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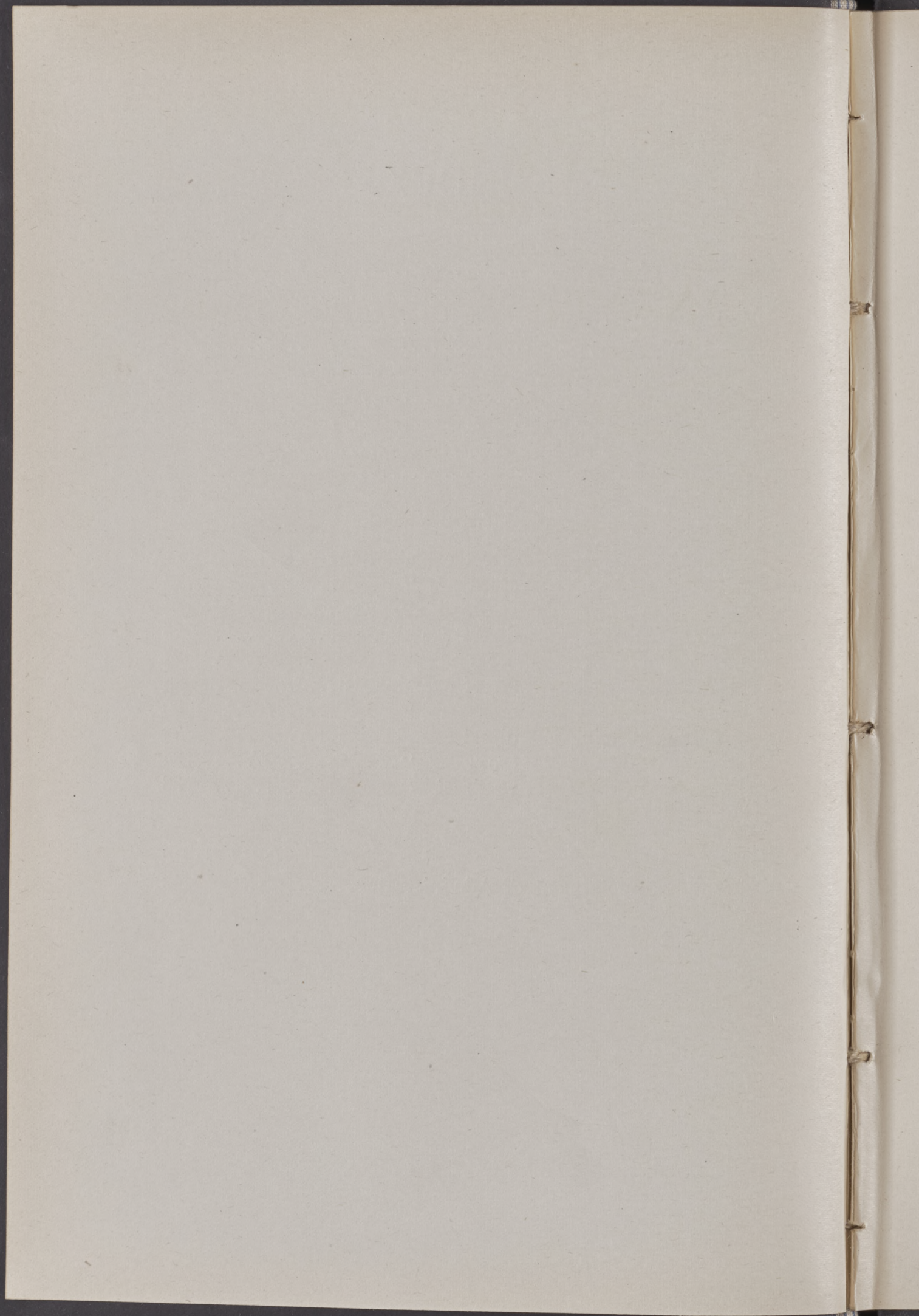
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## EXHIBIT.

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*Notice of Appeal.*

**NOTICE OF APPEAL.**

Served March 15, 1923.

**New Jersey Supreme Court**

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JAMES GAVIN, administrator *ad prosequendum* of the estate of John Gavin,  
deceased,

*Plaintiff-Appellant,*

*vs.*

THOMAS O'CONNOR,

*Defendant-Respondent.*

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*Notice of  
Appeal.*

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To Irving Lipman, Esq., attorney of plaintiff-appellant:

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TAKE NOTICE, that the defendant appeals to the Court of Errors and Appeals from the decision in this case reversing judgment entered in the Hudson County Court of Common Pleas and awarding a *venire de novo*, upon the following grounds:

That the Supreme Court gave judgment for the plaintiff instead of for the defendant.

Dated March 15, 1923.

Respectfully yours,

30

EUGENE T. SHARKEY,  
*Attorney of Defendant.*

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*Opinion of Supreme Court.*

**OPINION OF SUPREME COURT.**

Filed February 20, 1923.

NEW JERSEY SUPREME COURT.

No. 72, November Term, 1922.

10

JAMES GAVIN, administrator *ad prosequendum* of the estate of John Gavin, deceased,

*Plaintiff-Appellant,*

*vs.*

THOMAS O'CONNOR,

*Defendant-Respondent.*

20

Lazarus & Brenner, for plaintiff.

Sanborn & Sharkey, for defendant.

*Per Curiam.*

John Gavin, a lad about seven years of age, was killed by the falling of a clothes pole in the back yard of a two-family house occupied by his father and family and one Kerwin. The pole was used by the Gavin family as well as the Kerwin family.

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When James Gavin, the lad's father, rented the apartment he noticed that the pole had a cleat upon it, and afterwards he noticed that it was decayed and worm-eaten. After the death of his son he and a police officer found it in a very bad condition so that they could kick the rotten part away with their shoes.

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The complaint in the case avers that at the time of the accident one of the apartments was occupied by the plaintiff and the members of his family, including his son John Gavin, and he thereby became and was entitled to all the rights and privileges of a tenant of the said defendant, and this is admitted by the answer.

*Opinion of Supreme Court.*

The learned Trial Judge directed a judgment of non-suit against the plaintiff and an exception was duly taken and the non-suit is assigned as a ground of appeal. We think the Trial Judge was in error. The case is within the rule of *Siggins v. McGill*, 72 N. J. Law 263, which has been followed in *Perry v. Levy*, 87 N. J. Law 670; *Chaney v. Cohen*, 94 N. J. Law 381.

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Let the judgment be reversed and the record remitted for a new trial.

ENOCH L. JOHNSON,  
*Clerk.*

Filed February 20, 1923.

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*Judgment of Supreme Court.*

**JUDGMENT OF SUPREME COURT.**

**NEW JERSEY SUPREME COURT.**

10	JAMES GAVIN, administrator <i>ad prosequendum</i> of the estate of John Gavin, deceased, <p style="text-align: center;"><i>Plaintiff-Appellant,</i></p> <p style="text-align: center;"><i>vs.</i></p> THOMAS O'CONNOR, <p style="text-align: center;"><i>Defendant-Respondent.</i></p>	}	<p><i>Action at Law.</i></p> <p><i>Order on</i> <i>Reversal of</i> <i>Judgment.</i></p>
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20 This cause having been duly submitted on briefs at the November Term, 1922, of this court, by Irving Lipman, attorney of appellant, and Lazarus & Brenner, of counsel for the appellant, and Sanborn & Sharkey, of counsel for the respondent, and the Court having inspected the record and judgment below, and considered the causes assigned for error and the grounds of appeal therein;

30 It is, thereupon, on this seventh day of March, 1923, ordered, that the judgment of the said Hudson County Court of Common Pleas be in all things reversed, set aside and for nothing holden, and that the record and proceedings be remitted to the said Hudson County Court of Common Pleas to be proceeded with in accordance with this judgment and the practice of the said court, to the end that a new trial therein may be had.

Entered March 7, 1923, on motion of

IRVING LIPMAN,  
*Attorney.*

*Complaint.*

**COMPLAINT.**

Filed October 10, 1921.

HUDSON COUNTY COURT OF COMMON PLEAS.

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JAMES GAVIN, administrator *ad prosequendum* of the estate of John Gavin, deceased,

*Plaintiff,*

*vs.*

THOMAS O'CONNOR,

*Defendant.*

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*Action at Law.*

*Complaint.*

Plaintiff, residing in the City of Bayonne, County of Hudson and State of New Jersey, says that:

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1. On or about March 27, 1920, the said defendant, Thomas O'Connor, was the owner of certain premises known and designated as number 39 West Ninth street, in the City of Bayonne, County of Hudson and State of New Jersey.

2. Said premises consisted of a building occupied by two families and commonly known as a two-family dwelling house, and a yard in the rear thereof.

3. At the time aforesaid one of the said apartments was occupied by said plaintiff and the members of his family, including his son, John Gavin, and thereby became and was entitled to all the rights and privileges of a tenant of the said defendant.

30

4. The yard in the rear of the premises aforesaid was not part of the demised or rented premises, but was reserved by the owner for the use in common by all the tenants in said premises and erected in said yard and to the rear thereof was a clothespole upon which lines were strung to the apartments occupied by the tenants in said

40

*Complaint.*

building, and to a tree standing in the rear of said premises, such clothespole being used in common by the tenants in said premises for the purpose of stringing said clotheslines therefrom to their respective apartments.

5. At the time aforesaid through the negligence and carelessness of the said defendant and of his servants,  
 10 agents and employees the said clothespole broke off and fell, and in falling did strike and fall upon the said John Gavin, and as the result of his being so struck, he sustained such severe and serious injuries, that on March 27, 1920, he died as a result thereof.

6. The negligence of the said defendant and of his agents, servants and employees consisted in this:

(a) Because he permitted and allowed the said clothespole to become rotted, dilapidated and in a dangerous condition and out of repair, the condition of said clothespole  
 20 being known to him and he having notice thereof.

(b) Because having knowledge and notice of the defective condition of the said clothespole no proper repairs were made thereto, so as to properly safeguard the same against falling and injuring persons lawfully using the said yard.

(c) Because although the defendant had knowledge of the defective condition of the said clothespole, the same was not properly secured by guards, braces or otherwise, or  
 30 removed, but was left in such a dangerous, defective and hazardous condition that it became and was at the time of the falling, and for a long time previous thereto, a nuisance, and constant danger and menace to the safety of persons being lawfully in or upon or using the said yard.

(d) Because long previous to the time that said clothespole fell, the said defendant, or his agents or servants, attempted to make repairs to the said pole, but such repairs were so negligently, improperly and carelessly made that the then existing condition of the pole was not improved  
 40 but still remained a source of danger to the safety of

*Complaint.*

persons lawfully using or being in or upon the said yard, such condition being known to the said defendant and he having had due notice thereof.

7. Said decedent left him surviving his father, this plaintiff, 41 years of age, his mother, Catherine Gavin, 38 years of age, William Gavin, a brother, 13 years of age, James Gavin, a brother, 10 years of age, Alice Gavin, a sister, six years of age, Margaret Gavin, a sister, two years of age and John Gavin, a brother, six months old, who are his only and next of kin, and who have suffered pecuniary loss by reason of his death. 10

8. Decedent at the time of his death was six years of age.

9. On October 1, 1921, letters of administration *ad prosequendum* were granted upon the estate of John Gavin, by the Surrogate of the County of Hudson aforesaid, to the plaintiff, and were accepted by him. 20

10. This action is commenced within twenty-four calendar months after the date of the death of the decedent.

By reason of the premises, plaintiff, administrator *ad prosequendum*, has been damaged in the sum of ten thousand (\$10,000) dollars.

LAZARUS & BRENNER,  
*Attorneys of Plaintiff.*

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*Answer.*

**ANSWER.**

Filed November 1, 1921.

HUDSON COUNTY COURT OF COMMON PLEAS.

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JAMES GAVIN, administrator *ad prosequendum* of the estate of John Gavin, deceased,

*Plaintiff,*

*Action at Law.*

*vs.*

*Answer.*

THOMAS O'CONNOR,

*Defendant.*

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The defendant, Thomas O'Connor, residing in the City of Bayonne, Hudson County, New Jersey, answering the plaintiff's complaint, says that:

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1. He admits paragraph number one.
2. He admits paragraph number two.
3. He admits paragraph number three.
4. He denies paragraph number four.
5. He denies paragraph number five.
6. He denies paragraph number six.
7. As to the allegations of paragraphs number 7, 8, 9 and 10, he has no information or knowledge thereof sufficient to form a belief.

FIRST SEPARATE DEFENSE.

1. The death of said John Gavin was the result of conditions and circumstances for which defendant was not responsible and over which defendant had no control.

SANBORN & SHARKEY,  
*Attorneys of Defendant.*

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*Reply.*

**REPLY.**

Filed November 9, 1921.

HUDSON COUNTY COURT OF COMMON PLEAS.

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JAMES GAVIN, administrator *ad prosequendum* of the estate of John Gavin,  
deceased,

*Plaintiff,*

*vs.*

THOMAS O'CONNOR,

*Defendant.*

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*Action at Law.*

*Reply.*

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Plaintiff denies the allegations contained in the answer.

LAZARUS & BRENNER,

*Attorneys of Plaintiff.*

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*Judgment of non-suit.*

**JUDGMENT.**

HUDSON COUNTY COURT OF COMMON PLEAS.

10	JAMES GAVIN, administrator <i>ad prosequendum</i> of the estate of John Gavin, deceased,  <div style="text-align: right;"><i>Plaintiff,</i></div>	}	<i>Action at Law.</i>
	<i>vs.</i>		
	THOMAS O'CONNOR,  <div style="text-align: right;"><i>Defendant.</i></div>		

20 The above-entitled cause came on for trial before Richard Doherty, a judge of the above court and a jury on April 24, 1922, in the presence of the attorneys of the respective parties, and at the conclusion of the plaintiff's case, defendant moved for a non-suit which was granted.

It is, therefore, ordered that judgment of non-suit be entered in favor of the defendant, Thomas O'Connor, and against the plaintiff, James Gavin, administrator *ad prosequendum* of the estate of John Gavin, deceased, besides costs of suit to be taxed.

RICHARD DOHERTY,  
*Judge.*

30

On motion of

EUGENE T. SHARKEY.

Rule actually entered April 25, 1922.

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*Thomas O'Connor, direct.*

HUDSON COUNTY COURT OF COMMON PLEAS.

JAMES GAVIN,

*vs.*

THOMAS O'CONNOR.

10

Before Honorable Richard Doherty, Judge, and a jury.

Appearances:

Lazarus & Brenner, by Mr. Brenner.

Sanborn & Sharkey, by Mr. Sharkey.

Tried April 24, 1922.

THOMAS O'CONNOR, sworn.

*Direct examination* by Mr. Brenner.

20

Q You are the defendant in this action? A Yes, sir.

Q And you were the owner of premises No. 39 West Ninth street, Bayonne? A At one time yes. I owned it, but I sold that property.

Q When? A About a year or ten months ago.

Q You did own it, however, on March 27, 1920, at the time this accident occurred? A Yes, sir.

Q And what kind of a piece of property is that; a one-family house or a two-family house? A Two-family house. 30

Q Rented at that time to two tenants? A Yes, sir.

Q The tenant on the ground floor was Gavin? A Yes, sir.

Q And the tenant on the second floor was who? A Kerwin.

Q In the rear of that property there was located a clothespole, wasn't there? A Yes.

Q And how far was that from the rear of the house?  
A Might have been about forty feet from the shed. 40

*Thomas O'Connor, cross.*

Q Was there a clothesline attached to that pole? A Yes, sir; from the shed to the top of the pole.

Q And that pole was used by both tenants? A If they wished to.

Q It was provided for that purpose? A Yes, sir.

10 Q Did you have anybody living in that house who was supposed to look after it? A No, sir.

Q Was Mrs. Kerwin supposed to look after it? A Mrs. Kerwin promised me she would take care of the house and see that nothing would happen to it, by lowering her rent for her.

Q You say there was a reduction in rent for that? A Yes, sir.

Q And that she was supposed to look after the property for you?

20 *Mr. Sharkey.* If the Court please, I think he has answered that fully.

*The Court.* She was to take care of the house and see that nothing happened to it.

Q And you mean by that that if there was something wrong about the house she was to report that to you? A She was supposed to. She promised me she would look after the house if she got the rent two dollars a month cheaper.

30 *Mr. Brenner.* That is all.

*Cross examination by Mr. Sharkey.*

Q At the time you rented the premises to Mr. and Mrs. Gavin was there a clothesline hung from the pole to the house? A Why—

*Mr. Sharkey.* I withdraw the question.

40 Q Who lived on the ground floor before the Gavins moved it? A A fellow by the name of Sumner—they took their clothesline with them.

*Thomas O'Connor, cross.*

Q Did you furnish the tenants with clotheslines for the pole? A No, sir.

Q Did you furnish the Gavins with a clothesline? A No, sir.

Q Did Mrs. Kerwin ever make a report to you concerning the pole?

*Mr. Brenner.* I object to that as improper cross examination. 10

*The Witness.* No.

*The Court.* You have elicited that she was to take care of the house, see that nothing happened, and promised to report matters to this owner. I think it is proper cross examination. You may have an exception.

Q Did Mrs. Kerwin ever report to you anything concerning the pole? A No, sir.

Q Prior to the day of the accident when had you been to the premises? A Might have been—I remember I was there on two occasions in January— 20

*Mr. Brenner.* I object, not proper cross examination.

*The Court.* I sustain the objection. Strike out any partial answer he has given.

Q Did you ever get a report from anyone concerning the condition of the pole? 30

*Mr. Brenner.* I object to that, if the Court please; not proper cross examination.

*The Witness.* No, sir.

*The Court.* Objection overruled.

Q Can you recall just what you stated to Mrs. Kerwin or about what you stated to Mrs. Kerwin at the time you told her to look after the premises? A Whatever transaction there was on this account was between Mrs. Kerwin and Mrs. O'Connor. 40

*Thomas O'Connor, re-direct.*

Q Not with you? A No, sir.

Q Did you have any conversation at all with Mrs. Kerwin—did you give her any express authority yourself? A No, sir; I did not.

Q You said—

10

*The Court.* Did you discuss with her the matter of her duty to make any report to you?

*The Witness.* No, sir; she volunteered to look after the house.

*The Court.* Did she make that offer to you or to your wife?

*The Witness.* To my wife.

*The Court.* Then you knew nothing at all about her undertaking in that respect?

*The Witness.* No, sir.

20

*Re-direct examination by Mr. Brenner.*

Q Was that reported by your wife to you, the fact that Mrs. Kerwin had volunteered to do this? A She told me.

Q Your wife? A That if we would reduce her rent one dollar or two dollars a month, the lady promised she would look after the place.

Q Did she agree to do that with you or your wife? A With my wife.

30

Q And did your wife tell you that? A She told me.

Q And was that agreeable to you? A Satisfactory to me; yes, sir.

*The Court.* How tall was that pole?

*The Witness.* About fifteen feet; the average pole for a two-family house.

Witness excused.

40

*James Gavin, direct.*

JAMES GAVIN, sworn.

*Direct examination by Mr. Brenner.*

Q At the present time, where do you live? A 25  
Anthony street, Bayonne, N. J.

Q And you are the father of John Gavin? A Yes,  
sir. 10

Q On March 27, 1920, you were a tenant in the house  
owned by Mr. O'Connor? A Yes, sir, 39 West 9th  
street.

Q And you resided on the ground floor? A Yes,  
sir.

Q Did members of your family reside there with you?  
A Yes, sir.

Q How old was John Gavin on March 27, 1920? A  
He was past seven.

Q Past seven? A Yes, sir.

Q When had he been seven? A It was in April—he  
was to be eight in April. 20

Q In the rear of the yard of that house there was a  
clothespole? A Yes, sir.

Q And that clothespole was in the yard at the time you  
first rented the premises? A Yes, sir.

Q How long before March 20th had you rented the  
premises? A I believe it was in August.

Q The August before? A 1919, I moved into the  
house. 30

Q August, 1919? A I am not sure of that, but I be-  
lieve it was around August.

Q Did you ever observe this clothespole during the  
time you lived there? A Yes, sir. It seems to me it kind  
of shook.

Q And did you ever go and examine it or look at  
it?

*Mr. Sharkey.* If the Court please, I think this  
is leading. I think he has gone along far enough  
that way. 40

*James Gavin, direct.*

*The Court.* I will allow this question to be answered.

Q Did you ever examine it? A I didn't make a thorough examination; no, sir.

Q Did you look at it at all? A Yes, sir; I looked at it.

10 Q And when you looked at it, what did you observe about it? A I observed—

*Mr. Sharkey.* If the Court please—

Q Did you observe anything when you looked? A Yes, sir; I observed there was a cleat—the pole was cleated.

Q What do you mean by being cleated? A There was a piece of lumber attached on the inside of it, nailed on to the pole.

20 Q What else did you notice about the pole? A Well, it was very well decayed at the bottom of it.

Q Where? A About a foot or a foot and a half from the ground.

Q Could that easily be observed? A You could kick it off with your foot.

Q And from what distance could you see that?

*Mr. Sharkey.* If the Court please, I object to that.

30 Q From what distance did you see it? I withdraw my other question. A Well, I was close to the pole when I noticed it.

Q How close? A Probably two or three feet.

Q And were you able to see it at a greater distance than that?

*Mr. Sharkey.* I object.

Q Could you see it at a greater distance than that?

40 *Mr. Sharkey.* I object to that.

*James Gavin, direct.*

*The Court.* I sustain the objection.

*Mr. Sharkey.* I withdraw it.

Q You say you saw it when you were two feet from the pole. Did you ever look at it from a greater distance? A No, sir.

Q Never noticed it? A No, sir.

10

Q You say that you could kick pieces off with your foot. Did you ever do that? A No, I never done it.

Q How do you know that could be done? A Because it was worm-eaten, like if worms had eaten around through it.

Q And how long had that condition existed, as far as you know? A I suppose it was in that condition when I moved into the house.

Q And this cleat you talk about, will you describe just what you mean by that? A Well, for instance, you take two pieces of lumber and join them with a board; that is what I call a cleat.

20

Q And you say that that was on the inside of the pole? A Yes, sir.

Q What do you mean by that? A Facing the property—that is, facing the house.

Q You mean it was on the outside of the pole but facing the house? A Yes, sir; that is what I meant to say.

*The Court.* How was this pole hewn, was it a round pole or square?

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*The Witness.* Round.

*The Court.* Then how could a cleat be fastened to the cylindrical surface of a round pole? Was it square down at the bottom?

*The Witness.* No, sir. It could be done. It was just a board three inches wide. The pole was about eight inches in circumference; about eight inches thick.

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*James Gavin, direct.*

Q And by eight inches thick you mean through or around? A Through. The further up it went the smaller it got.

Q How wide was this cleat? A About a three-inch cleat.

10 Q And that was how high up on the pole? A About three feet long, the cleat was.

Q Did it go into the ground or stay above the ground? A Above the ground.

Q How far above the ground? A About a half foot above the ground.

Q Was that board put on at the time you were living there or was it put on before you got there? A Put on before I got there.

20 Q Now, when you noticed the condition of this pole and noticed that it swayed in the wind, did you call anybody's attention to that? A Not at the time; not when I first went there.

Q Did you subsequently call anybody's attention to it? A Yes, about a week or ten days previous to the accident.

Q Who did you tell about it? A Mrs. Kerwin.

Q She is the lady that lived upstairs? A Yes, sir.

Q What did you tell her—I withdraw that. What was it that led you to tell her about it? A What led me to tell her about it was her boy climbing the pole.

30 Q Did you see him climbing it? A Yes, sir.

Q And you say then you went in and spoke to her about it? A Not at the present time. It was a day or so after she was down to my rooms, and I explained to her about it.

Q What did you tell her? A I told her about the boy climbing the pole, and the pole was not very safe for the boy to be climbing it.

40 Q Tell her anything else? A I explained to her I didn't want her to get anxious, but I thought maybe it would be best to tell her.

*James Gavin, direct.*

Q When you told her that, what did she say? A Didn't say anything.

Q Did you say anything to her about telling that to Mr. O'Connor? A No, sir. I thought it was her business. She used to do his sweeping and cleaning up there.

Q Did you ever talk to Mr. O'Connor about it before that? A About the pole? 10

Q Yes. A No, sir.

Q You never did personally? A No, sir.

Q Had you ever talked to Mrs. Kerwin before that? A Yes.

Q Or was that the first time? A That was the first time.

Q How old are you, Mr. Gavin? A Forty-one.

Q And you are married? A Yes, sir.

Q How old is your wife? A Thirty-five—thirty-eight rather.

Q And this boy, you say, was eight? A Yes, sir. 20

Q Was he going to school at the time the accident happened? A Yes, sir.

Q What school? A St. Mary's school.

Q Down in Bayonne? A In Bayonne.

Q How long had he been going to school at the time? A I don't know. Probably six or seven months.

Q Just recently started? A Just started that term of school.

Q And he was in the first grade? A Well, I don't know what grade he was in. I suppose he was in the lower classes; he only just started. 30

Q Was the boy always healthy? A He was healthy, and a fine child.

Q When did you first learn of the accident? A Why, I didn't learn of it until I got home. I was working at the time.

Q And where was the boy when you first learned of the accident? A He was in the hospital.

Q Did you go up and see the boy? A Yes. 40

*James Gavin, direct.*

Q What was his condition at the time you saw him? A He was unconscious.

*Mr. Brenner.* I understand it is conceded that death resulted from the injury. We won't have to go into that.

10 *Mr. Sharkey.* Yes.

Q And when did he die? A I believe it was about two o'clock in the afternoon.

Q Of the following day? A No; the same day.

Q What time did you come home from work? A I got home about 11—half-past 11.

Q You were working nights at the time? A No, I was working days.

Q How did you learn of the accident? A I was telephoned. My wife sent word to work, and I came home. 20 Then I went up to the hospital. I got home first. Then I went up to the hospital.

Q And he died at two o'clock that same day at the Bayonne Hospital? A Two o'clock the same day.

Q Were there any other children besides John? A Yes.

Q How many? A Five.

Q How old are the other children? A Past thirteen.

Q The oldest is past thirteen? A The oldest is past 30 thirteen.

Q And the next? A Eleven.

Q And the next? A Seven.

Q And the next? A Two years.

Q That is the last? A No, there is one fourteen months.

Q Besides this swaying of the pole in the wind, did you notice whether the pole was absolutely solid or whether it leaned one way or the other? A I never noticed that.

Q After the accident occurred, did you examine the pole more closely? A Yes, sir. 40

*James Gavin, cross:*

Q And what did you find? A I found the pole was rotted through.

Q And when was this examination made? A After I came from the hospital.

Q The same day? A Yes, sir.

Q How did you find it was rotted clean through; was there anything you did? A It was like all dead wood, sir. 10

Q Could you plainly see that? A Yes, sir.

Q And how far up from the ground had it broken off? A About a foot and a half.

Q About a foot and a half from the ground? A Yes, sir.

Q Which way was the pole lying at the time you saw it? A At the time it fell?

Q At the time you examined it, you were not there when it fell. A It fell towards the house, in on the property. 20

*Mr. Brenner. Cross examine.*

*Cross examination by Mr. Sharkey.*

Q When you moved into that place, Mr. Gavin, you noticed the condition of the pole at the time, didn't you?

A Yes, sir.

Q You noticed it was in an unsafe condition? A I didn't notice it was in an unsafe condition, I noticed the condition of the pole. 30

Q The cleat was on it? A Yes, sir.

Q And that brought to your attention something was wrong with the pole, didn't it? A Yes, sir.

Q Did you make any inquiries from Mr. O'Connor or Mrs. Kerwin? A No, sir; I very seldom seen Mr. O'Connor to make any inquiries.

Q You are sure it was in August, 1919? A I am not sure about the month.

Q That you moved into the place? A Yes, sir. 40

*James Gavin, cross.*

Q You are sure, too, that the cleat was on the pole when you moved in? A Yes, sir; I am positive.

Q By the way, where is that pole, do you know, or the part of the pole that was broken off? A Where is it now?

Q Yes. A Why, the man that bought the house cut it up.

10 *The Court.* How long after the accident did you live there?

*The Witness.* About six months, maybe, I am not sure about that.

Q And during those six months did the pole remain in the yard? A No, it only remained there a short time after Mr. O'Connor sold the house.

Q Then what happened to it? A The man that bought the house cut it up.

20 Q While you were still living there? A Yes, sir.

Q Didn't you think it was important to keep that piece of wood? A I never thought of it; no, sir.

Q And you are sure it broke off a foot and a half above the ground? A Yes, sir.

Q What is your occupation? A Water tender.

Q Have you ever had any experience with poles setting in the ground? A No, I have not.

30 Q The rotted part was a foot and a half above the ground, is that so? A Yes.

Q And that was you could kick off with your foot, if you cared to? A Yes, sir.

Q Although you never tried to kick any of it off? A No, sir.

Q When did you first notice that the pole was very much rotted? A I could not say exactly.

Q When you did notice its rotten condition you knew it was not safe to have it there? A I could not say that I knew it was unsafe.

*James Gavin, cross.*

Q Was there anything about the condition of the pole that brought to your mind that it might break off at any time? A No, only the cleat.

Q And what did that indicate to you? A Well, I supposed the pole was in bad condition and was repaired.

Q During the time you were in the place your wife hung clothes on the line that was attached to that pole, didn't she? A Yes, sir. 10

Q She used it regularly, didn't she? A Not very regularly, no.

Q Your wife did the wash for the family, did she not? A Yes.

Q And hung out her own clothes? A Once in awhile.

Q Did anybody else hang them out for her? A No, we attached the clothesline from the shed to the window during the cold weather. 20

Q But, during the warm weather you used the clothes-pole, is that so? A Yes, sir.

Q Have you any idea of the number of times your wife used that pole? A No, sir; I was not home all the time.

Q You know she used it, though? A Yes.

Q Did you ever tell her not to use it? A No, sir.

Q When you noticed the rotten condition of the pole, didn't you think that it was about time for you to tell somebody that the pole was not safe? A Think it was time to tell anybody? 30

Q Yes; either the landlord or Mrs. Kerwin? A My wife did not go out there; I never seen it until it broke.

Q How long after the accident was it you noticed the pole was in a very much rotted condition? A I could not say.

Q Did you notice the rotted condition when you moved in, on the day you noticed the cleat? A Not the day I moved in; I didn't notice the bad condition. I noticed the cleat. 40

*James Gavin, cross.*

Q How far from the ground was the bottom of the cleat? A About a foot and a half from the ground.

Q How long was the cleat? A About three feet long.

Q And it started how far from the ground? A About a foot and a half from the ground.

Q And ran up three feet? A Yes, sir.

10 Q Where, with respect to the bottom of the cleat, was it that the pole broke off? In the middle of the cleat or the bottom of the cleat? A It was at the bottom of the cleat; through the cleat and all.

Q Were there nails in the cleat at the bottom? A Certainly there were nails in the bottom of the cleat.

Q And all along the cleat to the top were nails? A Yes, sir; it was nailed on.

Q Did you notice whether it was nailed to the pole where the pole broke off—after the pole had broken off, did you notice whether the nails were still at the bottom of the cleat? A No, sir.

Q You did not make any examination as to the nails at all? A No.

Q Did that rotted section extend all the way through the pole? A Yes, sir.

Q Or just an inch or so from the outer surface? A It was rotted right through.

Q Did you examine this rotted part with your hand or make any other examination of it? A After the accident?

Q Yes. A Yes, sir; there was myself and Lieutenant Gulesky there taking a police statement of the case, and Lieutenant Gulesky was kicking the rotten part with his shoe, and, of course, I done the same thing.

Q And how much of that rotted part did you kick off? A Just only a layer.

*The Court.* Have you told us where the pole broke with respect to the level of the ground?

40 *The Witness.* A foot and a half from the level of the ground.

*James Gavin, cross.*

*The Court.* Up?

*The Witness.* Up; yes, sir.

Q You saw Mrs. Kerwin's boy climb the pole one day?

A Yes, sir.

Q How long was that before the accident? A Probably a week or ten days.

Q And the pole appeared to you to be unsteady, didn't it? A Well, a good windy day. 10

Q What was there about the pole when the boy was climbing it that attracted your attention, or drew your attention, particularly? A Well, I didn't want to see the boy fall and get hurt.

Q What was there about the pole that led you to believe the boy was going to fall? A On account of the pole shaking.

Q Was the wind blowing? A Yes, it was blowing hard, a March day. 20

Q Had you ever observed the pole on other days when the wind was strong? A I have, yes.

Q And did it shake or move? A Oh, yes.

*The Court.* On this day had the boy mounted the pole?

*The Witness.* Yes, sir.

*The Court.* And it was waving while he was on it?

*The Witness.* Just barely shaking. 30

Q You thought he would fall? A Yes.

Q You did not think the pole would break, did you?

A No, sir.

*The Court.* How long was this before your boy was hurt?

*The Witness.* About a week or ten days.

Q You made some examination or observed that pole the day before the accident, didn't you? You had occasion to look at it? A No, sir. 40

*James Gavin, cross.*

Q Your children played in the yard, isn't that so?

A Yes.

Q With neighbor's children? A Yes, sir.

Q And did you think it was safe for them to play there? A I didn't think it was safe but what could you do with them?

10 Q You permitted them to play there, you knew it was not safe, but you permitted them to play there because you had no other place for them to play? A I was not home all the time; I was working.

Q Did you ever leave instructions at home that the children should not be allowed to play in the yard? A No, sir; because children always do what you tell them not to.

Q You were home at times during the day while you lived in O'Connor's house? A Yes, sir.

20 Q And you saw the children play around the house in the yard on the days you were home? A Yes, sir.

Q And did you think it was not safe for them to play there? A Where are you going to let them play?

Q You are asking me a question. Didn't you think it was not safe for them to play in the yard? A I never passed any opinion on that.

Q It didn't occur to you at all? A No, sir.

Q Because so far as you had observed the pole it was safe, isn't that so? A No.

30 *Mr. Brenner.* I object to that, as calling for a conclusion.

Q Well, didn't you think after you moved into the house that the pole was in an unsafe condition? A Well, I was of two minds on that; I was and I was not.

*Mr. Sharkey.* I ask that the answer be stricken out.

40 Q You understand the question, Mr. Gavin. Was there any time after you moved in Mr. O'Connor's house

*James Gavin, cross.*

that you felt that the pole was in an unsafe condition and it was likely to break off and come down? A No, sir.

Q Was there anything in the condition of the pole that led you to believe it might snap off or break down?

A No, sir.

Q So that the presence of the cleat on the pole did not worry you any as to the unsafe condition of the pole? You felt that with the cleat on it the pole was safe? 10

A I am not a lumber expert, I could not say if it was safe or unsafe.

Q I am asking you whether you thought that the pole with the cleat on it—

*The Court.* He said he could not say.

Q When was it that you reported the pole to Mrs. Kerwin? A A week or ten days before the accident. 20

Q That was after her little boy had climbed the pole? A Yes, sir.

Q Will you tell us what you said to Mrs. Kerwin? A I told Mrs. Kerwin about the boy climbing the pole, and I thought that the boy might fall and get hurt, and I didn't want her to think I was chastising the boy.

Q You were looking out for the safety of the boy? A Yes, sir. 30

Q You thought he might fall off the pole? A Yes, sir.

Q You did not think that the pole might snap or that the wind might blow the pole over? A No, sir.

Q Did you see the boy start to climb the pole? A Yes, sir; I seen him from the kitchen window.

Q Did you ask him not to climb it? A I went out and told the boy to get down.

Q After he had gotten up some distance? A Yes, sir. 40

*Catherine Gavin, direct.*

Q How far up the pole was he? A Probably a couple of feet.

Q When you made an examination of the pole after the accident, Mr. Gavin, where was the pole? What was the position of the pole with respect to the house?

A Well, the pole fell towards the back of the house,  
10 on to the property.

Q Directly toward the house? A Yes, sir.

Q Or somewhat to the side, to the right or to the left? A Well, now, I could not say which way the pole fell; that is the way the pole was when I got home from work.

Q Did you observe the condition of that part of the pole that remained in the ground? A Yes, sir.

Q What was its condition? A It was the same as the part that fell; decayed around.

20 Q Was there any part of the cleat left on the part that remained in the ground? A No, sir.

Q Was the cleat broken? A No, sir.

Q The entire cleat then was on the part that fell off into the yard? A Yes, intact with the pole that fell.

Witness excused.

CATHERINE GAVIN, sworn.

30 *Direct examination by Mr. Brenner.*

Q You are the wife of James Gavin? A Yes, sir.

Q And the mother of John Gavin, who is now dead?  
A Yes, sir.

Q And on March 27, 1920, you lived in Mr. O'Connor's house on West 9th street? A Yes, sir.

Q Did you see this accident happen? A No, sir.

Q When was the first that you learned that an accident had happened? A I was washing my baby when  
40 I heard hollering out in the yard.

*Catherine Gavin, direct.*

Q Who did you hear hollering? A Some neighbors in the back.

Q Did you go out? A Yes, I put my baby in the crib and went out.

Q Did you see the boy at the time? A No, sir; I met one of my boys, the two boys were carrying him in.

Q Carrying him into the house? A Yes, sir. 10

Q Who were the two boys that carried him in? A Thomas Graham, and I don't know the other boy's name—Stanley.

*The Court.* They were not your boys?

*The Witness.* No, sir; not those two boys.

Q Is Thomas here? A Yes.

Q Is the other boy here? A He is here, but I do not know him. He is a Polish boy and I do not know his name. 20

Q And what did you do then? A They kept on hollering and I found the other little fellow down in the yard.

Q Which little fellow? A The little fellow that got killed.

Q He was in the yard? A Yes, and I picked him up.

Q Was he the boy that they were carrying in or the other boy? A That was my other boy.

Q Both boys were hit? A Yes, sir. 30

Q One they were carrying in and the other was lying in the yard? A Yes, sir.

Q And was the one who was lying in the yard John? A Yes.

Q That is the boy that was killed? A Yes, sir.

Q What did you do then? A Well, I picked him up and I carried him in and the lady upstairs took him from me at the door; I was not able to carry him.

Q Did you see the pole at the time? A I never looked at the pole. 40

*Catherine Gavin, cross.*

Q Did you know what had happened? A Yes, I knew what had happened then.

Q Somebody tell you? A Yes, the pole fell.

Q Somebody did tell you what happened? A Yes, sir.

10 Q When was the next time you saw the pole? A I never seen it any more; I didn't go out there again.

Q How long did you continue to live there? A Oh, we lived there—

Q I mean after the accident happened? A About a year, I guess, after Mr. O'Connor sold the house.

Q How long after was a new pole put in? A While we were there; yes, sir.

Q Did you ever notice anything on the pole? A No, sir.

Q Notice that cleat that has been talked about? A Yes—

20

*Mr. Sharkey.* I object to that, if your Honor please, and I ask that the answer be struck out.

Q When I asked you the first question what did you think I meant by that—when I asked you if you noticed anything on the pole? A Well, was it in bad condition or anything.

Q That is what you thought I meant. Did you ever notice whether or not it was in bad condition? A No, sir.

30

Q But did you notice anything else about it? A I seen the piece around it, whatever you call it, the wood.

Q You saw the wood around it? A Yes, sir.

Q What has been referred to as the cleat? A Yes, sir.

*Cross examination by Mr. Sharkey.*

Q Who put the new pole in? A The party that bought the house after Mr. O'Connor sold it.

40

Q You used that pole? A The new pole; yes, sir.

*Catherine Gavin, cross.*

Q And attached your clothesline to it? A The new pole I used.

Q And the old one you used? A I didn't have a pulley on it, I just had a straight line on it.

Q But on the day of the accident you had a line attached to the pole? A Yes, sir.

Q Was it attached to a pulley or just tied? A I 10  
never had a pulley on it.

Q But on the day of the accident you had a line attached to this pole, is that right? A Yes, sir.

Q That was your clothesline? A Yes.

Q Did you leave it on the pole all the time or take it in after using it? A I don't know what happened to it.

Q Was it customary to leave the line attached to the pole? A It was there all the time.

Q And up to that time you had been using that line 20  
for hanging your clothes up? A Yes.

Q When before the accident had you hung any clothes on the line? A Not long before.

Q On what day was the little boy killed? A He was killed on a Saturday morning.

Q When before that had you hung any clothes on the line? A Monday or Tuesday of that week.

Q You had a pretty big washing? A Well, I had one little line between the shed and the window. Because my baby is small, I didn't want to be going out 30  
all the time; so I hung things out on that little line. There is a shed there, and there is another little yard.

Q And you had a line attached to that? A From my kitchen window to the shed; I had a little line up there.

*The Court.* This pole was in the rear part of the yard?

*The Witness.* Yes, sir.

*The Court.* And the line ran from that pole towards the house; that is, in the direction toward 40  
the house?

*Catherine Gavin, cross.*

*The Witness.* Yes, sir.

Q And you used the line attached to the pole for general washing? A Yes, sir.

Q While you were using that line for the purpose of hanging clothes, did you ever notice that the pole was in a defective condition? A No, sir; I never took notice; I didn't have time.

Q You told Judge Brenner you saw a box, or piece of wood? A Yes.

Q Just what was that? Was it an ordinary piece of wood, or a box? A It was wood nailed up to it.

Q How long was that? A About that long.

Q And how was it attached to the pole? A Around it.

Q Around the pole? A Yes, sir.

Q All around the pole? A Yes, sir.

Q Can you explain to us—you say it ran all the way around? A I don't know, but it was in front where I was hanging up the wash. It came up from the ground.

*The Court.* Was it a piece of wood that was nailed flat to the pole, or was it a plank that came out and beyond, away from the pole?

*The Witness.* No, sir; nailed like that.

*The Court.* Flat to the pole, to strengthen the pole?

*The Witness.* Yes, sir; I guess so.

Q About how long was this piece? A About that long; maybe it was more. I cannot say.

Q You say it ran from the ground right up? A Yes, sir.

Q Did you notice where the pole broke? A No, sir.

Q You did not notice the part of the pole that was broken? A No, sir.

Q Did you ever have occasion to go into the yard after the accident? A I didn't go in for a long time after

*William Gavin, direct.*

that. I didn't go in until the pole was taken away out of there altogether.

Q That is, the broken part? A Yes, sir.

Q Were you ever in the yard after the accident while the stump of the pole remained in the ground? A I don't know if the stump was there. I never looked.

Witness excused.

10

WILLIAM GAVIN, sworn.

*Direct examination by Mr. Brenner.*

Q How old are you? A Past 13.

Q And you are a brother of John Gavin? A Yes, sir.

Q Were you in the yard playing with John at the time of this accident? A Yes, sir.

Q What were you playing? A We were trying to make a tent; trying to get rugs to make a tent. 20

Q Where were you getting the rugs from? A I asked my mother for some old rugs.

Q Did she give them to you? A No, sir.

Q What were you doing when the pole fell? A I just put my hand up like that on the line, and then I put the other hand up, and that is all I knew after that.

Q You put your two hands up on the line? A I put my two hands up on the line.

Q And you say that is the last you knew after that? A Yes, sir. 30

Q What happened to you? A I just got knocked unconscious.

Q The pole hit you, too? A I don't know if it hit me or not. All I know, I got knocked unconscious, and the next thing I knew I was getting up out of bed.

Q You knew you had put your hands up on the line? A Yes, sir.

Q And you did not know anything more until the next day? A About two o'clock. 40

*William Gavin, cross.*

Q Were you hanging on the line? A I just put my hands up and bent down a little bit.

*The Court.* You say you bent down a little?

*The Witness.* I don't know whether it went down a little or not.

10 *The Court.* Did you say you put your hands on it and bent down?

*The Witness.* Just a little bit I bent down.

Q Was John holding this line, also? A No, sir.

Q Where was John? Do you know? A He was just in back of me.

Q And you, of course, did not see John hit, did you?  
A I didn't see John.

*Mr. Brenner.* I guess that is all.

20 *Cross examination by Mr. Sharkey.*

Q You had often swung on the rope, hadn't you? A No, sir.

Q Was that the first time you ever did? A That was the first time.

Q How many boys were in the yard at the time? A About five.

Q About how many? A About five.

Q The Kerwin boy was there, wasn't he? A The two Kerwin boys.

30 Q Who else? A My two brothers and myself.

Q Why did you take hold of the line? A I didn't. I just put my hand up.

Q You did not have your feet off the ground at all?  
A No, sir.

Q Just reached up? A Yes, sir.

Q And you had never swung on the line before? A Not that I remember.

40 Q How long had you been in the yard before you put your hand up on the line? A About three-quarters of an hour.

*William Gavin, cross.*

Q And during that three-quarters of an hour what had you and the boys been doing? A We were trying to get rugs for the tent.

Q Where were the rugs? A In the shed.

Q It did not take three-quarters of an hour—you did not spend three-quarters of an hour trying to get rugs, did you? A We were trying to find lines and big pieces of wood for the tent. 10

Q And why didn't you get the rugs? A Because my mother needed them for something else.

Q The rugs were in the shed, were they? A Yes, sir.

Q Before you reached up and grabbed the line, some of the boys had been swinging on it? A We had not been swinging on it.

Q Just seeing if you could touch the ground with your knees? A Holding on and bending down. 20

Q Holding on and drawing up your feet? A No, sir; trying to touch the ground with one knee, holding onto the pole.

Q You grabbed the line; then you took your feet off the ground? A No, sir; I held the rope like this and I tried to touch the ground with my knees, like that.

Q Who was on the rope with you at the time? A Nobody else was on the rope with me at the time.

Q Don't you remember speaking to Lieutenant Gulaskey after the accident? A No, sir. 30

Q You never spoke to him? A I didn't speak to him, but I saw him taking the rotten wood off the bottom of it.

Q Did you say you did not speak to Lieutenant Gulaskey? A No, sir; I didn't speak to him.

Q You never gave him a statement at all? A No, sir.

Q Didn't he come down one day and write something down and you told him? A I think he asked me how it happened. 40

*William Gavin, cross.*

Q And do you remember you told him you were walking hand over hand on the line? A No, sir; I don't remember telling him that.

Q Will you say you did not, William? A I don't know whether I did or not.

10

*The Court.* Is there any likelihood you did tell him that? Might you have told him that?

*The Witness.* I don't know if I told him that or not. I was just after getting up.

*The Court.* Do you remember what you did tell him?

*The Witness.* No, sir.

Q Did you ever walk hand over hand on the rope?

*Mr. Brenner.* I object to what he ever did.

20

*The Court.* I think it is relevant in the course of establishing that the act happened through an independent, efficient cause. I overrule the objection.

*Mr. Brenner.* Exception.

Q Before the accident had you ever walked hand over hand on the rope? A I think I done it once.

Q Did you ever see any of the other boys do it? A No, sir.

30

Q Did you ever see any of the other boys who play in the yard? A No, sir.

Q Did you ever see any of the boys swinging on the rope? A Just walking hand over hand.

Q On the day of the accident did some one dare you or tell you you could not walk hand over hand all the way to the pole? A Yes, my brother.

Q And you started to do it, didn't you? A I didn't start to do that.

40

Q But you were going to do it? A Yes, but I bent down first.

*William Gavin, cross.*

Q Were you the first to use the rope for walking hand over hand, or did somebody else do it? A My brother before me.

Q Which brother? A James.

Q And how far did he go on the rope in that manner? A He nearly went all the way.

Q Whose turn was it next? A My turn. 10

Q How old was your brother James—is he in court? A No, sir; he is sick.

Q How old is he, do you know? A He is going on 11—he must be past 11.

Q Are you sure that before the accident happened your brother James was the only one who had gone along the rope hand over hand that day? A Yes, sir.

Q And he went almost to the pole? A Yes, sir.

Q How far had you gone before the pole broke? A I didn't get started; just as I bent down, that was the last I knew. 20

Q You were pulling down on the rope? A Yes, sir.

Q In order to get the rope you had to reach up and get it? A Yes, sir.

Q Or did you have to jump? A I didn't have to jump.

Q Did James have to jump? A I guess he could touch it with his fingers.

Q Are you sure whether he had to jump or not? A No, sir. 30

Q But you had to jump; you grabbed the rope near the shed, didn't you? A I didn't have to jump.

Q It is higher there, isn't it, than it is in the middle? A But I could touch it with my fingers, then get hold of it.

Q You are sure you didn't have your feet off the ground? A Yes, sir.

Q Did you notice a board on the pole? A Yes, sir.

Q How many boards were on the pole? A One board. 40

*William Gavin, re-direct.*

Q How long was it? A I could not tell you.

Q When did you first see the board? A When we first came into the house.

Q Did you see it put on? A No, sir.

Q Did you see that piece of board we call the cleat here—did you notice the cleat or piece of board after the accident? A I noticed it was on the pole after it  
10 fell.

Q After the pole fell? A Yes, sir.

Q Were you confined to your bed on account of the injuries you received? A No, sir; just after I got knocked unconscious.

Q And how long after was it that the lieutenant spoke to you? A Right after I got up out of bed

Q That same day? A Yes, sir; some man came down there.

Q The Bayonne police officer? A I don't know if he  
20 was an officer or not.

Q Was he in uniform? A No, sir.

Q How long has your brother James been ill? A He is sick now.

Q Is he being attended by a doctor? A He is going to get the doctor today.

*Re-direct examination by Mr. Brenner.*

Q Do you know how much you weigh? A No, sir.

Q Do you know how much you weighed in March,  
30 1920? A No, sir.

Q You are thirteen years old now? A Yes, sir.

Q Are you heavier now than you were then? A Yes,  
sir.

Q Bigger now? A Yes, sir.

*Mr. Sharkey.* I object to that and ask that it be struck out. He does not know how much he weighs now and cannot tell what he weighed then.

*The Court.* I will allow it to illuminate the circumstances at the time of the injury.

*Motion for non-suit.*

Q You are bigger now than you were then? A Yes, sir; I am a good bit heavier.

Q That is just a little over two years ago that this thing happened? A Yes, sir.

Q You were only eleven years old then? A Yes, sir.

Witness excused.

10

*Mr. Brenner.* I offer in evidence appointment as administrator.

(Marked Exhibit P. 1.)

*Mr. Brenner.* We rest.

#### MOTION FOR NON-SUIT.

*Mr. Sharkey.* I now make a motion for a non-suit on the ground the plaintiff has not established: First, that the child who was struck and killed was there by invitation of the landlord; second, that the plaintiff did not prove that the pole was being subjected to a strain or to a use which the parties to the original renting must have contemplated. All the cases in which the landlord has been held liable in the State of New Jersey have been those cases in which the injury was the result of a use for which the defective part of the property was intended.

20

*The Court.* Has it been stipulated between the parties that this death resulted from the accident?

30

*Mr. Brenner.* Yes.

*The Court.* That is admitted here?

*Mr. Sharkey.* Yes.

*The Court.* What is the third ground?

*Mr. Sharkey.* First, that he was not there by invitation; second, the pole was subjected to a use not contemplated; third, an independent agency intervened.

*The Court.* What have you to say, Mr. Brenner?

40

*Motion for non-suit.*

Mr. Brenner. On the third proposition I might call the Court's attention to the pleadings in which there is no allegation that there was an independent cause, therefore I don't think that that can be used at the present time. It is not interposed as a defense. If it can be used, then we have this: that he saw that this pole was, and for a long time previous to the accident, had been in a dangerous and dilapidated condition. The father of this boy testified, if the Court recalls the testimony, that the condition of the pole was so bad and so rotted that pieces could be kicked from it and that an examination of the pole subsequent to the time of the accident revealed the fact that it was rotted clear through. It seems to me to be within the purview of the jury to determine whether this pole was in this dangerous and dilapidated condition and whether or not it was due to the negligence of the landlord, the man making the repairs, at the time when he could have perceived that the pole was in this condition. We have, further than that, the direct testimony that the Kerwin woman, who was taking care of this house at the request of the landlord, or at the request of the landlord's wife with his sanction, had been notified of the fact that this pole was in a dangerous condition. Gavin testified that he had noticed the swaying of the pole in a wind, so that the pole could not have been safe or secure. It seems to me that that is entirely within the purview of the jury to say whether this pole broke because of the fact that this boy whom the Court has seen and who probably weighed less than a basket full of clothes, could have caused the pole to break. The pole was equipped with two clotheslines apparently and used by both tenants; it was subject, therefore, to the weight of the wash of two families, which would seem to be at least equal to the weight of this boy then eleven years of age. That being so, the pole was put there with the idea that it would certainly stand a strain equal to the weight of

*Motion for non-suit.*

the boy, and it seems to me that there is nothing here to show that it was the weight of this boy that caused the pole to fall. The testimony is that all this boy did at the time of the accident was to put both hands on the line and he was attempting to kneel down on the ground. There is nothing in the evidence to show that the mere pulling on the line at the time by this boy eleven years of age caused this pole to fall, and it seems to me it should be for the jury to say whether or not it was the decayed condition of this pole that caused it to fall and whether or not a reasonable inspection would have disclosed this, because Gavin says its condition was such that it could have been observed, and this was a condition concerning which the landlord is charged with knowledge because, in fact, notification was given to the person apparently in charge of that particular thing. The question of invitation I hardly think it is necessary for me to answer—

*The Court.* It is not necessary.

*Mr. Brenner.* The next point, I think it was on the question of whether any negligence had been established. That I have practically argued. All the cases in this State hold that if the thing is so apparent that it could have been noticed and other repairs were made, that that is negligence, because then it is constructive notice. In this case we go a step beyond because we gave notice to the person in charge of these premises. It seems to me that this whole matter is a matter for the jury to decide and not to be decided as a matter of law.

*The Court.* On the renting of a premises of this character a landlord is under no obligation to supply a tenant with the convenience of a clothespole. In this case it is established that the landlord, before renting to the plaintiff, had supplied a clothespole to the premises as a facility in conjunction with the laundry work, that the pole required some reinforcement in the way of a cleat and that this measure of reinforcement was resorted to

*Motion for non-suit.*

by the landlord before the letting to the plaintiff. It is beyond the range of dispute that the landlord supplied this pole for the purpose of hanging clothes. His duty was to use reasonable care to maintain it in such safe condition as would enable it to be used for that contemplated purpose and there is no testimony here  
 10 of any vicissitude that resulted from the use of the pole as a clothespole for the hanging out of washing. The testimony as to this casualty was that some boys were in the yard and were placing a strain on the clothesline not belonging to the landlord—the clothesline is the property of the tenant, the landlord did not go to the length of supplying clotheslines—when the pole fell. We must either find that this pole fell as a result of the strain put on the clothesline or else it fell as the result of an unexplained fortuity. It seems to me that this entire  
 20 case simmers down to the question of the degree of weight that the boys put on the clothesline. Indeed, counsel for the plaintiff in answering the argument on this point inferentially admits that if the weight that was exerted by the boys was in excess of the ordinary weight of household washing that the landlord would be exculpated from liability in this case.

The plaintiff comes into court solely as a litigant setting out a cause of action and resting under the obligation of establishing that cause of action by proving it.  
 30 I do not feel that the plaintiff himself recognizes that he has discharged his burden; the entire case, according to his argument, is based upon an inference that the weight of a boy would not equal or exceed the weight of a quantity of household clothing, particularly when no evidence is offered as to what the weight of such clothing would ordinarily be; so that we therefore are obliged to recur to the question of when a landlord would be responsible for the failure of his pole. Even though this pole had deteriorated, even though it had rotted to the extent of  
 40 requiring reinforcing as described by the witnesses, this

*Motion for non-suit.*

landlord is not responsible if the pole was still of sufficient stability to hold up a line of clothes, because that is the only purpose for which he furnished it, as a convenience to the tenant. There is no proof here that it did deteriorate beyond that point. There is no proof here that it fell as the result of anything except the strain that was put on it by those boys in an act that was entirely unanticipated by the landlord at the time he furnished the pole, therefore, there will be a judgment of non-suit in this case. 10

*Mr. Brenner.* Exception.

*The Court.* Gentlemen of the jury, you are dismissed from further service in this case.

*Mr. Brenner.* You seemed to think I predicated my argument on the weight of the boy.

*The Court.* I said you inferentially admitted. 20

*Mr. Brenner.* I want to correct the Court's impression as to the nature of my argument. My argument was only regarding the weight of the boy, but I didn't use that in answer to the application for non-suit. My answer to the application for non-suit was based on the fact that it had been shown that this pole was in a dangerous and dilapidated condition and that therefore it was for the jury to determine whether or not that was the direct and proximate cause of the happening or whether, as the defendant contends, it occurred because of the weight of this boy on the clothesline. 30

Also, I want to call your attention to the fact that the answer sets up an intervening cause. We show that there was some dangerous agency that existed which could have caused this accident.

*The Court.* Your duty was to show that the injury resulted from the natural and proximate negligence of the defendant, so that the fact that there was an independent, efficient cause would be an answer that might 40

*Notice of Appeal.*

be made, but the mere pleading of it simply serves to negative your contention that it was the natural and proximate result. You may have an exception to all of the rulings I have made.

10

**NOTICE OF APPEAL.**

HUDSON COUNTY COURT OF COMMON PLEAS.

20

JAMES GAVIN, administrator *ad prosequendum* of the estate of John Gavin,  
deceased,

*Plaintiff-Appellant,*

*vs.*

THOMAS O'CONNOR,

*Defendant-Appellee.*

*On Appeal.*

*Notice of  
Appeal.*

*To Eugene T. Sharkey, Esq., Attorney of Defendant:*

TAKE NOTICE that the plaintiff appeals to the New Jersey Supreme Court, from the whole of the judgment entered in this case, upon the following grounds:

30 The Trial Court directed a judgment of non-suit against the plaintiff and in favor of the defendant when thereunto moved by counsel for the defendant, whereas said Court should have denied said motion and should have submitted to the jury for decision the questions involved in the issue.

IRVING LIPMAN,  
*Attorney of Appellant.*

40

*Exhibit P. 1.*

**EXHIBIT P. 1.**

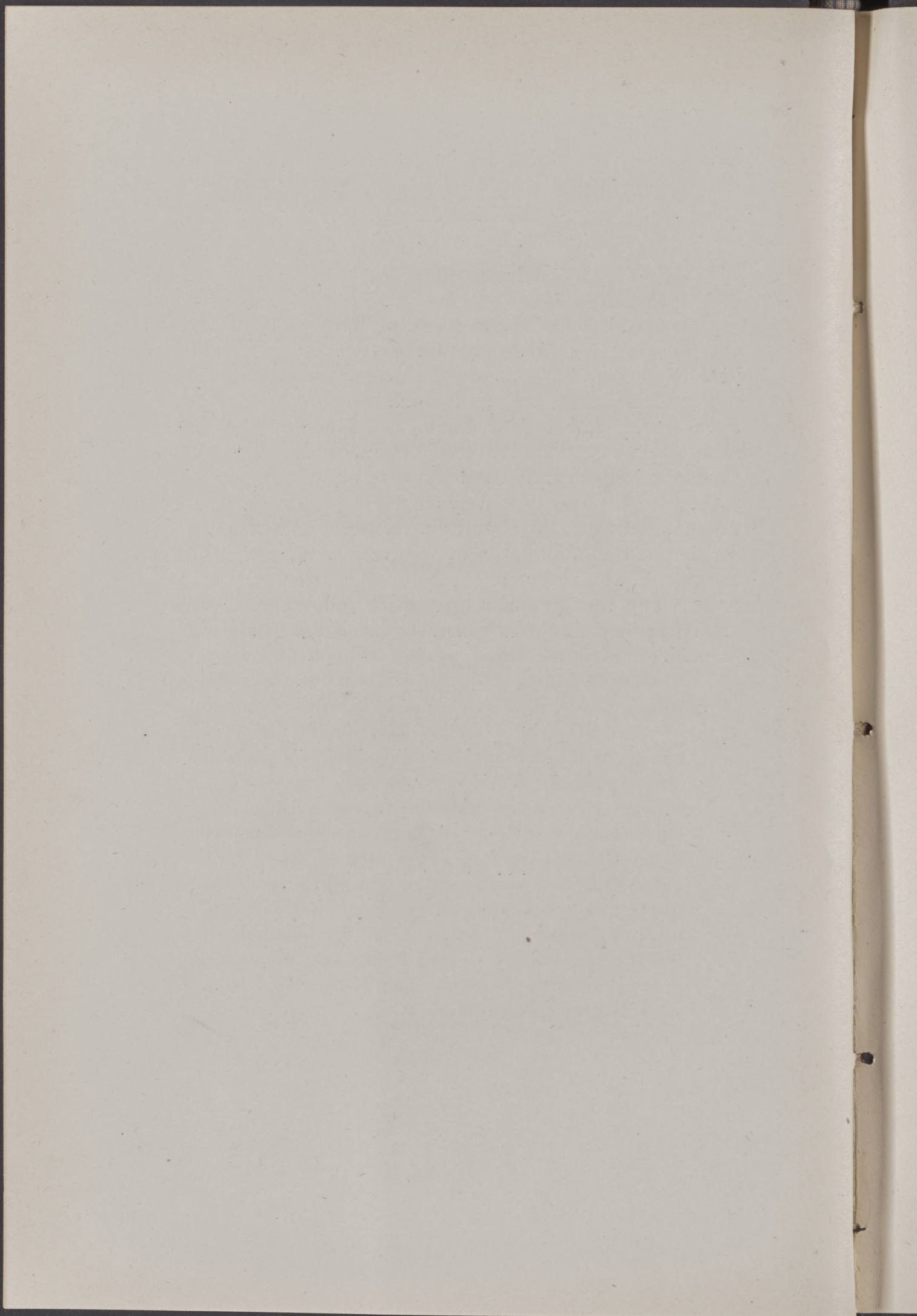
STATE OF NEW JERSEY, }  
COUNTY OF HUDSON. } ss.

I, JAMES F. NORTON, Surrogate of the County of Hudson, do certify that on the 1st day of October, in the year of our Lord one thousand nine hundred and twenty-one, administration *ad prosequendum* upon the estate of John Gavin, late of the County of Hudson, who died intestate, was granted by me to James Gavin, of the County of Hudson, for the purpose of enabling him to prosecute an alleged claim against the proper defendant. These letters of administration, however, do not authorize the said administrator to receive any moneys in settlement of any claim, either before or after suit, or to receive any assets of said estate such claim, moneys or assets to be paid to a general administrator when appointed.

(SEAL) WITNESS, my hand and seal of office, the first day of October, in the year of our Lord one thousand nine hundred and twenty-one.

JAMES F. NORTON,  
*Surrogate.*

Per JOHN F. CALLAHAN,  
*Deputy Surrogate.*



# New Jersey Court of Errors and Appeals

JAMES GAVIN, administrator *Ad Prosequendum* of the Estate of John Gavin, deceased,  
Plaintiff-Appellee,

*v.*

THOMAS O'CONNOR,  
Defendant-Appellant.

Action at Law.  
On Appeal from  
Supreme Court.

## BRIEF OF PLAINTIFF-APPELLEE.

### Statement.

This was an action brought by James Gavin, as Administrator *Ad Prosequendum* of the Estate of John Gavin, deceased, against Thomas O'Connor, to recover damages for the death of the plaintiff's intestate, who died as a result of injuries sustained by the falling of a clothes-pole on the premises owned by the defendant and occupied by plaintiff and the members of his family as a tenant.

Issue was joined and the action tried in the Hudson County Court of Common Pleas, before Judge Richard Doherty and a jury, on April 24th, 1922. At the conclusion of plaintiff's case, the Court directed a non-suit to be entered. On appeal, the Supreme Court reversed the judgment of the Hudson County Court of Common Pleas and granted a *venire de novo*. This is an appeal from such judgment of reversal.

**POINT I.****The Court erred in granting a non-suit.**

The testimony of the plaintiff, undisputed, tends to establish the fact that on March 27th, 1920, plaintiff was a tenant in the premises owned by the defendant, O'Connor, in the City of Bayonne, and resided on the ground floor with the members of his family, amongst whom was John Gavin, an infant seven years old. Plaintiff had rented the premises in August of 1919 and at that time, there was a clothes pole in the yard about forty feet to the rear of the house, which the defendant himself testified had been provided for the use of both tenants. Plaintiff's children had been in the habit of playing in the back yard with neighbors' children, as there was no other place for them to play, and while thus engaged in play, the clothes pole suddenly snapped and fell upon little John Gavin, who sustained injuries resulting in his death, which forms the basis of this suit.

In this posture of the case, a very important question arose that the trial court overlooked and ignored, which should have been submitted to the consideration of the jury, and that is, whether there was any evidence, no matter how slight, to fairly and reasonably justify a jury in finding that plaintiff's intestate was invited by the owner of the premises, O'Connor, or his ostensible agent, Mrs. Kerwin, whose duty it was to look after the premises, to use the yard as a playground. The jury would have been justified in finding from the evidence submitted that plaintiff's children and the neighbors' children had frequented the yard and had used it as a playground with the knowledge and acquiescence of the defendant and

his ostensible agent, Mrs. Kerwin, without objection by either of them. Such a finding by the jury would not be reversed on appeal. The present case is peculiarly analogous to the case of *Burnett v. Superior Realty Company*, 102 Atl. Rep., 831. There, plaintiff, a little girl of tender years, was injured in the back yard of the house where she lived with her parents, by a mortar-box falling upon her. No one saw it fall, but the child was heard to scream and was found lying flat on the ground, with the box lying over her. Parker, J., said:

“Two important questions in the case are whether there was any evidence to justify a jury in finding that the infant plaintiff was invited by the owner of the premises, the defendant, to use the yard as a playground, and, secondly, if so, whether there was any evidence to justify the jury in further finding that the fall of the box was due to any negligence that could be brought home to the defendant company. Both of these questions turn to some extent upon questions of authority, expressly or impliedly or ostensibly conferred upon the defendant as its agent.”

The Court here held that these questions appear as jury questions, and refused to reverse the finding of the jury and affirmed the judgment of the lower Court for the plaintiff. It was inferable from the testimony in the case at bar, as it was in the *Burnett* case, that plaintiff's intestate was invited, either expressly or impliedly, to use the yard as a playground, and that plaintiff's children had been accustomed to use the yard as such playground, with the defendant's knowledge and permission, and the jury should have been the proper tribunal to whose consideration this question should have been submitted, and it was reversible

error for the Trial Court to refuse to refer it to the jury and to direct the verdict of non-suit.

As to the allegation of negligence in the complaint, it appears from the testimony that during the time plaintiff occupied the premises as a tenant of defendant, plaintiff had occasion to observe the condition of the clothes-pole, and that it appeared to him that it "kind of shook"; that there was a cleat on the pole—that the pole was cleated—by a piece of lumber being nailed on the outside of the pole, facing the house. This cleat was necessitated by reason of the fact that the clothes-pole was considerably decayed near the bottom, about a foot and a half upwards from the ground. The cleat was about three inches wide and about three feet long, and was nailed to the outside of the pole so as to cover the decayed and rotted portion for the apparent purpose of strengthening the pole and thus preventing it from breaking off at the decayed point and falling. It further appears that the cleat was put on the pole before the plaintiff moved into the premises, and had remained on the pole in that condition up until the pole fell; that the rotted section extended right through the pole and was worm eaten; and that immediately after the happening of the accident, plaintiff made an examination of the rotted pole on the ground and plaintiff and a police lieutenant kicked the rotted part off with their feet. Testimony further tends to show that this rotted and decayed and dangerously defective clothes-pole was permitted and allowed by the said defendant to remain in the yard of the premises, with a cleat on it, from the time that the plaintiff rented the premises from the defendant, in August of 1919, and for a long time prior thereto, down to the time of the happening of the accident in March, 1920, a period of more than

seven months. This testimony by the plaintiff as to the rotted and decayed condition of the clothes-pole was substantially corroborated by plaintiff's wife, Catherine Gavin, so that there was before the Court and jury the testimony of two witnesses produced on the part of the plaintiff as to the rotted and dangerous condition of the clothes-pole, undenied and undisputed, from which the jury could fairly and reasonably spell out negligence on the part of the defendant.

We now come to the testimony of William Gavin, another witness produced on the part of the plaintiff. He testified that he was in the yard with his brother, John, at the time that the accident happened and that when the pole fell he "just put up his hand like that on the line and then put up the other hand, and that is all he knew after that"; that he put his two hands up on the line and bent down a little bit, but that he did not have his feet off the ground at all; that he had never swung on the rope, and that on the day of the accident someone told him that he could not walk hand over hand on the line to the pole, and that he was going to do it, but had never started to do so, and that the pole broke before he got started.

At the conclusion of the plaintiff's case a motion for non-suit was made, which motion should have been denied by the Court and the case submitted to the jury upon the questions involved. The jury would have the right to find from the testimony that the rotted and decayed clothes-pole was permitted and allowed to remain in the yard by the defendant in a dangerous and defective condition, in a place which plaintiff and the members of his family had a right to use and which plaintiff's in-estate had been accustomed to use as a playground, with defendant's knowledge and acqui-

escence—a place where defendant knew or should have reasonably anticipated that the children of the tenants occupying the premises would be likely to play in and might be seriously injured by the falling of the decayed clothes-pole and that the defendant was negligent in this respect. The jury would have been justified in finding that the defendant was guilty of negligence in permitting a rotted and decayed clothes-pole, with a brace or cleat attached to it, to remain in such a condition, known to him to be dangerous or which he should have reasonably anticipated to be dangerous, in a place used and frequented by children, as a playground. There is nothing in the testimony to show that, as a matter of law, the clothes-pole fell as the result of the witness, William Gavin, taking hold of the clothes-line; in fact, there is nothing in the testimony which tends to conclusively show what actually did make the clothes-pole fall. The testimony was and is equally consistent with the idea that the pole fell as the result of the negligence of the defendant in permitting such a dangerous and defective pole to remain in his yard and as a result of the defendant's failure to perform the duty imposed upon him by law as it was with the idea that the pole fell as a result of any act on the part of the witness, William Gavin. The Court cannot weigh the testimony, on a motion to non-suit or to direct a verdict, but must take as true all the evidence which supports the view of the party against whom the motions are made, and must give him the benefit of all legitimate inferences which are to be drawn therefrom in his favor.

In *Sutton v. Bell*, 79 N. J. Law, 507, Mr. Justice Garrison says:

"The existence of negligence whether of the plaintiff or of the defendant depended upon the conclusion to be reached from a variety of circumstances considered not as isolated occurrences but altogether and in view of their relation to and reaction upon each other. To draw a conclusion as to the conduct of the parties under circumstances thus connected, is of the very essence of the jury function. In proportion as such circumstances multiply and intercolate it becomes more and more a matter of deciding between conflicting inferences, and less and less a matter of declaring that one inference alone is conclusively compelled by the testimony. The latter, viz.: to decide that there exists no recognizable controversy upon the testimony, is a function of a court; but to recognize the existence of such a controversy and to proceed to decide it, is to usurp the function of the jury."

To the same effect is the case of *Thornton v. Cater*, 111 Atl. Rep., 158, in which Chief Justice Gummere, speaking for the Court of Errors and Appeals, says that in determining whether or not a non-suit was properly directed, every presumption of fact must be resolved in favor of the plaintiff.

"In passing upon motions of non-suit and for direction of a verdict, the court cannot weigh the evidence, but must take as true all evidence which supports the view of the party against whom the motions are made, and must give him the benefit of all legitimate inferences which are to be drawn therefrom in his favor."

*Andre v. Mertens*, 88 N. J. Law, 626.

"Where the existence of negligence depends upon the conclusion to be drawn from a variety and combination of circumstances

considered in their relation to and their reaction upon each other, the jury, and not the court, is normally the tribunal to draw such conclusion."

Fagan *v.* C. R. R. of N. J., 111 Atl. Rep., 32.

In the case of Newark Passenger Railway Co. *v.* Block, 55 N. J. Law, 605, at page 607, Mr. Justice Magie uses this language:

"It has been questioned elsewhere, whether, in actions to enforce a liability arising from negligence the trial judge can withdraw from the jury, by non-suit or direction for a verdict, the question of negligence which is a mixed question of law and fact.

"When, in such cases, the trial judge is requested to non-suit, or to direct a verdict, his duty is, as was well expressed by Lord Chancellor Cairnes, in Metropolitan Railway Co. *v.* Jackson, L. R., 3 App. Cases, 193, to say whether any facts have been established by evidence from which negligence MAY be reasonably inferred. If none, there is no case to go to the jury; but if from facts established negligence may reasonably and legitimately be inferred, it is for the jury to say whether from these facts negligence OUGHT to be inferred.

"In performing this function, the trial judge must take care not to trench on the peculiar province of the jury to determine questions of fact, and must bear in mind that the question is not whether he would infer negligence from the established facts, but whether negligence can be reasonably and legitimately inferred therefrom by the jury."

In Guilfoyle *v.* Smith, 111 Atl. Rep., 593, the Court says:

"Unless unworthy of credence, the trial court, on motion for non-suit, must regard the evidence introduced by plaintiff in the aspect

most favorable to his cause of action, and he cannot grant a non-suit if plaintiff makes out a *prima facie* case, though it may in the opinion of the court be a weak one."

The case of *Hayward v. North Jersey Street Railway Co.*, 74 N. J. Law, 678, is an exceptionally strong case in point. There the Court said that a motion to non-suit and for the direction of a verdict for the defendant is in effect a demurrer to so much of the whole testimony as is favorable to plaintiff, admitting its verity in point of fact for the purpose of denying its sufficiency in point of law. In this case the Court held that plaintiff's cross examination tended to show lack of ordinary caution, was contradictory to testimony on direct examination and to testimony of other of plaintiff's witnesses, and held, that on motion to non-suit and to direct a verdict for defendant, the Trial Judge could not ignore the testimony of other witnesses for plaintiff in favor of plaintiff's testimony on cross examination, nor pass upon conflicting claims of credibility.

In *Rand v. Armm*, 74 N. J. Law, 704, the Court held that if a Trial Court, in directing a verdict, assumes or decides a material fact as to which a different conclusion might legitimately be reached upon the testimony, the resulting judgment will be set aside on error.

An unusually strong case in point is the case of *Salisbury v. Crudale*, 192 Atl. Rep., 731 (Rhode Island Case). This was an action of trespass on the case for negligence by plaintiff, a minor, against the father of a boy, also a minor, to recover for injuries from a shot fired by defendant's son, and here the Court held that whether defendant was negligent in allowing his son to get possession of a loaded rifle, and whether such

negligence was the cause of the injury, were questions for the jury. The Chief Justice, in the course of his opinion, says:

“In our opinion, the jury could find upon the evidence that the defendant was negligent, and that his negligence was the cause of the injury to the plaintiff. In other words, the jury could find upon all the evidence that the defendant was negligent in leaving a loaded gun under his bed, a place where he, in the exercise of reasonable judgment, should have known to be, as it was proved to be, accessible to his son; and the jury was warranted in the conclusion that the defendant’s negligence was the *causa causans* of the injury to the plaintiff.”

The Court then referred at length to the English authorities on the question, and cites the English case of *Dixon v. Bell*, 5 M. & S., 198, approved in *Sullivan v. Creed*, 2 Ir. K. B. D., 317, and quotes at length not only the evidence in the case, but the entire opinion of the Judges of the King’s Bench Division. At the conclusion of plaintiff’s testimony, defendant asked for a direction on the following grounds: That the injuries arose from the wilful act of a third party of upwards of fourteen years of age, and that there was no legal liability on the defendant for the act of such a party. The Court then goes on to say:

“Lastly, I cannot think that it was beyond the province of a jury to hold that he might have foreseen that the taking of the gun by the boy would not have been an improbable result of his seeing it, in a place where there was not a parent or a person in authority to prevent him. I am, therefore, of opinion that a jury might well have found that the defendant ought, under the circumstances, to have foreseen that the boy might take possession

of the gun. But even this is not necessary, for, in my opinion, the liability of the defendant would be the same if he ought to have foreseen that *any* boy, as distinguished from this particular boy, might have seen and handled the gun; and, having regard to the place in which it was placed, I think it would have been wholly impossible to have withdrawn from the jury the question whether he ought to have so foreseen. This alone, however, would not be enough. Ought he then to have foreseen that the boy *might*—I do not say *would*, but that he *might*—use the gun negligently? This appears to me to be the ultimate and crucial question in the case. No doubt the answer must be based upon the common experience of mankind as to what, under the circumstances, would be the action of that person of whom we so often speak, but who, to my mind, has no existence, save as an *ens rationis*—‘the reasonable man.’ However, no one individual can determine what would be done by this hypothetical creature under any given state of circumstances, otherwise than by his own experience, and as the experience of one man usually differs from that of another, our law wisely says that what is ‘reasonable’ is to be determined by the jury—that is, it is to be the resultant of the, to a certain extent varying, opinions of 12 different persons.”

The cases in this State and elsewhere, all bearing upon the same question involved above, are too numerous to mention, and it will serve no useful purpose to cite each and every case in point.

The cases considered above will suffice to show that in every instance where the Trial Court usurps the function of the jury to determine questions of fact in cases where plaintiff has made out a *prima facie* case, even though it may be a weak one, that a directed verdict will be reversed on

error. In the case at bar there appears the undisputed testimony of the plaintiff, James Gavin, and his wife, Catherine Gavin, as to the defective and rotted condition of the clothes-pole in a place where the defendant might have foreseen that injuries to children would not have been an improbable result of the falling of the clothes-pole; in a place where defendant knew or must have known that the yard in which the pole in question was situated, was a place used by children as a playground. A jury might well have found that the defendant ought, under the circumstances, to have foreseen that the clothes-pole would break and fall sooner or later and result in injury to someone. The defendant ought to have foreseen that injury might be likely to occur by reason of the defective condition of the pole and his failure to properly safeguard and protect the public from injury constituted negligence upon his part, and it was error to withdraw from the jury the question whether he ought to have so foreseen. The jury would have the right to conclude that the pole fell as a result of the negligence of the defendant or as a result of a strain that might have been put upon it, for it would be entirely within the province of the jury to accept as true either the testimony of plaintiff and his wife or to accept the testimony of the son. In either case, the actual cause of the falling of the clothes-pole is unexplained, and it was for the jury to say how the accident happened.

It seems proper, at this time, to consider the duty of the landlord imposed upon him by law with respect to the condition of portions of demised premises retained by the landlord for the common use of the tenants.

In *Phillips v. Library Co.*, 55 N. J. Law, 307, the Court of Errors and Appeals says:

“An owner of lands who, by invitation, expressed or implied, induces persons to come upon his premises, is under a duty to exercise ordinary care to render the premises reasonably safe for such purposes.”

An unusually strong case in point is that of *Siggins v. McGill*, 72 N. J. L., page 263. In this case the Court of Errors and Appeals, after laying down the general rule of law to the effect 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 premises demised, then states that it is well recognized that this rule does not apply to those portions of his property that are not demised to the tenant, but are retained in the possession or 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 premises demised. “With respect to such ways,” Justice Pitney says, “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 reasonably fit and safe for the uses which he has invited others to make of them.”

A case peculiarly analogous to the case at bar is the case of *Charney v. Cohen*, 110 Atl. Rep., 698, in which Justice Minturn uses this language:

“We think upon the rational of the cases to which we have adverted, establishing the principle of liability or nonliability the ques-

tion of whether the landlord retained control of the balcony, and rail, for the general use of the tenants, and whether he used due care under the facts to keep it reasonably safe, were jury questions."

In its opinion in this case, the Supreme Court also lays down the principle that where a landlord undertook to make repairs to portions of his building used by tenants, that the landlord was liable, although he was under no duty to make the repairs, if reasonable care was not exercised.

In the case of *Varr v. Pen Carbon Manifold Co.*, 81 N. J. Law, 712, which was an action by a servant for personal injuries alleged to have been sustained by the giving way of one of the rungs of a ladder on which he was standing, it was there held that the question of the way in which the accident happened was for the jury.

It seems now pertinent to consider the question of notice, that is, whether the defendant had actual or constructive notice of the unsafe condition of the rotted clothes pole so as to impose liability upon him. Upon this question, the evidence shows that at the time of the happening of the accident, the defendant was the owner of the premises, in the rear of which was a clothes pole, used by both tenants and provided for that purpose by him; that the clothes pole was decayed near the bottom and worm eaten clear through and was cleated and was in that condition for some time prior to the time that the plaintiff rented the premises down to the time of the happening of the accident, which rotted condition could easily be observed by an inspection of the pole from the outside. Plaintiff occupied the ground floor of the apartment while the second floor was occupied by a tenant named Mrs. Kerwin. Defendant, O'Connor, who was

called as a witness for the plaintiff, testified that Mrs. Kerwin promised him that she would take care of the house and see that nothing would happen to it, and that in consideration of her taking care of the property for the defendant, her rent was reduced. He further testified that she was supposed to report to him if there was something wrong about the house.

In this aspect of the case it was fairly inferable from the testimony, and a jury would have the right to conclude that at the time plaintiff rented the premises from the defendant, the clothes pole was in a rotted and dangerous condition; that this condition could easily be observed for some distance away from the pole and that in order to strengthen the pole at the point of decay, a wooden cleat was nailed on the outside, to cover the decayed portion, for the apparent purpose of strengthening it. The jury would have the further right to conclude the defendant, being the owner of the premises, knew or was charged with the knowledge of the unsafe and dangerous condition of the clothes pole and that in order to prevent it from breaking off and falling that, either he himself or someone else, by his direction or with his knowledge and consent, had nailed the cleat to the pole. The defect was not a latent one, but, on the contrary, was patent and could easily have been observed by the defendant by the exercise of ordinary and reasonable care, on his part, or by an inspection of the pole. The fact that there was a cleat on the pole charged the defendant with the knowledge that there was something about the condition of the pole which was dangerous and which required strengthening, and the fact that the defendant, having such knowledge failed to do anything with respect to the pole to prevent it from

falling, made him responsible for any resulting damage. The defendant owed a duty with respect to this plaintiff and to the public, which was imposed upon him by law and his failure to discharge this duty resulted to plaintiff's damage. From the testimony, the jury would have the further right to conclude that the defendant had turned over the care and management of the property to his janitress or superintendent, Mrs. Kerwin, who was delegated by him and whose duty it was to look after the property and see that nothing happened to it. The testimony further shows that about a week or ten days previous to the accident, plaintiff, James Gavin, observed Mrs. Kerwin's boy climbing the clothes pole in question and called her attention to it and warned her that he thought it was unsafe for her boy to be climbing the pole. From this testimony it appears that defendant's ostensible agent had actual notice of the dangerous and defective condition of the clothes pole, and yet, despite such knowledge upon her part and despite plaintiff's warning, nothing was done concerning the condition of the pole and it was allowed and permitted by the defendant to remain in that condition until it fell. To refuse to submit the question of negligence on the part of the defendant or on the part of his agent to the jury, constituted error in law, for which a new trial should be granted.

As to the question of reasonable time and reasonable inspection, the testimony shows that plaintiff moved into the premises in August of 1919 and that the clothes pole was in a rotted condition and cleated from that time down to the time of the happening of the accident in March, 1920, a period of more than seven months. It surely cannot be seriously contended that seven months was not

more than a reasonable length of time within which the charge the defendant with notice of the condition of the pole so as to make any necessary repairs, for not only did the defendant's ostensible agent have actual notice, but the defendant himself could have easily ascertained the condition by a casual inspection and examination himself if he had exercised the ordinary and reasonable care that an owner of property should have exercised under the circumstances of this case. Even assuming for the sake of argument that the defendant himself had no knowledge of its condition, Mrs. Kerwin, his agent and janitress, knew it, and she could have readily notified the defendant if she had discharged her duty as a caretaker of the property.

In *Frank v. Conradi*, 21 Vr., 23, the Court lays down this rule:

"To ascertain the time or times for making repairs, we must invoke the usual legal implication, applicable to contracts indefinite as to time of performance, that they must be performed with reasonable diligence and promptness. This legal rule imposed upon the landlord the duty of properly inspecting the premises and of making such repairs as a due inspection would show to be necessary."

## POINT II.

**The negligence of a third person will not excuse the original wrong-doer from his negligence.**

The trial Court, in its judgment of non-suit, said, that because of the intervening agency of a third person, the defendant was not responsible to plaintiff. Assuming, for the sake of argument,

that even if the act of a third person intervened between the original negligence of the defendant and the happening of the accident, yet the act of such third person intervening would not in any way relieve or excuse the defendant from his original negligence. In the case of *Brauer v. New York Central & H. R. R. Co.*, 103 Atl. Rep., 166, in which case, as the result of a collision between a locomotive of defendant company and a horse and wagon belonging to plaintiff, the contents of the wagon, consisting of empty barrels and a keg of cider, were scattered and probably stolen by people at the scene of the accident. Mr. Justice Swayze, speaking for the court, says:

“It is now argued that the defendant’s negligence was not in any event the proximate cause of the loss of this property, since the act of the thieves intervened. The rule of law exempting the one guilty of the original negligence from damage due to an intervening cause is well settled. Like the question of proximate cause, this is ordinarily a jury question, citing the cases of *Milwaukee, etc., Railway Co. v. Kellogg*, 94 U. S., 469, 475, 24 L. Ed., 256; *Del. Lack. & West. R. R. Co. v. Salmon*, 39 N. J. Law, 299. In his opinion in the last-named case Justice Depue, speaking for this court, says that the cases in which the responsibility is laid on the original wrongdoer, though intervening agencies without his fault have interposed, are quite numerous, and he adds that they are only instances of the application of the principle of *Scott v. Shephard*, 2 W. Bl., 892.

“‘The act of a third person,’ said the Supreme Court of Massachusetts, ‘intervening and contributing a condition necessary to the injurious effect of the original negligence, will not excuse the first wrongdoer, if such act ought to have been foreseen.’ *Lane v. Atlantic Works*, 111 Mass., 136.”

If the defendant was negligent in permitting a rotted and decayed clothes-pole to remain in the yard in the rear of his premises and the negligence of a third person contributed with the original negligence of the defendant in producing the injury complained of, while such negligence of the defendant might not have been the sole or immediate cause of the happening of the accident, yet it cannot be doubted that it was the proximate cause. If the defendant had not been negligent in the first instance and had furnished for the use of the tenants a new, strong and perfectly safe clothes-pole, instead of the rotted one actually in use, there is no doubt but that the accident would never have happened even though the negligence of a third party intervened or concurred. An illustration of this can be found in the case of *Thomas v. Southern Pa. Traction Co.*, 112 Atl. Rep., 918 (Pa. Case), which is aptly in point. Here plaintiff's son, 8 years old, jumped on the rear step of one of the defendant's cars to get a free ride, and supported himself by grasping an iron gate. While the car was in motion the conductor struck the gate with his foot to frighten the boy and he jumped into the street, where he was struck by an automobile jitney and killed. The Trial Court entered a judgment of non-suit, and on appeal from this judgment the appeal was sustained and a new trial ordered. The Court, on page 919, says:

"Negligence, however, may be the proximate cause of an injury of which it not the sole or immediate cause. If the defendant's negligence concurred with some other event (other than plaintiff's fault) to produce the plaintiff's injury, so that it clearly appears that but for such negligence the injury would not have happened, and both circumstances are closely connected with the injury in the

order of events, the defendant is responsible, even though his negligent act was not the nearest cause in the order of time.

"The fact that the injury was caused by the joint negligence of the defendant and the stranger is, of course, no defense; therefore, if the jitney driver was also at fault, it would be no excuse here. As the accident immediately followed the jump from the car, before the boy could reach a place of safety, the jitney cannot be regarded as an independent intervening cause."

To the same effect is the case of *Max v. Kahn*, 102 Atl. Rep., 737, in which Chief Justice Gummere, speaking for the court, says:

"Where the effect produced by the wrongful act is one which was intended, and is one which, in the usual course of events, would probably follow from the cause, the person putting such cause in motion will be responsible, even though there be intervening agencies between such cause and its consequences. In the case of *McDonald v. Snelling*, 14 Allen (Mass.), 290, the rule upon this subject is correctly stated in the following words:

"Where the defendant has violated a duty imposed upon him by law, it seems just and reasonable that he should be held liable to every person injured whose injury as the natural and probable consequence of the misconduct. This is the well-established and ancient doctrine of the common law, and such liability extends to consequential injuries by whomsoever sustained, so long as they are of a character likely to follow, and which might reasonably have been anticipated as the natural and probable result under ordinary circumstances of the wrongful act.'"

In the case of *Davenport v. McClellan*, 88 N. J. Law, 653, the defendant built a fire in one of the public streets of East Orange for the purpose of burning leaves, and after the fire had been burning for about an hour, he left it unextinguished

and unguarded, and plaintiff, a child, playing in the street, gathered other leaves and put them on the fire, thereby causing a flame which set fire to his clothing, and he was severely burned.

The Trial Court ordered a judgment of nonsuit upon the ground that the act of the child was an intervening cause, and therefore the negligence of the defendant was not the proximate cause of the injury. On appeal, the Court said:

“We think there was sufficient proof on the question of negligence to require that it be submitted to the jury. On the question of intervening cause, we think the trial court was clearly in error. An intervening cause is the act of an independent agency which destroys the casual connection between the negligent act of the defendant and the wrongful injury, the independent act being the immediate cause, in which case damages are not recovered because the original wrongful act is not the proximate cause.” (See cases cited.)

A very late case upon the question of independent and intervening cause has just been decided by the Supreme Court of Vermont, the case of *Shanley v. Hurley*, in 117 Atlantic Reporter, 250. There, plaintiff's horses, which the defendant had contracted to pasture, escaped from the pasture through the defendant's fence, which had been rendered defective by the acts of third persons, and after straying on the public highway, went upon a railroad track, some distance away, and were killed by a train. At the trial, it was urged that the act of the railroad company in killing the horses was an efficient intervening cause, not under the control of the defendant, and so the negligence of the latter was not the proximate cause of the injury. The Court, in disposing of this contention, says:

“If, in the sequence of events between the defendant’s negligence and the final injury, the act of the railroad company was an entirely independent and unrelated intervening cause, and was of itself sufficient to stand as the cause of the injury, the latter would ordinarily be regarded as the proximate cause and the other as the remote cause. But as to whether the act of the company was such an intervening efficient cause as prevented the negligence of the defendant from being a proximate cause of the injury, fair-minded men might differ, and it was therefore a question for the jury, under proper instructions from the Court. *Milwaukee Railroad Company v. Kellogg*, 94 U. S., 469.”

It would serve no useful purpose here to cite the innumerable cases in point upon this question, as it would only tend to enlarge this brief. The famous *Squibb* case and others are well known in the law. The Trial Court, in its judgment of nonsuit, stated that there was an independent efficient cause which resulted in the falling of the pole; that “the testimony as to this casualty was that some boys were in the yard and were placing a strain on the clothes-line, when the pole fell.” An examination of the testimony of William Gavin, the only witness who gave any testimony at all upon this question, fails to disclose any justification or warrant for the making of such a statement by the Court. The Court employs the plural number, “Boys,” and states that there were boys placing a strain on the clothes-line when the pole fell. Not only is there no such testimony to be found in the entire record, but there is no testimony to be found that a strain was put upon the clothes-line when the pole fell.

The witness could not possibly have been placing a strain upon the clothes-line when the pole fell because the testimony is that William Gavin had

merely put up his hands on the line and his feet had never been off the ground when the pole fell, so that there can be no question but that the rotted and dilapidated condition of the pole caused it to break and fall. In any event, it was for the jury to determine whether or not the defective and dangerous condition of the pole was due to the negligence of the defendant in failing to properly repair and whether the pole broke and fell as the result of this negligence, or whether the pole fell as a result of some other cause.

As to the question of intervening agency, it is contended by the plaintiff that the act of the third party, if there was any such act, which caused the accident, that is, the act of the boy in taking hold of the clothes-line, was not an intervening cause, in that it destroyed the casual connection between the defendant's original negligence and the resulting injury, but rather an act which, under the evidence, and circumstances of the case, the jury might have found contributed to the resulting damage.

**For the reasons above urged, we respectfully submit that the judgment of the Supreme Court should not be disturbed, but should be affirmed in all respects.**

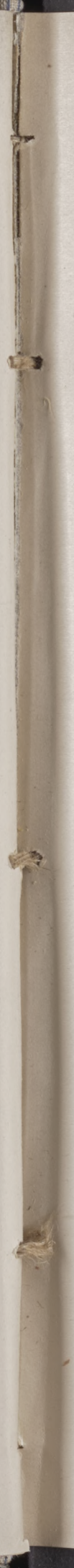
Respectfully submitted,

IRVING LIPMAN,  
Attorney of Plaintiff-Appellee.

ALFRED BRENNER,  
Of Counsel.

[9748]

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## New Jersey Court of Errors and Appeals

JAMES GAVIN, Administrator *ad prosequendum* of the estate of John Gavin,  
deceased,

Plaintiff-Appellee,

vs.

THOMAS O'CONNOR,

Defendant-Appellant.

*Action at Law.*

*On Appeal from  
Supreme Court.*

### BRIEF OF EUGENE T. SHARKEY, for Defendant-Appellant.

#### Statement.

This is an appeal from the judgment of the Supreme Court setting aside a judgment of the Hudson County Court of Common Pleas, and granting a *venire de novo*.

The facts on which the Court of Common Pleas granted a non-suit are briefly these: Plaintiff James Gavin and his family occupied as monthly tenants the ground floor of a two-family house at the City of Bayonne, owned by defendant. In the yard in the rear of the house was a clothes pole, maintained by defendant for the convenience of plaintiff and the other tenant in hanging out their clothes to dry. While the intestate, a son of plaintiff, of the age of eight years, was playing in the yard with other children, one of whom was hanging on or pulling down on plaintiff's clothesline which was attached to the pole, the pole broke, striking the intestate on the head and killing him almost instantly.

**POINT I.**

There is no proof that decedent at the time of the accident was on the premises at the invitation, express or implied, of defendant.

The testimony does not disclose in what part of the premises the accident occurred; what part of the premises was included in the demise to the Gavins or what part of the premises was reserved by the defendant for use in common by plaintiff and the other tenant. Nor does it appear that defendant knew the Gavin and other children were using the yard as a playground. These facts are very important. For if the Gavin children were using the premises in a manner not authorized by defendant they would be considered, in a construction of the testimony most favorable to plaintiff, mere licensees and defendant would be under no obligation to keep the yard in a reasonably safe condition.

*D., L. & W. R. R. Co. v. Reich*, 61 N. J. L. 635.

While, if at the time of the accident decedent was playing in the yard at the invitation of defendant, express or implied, unquestionably, defendant would have been bound to keep the yard in reasonably safe condition.

In *Burnett v. Superior Realty Co.*, 102 Atl. Rep. 831, a little girl of tender years was injured in the back yard of an apartment house where she lived with her parents on the ground floor, by a mortar box about six feet long and four feet wide falling upon her. No one saw the box fall, but the child was heard to scream and was found lying flat on the ground on her face, with the box lying over her. The Court found that it was inferable from the evidence that the mortar box had been stored in the yard on its edge so that it might easily be caused to fall in the manner in which it did fall. Parker, *J.*, in delivering the opinion of the Supreme Court which opinion was later concurred in by the Court of Errors and Appeals, stated:

“Two important questions in this case are whether there was any evidence to justify a jury

in finding that the infant plaintiff was invited by the owner of the premises, the defendant, to use the yard as a playground, and, secondly, if so, whether there was evidence to justify the jury in further finding the fall of the box was due to any negligence that could be brought home to the defendant company.

“We think it sufficiently appears as a jury question that the rooms were rented to the Burnetts with the specific privilege of the yard for the children. The evidence indicates that Mrs. Burnett, who went to arrange for the rental, dealt with the janitress, who offered her the second floor rooms, and Mrs. Burnett refused to take them and insisted on the ground floor on account of the children.”

There is no evidence in this case that the decedent was in the yard at the time of the accident under a right incident to the tenancy under which his parents occupied part of the premises or under any right extended to him by defendant by way of invitation, either express or implied.

## POINT II.

There is no prof that the defendant knew or should have known that the pole was unsafe for the purposes for which it was maintained by him on the premises or for the purposes for which he must have contemplated the pole would be used.

Assuming that the pole at the time of the accident was in a dangerous and defective condition and unfit for the purposes for which defendant intended it to be used, there is nothing in the testimony to show that he was aware of the condition or that a reasonable inspection by him would have disclosed it.

Mr. Gavin testified (p. 23, l. 37), that when he moved into defendant's premises, about seven months before the accident, he noticed a cleat about three feet long nailed to the pole perpendicularly (top p. 24). The lower end

of the cleat was about a foot and a half from the ground. After the accident he noticed that the pole was rotted (p. 24, l. 24 to top p. 25). Between the time he moved into the premises and the accident, neither the cleat or any other condition of the pole indicated to him that the pole was unsafe (p. 26, l. 35 to p. 27, l. 18). Ten days before the accident he saw the son of Mrs. Kerwin, the other tenant at the premises, attempt to climb the pole. He immediately reported the act to the boy's mother, not because he feared the pole might break under the weight of the boy, but because he thought the boy might fall off. At this time there was nothing, so far as Mr. Gavin's observations are disclosed, indicative of a defective condition of the pole (p. 27, l. 19 to p. 28, l. 1).

It might be well to state here that the only testimony concerning the rotted condition of the pole was that offered by Mr. Gavin, the plaintiff. He testified (p. 24, ll. 2 to 36), that he made an examination of the pole by kicking off only a layer of what he thought was the rotted portion. This was the extent of his examination.

The presence of the cleat on the pole means nothing by way of notice to the defendant that the pole was in a weakened condition. It does not appear in the testimony who attached the cleat to the pole; nor what the condition of the pole was at the place the cleat was attached to it. And it will be noted in this connection that the pole broke below the cleat—a fact which indicates that it did not break by reason of defects which the cleat (if it can be found that it was put there for that purpose) was intended to remedy (p. 28, l. 24).

In *Frank v. Cundari*, 50 N. J. L. 23, Dixon J., held:

“The charge of the court was, in effect, that the contract of the landlord to make repairs, to attend to all repairs, was equivalent to a guaranty that the premises should not become unsafe or insecure through lack of repair. It ignored any inquiry as to whether the landlords were or by due diligence would have been appraised that repair was needed. In this respect we think the landlord's duty was

misrepresented. In the present case, the question whether the landlords would by reasonable diligence have learned that the railing needed repair is important, for although the plaintiffs and many other tenants had frequent occasions for observing the condition of the railing, no one appears to have noticed that it was insecure."

It is submitted that there is no testimony in this case which would justify a jury in finding that defendant had actual notice of any defective condition of the pole or that by the exercise of reasonable diligence he would have ascertained that fact.

### POINT III.

There was no proof that defendant failed to maintain the pole in such condition that it could be safely used by the tenants for the purpose for which it was placed on the premises, namely, hanging clothes.

Nowhere in this case can there be found testimony by plaintiff or any of his witnesses that the pole was unfit or unsafe for hanging clothes. Mrs. Catherine Gavin, decedent's mother, testified that she had been using her own clothesline which was attached to the pole, for hanging out general washing; that she used it for that purpose Monday or Tuesday of the week of the accident; and that at no time did she notice that the pole was in a dangerous or defective condition (p. 31, l. 12 to p. 32, l. 10).

To establish a cause of action against a landlord the plaintiff must establish: first, a duty imposed by law upon the landlord; and second, a failure by the landlord to perform that duty. For, as stated by Mr. Justice Gummere, in *D., L. & W. R. R. Co. v. Reich*, 61 N. J. L. 635, at p. 637:

"If there is no duty in the case there can be no negligence; there cannot be such a thing as the negligent performance of a non-existent duty."

In the case at hand, if any duty was owing from defendant to plaintiff and his family, it was the duty to keep

the clothespole in a reasonably safe condition for the purpose of hanging out clothes. So long as the defendant kept the pole in such condition he fulfilled the obligation imposed upon him by law.

As plaintiff's case fails to show the violation by the defendant of any duty imposed upon him by law, the Trial Court properly granted a non-suit.

#### POINT IV.

**There was no proof that the pole broke as a result of being subjected to a use for which it was intended, or to a use which defendant must have contemplated.**

Decedent, his two brothers and other children were amusing themselves in the yard of defendant's premises (p. 35, ll. 1 to 19) by playing with a clothesline that was attached at one end to the pole in the rear of the yard and at the other end to a shed near the house. The play at which they were engaged consisted of pulling themselves along the clothesline, hand over hand, toward the pole. A short time prior to the accident, James Gavin, a brother of decedent, had gone along the clothesline in this manner for some distance. William Gavin, another brother of decedent, who was next in turn to attempt the feat, took hold of the line and while he was pulling down on it, the pole broke, striking him, and decedent (p. 36, l. 25 to p. 37, l. 25).

It will be observed that the clothesline on which the boys were swinging was the property of decedent's mother (p. 13, ll. 1 to 4; p. 31, ll. 1 to 15).

This case differs from the cases in which landlords have been held to answer in damages to persons injured by reason of defects in parts of premises used in common by tenants, in that in all such cases there was proof that, at the time of the accident, the plaintiffs were using the defective parts of the premises, either for the purposes for which they were intended by the landlords to be used, or for purposes for which the landlords must have con-

templated they would be used, while in this case no such proof can be found.

In *Walsh v. Frey*, 116 N. Y. App. Div. 527; 101 N. Y. Supp. 774, the plaintiff, a tenant, sought to recover from her landlord damages for injuries sustained by her when a banister against which she was leaning gave away while she was hanging out clothes on a line attached at one end to an upright of the porch and at the other end to a pole in the yard. The landlord had provided facilities in the yard for hanging and drying clothes. It was held that:

“The use plaintiff was making of the piazza when she was injured was not in any sense a common use, or as a thoroughfare or right of way, and was not a use available to the other tenant as well as to herself, but was an exclusive use to suit her own convenience, and, unless we are to enlarge or extend the liability of a landlord beyond that held in any reported case that has been called to our attention, the plaintiff cannot succeed in her action.”

In *Gillon v. Reilly*, 50 N. J. L. 26, the plaintiff, daughter of one of the tenants, of premises owned by the defendant, caught the heel of her boot in the oilcloth of the stairs and fell, sustaining the injury for which suit was brought. Dixon, J., in granting a new trial stated:

“It is plain that the direction given the jury at the trial carried the responsibility of the landlord beyond what the law will warrant. The sole conditions of his liability were declared to be a defect in the oilcloth and the plaintiff's being thrown down by reason of it. Although the testimony was conflicting as to the existence of any noticeable defect, the attention of the jury was not called to, but was diverted from the important inquiries whether the defect was of such a nature as to render the stairs not reasonably fit for the purpose of passage, and whether the landlord had failed to use reasonable care in the matter.”

In *Siggins v. McGill*, 72 N. J. L. 263, plaintiff, a tenant, sought to recover from her landlord damages for injuries sustained by her while descending a stairway. Pitney, J.,

in pronouncing the opinion of the Court of Errors and Appeals, held that:

“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 reasonably fit and safe for the uses which he has invited others to make of them.”

*Gleason v. Boehm*, 58 N. J. L. 475;

*Perry v. Levy*, 87 N. J. L. 670.

In *Phillips v. Library Co.*, 55 N. J. L. 307, at p. 310, the Court of Errors and Appeals held:

“An owner of lands who by invitation, express or implied, induces persons to come upon his premises, is under a duty to exercise ordinary care to render the premises reasonably safe for such purposes, or at least to abstain from any act that will make the entry upon or use of the premises dangerous.”

And at p. 315:

“The owner’s liability for the condition of the premises is only co-extensive with his invitation.”

According to these authorities, the plaintiff, in order to establish a *prima facie* case against the defendant, was under the burden of establishing facts and circumstances from which the jury could reasonably have found that decedent, at the time of the accident, was using the yard for a purpose for which he was invited to use it by the express or implied invitation of the landlord, and also that the pole broke as a result of being subjected to a use for which it was intended or to a use which defendant must have contemplated. In this the plaintiff has failed.

Defendant respectfully submits that the judgment of the Supreme Court should be set aside and that the judgment of the Court of Common Pleas should be affirmed in every respect.

Respectfully submitted,

EUGENE T. SHARKEY,  
*Attorney for Defendant-Appellant.*

