

Complaint.

(Filed March 6, 1927.)

New Jersey Supreme Court

UNION COUNTY.

HORACE MORRIL, by his next
friend, Morris Morril, and
MORRIS MORRIL,

Plaintiffs,

vs.

FLORENCE MORRIL,
Defendant.

COMPLAINT.

Action at Law
on Tort.

10

20

Horace Morril by his next friend, Morris Morril, and Morris Morril, Plaintiffs, residing in the City of Plainfield, County of Union and State of New Jersey say that:

FIRST COUNT.

1. On or about the 29th day of November, 1926, the defendant was the owner of a certain building known as #1932 Loring Place, New York City.

30

2. That on or about said 29th day of November, 1926, the plaintiff, Horace Morril, was a guest of said defendant at her home, #1932 Loring Place.

3. That on or about said day, said plaintiff, Horace Morril, was requested by the said defendant to play in the rear yard of said premises.

4. That it became then and there and was the duty of said defendant to see that the said prem-

40

INDEX.

	PAGE
Complaint	1
Answer	4
Reply	6
Testimony	7
Motion for Nonsuit.....	33, 51
The Court's Charge.....	51
Postea	55
Judgment for Nonsuit.....	56
Notice of Appeal—Grounds for Appeal.....	57

WITNESSES FOR PLAINTIFFS.

Horace Morril,	
Direct	8
Cross	14
Morris Morril,	
Direct	21
Cross	27

DEPOSITIONS IN BEHALF OF DEFENDANTS.

Sidney Friedman,	
Direct	37
Cross	42
David Finklestein,	
Direct	44
Cross	49
Re-direct	50

Defendant's Exhibit 1 inserted between pages 50 and 51.

Complaint.

ises were free from danger and safe for the plaintiff to play in.

10 5. That on the said 29th day of November, 1926, the said infant, Horace Morrill, while playing in the rear yard of said premises and while on said premises by the consent, permission and invitation of the defendant, was struck by the door of the garage, thrown to the ground, bruised and dazed, greatly and permanently wounding and injuring him, so that it became necessary to operate upon the said defendant and to remove the right eye of said defendant and the said defendant has lost the sight of said right eye and has been maimed for life, and it has become necessary to
20 replace the same with a glass eye and he has suffered great pain and anguish and torture of both body and mind.

6. That the rear of said basement of said premises was constructed and used as a garage and it became and it was the duty of the said defendant to see that the said garage door was securely fastened so as not to injure the plaintiff or any person or persons who had a lawful right to be on the said premises.

30 7. That because of the negligence of said defendant in not securely fastening said garage door the same flew open and struck and injured the said plaintiff, who had a lawful right to be on the said premises.

40 8. That said defendant was further negligent in that the said garage door was out of order and in a dangerous condition and out of repair, all of which facts were known to said defendant and it became and it was the duty of said defendant

Complaint.

to keep and maintain the said garage door of the premises in the rear of said house and the rear yard in a proper manner so as not to injure the defendant or the public who had a lawful right to be thereon.

That because of said injury to the said plaintiff, Horace Morrill, the said plaintiff, Morris Morrill, as next friend of said Horace Morrill, demands as damages the sum of \$25,000.00. 10

SECOND COUNT.

1. Paragraphs *one to eight* of the first count are hereby reiterated in this count as if set forth at length.

9. The plaintiff, Morris Morrill, at all times hereinafter mentioned, was then and now is the father of Horace Morrill, an infant about the age of thirteen, with whom said infant resides, and as such father he is entitled to the services and earnings of said Horace Morrill and until said infant becomes twenty-one years of age. 20

10. That by reason of said injury to the plaintiff, Horace Morrill, the plaintiff has paid out and expended, and will pay out and expend, large sums of money to wit, \$1,000.00 or more for medicine, medical attendance, bandages, eye glasses, glass eyes and surgical operations and hospital bills. 30

The plaintiff, Morris Morrill, demands judgment for the sum of One Thousand (\$1,000) Dollars.

EDWARD SACHAR,
Attorney for Plaintiffs.

Answer.

(Filed March 9, 1927.)

NEW JERSEY SUPREME COURT,
UNION COUNTY.

10

HORACE MORRIL, by his next
friend, MORRIS MORRIL, and
MORRIS MORRIL,

Plaintiffs,

vs.

FLORENCE MORRIL,
Defendant.

Law.
Action at
Answer.

20

The defendant residing in the City of Bronx,
County of Bronx and State of New York, by way
of answer to the plaintiffs' complaint, says that;

ANSWER TO FIRST COUNT.

30

1. The defendant admits the allegations con-
tained in paragraph 1.

2. The defendant admits the allegations con-
tained in paragraph 2.

3. The defendant denies the allegations con-
tained in paragraph 3.

40

4. The defendant refuses to plead to the allega-
tions contained in paragraph 4, which are allega-
tions of law and not allegations of fact.

Answer.

5. Defendant denies each and every allegation
contained in paragraphs 5, 6, 7 and 8 of the com-
plaint.

ANSWER TO SECOND COUNT.

10

1. Defendant repeats her answers to para-
graphs 1 to 8 of the First Count inclusive with the
same force and effect as if set forth herein in full.

2. Defendant admits that the plaintiff, Morris
Morril at all times mentioned in the complaint
was and now is the father of Horace Morril an
infant about the age of 13 years, with whom said
infant resides, and has no knowledge or informa-
tion sufficient to form an opinion as to the other
allegations contained in paragraph 9.

20

3. Defendant denies each and every allegation
contained in paragraph 10.

FIRST SEPARATE DEFENSE TO BOTH COUNTS.

The defendant, Florence Morril, was not guilty
of any negligence.

30

SECOND SEPARATE DEFENSE TO BOTH COUNTS.

The plaintiff, Horace Morril, was guilty of neg-
ligence which contributed to the happening of the
accident set forth in the complaint.

McDERMOTT, ENRIGHT & CARPENTER,
Attorneys of Defendant.

40

Reply.

(Filed March 12, 1927.)

SUPREME COURT,

UNION COUNTY.

10

HORACE MORRIL, by his next friend, Morris Morrill, and MORRIS MORRIL,

Plaintiffs,

vs.

FLORENCE MORRIL,
Defendant.

Action at Law.

Reply.

20

The Plaintiffs Horace Morrill, by his next friend, Morris Morrill, and Morris Morrill, residing in the City of Plainfield, County of Union, and State of New Jersey, says that:

He joins issue with the defendant on the answer and denies the first and second separate defenses to both counts.

30

EDWARD SACHAR,
Attorney for Plaintiffs.

40

Testimony.

NEW JERSEY SUPREME COURT,

UNION COUNTY CIRCUIT.

May Term, 1927.

10

HORACE MORRIL, by his next friend, Morris Morrill, and MORRIS MORRIL,

vs.

FLORENCE MORRIL.

20

Transcript of stenographer's notes of evidence in the above entitled cause, taken before Hon. PETER F. DALY, Circuit Court Judge, and a Jury, at the Union County Court House, in the City of Elizabeth, New Jersey, on the twenty-eighth day of June, A. D. 1927, at 11:30 A. M.

Appearances:

EDWARD SACHAR, Esq., Attorney for the Plaintiffs.

30

MESSRS. McDERMOTT, ENRIGHT & CARPENTER, CARL S. KUEBLER, Esq. (present), Attorneys for the Defendant.

A jury being empaneled and found satisfactory, they were sworn.

Mr. Sachar opens the case for the plaintiffs.

Mr. Kuebler opens the case for the defendant.

Mr. Sachar: I move to amend the complaint in

40

Horace Morrill, for Plaintiffs—Direct.

this case so as to fix the date of the accident as the 26th day of November, 1926.

Counsel for the defendant has consented to the change.

10 HORACE MORRILL, one of the plaintiffs, being duly sworn according to law, on his oath, saith:

Direct examination by Mr. Sachar:

Q. How old are you? A. Thirteen years.

Q. On the twenty-sixth day of November, 1926, where were you at? A. New York City, visiting my aunt.

Q. What is her name? A. Flora.

20 Q. That is the defendant Florence Morrill? A. Yes, sir.

Q. Were you a guest at her home? A. Yes, sir.

Q. When did you arrive there? A. November 24, 1926.

Q. Did you stay there? A. Yes, sir.

Q. What time did you get there on the twenty-fourth? A. Between six and seven o'clock in the evening.

30 Q. Where were you on the twenty-fifth? A. I was there and my cousin took me to a football game at the Yankee Stadium.

Q. What time did you go to this football game? A. About eleven o'clock.

Q. And when did you get home? A. About four.

Q. On the twenty-sixth where were you? A. At my aunt's house.

40 Q. On the twenty-sixth day of November did anything happen to you? A. Yes, sir.

Q. What happened? A. I had an accident.

Horace Morrill, for Plaintiffs—Direct.

Q. On that day were you staying at your aunt's house? A. Yes, sir.

Q. Did you want to go to any particular place or places on that day? A. Yes, sir.

Q. Did you tell your aunt of that fact? A. Yes, sir.

Q. Where did you tell her you wanted to go? 10

Mr. Kuebler: I object to this as immaterial, where he wanted to go.

Mr. Sachar: The question is very material. It is introduced for the purpose of laying the foundation that it was at her request that he went to play in the yard, and that he did not go where he had made up his mind to go.

The Court: Why do you object to conversations between this witness and the defendant? 20

Mr. Kuebler: I will withdraw the objection.

(Question repeated by stenographer.)

A. I wanted to go to my uncle's.

Q. Did you tell her that? A. Yes, sir.

Q. What did she tell you? A. She said I could go later in the day, when my cousin was home. 30

Q. Did she tell you to go any place? A. Well, she said that I should not play in the street, I should go in the back yard and play back there.

Q. She told you not to play in the street but to play in the back yard? A. Yes, sir.

Q. Pursuant to her request did you go in the back yard to play? A. Yes, sir.

Q. When you came there who was in the back yard? A. Three boys in the back yard.

Q. What were the names of the three boys? A. 40

Horace Morrill, for Plaintiffs—Direct.

Sidney Kottler, Danny Goldstein and Sidney Friedman.

Q. Were they playing? A. No, sir.

Q. What did you do? A. Well, they were talking and I entered into the conversation.

10 Q. Then what happened? A. Then we decided to choose up a game of catch football, and we started to play.

Q. Did you choose up? A. I went the captain.

Q. So a game started? A. Yes, sir.

Q. Where were you placed in this game? A. Well, I was placed at the left side of the alleyway like there.

Q. You say you were placed at the left side of the alleyway? A. Yes.

20 Q. And how far from 1932, the back of the house? A. About three or four foot.

Q. You were three or four feet in back of the house of 1932? A. Yes, sir.

Q. Did you play? A. Yes, sir.

Q. Will you tell the Court and jury just how this accident took place? A. Well, I signaled for a forward pass, I ran out and I was looking at the ball, I caught the pass, and then I huddled down and the door opened and smashed me in my eye.

30 Q. Do you know what way Loring Place runs? A. East and west.

Q. Looking at the back of the house from the rear yard, which garage door, or doors was it that struck you? A. It was one on the left side.

Q. One on the left? A. Yes, sir.

Q. Was it on the extreme left? A. Yes, sir.

40 Q. After you were struck by the door what took place? A. Well, I was stunned for awhile, and then the boys took me and they washed out the eye at Sidney Kottler's house, then they took me over to my aunt's house and they called a doctor.

Horace Morrill, for Plaintiffs—Direct.

Q. Whom did they call? A. Dr. Feidelberg.

Q. What happened then? A. Well, he examined the eye and cleaned it up and then told me to go to Dr. Samuels.

Q. Did you go to Dr. Samuels? A. Yes, sir.

Q. What did Dr. Samuels do? A. He examined the eye and put a blinker over it and told them to take me down to the New York Eye and Ear Hospital. 10

Q. Did they take you down to the hospital? A. Yes, sir.

Q. What time did you get to the hospital, about what time? A. I don't know. I can't recollect.

Q. Was it on the same day? A. Yes, sir.

Q. All these events happened one right after the other? A. Yes, sir.

Q. What did they do with you at the hospital when you got there? A. Well, he sent a letter with my uncle to Dr. Teagle and took me in a small room and put some cocaine in my eye and took something out. 20

Q. What? A. The retina out.

Q. They put cocaine in your eye and took the retina out? A. They put the cocaine in to deaden the pain.

Q. Did they put you to bed in the hospital? A. They didn't put me to bed; they gave me my room. 30

Q. You stayed in the hospital over night? A. Yes.

Q. What did they do the next day to you? A. Well, the next day the doctors had a consultation and decided they would take the eye out.

Mr. Kuebler: I object.

The Court: Yes. Strike out what they decided. 40

Horace Morril, for Plaintiffs—Direct.

Q. What did they do to you? A. Well, they operated on me.

Q. On what part of your body? A. My eye.

Q. Did they take the eye out? A. Yes, sir.

Q. Then what did they do to you? A. Well, during the operation they put a gold ball in.

10

Mr. Kuebler: I object to this. I do not know how he would know what they did.

A. Well, they told me afterwards.

The Court: Strike that out.

Q. Did you see the gold ball? A. No, sir.

Q. After the operation did they take you back to the room? A. Yes, sir.

20

Q. How long did you stay in the hospital? A. For a week.

Q. Then where were you taken to? A. To my aunt's house.

Q. How long were you there? A. For about two months.

Q. And during that time were you treated? A. Yes, sir.

Q. Then from there where did you go to? A. Well, from my aunt's house, after the doctor finished treating me I went home.

30

Q. While there did you go back to see Dr. Samuels? A. Yes, sir.

Q. Do you remember how many times? A. Well, about three or four times.

Q. When was it that they put the glass eye in? A. Well, it was about the beginning of school after the Christmas vacation.

Q. Was that after the eye had healed? A. Yes, sir.

40

Q. Will you point to the jury and show them

Horace Morril, for Plaintiffs—Direct.

which eye was the one that is injured? A. This one right here (indicating).

Q. Which is the glass eye? A. This one.

Q. Will you show that to the jury?

(Witness illustrates.)

Q. Before this accident did you ever wear glasses? A. No, sir.

10

Q. Did you ever have any trouble with your eyes? A. No, sir.

Q. Do you know whether or not Dr. Samuels prescribed glasses for you? A. He did.

Q. Did you get them? A. Yes, sir.

Q. Have you got them with you? A. Yes, sir.

Q. Will you take them out, please?

(Witness indicates.)

20

Q. When do you have to use them? A. When I read.

Q. You don't have to use them at any other time, do you? A. No, sir.

Q. At the time of this accident were you going to school? A. Yes, sir.

Q. What school were you going to? A. Jefferson.

Q. What grade were you in? A. Eighth.

30

Q. When were you to graduate? A. February.

Q. Did you graduate in February? A. No, sir.

Q. Why didn't you? A. Well, I missed too much work, I couldn't make it up.

Q. As the result of that when did you graduate? A. June.

Q. While going to school had you planned to take up any particular career, or thought of any? A. No, sir.

Mr. Sachar: That is all.

40

*Horace Morril, for Plaintiffs—Cross.**Cross-examination by Mr. Kuebler:*

Q. Horace, on the day in question about what time was it that you went out to play? A. Well, it was about two o'clock.

10 Q. Were the other boys out there when you got there? A. Yes, sir.

Q. You had your lunch at your aunt's? A. Yes, sir.

Q. Was it right after your lunch that you went out to play? A. Yes, sir.

Q. How long had you been playing before this happened? A. For quite a while. I don't know about how long.

20 Q. Do you know what time of the day it was this happened? A. Well, it was about four o'clock.

Q. Then you had been playing about two hours? A. Yes, sir.

Q. Had the other three fellows all been there during that period of time? A. Yes, sir.

Q. When you went out to play were the doors to the garage open or closed? A. I didn't notice.

Q. Had the other fellows been playing when you got out there or not? A. No, sir.

30 Q. Did they have a football there when you got out? A. No, sir.

Q. Whose football was it? A. Sidney Kotler's.

Q. The game was all hatched up then after you got out there? A. No, sir.

Q. You started to play about how long after you got out? A. We were talking about four or five minutes and then we decided to choose up for sides and play football.

40 Q. Then as far as you know when you came out there the garage doors were all closed? A. I didn't notice them.

Horace Morril, for Plaintiffs—Cross.

Q. You didn't notice them? A. I didn't take any particular attention to them.

Q. Had you played out in the back yard there before? A. No, sir.

Q. Had you been over to see your aunt before that? A. I don't know.

10 Q. You don't know? A. I don't remember going there.

Q. Don't you remember ever going to see your aunt before that? A. Not while she lived there.

Q. She lived there a couple of years? A. I don't know how long she lived there.

Q. Where did you last see her? A. After the accident?

20 Q. No. Where did you last see her before this occurred? A. Well, I don't remember exactly when but I think she was at my house.

Q. At your house? A. Yes, sir.

Q. In Plainfield? A. Yes, sir.

Q. Has she been to your house in Plainfield since? A. Yes, sir.

Q. When was she at your house in Plainfield last? A. About two weeks ago.

Q. Now, Horace, as this ball was being passed to you? A. Yes, sir.

30 Q. I understand at the time or just before this occurred? A. Yes, sir.

Q. What kind of a day was it? A. Windy.

Q. Was the wind very strong? A. Yes, sir.

Q. Was the wind strong enough to have any effect upon the speed or the distance the ball was thrown? A. Yes, sir.

Q. Who was throwing the ball to you? A. Sidney Friedman.

Q. Was he throwing it with the wind or against the wind? A. Against the wind.

40 Q. You were standing then on a line or close to the garage were you not? A. Yes, sir.

Horace Morrill, for Plaintiffs—Cross.

Q. About how far were you from the garage?
A. Three or four feet.

Q. Were you standing waiting to catch this ball or were you in motion? A. Well, I ran for a few feet and then I waited.

10 Q. In other words, you were too far back because the ball was short and you ran up to get the ball? A. No. I was too far this way and I went over a little further.

Q. Do you mean you were too close to the man that threw the ball? A. No. The ball was going towards the left—towards the right, and I was too much to the left.

Q. The ball was going towards the right? A. Yes, sir.

20 Q. Well, now, do you mean the ball was going towards the garage? A. Yes, sir.

Q. Then the ball was pretty close to the garage, was it? A. Yes, sir.

Q. Did the ball touch the garage? A. No, sir.

Q. How close did the ball come to the garage?
A. I don't know.

Q. Don't you know approximately about how far it came to the garage? A. No.

30 Q. Can you show us, by pointing to something here, how close it came to the garage? A. No, sir. I wasn't looking at the garage; I was looking at the ball. I looked up in the air. I didn't take notice how far it was.

Q. But it was pretty close to the garage? A. Yes, sir.

Q. Then, of course, you were pretty close to the garage? A. Yes, sir.

Q. You were about how far from the garage?
A. I don't know.

40 Q. Were you standing on the dirt or cinders, or were you standing on concrete? A. Concrete.

Horace Morrill, for Plaintiffs—Cross.

Q. You were standing on concrete? A. Yes, sir.

Q. Is it all concrete in back of the garage, or partly concrete? A. Yes, sir; all of it is.

Q. You were all playing on concrete back there? A. Yes, sir.

10 Q. Which garage door were you standing near?
A. Near the one to the extreme left of 1932 Loring Place.

Q. How many doors are there on the garage?
A. Well, there is two garages, there is two doors on each garage.

Q. Do you mean you were standing by the garage or by the door to the garage? A. The garage to the left.

20 Q. And which door was it on that left-hand garage? A. The left door.

Q. The left door? A. Yes, sir.

Q. In other words, it was the door furthest over to the left-hand side of the house as you looked at it? A. Yes, sir.

Q. And I mean by that, as you looked at the house in the back? A. Yes, sir.

Q. In other words, when you looked at the house from in back you see two garages? A. Yes, sir.

30 Q. And you see, counting from your left, altogether four doors, is that correct? A. Not if you look to your left.

Q. I mean if you look first looking from your left over toward your right, if you count the doors across the back of the house, the doors to the garage, you would count four doors, wouldn't you? A. Yes, sir.

40 Q. And this was the very first door to the left as you look at the back of the house? A. No. It was the last one.

Horace Morril, for Plaintiffs—Cross.

Q. That is the last one on the left side? A. Yes, sir.

Q. In other words, it was an outside door? A. Yes, sir.

Q. Had the wind been blowing hard all afternoon? A. Quite hard.

10 Q. Was the wind blowing hard at the time this ball was passed? A. Yes, sir.

Q. It was an unusually windy day, wasn't it? A. Yes, sir.

Q. What part of your body first came in contact with the door? A. Well, the door came in contact with my eye. I didn't come in contact.

Q. With your eye? A. Yes, sir.

Q. Didn't come in contact with any other part of the door? A. No.

20 Q. Are you sure you didn't stumble over the door? A. I am sure.

Q. Sure no part of your body struck against the door? A. Yes, sir. When the accident happened my eye struck it.

Q. Do you know what part of the door your eye came in contact with? A. Well, there was an iron thing projecting out, and that hit my eye.

Q. Mr. Sachar, your attorney, is related to you, is he not? A. Yes, sir.

30 Q. What relation is he? A. Uncle.

Mr. Kuebler: I think that is all.

Mr. Sachar: That is all at this time. I want to reserve the right to recall him later.

The Court: Recall him for what?

Mr. Sachar: There are certain depositions in the case, and I may want to use him on those depositions.

40 Mr. Kuebler: Unless it is rebuttal, or something of that sort.

Horace Morril, for Plaintiffs—Cross.

The Court: Yes. If it is rebuttal you have a right to recall him. Otherwise you have not.

Mr. Sachar: Has your Honor the deposition that was taken in this case by the defendant?

The Court: Taken by whom? 10

Mr. Sachar: Taken by the defendant.

The Court: What officer?

Mr. Sachar: I want to introduce at this time the deposition taken by the defendant of two of the witnesses called by the defendant in New York.

Mr. Kuebler: I certainly object to the introduction of it. They are my witnesses.

Mr. Sachar: Under the act, where depositions are taken de bene esse, before a Master, either party can introduce the evidence at the trial. 20

Mr. Kuebler: I know of no such act. I think he has in mind the question of examinations before trial.

Mr. Sachar: I have in mind depositions taken by leave of the Court.

The Court: Give me your authority. Where is your authority?

Mr. Sachar: Page 2234 of the compiled statutes. 30

The Court: What are the grounds of your objection?

Mr. Kuebler: I object because the testimony of these two witnesses was taken by consent of counsel and by direction of the court. You may recall, your Honor, that I gave notice to take it on a certain date, and in order to expedite matters and to bring about the trial at an earlier date, you di- 40

Horace Morril, for Plaintiffs—Cross.

10 reated Mr. Sachar to take it with me at an earlier date. They are my witnesses, they are witnesses for the defense. I am under an obligation to put in their testimony, having taken the testimony, and I intend to put in the testimony at the proper time.

The Court: You do intend to put this in?

20 Mr. Kuebler: At the proper time in my case. In fact, I believe I am under an obligation to, having taken the testimony, and I want to. But I do not feel that the plaintiff can take the testimony out of my hands and put it in and use it on his case. It was expressly stipulated in those depositions that the testimony was taken for the defendant; they are the defendant's witnesses. They were examined first by myself, as attorney for the defendant, and then cross-examined by Mr. Sachar.

30 Mr. Sachar: In reply to that, if your Honor please, the formal notice was served upon me to take the depositions of the witnesses for the twenty-ninth of June. In order that this case should be tried before the twenty-ninth your Honor suggested that I give him a short day and take the depositions. We consented to a day, the depositions were taken pursuant to Sections 45 and 51 of the act, and it provides that either party, once they are returned to the court, may read them to the jury. I have a right, on the plaintiffs' case, to prove my case by whatever evidence I may have, or by whatever evidence I may be able to produce. At this time I am able to produce testimony of the defendant to prove

40

Morris Morril, for Plaintiffs—Direct.

my case and I have a right that it should go to the jury as part of my case.

The Court: Objection sustained. You are simply allowed by agreement, instead of bringing these witnesses here, it was agreed that these witnesses, the witnesses of the defendant, so-called, would be examined in New York before a Master or other proper officer. The regulation of the time that this evidence is introduced is somewhat within the discretion of the Court. In view of Mr. Kuebler's statement that he intends, at the proper time, to put this evidence in, in about the same order that he would have put on these witnesses, if they were available and under subpoena, it is sufficient to me to say that at the present time I will not permit you to read that deposition.

10

20

Mr. Sachar: I ask an exception.

The Court: You may have it.

MORRIS MORRIL, one of the plaintiffs, being duly sworn according to law, on his oath, saith:

Direct examination by Mr. Sachar:

30

Q. Mr. Morril, are you the father of Horace Morril? A. Yes, sir.

Q. How old is Horace? A. Thirteen.

Q. On or about the twenty-sixth day of November, 1926, was he visiting in New York? A. Yes, sir.

Q. Who was he visiting? A. His aunt.

Q. What is her name? A. Florence Morril.

Q. And that is the defendant in this action? A. Yes, sir.

40

Morris Morril, for Plaintiffs—Direct.

Q. Were you in New York at that time? A. At the time of the accident?

Q. Yes. A. No, sir.

Q. When did you get to New York? A. Why, I got to New York on Sunday.

Q. Was that the Sunday after the accident? A. 10 After the accident.

Q. Where did you go to? A. I went to Florence's house.

Q. What made you go there on that Sunday? A. Why, I went up there to see what happened there.

Q. Were you notified an accident had happened? A. Yes, sir.

Q. Who notified you? A. Florence Morril.

Q. What time did you get to the house? A. 20 About one-thirty.

Q. Whom did you see when you got there? A. I seen Miss Florence Morril.

Q. Anyone else there beside her? A. I couldn't recollect the people that were there; there was quite a few people, but I wasn't at that time interested in others.

Q. Did you have any conversation with her with reference to this accident? A. I did.

Q. What did she tell you? A. Why, she told 30 me she told him to go out to play in the back yard and he was playing there for quite a while and then she heard a knock and she went out and seen what happened. She told me that he was playing ball and the garage door swung open and hit him in the eye.

Q. Did she point out to you which garage door it was that swung open? A. Yes, sir.

Q. Which one did she point out? A. The one that hit him.

40 Q. Which one was that with reference to the

Morris Morril, for Plaintiffs—Direct.

four doors in the back? A. That is the one, when you look at the garage on your left side, it is the one on your right-hand.

Q. That is the garage door on the extreme left as you look at it? A. The garage door—there is two garages here.

Q. Yes. A. Here is one and here is another. 10

Q. Yes. A. There is two doors in this garage.

Q. Yes. A. There is the door that hit him.

Q. That is the one on the extreme left of the garage? A. Yes, sir.

Q. Now, then, did you examine this garage door? A. I did.

Q. What did you observe about its condition?

A. Why, I noticed that—

Mr. Kuebler: I object to what he observed on Sunday after the accident occurred. That was two or three days after it happened. 20

Mr. Sachar: The accident happened on Friday and he examined the door on Sunday.

The Court: I will allow it. You may take an exception.

Mr. Kuebler: Prays exception.

Q. What did you find as the result of your examination? A. I find that catch in that little piece that goes in was bent. 30

Q. How much was it bent? A. About two inches.

Q. By that piece you mean the latch on the garage door? A. Yes, sir.

Q. Did you say anything to her, or she to you, with reference to this bent latch? A. Why, I have called her attention at that time to that latch, that is in very dangerous condition. 40

Morris Morrill, for Plaintiffs—Direct.

Q. Yes. A. And she told me that she knew about it and she call attention of Mr. Morrill that ought to be fixed, and he was try to fix that Thanksgiving, but he couldn't do it. Instead of improving it he made it worse, and then he thought he was going to buy a new latch.

10 Q. Did she tell you when he attempted to fix it? A. Why, afterwards.

Q. I mean, when she spoke to you on that Sunday about him attempting to fix it, instead of making it better, that he had made it worse, did she fix the date when he had fixed it? A. Why, no.

The Court: What kind of a case is this? What is your contention, that this boy, this plaintiff, was invited by his aunt to visit her in New York, and she told him to go out in the yard to play, and that while he was out in the yard playing with other boys that the wind caused the opening of a door of the garage, and that the wind could not have caused the opening of the door of the garage if there were not a faulty latch on the door?

Mr. Sachar: Yes, sir.

30 The Court: And the door, while opening as the result of the wind blowing this unlatched door struck this boy in the eye, with the effect that the eye was lost, and she is responsible because she didn't keep the latch on the door so that the wind could not blow it open, is that your position?

Mr. Sachar: That is my position.

ADJOURNED UNTIL 1.30 P. M.

Morris Morrill, for Plaintiffs—Direct.

AFTERNOON SESSION 1.30 P. M.

(Question and answer repeated by stenographer.)

Q. Where did you go to after you left Mrs. Morrill's on that Sunday? A. Why, we went downtown and then we went home. 10

Q. How long was your son Horace in the hospital? A. He was there about a week.

Q. From the hospital where did he go to? A. He went up to Florence Morrill's house.

Q. How long was he there? A. About two weeks.

Q. Where did he go from there? A. From there he went home. 20

Q. While he was at home was he under treatment of a doctor? A. Yes, sir.

Q. What doctor? A. Dr. Samuels.

Q. How long was he under treatment of Dr. Samuels? A. Well, he still continues going there now and then.

Q. When was the last time that he was to see Dr. Samuels? A. Why, about a month ago.

Q. Who performed the operation on him? A. Dr. Samuels. 30

Q. You paid him? A. Yes, sir.

Q. What did you pay him? A. I paid Dr. Samuels \$175.

Q. Did you pay for the glass eye? A. Yes, sir.

Q. What did you pay for the glass eye? A. Fifteen dollars.

Q. Did you pay for the glasses? A. Yes, sir.

Q. How much were those? A. Glasses were eight dollars.

Q. Did you pay the hospital bills? A. Yes, sir. 40

Morris Morril, for Plaintiffs—Direct.

Q. What did that amount to? A. \$53, and three dollars for the gold ball.

Q. Did you pay any other expenses? A. Well, there is expense going on all the time on account of that case, because he is still under the doctor's treatment and we always have to get some new medicines. 10

Q. What is the medicine used for? A. Medicine used at present that he takes the eye out in the morning and at night and he has to put in those drops.

Q. At my request, did you attempt to secure and buy in the open market a latch or lock similar to the one that is on the door? A. I did.

Q. Have you that in court? A. Yes, sir.

Q. I show you this and ask you whether this is of the same make as the one on the door? A. Yes, sir. 20

Q. Will you show the Court and jury the way the lock worked?

Mr. Kuebler: I object to this. This is not the actual latch.

The Court: Objection sustained.

Mr. Sachar: Prays exception. That is all. 30

By a Juror:

Q. What way was the lock bent, or this staple, whatever holds the door, what way was it bent?

The Court: I have not refused the lock as a matter of illustration, but you asked how it worked. He does not know how it worked because he did not see it work before the accident.

Mr. Sachar: He has testified that he examined the lock and the latch on the door. 40

Morris Morril, for Plaintiffs—Cross.

The Court: The jury can tell as well as he can how it worked.

Mr. Kuebler: I object to illustrating.

By the Court:

Q. Do not illustrate. Just tell the jury. You said that staple was bent, didn't you? A. Yes, sir. 10

Q. Just explain that orally, by word of mouth. A. Why, that latch was supposed to be straight and should fit in right in that catch, and instead of being straight it should fall into it, it was bent out about two inches.

By a Juror:

Q. Which way? A. Out, towards the yard. Instead of fit in close to the door as it should, or straight, it was bent outside, on the outside. 20

Q. Which part was bent? A. The end of the latch.

Cross-examination by Mr. Kuebler:

Q. Mr. Morril, the first time you saw this latch was on Sunday after this happened? A. Yes, sir.

Q. It happened on Friday, did it not? A. Yes, sir. 30

Q. Was that the first time you went over to see your boy, on the Sunday after it happened, is that correct? A. Yes, sir. I couldn't see him before.

Q. When you went to Mrs. Morril's house what time did you get there that Sunday? A. About 1.30.

Q. What time did you look at the latch? A. About a half hour later, in the course of conversation.

Q. Who was there? A. Why, there was quite 40

Morris Morrill, for Plaintiffs—Cross.

a few people there, but I couldn't remember them. Mrs. Morrill was there.

Q. And where? What part of the house were you when you talked about this latch? A. Why, we were in the sitting room, of course.

10 Q. Had you gone down to look at the latch then? A. Yes, sir.

Q. You went down before that and looked at the latch? A. Not before. I went down with Mrs. Morrill during the course of the conversation.

Q. You say the latch was bent out? A. Yes, sir.

Q. By out you mean from the building out toward the yard? A. Towards the yard.

20 Q. How much of the latch was bent, that is from the extreme end of the latch, how far was it bent? A. Over half of it was bent out.

Q. About half? A. Over half.

Q. When you went out there was Mrs. Morrill with you? A. Yes, sir.

Q. She was with you when you went out there to look at the latch? A. Yes, sir; we went out together.

30 Q. Was that when she told you that they tried to fix the latch? A. I have called her attention again during the course of the conversation; I said, Florence, this looks very dangerous, it might occur again.

Q. Then you called her attention to it then? A. Yes, sir.

Q. Did you call her attention to the latch before she spoke about it? A. Why, I didn't call her attention until I looked at it. There was nothing I could call her attention to before I saw it.

Q. Then you were the one called her attention to the latch? A. Yes, sir.

40 Q. Before that nothing had been said about the

Morris Morrill, for Plaintiffs—Cross.

latch, had there? A. Well, I wasn't interested what was going on before because I wasn't there. I wasn't interested in the garage door. It is not mine.

Q. Has Mrs. Morrill been over to see you recently? A. Why, she comes to Plainfield every now and then. She has quite a family there. 10

Q. What was the last time she came over to see you? A. Why, she was over to Plainfield, she didn't come to see me, she was invited to a confirmation party and she was out there two weeks ago.

Q. Did you see her then? A. Yes, sir, I did.

Q. When was the last time she came to your house? A. That was the last time.

Q. She came to your house two weeks ago? A. Yes, sir. 20

Q. She came out there in the Fall when you had this suit paper served on her, didn't she? A. She comes out to Plainfield occasionally.

Q. It was one of those times you had the suit papers served on her? A. I wasn't the one served on her. You shouldn't question me on that.

Q. How many parts of this latch were there that projected out from the door? A. There is only one part that was bent out.

Q. How many parts of the latch were there that projected or extended out from the door? A. The only one that stands out from the door is that latch. 30

Q. That is the only one that stands out from the door? A. That is the outside of the door.

Q. Are you sure there is nothing else on that latch that extends out from the door? A. Not outside of the door; no, sir, but I mean at the end of the door.

Q. Was there any other thing outside of the 40

Morris Morrill, for Plaintiffs—Cross.

door that extends out? A. Why, there is a handle that controls that latch.

Q. Sure. When you came out there was the door open or closed? A. Why, the door was just pushed over one to another, but it wasn't closed, because it didn't catch then neither.

10 Q. It was open? A. It wasn't exactly open. It simply was just pushed up there.

Q. Did you try to close the door? A. I have tried, but in order to close that door real good, why, you have to use quite some of your energy to close it. That is the condition of that latch even at present.

Q. That was the condition on that Sunday, was it? A. It still is.

20 Q. You did try to close the door then on Sunday? A. Yes, sir. Just for my own curiosity.

Q. And you couldn't close the door? A. Why, you can close it by trying very hard to do it in order to squeeze—you have to squeeze that latch in order to get it closed.

Q. Did it take a lot of your strength to close the door? A. I didn't try my strength then, but it takes quite a strong man to do it, to close a door like that. You can use your own judgment when it is two inches out of the way.

30 Q. Do you think your boy could close the door? A. I doubt it.

Q. You don't think a boy of his age could close the door? A. No, sir.

Mr. Kuebler: That is all.

Mr. Sachar: I want to offer the lock in evidence, or offer the latch in evidence for the purpose of showing a similar kind.

Mr. Kuebler: I object.

40 The Court: Why do you object?

Mr. Kuebler: I am afraid it will not give

Morris Morrill, for Plaintiffs—Cross.

the proper impression because it is not the same latch.

The Court: Of course the jury understands that. It is only put in for illustrative purposes, to assist the oral evidence. Of course the jury understand that does not show them the condition of that latch. It supplies an illustration that can be seen, that assists them in determining what kind of a latch it was. I do not think the case is going to hinge upon any such question as that anyhow. However, I will allow it. You may take an exception.

Mr. Kuebler: Prays exception.

A Juror: He said they took him to the hospital, they took him around; just who did he mean by "they"?

The Court: Who did you mean?

The Plaintiff: My uncle and his nephew.

By the Court:

Q. What relation are you to this woman that you sue? A. Brother-in-law.

Q. Did she marry your brother, or did you marry her sister, which? A. She married my brother.

Q. You are suing her? A. Yes, sir.

By a Juror:

Q. Did you know the condition of that lock before this accident? A. I did not.

By Mr. Sachar:

Q. So that Sunday that you went to visit the back yard, was that the first time that you ever saw it? A. Why, I was never in that back yard before.

Morris Morril, for Plaintiffs—Cross.

By the Court:

Q. Did you ever visit your sister-in-law before that? A. Yes, sir; but I had no occasion to go to the garage.

10 Q. How often did you visit her? A. We generally visited her about every three months.

Q. How big a yard is this? A. Well, that yard represents two houses.

Q. How deep is the yard, about, and how wide is it? A. I couldn't really tell you, your Honor.

Q. Well, is it as deep as this court room? A. No, sir.

Q. Well, what comparison as between the length of this court room and the length of that yard? A. I should judge about halfways.

20 Q. Only halfways? A. Yes, sir.

Q. How about the width? A. The width is from the wall about until that second.

Q. About two-thirds of the width. There are two houses on one yard.

Q. Who owns these houses? A. One of them is owned by Mrs. Morril. The other one I don't know the owner.

Q. The one she lives in she owns? A. Yes. The one on the end she owns.

30 Q. Where is the garage? A. The garage is underneath the one that she owns.

Q. In the rear of the lot or in the front of the lot? A. It is under the house.

Q. How big a door was this door? A. Why, it is a regular garage door, a regular size, I presume.

Q. They are different sizes? A. I really couldn't give you the right answer of that.

40 Q. Was it a double door? A. Double door. It is two doors. The one that had the latch on was close on top of the other. It fits in.

Morris Morril, for Plaintiffs—Cross.

Q. Was this a one-car garage? A. It is a double garage.

Q. Big enough for two cars? A. Yes. Two tenants of the building. One up and one down.

Q. You live where? A. Plainfield.

Q. What part of New York is this in? A. 1932 Loring Place. 10

Q. Where is that? A. Away up in the Bronx.

The Court: That is all I have.

By Mr. Kuebler:

Q. You say then that the back yard in back of Mrs. Morril's house occupies the width of her lot; how wide would you say that lot was? A. I couldn't answer it; I never measured it; I couldn't give you a settled answer on it. 20

Q. Thirty feet? A. I couldn't give you any answer unless I measured it.

Q. Is the back yard, in your opinion, any deeper than it is wide, or is it as deep as wide? A. I couldn't give you a civil answer on it, unless you allow me to go and measure it right now. Then I will answer you civil answer.

By a Juror:

Q. Do we understand you paid the expenses of this boy's injury yourself? A. Yes, sir. 30

Mr. Sachar: That is the plaintiffs' case.

MOTION FOR NONSUIT.

Mr. Kuebler: I move for a nonsuit—

The Court: How can you move for a nonsuit? You have gone into your defense.

Mr. Kuebler: I do not think I have.

The Court: Yes, you have. When you 40

Motion for Nonsuit.

make application to examine a witness for the defense you went into the defense.

Mr. Kuebler: I do not understand that to be the law. If I go to my defense I have to put the witness's testimony in that I have taken.

10

The Court: That being so, before I allow you to make a motion to nonsuit, I will allow now the application of the plaintiff to read that testimony. You cannot do both. You cannot exclude that until such time as you get good and ready to put it in, and make your nonsuit upon the basis that evidence is not already in. That evidence is subject to the order of either one side or the other, but as a matter of regular procedure I was willing that it should not be put in until such time as you would have put the witnesses on the stand, in case he was personally within your control and was physically present. I will allow the reading of that before you make your motion to nonsuit, because that is evidence which, according to the decision on that section of the statute, is transmitted to the Court, and it is already in, excepting for the reading of it. You may take an exception. I will let you read it.

20

30

40

Motion for Nonsuit.

Mr. Sachar: I want to offer in evidence at this time the deposition of Sidney Friedman, taken before John Winans, a Master in Chancery of New Jersey, at his office, number fifty Church street, in the Borough of Manhattan, New York City, at ten o'clock on the twenty-second day of June, 1927.

10

The Court: When you come to anything that was objected to, I do not want you to read it, but you may look at it, so that it will not be heard by the jury in case I find it was something that should not have been asked, or an answer that should not have been given.

Mr. Sachar: (Reading) "Testimony of Sidney Friedman, a witness produced on behalf of the defendant, being first duly sworn by the Master testifies as follows:

20

(Deposition read to the jury by Mr. Sachar.)

Mr. Sachar: There were two objections made. I will withdraw the objections at this time.

Mr. Kuebler: We are willing to stipulate the boys were all about the same age, thirteen, fourteen or fifteen years of age.

30

40

Depositions.

NEW JERSEY SUPREME COURT,
UNION COUNTY.

10	HORACE MORRIL, by his next friend, Morris Morrill and MORRIS MORRIL, Plaintiffs, <i>vs.</i> FLORENCE MORRIL, Defendant.	} Action at Law.
----	---	------------------------

20

Depositions taken at No. 50 Church Street, Borough of Manhattan, New York City, this 22d day of June, 1927, at 10 o'clock A. M. by consent of counsel for the respective sides and by direction of the Court before John Winans, a Master in Chancery of New Jersey.

Appearances:

30 McDERMOTT, ENRIGHT & CARPENTER, Esqs.,
Attorneys for the Defendant, by CARL S.
KUEBLER, Esq., Counsel.

EDWARD SACHAR, Esq., Attorney for Plaintiff.

Miss Agnes M. Maier was designated by the Master to act as stenographer and was duly sworn well and faithfully to take the testimony and transcribe the same to the best of her skill and
40 ability.

Deposition of Sidney Friedman—Direct.

SIDNEY FRIEDMAN, a witness produced in behalf of the defendant, being first duly sworn by the Master, testified as follows:

Direct examination by Mr. Kuebler:

Q. Mr. Friedman, where do you live? A. 1936 10
Loring Place, Bronx, New York.

Q. Did you live there in November of 1926? A.
Yes, sir.

Q. And that is in the same neighborhood in which Florence Morrill, the defendant in this suit, lives? A. Yes, sir.

Q. Did you, in November, 1926, know a boy by the name of Horace Morrill? A. Yes, I knew him.

Q. You recall being with him on an afternoon in November, when he sustained an injury to his 20
eye? A. Yes, sir.

Q. Where did that occur? A. In the backyard of Mr. Morrill's house.

Q. Did you know the street number? A. 1932
Loring Place.

Q. What was the occasion for your being in the backyard at that time? A. We were together and we did not have anything else to do so we just picked up a little game between ourselves.

Q. Game of what? A. I do not know if you can 30
call it any kind of game, most part a catch of football.

Q. What time did you go over to Mr. Morrill's backyard? A. I could not say. I do not remember.

Q. Do you know approximately, was it in the morning or afternoon? A. In the afternoon.

Q. Could you say about what time in the afternoon? A. I do not remember.

Q. Were there any others there in the backyard 40

Deposition of Sidney Friedman—Direct.

playing besides yourself and Mr. Morrill? A. Yes, sir. Two others.

Q. Who were the two other boys? A. David Finklestein and Sidney Kottler.

10 Q. Had you known Horace Morrill before this? A. Well, he was just over at Mrs. Morrill's for, I think, the week-end. Just came over for a vacation at that time.

Q. Had you played with him on any other previous occasions? A. I do not think so.

Q. Had you played in that backyard before? A. Well, we had played no special game.

Q. The day before did you play with Horace Morrill over in that backyard? A. I do not recall.

20 Q. Do you know how long Horace Morrill had been there to see his aunt? A. No, I do not know.

Q. But you had known Horace Morrill at another time at which he had been at his aunt's house? A. That was the first time he was over there.

Q. Well, now you are familiar with the backyard at 1932 Loring Place, are you not? A. Yes, sir.

30 Q. Will you please tell us what happened while you were playing there? A. Well, he was running to catch a ball and he must have been about 4 feet away from the door where the accident happened and it was pretty windy that day and just as he turned around the door swung open and he fell right on the latch. His eye hit the latch.

Q. You say it was quite windy that day? A. Yes, sir.

Q. Was the wind blowing when this door came open? A. That is the only way it could have opened. We closed it before.

40 Q. How long before did you close it? A. Before we started to play.

Deposition of Sidney Friedman—Direct.

Q. There was a latch on the door, was there not? A. Yes, sir.

Q. You closed the door and the door was tight shut then? A. Yes, sir.

10 Q. And you say that was before you started to play, and about how long had you been playing between the time you closed that door and the time this accident occurred? Just approximately how long? A. I do not think it was very long.

Q. When you came there to play do you recall whether the door was open or shut? A. It was a little open and we closed it.

Q. You closed it just once then while you were playing? A. Yes, sir. It remained closed until that time.

20 Q. What do you refer to as that time? A. When he turned around and bumped into the door.

Q. Was it a strong wind that was blowing that day? A. It must have been a very strong wind to open it up.

Q. Could you feel the wind blowing on you? A. We were in the heat of the game so I do not think so.

30 Q. I show you a picture and ask you if that represents the garage or garages as they existed on the date that this occurred? A. If I am not mistaken, this latch was bent out and we closed the door and it rubbed against the sidewalk and the two parts of the latches touched.

Q. This house, of course, faces Loring Place, does it not? A. Yes.

Q. In what direction does Loring Place go, north or south, or east and west? A. It runs north and south.

40 Q. And does the Morrill house face east or west? A. I do not know.

Deposition of Sidney Friedman—Direct.

Q. The garage is in the back of the building, is it not? A. Yes, sir.

Q. How many garages are there there? A. On the one building there are two garages.

10 I offer this in evidence as Exhibit D-1, being a photograph showing the doors of the garages at the rear of 1932 Loring Place, Bronx, New York.

Mr. Sachar: I object to the admission of the photograph in evidence on the ground that the witness has testified that the picture does not represent the condition of the garage at the time the accident occurred. The witness having testified that the door where the handkerchiefs or clothing appears is where the latch was bent at the time and in this picture the same was covered up, not showing its true condition.

20

(Exhibit D-1 put in evidence by the Master.)

Mr. Kuebler:

Q. Referring to this Exhibit D-1, will you show us which door it was that came open? A. The second door from the left-hand side of the photograph as you look at it.

30

Q. In other words, the second door on the left-hand garage as you look at it? A. Yes, sir.

Q. Who shut the garage door when you started to play there? A. I do not recall.

Q. You did not shut it, did you? A. I do not remember; I might have. There was a whole bunch together, we usually do that before we do anything.

40 Q. And when you say we usually do that, had

Deposition of Sidney Friedman—Direct.

you played there before? A. Just catch, whenever we do anything.

Q. When did you first notice that the latch on the door was bent? A. Well, after when we looked at it after he was hurt, and then a few days afterwards, and it remained bent.

Q. Then the first that you noticed that it was bent was after Horace Morrill had run into it? A. I guess so.

10

Q. Well, you had not noticed the latch particularly before that, had you? A. I do not think so.

Q. Now, in what way was the latch bent? A. Bent out.

Q. And how much was it bent out from the end of the latch when the door was closed? A. It was about two inches away from the door. Ordinarily it would be straight with the door if the latch were not bent.

20

Q. And that was based upon your observation after the accident occurred? A. Yes, sir.

Q. Now, Sidney, where were you standing or where were you playing at the time this occurred? A. I think I was in the alley between my own house, 1936 Loring Place and 1938 Loring Place. These backyards all run together. There are garages for each two houses.

30

Q. You mean, then, that you were playing in the next yard. A. The yard in back of that, yes.

Q. And how far were you from this door? A. It must have been about 40 feet, I guess.

Q. Were you looking in that direction? A. Yes, sir, I was looking in that direction.

Q. Did you see him run against the door? A. He would not have run against the door if the door had not opened. He was away from the door. I saw the door open as he turned around.

40

Deposition of Sidney Friedman—Cross.

Q. And you said the wind was blowing at the time? A. Yes, sir.

10 Q. How far did the door blow open? A. The door must have blown open about three-quarters of the way of its own length. That is, he was about 3 feet away from the door and the door blew open 3 feet and as the door blew he continued to run in towards the door but straight. There is another yard and he wanted to run straight down to the last yard but he tripped on the door and fell on the latch.

Q. Did you notice what part of his body first came in contact with the door? A. I could not, it was too quick.

20 Q. Who else was there at that time? A. Was where?

Q. At the time the accident occurred. Was any one there besides Horace Morrill, yourself and the other two boys? A. No, sir.

30 Q. What did you do with Horace Morrill right after that? A. Well, before we could come down to him, he started to his aunt's house, Mrs. Kottler, that was the last house. I do not think anybody was over in Mrs. Morrill's house at that time but he wanted to run upstairs. That is all we saw of him.

Cross-examination by Mr. Sachar:

Q. Were you with Horace Morrill on Thanksgiving? A. I do not remember.

Q. Did you go with him, during his stay at any time, to see Red Grange play football? A. No, sir.

40 Q. Do you know who went with him? A. No, sir, I do not think so, because at the time Red Grange was playing up there that happened.

Deposition of Sidney Friedman—Cross.

Q. Do you recall the date of the accident? A. I do not recall the day, no.

Q. Do you recall the day of the week? A. No, sir.

10 Q. Now, then, I show you Defendant's Exhibit D 1, and ask you whether, at the time of the accident, this handkerchief or cloth was there on the garage door? A. I really do not remember, but I do not think so.

Q. Now, then, in referring to alley-ways, what you mean is the driveway between the houses, is that correct? A. Yes, sir.

Q. And those alley-ways are used for the cars to come from Loring Place in order to get into the garage, is that correct? A. Yes, sir.

20 Q. And when you refer to "we" play there before this date, you do not include Horace Morrill in that "we" do you? A. No, sir.

Q. By "we" do you mean yourself, David Finklestein and Samuel Cholrus? A. Well, occasionally. We do not play there regularly but once in a while.

Q. By "we" you mean the boys in the neighborhood, is that it? A. Yes, sir.

30 Q. This was the first time, was it, that Horace Morrill ever played with you in that yard? A. Yes, sir.

Q. Now, after the accident, did you have occasion to see Horace Morrill? A. I do not think so. I did not see Horace Morrill after the accident.

Q. By that I mean, did you see him after he came out of the hospital? A. I visited him once.

Q. And where did you visit him at? A. At the hospital. I do not remember where it was.

40 Q. And at the time that you visited him, do you recall whether or not his eye was bandaged? A. Yes, sir.

Deposition of David Finklestein—Direct.

Q. Did you ever visit him at any other time?

A. I think about two weeks ago or a month ago. He visited his aunt's house again.

Q. Have you seen him since? A. No, sir.

10

DAVID FINKLESTEIN, a witness produced in behalf of the defendant, having first been duly sworn by the master, testified as follows:

Direct examination by Mr. Kuebler:

Q. David, where do you live? A. 1974 Loring Place, Bronx, New York.

Q. Do you live a few doors from Mr. Morrill?

20 A. I live a block away.

Q. And, one afternoon in November, 1926, last November, were you playing in the backyard of 1932 Loring Place, with Horace Morrill and 2 other boys? A. Yes, sir.

Q. Do you know about what time in the afternoon you started to play in that yard? A. I do not know exactly, but I imagine between 2 and 3, around that time. I am not certain.

30 Q. Your best recollection is that you played from 2 to 3 or began about 2 to 3? A. During that time.

Q. Do you recall an accident occurring to Horace Morrill that afternoon? A. Yes, sir.

Q. About what time did that occur? A. I haven't any idea.

40 Q. At the time the accident occurred, where were you stationed. What position were you playing in. A. I was right in front of Sidney Friedman. I was standing in the alley between the houses of 1936 and 1938 and I was right in front of him.

Deposition of David Finklestein—Direct.

Q. Between the alley of the two adjoining houses? A. It was between the house of 1936 and 1938.

Q. Did you see anything happening to Horace Morrill? A. Yes, sir.

Q. What did you see happen to him? A. Well, Sidney threw the ball to him, on a forward pass to him and he caught the ball and swung around and run toward the goal when the door swung open and it hit him. 10

Q. Where was the goal? A. The goal where he was supposed to run? It was at the end of the yard. That was at the end of the house 1930.

Q. Then, as I understand it, Horace Morrill was running in a straight line, approximately straight line, even with the back of the buildings? A. It was not exactly a straight line. 20

Q. About how was he running? A. Then? He ran toward the garage on the slant and then he was going to run straight from there.

Q. When he got the ball, how far was he from the door that he came in contact with? A. About 3 feet from the end of the garage.

Q. And when he got the ball what direction was he facing? A. When he caught the ball he was in a half turn between me and the door. 30

Q. Then when he caught the ball, what did he do? I mean did he change his direction at all or not? A. He did. His head was turned to the house when he caught the ball and when he started to run, he swung around and came in contact with the garage door. 30

Q. Was there any wind blowing at that time? A. As I remember, yes, because I know he can throw a forward pass pretty far and the wind was against him. It would not go far because he did not have the power to throw it against that wind because it was very strong. 40

Deposition of David Finklestein—Direct.

Q. Now, as he was running down this yard with the ball, or as he caught the ball and proceeded to run, what direction was he going toward the goal?

A. South. He started to run towards the south. That is where his goal was at the south. Our goal was at the north. Loring Place runs north and south.

10

Q. Loring Place runs north and south. A. Yes, sir.

Q. And 1932 faces in which direction, east or west? The house? A. The front of the house faces the west.

Q. Do you understand, David, that this picture shows the back of the building? A. Yes, sir.

Q. And as you look at that picture am I correct or not in stating that the yard in which you were playing, or a portion of it, was directly in back of that garage or in front of the picture as you now look at it? A. I do not get the question.

20

Q. Looking at that picture, Exhibit D 1, can you tell us where the yard was in which you were playing? A. Yes, it was out of this picture.

Q. Well, now assuming you were in back of 1932 Loring Place, and looking directly at the back of the building, is it not true that this is the garage and the building that you would see right in front. A. I cannot tell you because they all look alike.

30

Q. Assuming that is 1932 and you were looking at the back of the building at the present time would you be stationed as you were playing, to the left or to the right of this building.

Mr. Sachar: I object to the question on the ground that the witness has stated that he is unable to answer because they all look alike.

40

Deposition of David Finklestein—Direct.

A. To the right. That does not look like it at the time of the accident.

Mr. Sachar: I move to strike out the latter part, which took in the appearance of the garage, which is not responsive.

Mr. Kuebler: I object to it being stricken out on the ground that the exhibit was offered by the plaintiff and the defendant has answered the question. 10

Q. As you look at this Exhibit D-1, can you point to the door that Horace Morrill came in contact with?

Mr. Sachar: I object to the form of the question on the ground that the witnesses produced by defendant have testified that the door swung open and struck the plaintiff. 20

Q. Can you answer the question? A. I think it was this door but it did not look like it at the time of the accident. (Witness indicating the second of the four doors, counting from the left at the photograph D-1.) It did not look like it at the time of the accident.

Q. Were you present when the door was shut when you started to play? A. I think I was because I was there at the beginning of the game. 30

Q. Do you know who shut it? A. No.

Q. Did you shut it? A. I am positive I did not shut it.

Q. Did you at any time examine the door closely as you passed it? A. I noticed it but I did not examine it closely.

Q. When did you examine it closely? A. I never did examine it closely. But after the acci- 40

Deposition of David Finklestein—Direct.

dent I looked at the place where he struck it to see if there was blood there or anything.

Q. Was there any blood there? A. There was blood on the ground.

Q. And how far was the door open then? A. When?

10 Q. Did you see the door and the boy come together? A. I saw it.

Q. How far was the door open then? A. It swung open about three feet.

Q. Then the only examination you made was to see whether there was any blood there or not? A. What do you mean close examination? Well, that was close, but I know the door because I pass it very often.

20 Q. But after the accident the only examination you made was to find that there was blood below the door? A. No, that was not the only examination.

Q. Did you make any other examination after the accident? A. Well, I found the door was open after the accident, there was blood on the floor, the latch was bent and the door, well, I remember I made some mental note about the chain on the door.

30 Q. Well, now, as Horace was running at that time, was he running from the right end of the picture, as you look at it, toward the left end of the picture or was he running from the left toward the right end?

Mr. Sachar: I object to it on the ground that the question is introduced for the purpose of causing confusion and is meaningless when read in open court as neither the court nor jury can see the picture of the back as it is at present nor the position of the witness as he is now sitting.

40

Deposition of David Finklestein—Cross.

Q. Did you understand the question? A. Yes, sir, he was running from right to left.

Q. Did you observe any blood at all on the latch? A. No.

Q. The ball had been thrown, had it not, in the same direction that he was running? A. Yes, sir. 10

Q. Had this wind that you spoke of been blowing all afternoon? A. It was a windy day.

Q. You said, I believe, that the wind stopped the speed of the ball? A. It did.

Cross-examination by Mr. Sachar:

Q. You stated on direct examination that you made a mental note of a chain? Where was the chain located? A. It was inside of the garage door. 20

Q. What did you observe about that chain? A. I do not remember now. I said at that time that I made some mental note, but I do not remember now.

Q. Did you go to the hospital to see Horace? A. Yes, sir.

Q. And how soon after the accident was it that you went down there? A. About a week after. I am not sure.

Q. Do you remember the name of the hospital? A. The Eye and Ear Hospital. 30

Q. And at that time did he have a bandage on his eye or was it off? A. It was on. Heavy bandage on.

Q. Do you remember what day of the week this accident happened? A. I think it was on a Friday. If any day it was on a Friday.

Q. Do you recall the date? A. No.

Q. After the accident, did you notice whether or not the latch on the garage door was straight or bent? A. It was bent. 40

Deposition of David Finklestein—Re-direct.

Re-direct examination by Mr. Kuebler:

Q. Do you know who threw the ball to Horace Morrill? A. Yes sir, Sidney Friedman.

10 Q. Can you testify whether this door started to open before or after Horace Morrill caught the ball? A. While he was getting it it opened but I cannot answer it because I am not very sure about it.

Q. Was that while the wind was blowing or not? A. The wind was blowing.

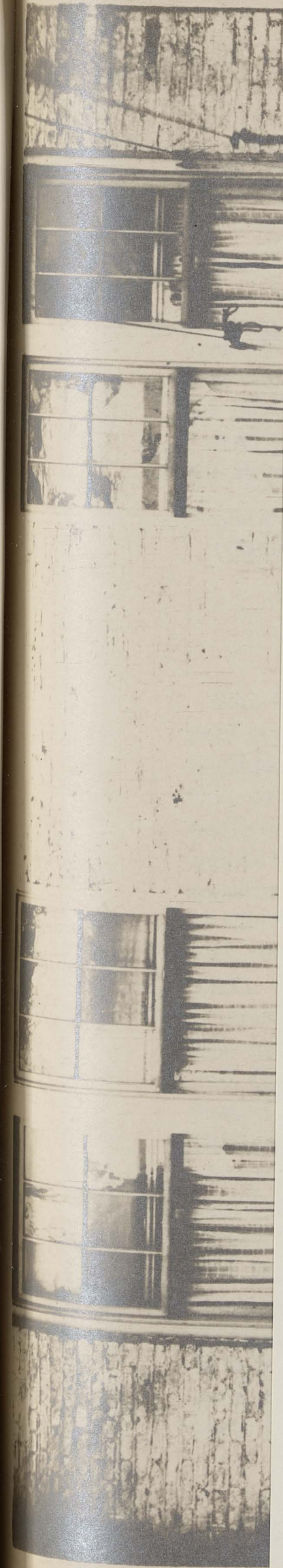
EXAMINATION CLOSED.

20 It is stipulated that signatures of the witnesses are waived, that the Master make up three copies of the testimony, the original of which shall be submitted by the Master to Honorable Peter F. Daly, and one copy delivered to each of counsel.

30 I, JOHN WINANS, the Master of the Court of Chancery of New Jersey before whom the foregoing depositions were taken, do hereby certify that the witnesses therein named, Sidney Friedland and David Finklestein, appeared before me at the time and place therein stated and were duly sworn by me to tell the truth, the whole truth and nothing but the truth; that their testimony was thereupon taken *viva voce* before me, taken down stenographically in my presence by Agnes M. Maier, who was first duly sworn as stenographer for the purpose, and were thereafter duly transcribed by her and that the same fully and correctly sets forth the testimony given at the time and place aforesaid by said two witnesses.

40 All of which I respectfully certify to the above named court this 22d day of June, 1927.

JOHN WINANS,
Master in Chancery of New Jersey.



ground
e upon
plain- 10
)

d upon
nd what
case as 20
make up
gligence
the first
he duty
ed. She
nises to
at those
ndpoint.
ere safe
omething 30
premises
ordinary
e whole
his kind,
landlord
ercise on
ared by
he dark,
our ten-
see, and 40
in this

*Deposition of David Finklestein—Re-direct.**Re-direct examination by Mr. Kuebler:*

Q. Do you know who threw the ball to Horace Morrill? A. Yes sir, Sidney Friedman.

Q. Can you testify whether this door started to open before or after Horace Morrill caught the ball? A. While he was getting it it opened but I cannot answer it because I am not very sure about it.

Q. Was that while the wind was blowing or not? A. The wind was blowing.

EXAMINATION CLOSED.

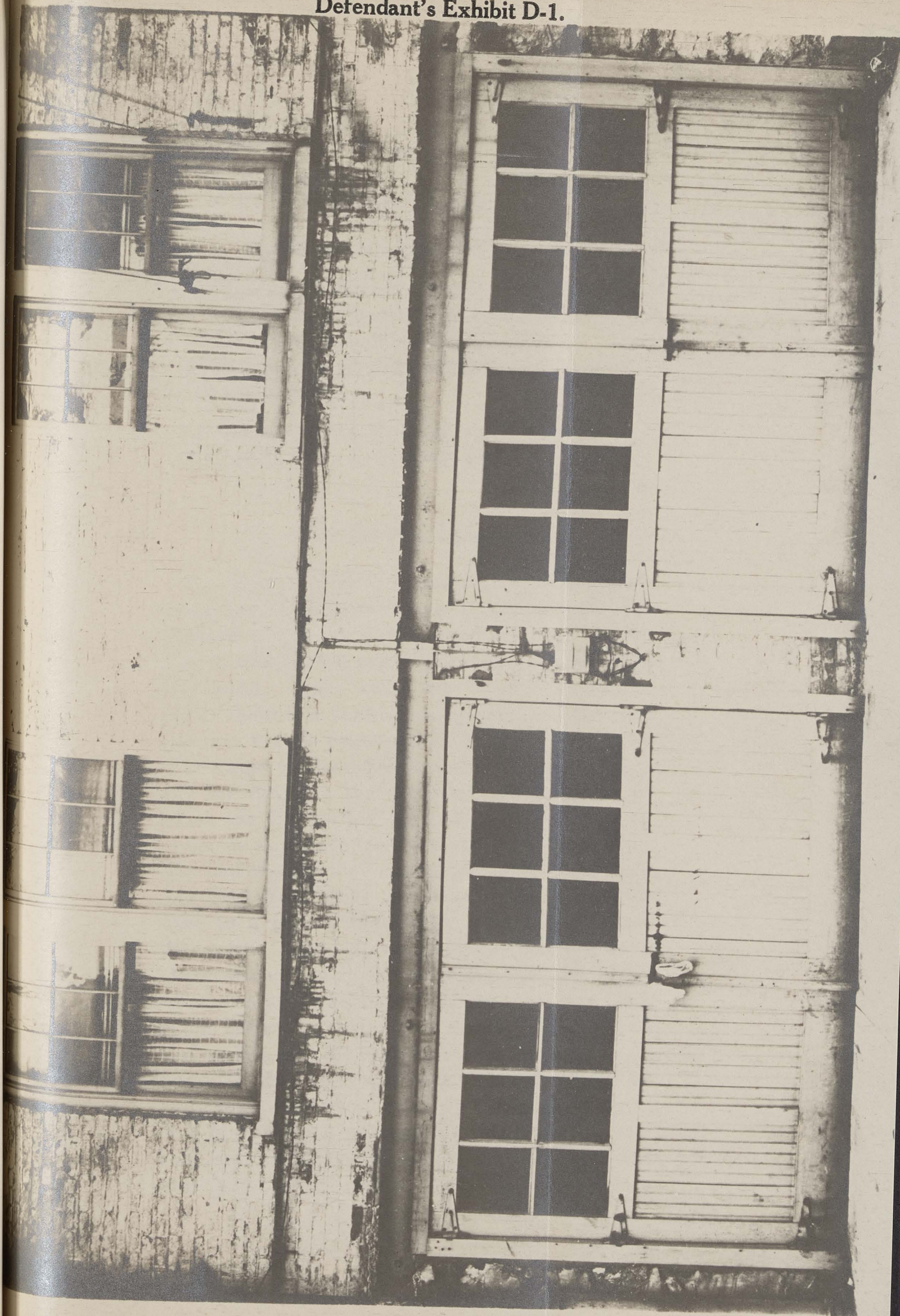
It is stipulated that signatures of the witnesses are waived, that the Master make up three copies of the testimony, the original of which shall be submitted by the Master to Honorable Peter F. Daly, and one copy delivered to each of counsel.

I, JOHN WINANS, the Master of the Court of Chancery of New Jersey before whom the foregoing depositions were taken, do hereby certify that the witnesses therein named, Sidney Friedland and David Finklestein, appeared before me at the time and place therein stated and were duly sworn by me to tell the truth, the whole truth and nothing but the truth; that their testimony was thereupon taken *viva voce* before me, taken down stenographically in my presence by Agnes M. Maier, who was first duly sworn as stenographer for the purpose, and were thereafter duly transcribed by her and that the same fully and correctly sets forth the testimony given at the time and place aforesaid by said two witnesses.

All of which I respectfully certify to the above named court this 22d day of June, 1927.

JOHN WINANS,
Master in Chancery of New Jersey.

Defendant's Exhibit D-1.



Depos

Re-direct

Q. Do
Morril?

10 Q. Can
open befo
ball? A.
cannot an
about it.

Q. Was
A. The w

20 It is sti
are waive
of the tes
submitted
Daly, and

I, JOHN
Chancery
ing deposi
the witnes
and David
time and p
30 by me to t
ing but the
upon taken
graphically
who was fi
purpose, a
her and t
forth the
aforesaid

40 All of w
named cou

The Court's Charge.

MOTION FOR NONSUIT.

Mr. Kuebler: I move for a nonsuit on the ground that there is no evidence of any negligence upon the part of the defendant Florence Morril.

And on the contributory negligence of the plaintiff Horace Morril. 10

(Argument by Mr. Kuebler on the motion.)
(Citing 67 N. J. Law, Page 324.)

The Court's Charge.

The Court: This is a suit that is based upon negligence, and it is necessary to understand what negligence is, and it is necessary, in such a case as this, to analyze the principles that go to make up negligence. There never can be any negligence unless there is a violation of a duty, and the first question that is presented is, what was the duty of this aunt to this nephew whom she invited. She had the duty, as the owner of the premises to which she invited her nephew, to see that those premises were safe from a reasonable standpoint. She had the duty of seeing that they were safe and free from these so-called traps, something that, to a person unfamiliar with the premises themselves, would not be open to their ordinary observation; and it seems to me that the whole trend of cases have underlying, cases of this kind, it has generally come up in the case of landlord and tenant, and the care that he shall exercise on premises that are to be occupied and shared by more than one tenant. For instance, in the dark, if it is a common passage for three or four tenants, and there is something they cannot see, and they trip, as we had a case this term in this 40

The Court's Charge.

county, then they are responsible. The case you cite here, where a party, who was an invitee of one of the tenants of the place, I think it was, or maybe it was the Library Association, and they went from the premises in the rear to the toilet, and there in the yard there was a hole that ordinary observation could not detect, and the man went in the hole and was injured. Of course the owner was liable for that, because that was actually a trap.

This aunt invited this boy there, and according to the boy's own story,—and it is the only evidence we have as to why he was in the yard at this particular time,—but still, on a motion for nonsuit, we have to assume that the jury would believe the most extreme, along the line of interests of the plaintiff, the boy was in the yard at the direction of the aunt. It is suggested that he wanted to do something else but she ordered him there. Of what importance is that? She was there to see that her nephew was properly entertained, and the fact is that afterwards, shortly afterwards, two or three urchins of the same age and kind engaged in this football game in there; and here in this yard was located a garage, or rather, according to one of the witnesses, the garage was under the house itself, and it had two doors closing in the center, and the latch was a defective latch, we may assume, from the evidence in the case, according to the testimony of one of the witnesses offered by the plaintiff, that door had been locked or latched, the door presumably had been opened; who left the door open? If the door had been allowed to stay open, then this question of the latch would not be in at all. Who closed the door? Certainly the aunt did not close the door. The door was closed by some of those boys who were

The Court's Charge.

engaged in common play; and when they say they closed it, then the boy who is suing through his father says that he ran by them, that there are two doors, it was a big door, and hard for them to close it, but they did close it. How do we know but the aunt wanted the door to be open because the latch was bad, or for any other reason; and she had the right to have the door open, and she had the right to have the door without any latch at all. The only time I could hear of such a situation is where it was a trap, where it was something that nobody could foresee, where it was something that somebody had a right to assume that it was perfectly safe, and with the ordinary care and caution of a boy of this age, could not foresee, a hidden danger. They were engaged in the playing of this game, and it was presumably a windy day, from the uncontradicted testimony, and the wind opened this door. Now, coming back again to the negligence, there must be a duty, and a violation of a duty, further than the mere violation of a duty, if there was any in this case; but you cannot be held responsible for anything excepting that which from the standpoint of an ordinarily prudent person you should reasonably anticipate. A man may be guilty of what is proved to be negligence, but he cannot be held responsible for the effects of that, if the effects are such that he could not, from the standpoint of the ordinary man, reasonably foresee those effects; because it would be pretty all life if you were held responsible for that which, from the standpoint of common sense, you could not have reasonably anticipated. You cannot then be held.

Now, assuming that this woman, the defendant, knew that this door had a poor latch in it,—and in practically ninety per cent. of the houses in the

The Court's Charge.

10 whole country you can say that there is a latch
somewhere in the house, on some one door or an-
other, loose or broke. To think in such a case as
that, if the wind comes along and blows the door
shut, or open, either one way or the other, and
someone is injured by it, that that is something
that the owner should have foreseen? Where is
there anything that would justify a jury in finding
that this woman, when she sent this boy out in the
yard, if she did,—and we are assuming, for the
purpose of this motion, that she did,—that she
sent him to a place of danger, that she sent him
to a place that she knew was dangerous, that she
sent him, knowing that on this windy day that
there was such a latch on this door that unless
she guarded especially that boy and warned him
20 to keep away from that door, that danger might
result to that boy? Where is there anything
in the wildest imagination that can conceive she
felt that that was likely or probably to happen to
this boy?

In such a case as this, unfortunate as it was,
an aunt, presumably in the interest of love and
blood, inviting this boy there, to say that she knew
that she was placing this son of her intimate close
blood relation in a place of danger, knowing that
30 it was dangerous, and knowing when she placed
that boy there that the probable result, or even
a possible result was that that boy would be in-
jured in the place that she had put him, it is simply
shocking to me to think the law would hold her,
unfortunate as the result might be. I think it was
one of those cases of a mere accident, in this case.
I am constrained in my knowledge of what consti-
tutes negligence, whether it is right or not, I am
constrained from the evidence in this case to
40 grant this motion for a nonsuit, and a motion is
granted. You may take an exception.

Mr. Sachar: Prays exception.

Postea.

(Filed July 8, 1927.)

NEW JERSEY SUPREME COURT,
UNION COUNTY.

HORACE MORRIL, by his next
friend, Morris Morrill, and
MORRIS MORRIL,

Plaintiffs,

vs.

FLORENCE MORRIL,
Defendant.

Action at
Law.

Postea.

10

20

This case was tried before the Honorable Peter
F. Daly, Judge of the Union County Circuit Court,
on Tuesday the 28th day of June, 1927. At the
close of the plaintiffs' case the defendant moved
for a non-suit, which motion was granted by the
court.

PETER F. DALY,
Judge.

30

A true copy

EDWARD KELLEHER,
Clerk.

40

Judgment of Nonsuit.

NEW JERSEY SUPREME COURT.

10	HORACE MORRIL, by his next friend, Morris Morrill, and MORRIS MORRIL, Plaintiffs, <i>vs.</i> FLORENCE MORRIL, Defendant.	Action at Law. On Postea. JUDGMENT OF NONSUIT.
----	--	--

20	McDERMOTT, ENRIGHT & CARPENTER, Attorneys.
----	---

Judgment entered this eighth day of July, A. D. nineteen hundred and twenty-seven in favor of defendant and against the plaintiffs for the sum of.....costs.

WM. S. GUMMERE,
C. J.

30 I, EDWARD J. KELLEHER, Clerk of the Supreme Court of the State of New Jersey, do certify that the foregoing is a true copy of the Judgment entered in above-stated cause which said Judgment is recorded in this office in Vol. 22 of Judgments, page 83.

40 [SEAL] In TESTIMONY WHEREOF I have set my hand and the seal of said Court at Trenton, this eighth day of August, A. D. nineteen hundred and twenty-seven.

EDWARD J. KELLEHER,
Clerk.

Notice of Appeal—Grounds for Appeal.

(Filed August 13, 1927.)

NEW JERSEY SUPREME COURT,
UNION COUNTY.

10	HORACE MORRIL, by his next friend, Morris Morrill, and MORRIS MORRIL, Plaintiffs, <i>vs.</i> FLORENCE MORRIL, Defendant.	Action at Law. NOTICE OF APPEAL— GROUNDS FOR APPEAL.
----	--	---

20	FLORENCE MORRIL, Defendant.
----	--------------------------------

TAKE NOTICE that the Plaintiffs' appeals to the Court of Errors and Appeals from the whole of the judgment entered in this cause on the following ground.

1. The trial judge granted the motion for nonsuit made by the defendant at the conclusion of the Plaintiff's case when he should have denied said motion.

EDWARD SACHAR,
Attorney for Plaintiffs.

(1726)

40

New Jersey Court of Errors and Appeals

HORACE MORRIL, by his next friend, Morris Morrill, and Morris Morrill,
Plaintiffs-Appellants,

vs.

FLORENCE MORRIL,
Defendant-Respondent.

Action at Law.
ON APPEAL.

BRIEF OF MC DERMOTT, ENRIGHT & CARPENTER, FOR DEFENDANT-RESPONDENT.

Statement.

This case was tried before the Honorable Peter F. Daly, Circuit Court Judge, and a jury in the Union County Circuit on June 28, 1927. At the close of the plaintiffs' case the Judge granted the defendant's motion for a nonsuit. This Court is asked to pass upon the propriety of the Judge's ruling on said motion.

Brief Statement of Facts.

This suit was instituted by Horace Morrill, an infant thirteen years of age and his father, Morris Morrill, against the boy's aunt, Florence Morrill the owner of the property known as 1932 Loring Place, New York City. The complaint alleges that Horace was a guest of his aunt at that address; that on the 26th day of November (referred

to in the complaint as the 29th), he was requested by his aunt, the defendant, to play in the rear yard of said premises; that it was the duty of the defendant to see that said premises were free from danger and safe for him to play in; that the rear basement of the building was constructed into a garage and that it was the duty of the defendant to see that the garage door was securely fastened so as not to injure the plaintiff and that because of the negligence of the defendant in not securely fastening said garage door, the same flew open and struck and injured the plaintiff. It was further alleged that the defendant was negligent in that the door was in a dangerous condition and out of repair.

Horace testified that he arrived at his aunt's on November 24th and that on Friday the 26th, the day after Thanksgiving, he wanted to go to his uncles but that his aunt said he could go later in the day.

"Q. Did she tell you to go any place? A. Well, she said that I should not play in the street, I should go in the back yard and play back there" (p. 9, l. 31).

He went in the back yard with three other boys and they decided to choose up a game of catch football. He described what happened (p. 10, l. 25):

"Q. Will you tell the Court and jury just how this accident took place? A. Well, I signalled for a forward pass, I ran out and I was looking at the ball, I caught the pass, and then I huddled down and the door opened and smashed me in the eye."

His testimony shows that it was the door on the extreme left looking at the rear of the house,

which is the extreme left door on Defendant's Exhibit D-1, State of Case, p. 51. The eye was lacerated so badly that it was necessary that it be enucleated. His testimony further shows that the other boys were out there when he went in back of the house and that they had been playing about two hours when this happened. He testified that he did not notice whether the door was open or not when he went out, but Sidney Friedman, one of the other boys testified, as we will point out later, that the door was open when they went out and he closed it. The plaintiff contends that a strong wind was blowing; that he was three or four feet from the garage catching the ball which was being thrown as a forward pass to him; that he ran for a few feet and waited; that the ball was pretty close to the garage and that he was pretty close to the garage, and that when the accident happened (p. 18, l. 23) his eye struck an iron thing projecting out from the door (identified as the latch).

The father was not present at the time this occurred. He lived in Plainfield. According to his testimony, he came to Mrs. Morrill's home in New York the following Sunday. The claim is based largely upon the testimony of Mr. Morrill and a conversation which he had with Mrs. Morrill that day and his observation of the latch. He testified as follows (p. 23, l. 31):

"I find that catch in that little piece that goes in was bent.

Q. How much was it bent? A. About two inches.

Q. Did you say anything to her, or she to you, with reference to this bent latch? A. Why, I have called her attention at that time to that latch, that is in very dangerous condition.

Q. Yes? A. And she told me that she knew about it and she call attention to Mr. Morrill that ought to be fixed, and he was try to fix that Thanksgiving, but he couldn't do it. Instead of improving it he made it worse, and then he thought he was going to buy a new latch."

This accident happened the day following Thanksgiving. He was asked if he tried to close the door, and replied (p. 30, l. 12):

"I have tried, but in order to close that door real good, why, you have to use some of your energy to close it."

On p. 32, he expressed the opinion that he did not think his son or a boy of that age could close the door. He admitted that he was suing his brother's wife.

Depositions of two other boys who were playing with Horace Morrill were taken on the part of the defendant, but introduced by the plaintiff. Sidney Friedman described the accident as follows:

"Well, he was running to catch a ball and he must have been about 4 feet away from the door where the accident happened and it was pretty windy that day and just as he turned around the door swung open and he fell right on the latch. His eye hit the latch" (p. 38, l. 28).

On line 37, he testified as follows:

"Q. Was the wind blowing when this door came open? A. That is the only way it could have opened. We closed it before.

Q. How long before did you close it? A. Before we started to play."

Page 39, line 6:

"Q. You closed the door and the door was tight shut then? A. Yes, sir.

Q. When you came there to play do you recall whether the door was open or shut? A. It was a little open and we closed it.

Q. You closed it just once then while you were playing? A. Yes, sir. It remained closed until that time."

He stated (l. 30) that the latch was bent when they closed the door, and it rubbed against the sidewalk and the two parts of the latches touched. He identified the door (p. 40, l. 28) as the second door from the left-hand side of the photograph which appears to be the door with the latch on, rather than the first from the left, as described by the plaintiffs.

Sidney Friedman gives a further description of how this occurred on p. 42, l. 6, etc., in which he says:

"There is another yard and he wanted to run straight down to the last yard *but he tripped on the door and fell on the latch.*"

David Finkelstein testified that when he caught the ball his head was turned to the house and when he started to run, he swung around and came in contact with the garage door (p. 45, l. 32). This boy did not examine the door or the latch carefully. His testimony shows that the door opened while Horace was catching the ball.

POINT I.

The Court properly granted the defendant's motion for a non-suit.

At the close of the plaintiffs' case, we moved for a non-suit on the ground that there was no evidence of any negligence upon the part of the defendant, Florence Morrill, and on the further ground that the testimony showed contributory negligence of the plaintiff, Horace Morrill.

It was admitted by all the witnesses who were present at the time this occurred that a wind was blowing and the wind had been blowing all that afternoon. According to the testimony of the boys, the door was open when they started to play. One boy closed the door and according to his testimony, he closed it tight. One boy testified that when the door was closed "it rubbed against the sidewalk" (p. 30, l. 31), apparently meaning the concrete in front of the garage. If it rubbed tight against the sidewalk or concrete, the door was certainly shut tight and it would require a considerable force to open it. It remained closed during all the period of time that the boys were playing. This same boy testified (l. 32), "that the two parts of the latch touched", which would be perfectly natural. This was admittedly a common latch as usually found on garages or barns with one iron arm on the one door which lifts and drops into a groove in an iron on the other door. Although Morris Morrill, the father, testified that it would take quite a strong man to close the door and did not think the boys could close it, it was, according to their testimony, closed tight.

The only evidence in the case upon which the plaintiffs' claim any negligence on the part of the

defendant was the fact that the arm of this latch was bent. Even if the latch was bent, as described by the father, we submit that such a condition would not imply negligence on the part of the defendant. There may be a considerable amount of danger in any latch, in any door knob and in many other items which go into the construction of a house. The wall of a house is dangerous if someone bangs his head against it, but it cannot be said that because there is some element of danger involved in a latch or a door knob or some other article, if a person comes in contact with it, that there is negligence upon the part of the owner.

How many houses are there in which something is not slightly out of order? Judge Daly in rendering his opinion in this case said that in practically 90% of the houses in the whole country, there is a latch somewhere in the house or some door loose or broken. It would be absurd to think that the owner of the property could be held liable for injury to another resulting from every little defect or imperfection which might appear in and about the construction or maintenance of a house. In this particular case, even if the latch was slightly bent, there is nothing in the evidence to show that it was because of this bent latch that the door came open. The door was shut, and was shut tight and if a door is shut and the latch is bent it is very often possible for the door to be shut tighter than it would be under normal conditions. The door, of course, may be harder to shut, but when shut it will certainly remain shut. The complaint alleges that the accident occurred on November 29th, but it was agreed that it happened the day after Thanksgiving or November 26th.

There is nothing in the evidence to show that the defendant knew the latch was bent prior to

Thanksgiving Day. The father testifies that she told him that her husband tried to fix it that day and, according to his story, made it worse. Therefore, even if the latch was bent the defendant, through her husband, apparently tried to straighten out the latch, but according to the testimony of Morris Morrill, was unable to do so. Thanksgiving Day was a holiday, of course, and he could not have purchased another latch on that day. The accident happened the following day. Certainly the defendant would be entitled to a reasonable time within which to replace the latch. It does not seem to us that any reasonable time had elapsed between the time he attempted to repair this latch, as is claimed, and the time the injury occurred.

Schnatterer v. Bamberger, 81 N. J. L., 558.

Furthermore, who could anticipate such an accident as this. In order to hold a defendant for negligence, it is necessary to prove not only that the defendant failed to use reasonable care but that the result of an injury could have been anticipated from such failure to use reasonable care. Mrs. Morrill was not running a football field and apparently never anticipated that her back yard would be used for a rough game such as catch football. Judge Daly points out in his opinion (p. 53, l. 30), that a man cannot be held responsible if the effects are such that he could not from the standpoint of an ordinary man, reasonably foresee those effects, and that it would be a pretty sad life if we were held responsible for what we could not have reasonably anticipated.

When these boys went out to play, the door was open. If this latch was bent and Mrs. Morrill knew it, possibly the door was left open intention-

ally. Mrs. Morrill did not close the door. The boys admitted that they closed it. She had a right to have the door open as Judge Daly points out and a right to have the door swinging without any latch at all and it could not be said that she was negligent because she had a door in her yard with a latch on that was open, or because she had a door on her garage without any latch on. Certainly the door was not as it was when the boys found it, for they themselves had closed it.

Mrs. Morrill sent the boy in the back yard to play, according to the testimony. She apparently wanted to keep him off the street. The plaintiffs would give us to understand that she knowingly sent him to a place of danger. We submit, however, that there is nothing in the testimony which would have warranted any conclusion such as that and that nothing but the mercenary interests of the plaintiffs could have induced them to take such an attitude to the defendant, with whom, it seems, their friendship has continued up to the time of trial.

Regardless of just how this accident occurred and just how this boy came in contact with the door or the door came in contact with the boy, it does seem to be a case of a mere accident resulting from a rough and tumble game of catch football.

Certainly the defendant did not maintain any trap or pitfall upon the premises and we believe she maintained the premises in a reasonably safe condition.

This case also raises the question as to what degree of care is required of one who invites another as a social guest. Horace was visiting his aunt during his vacation over the Thanksgiving Holiday. He was practically a member of the defendant's household at that time. Some Courts

have laid down distinct rules governing the owner's liability to social guests. These suits are becoming more prevalent each year.

In the case of *Southcote v. Stanley*, 1 Hurl. & N. 247; 25 L. J. (Exch.) 339, the Court decided that as the plaintiff was not a guest for reward at the hotel, but simply a social guest, the owner is bound to take only the same care of him as he takes of himself and other members of his establishment. Thompson's Commentaries on the law of negligence, Vol. I Par. 971, give a synopsis of this case.

"Where one visits the private house of another, as a social guest, the owner is bound to take the same care of him that he takes of himself and the other members of his establishment, and no more. Thus, a declaration averred that the defendant was possessed of a hotel, into which he had invited the plaintiff to come as a visitor, and in which there was a glass door, which it was necessary for the plaintiff to open for the purpose of leaving the hotel, and which the plaintiff, by the permission of the defendant, and with his knowledge, and without any warning from him, lawfully opened for the purpose aforesaid, as a door which was in proper condition to be opened; nevertheless, by and through the mere carelessness, negligence and default of the defendant, the door was then in an insecure and dangerous condition, and unfit to be opened, and by reason of the said door being in such an insecure and dangerous condition, and of the then carelessness, negligence, default and improper conduct of the defendant in that behalf, a large piece of glass fell from the door and wounded the plaintiff. It was held that the declaration disclosed no cause of action against the defendant. It was considered that the plaintiff being at the hotel, not as a guest for a reward paid to the proprietor, but as a guest in a *social way*, the

case stood on the same grounds as if it had been a private house."

Horace was a social guest, if not a member of the family for the time being.

Greenfield vs. Miller, 12 American Law Reports 982, holds:

"An invited guest or a visitor stands on no better footing than a mere licensee and must take the premises as he finds them, subject to the limitation that the licensor must not set a trap or be guilty of active negligence which contributes to the injury."

Even under the ruling of reasonable care, we contend that there is nothing in this evidence which would indicate the proximate cause of this accident was the negligence of the defendant.

These boys were playing together. They were having a game of football and were under the circumstances apparently engaged in a joint venture. If that is the case, if one was guilty of any negligence it would be imputed to the other.

Lange vs. N. Y. L. & W. R. R. Co., 89 N. J. L. 604.

The Court could find in this case as a matter of law, that the plaintiff, Horace, was guilty either actually or by imputation of contributory negligence, either in closing the door, or in not properly closing the door. The boy who closed the door testified that the latch was bent. He had knowledge of this condition therefore, which would be imputed to the plaintiff. Of course, if the door was tight and latched it could not have come open unless some force had come in contact with the latch. But if the door was closed and improperly latched, the boys were guilty of con-

tributory negligence. If they knew that the latch was bent and that the door would not latch properly, they were chargeable with notice of the condition of the latch and if the defendant could be chargeable with negligence, the plaintiff could be chargeable with contributory negligence.

Conclusion.

We refer particularly to the thought on this subject as contained in the opinion of Judge Daly on p. 51 of the State of Case. We submit for the reasons contained therein and the arguments submitted here that the ruling of the Court in granting the nonsuit should be affirmed. The appellants refer to *Quinn vs. The West Jersey & Seashore R. R. Co.*, 78 N. J. L. 539. That case holds, "That upon any given state of facts, it is for the Judge to say whether negligence can legitimately be inferred, and for the jury to say whether it ought to be inferred."

In the case at bar, the Judge decided that negligence could not legitimately be inferred from the testimony. There was nothing for the jury to pass upon. In this conclusion we submit that the Judge was correct.

McDERMOTT, ENRIGHT & CARPENTER,
Attorneys and Counsel for
Defendant-Respondent.

CARL S. KUEBLER,
Of Counsel.

February Term 1928.

New Jersey Court of Errors and Appeals

HORACE MORRIL, by his next friend
Morris Morril, and MORRIS
MORRIL,
Plaintiffs-Appellants,
vs.
FLORENCE MORRIL,
Defendant-Respondent.

Action at Law.
ON APPEAL.

BRIEF FOR PLAINTIFFS-APPELLANTS.

The plaintiff Horace Morril, a boy of thirteen years, was a guest at the house of his aunt, the defendant Florence Morril, in November, 1926. She told him to go in the back yard to play, and he went and played catch football with several other boys there. He had never played there before. He caught a forward pass about three or four feet from the garage, when a door of the garage was blown open by the wind and a bent, defective latch hit him in the eye, resulting in the loss of the eye. Defendant knew about the defective latch, and her husband had tried just previously to fix it, but instead, had made it worse, and he intended getting a new latch. The door was a little open when play began, and one of the boys closed it, but the defective latch did not hold it against the wind. On these facts the Court granted defendant's motion to nonsuit, and this appeal presents for review the correctness of that action.

Testimony as to Accident.

The testimony as to the accident was as follows:

By plaintiff Horace Morrill:

“Q. Will you tell the Court and jury just how this accident took place? A. Well, I signaled for a forward pass, I ran out and I was looking at the ball, I caught the pass, and then I huddled down and the door opened and smashed me in my eye” (Case, p. 10, lines 24-29).

“Q. After you were struck by the door what took place? A. Well, I was stunned for awhile, and then the boys took me and they washed out the eye at Sidney Kottler’s house, then they took me over to my aunt’s house and they called a doctor” (Case, p. 10, lines 36-41).

“Q. Had the wind been blowing hard all afternoon? A. Quite hard.

Q. Was the wind blowing hard at the time this ball was passed? A. Yes, sir.

Q. It was an unusually windy day, wasn’t it? A. Yes, sir.

Q. What part of your body first came in contact with the door? A. Well, the door came in contact with my eye. I didn’t come in contact.

Q. With your eye? A. Yes, sir.

Q. Didn’t come in contact with any other part of the door? A. No.

Q. Are you sure you didn’t stumble over the door? A. I am sure.

Q. Sure no part of your body struck against the door? A. Yes, sir. When the accident happened my eye struck it.

Q. Do you know what part of the door your eye came in contact with? A. Well, there was an iron thing projecting out, and that hit my eye” (Case, p. 18, lines 8-27).

By plaintiff Morris Morrill:

“Q. Were you notified an accident had happened? A. Yes, sir.

Q. Who notified you? A. Florence Morrill.

Q. What time did you get to the house?

A. About one-thirty.

Q. Whom did you see when you got there?

A. I seen Miss Florence Morrill.

Q. Anyone else there beside her? A. I couldn’t recollect the people that were there; there was quite a few pepole, but I wasn’t at that time interested in others.

Q. Did you have any conversation with her with reference to this accident? A. I did.

Q. What did she tell you? A. Why, she told me she told him to go out to play in the back yard and he was playing there for quite a while and then she heard a knock and she went out and seen what happened. She told me that he was playing ball and the garage door swung open and hit him in the eye” (Case, p. 22, lines 16-35).

By Sidney Friedman:

“Q. Will you please tell us what happened while you were playing there? A. Well, he was running to catch a ball and he must have been about 4 feet away from the door where the accident happened and it was pretty windy that day and just as he turned around the door swung open and he fell right on the latch. His eye hit the latch.

Q. You say it was quite windy that day? A. Yes, sir.

Q. Was the wind blowing when this door came open? A. That is the only way it could have opened. We closed it before.

Q. How long before did you close it? A. Before we started to play.

Q. There was a latch on the door, was there not? A. Yes, sir.

Q. You closed the door and the door was tight shut then? A. Yes, sir.

Q. And you say that was before you started to play, and about how long had you been playing between the time you closed that door and the time this accident occurred? Just approximately how long? A. I do not think it was very long.

Q. When you came there to play do you recall whether the door was open or shut? A. It was a little open and we closed it.

Q. You closed it just once then while you were playing? A. Yes, sir. It remained closed until that time.

Q. What do you refer to as that time? A. When he turned around and bumped into the door.

Q. Was it a strong wind that was blowing that day? A. It must have been a very strong wind to open it up.

Q. Could you feel the wind blowing on you? A. We were in the heat of the game so I do not think so" (Case, p. 38, lines 28-40; p. 39, lines 1-27).

"Q. Did you see him run against the door? A. He would not have run against the door if the door had not opened. He was away from the door. I saw the door open as he turned around.

Q. And you said the wind was blowing at the time? A. Yes, sir.

Q. How far did the door blow open? A. The door must have blown open about three-quarters of the way of its own length. That is, he was about 3 feet away from the door and the door blew open 3 feet and as the door blew he continued to run in towards the door but straight. There is another yard and he wanted to run straight down to the last yard but he tripped on the door and fell on the latch" (Case, p. 41, lines 37-40; p. 42, lines 1-15).

By David Finkelstein:

"Q. Did you see anything happening to Horace Morrill? A. Yes, sir.

Q. What did you see happen to him? A. Well, Sidney threw the ball to him, on a

forward pass to him and he caught the ball and swung around and run toward the goal when the door swung open and it hit him" (Case, p. 45, lines 8-14).

"Q. When he got the ball, how far was he from the door that he came in contact with? A. About 3 feet from the end of the garage.

Q. And when he got the ball what direction was he facing? A. When he caught the ball he was in a half turn between me and the door.

Q. Then when he caught the ball, what did he do? I mean did he change his direction at all or not? A. He did. His head was turned to the house when he caught the ball and when he started to run, he swung around and came in contact with the garage door.

Q. Was there any wind blowing at that time? A. As I remember, yes, because I know he can throw a forward pass pretty far and the wind was against him. It would not go far because he did not have the power to throw it against that wind because it was very strong" (Case, p. 45, lines 24-40).

"Q. Did you see the door and the boy come together? A. I saw it.

Q. How far was the door open then? A. It swung open about three feet" (Case, p. 48, lines 10-13).

"Q. Can you testify whether this door started to open before or after Horace Morrill caught the ball? A. While he was getting it it opened but I cannot answer it because I am not very sure about it.

Q. Was that while the wind was blowing or not? A. The wind was blowing" (Case, p. 50, lines 8-14).

Testimony as to Defective Latch.

The testimony as to the defective latch was as follows. By plaintiff Morris Morrill:

"Q. What did you find as the result of your examination? A. I find that catch in that little piece that goes in was bent.

Q. How much was it bent? A. About two inches.

Q. By that piece you mean the latch on the garage door? A. Yes, sir.

Q. Did you say anything to her, or she to you, with reference to this bent latch? A. Why, I have called her attention at that time to that latch, that is in very dangerous condition.

Q. Yes. A. And she told me that she knew about it and she call attention of Mr. Morrill that ought to be fixed, and he was try to fix that Thanksgiving, but he couldn't do it. Instead of improving it he made it worse, and then he thought he was going to buy a new latch" (Case, p. 23, lines 30-40; p. 24, lines 1-10).

Q. You went down before that and looked at the latch? A. Not before. I went down with Mrs. Morrill during the course of the conversation.

Q. You say the latch was bent out? A. Yes, sir.

Q. By out you mean from the building out toward the yard? A. Towards the yard.

Q. How much of the latch was bent, that is from the extreme end of the latch, how far was it bent? A. Over half of it was bent out.

Q. About half? A. Over half.

Q. When you went out there was Mrs. Morrill with you? A. Yes, sir.

Q. She was with you when you went out there to look at the latch? A. Yes, sir; we went out together.

Q. Was that when she told you that they tried to fix the latch? A. I have called her attention again during the course of the conversation; I said, Florence, this looks very dangerous, it might occur again" (Case, p. 28, lines 11-31).

By Sidney Friedman:

"Q. Now, in what way was the latch bent?
A. Bent out.

Q. And how much was it bent out from the end of the latch when the door was closed?
A. It was about two inches away from the door. Ordinarily it would be straight with the door if the latch were not bent.

Q. And that was based upon your observation after the accident occurred? A. Yes, sir" (Case, p. 41, lines 16-24).

By David Finklestein:

"Q. Did you at any time examine the door closely as you passed it? A. I noticed it but I did not examine it closely.

Q. When did you examine it closely? A. I never did examine it closely. But after the accident I looked at the place where he struck it to see if there was blood there or anything.

Q. Was there any blood there? A. There was blood on the ground" (Case, p. 47, lines 36-40; p. 48, lines 1-7).

"Q. Did you make any other examination after the accident? A. Well, I found the door was open after the accident, there was blood on the floor, the latch was bent and the door, well, I remember I made some mental note about the chain on the door" (Case, p. 48, lines 23-28).

Rule of Proximate Cause.

The proximate cause, or at least one of the proximate causes, of the loss of the plaintiff boy's eye was the defective latch. The fact that the wind blew the door open does not alter this.

In *Sutphen vs. Hedden*, 67 N. J. L. 324, 329 (Errors and Appeals, 1901, Hendrickson, J.) the violence of a wind blew down a fence guarding an excavation, the plaintiff sustained injury, and the trial court was asked to charge "that unless the evidence satisfies the jury that the plaintiff was actually struck by the falling fence while he was on the public highway, the falling of the fence

cannot be regarded as the proximate cause of the plaintiff's injury, and the verdict must be for the defendant." This the trial court refused to do, error was assigned on this refusal, and this court in sustaining the ruling of the trial court said:

"Assuming as we must under this request that the falling of the fence was at least one of the efficient causes of the accident, it is none the less proximate in character because the wind was a concurring cause in producing that result. It is true that without this concurring force the accident could not have happened, but it is equally true that if the fence had not given way under the violence of the wind the accident could not have occurred. Such a concurrence of causes does not necessarily render either a remote cause. They both may be proximate. 16 Am. & Eng. Encyl. L., 440; 15 Id. (2d ed.) 460; Thomp. Negl. 1085."

And in this same case, the Court said (p. 328):

"They were bound to exercise ordinary care and skill in the erection and maintaining of the fence, so that it should not itself become a menace to the public, and the plaintiff had the right to assume that it had been made reasonably safe."

Paraphrasing this language, may it not properly be said of this defendant under the circumstances in this case, "She was bound to exercise ordinary care and skill in the erection and maintaining of the garage door, so that it should not itself become a menace to those rightfully in the yard and the plaintiff had the right to assume that it had been made reasonably safe." And can it be said, as a matter of law, that when an owner has knowledge of a latch bent two inches outward from the door to which attached, instead of being straight with the door, and thus does

not hold the door shut, that it is not, or may not become, a menace to those rightfully in its immediate neighborhood; and that an owner with knowledge of such condition who attempts to fix it but makes it worse is not responsible for injuries resulting therefrom?

What difference in theory is there between maintaining a door with a bent latch sticking two inches outward from the door and an excavation not readily to be seen or with maintaining any other defective condition about a property which may lead to injury?

Question for Jury.

At all events, is not the question one for the jury and not one for the Court?

In *Newark Passenger Ry. Co. vs. Block*, 55 N. J. L. 605, 607 (Errors and Appeals, 1893, Magie, J.), this Court said:

"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. Cas. 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 a jury; but if from facts established negligence may reasonably and legitimately be inferred, it is for the jury to say whether from those 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."

This statement of the law has been affirmed repeatedly since.

In *Quinn vs. West Jersey & Seashore R. R. Co.*, 78 N. J. L. 539, 540, 541 (Errors and Appeals, 1909, Minturn, J.), this Court said:

“Negligence and contributory negligence are relative terms, to be determined upon the facts of each case, so that the rules governing this department of the law, by long-continued judicial reiteration, have become axiomatic, one of which, in the language of the leading English case, is that ‘upon any given state of facts it is for the judge to say, whether negligence can legitimately be inferred, and for the jury to say whether it ought to be inferred.’”

In *Hummer vs. Lehigh Valley R. R. Co.*, 74 N. J. L. 196, 198 (Supreme Court, 1906, Trenchard, J.), the rule was thus stated:

“* * * where fair-minded men might honestly differ as to the conclusions to be drawn from facts whether controverted or uncontroverted the question at issue should go to the jury.”

The same rule was reiterated in

Bennett vs. Busch, 67 A. 188; 75 N. J. L. 240.

McCarthy vs. Metropolitan Life Ins. Co., 69 A. 170; 75 N. J. L. 887.

More Jonas Glass Co. vs. West Jersey & S. R. Co., 72 A. 65, 76 N. J. L. 708.

It is most respectfully submitted that the learned Trial Judge erred in granting the motion for a non-suit.

EDWARD SACHAR,
Attorney and Counsel for
Plaintiffs-Appellants.

W. S. ANGLEMAN,
Of Counsel.

February Term, 1928.

