, sir.

Q. Were they? A. Yes, sir.

Q. How many times did you see that? A. Quite often.

Q. Is that so? And other days of the week besides Sunday? A. Yes, sir.

Q. Is your tenement or apartment or house on the lower floor or the upper floor? A. No. I live right directly back of it.

20 Q. Right back of this house? A. Yes, sir. There is a lot between this—our house and their house.

Q. And then a fence between the houses? A. Yes, sir.

Q. A high fence? A. No, very low.

Q. And from the windows of your house, whatever you saw, you saw from the windows of your house, I take it, didn't you? A. Well, I can see it from the rear, upstairs.

30 Q. Oh, you could. But what you did do was to see it from your windows, wasn't it? A. Why, no; it could be from the rear, or the windows—

The Court: We are not interested, Recorder, in what you could do; but from what point on your premises did you see these people on the roof, is what he is asking?

The Witness: From the kitchen window of our premises.

The Court: Very well.

40 Q. And you did not spend a great deal of your spare time at the kitchen window, I do not suppose? A. Well, no, sir.

*Herman Barthelmess, direct.*

Q. So that what you really mean is this: that occasionally you saw some women on that roof, apparently hanging out their clothes? A. Yes, sir.

Mr. Luce: That is all.

HERMAN BARTHELMESS, sworn as a witness on behalf of the plaintiff, testified as follows:

10

*Direct examination by Mr. Ward:*

Q. You are the husband of the plaintiff in this case? A. Yes, sir.

Q. And you live with her and your children? You were living with her and your children in August when this place was rented? A. Yes, sir.

Q. Keep your voice up, please. A. Yes, sir.

20

Q. So that all the members of the jury may hear. Do you recall going to this place to look it over before you rented it? A. Yes, sir.

Q. Whom did you see? A. Miss Perretti.

Q. Who is Mrs. Perretti? A. The daughter of the owner of the house.

Q. And who are the owners of the house?

Mr. Ward: I think that is admitted.

Mr. Luce: Well, we do not admit that. We will admit that the defendant Teresa Bergamo is the owner, at that time, of the house, but not that Liberale was. We deny that he was.

30

The Court: Very well.

Q. When you went to the house, and you saw this Mrs. Liberale, you say? A. Perretti.

Q. Pardon me? A. Perretti.

Q. Or Mrs. Perretti, what conversation, if any, was had between you and your wife and Mrs. Perretti? A. Well, she took us in the—in the rooms.

40

*Herman Barthelmess, direct.*

We went in the house first, and we went with Mrs. Perretti, and she took us up in the rooms, and she showed us around; she showed us the rooms; and there was a bedroom, a kitchen, bedroom, dining-room, and another bedroom. Then the wife de-  
10 cided to take the rooms. So, on our way going out, out of the hall, there was a window in the hall leading out to that porch, and she says, "There is the pole and there is the hook on the house; there is where you will have to hang your wash." So—

Q. Did you see the hook that she indicated? A. I seen the hook.

Q. Where was the hook? A. Well, I should judge it would be about six or seven inches from the top.

20 Q. The top of what? A. Well, it wasn't on the window. It was on the frame work, the frame work of the window.

Q. On the frame work of the window? A. On the frame work of the window.

Q. I show you Exhibit P-1, and indicate "B." Was it on the frame work of that window? A. Exactly.

Q. And about six or seven inches from the top, you say? A. Yes, sir.

30 Q. And I show you Exhibit P-1, and show you "X." Is that the window that she indicated? A. Right there (indicating), is the window.

Q. That one had to go out to put the wash out? A. Exactly.

Q. Do you know whether or not that place was commonly used after that, after you moved in? A. (No response.)

Q. Do you know? A. Do I know—

40 Q. Whether or not that roof and that window was used? A. It always was used.

*Herman Barthelmess, direct.*

Q. By whom? A. By my wife, and my wife's sister.

Q. And where did your wife's sister live? A. She lived next door in the same house.

Q. And used for what purpose? A. For going out and hanging up the wash. 10

Q. Were you there when the attic rooms were rented? A. No, sir.

Q. Now, did you ever see Mr. Bergamo? A. Yes, I seen him—I seen him one—there was one time; it was about a month when we got in the house.

Q. And did he or not at that time say that he was the owner? A. He was the owner, but he left everything up to his daughter. 20

The Court: Is that what he said?

The Witness: Yes, sir.

Q. Now, tell us about what was said at that time? A. We had some—about—about gas; there was no gas in the bedrooms. So I asked him if he would put the gas in the bedrooms. And he says, "I have nothing to do with the gas at all." He says, "That is all up to my daughter. She rented the rooms to you, and you will have to see her about it." So I went to her and asked her if she would put— 30

Q. Never mind. Had you formerly asked her about the gas when wou rented the place? A. I have asked her before that.

Q. You remember the time of the accident? A. Yes, sir.

The Court: We will take a recess now, until 2 o'clock.

(Recess.)

40

*Herman Barthelmess, direct.*

AFTER RECESS: 2:00 O'CLOCK P. M.

HERMAN BARTHELMESS, recalled as a witness on behalf of the plaintiff, testified as follows:

*Direct examination by Mr. Ward (cont'd):*

10 Q. Mr. Barthelmess, how soon after your wife's accident did you know it had happened? A. Well, it was about a half an hour after.

Q. And then, did you see her after that? A. Yes, sir.

Q. Where? A. In the—in the house; in the same house, but downstairs on the—on the right-hand side, Michael's.

20 Q. And when she was taken to the hospital, did you see her over there? A. I took her up there myself in the ambulance.

Q. And she was five months, I believe, in the hospital? A. Five months.

Q. Now, during that period of time, did she or not, to you, have the appearance of suffering pain? A. She suffered pain ever since she is up in the hospital, and she is complaining today, yet.

Q. Even today? A. Even today.

30 Q. After leaving the hospital, I believe she came back to this place on Central Avenue, or Central Street? A. Yes, sir.

Q. Carlstadt? A. Yes, sir.

Q. And after her return, did you ever have any talk with Mr. Bergamo? A. Yes, sir.

Q. How long after her return was it that you had this talk with Mr. Bergamo? A. Well, it was a few months after. I just cannot say about when it was, but—

40 Q. Without setting it at any definite date, you recall having a talk with him, do you? A. Well, I couldn't remember that.

*Herman Barthelmess, cross.*

Q. I say, without setting the date, without fixing the date. A. Yes, I spoke to him.

Q. And it was with reference to what? A. Well, after that, it was about the sash cords in the windows.

Q. And during the course of the conversation that you had with him,— A. He said he was awful sorry that the accident happened, and he is sorry that he didn't put the rail there before it did happen. 10

Q. Do you remember anything else that he said at that time? A. Well, he said that he was going to put the rail up after that, and it ain't up there yet.

Q. And that was after the accident happened? A. After the accident. 20

Q. Do you know whether or not anyone did the housework that your wife did, while she was in the hospital? A. Yes, sir; my mother.

Q. And do you know whether or not anyone has done the washing? A. Yes, sir.

Q. And cleaning? A. Yes, sir.

Q. Since then? A. My wife's sister done the washing, and my wife's sister-in-law done the cleaning.

Mr. Ward: Cross examine. 30

*Cross examination by Mr. Luce:*

Q. How long after the accident was it that you had this conversation which you have spoken of, with Mr. Bergamo? A. I just cannot remember.

Q. Well, try to get at it as nearly as you can. A. Well, it is quite a while ago, so I cannot just recall.

Q. Was it while your wife was in the hospital? A. What did you say? 40

*Motion for Non-Suit.*

Q. Was it while your wife was in the hospital?

A. No, sir. While she was home.

Q. Then it was after she had returned home from the hospital? A. After the accident.

10 Q. That would be at least five months after the accident? A. No.

Q. Wasn't your wife in the hospital from November to April? A. She was in the hospital five months.

Q. Yes. Then this conversation happened after that? A. Yes, after that.

Q. It was at least five months after the accident? A. Well, I don't think it was quite as long as that.

20 Q. Well, but it was after she came home from the hospital, wasn't it? A. Yes, sir.

Q. And she was in the hospital five months? A. Yes, five months, after she come home.

Q. Then it was more than five months after the accident that this conversation took place? A. Yes.

Q. Now, will you repeat again what that conversation was? A. Mr. Bergamo came to the house, and while he was to the house, I asked him to put sash cords in the window, because—

30 Q. What did he come to the house for? A. Well, I cannot tell you that, because I do not know.

Q. Well, was it to collect the rent, or anything like that? A. No, sir.

Q. Well, go on. A. It might have been from his daughter; I don't know, but I shouldn't wonder his daughter told him—

40 The Court: No. If you do not know, you do not know.

The Witness: Well, I do not know.

*Case.*

Q. Well, state what the conversation was. A. So, when he come up, he says, "Well, what's the trouble?" And I told him I wanted ropes in the window, that is, sashes, ropes in the sashes. So he put the ropes in, and he says, "How is your wife?" And I says, "Well, she ain't feeling very good." And he says, "I am very sorry that that thing had to happen. I wanted to put a rail around there before, but I neglected it," and he promised that he was going to put it after that, and it ain't up there yet. 10

Q. You mean, he promised then that he would put a rail there? A. Yes, sir.

Q. Then what he said was, that he was sorry that he had not put a rail there before? A. Yes, sir. 20

Q. And that he then intended to put a rail? A. Yes, sir.

Q. That is what he said, was it? A. Yes, sir.

Mr. Luce: That is all.

Mr. Ward: That is all. We wish to read into the record, with the consent of the counsel for the defendant, the fact that it appears in Deeds 1106, on page 322, a conveyance from Richard Nesser, Jr., and May, his wife, to Liberale Bergamo and Teresa, his wife, the property in question, and that the only other conveyance of any part of that property from them is in 1924, deeded part of this property to Joseph— 30

Mr. Luce: I do not think that part is material. I object to that as immaterial, anyway, any conveyance that they may have. The only material thing in this case was the ownership at the time of the leasing and at the time of the accident. 40

*Case.*

The Court: What is the materiality?

Mr. Luce: We will now admit that at the time of the accident and at the time of the leasing and in the intervening time, the two defendants were owners by entirety.

10 The Court: Very well. Then you do not need anything more than that?

Mr. Ward: No, sir. The plaintiff rests.

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Mr. Luce: If the Court please, I move for a non-suit in the case.

The Court: Do you wish to exclude the jury, either of you, during this motion?

Mr. Luce: I think it would be, perhaps, wise to do so.

20 The Court: Will the jury please go into the ante-room?

(The jury retired.)

Mr. Luce: I hope your Honor will bear with me in making this motion if I say a good deal that the Court knows as well or better than I do.

The Court: Well, I won't assume that before you start.

30 Mr. Luce: I think that the only theory upon which the plaintiff can succeed in this case at all would be the theory that there was what the law technically calls an invitation on the part of the defendants to the plaintiff to use that roof for the purpose of hanging out washing. If there was not what the law strictly calls an invitation, then there could be no liability on the part of the defendants for the accident that ensued. My  
40 understanding is that, so far as the demised

*Case.*

premises go, a landlord is not liable to his tenant, if the tenant takes them as they are, and as far as the demised premises themselves go, there is no liability on the landlord's part for any defective condition; but that with regard to those parts of the house like those which are within the landlord's control, and are for the common use of all of the different tenants, why, there he must exercise reasonable care to see that those parts are in a safe condition for the uses for which they are obviously intended. 10

The Court: That is my understanding of the law.

Mr. Luce: So that, in this case, if the defendants are liable at all, it must be on the ground that this roof was such a place, and that the plaintiff was engaged properly in using it at the time the accident occurred. Now, that I say, is the same thing; the liability of the owners, therefore, would be the very same thing as the liability of a railroad company, for instance, who invites a passenger to ride on its trains, and who, therefore, must provide platforms and things like that for them to take and leave the train. And the same rule applies there, that it has obligations to use reasonable care to see that those platforms are in a suitable condition for them to do that sort of thing. Now, the only evidence in this case that there was anything which justified the plaintiff in assuming that this roof was such an appurtenance for the tenants is the statement of the plaintiff that when she was shown the premises by Mrs. Perretti, the defendants' agent, 20 30 40

*Case.*

she was told, "That is where you go"—"that is where you go," I think she said, "to hang your clothes."

10 My first point is that that, in and of itself, was a mere permissive statement. It was not equivalent to the statement that "that is an appurtenance which I have provided for the common use of my tenants for that purpose," but it is a place where you can go to do thus and so. That is, "you may do it, if you choose," which, of course, means, "You may do so at your own risk." It may be that your Honor won't take that view; but I desire to make that as the first point for the non-suit, that that is all it amounted to, anyway.

20

But now, going one step further, and assuming that your Honor may hold that that language was equivalent to a statement that this part of the premises which you are entitled to use for that purpose as appurtenant to the demised premises, and for which I am going to be responsible to you, assuming it is equivalent to that, then I say that the proof in this case does not show that the plaintiff can recover, because it shows clearly that this roof was a platform without any railing or anything like that on the outside of it; that it had a slight slant from the top to the roof, but very slight, so that it afforded a reasonably secure platform upon which anybody could stand; and that if there was what is equivalent to an invitation to use it for that purpose, it was an invitation to use it as it was, without a railing or anything like that, and therefore, the invitation

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*Case.*

itself was limited to such a use as would be a reasonably careful use of that platform as it was. Therefore, it seems to me that on the undisputed and uncontradicted evidence in the case on any theory that you can frame it the case is exactly on all fours with the case of *Dotson v. Erie Railroad Company*, 68 N. J. L. (from which citations were read). 10

Now, here is a platform that is 18 feet long, which would have afforded a substantial platform upon which anybody could stand, and if anybody did not get too near the edge of it, it was reasonably safe. In fact, it is not contended there is any evidence whatever that the roof was in an imperfect or defective condition. Therefore, the case is distinguishable entirely from this case between landlord and tenant, one of which was in our court, where the roof under the landlord's control leaked on the plastering in the ceiling and the ceiling fell on one of the tenants in the house and injured them. There the roof was defective, and the landlord was clearly liable. And in another case, perhaps more nearly in point, there was a stairway that was for the common use of the tenants in this apartment house, and the plaintiff was injured while going down the stairs because the stair carpet was ragged and caught her foot and caused her to stumble and fall. Now, there is nothing like that in this case. There was no defect in the roof. It was sound, whole; there was no pretense that she stumbled and fell off the roof, because the landlord had not made it a perfectly safe platform for 20 30 40

*Case.*

10 her to stand on. And the landlord, I say, was no more obliged to put a railing around that roof than the railroad company was obliged to put a railing around its platform in the Dotson case. It could have done so. The railroad company could fence its station platforms in such a way that passengers could not stand too near the edge; but the Court of Errors and Appeals holds in that case that is not the duty of the railroad but, on the contrary, where the danger is obvious,—

20 The Court: Then, do you say, by analogy of that Erie Railroad case, that an owner of a tenement house may leave the railing off of the stairs and if, by reason of leaving the railing off of the stairs, the tenants who have that means, and only that means, of entrance to their apartments on upper floors, become injured, they cannot recover?

Mr. Luce: I think I would say that; yes, sir.

30 The Court: I do not believe the Court of Errors would go that far, do you? In other words, as I understand the theory of the plaintiff's case, it is that the landlord owed a duty to the tenants to keep reasonably safe those parts of the premises that they in common used with other tenants. They do not allege that those premises were out of repair; they do not allege that this roof was in disrepair and, because of that, this plaintiff was injured. But they claim that this roof was a place that was used in common with other tenants, and the tenant had no supervision over it or no control over it,

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*Case.*

distinguishing it from the lack of responsibility of the landlord, under our cases, to make repairs. They say that the landlord kept under his control this place that was used in common and that, therefore, as I understand the theory of the plaintiff, the landlord was under a duty to use reasonable care to make this place that the tenants were entitled to use and did use a safe place. Now, that is your point, Senator, isn't it? 10

Mr. McGinnis: Yes, sir.

The Court: And that is your theory?

Mr. McGinnis: That is our theory.

The Court: Now, that being so, I ask a question, in view of the Erie Railroad case that you have cited, whether you would say that under that theory a landlord need not provide a rail to a stairway going up to the upper part of a tenement house, and if he did not, it being so obvious to the tenants that it was a place of danger, and that they must not expect to be safe from a fall by the protection of a railing, that they went there upon their risk, and if they did fall, it was not the landlord's fault or responsibility? Do you feel that that Erie Railroad case would go that far? 20 30

Mr. Luce: I think it would go that far, as sustaining the contention that if the tenant, with his eyes open, used the stairway without a railing, why, he did so at his own risk. It would be an obvious risk.

The Court: I think that the cases hold, on the contrary, that a landlord is under a duty to use reasonable care in affording proper safeguards around that part of the 40

*Case.*

10 premises that are used in common by the tenants over which they have no control, and if he fails to use reasonable care in so building these places that they used in common, he is responsible. Now, I admit that there is rather a thin line, perhaps, between that theory and the theory of your railroad case, which I have not read; but if I am correct in my statement of the law as I understand it, under the decisions of the courts of this State, I must disagree with your view.

20 Mr. Luce: Then, there is one thing further that I would say, that while it might be true that the landlord would have to provide a rail for a stairway in order to have performed his duty of providing a reasonably safe place, that could be distinguished and, I think, should be distinguished from this case, because such a railing is an ordinary and common and everyday appliance that is part of the stairway; but in this case, a railing around a roof, even that is used as a platform, is not such an appliance. It is undoubtedly something which might prevent an accident, but it is not one of the things that ordinarily is to be reckoned as part of the things which the permission extended to the tenant allows them to use.

30 The Court: Let us go back to the stairway for a moment. Now, we supposed a case where there was no railing. Let us suppose a case where there was a railing, which railing became out of repair, and a child leaned against it and it gave way, and the child was precipitated.

40 Mr. Luce: Then the landlord would be clearly liable.

*Case.*

The Court: Then if the landlord would be liable where you did provide a railing, but an insecure one and allowed it to get out of repair, do you distinguish that between the case and the case where there was no railing at all?

10

Mr. Luce: Yes. Because with the railing there, the tenant might well suppose it was safe to rely on it; it would <sup>not</sup> be obvious it was dangerous.

The Court: I think you are right.

Mr. Luce: Now, in this case, it seems to me the railroad case is directly in point. Here the danger was obvious. I take it, whatever my duty of care to another person is, their correlative duty always exists, that they must not fly in the face of an obvious danger, and putting themselves in a position where, with the circumstances as they exist, the danger would be obvious and staring them in the face, even if they in their duty to exercise reasonable care which they owe, and that this roof, while it was possible to use it, if it was used within reasonable limits, for the purpose that the invitation was given, the moment you went outside of those limits, then it would cease to be so and cease to be so within the complete knowledge of the plaintiff. That, it seems to me, is the point, and on that point, that there was, therefore, contributory negligence in her standing where she says confessedly that she did stand, within such a short distance of that edge, that some apparently slight thing, she does not know what, caused her

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*Case.*

to lose her balance, of course, and fall over the edge, in going that far, unnecessarily—

10 The Court: Well, when we get by the legal phase of it, as to whether or not, under the circumstances, that phase advanced by the plaintiff,—when we get by that, I think the facts must be determined by the jury as to whether there was contributory negligence or not in her going where she did, under the circumstances.

Mr. Luce: Of course, I am insisting that that is to be found by the Court on the undisputed evidence; there is clear evidence here.

20 The Court: Now, you are arguing that even assuming that there was negligence on the part of the landlord in not providing a railing there, or some safeguard, that on the evidence as it has been developed there was contributory negligence clearly from the testimony.

Mr. Luce: On her part.

30 The Court: I think that is a question of fact for the jury, and I will deny the motion on that ground; and I will deny your motion on the broad general ground that you have advanced for the reasons that I have stated.

Mr. Luce: And I will ask an exception.

The Court: And, of course, I will grant you an exception.

Bring in the jury.

(The jury returned.)

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*Teresa Bergamo, direct.*

The Defendants' Case.

TERESA BERGAMO, sworn as a witness on behalf of the defendants, testified as follows:

*Direct examination by Mr. Towe:*

Q. Mrs. Bergamo, you are one of the defendants in this case? A. Yes, sir. 10

Q. Have you ever lived in this house, Mrs. Bergamo? A. No, sir.

Q. You visit there occasionally, do you? A. Yes. I go often.

Q. On any of the visits you have made to this house, have you ever seen any of the tenants on the roof in the back? A. Well, I was coming from New York; I was coming up the back road, that is on— 20

Q. A little louder. A. And I seen—

Mr. Ward: One moment. I think that should be answered yes or no.

The Court: Yes. The question is susceptible of being answered yes or no, Mrs. Bergamo. The question is, did you ever see anyone on this back roof?

The Witness: Yes, sir.

The Court: All right 30

Q. Now, on what occasion did you see this person, whoever he might have been, on the back roof? A. I was going in to see my daughter, from the back road,—

Q. You were going in? A. —and I seen Mrs. Barthelness on the roof. I said, "You know you have no business on that roof. I have just been getting paying for the tar and paper we had to fix." So then, I went in to my daughter, and I told her, I says— 40

*Teresa Bergamo, direct.*

Mr. Ward: I object, your Honor please.

The Court: Objection sustained, as to what you told your daughter. Do I understand that you had a conversation with Mrs. Barthelmess about it?

10 The Witness: I just scolded her from the yard, telling her that she had no business to step on that roof.

The Court: Turn the other way, so the jury can hear you.

Q. Just repeat that again, what you told Mrs. Barthelmess. A. I told Mrs. Barthelmess that she shouldn't—she shouldn't stand on that roof to hang any clothes, for I had just been after paying the bill to get it fixed.

20 Q. All right.

*By the Court:*

Q. And when was that, Mrs. Bergamo? A. That was some part of November, I think it was.

Q. The same month that she was hurt? A. No, no. That was the first—well, it was the first time she moved in.

30 Q. Well, when did she move in? A. But I seen her before that. My daughter introduced me to her on the porch. She said, "This is the lady I rented the rooms upstairs to."

Q. Yes. A. I said, "Very well." That is all.

Q. Yes. But when was it that you saw her on the roof? A. Oh, long before; it was just when she moved in.

Q. That was when? A. That was in—in September, it must have been.

Q. Well,— A. It was right after the summer, I know.

40 Q. Might it not have been August? A. No, sir.

Q. Very well.

*Teresa Bergamo, cross.*

*By Mr. Towe:*

Q. Was it before or after the accident? A. Well, August or September. I know it was after the summer.

Q. Was it before or after the accident happened?  
A. Oh, before. It was just when she moved in the house.

10

Q. All right.

Mr. Towe: That is all.

*Cross examination by Mr. Ward:*

Q. You were coming from the railroad? A. I was coming from New York.

Q. You lived in New York then? A. I live in New York yet.

20

Q. You live there now? A. Yes, sir.

Q. You saw someone on this roof? A. Mrs. Barthelmess, I seen.

Q. Yes. And all that you said to her was, "You must not use that roof"? A. "You shouldn't be on that roof hanging clothes."

Q. I beg your pardon. "You shouldn't be on that roof hanging clothes"? A. Yes. "That is no place to go."

Q. That was all? A. I said a whole string to her, that—

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Q. Oh, you said a whole string to her? A. I was after paying the bill, I told her, too.

Q. But all that you said to her, "You shouldn't be on that roof hanging clothes"? A. Oh, I was mad. I told her a whole lot.

Q. What did you tell her? A. I told her she shouldn't be on that roof hanging clothes.

Q. You have told us that before. Now, what else did you tell her? A. I was just after paying the bill. I didn't want them to stand on that roof.

40

*Teresa Bergamo, cross.*

Q. And she did not say anything? A. She looked at me, and that is all; and she kept on hanging.

Q. And did not say a word? A. She looked at me; that is all.

Q. Just looked at you? A. Yes.

10 Q. Now, you are sure of that, Mrs. Bergamo?  
A. Certainly.

Q. Bergamo, is it? A. Yes.

Q. And how long did it take you to say this? A. Oh, in my madness, I didn't take long to talk.

Q. A second or two? A. Oh, I didn't take no time.

Q. And she was still there, keeping on hanging?

A. She kept on.

20 Q. She kept on hanging up clothes until you went in? A. Till she was finished.

Q. And you left there? A. No, I went in and scolded my daughter.

Q. You left the place where you were talking to her, didn't you? A. Yes.

Q. And went somewheres else? A. In the rooms with my daughter.

Q. And you left her up there where you say you told her not to be? A. Finishing her duty.

Q. Yes. A. Yes.

30 Q. Now, there was a pole there? A. Oh, that pole is about 20 odd yards away.

Q. Yes. Well, it was a pole for ropes, to which ropes were attached, to hang clothes? A. Yes, sir.

Q. And the ropes extended right to that roof, didn't they? A. It extended from the window to the pole.

40 Q. Yes. And the windows opened up on that roof, didn't they? A. The windows was supposed to go down, and she should have hung from the window.

*Teresa Bergamo, cross.*

Q. One moment. But the ropes extended from the pole to some place above that roof, didn't they?

A. On the window sill.

Q. Yes. You say on the window sill? A. On the sill; on the sashes of the window.

Q. Now, do you mean the window sill or the sashes? A. You cannot put a rope on the sill. 10

Q. You said the sill a moment ago? A. Well, give me the paper, and I will show you where.

Q. Please answer my questions, Madam. A. It is on the window.

Q. On the side of the window? A. Yes.

Q. And did you know where the hook was? A. Certainly, I knew.

Q. And it was up within six inches of the top of the window, wasn't it? A. I don't think it was six inches; it was higher up. 20

Q. Well, how far would you say that that was? A. About four inches from the top of the window.

Q. About four inches from the top of the window? A. Yes.

Q. And that was the hook— A. Yes.

Q. —upon which the rope, or to which the rope was attached that led out to the pole where the clothes were to be hung? A. Yes.

Q. And you had intended that the rope lead from that hook to the pole, didn't you? That is right, isn't it? A. I didn't intend it. I know it was— 30

Q. You knew it was there? A. Yes. That is where they had to hang their clothes, but not stand on the roof.

Q. One moment, please. And although you have said that you made all these remarks, or, at least, a lot of remarks,— A. That was the only time— 40

Q. One moment.

*Teresa Bergamo, cross.*

The Court: Please wait, Mrs. Bergamo, until he has finished the question.

Q. —to Mrs. Barthelmess, she simply continued on her work, and did not say a word? A. Yes.

10 Mr. Ward: That is all.

Mr. Towe: That is all, Mrs. Bergamo.

Mr. Ward: Will your Honor permit me to recall the last witness?

The Court: Yes. Mrs. Bergamo, will you come back, please?

TERESA BERGAMO, recalled for further cross examination, testified as follows:

20 *By Mr. Ward:*

Q. Mrs. Bergamo, isn't it true that you never saw this woman until you came to court? A. Well,—

Q. Isn't that the truth? A. Why, no. I seen that woman when she first rented the rooms. My daughter introduced me to her on the porch.

Q. Who was with you beside your daughter?

A. My daughter; that is all.

30 Q. And who else? A. Myself.

Q. When? A. That was before she—when she rented the rooms, the first week she was in there, she was on the porch.

Q. What month? A. In—what month she rented the rooms; I don't know. My daughter will have the receipt. You talk to her.

Mr. Ward: That is all.

Mr. Towe: That is all, Mrs. Bergamo.

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*Samuel York, direct.*

SAMUEL YORK, sworn as a witness on behalf of the defendants, testified as follows:

*Direct examination by Mr. Towe:*

Q. Mr. York, you are the father-in-law, are you not, of Mrs. Dora York? A. Yes. 10

Q. You visited her house occasionally, did you? A. Yes, sir.

Q. Where does she live? A. 518 Central Avenue, Carlstadt.

Q. 518 Central Avenue? A. Yes, sir.

Q. Did you or did you not ever hear Mrs. Bergamo, the lady who just testified, warn Mrs. Barthelness to stay off the roof?

Mr. Ward: I object to the question as leading. 20

The Court: Well, it is leading; but I think I will use my discretion and allow it.

Mr. Ward: All right, sir.

A. I did; yes, sir.

Q. What did you hear her say at that time, if anything? A. Well, in September, the early part, I really couldn't say, see, because I alternate every week on the position I work, and it is impossible to say what date it was or the week it was in, but it was in the early part of September, and— 30

The Court: What year?

The Witness: 1923.

Q. Go ahead. A. And I was sitting at the window. My little granddaughter, I always go over and take her out in the morning; so I went over there, and as I did, my daughter-in-law and her sister, Mrs. Barthelness, was out on the roof, and Mrs. Bergamo came up Madison Street—whether 40

*Samuel York, cross.*

she came up or down, I really couldn't say, but she came up the automobile driveway from Madison Street into the back way where the automobile shed is. I heard some woman talking, and I looked out of the window, and I heard Mrs. Bergamo say to my daughter-in-law and her sister, Mrs. Barthelmiss, "Won't you kindly get in off that roof? I have warned you many times." And Mrs. Barthelmiss, she didn't say nothing, and the daughter-in-law didn't either; but they just kept on. About ten minutes after, Mrs. Perretti came up from downstairs, and she says, "Mrs. York," or "Mrs. Barthelmiss, will you please get in off that roof as mother asked you to do?" So, with that, neither one of them said anything either. But a few minutes after Mrs. Perretti—I was sitting in the kitchen holding the granddaughter on my lap, and Mrs. Perretti turned from the window in the hall, looking in towards the door; she said, "What do you think of that?" And Mrs. Barthelmiss says, "Haw, haw, haw." And that is all.

Mr. Towe: That is all.

*Cross examination by Mr. Ward:*

30 Q. You have been quite intimate with Mrs. Perretti, haven't you? A. Occasionally, getting in and out.

Q. Mrs. York is a daughter-in-law of yours? A. Yes, sir.

Q. And, of course, Mr. York is your son? A. Yes, sir.

Q. And you have been sitting here in court with Mrs. Perretti? A. Yes, sir.

40 Q. Who is the daughter of one of the defendants? A. Yes, sir.

*Samuel York, cross.*

Q. Mrs. Perretti is the lady with the red coat?

A. Yes, sir.

Q. And your daughter-in-law is sitting right next to Mrs. Perretti, isn't she? A. Yes, sir.

Q. And next to Mrs. Perretti on the right, is Mrs. Bergamo, the woman who was just on the stand, the defendant in this case? A. Yes, sir. 10

Q. And you have been quite intimate with Mrs. Perretti, I believe you have said? A. Well, passing in and out, yes, bidding her the time.

Q. And friendly with her? A. Exactly.

Q. So much so that you come here to court to testify, do you? A. Yes, sir.

Q. Have you a subpoena? A. What is that?

Q. Have you a subpoena? A. Yes, sir. 20

Mr. Luce: I object to that.

Q. Where is it? Where is your subpoena?

The Court: I will allow it.

A. No, I haven't. That is true.

Q. What made you say a moment ago that you had a subpoena?

The Court: Answer the question, please.

The Witness: I made a mistake, Judge, Your Honor. 30

The Court: All right.

Q. You knew what I meant when I asked you if you had a subpoena, and you knew what you meant when you answered yes, didn't you? A. Yes.

Q. And you knew you were telling an untruth when you answered yes, didn't you? A. I didn't realize for the moment, no.

Q. You didn't realize? A. No, no. 40

Q. But you realize you are in a court of law,

*Samuel York, cross.*

under oath now, don't you? A. Yes, I do now, yes.

Q. But you did not realize that until I asked you where your subpoena was, did you? A. No.

10 Q. And you happened to be at your daughter-in-law's, Mrs. York's? A. Yes, sir.

Q. How often do you go there? A. Well, see, I alternate, the position I have, I alternate every week.

Q. Well, alternating, as you say,— A. Yes.

Q. —how often do you go there? A. Every time that I am working, one shift I work on four to twelve.

Q. That is not your home? A. What is that?

20 Q. That is not your home, or wasn't your home there? A. It is my daughter-in-law's home.

Q. What? A. It is my daughter-in-law's home.

Q. It was not your home? A. No, no.

Q. And you had a home, didn't you? A. Yes.

Q. At that time? A. Yes.

Q. And yet you say you were living there at that time? A. No, no, no.

Q. Just staying there? A. I didn't live there. No, I didn't live there. I only stay there. And I didn't say I did.

30 Q. Well, you were there, were you? You are sure about that? A. Every day when I work those two watches, yes, yes.

Q. Do you know Mrs. Bergamo pretty well, since this trial began? A. No, I don't. I haven't saw the woman.

Q. Since the trial began? A. I haven't saw her four times since the trial began.

40 Q. Why, you have been sitting in the same row with her? A. Why, I have only been here—this is the third day.

*Samuel York, cross.*

Q. Well, for the third day you have been sitting with her? A. Well, yes; that is right.

Q. And going out with her, haven't you, at noon hour? A. Yes, yes.

Q. Going home with her? A. Yes, that is right, yes. 10

Q. And you happened to be in the window, in September? A. Yes.

Q. Of 1923? A. Yes, sir.

Q. And you remember distinctly just what was said? A. Exactly. I heard it.

Q. One moment. And you happened to notice Mrs. Bergamo coming up along the walk leading to the garage? A. Not until my attention was drawn when she hollered up to—

Q. Then you first noticed when she yelled or hollered up? A. Yes. 20

Q. And what she yelled up was, "Will you get off the roof?" A. "Please get off the roof. I have asked you so many times."

Q. One moment. Was your recollection keen a moment ago when you testified as to what she said? A. Why, yes.

Q. Did she say, "Please get off," or "Will you get off the roof"? A. No. "Will you, please."

Q. All right. "Will you please get off the roof?" A. Yes, yes. 30

Q. Did she say that? A. Yes.

Q. Was that all that she said? A. Well,—

Q. Was that all that she said? Answer me. A. I told you a little more besides that.

Q. What more beside that? A. Do you want me to tell you?

Q. Yes. A. All right. "I am only after paying the bill for the repairs of that roof, and the tenant that lives below is kicking that the rain is 40

*Samuel York, cross.*

coming in, that you are always out there washing, and I have asked you so many times to kindly keep off there." With that, I heard no more from her.

10 Q. Now, why didn't you tell us that before? A. Well, you didn't ask me that.

Q. You were asked what was said, by counsel, weren't you? A. Yes. I told him, too.

Q. You understood his question, didn't you? A. Yes.

Q. Why didn't you tell that when you were asked? A. I did, to a certain extent, as he asked me to.

20 Q. But you have added to it now? A. That is all right. You asked me to add to it, and I done so.

Q. Yes. A. Yes.

Q. And you have done so? A. Yes.

Q. Now, have you told us all that was said? A. I have told you all that was said; yes, sir.

Q. Word for word, Mr. York? A. Yes, sir.

Q. And you understand now that you are testifying under oath? A. Yes, sir; I do.

Q. You cannot be mistaken as to a single word that was said, either,— A. Well,—

30 Q. —can you? A. I would hardly think I can.

Q. No. A. No.

Q. And you know that that was in November, 1923? A. No, sir. In September, 1923.

Q. I beg your pardon? Pardon me? September? A. Yes, sir.

Q. 1923? A. That is right.

Q. Nothing to make any impression on your mind, was there? A. No.

40 Q. Then, afterwards, you say that Mrs. Perretti came upstairs? A. Yes, sir.

*Samuel York, cross.*

Q. And she said, "Will you please get off the roof"? A. "As my mother asked you to do."

Q. "Will you please get off my roof as my mother asked you to"? A. Right; yes, sir.

Q. And they did not get off? A. No.

Q. And then she turned and said, "What do you think about that"? A. Yes. 10

Q. And that was all? A. No. Mrs. Barthelmess says, "Haw, haw, haw."

Q. I forgot the "haw, haw, haw." A. Well, that is all right. I didn't.

Q. No. You remember that distinctly? A. Yes.

Q. Now, do you remember that those were the exact words that were used? A. Yes.

Q. And you cannot be mistaken about the exact language? A. I hardly think so. 20

Q. And from September, 1923, to date, you have kept that in mind? A. Well, yes.

Q. Have you or not? A. Yes.

Q. Why? A. Why?

Q. Yes. A. Why, I just happened to think of it when it came up, as I was asked to come to court.

Q. When were you asked to come to court? A. When was I asked?

Q. Yes. A. When Mrs. Bergamo got notified that the case was coming up. 30

Q. Well, so that— A. Day before yesterday.

Q. So that was the first that you had given this matter any thought from September, 1923, to date? A. Exactly.

Q. Who else had you talked to on that day? A. Who else did I talk to on that day?

Q. In September, 1923, yes. A. Why, nobody that I know of.

Q. So you haven't talked to a living soul on that day that you remember? A. Only my daughter-in-law, and my own family. 40

*Samuel York, cross.*

Q. What did you say to your own family on that day? A. I asked her when she came in—

Q. One moment. A. Why, you are asking me a question, and I am answering.

Q. One moment.

10

Mr. Ward: I withdraw that question.

Q. What did you say to your own family on that day, do you remember? A. To my daughter-in-law?

Q. To your own family, aside from your daughter-in-law. A. Nothing at all; only, it was a shame that they didn't—to my wife.

Q. To your wife? A. Yes.

Q. You say you said "It was a shame"? A. Yes.

20

Q. What else did you talk to your wife about? A. That is all that I can recollect of.

Q. So that that is the only thing that you remember? A. Right.

Q. Since September, 1923? A. Right, right.

Mr. Ward: That is all.

*By the Court:*

Q. Mr. York,— A. Yes, sir.

30

Q. —part of the things that you heard Mrs. Bergamo say to Mrs. Barthelmess was, "I have told you before not to use the roof," is that correct? A. Exactly.

Q. Are you sure about that? A. Positive, positive.

Q. All right.

*By Mr. Ward:*

40

Q. But you were never there before with Mrs. Bergamo? A. I was what?

Q. You were never there before this occasion in

*Samuel York, redirect.*

September, 1923, when Mrs. Bergamo told them? Were you, or not? A. Yes, I was.

Q. Oh, let me see, now. So that you were there regularly when Mrs. Bergamo— A. No, no; not when Mrs. Bergamo—

Q. Were you ever there before when Mrs. Bergamo told Mrs. Barthelmess not to use that roof? A. Not only that one day. 10

Q. Only that one day? A. Only that one day.

Q. But you also distinctly remember that Mrs. Bergamo said to Mrs. Barthelmess, "I have told you before not to use the roof"? A. That is the very words the lady repeated, yes.

Q. Don't you know that was the first time she had ever seen Mrs. Barthelmess on the roof? A. That I don't know nothing about. I am sure I don't follow her around. 20

Q. But you do remember this accurately? A. Right.

Q. This conversation? A. Right. Yes, sir.

Mr. Ward: That is all.

*Redirect examination by Mr. Towe:*

Q. Who was on the roof at the time, Mr. York? A. Mrs. Barthelmess and Mrs. York, my daughter-in-law, is all was on the roof, and I was sitting at the window. 30

The Court: Well, we do not care whether they were always on the roof. Do you understand the question?

Q. At that time?

The Court: At that time, who was on the roof?

The Witness: Yes, Judge, your Honor; 40

*Anna Perretti, direct.*

my daughter-in-law and Mrs. Barthelmess was always on the roof.

The Court: Well, then, was Mrs. Bergamo talking to Mrs. York or to Mrs. Barthelmess?

10 The Witness: She stopped both of them from this here driveway that comes up from Madison Street to the back of the premises.

The Court: She stopped both of them?

The Witness: Yes, sir.

The Court: Well, you did not tell us about that before.

The Witness: I beg your pardon. I repeated that, Judge, your Honor.

Mr. Luce: I so understood it, your Honor.

20 The Court: Oh, very well. I did not understand that. Very well. All right.

Mr. Towe: That is all, Mr. York.

The Witness: Thank you.

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ANNA PERRETTI, sworn as a witness on behalf of the defendants, testified as follows:

*Direct examination by Mr. Towe:*

Q. Mrs. Perretti, you are the daughter of Mrs. Bergamo? A. Yes, sir.

30 Q. Where do you live? A. 518 Central Avenue.

The Court: A little louder, please, Mrs. Perretti.

The Witness: 518 Central Avenue, Carlstadt.

Q. And did you show the premises to Mrs. Barthelmess? A. No, sir.

Q. The rooms that they rented? A. No, sir; I did not.

40 Q. You did not? A. No, sir.

Q. Do you know who did it? A. The sister.

*Anna Perretti, direct.*

Mr. Ward: One moment.

A. (Continuing.) Mrs. York did.

Mr. Ward: Was she there?

The Court: Do you know? How do you know? 10

The Witness: How do I know?

Q. Who gave you—

The Court: How do you know that Mrs. York showed the rooms?

The Witness: Well, they afterwards came down to me.

The Court: You did not see them? You did not see her show the rooms?

The Witness: No, sir. 20

The Court: You only know that from what you were told?

The Witness: I know that she had showed the rooms, because they immediately—Mr. York brought them downstairs to me, and she gave me the deposit.

The Court: All right.

The Witness: I did not show the rooms.

The Court: All right. 30

Q. Did you ever see Mrs. York or Mrs. Barthel-  
mess, or both of them, on the roof? A. I did; yes,  
sir.

Q. What were they doing on the roof when you  
saw them? A. Hanging clothes. And I repeatedly  
warned them to keep off that roof.

Mr. Ward: I ask the last part be stricken  
out.

The Court: Strike it out as not respon-  
sive. 40

*Anna Perretti, direct.*

Q. What did you say to them at the time, if anything? At the time you saw them hanging clothes, what did you say to either or both of them, if you said anything? A. I told them that my mother is always after me to tell them to keep off that roof, it is continually leaking into my rooms. And it seems they never paid attention to me.

The Court: Do not volunteer, Mrs. Perretti, please. Your counsel will ask you questions so that you need not fear but you will have a chance to tell your story. You will get along a little faster if you just confine your answers to the questions that are asked.

Q. Now, on the day that Mrs. Barthelmess was precipitated from the roof, where were you at the time? A. I was sitting in my dining-room putting the baby to sleep; I was rocking her to sleep.

Q. Where is that with respect to her apartment? That is, is it on the same side of the house, or on the other side? A. The same side.

Q. It is underneath it or above it? A. My dining-room and kitchen are underneath the roof.

Q. Underneath? A. Yes.

A Juror: We cannot hear.

The Witness: My dining-room and kitchen are underneath the roof, this roof we are speaking of now.

The Court: On the same side as the apartments were of Mrs. Barthelmess?

The Witness: Yes.

Q. Just keep your voice up. And how did you first know that an accident had happened? A. Well, I heard her hollering.

Q. Just a little louder.

*Anna Perretti, direct.*

The Court: "I heard her hollering."

A. I heard her hollering. It seems, when she—I guess the line broke and—the line sagged.

Q. Never mind. A. And it pulled her off, and I heard her running off, and then I heard her scream; and I put the baby down and I quick ran downstairs, and I ran next door to the neighbor to call the doctor. 10

The Court: Did I understand you to say you heard her running off the roof?

The Witness: When the line pulled her.

The Court: Well, you did not see the line pull her; you were in the house, were you not?

The Witness: I was in the house. 20

The Court: Well, do not tell us anything that you suppose.

The Witness: But I heard distinctly.

The Court: Wait a moment, please. Do not interrupt me. Do not tell us anything that you suppose. Now, you did not see the line break, did you?

The Witness: I didn't see it break, no, sir.

The Court: So that you heard her running on the roof, is that correct? 30

The Witness: Yes, sir.

The Court: And then heard her fall, or just heard her scream?

The Witness: I heard her scream.

The Court: All right.

Q. Then what did you do? A. I put the baby down and I ran downstairs. Then I think I went next door to the neighbor, and she telephoned to the doctor. 40

Q. Did you go outside first? A. No. I went

*Anna Perretti, direct.*

right down to her, right downstairs. She asked me to bring her a glass of water, which I did.

Q. And did you observe the rope at that time, that is, the clothes line? Where were the clothes?

A. All in the yard, and they—

10 Q. What position was the rope in? A. And they extended down right by her feet.

The Court: What was the condition of the rope, you are asked?

The Witness: The rope broke. That is how—

The Court: It was broken?

The Witness: Yes, sir.

The Court: All right.

20 Q. And was it near her, one end of it? A. Yes. Yes, right down by her feet.

Q. Did you observe whether or not the rope was wrapped around her hand? A. I believe her wrist was red from it.

Q. Her wrist was red? A. Yes.

Q. Was there more than one mark, or just one mark? A. Just the one mark.

Q. Just the one mark? A. Yes.

30 Q. Now, you have just testified, or, at the beginning of your testimony, you said that you did not show the rooms to Mrs. Barthelmess? A. No, sir; I did not.

Q. Did you ever say to her, pointing out the window on to the roof, "There is where you go to hang your clothes"? Did you ever say that to Mrs. Barthelmess? A. No, I did not.

Q. You did not? A. No. She understood that she was to hang—

40 The Court: No, no. Do not testify what you think she thought.

*Anna Perretti, direct.*

A. (Continuing.) I told her that was where she was to hang from.

Q. But at the time that Mrs. Barthelmess testified this morning that you were with her and showed her the rooms— A. No, I did not show the rooms.

Q. So that at that time, you did not point out the window when she was being shown the rooms? 10

A. Not at that time.

Mr. Waru: Do not lead her.

The Court: All right. Proceed.

Q. Did you or did you not say anything to her about where she was to hang her clothes at the time she was being shown the rooms? A. No, sir; I did not.

Q. When did you, if ever, say anything to her, or indicate where she was to hang her clothes? A. I told her that she was to hang from the window. 20

Q. You told her that she was to hang from the window? A. I did.

The Court: When was that?

Q. When did you tell her that? A. Right after when I heard her walking on the roof.

The Court: What day?

The Witness: I do not remember what day. 30

The Court: How soon after was that, the first time that you heard her on the roof, that you told her where she was to hang her clothes from?

The Witness: No. It kept on for about a week or so.

The Court: No. We are trying to find out when you told her where she was to hang 40

*Anna Perretti, direct.*

the clothes. When was that? How soon after she moved in?

The Witness: Well, it wasn't very long after she moved in. It wasn't longer than a week.

10 The Court: And had she ever been on the roof before that, to your knowledge?

The Witness: Before I told her?

The Court: Yes.

The Witness: Yes. I believe she did go out on the roof. I thought her sister had explained to her that she was to hang from the roof. I didn't notice—

Mr. Ward: I object to that.

The Court: Strike it out.

20 How did you come to tell her where she was to hang her clothes this time when you did tell her? Do you remember what the circumstances were? How did you come to tell her that?

The Witness: Well, she used to go on the roof to hang clothes.

30 The Court: So that after you learned that she went on the roof to hang the clothes was when you told her she must hang them from inside the room, is that right?

The Witness: Yes, sir; that is right.

The Court: And just what did you say to her at that time?

The Witness: I told her that she was supposed to hang from the window.

The Court: What do you mean by that?

40 The Witness: Well, she is supposed to— if she can't reach, she is supposed to step up on a chair and pull the sash down from the top and hang that way.

*Anna Perretti, direct.*

A Juror: We cannot hear.

The Court: She says that after she learned that Mrs. Barthelmess went out on the roof to hang the clothes, she then explained to her that she must hang them from the window.

10

Now, I am asking you—and keep your face turned toward the jury, Mrs. Perretti—whether at that time you also explained to her that if she could not reach, she was to stand on a chair?

The Witness: Yes, sir. That is just what I said.

The Court: You did explain that to her?

The Witness: Yes, sir.

The Court: And why did you explain that to her? Did she say she couldn't reach?

20

The Witness: I don't know the reason why.

The Court: "I don't know the reason why." Keep your face the other way. It is not important that I should hear you, but it is very important that the jury should hear you.

Proceed, please.

But you did also tell her that she was to pull the shade up and the upper sash down, is that correct?

30

The Witness: I did.

The Court: You told her all those details?

The Witness: She is supposed to step up on a chair and pull the sash down from the top and hang that way.

The Court: Did you tell her why she was to do it?

40

*Anna Perretti, cross.*

The Witness: Because the roof was continually leaking, and the water was coming down into my kitchen.

10 The Court: And that was just after the first time that she was on the roof, to your knowledge; is that correct?

The Witness: Yes, sir.

The Court: All right.

Mr. Towe: That is all.

*Cross examination by Mr. Ward:*

Q. Do you still live at the same place, Mrs. Perretti? A. Sir?

Q. Do you still live at the same place? A. I do; yes, sir.

20 Q. And I believe you stated you were a daughter— A. I am; yes, sir.

Q. —of Liberale, and— A. Teresa.

Q. —Teresa— A. Teresa Bergamo.

Q. —Bergamo, is that pronounced? A. Bergamo.

Q. They live in New York. A. Yes, sir.

Q. They have no other relatives living in this building, have they? A. No, sir.

30 Q. And you collect the rents there, don't you? A. Yes, I do that for my mother.

Q. One moment. And you have charge of the building, haven't you? A. Yes, sir.

Q. The renting of the building? A. Yes.

Q. So that when Mrs. Barthelmess came over to rent the building, you collected the rents, didn't you? A. Yes, sir.

Q. Do you remember seeing her and her husband?

40 Mr. Ward: Will you please stand up, Mr. Barthelmess? (Man stands.)

*Anna Perretti, cross.*

Q. Do you remember seeing her and her husband there? A. Yes, sir.

Q. And do you remember talking to them about the rooms? A. I didn't show them the rooms.

The Court: He did not ask you that. He asked you whether you remember talking to them about the rooms. 10

The Witness: Yes, sir.

Q. Do you remember talking to them about putting the gas in the bedrooms? A. No.

Q. Do you remember about the paper on the walls? A. No. The—

Q. One moment. Did you talk to them about putting paper on the walls? A. No, sir.

Q. Did you talk to them about the gas fixtures in the rooms? A. No, sir. 20

Q. Were there gas fixtures put in the rooms? A. He put them in himself.

Q. There were gas fixtures, then, put in the rooms, in the bedrooms, were there? A. He put them in himself.

The Court: Were there or were there not? Yes or no? We do not care who put them there.

The Witness: No. 30

The Court: There were none put in?

The Witness: No.

Q. At any time? A. No. He put in—

Q. Did anybody put gas fixtures in the bedrooms? A. He put it in himself.

Q. All right. They were put in then, weren't they? A. Yes.

Q. And you, having supervision of this building, naturally wanted to see what tenants came in there, didn't you? A. Yes. 40

*Anna Perretti, cross.*

Q. And you gave the receipts yourself, didn't you? A. I did.

Q. And you gave the receipt for the rent to Mrs. Barthelness, didn't you? A. I did; yes, sir.

10 Q. So that, when Mrs. Barthelness rented these rooms, you gave her the receipt, didn't you? A. Yes, sir.

Q. And her husband was with her at that time, wasn't he? A. Yes, sir.

Q. Well now, when she and her husband rented these rooms and you gave her the receipt and she paid the rent, didn't you at that time talk about where she was to hang the clothes? A. Not at that time; no, sir.

Q. Didn't she ask you? A. No, sir.

20 Q. But there was a pole there, wasn't there? A. Yes, sir.

Q. And the tenants were hanging the clothes from this pole, weren't they? A. Yes, sir.

Q. On a rope? A. Yes.

Q. And the pole, or the clothes line for hanging the clothes, extended from the pole to this building, didn't it? A. Yes.

Q. And where Mrs. Barthelness' apartment was, or the premises that she occupied,— A. Yes.

30 Q. —there was a hook, wasn't there? A. Yes.

Q. And that hook was way up above, about four inches from the top of the window? A. From the top of the—

Q. Yes. A. —sash, from the frame.

Q. The top of the frame? A. Yes.

Q. Now, I show you Exhibit P-1, and those windows, each window has eight panes in, hasn't it? A. Yes, sir.

40 Q. In other words, this picture is taken above the lower half, and the lower— A. Sash.

*Anna Perretti, cross.*

Q. —sash is not shown? A. No, sir.

Q. Because of the angle of the picture. And did I understand you to say that you heard her on the roof for a week before you said anything to her?

A. I did.

Q. So that, for about a week, you heard her going out on that roof? A. Yes. 10

Q. And although you say you did not want her to go on the roof, you never said a word to her?

A. Well, I didn't like to.

Q. Well, you never said a word to her, did you?

A. No, I did not.

Q. Or never said a word to anyone else before that? A. I did.

Q. But then there was some occasion when you say that you said something to her? A. I did not understand that question. 20

Q. I beg your pardon. If you do not understand, tell me. A. Yes.

Q. There was some time when you told her not to go on? A. I did tell her, yes; more than once I told her.

Q. More than once. And the first time was about how long before the accident? A. Oh, quite some time.

Q. Well, about how long? A. The first time? 30

Q. Yes. A. The first time I told her about a week after she was in the house.

Q. About how long before the accident? A. I was only speaking to her about a few days before the accident.

Q. I mean, the first time that you told her. A. About a week after she was in the rooms, I told her.

*By the Court:* 40

Q. And he is now asking you how long that was

*Anna Perretti, cross.*

before the accident, if you know? A. The last time I talked to her?

Q. No. The first time you talked to her was about a week after she moved in? A. Yes, sir.

10 Q. And you were asked to state how long before the accident that was? A. About three months.

Q. About three months? A. Yes, sir.

*By Mr. Ward:*

Q. Now, have you told us all there is about your telling Mrs. Barthelmess? A. I told Mrs. Barthelmess and her sister, both.

Q. Yes. A. To keep off the roof.

Q. Now, have you told us of every occasion? A. I told her about six times altogether.

20 Q. About six times altogether? A. Before the accident, to keep off.

Q. And the six times that you told her were in between the first time, about a week after she went in,— A. Yes.

Q. —and the last time was about a week before the accident happened, you said? A. Before the accident.

Q. And that covered a period of about three months? A. About three months.

30 Q. And she was always alone when you told her? A. I told her once when she was with her sister.

Q. Once she was with her sister? A. Yes, sir; she was—

Q. That was the only time she was with anyone else? A. Yes, sir.

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

Q. And that was the only time that she was there when she was with anyone else? A. I—

40 Q. Was it or not, that you know of? A. I went upstairs and told her again. I told both of them.

*Anna Perretti, cross.*

Q. Well, did you tell her in the presence of anybody else more than once? A. No.

Q. So that, on one occasion, you told her in the presence of somebody else? A. I did.

Q. And that other person was her sister? A. Yes, sir. 10

Q. Nobody else? A. Nobody else.

Q. You are sure of that? A. Yes, sir; unless someone heard me.

Q. Unless someone might have heard? A. Yes.

Q. Now, there was some occasion when you told her where to hang out the clothes, wasn't there? A. Yes.

Q. And she was to hang out the clothes on some rope that extended from the pulley on the pole? A. Yes. 20

Q. Back to the building, wasn't she? A. Yes.

Q. And you haven't any idea why you told her to stand on a chair, have you? A. To keep off the roof.

Q. Well, you didn't know whether it would be necessary to stand on a chair? A. Well, she couldn't reach from the floor.

Q. She could not? A. No, sir.

Q. Are you sure of that? A. I am positive she could not reach from the floor. 30

Q. Were you asked a moment ago why you told her to stand on a chair, and did you say that you did not know why? A. I didn't say no such a thing.

Q. I see.

The Court: Keep your voice up, Mrs. Perretti, please.

Q. This pole was how far from the house? A. Well, they need 50 yards of rope. 40

*Anna Perretti, cross.*

Q. 50 yards. 25 yards, in other words, from the house; is that right? A. Well, yes; that is right. 50 yards.

Q. And had other tenants been in this place before Mrs. Barthelmess? A. Yes, sir.

10 Q. And Mrs. York was there before Mrs. Barthelmess came in? A. Yes, sir.

Q. And they had all been hanging their clothes from the roof, hadn't they? A. The lady before—

Q. Had they, or not? A. Yes, they had.

Q. And they had all been using the roof, hadn't they? A. Yes.

Q. Standing on the roof? A. Yes.

Q. And you had never put anyone out for that reason, had you? A. No, sir; but I—

20 Q. One moment. A. —warned them to keep off.

Q. One moment. So that you knew it was a common practice to go out on that roof? A. Yes.

Q. To use the roof, or the place there, to hang the clothes to that pole? A. That was against the landlord's wishes to do that.

Q. It was what they did, wasn't it? A. Yes.

Q. And you continued to let them do it without putting them out, didn't you? A. Well, they paid no attention to me.

30 Q. Well, you didn't put them out, or try to put them out, did you, at any time? A. Well, I didn't know how to put them out.

The Court: That is not the question that is asked you, Mrs. Perretti. You are asked whether you did or did not put them out?

The Witness: No, sir.

The Court: Because of their doing it?

The Witness: No, sir.

40 The Court: Very well.

*Anna Perretti, cross.*

Q. Now, Mrs. York is a particular friend of yours, isn't she? A. Well, naturally; she lives in the house.

Q. She is still a tenant in the building, isn't she? A. Yes, sir.

Q. She is here in court? A. Yes, sir. 10

Q. Isn't she? She was sitting next to you? A. Yes.

Q. She is now sitting next to your mother? A. Yes.

Q. And she is a sister of this Mrs. Barthelness who has been hurt, isn't she? A. Yes.

Q. And you never spoke to anyone else beside Mrs. Barthelness about her using that roof, did you? A. I spoke to her sister.

Q. Yes, I know. But I mean, about Mrs. Barthelness using the roof? A. I did. 20

Q. To whom? A. I spoke to my husband and I spoke to my mother.

Q. You did? A. I did.

Q. And the roof was used commonly by everybody who was there, or who were tenants, up to the time of this accident, wasn't it? A. Yes, sir.

Q. And then, afterwards it stopped, didn't it? A. It stopped; yes, sir.

Q. Yes. So that the first that the hanging of clothes from that roof stopped was after this accident happened to Mrs. Barthelness? A. Yes. 30

Q. And you say you heard something on the roof? A. Yes, I heard the rumpus on the roof when she—

Q. Had you heard it that morning? A. Yes, I had.

Q. And yet you did not go up that morning? A. No.

*Anna Perretti, cross.*

Q. Did you? A. No, I did not.

Q. So that, according to you, although you heard Mrs. Barthelmess on the roof on the morning of the accident, you did not go up there to say anything to her, did you? A. No, sir.

10 Q. But then you heard another rumpus in the afternoon? A. About one o'clock.

Q. And then you went out and you found her injured? A. Yes.

Q. And she was in great pain, wasn't she? A. No doubt she was, yes.

Q. Yes. And you went and got her a drink of water? A. I did. She asked me to do that.

The Court: Keep your voice up.

20 The Witness: She asked me to do that.

Q. Yes. And you did it for her? A. I did, yes.

Q. How did you happen to see her wrist, to look at that? A. Why, I looked at her.

Q. Why? A. Because the clothes was right there beside her.

Q. Well, the clothes line may have been beside her, but it wasn't around her wrist, was it? A. Her wrist was red.

30 Q. The clothes line wasn't around her wrist, was it? A. It was right around her feet.

Q. Well, around her feet. Were her feet red? A. Well, I suppose she threw it off.

Q. Were her feet red? A. No.

Q. Did you look to see if her feet were red? A. How could I? She had shoes on.

Q. I beg your pardon? I did not hear that, Madam. A. She had shoes on. I couldn't see her feet.

40 Q. So, although the clothes line was around her feet, you looked at her wrist? A. I did.

*Anna Perretti, cross.*

Q. Why? A. Well, I looked at the lady. I couldn't help seeing it.

Q. But you knew her leg was the part that was injured, didn't you? A. Well, we didn't know it was broken.

Q. You knew she couldn't stand up, didn't you? 10  
A. I didn't know it, no. She complained, "Oh, my leg," but we didn't know it was broken.

Q. So that the thing that she complained about was her leg? A. Yes.

Q. And yet you looked at her wrist? A. I couldn't help seeing that.

Q. For how long before you went up had you heard this rumpus? I think you used the word "rumpus"? A. Yes.

Q. On the roof. I mean, now, in the afternoon. 20  
Some little time? A. Well, after the rumpus, she fell down, and I heard her scream.

Q. No. But I mean before the accident. You had heard her on the roof in the morning, hadn't you? A. Yes.

Q. And then, in the afternoon, you heard her again? A. About one o'clock.

Q. Yes. And before you heard her scream, how long did you hear her on the roof there, by going back and forth, or whatever it was that the rumpus was? A. Well, she just hung out the largest part of her clothes. 30

Q. How long did that take? A. Not very long. About ten or fifteen minutes.

Q. So you heard her in the afternoon for about ten or fifteen minutes? A. No. About one o'clock.

Q. And you never went up there? A. No. I had told her.

Q. And you had charge of the building, didn't you? A. Yes. 40

Mr. Ward: That is all.

*Dora York, direct.*

DORA YORK, sworn as a witness on behalf of the defendants, testified as follows:

*Direct examination by Mr. Towe:*

10 Q. Mrs. York, you are the sister of Mrs. Barthelmess, the plaintiff in this case? A. Yes, sir.

Q. And you live at the same address that she lived at the time she was injured? A. Yes, sir.

Q. Before this accident happened, where were you in the habit of hanging your clothes from? A. I hung it from the roof, but when I took the room, she told me to—

Mr. Ward: One moment, now. Do not volunteer.

20 The Court: You hung it from the roof?  
The Witness: I hung it from the roof.

Q. Just answer the questions I ask you. A. All right.

Q. Did you have permission from the landlord to hang your clothes from the roof? A. No, sir.

Q. Did they ever tell you that that was where you were to hang them from? A. No, sir.

Q. Who showed these rooms to Mr. and Mrs. Barthelmess? A. I did.

30 Q. You did? A. And she knows it.

Q. Just answer the question. Now, were you ever warned by Mrs. Bergamo or Mrs. Perretti—  
A. Yes, sir.

Q. —to stay off the roof?

Mr. Ward: Please wait. If your Honor please, may I object to the witness endeavoring to answer the question before it is asked?

40 The Court: I will strike it out if she does.

*Dora York, cross.*

Just confine your answers to the questions that are asked.

Q. Were you ever warned by either Mrs. Bergamo or Mrs. Perretti to stay off the roof?

Mr. Ward: I object to the question. 10

A. Yes.

Mr. Ward: Now, your Honor—

The Court: Do not answer when an objection has been made, Mrs. York. Strike the answer off.

Mr. Ward: I object.

The Court: On what ground?

Mr. Ward: On the ground that whatever may have been said to this witness not in the presence, of course, of the plaintiff, is not relevant. 20

The Court: Objection sustained.

Q. Were you ever in the presence of Mrs. Barthelness when either Mrs. Bergamo or Mrs. Perretti warned her to stay off the roof? A. Mrs. Barthelness and I was going out one day, or either we were sitting on the porch, I don't know which, when Mrs. Perretti came out and told her and I to stay off the porch, and that is the God's honest truth. 30

The Court: We do not want you to say anything except what is the truth.

Mr. Luce: That is all.

*Cross examination by Mr. Ward:*

Q. You are a sister of this woman whose leg was broken, aren't you? A. Yes, I am.

Q. And you are a tenant in this building yet, aren't you? A. Yes, I am. 40

*Dora York, cross*

Q. Still living there? A. Yes, I am.

Q. Have you a subpoena? A. You sent it to me.

Q. Yes. Have you a subpoena from them? A. No, I haven't.

10 Q. You haven't any subpoena from them? A. No.

Q. But you recall,—I think it was yesterday, wasn't it? A. Yes.

Q. And you recall that when we were talking with your sister, this gentleman, Mr.—

Mr. Towe: Towe.

Q. —Mr. Towe,— A. Yes.

Q. —came and asked you to come out? A. Yes.

Q. And we told you to go, didn't we? A. Yes.

20 Q. And then it is true, is it not, that afterwards, Mr. Allen—

Mr. Ward: Will Mr. Allen stand up?  
(Man stands.)

Q. —talked to you? A. Yes.

Q. By the way, I might say I had never seen you before, had I? A. No.

Q. Any of you, so far as you know? A. No.

30 Q. But Mr. Allen came to you and said that I would like to talk to you; do you remember that? A. Yes.

Q. And you then replied to Mr. Allen that you did not care to move, did you? A. I said I could sit still.

Q. Yes. You preferred to sit still; but you had already talked to Mr. Towe, hadn't you? A. No. Not yesterday morning.

40 Q. Or, Mr. Towe took you out of the room where we were, didn't he? A. And I came in and sat in the back.

*Dora York, cross.*

Q. All right. And Mr. Towe said that he wanted to talk to you, didn't he? A. But he didn't talk.

Q. Did he say that or not in the presence of all of us? A. Yes, he said that.

Q. Yes. And you went out without any objection to us, or on our part, Mr. Allen and myself; that is right, isn't it? A. Well, I didn't know I had to sit in there. 10

Q. Yes. But then, later on, when you had refused to come out, when Mr. Allen came into the courtroom here and asked you to come out, you told him you were sitting still? A. Yes.

Q. And you recall I came in, didn't I? A. Yes.

Q. And told you I wanted to talk to you, didn't I? A. Yes.

Q. And then you didn't come out, did you? A. No, I didn't. 20

Q. You wouldn't come out, would you? A. No; because I was sitting still.

Q. Yes. You wanted to sit still? A. Sure.

Q. And you knew that I had been talking to your sister about her case? A. Yes.

Q. Then, finally, I came to you again and told you that I wanted to talk to you, didn't I? A. Yes.

Q. And then you came out, didn't you? A. Yes. Then I came out. 30

Q. And when you got out in the hallway,— A. Yes.

Q. —I told you—or, then Mr. Towe came up, didn't he? A. Yes.

Q. And tried to take you away, didn't he? A. I don't know. I wasn't interested.

Q. Well, he came up where we were standing, before we had talked, didn't he? A. Yes.

Q. Then I told you and Mr. Towe that I wanted the same privilege that I had given them? A. Yes. 40

*Dora York, cross.*

Q. Or given him, to talk to you? A. Yes.

Q. And I expected it. I told him that, didn't I?

A. I don't remember what you told him.

Q. And then I called Mr. Towe back before I talked to you, didn't I? A. I don't remember.

10 Q. Well, do you remember my stating that all we wanted in this case was the truth? A. And I told you the truth.

Q. I told you that, didn't I? A. Yes.

Q. And then, do you remember blurting out, or saying, before you were asked a single question, "Well, I have got to say that my sister and I were told"? A. I didn't say nothing of the kind. You asked me the truth. You said, "Did you go on that roof?" I says, "Yes, and I was told to stay off."

20 Q. One moment. Do you remember blurting out, without one question being asked you, "My sister and I were told to stay off"? A. You—

Q. One moment.

Mr. Ward: I will reframe that.

Q. Did you not say, in the presence of Mr. Allen and myself, after Mr. Towe had left, "I have got to say that my sister and I were told to keep off that roof"? A. You asked me what I knew.

30 Q. Did you say that? A. And I said, "She told my sister and I, and I have got to say it, because it is the truth."

Q. Madam, did you say, "I have got to say we were told to stay off that roof"? A. Because it is the truth, I said.

Q. Did you say that without— A. Yes.

Q. —being asked a question? A. You asked me what I knew, and I told you.

40 Q. One moment. Then you went back, and you— A. I sat down.

*Dora York, cross.*

Q. —again went—

The Court: Do not answer the question until it is asked, please.

Q. You again went to Mrs. Perretti, is it? A. Yes.

10

Q. And her mother? A. Mrs. Perretti sat in the front, and Mrs. Bergamo and I sat in the back, in the last two seats, right together; my father-in-law in the front.

Q. And your father-in-law? A. And Mrs. Bergamo in the back.

Q. Now, you used this roof, didn't you? A. Yes, I used the roof.

The Court: Keep your voice up so the jury can hear you, Mrs. York.

20

The Witness: All right.

Q. And I think you say you remember one time you were sitting on the porch when you were told not to use it? A. Yes.

Q. You and your sister were? A. Yes.

Q. You were told by whom? A. Mrs. Perretti.

Q. And that was the only time that you were told? A. I was told with my sister present, and that was the only time; but when I—

30

Q. One moment. That was the only time that you were told when your sister— A. Yes.

Q. And you and your sister were sitting on what porch, in the front, do you mean? A. On the front porch, yes.

Q. So that the only time when you and your sister were together when you were told not to use this extension— A. Yes.

Q. —was when you and your sister were sitting on the front porch in front of the building? A. Yes.

40

*Dora York, cross.*

Q. Can you place that time? A. I cannot place the time; but I know it was before the accident.

Q. Now, is that the first time that you yourself had ever been told not to use it? A. No. When I took the rooms—

10 Q. One moment. You have been occupying that building for how long? A. I lived there four years in November, this coming.

Q. That would be two years before the— A. It was a year and something before my sister went there.

Q. A year and something, before your sister went there? A. Yes.

Q. Now, you say that you showed your sister the rooms? A. I showed my sister the rooms.

20 Q. Is that true? A. That is true.

Q. Were you there when her husband was shown the rooms in the evening? A. They came—

Q. Were you there, Madam? A. Yes.

Q. Did Mrs. Perretti show the rooms that night? A. They went to Mrs. Perretti.

Q. Did Mrs. Perretti show them the rooms that night? A. I don't know. That is one thing I won't say. I don't know.

30 Q. Didn't Mrs. Perretti give them the receipt, or don't you know? A. They went downstairs. That is all I know. She says she paid a deposit when she went downstairs.

Q. Were you with them then? A. No. I was upstairs when they paid the deposit.

Q. But for the period of time,— A. Yes.

Q. —for the year— A. Yes.

Q. —before your sister came to live there,— A. Yes.

40 Q. —you had been using that roof right along to hang your clothes, hadn't you? A. Yes. And she warned me.

*Dora York, cross.*

Q. You had used it, hadn't you? A. Yes.

Q. And you had lived there for a year, hadn't you? A. Yes.

Q. And there was a window at the end of the stairway, or on the end of the hallway on the second floor, wasn't there? A. Yes. 10

Q. And it was a window that was gotten in and out, wasn't it? A. Yes.

Q. Commonly used, wasn't it? A. By me.

Q. By you and the people who lived on the third floor, when they were up there? A. Nobody lived in the attic since I lived in that house.

Q. They didn't? A. No.

Q. But that was the window that was used by you? A. By me.

Q. Now, you are sure about this incident about which you have told us when you and your sister were on the front porch? A. Yes. My sister and I was sitting together. 20

Q. Do you remember that distinctly? A. I remember that distinctly.

Q. And that was the one occasion that you remember? A. I remember that, with my sister.

Q. And that, I say, was the one occasion that you remember? A. She told me before, but I—

Q. Yes. But you and your sister, I mean? A. No. Not together with my sister. 30

Mr. Ward: That is all.

*By the Court:*

Q. Were you home the day your sister fell off the roof? A. Yes, I was.

Q. Where were you? A. I had her two children and my one.

Q. Where? A. In my kitchen. 40

Q. You did not see the accident? A. No. When I came, they had called the doctor already.

*Dora York, redirect.*

Q. Did you hear her scream? A. No. If it wasn't for her little boy, I wouldn't have known it.

Q. All right.

The Court: Anything more?

10 *Redirect examination by Mr. Towe:*

Q. At the time of the accident, did you go out—

A. Did I go out?

Q. —side to where Mrs. Barthelmess was lying?

A. Yes. Her little boy had to go to the toilet and he wouldn't go in my house, and I went to look for my sister.

Q. A little louder. A. And I went to look for my sister, and I looked out, and I seen her line was gone, and I said, "My God, Kate fell off the roof."

20

Mr. Ward: One moment.

Mr. Towe: She is just talking to herself.

Mr. Ward: I submit that has no place in court, a person talking to themselves.

The Court: I will let it stand.

A. (Continuing.) And I went to look for Kate, and look on the roof, and Kate was laying there. And the doctor was called when I came down.

30

The Court: And you went down?

The Witness: Yes; I went down.

Q. Where were the clothes when you got there?

A. Laying down there on the ground.

Q. And what had happened to the line? A. The line had broke.

Q. Now, during the time that you say you used the roof— A. Yes.

Q. —for a place to hang your clothes from,—

40

A. Yes.

Q. —did you do that with or without the per-

*Dora York, redirect.*

mission of the landlord? A. Without the permission of Perretti.

Mr. Ward: I object as a conclusion.

The Court: Objection sustained. That is a conclusion. 10

Q. Well, were you ever warned during the time— A. Yes.

Q. Just a moment now. Were you ever warned during that time by Mrs. Perretti? A. Yes.

Q. And what was that warning? A. Keep off the roof.

Mr. Ward: I object to that, your Honor, please.

The Court: On what ground? 20

Mr. Ward: On the ground that the plaintiff herself was not present at the time.

Mr. Towe: Well, you have had her testify that during that time, she used the roof. Now, I am asking her—

The Court: I will allow it.

Q. Answer the question. A. Yes.

Q. Were you or were you not warned? A. Yes. I was warned. I was sick in bed— 30

The Court: That is all. We are not interested in your being sick in bed.

Q. Now Mr. Ward has referred to the incident out in the hall. I want to ask you to tell the Court and jury what the conversation was between you and Mr. Ward? A. I had came out, and he called me, and Mr. Towe said I didn't have to sit in that room. I came back in the court house, and said I didn't know I had to stay with Mr. Towe. Then the young man came and called me, whatever his 40

*Dora York, recross.*

name is. I says, "No, I am going to sit still." Mr. Towe came. He says, "I want you to come in the hall." I says, "I am going to sit still." He says, "I want you to come in the hall."

10 Q. That was Mr. Towe or Mr. Ward? A. This man (indicating).

Q. That is Mr. Ward. A. He says to me, "What do you know of that case?" I says, "I was told to stay off the roof and so was my sister." And he says, "You are a very peculiar sister," he says. I says, "You asked me the truth and I am telling you." He walked up these steps here, and he said to me, "Was you told to say that?" I said, "No, I wasn't present with her, and I was told to stay off the roof."

20

Mr. Towe: That is all.

*Recross examination by Mr. Ward:*

Q. One moment. A. Oh!

Q. Have you forgotten that when Mr. Ward, referring to myself, first spoke to you, you were told that we wanted the truth in this matter? A. And didn't I tell you—

Q. Do you remember that? A. Yes.

30 Q. And do you remember, also, before any question was asked you,— A. Yes.

Q. —was being asked of you,— A. Yes.

Q. —blurting out, as you are blurting out on the stand here today, "Well, I have got to say that we were both warned"? A. You asked me—

Q. Did you or not say that? A. —the truth, and I said—

Q. Did you say that? A. I said that.

40

Mr. Ward: That is all.

*Robert Allen, direct.*

*By Mr. Towe:*

Q. Why did you say that? A. Because he asked me the truth, and I told him.

Q. All right.

Mr. Towe: That is all.

10

Mr. Luce: The defendant rests.

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REBUTTAL.

ROBERT ALLEN, sworn as a witness in rebuttal, testified as follows:

*Direct examination by Mr. Ward:*

Q. Mr. Allen, do you recall yesterday afternoon talking to this last witness, Mrs. York? A. Yesterday morning, I believe.

20

Q. Do you remember her refusing to come out to be talked to? A. Yes, sir.

Q. After that, do you remember her coming out when I requested her to come out? A. Yes, sir.

Q. Do you remember that Mr. Towe immediately came up where she was? A. Yes, sir.

Q. Where we were? A. Yes, sir.

Q. Before we talked to her? A. Yes, sir.

Q. And do you remember my telling her then, that we wanted the truth, that was all? A. Yes, sir.

30

Q. And do you remember then, her saying—

Mr. Luce: Supposing you do not lead him, Mr. Ward.

Q. Well, did she or not at that time say, before she was asked any question, "Well, I have got to say that we were warned to keep off the roof"?

Mr. Luce: I object to the question as leading.

40

*Robert Allen, cross.*

Mr. Ward: It is in contradiction of the witness.

The Court: It is rather leading, but I will allow it.

10 A. Yes, sir; she did say that.

Mr. Ward: That is all.

*Cross examination by Mr. Luce:*

Q. How long had you been there? A. Been where?

Q. Where you were at the time of this conversation that you have just referred to. A. I just told her to come out, and I stepped out into the hall.

20 Q. Where had you been? Where was it that this conversation took place? A. Out in the hall.

Q. The hall of this court room? A. Yes, sir.

Q. And you had just got out in the hall? A. Yes, sir.

Q. Where had you been just before that? A. I had been over in the Common Pleas court room.

Q. Yes. You do not know where Mr. Ward and this witness had been before that? A. Prior to that time, I should say, out in the hall.

30 Q. Prior to the time you got there? A. Where Mr. Ward—I do know where she was.

Q. Well, where was she? A. She was sitting in the court room.

Q. What court room? A. This court room.

Q. And you and Mr. Ward had been in another room, had you? A. Yes, sir.

40 Q. And you and Mr. Ward came out, then, into the lobby, did you? A. Yes, sir. We weren't in a room in this court room, but a room in the Common Pleas court room.

*Robert Allen, cross.*

Q. As I understand it, you and Mr. Ward came out of the other room, and this witness came out of this room, out into the lobby and met you there, is that right? A. No. We left the Common Pleas court room and came over to this court.

Q. And Mrs. York was sitting in this court room? 10

*By the Court:*

Q. Did you call her out in the hall? A. And I called her out in the hall.

Q. Where Mr. Ward was? A. Mr. Ward, at that time, was over in the Common Pleas court room.

*By Mr. Luce:*

Q. Did you go with her, then, into the Common Pleas court room? A. No. She stayed right here, and I asked her to come out. 20

Q. Until you got her out into the hall? A. No. She stayed here. I asked her to come out, and she said she wouldn't come out.

Q. And then you went back to Mr. Ward? A. And then Mr. Ward came over.

Q. Over where? A. Into this room.

Q. Then, what happened? A. And then he called her out.

Q. And then she went? A. She went out into the hall. 30

Q. And then you went, too? A. I did.

Q. And was that the first time you had ever seen her? A. No. I seen her here yesterday morning.

Q. Yesterday morning, where did you see her? A. I saw her in the court room.

Q. Well, did you see her to talk to her yesterday morning? A. Sure, I could talk to her.

Q. Where? 40

*Robert Allen, cross.*

The Court: Did you talk to her?

Q. Where did you see her to talk to her? A. Yes, I did talk to her. She was in the court room. That was at ten o'clock.

10 Q. Nowhere else? A. Right here.

The Court: And did you have a talk with her?

The Witness: No. I just asked her to come out of the court room.

Q. And she did, didn't she? A. Yes, sir.

Q. And who was there? A. Who was in the room?

Q. Why, of course. Who was there? A. Why, Mr. Ward.

20 Q. Yes. A. And I believe—

Q. And you? A. And me.

Q. And Mr. Ward had a talk with her, didn't he? A. No, he didn't talk to her at all.

Q. How long was she there? A. I don't believe she was there for more than ten or fifteen minutes.

Q. Nothing was said to her? A. Not a word.

30 Q. And it was after she had been there some minutes that Mr. Towe came and called for her, wasn't it? A. I called her, and she went out of the room. She said she would be back, and did not come back.

The Court: You had not attempted to talk to her, nor had Mr. Ward, during that ten or fifteen minutes?

The Witness: No, sir.

The Court: That she was there?

The Witness: No, sir.

40 The Court: You were busy doing something else?

*Catherine Barthelmess, direct.*

The Witness: Yes, sir.

The Court: Very well.

Mr. Luce: I guess that is all.

The Court: That is all.

CATHERINE BARTHELMESS, recalled as a witness in rebuttal, testified as follows: 10

*Direct examination by Mr. Ward:*

Q. Did you ever know this woman, Mrs. Bergamo? A. No, sir.

Q. Before you were hurt? A. No, sir.

Q. Was there any occasion when you were on the roof, when she ever came up the roadway and warned you and your sister to get off the roof?

A. No, sir. I had to ask today who she was. 20

Q. One moment. Was there ever any occasion, when you and your sister were on the front porch in front of the building,— A. No, sir.

Q. —when Mrs. Perretti warned you not to use the roof? A. She never warned me not to go on the roof.

Q. Or told you not to go on the roof? A. No, sir.

Mr. Ward: Cross examine.

The Court: Were you ever introduced to Mrs. Bergamo by her daughter,— 30

The Witness: No, sir.

The Court: —Mrs. Perretti?

The Witness: No, sir. I never seen the woman.

The Court: Cross examine.

Mr. Luce: That is all.

Mr. Ward: That is all. We rest, sir.

The Court: Has the defendant anything in rebuttal? 40

*Motion for Verdict.*

Mr. Luce: Nothing in rebuttal.

The Court: We will take a recess until tomorrow morning.

(Recess.)

10

Hackensack, N. J., May 20, 1926.

10:00 o'clock A. M.

Trial Resumed.

20

Mr. Luce: I desire at this time, first, to move for the direction of a verdict in favor of the defendant on two grounds; first, that no negligence imputable to the defendant has been shown; second, that if such negligence is conceived to have been shown, it must have been because, and only because, the defendants did not provide this roof with a railing or fence. If it was incumbent upon them in the exercise of care imposed upon them to do that, it must have been because it was patent to a person of reasonable discretion and prudence that that was an unsafe place for anybody to use without that railing. If that was so, that was as patent and obvious to the plaintiff as to anybody else. Therefore, that the plaintiff, by using the place for the purpose for which she did, was, *ipso facto* and necessarily, guilty of contributory negligence.

30

The Court: Motion denied for the reasons that I gave yesterday.

Mr. Luce: And exception.

Mr. Luce sums up the case to the jury on behalf of the defendants.

40

M. Ward sums up the case to the jury on behalf of the plaintiff.

The Court then charged the jury as follows:

**Charge.**

PORTER, J.—Members of the jury, you have been empanelled to try an issue raised in the case of Catherine Barthelmess against Liberale Bergamo and Teresa Bergamo, and it is alleged on the part of the plaintiff that she was a tenant in the premises owned by the defendants, and that on the 19th of November, 1923, through the negligence of the defendant, she met with an accident which has caused her permanent disability, and she asks for a judgment at your hands because of the negligence of the defendant, which she claims is the proximate reason or cause for her injuries.

10

The defendants come in and deny that they were negligent in any respect and, as a defense, they say that the plaintiff was guilty of contributory negligence.

20

Negligence is the omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or the doing of something which a prudent and reasonable man would not do. The standard is not that of a particular man, but of the average prudent man. The failure to observe for the protection of the interest of another person that degree of care, precaution and vigilance which the circumstances justly demand, whereby such other person suffers injury. Negligence in its civil relation is such an inadvertent imperfection by a responsible human agent in the discharge of a legal duty as immediately produces in the ordinary and natural sequence a damage to another.

30

Even though you should find, as a matter of fact, that there was negligence on the part of the owners of this building, the defendants in this action, and

40

*Judge's Charge.*

10 you find, as a matter of fact, that the act of the plaintiff was also negligent, then you must find for the defendants. The question must always be considered whether the act of the plaintiff had a natural tendency to expose her directly to the danger which resulted in the injury complained of. If it had not, the plaintiff's negligence is not considered in law as contributing to the injury.

20 The facts in this case are for you to settle. It is the function and duty of the Court to state to you the law, and you will take what the Court says the law to be as a correct statement of the law; and, insofar as the Court states the law contrary to statements of counsel, you will disregard what counsel have said with respect to the law governing this case. The function of the jury is to find the facts, and that is the sole function of the jury. If the Court, in commenting on the facts, misstates the evidence, you will disregard what the Court has said insofar as it does not coincide with your own recollection of the evidence, because you must decide this case on your recollection of what the evidence is and not on the recollection of the Court or the recollection of counsel.

30 If you find that any witness has testified falsely to a material fact, you have a right to disregard all of the testimony that such witness may have given. You must take into consideration the interest that the various witnesses have in the outcome of this suit, in weighing the evidence that such witnesses have given. You must separate the wheat from the chaff. You must weigh and carefully consider the evidence in order to find what the facts are.

40 Counsel for the defendant has made a motion for a nonsuit on the theory that on the plaintiff's

*Judge's Charge.*

presentation of the case no legal right of action existed, and the Court denied that motion because, in the view of the Court, there was a question of fact which must be decided by the jury. You are not to assume that because the Court denied that motion that indicates in any way any view that the Court may have with respect to the respective rights of the parties. 10

There are certain issues in this case that are not disputed. First, it is not disputed that the defendants are the owners, or were the owners at the time of this accident, of the premises in question. It is not disputed that the plaintiff was a tenant there. It is not disputed that she fell from the roof and was severely injured. There are questions in the case that are in dispute. The contention of the plaintiff is that she was a tenant in this house, and that she rented the premises and had her dealings with Mrs. Perretti,—I have forgotten her exact name—the daughter of the defendants. She paid her rent to her. She got her receipts from her. She was in charge of the premises. If you find that to be a fact, the act of the agent binds the principal; she was acting for the owners of this property, and anything that she may have done as such representative is binding upon the owners of the property. The plaintiff contends that this agent, this daughter of the defendants, instructed her with respect to where to hang her clothes at the inception of the tenancy; that she showed her the pole in the yard and the hook on the house, and pointing out of a window in the hall, told her that there was the place from which she was to hang her clothes, as I recall the evidence. Pursuant to that, the plaintiff took her clothes out of the window that led from the hall- 20 30 40

*Judge's Charge.*

way onto this roof that extended over rooms that were on the floor below that were occupied by the daughter of the defendants, the agent of the premises, and was some 18 feet wide, as I recall the testimony. She says that during the period  
10 from around the first of August, 1923, until November 19th, 1923, the day of the accident, she was in the habit of going out of that window onto the roof and there manipulating her pulley which was attached to the hook in the window frame of her kitchen window, and attached to the pole in the yard some 25 yards distant, I think the testimony of one witness was, for the purpose of hanging out her clothes; that she would stand not close to the house, but on the day in question, at  
20 any rate, stood some six feet from the edge of the roof; that the hook on which the pulley was attached was some six feet from the roof, about as high she could reach by extending her arm to the utmost; that the rope sagged, and that in order to prevent the clothes from dragging on the roof it was necessary for her to go some distance from the house. I think that was her testimony. At any rate, that is what she was doing on the day of the accident. She says that on that day she felt  
30 a tug or pull, I have forgotten her exact words, and was precipitated over the edge of the roof and fell to the basement where she was found and taken to a hospital, with a broken leg, where she remained, I think, for five months. You have heard the testimony with respect to her injuries and the extent of her injuries. She says that she suffered great pain; she was unable to do any work during that time, and for sometime after; she returned to her household duties in April of  
40 1924; that there is a shortening of her right leg

*Judge's Charge.*

of  $\frac{7}{8}$  of an inch,  $\frac{3}{4}$  to  $\frac{7}{8}$  of an inch, as I recall the doctor's testimony. She walked in front of you and showed you the condition of the shortened limb. She says she still suffers pain, and the testimony of the physician is that she is likely to continue to suffer pain, and that she is permanently disabled, in his opinion. She says that she paid a hospital bill of \$225; that she paid Doctor Cooper \$24; that she had a woman do her household work for her while she was incapacitated in the hospital; that she compensated her by paying her rent of \$20 a month for those five months, and providing her with food; that the total outlay that she was obliged to expend to have her housework done was about \$100 for food and above \$100 for rent. As far as I recall, those were the only items that were testified to with respect to the actual expenditures. The wheel chair was provided by the hospital. There was no testimony with respect to who paid for the crutches that I recall. It had been testified that Mrs. Barthelmess paid these moneys out of her own funds which, while true, were furnished her by her husband, they nevertheless were her own funds; and if you find that to be a fact, and you find that she is entitled to recovery under the facts and the law as I will presently state it to you, you will include in your judgment to the plaintiff the sums of money that she has expended and, of course, if you also find for her, you will compensate her for the injury that she received. You will compensate her in a money judgment for the pain and suffering that she has undergone and the disability that she had and will continue to have.

The defendant says that that roof was not pro-

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*Judge's Charge.*

vided as a place for the tenants to use in hanging up their clothes; that the plaintiff was not told that she was to use the roof for that purpose at any time. And while the defendant admits that the tenants did for a long period of time before this  
10 accident use the roof for that purpose, and Mrs. York, the sister of the plaintiff, corroborates that and says that she was a tenant there for a year, I think, prior to the time that her sister, the plaintiff, moved there, and that she constantly used the roof for that purpose, she having a pulley line adjacent to her window, the agent for the landlord says that she knew that the tenants did use that  
20 roof for that purpose, but she says they did it without authority and against the express orders of the landlord. She goes further and says that she not only did not instruct the plaintiff to use the roof for that purpose, as the plaintiff testified, but that she admonished her against using it and told her she must not use it after she had notice that she was using it. And she says—and Mrs. York bears her out—that on one occasion she told both women when they were together that they must  
30 discontinue the use of the roof, and Mr. York corroborates that testimony by saying that he heard Mrs. Bergamo, the owner of these premises, from the yard, when he was visiting his daughter in her rooms, advise Mrs. Barthelmess, the plaintiff, that she must get off the roof and not use it; that the roof leaked; that she had just repaired the roof, and they must not use it for that purpose. Mrs. Perretti, the agent, further says that she not only did not tell Mrs. Barthelmess that she should use the roof in the manner that Mrs. Barthelmess testified, but that, on the contrary, she told her that  
40 she must hang her clothes on the line from her

*Requests to Charge.*

kitchen, by raising the shade, pulling down the upper sash and standing on a chair and passing the clothes out of the window through the upper sash, and hang her clothes on the line in that manner. Those are the main points in dispute as the Court recalls them.

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The question is, was this roof used and intended to be used by the landlord for the purpose of going upon it to hang out the clothes? Was it used in common by the tenants on that floor for that purpose, or was it used without authority by the tenants and against the express orders of the landlord? Those are questions that you must decide. Those are questions that are in dispute.

The law of this State is that a landlord who provides a place such as a hallway, a stoop, a platform, from which to hang out clothes, or what not, that is not a part of the demised premises, that is not within the apartment or place rented, but is a place or places that are used in common by the tenants; that for such places the landlord is under a legal duty and bound to use reasonable care to have such places reasonably fit and safe for such use.

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I am requested by the defendant to charge you as follows:

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(1) If the plaintiff, when injured, was not on the roof upon the invitation of the defendants, but merely by their leave or permission, the plaintiff cannot recover. I so charge you.

(2) To find that the plaintiff at the time of the accident was on the roof upon the defendants' invitation, the jury must be satisfied by a fair preponderance of the evidence that the plaintiff was expressly told by the defendants, or their agent, that she could use the roof as she was doing when

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*Requests to Charge.*

she fell and was injured, and that such invitation had not been countermanded. I so charge you.

10 (3) The roof from which the plaintiff fell could only be approached through a window and showed no evidences that it was designed or intended as a platform, to be used to put out and take in a washing. No invitation to use it for such purposes can be implied from the mere fact that the plaintiff and other tenants frequently so used it with the defendants' knowledge and permission; and unless the jury find that there was an express invitation not countermanded before the time of the accident, the plaintiff cannot recover. I so charge you.

20 (4) Although the jury find that the plaintiff was invited to use the roof as she was doing when injured, yet if they also find that the plaintiff was subsequently, and before the day of the accident, told by defendants or their agent that she must not go on the roof, the defendants are not liable, even though they knew that plaintiff continued to go upon the roof in spite of their instructions, and took no legal steps to dispossess them therefor. In such case, the plaintiff's use of the roof ceased to be a use upon the defendants' invitation, and became a merely permissive use, and the only duty  
30 that the defendants owed to her was to abstain from any wilful acts to her injury. There is no pretense that there were any such acts. I so charge you.

40 (5) I refuse to charge as requested, but charge it as I am modifying it. If the jury find that at the time of the plaintiff's injury she was on the roof at the invitation of the defendants, the jury must find that such invitation was an invitation to make such use of the roof as a reasonably prudent person should have made in view of the pat-

*Requests to Charge.*

ent fact that it was without any railing or fence around its edges; and it is for you to find as a fact whether the plaintiff's injuries were due either solely to her own negligence, or to her contributory negligence, if she fell and was injured while she stood nearer to the edge of the roof than she should have stood, in the exercise of reasonable prudence; and in either case, that is, if you find her negligent or contributorily negligent, she cannot recover. I so charge you as I have just read.

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(6) If the jury find that at the time when plaintiff fell and was injured she was holding onto the clothes line in such a manner that her own weight broke it, and so caused her to lose her balance and fall, and that she was standing at the time so near to the edge of the roof that she fell over and off of it, instead of upon it, they will be warranted in finding that in so standing and holding the line, plaintiff was guilty of contributory negligence. If they so find, the plaintiff cannot recover. I so charge.

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I refuse to charge request number seven.

(8) The testimony of Mr. Barthelmess, that six months after the accident Mr. Bergamo said that he was going to put a guard rail on the roof, and that he was sorry that he had not done so before the accident happened, must not be considered by the jury as any proof that he was guilty of negligence in not having done so. For that purpose, the evidence was incompetent. It was competent, and therefore admitted, only because it showed that the defendants were in possession and could have put a rail on the roof before the accident and did not do so; but it is not to be considered as an admission that they were under any obligation to the plaintiff to do so.

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*Exceptions to Charge.*

The burden of proof is on the plaintiff to prove her case, namely, that she was injured by reason of the negligence of the defendant in that he did not provide a place that was safe, a place such as a reasonably prudent man would have provided for the purpose for which it was placed or used. If you find that the burden of proof has been sustained by the plaintiff, that the clear weight of the testimony satisfies you by the preponderance of the testimony that those were the facts, there will be a recovery at your hands for the plaintiff. If, on the other hand, you find from the facts that this place was not provided for that purpose, that it was not intended for that purpose, that she had no permission to use it, that she was not instructed to use it, and that even though there was negligence on the part of the defendant in not making it as safe as a reasonably prudent man would do; but that she met this accident because of her own contributory negligence, then you will find for the defendants.

You may now take the case.

(Officer sworn and the jury retired.)

Mr. Ward: I wish to except to that part of your Honor's charge wherein you charged the jury that if the act of negligence on the part of the plaintiff was such that caused the accident, that then the plaintiff could not recover, my ground being that if the negligence of the defendants was such that, irrespective of the negligence of the plaintiff, the accident would have happened, there could be a recovery.

The Court: Very well.

Mr. Ward: And also that part of your Honor's charge where you repeated that, where you said that if the act of the plaintiff was the cause of the

*Exceptions to Charge.*

injury, there could be no recovery, as taking from the jury the consideration that if the negligence of the defendant was such that the accident could have happened, irrespective of any negligence on the part of the plaintiff, that there could be a recovery.

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And I wish to except to the first request to charge, and the second, and the third, the fourth, the fifth as charged, and the sixth, calling your Honor's attention in the sixth request to charge, you have charged, or taken from the province of the jury, the decision of certain facts, and that in that request to charge you have charged certain facts upon which they may base their consideration, and decide upon their deliberation, and I cite the case of Brown, and the case against Rock, in that.

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The Court: In other words, I should have said, if you should find?

Mr. Ward: Yes, sir. You should not have assumed that the facts were as in the request to charge and stated to them as requested in the charge, and left the finding of the facts entirely to the jury.

And also to the sixth and eighth requests to charge.

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The Court: Very well.

Mr. Luce: I desire to note an exception to your Honor's refusal to charge the defendants' seventh request, and also to the refusal to charge the fifth request, except as modified.

The Court: As modified, yes.

The defendants' requests to charge Numbers 5 and 7, as originally submitted to the Court, are as follows:

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(5) If the jury find that at the time of the plain-

*Exceptions to Charge.*

10 tiff's injury she was on the roof at the invitation  
of the defendants, the jury must find that such  
invitation was an invitation to make such use of  
the roof as a reasonably prudent person should  
have made in view of the patent fact that it was  
without any railing or fence around its edges; and  
the plaintiff's injuries were due either solely to her  
own negligence, or to her contributory negligence,  
if she fell and was injured while she stood nearer  
to the edge of the roof than she should have stood,  
in the exercise of reasonable prudence; and in  
either case, she cannot recover.

20 (7) Apart from the testimony to the effect that  
the plaintiff was told by the defendants, or their  
agent, that she could use the roof as a place from  
which to put out and take in her washing, there is  
nothing which warrants the jury in finding that  
there was any invitation to her so to use the roof;  
and if the jury disbelieve that testimony, or if they  
believe the testimony to the effect that the plaintiff  
was subsequently told to stop using the roof, the  
plaintiff cannot recover.

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## New Jersey Court of Errors and Appeals

CATHERINE BARTHELMESS,  
Plaintiff-Appellee,

*v.*

LIBERALE BERGAMO and THERESA  
BERGAMO,  
Defendants-Appellants.

On Appeal  
from the Ber-  
gen Circuit.

### APPELLANTS' BRIEF.

#### Statement.

The suit of the plaintiff in this case was to recover damages which resulted from an accident which happened to her on November 19, 1923.

The defendants, as tenants by the entirety, were the owners (Case, p. 103) of a tenement house situated in the Borough of Carlstadt, N. J., and known as No. 518 on Central Avenue.

At the time of the accident the tenement was occupied by four families, two on the first, or ground floor, and two on the upper or second floor. The plaintiff occupied one of the apartments on the second floor, consisting of two bedrooms a dining room and a kitchen. One of the bedrooms and the kitchen were at the rear of the apartment, the other bedroom and the dining room were at the front of the apartment. The rear bedroom had one window and the kitchen had two windows, all of them looking out toward the back yard of the premises (Case, p. 44).

Between the four-room apartment occupied by the plaintiff and the other apartment on the sec-

ond floor, there was a hall (Case, p. 44). At the end of this hall there was a window which looked out upon the back yard, and the sill of this window was three feet above the floor of the hall (Case, p. 26). The plaintiff's kitchen was next to this hall and between it and her rear bedroom (Case, p. 44).

A photograph of the rear of the house in question was put in evidence and marked P-1. Upon this photograph the plaintiff marked the hall window with a cross (X) and on one of her kitchen windows marked the letter B. She also, by a line, indicated the three rear windows of her apartment (Case, pp. 19, 27, 28).

As the photograph shows, across the entire rear of the building, there was a one-story extension of its first, or ground story, which was covered with a flat roof, and which extended toward the rear, beyond the rear wall of plaintiff's apartment, some 17 or 18 feet. This roof was covered with tar paper and had a slight slope from the point where it met the perpendicular wall of the second story to its rear edge, or gutter (Case, pp. 51, 52). At the time of the accident, it had no guard railing, and it never had had any at any time prior to the accident.

In the yard at the rear of the house, and about 30 feet distant from the rear of the building, there was a pole (Case, p. 19); and at the side of one of the kitchen windows of the plaintiff's apartment (the one marked B on the photograph) and six feet above the roof of the flat roof extension there was a hook (Case, pp. 46-49).

The plaintiff hired her apartment in August, 1923, being shown the rooms by a daughter of the defendants, a Mrs. Peretti, who acted as agent of the latter, who resided in New York. At the time she was shown the apartment and hired it,

the plaintiff testified that she was taken by Mrs. Peretti to the hall window (the one marked X on the photograph) and her account of what was then said and done is as follows (Case, p. 17):

“there was a little hall and by that hall there was a window, and it was about that high (indicating); you had to climb through. And she pointed out; she says,—there is where you are to hang your clothes. There is your pole, and there is your hooks.”

And on page 18:

“She pointed out of the window. She says—‘Here is where you are to go.’ I don’t know if you call it a roof or you would call it the porch, but it was—I had to go out, not only I but the neighbor on the same floor had to use that window.

“There was hooks and there was a pole and Miss Peretti pointed out the window and says—‘You are supposed to go there and hang your clothes.’ Anybody knows I had to wash; I wasn’t rich.

“There was a window there and the window was open—and she said—‘You are supposed to go out there and hang your clothes. There is the pole and there is the hooks.’ I had to supply my own line.

“Q. Did she say you had to supply your own line? A. Yes, sir.”

And on page 44:

“Q. At the time you rented the premises from her and while they were being shown to you by her, she took you to this hall window? A. Yes, sir.

“Q. And pointed out this hook? A. Yes, sir.

“Q. And pointed out the pole in the rear of the yard? A. Yes, sir.

“Q. And said—That is where you hang your clothes? A. Yes, sir.

“Q. Now is that exactly what she said? A. Yes, sir.

"Q. Did she say anything else but that? A. No. She showed me my rooms first.

"Q. Yes, but did she say anything else but just simply that that is where you hang your clothes? A. No. She says I had to go out there to hang my clothes.

"Q. You are sure she said that to you? A. Yes, sir.

"Q. Indicating by there— A. Out through the window.

"Q. Did she point to the roof? A. Yes, sir. Out through the window to the roof. There is where I had to go to hang my clothes.

"Q. Well you say, there is where you had to go? A. No. She pointed out of the window.

"Q. That is what I wanted to know. She pointed to that roof, did she? A. Yes, sir.

"Q. Out of the hall window? A. Yes, sir.

"Q. And said, 'That is where you go to hang your clothes'? A. Yes, sir."

The plaintiff testified (Case, pp. 22-27) that she began to occupy the apartment in question in August, 1923; that her husband put up a rope from the pole to her kitchen window; and that, during the three months and nineteen days of her occupancy prior to the accident, she constantly, and at least once or twice in each week, climbed up over the sill of the hall window and out upon the roof of the extension and stood there, to hang out her clothes and take them in.

The way the clothes line was put up and operated was described by the plaintiff (Case, pp. 49-50). In brief, the line was an endless one, running through a pulley attached to the pole in the back yard, and to and through another pulley attached to the hook beside the upper side of the kitchen window. The pulley at the pole was considerably higher than the pulley at the kitchen window, so that the line ran down hill from the pole to the kitchen window (Case, p. 58). The

person, hanging out, or taking in clothes, operated by standing in one place and pulling the line in toward, or out and away from, her, as she attached clothes to, or took them in from, the line.

The plaintiff's account of the accident was as follows (Case, p. 32):

"On the 19th of November in the morning I washed my clothes and hung them out. I had a line full and I finished the rest, and I had some more to hang, but at dinner time I pulled them in and put the other out, when my accident was. \* \* \* When I was putting out these other clothes, I was about 5 or 6 or 7 feet, I really don't know, from the edge of the roof, and along the edge there wasn't anything, only the gutter. The gutter wasn't much higher than the roof only about like that (indicating about 3 inches) (p. 33). I was standing anyhow 5 or 6 feet from the edge of the roof. From the edge of the roof to the building it was about 18-17 feet. Well I pulled them all in, and I put the next bunch out, and I was nearly all finished, when—I don't know, like a gush, or something, I don't know, something—a tug, or something, some (p. 34) thing happened to me, and all I know, I was over. What happened when that tug came, I don't know. I was pulled down. I don't know if the line—

"Q. Well, were you or not pulled towards the edge? A. I was pulled off to the edge, and to the basement.

"Q. Did you have time to let go? A. No, sir; it went so quick, I couldn't let go; or whatever it was, I don't know.

"Q. Well what did you have hold of? A. I really don't know. I was pulling the line.

"Q. Well then if you were pulling the line you had ahold of the line, didn't you? A. I suppose I did. I was finishing up the wash.

"Q. And you fell over? A. Yes, sir. I must have fell over.

“Q. What caused you to fall over there? A. I don’t know. Wind or something pulled or something.

“Q. And there was at that time no railing, or any protection of any kind? A. No, sir; no railing or no protection; no sir. (p. 35) I fell down a story into the basement; one story, and then down into the basement.

“Were you conscious? A. Yes, sir.”

Again at page 59:

“Q. You have stated you felt a clutch or pull? A. Something.

“Q. And then you went over? A. Yes, sir.

“Q. Now, aside from the clutch or pull, did you do anything such as stumbling or walking, to throw yourself off that roof? A. I really wouldn’t say I did, and I wouldn’t say I didn’t. All I knew, that something—I don’t know if it was a pull.

“Q. What I mean, did you walk off the roof? A. No, sir.

“Q. Or did you do anything to throw yourself off? A. No, sir.

“Q. Or precipitate yourself off the roof? A. No, sir.

“Q. All you know, there was a clutch or a pull? A. That pulled me off.

“Q. That pulled you off your feet, off the side of the roof. A. Yes, sir.

“Mr. Ward: That is all.

“The Witness: That would be nice, to walk off, wouldn’t it?”

It is apparent that the plaintiff, prior to the accident, had abundant opportunity to become entirely familiar with the place where the accident happened. Her testimony as to the character of the roof’s surface; that it was a flat roof, covered with tar paper, with a slight slope from its front to its rear; that it was 17 or 18 feet wide from its front to its rear; that (p. 53) she saw that there was no rail to it; and the other details that she testified to,

such as the height of the hall window above the floor, the height of the hook at the kitchen window, and of the pulley on the pole at the back of the yard, etc., which are all consonant with the facts as the photograph (P-1) discloses them, show that she was an observant person and had become thoroughly familiar with the place before the accident happened.

Originally in the complaint, it was alleged that the defendants had carelessly and negligently permitted and allowed the roof (which the complaint also calls a porch) and its appliances to become worn and out of repair, and that the accident was occasioned thereby; but the plaintiff, on the opening of the case, asked, and was allowed, to amend by striking out that allegation, and by alleging in lieu thereof that it was occasioned by the defendants' carelessness and negligence in not properly protecting the roof by a railing (Case, p. 10).

The plaintiff's contention throughout the trial was, that the defendants were liable because they did not provide such a protecting railing; and it was not suggested, and there was not a particle of evidence upon which it could have been contended, that the roof or place, from which the plaintiff fell and was injured, was defective in any other respect. (See Case at p. 108.)

The plaintiff testified (Case, p. 57, etc.) that as clothes were attached to the line, they caused it to sag, so that the clothes would drag on the roof, if she stood well back on the roof while she attached them or took them in. For that reason, she said, she had to stand near to the edge of the roof, when the accident occurred; which meant, of course, that she stood so near the edge as to enable her to reach out, and put on, or take off, clothes hanging clear of the edge and out beyond it. When she did that she must have known that there was no

railing, or other like protection, along the edge of the roof, and, as previously stated, she testified that she *did* know that there was none.

At the close of the plaintiff's case, the defendants moved for a nonsuit. The motion was denied, and exception taken (see Case, p. 104, *et seq.*).

At the close of the whole case, defendants moved that verdict for the defendants be directed. The motion was denied, and exception taken (see Case, p. 162, *et seq.*).

The grounds upon which both motions were based were:

First, that there was no actionable negligence on the part of the defendants; and

Second, that if there was any actionable negligence on the part of the plaintiff, there was *ipso facto*, and necessarily contributory negligence, on the part of the plaintiff.

The refusal to nonsuit, and the refusal to direct a verdict for defendants, are assigned as the grounds for this appeal.

## I.

**It conclusively appeared that there was no actionable negligence on the part of the defendants.**

### 1.

It is established in this State, as a general rule, that a landlord is not liable for injuries sustained by a tenant or his family or guests by reason of the ruinous condition of the demised premises, there being, upon the letting of a house or lands, no implied contract or condition that the premises are, or shall be, fit and suitable for the use of the tenant; but it is also recognized that this rule does not include those parts of the property

(such as passageways, stairways, and the like) which are not demised to the tenant, but are retained in the possession and control of the landlord for the common use of the tenants and those having lawful occasion to visit them, the ways being used as appurtenant to the demised premises; and that the duty of the landlord, as to such appurtenances, is to exercise reasonable care to keep them in such a condition that they can be safely used for the purposes for which they are obviously intended.

*Siggins v. McGill*, 72 N. J. L., 263.

## 2.

So also, where different apartments, under a common roof, are demised, it is the landlord's duty to exercise reasonable care to keep the roof in such repair that its condition (as, for example, by becoming leaky) will not be a source of injury to any of the different tenants.

*Perry v. Levy*, 87 N. J. L., 670.

## 3.

In all such cases, one reason for the landlord's liability, for the safe condition of such appurtenances, which are under his, and not under the tenant's control, is obviously because the right to use such appurtenances, or to have them maintained, for the purposes for which they are plainly intended, is *essential* to the tenant's enjoyment of the part of the premises which is demised to such tenant.

## 4.

Between such cases, and the one here under review, there is a distinction, material to be observed.

The roof, from which the plaintiff fell, did not cover any part of her apartment; and it very plainly was neither designed, nor intended, for any such use as she was making of it, when the accident happened. Neither was any such use essential to her enjoyment of the apartment demised to her; and her landlords were under no obligation, from the mere fact of the letting, to provide any place for her to hang her washing, outside of the four walls of her apartment.

Hence, no right to use the roof for any purpose could have been implied (*Sweeny v. Old Colony Co.*, 10 Allen, 368; *Phillips v. Library Co.*, 55 N. J. L., 307; *Turess v. Susquehanna Co.*, 61 N. J. L., 314; *Furey v. New York Central, etc.*, 67 N. J. L., 270), and the plaintiff's right to make such use of it as she was making, at the time of the accident, rested, and could only be rested, upon the fact that she was told by the defendants (as the verdict establishes) that she could go out upon it and make use of it as a platform upon which to stand, to put out, and take in, her washing.

## 5.

That permission, or invitation, was plainly a permission, or invitation, to use, for the indicated purpose, the roof *as it was*, *Dobson v. Horsley* (1915), 1 K. B., 634; *Lucy v. Bawden* (1914), 2 K. B., 318; and the liability that was thereby imposed upon the defendants, being co-extensive only with such invitation (see *Phillips v. Library Assn.*, *supra*, at p. 315; and *Furey v. New York Central, etc.*, *supra*, at p. 274), could only have been to exercise reasonable care to keep the roof, *as it then was*, in a state of such repair that it could be safely so used.

## 6.

There was no evidence whatsoever in the case that the defendants in anywise failed to do that. The roof was broad and flat. There was plenty of room upon its surface within which the plaintiff could have stood, with perfect safety; and there was, and could have been, no contention that the plaintiff's fall was due to any lack of repair or other like defect. On the contrary, it appeared, beyond any dispute, that the plaintiff's fall was due solely to the fact that she stood so near to the edge of the roof that some sudden tug or pull upon the clothes line, of which she had hold, precipitated her over, and the only ground upon which it was, or could have been, contended that the defendants were liable for the consequences of her fall was, that there was no guard railing, or fence along the edge of the roof, to prevent the fall.

We submit that, in going and standing where she did, the plaintiff went beyond the fair limits of the permission or invitation extended to her by the defendants; and that if that was not so, the defendants nevertheless owed her no such duty as was contended for. That is to say, the defendant was perfectly aware, at all times, that the roof was without any railing or guard rail, and if she chose to use the roof in any manner, she accepted the risk of using it as it was; and the defendants were under no obligation to erect or maintain any railing or guard rail.

plaintiff

## 7.

We submit that the decision of this Court in *Dotson v. Erie R. R.*, 68 N. J. L., 679, is here in point.

In that case the plaintiff, in tending to take passage on a train, and while waiting for it, stood so near the edge of the station platform that she was

struck and injured by a passing train. It was held that the railroad company was not liable, and in its opinion this Court said:

“It is undoubtedly a settled rule that a railroad company is under a duty to exercise ordinary care to so construct and maintain station buildings, platforms, and approaches that they shall be safe for use by passengers. But this use is to be exercised in conformity to the manifest purpose for which the structure in question is adapted. \* \* \* It is plainly the duty of the passenger, when not getting on or off of a train, but while he may be walking about the platform, to keep such a distance from the edge next to the rail that he would be beyond the reach of projections of ordinary trains. And the company is not liable for injuries to a passenger who suffers himself to go beyond such a limit, and is injured by a passing train.”

## 8.

As in the *Dotson* case, so here, the plaintiff was injured while standing in a position which was beyond the limits of her invitation. In that position, she was no longer an invitee, but a mere licensee, and the only duty which the defendants then owed to her was to abstain from acts wilfully injurious to her, of which there were none.

*Delaware, etc., Co. v. Reich*, 61 N. J. L., 635,  
at p. 643;

*Fleckenstein v. Gt. Atl. Co.*, 91 N. J. L., 145.

## 9.

The case of *Gleason v. Boehm*, 58 N. J. L., 475, is also in point. There the plaintiff, visiting the tenant of an apartment house, which she had never entered before, was injured while descending a stairway in the dark. She supposed that she had

descended to the floor, when she, in fact, had only reached a platform of the stairway, and, going forward, fell from the platform down the remainder of the stairway. It was contended that the landlord was liable because he had provided no light; but the Supreme Court held that he was under no duty to do that; that he was bound to take reasonable care to have the hall and stairway reasonably fit for the passage, to and fro, of tenants and their visitors, but was under no duty as to the safe use of the means of passage so provided by him; and that if a light was necessary, *in order to use the stairway safely* at night, the tenant, and not the landlord, must provide it. This decision was approved by this Court in *Rhodes v. Fuller Co.*, 92 N. J. L., 569.

In principle the same as the cases above cited, but more closely in point, are the following well considered cases:

In *Dobson v. Horsley* (1915), 1 K. B., 634, it was said:

“The defendant lessor is liable in any case in which, by way of implied grant, he enters into an obligation to provide something, and fails to provide it. But where that is not the case, and where the lessor simply offers to the tenant the right to use a particular sort of approach, and the tenant accepts it, the tenant must accept the approach such as it is—say a plank with no handrail across a stream, or steps protected only by a coping 8 inches high. The tenant using it is not trapped in any way; he knows perfectly well that there is no handrail or railing, and he accepts the risk of using the access in the form in which it is provided.”

So in *Lucey v. Bawden* (1914), 2 K. B., 318, the landlord is not liable for injury to the wife of a tenant, occupying a portion of the house, who

slipped on steps used or reserved by the landlord, and fell into an area way, where the defect in the steps was due to the absence of a railing rather than to any disrepair in the steps. The Court said:

“On principle it is difficult to see how an obligation could be imposed upon a landlord larger than the obligation to avoid traps. It is plain that, in the absence of express or implied agreement, he is not liable at all for the consequences of letting a house in a state of even dangerous disrepair. If he lets a loft approached by a ladder, a cellar approached by steep steps, or invites access to his premises over a plank, there seems no reason why a person accepting the invitation to use the ladder, the steps, or the plank, should, if injured by no hidden danger, be at liberty to complain that the access was not of a different and safe character.”

So in *Brown v. Wittner*, 43 Ap. D., 135; 59 N. Y. Supp., 385, it was held that a tenant of an apartment, who knew that a stairway was without a railing, could not recover for injuries due to the lack of it.

To the same effect are also the following decisions:

*Ten Broeck v. Deinhardt*, 120 App. Div., 473; 105 N. Y. S., 59;

*De Negro v. Christman*, 77 Misc., 147; 136 N. Y. S., 364;

*O'Neill v. Hayes*, 145 N. Y. S., 926;

*Hatman v. Boettigheimer*, 128 N. Y. S., 22;

*Bowman v. United Merch. Co.*, 264 Pa., 156; 107 Atl., 682;

*Mospens v. Konz*, 105 S. W. Rep., 381 (Ky.).

We find two cases (*Wilcox v. Zane*, 167 Mass., 302; 45 N. E. Rep., 923; and *Branigan v. Lederer*

*Co.* [R. I.], 101 Atl. Rep., 122), in which the plaintiff was injured while using a roof, with the landlord's permission, as a place for hanging clothes to dry, but in both those cases the plaintiff was injured because in the one case the roof itself, and in the other a step maintained as an approach to it, were negligently suffered by the landlord to be out of repair.

These two cases, perhaps have no material bearing on the questions which may be controverted in this case; but they certainly afford no support for the contention that there was any duty, on the part of the defendants, to erect or maintain any guard rail, or like safeguard, upon the roof in question.

On the other hand, the case of *De Negro v. Christman, supra*, was precisely identical with the present case (except in the one respect that there the landlord had promised to erect a guard rail), and the decision so completely sustains our contentions in this brief, that we print the opinion in full, as an appendix. Leave to appeal, from the judgment in that case, was denied by the Appellate Division in 139 N. Y. S., at page 1121. The decision has never been questioned.

In connection with that opinion we quote what Judge GAYNOR said in *Ten Broeck v. Deinhardt, supra*, in which a front door was left open and a gust of wind from an open back door blew the front door shut, and smashed its glass panel which cut the plaintiff:

"It would be carrying the liability of a landlord for negligence to an extreme that has no foundation to uphold this judgment. If the door was dangerous without a hook, that was just as plain to every one as to the landlord. It has remained until now for any one to suggest that the millions of front doors without hooks to hold them back when open are dangerous."

We submit that the defendants' motion for a nonsuit, and their motion for a verdict, should both have been granted, because there was no actionable negligence on the part of the defendants.

## II.

**It conclusively appeared that there was assumption of risk and contributory negligence on the part of the plaintiff.**

### 1.

Assuming as proved (though it was by no means so) that the roof was an unsafe place for the plaintiff to make use of, unless it was guarded by a railing around its edge, the danger was as obvious to the plaintiff (who admittedly was perfectly familiar with it and knew that it had no such protection) as it could have been to the defendants; and when she undertook to use the roof, with full knowledge of the danger she ran in doing so, she assumed the risk of such injury as might thereby result to her, and cannot now change it upon the defendants.

*Saunders v. Smith Co.*, 84 N. J. L., 276, at p. 280;

*Vorrath v. Blake*, 63 N. J. L., 189.

To the same effect, we submit, are also:

*Dotson v. Erie R. R.*, *supra*;

*Gleason v. Boehm*, *supra*;

*Rhodes v. Fuller Co.*, *supra*;

*Dobson v. Horsley*, *supra*;

*Lucey v. Bawden*, *supra*;

*Brown v. Wittner*, *supra*;

*Ten Broeck v. Deinhardt*, *supra*;

*De Negro v. Christman*, *supra*;

*O'Neill v. Hayes*, *supra*;

*Hatman v. Boettigheimer*, *supra*.

## 2.

The same thing is, of course, true, if it be assumed that though the roof was a safe place without a rail, if it was safely used; it was an unsafe place without a rail, when used as the plaintiff was using it at the time she fell and was injured.

## 3.

For the same reasons, the plaintiff was culpably negligent in using the roof as she was using it when she fell. She testified (Case, p. 43) that, from April in 1924 to November in 1925, she continued to occupy the apartment which she occupied at the time of the accident and that (Case, p. 50, etc.) during all that time she put out her clothes and took them in without ever going upon the roof. It was thus, as well as in the nature of things, apparent, that there was no necessity for her to go upon the roof at all; and when she did so, if it was dangerous for her to do so because there was no rail or fence, she acted with full knowledge of that danger, and was guilty of negligence contributing to the accident and could not recover.

*Saunders v. Smith Co.*, 84 N. J. L., 276;

*Rooney v. Siletti*, 96 N. J. L., 312.

## 4.

The only theory upon which it was possible to contend that there could be any negligence imputable to the defendants is the supposition that it was so inherently and obviously dangerous for anyone to make use of the roof for the purposes mentioned, in the absence of any railing or fence, that any reasonably prudent person must peradventure and beyond any question have foreseen that it was so: and that is to say, that if the defendants could be regarded as having been negli-

gent, *ipso facto*, and as matter of law, the plaintiff must also have been guilty of contributory negligence.

In that respect, the decisions of this Court in *Dotson v. Erie R. R. Co.*, 68 N. J. L., 679, at p. 684, and *Higgins v. Erie R. R. Co.*, 89 N. J. L., 629, are directly in point; although the present case is, in other respects, a much stronger case for the defendants, since in those cases the plaintiffs were injured while they were necessarily upon the station platform, in order to take a train; while here it was not necessary for the plaintiff to be upon the roof, in order to put out her washing.

## 5.

The decision of this Court in *Munroe v. Penna. R. R. Co.*, 85 N. J. L., 688, is not to the contrary. There the plaintiff's decedent was killed while standing on a station platform, about 3 feet from its edge. A belated train, passing at great speed, *and with no warning given*, caused him to fall and strike his head, from the effects of which he died. He was not struck by the passing train nor drawn under it. He was necessarily upon the platform, in order to take a train. The negligence imputable to the defendant was that no warning of the approach of the train was given.

That was a circumstance which certainly made the decedent's position much more perilous than it would have been, had warning been given, *and it was equally certain that he could not have foreknown, and was not bound to anticipate, that he would be subjected to that peril.*

Under those circumstances, it was clearly a disputable question, as to whether the peril of his standing where he did was an obvious one.

The plain distinction between that case and the one now in review is, of course, that here there

was no peril, resulting from any actual or supposable remissness, on the part of the defendants, that was not as obvious to, and as fully known by, the plaintiff before the accident as it was at any time afterwards. There, there was.

### III.

**We submit that the defendants' motion for a nonsuit, and their motion for a verdict, should both have been granted, and that the judgment below should be reversed.**

We further submit that, in reversing because a verdict for the defendants ought to have been granted, the whole merits of the case will be fully and finally determined, and that, consequently, this Court should give judgment for the defendants.

*Lehigh R. R. v. McFarland*, 44 N. J. L., 674.

Respectfully submitted,

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EDWARD J. LUCE,  
Of Counsel.

**APPENDIX.****DE NEGRO V. CHRISTMAN.**

(Supreme Court, Appellate Term. June 14, 1912)

1. Landlord and Tenant (S. 164\*)—Defects in Premises—Liability of Landlord.

In the absence of fraud or any agreement, the landlord is not liable to tenants, or others upon the premises, for their condition; and so a landlord is not liable to a tenant, who by reason of a sloping roof, on which she hung clothes, slipped and fell, because of the absence of a railing on its outer edge.

(Ed. note: For other cases, see Landlord and Tenant, Cent. Dig. SS 630-637, 639, 641; Dec. Dig. S. 164\*)

2. Landlord and Tenant (S. 164\*)—Defective Premises—Nuisance.

A roof, used for the purpose of hanging out clothes, with a slope of less than eight-tenths of an inch to a foot, is not so inherently dangerous as to be a nuisance, to be guarded by a fence or railing, and to render the lessor liable when not so guarded.

(Ed. note: For other cases, see Landlord and Tenant, Cent. Dig. SS 630-637, 639, 641; Dec. Dig. S. 164\*).

3. Landlord and Tenant (S. 164\*)—Defective Premises—Landlord's Liability.

Where a sloping roof was used by all of the tenants as a place to hang out clothes, the landlord is not liable on the theory that it was a portion reserved for the common use of the tenants, for an injury occasioned because of the absence of a railing on the outer edge; the defect not being caused by failure to keep the roof in repair.

(Ed. note: For other cases see Landlord and Tenant, Cent. Dig. SS 630, 637, 639, 641, Dec. Dig. S. 164\*)

4. Landlord and Tenant (S. 164\*)—Invitees.

Where a landlord allowed his tenants to hang out clothes on a sloping roof, a tenant who fell from the roof cannot recover from the landlord, on the theory that she was on the roof by his invitation; an invitee taking the premises as he finds them.

Ed. note: For other cases see Landlord and Tenant, Cent. Dig. SS. 630-637, 639, 641; Dec. Dig. 164\*)

5. Landlord and Tenant (S. 164\*)—Defective remises—Agreements.

Where a Landlord agreed to place a railing on the outer edge of a sloping roof which was used by his tenants as a place to hang out clothes, a tenant cannot, after the lapse of several months, recover for injuries occasioned by falling off the roof; the tenant not being at liberty, if the landlord failed to keep his agreement, to permit the premises to remain in an unsafe condition and use them with the liability of injury.

(Ed. note—For other cases, see Landlord and Tenant, Cent. Dig. SS 630-637, 639, 641; Dec. DS. 164)

Appeal from City Court of New York, Trial Term.

Action by Amina De Negro against Charles A. Christman. From a judgment of plaintiff, defendant appeals. Reversed, and complaint dismissed.

Argued May Term, 1912, before SEABURY, LEHMAN AND PAGE, JJ.

Amos H. Stephens, of New York City (Joseph F. Murray, of New York City, of counsel) for appellant.

Morris & Samuel Meyers, of New York City (Nathaniel Choloney, of New York City, of counsel), for respondent.

PAGE, J.—The plaintiff was a tenant of the first floor above the store in premises owned by the defendant. On each of the floors there was a line operated by pulleys extending from near the rear windows to the wall of a rear building. These lines were used by the respective tenants for the purpose of hanging out their wash. On the store floor there was an extension 19 feet wide and 21 feet deep, the roof of which is about 3 or 4 inches below the sill of the windows in the rear of plaintiff's premises, and slopes down 16 inches to the outer edge of the roof. Plaintiff used this roof for the purpose of hanging out her clothes on the pulley line above mentioned. She testifies that while she was thus engaged, and standing within a foot or two of the window, the line which she attempted to pull broke, and she fell, rolled to the edge of the roof, and dropped to the yard below, sustaining severe bodily injuries.

The plaintiff had resided in these premises for a year and a half prior to the purchase of the building by the defendant, and had used the roof for the aforesaid purpose during that time. She testified that the former landlord had promised to build a fence upon this roof, and when the new landlord (the defendant) called upon her she told him of this promise that the former owner had made, and said "Now the old landlord sold the house, and he did not do anything, and for that reason I am not satisfied", to which defendant replied, "being that he promised to build you a

fence, I will build it for you, and I think you will be satisfied, and you will remain in the house, and we will remain good friends." This conversation is denied by the defendant; but the jury having found for the plaintiff, have found that such conversation did take place.

The action was brought to recover damages for the personal injuries thus sustained by reason of the alleged negligence of the defendant. The case was submitted to the jury on the theory that the landlord having allowed the plaintiff to use the roof of the extension, he was bound to make it a safe place; and if the condition was obviously dangerous, he was bound to take notice of the fact, and remedy whatever defects might exist. If it were not obvious, and his attention was called to it, then it was his duty to take such steps as were necessary, within a reasonable time, to overcome the dangerous conditions and prevent an accident.

(1) Had the relation of the parties been that of master and servant, instead of landlord and tenant, the charge would have been more nearly a correct statement of the law. The lessor of buildings, in the absence of fraud, or any agreement to that effect, is not liable to tenants, or others lawfully upon the premises by his authority, for their condition, or that they are tenantable, and may be safely and conveniently used for the purposes for which they were apparently intended. *Jaffe v. Harteau*, 56 N. Y., 398, 401, 15 Am. Rep., 438. "The tenant hires at his peril, and a rule similar to that of *caveat emptor* applies, and throws on the lessee the responsibility of examining as to the existence of defects in the premises and of providing against their ill effects." *Franklin v. Brown*, 118 N. Y., 110, 112, 115, 23 N. E., 126, 127 (6 L. R. A., 770, 16 Am. St. Rep., 744). The

alleged defect in the case at bar was the lack of a railing on the outer edge of the roof. If this was a defect, it was open and obvious, and known to the tenant. Therefore, if this roof, as a place for hanging clothes, was an appurtenance to the demised premises, no duty rested upon the landlord to alter its construction.

(2) Nor does this case come within the exception to the rule above stated; *i. e.*, where the premises that are rented are in such a dangerous condition as to constitute a nuisance at the time of renting the lessor remains liable for the consequences of the nuisance. *Luck v. Peck*, 132 App. Div., 426, 116 N. Y. Supp., 1051, affirmed 199 N. Y., 546, 93 N. E., 377; *Barrett v. L. O. Beach Imp. Co.*, 174 N. Y., 310, 314, 66 N. E., 968, 61 L. R. A., 829. It cannot be said that the roof of an extension with a slope less than eight-tenths of an inch to a foot is so inherently dangerous as to be a nuisance, to be guarded by a fence or railing.

(3) Nor is this a case where a portion of the premises was reserved by the landlord for the common use of all the tenants. An exceptional use, as a portion of the fire escape, was contemplated. It was not designed for the common use of the tenants as a place to hang clothes. The alleged defect was not caused by a failure to keep the roof in repair, by reason of which it had become unsafe, and, therefore, had it been a place reserved for the use of all the tenants, the landlord's liability could not be predicated upon his failure to repair, which distinguishes this case from those relied upon by respondent, *Alperin v. Earle*, 55 Hun, 211, 8 N. Y. Supp., 51; *Rouillon v. Wilson*, 29 App. Div., 307, 51 N. Y. Supp., 430; *Decker v. Osterweil*, 144 App. Div., 653; 129 N. Y. Supp., 681.

(4) Nor was the defendant liable on the theory that the plaintiff was on his roof by his invitation. The lack of a railing was known to the plaintiff, and the person who invites another is bound to guard the one invited from dangers known to him, but not to the one invited, but not to reconstruct or alter his premises to obviate known and obvious dangers. Even if she were on the premises by invitation, she could not deliberately place herself in a position of danger known to her and recover for injuries sustained. This was not an unknown pitfall upon the premises. That there was no rail or fence upon the roof was open, obvious, and well known to the plaintiff.

If the facts of this case came within the theory of negligence, then the jurymen were improperly instructed on the question of contributory negligence. There was no application of the rule of law laid down to the facts of this case, so that the jury could intelligently apply it. This was shown when the jury returned for further instructions, and in substance requested to be instructed as to whether the use of the roof by plaintiff, with knowledge that the railing had not been constructed, did not constitute contributory negligence. The reply was merely a reiteration of the main charge that the plaintiff was required to use that care that a reasonably prudent person would under the circumstances. The judgment would have to be reversed upon the exceptions. The case, however, was brought and tried upon the wrong theory.

(5) The effect of the defendant's failure to keep his promise to put a fence upon the roof remains to be considered. The promise was alleged to have been made in January. The accident happened in September. The most that can be claimed for this promise is that the landlord had agreed to put a certain improvement upon the premises

to obviate a dangerous condition, and for a breach of that agreement he was liable on the contract, and not in tort. The tenant was not at liberty, if the landlord failed to keep his agreement, to permit the premises to remain in an unsafe condition, and to stay there at the risk of receiving injuries on account of the defects in the premises, and then recover as for negligence for any injury she might suffer.

The measure of damage for the breach of the contract is the expense for doing the work which the landlord agreed to do, but did not do. "A contract to repair does not contemplate, as damages for the failure to keep it, that any liability for personal injuries shall grow out of the defective condition of the premises." McAdam, *Landlord and Tenant* (4th Ed.), pages 1610, 1611. If this be true of a contract to repair, how much stronger would be the rule applicable to a contract to add an improvement.

Therefore the judgment should be reversed, with costs, and the complaint dismissed, with costs. All concur.

1920

## New Jersey Court of Errors and Appeals

Catherine Barthelmess,  
Plaintiff-Appellee,  
vs.  
Liberale Bergamo and Teresa  
Bergamo,  
Defendants-Appellants.

On Appeal  
from Bergen  
Circuit

### Brief on Behalf of Appellee

#### STATEMENT OF FACTS

The defendants, the appellants, seek to reverse the judgment which the plaintiff obtained at the Bergen Circuit, for injuries which she sustained under the following circumstances:

The defendants were the owners of a two story and attic building, known as No. 518 Central Ave., Carlstadt, New Jersey. The plaintiff occupied the second floor of said premises as a tenant. There were four families in all in the building, two on the first and two on the second floor. The first floor in the rear projected out so that the roof formed a sort of a porch, or balcony. (See Photograph Exhibit.)

Plaintiff was putting out her clothes and was about five or six or seven feet from the edge of the porch, along the edge of which porch there was only a gutter about three inches high. (P. 32 l. 20-40; P. 33, l. 10.)

When the plaintiff hired the premises, the landlords, through their agents, indicated this porch as

the place upon which she was to go for the purpose of hanging her clothes, indicating to her how she should go out, and designating the pole and hooks she was to use (P. 17, l. 35-40; P. 18, l. 1-10); also that the other tenant was to make like use of the porch for the same purpose (P. 18, l. 9.) Witness repeated this testimony at page 18, l. 30-38. There was other testimony to the same effect in the case, thus clearly establishing that the control of the porch had been retained by the landlords, and hence responsible for its condition. It was on this theory that the trial judge sent the case to the jury. (See his charge at page 165, l. 30-40; P. 169, l. 10-28.)

The Court in charging the jury left it to them as a question of fact as to whether or not the landlords had reserved to themselves the control of the porch in question, and then correctly stated the law on the subject as follows:

The law of this State is that a landlord who provides a place such as a hallway, a stoop, a platform, from which to hang out clothes, or what not, that it is not a part of the demised premises, that is not within the apartment or place rented, but is a place or places that are used in common by tenants; that for such places the landlord is under a legal duty and bound to use reasonable care, to have such places reasonably fit and safe for such use.

(State of case, P. 169, l. 18-20.)

A verdict having been found in favor of the plaintiff for \$6500.00, a rule to show cause with ex-

ceptions reserved, was granted. The question of the weight of evidence was amongst the matters considered, and the rule to show cause was discharged, so that the question as to whether or not the porch in question was reserved by the landlords for common use of all the tenants is not now open for debate.

#### POINT I.

#### THE LANDLORD'S DUTY.

The general rule of law as stated over and over again in this State is, that it is the duty of the landlord, who rents out parts of his building to various tenants reserving to himself the halls, stairs etc., to use reasonable care to keep such places in a reasonably safe and fit condition.

This rule has been stated in a number of cases, amongst them *Higgins v. McGill*, 72 N. J. L., 263. It will be observed that the language used in all of these cases is, that it is the landlord's duty to keep the place reasonably safe and fit. The language isn't merely that he should make necessary repairs, or repair broken and defective conditions, but that he shall maintain the reserved portions reasonably safe and fit for use.

It is true that the great mass of cases in our reports deal with broken or defective conditions, such as broken stairs, broken banisters, holes in the floor and the like, but that does not alter the general rule,

that the landlord must do everything in reason to keep the place reasonably safe and fit.

Now in the case at bar the landlord knew that this porch was without a rail or guard of any kind, he knew the use of which the tenants would put this porch, viz., that they would climb out and hang clothes upon the line. The plaintiff testified in Court, and therefore the jury was justified in finding, that the defendants knew, in order to make the ordinary reasonable use of this porch for hanging out clothes, she would be required to go near the edge of it.

In substantiation of this, the evidence disclosed that the hook was 6 feet above the floor of the roof (P. 48, l. 30; P. 49, l. 1-12); that the porch from the window where the hook projected extended out about 18 or 17 feet (P. 33, l. 24; P. 51, l. 22); that the plaintiff was obliged to go near the edge of this porch in the ordinary exercising of her work; that the hook was of such a height that she could not with ordinary convenience reach the line at the point of the hook, so that she had to go out towards the edge of the porch, and to a point where the line sagged sufficient for her to reach it (P. 46 at bottom, P. 47 at top); another reason plaintiff gave was that to hang the clean clothes on the line over near the hook, would cause them to drag upon the roof and get all dirty again (P. 53, l. 3-10). The landlords of course knew this situation, hence it became their duty in the exercise of reasonable care to make the place safe for the tenant, so that in the event of the line falling that she would not of necessity go over the edge of the porch to the ground below. The failure of the defendants, the landlords, to provide a

safety rail or guard was the primary cause of this accident.

It was practically conceded in the argument, and we feel the Court must here readily see that had there been erected a railing around the porch, the accident could not possibly have happened. In our own State, we submit that the law is quite clear as to a landlord's duty, as we have cited above, and the following authorities we submit justify our contention that the duty of the landlord goes further than merely repairing a broken or defective condition.

The theory of the defendant that there must be an actual defect in order to hold the landlord responsible is not sound in law. The law is not merely that the landlord shall maintain hallways, porches etc., free from defects, but that he shall maintain them in a safe condition.

Kelly vs. Betz Eagle Brewing Co., 86 N. J. L., P. 471, is in point. In that case the injury to the plaintiff was occasioned by slipping on an iron cellar door. There was no contention that the door was broken, but merely that it had worn smooth.

In Higgins v. McGill, 72 N. J. L. P. 263, Justice Pitney speaking for the Court of Errors and Appeals, at page 265, said:

With respect to such ways, it has been held by our Supreme Court that the landlord is under the responsibility of a general owner of real estate who holds out an invitation to others to enter upon and use his property,

and is bound to see that reasonable care is exercised to have the passageways and stairways reasonable **fit and safe** for the uses which he has invited others to make of them.

In *Phillips vs. Library Co., of Burlington*, 55 N. J. L., P. 307, the rule is stated as requiring the landlord to render the premises "reasonably safe", etc.

Syllabus two reads as follows:

But the owner or occupier of lands, who, by invitation, express or implied, induces persons to come upon the premises, is under a duty to exercise ordinary care to render the premises reasonable care for such purposes, or at least to abstain from any act that will make the entry upon or use of the premises dangerous.

In *Rooney vs. Siletti*, 96 N. J. L., p. 312, the Court held:

A landlord is bound to use reasonable care to keep premises belonging to him, and of which several tenants have the common use, in a safe condition.

In that case the plaintiff slipped on cellar steps and was injured. There were no defects of any kind in the steps, but the unsafe condition consisted in the accumulation of some snow and ice thereon. A motion for non-suit was made on the ground that the proofs did not show that the defendant was derelict in his duty by reason of his failure to have the cellar steps cleaned; the Supreme Court held that the trial judge was right in refusing to grant

such non-suit. On this point of the case the Court said:

It was for the jury to determine whether the defendant was guilty of a neglect of the duty which she owed to her tenants (including the plaintiff) to use reasonable care to keep this stairway in a safe and useable condition.

In this last case it will be noted that the Court used the word "useable" condition, and not merely "safe" condition. It would seem therefore to argue, that when the Supreme Court used the word "useable", it meant a safe and useable condition.

If this be the rule then we submit that it was clearly for the jury to find, that the landlords, the defendants in this case, knowing that the tenant, the plaintiff, would be obliged to go near the edge of this porch to hang her clothes, should have in the exercise or reasonable care provided a rail or guard of some kind to prevent her from falling over, otherwise it would not be in a safe and useable condition.

We also respectfully refer the Court to the following cases:

Wilcox vs. Zane, 167 Massachusetts, 302; 45 N. E., 923.

If the roof of a tenement house is retained in the possession of the landlord as a place to be used in common by his tenants for hanging clothes, and for other uses to which the yard of a dwelling-house is commonly put, it is his duty to keep it in a reasonably safe condition for the uses for which it is intended.

Gillvon vs. Reilley, et al., 50 New Jersey Law Reports, 26:

Where the owner of a building divides it into several tenements which he lets to various tenants, but retaining to himself control of the halls and stairways for the common use of the occupants and those having lawful occasion to be there, he is bound to see that reasonable care and skill are exercised to render the halls and stairways reasonably fit for the uses which he thus invites others to make of them, and he is responsible for any injury which others, lawfully using them with due care, sustain through his failure to discharge this duty. But he is not answerable for defects which do not render the halls or stairways reasonably unfit for use, or which reasonable care and skill would not prevent.

Perry vs. Levy, 87 New Jersey Law Reports, 670:

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.

## POINT II.

### THE QUESTION OF CONTRIBUTORY NEGLIGENCE.

Counsel for defendant argues that the plaintiff was guilty of contributory negligence, and such was his motion before the trial court. It would seem, how-

ever, upon careful examination of the evidence in the case, that what counsel meant to say was, that the plaintiff assumed the risk of what she did, a very different thing from contributory negligence.

There was no contributory negligence in this case. Plaintiff had the right to be on this porch, which was the place designated by the defendants, the landlords, for her to hang her clothes. At the time of the accident which caused the injury, they and she were aware that she had the right to use said porch in the exercise of ordinary care.

It was not negligence for her to hang her clothes out on this line standing on any part of that porch. As a matter of fact she had not gotten close to the edge of the porch, but even if she had this would not necessarily mean that it was negligence on her part to do so, as we have pointed out elsewhere in our brief, that the hook of the line was of such a height that she could not reach the line at that point with ordinary convenience, and also to hang clean clothes over near the hook, would cause them to drag upon the roof and get dirty. It was not feasible, therefore, for plaintiff to hang the clothes at that part of the porch nearest the window.

Aside from this the evidence discloses that the plaintiff was either pulled by the drag of the rope or blown from the porch, hence it was no voluntary action on her part that brought her to the end of the porch and over. Had there been a rail erected as we contend, it would have been impossible for the plaintiff to have gone over the edge of the porch, no matter how close she had been to it.

Contributory negligence is never presumed. It is an affirmative defense, and the burden therefore was on the defendant of establishing contributory negligence. This we say the defendant failed to do. In fact the whole argument of counsel for the defendants seems to be, that plaintiff went on the roof to hang her clothes, knowing that there was no guard rail there, and that therefore she was guilty of contributory negligence. We say this assumption is unjustifiable either under the evidence or under the law.

#### CONCLUSION

For the foregoing reasons it is respectfully submitted that the verdict should be affirmed.

WARD & MC GINNIS,  
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Plaintiff-Appellee.

October Term, 1926.



