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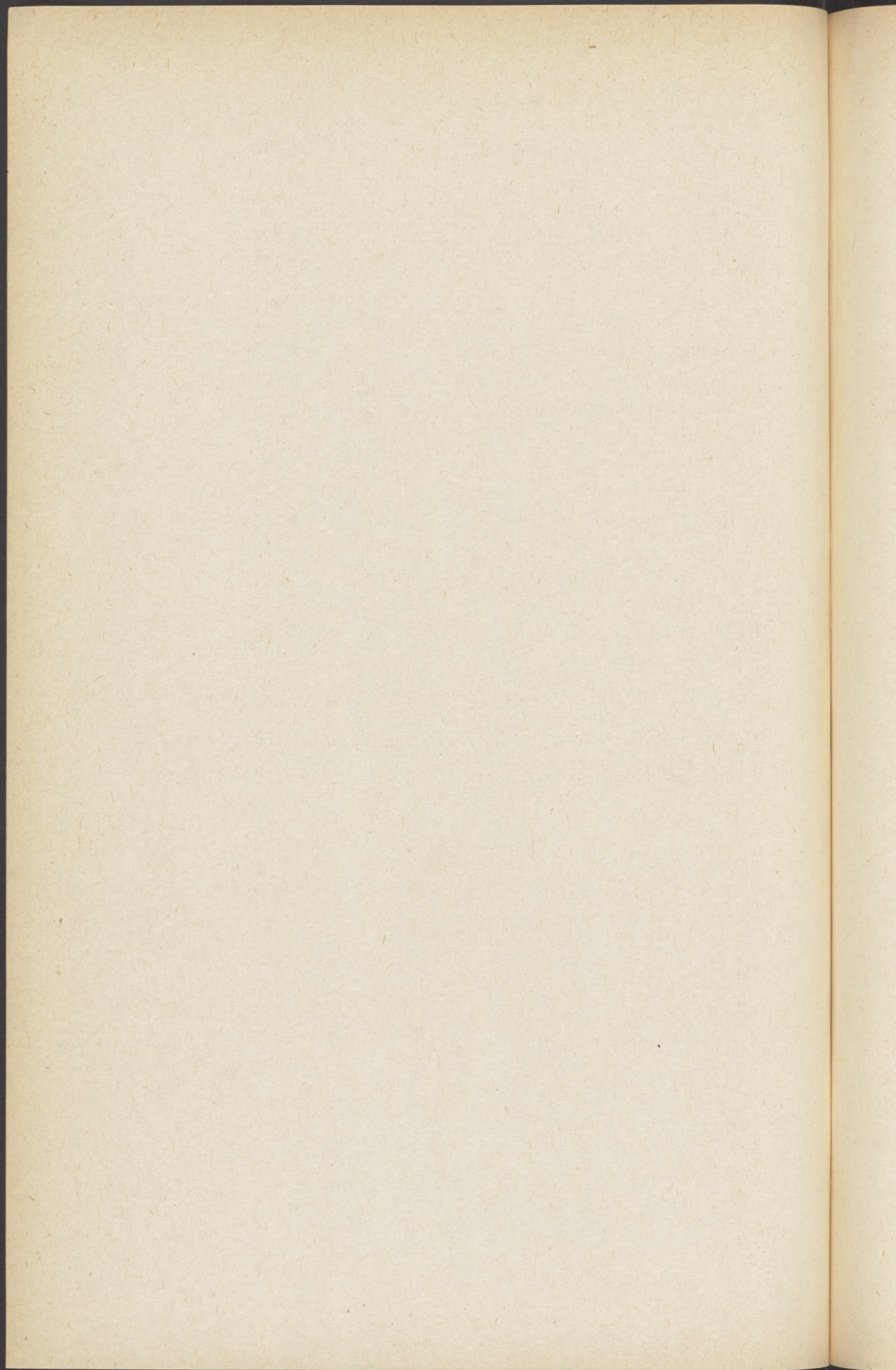
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NOTICE OF APPEAL.

(Filed Sep. 7, 1935.)

NEW JERSEY SUPREME COURT.

SEYMOUR FEINGOLD by
JACOB L. FEINGOLD, his
father and next friend,
and JACOB L. FEINGOLD,
individually,

Plaintiffs-Appellees,

v.

S. S. KRESGE COMPANY, a
corporation,

Defendant-Appellant.

10

Action at Law.
Notice of Appeal.

20

*To Seymour Feingold, by Jacob L. Feingold, his
father and next friend, and Jacob L. Feingold,
individually; James B. Avis and Frank Sahl,
Esquires, Attorneys of Plaintiffs:*

Sirs:

Take notice, that the defendant, S. S. Kresge
Company, a corporation, appeals to the Court of
Errors and Appeals of New Jersey, from the whole 30
of the judgment entered in the above named cause.

Respectfully,

GEORGE B. MARSHALL,

Attorney of Defendant.

Dated: September 6th, 1935.

Grounds of Appeal

[ENDORSED]

Service of within notice of appeal acknowledged this 6th day of September, 1935.

10 James B. Avis,
Frank Sahl,
Attorneys of Plaintiffs.

GROUPS OF APPEAL.

(Filed Oct. 1, 1935.)

NEW JERSEY COURT OF ERRORS AND APPEALS.

20	SEYMOUR FEINGOLD, by JACOB L. FEINGOLD, his father and next friend, and JACOB L. FEINGOLD, individually, <i>Plaintiffs-Respondents,</i>	}	On Appeal. Grounds of Appeal.
	v. S. S. KRESGE COMPANY, a corporation, <i>Defendant-Appellant.</i>		

30 *To Frank A. Sahl and James B. Avis, Esquires, Attorneys of Plaintiffs-Respondent:*

The appellant states the following grounds of appeal:

1. The trial Court refused to grant a non-suit in favor of the defendant, when thereunto moved,

whereas said motion should have been granted for one or more of the following reasons:

(a) There was no proof of negligence on the part of the defendant;

(b) Specific acts of negligence were alleged by the plaintiffs, but no proof offered in support thereof;

(c) Specific acts of negligence were alleged by the plaintiffs by which they forfeited all right to rely on the doctrine of *res ipsa loquitur*;

(d) Specific negligence having been pleaded by the plaintiffs, the doctrine of *res ipsa loquitur* does not apply;

(e) That plaintiffs failed to show any violation of any duty which defendant company owed to the plaintiff, and at the close of the plaintiff's case, there was proof only of the happening of the accident complained of, and no evidence to show how it was occasioned.

2. The trial Court charged the jury as follows:

“Now, if the mother was a plaintiff in this case, then possibly her negligence, if there was any negligence on her part, would bar a recovery as far as she is concerned, but any negligence that she may have been guilty of, if any, will not bar the father nor will it bar the child.”

GEORGE B. MARSHALL,
Attorney of Defendant-Appellant.

Complaint

[ENDORSED]

Service of within grounds of appeal
duly acknowledged this 30th day of Sep-
tember, 1935.

10 James B. Avis,
Frank A. Sahl,
Attorneys of Plaintiffs-
Respondent.

TRANSCRIPT OF PLEADING FOR TRIAL.

COMPLAINT.

(Filed Apr. 6, 1935.)

20 SUPREME COURT OF NEW JERSEY.
GLOUCESTER COUNTY.

<p>SEYMOUR FEINGOLD by JACOB L. FEINGOLD, his father and next friend, and JACOB L. FEINGOLD, individually, <i>Plaintiffs,</i></p>	}	<p>James B. Avis and Frank Sahl, Attor- neys for Plaintiffs. George B. Marshall, Attorney of Defen- dant.</p>
<p>v.</p>		
<p>30 S. S. KRESGE COMPANY, a corporation, <i>Defendant.</i></p>	}	

Summons issued March 22, 1935.

The plaintiff, Seymour Feingold, an infant of the
age of three years, by Jacob L. Feingold, his father

and next friend, and Jacob L. Feingold, individually, of the City of Woodbury, County of Gloucester and State of New Jersey, says that:

1. On or about November 3, 1934, the defendant, S. S. Kresge Company, a corporation, operated and maintained in the City of Woodbury, Gloucester County, New Jersey, at 66 South Broad Street, a 10 public store in which it transacted a business of selling to the public at large, various merchandise and other articles of trade, said business being generally recognized and termed a five, ten and twenty-five cent store.

2. On said date, the plaintiff, Seymore Feingold, an infant of the age of three years, accompanied by his mother, Lillian Feingold, entered said store as invitees and customers and for the purpose of mak- 20 ing a purchase or purchases in said store.

3. It was the duty of the defendant, S. S. Kresge Company, a corporation, to operate and maintain said store and premises in a safe manner and condition and to exercise due care in the operation and maintaining of said store and its fixtures, stock and equipment for the safety of its invitees and customers and for the safety of the plaintiff, Sey- 30 more Feingold.

Notwithstanding said duty, the defendant on said date, November 3, 1934, carelessly and negligently and in violation of said duty, by its agents and servants, carelessly and negligently, maintained and permitted to stand a certain box, shelf or rack,

Complaint

which was not fastened either to the floor or to the wall, and which was located in said store at a place open to the public and its invitees, including plaintiff, Seymore Feingold, and which said box, rack or shelf was placed in such a position that same was unsafe to the invitees and customers of the defendant, which said fact defendant knew, or should
10 have known. Defendant further, negligently and carelessly, placed on said box, shelf or rack, numerous picture frames and/or other articles or merchandise in such a manner as to render said box, shelf or rack unstable and liable to fall.

4. By reason of the negligence of the defendant as aforesaid, said box, rack or shelf did, on the third day of November, 1934, tilt, topple and fall on the person or body of the plaintiff, Seymour Feingold,
20 whereby said plaintiff was severely injured in and about his head, knee, shoulders, arms, legs and other parts of his body and as a further result thereof, said plaintiff has suffered a serious injury to his back, shoulder and shoulder blade, the nature of which plaintiff is unable to technically describe, which said injuries will be permanent, and in addition thereto plaintiff, Seymore Feingold, underwent great pain and suffering and in the future will
30 undergo great pain and suffering and was permanently injured, scarred and disfigured.

5. As a further result of plaintiff's said injuries, caused solely by defendant's negligence as aforesaid, the plaintiff, Jacob L. Feingold, was forced to expend large sums of money in doctors, medi-

cines and hospitals in endeavoring to cure his said infant son of his said injuries and in the future will be compelled to expend large sums of money in so endeavoring to cure his infant son of his said injuries.

The plaintiff, Seymore Feingold, by his father and next friend, Jacob L. Feingold, demands as damages the sum of twenty-five thousand dollars, and the plaintiff, Jacob L. Feingold, individually, demands as damages the sum of five thousand dollars. 10

JAMES B. AVIS, and
FRANK SAHL,
Attorneys of Plaintiffs.

ANSWER.

20

(Filed Apr. 24, 1935.)

The defendant, S. S. Kresge Company, a corporation, answering the complaint herein, says that:

1. Defendant admits paragraph one of the complaint.

2. Defendant admits paragraph two of the complaint. 30

3. Defendant admits the first paragraph or portion of the third paragraph of the complaint and

denies the remaining portion thereof. That portion admitted relates to the duty of the defendant to operate and maintain said store and premises and to exercise due care in the operation and maintenance of said store and fixtures, but denies each and every allegation set forth in said paragraph of negligence on their part at the time and place
10 mentioned in said paragraph.

4. Defendant denies each and every allegation of paragraph four of the complaint.

5. Defendant denies paragraph five of the complaint.

Defendant denies any claim to damages on the part of Seymour Feingold, by his father and next
20 friend, Jacob L. Feingold, or any claim of Jacob L. Feingold, individually, with respect to the action set forth in said complaint.

FIRST DEFENSE.

This defendant was guilty of no negligence.

SECOND DEFENSE.

30 Any injury or damages sustained by the plaintiff or plaintiffs in this action are due to the contributory negligence of the plaintiff, Seymour Feingold, and his mother, who was accompanying said plaintiff.

This defendant will urge at the trial of this cause

Reply
Clerk's Certificate

9

that if any injuries were sustained by the said Seymour Feingold that they were occasioned at a time when the mother, Lillian Feingold, was in the immediate presence, and who at the time had full control of the said Seymour Feingold, but nevertheless, while in the presence and still under the custody and control of his said mother, deliberately pushed off a certain rack movable material placed thereon for sale, and thereby sustained the injuries of which complaint is made. 10

GEORGE B. MARSHALL,
Attorney of Defendant.

REPLY.

20

(Filed Apr. 25, 1935.)

The plaintiffs deny the allegations contained in the first and second defenses.

JAMES B. AVIS, and
FRANK SAHL,
Attorneys for Plaintiffs.

30

I, the undersigned, Clerk of the Supreme Court of the State of New Jersey, do certify that the foregoing is a true transcript of the pleadings in the above stated cause as the same remain on file in my office.

Postea

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

FRED L. BLOODGOOD,

(Seal)

Clerk.

POSTEA.

SUPREME COURT OF NEW JERSEY.

GLOUCESTER COUNTY.

SEYMOUR (OR SEYMORE)
FEINGOLD, by JACOB L.
FEINGOLD, his father and
20 next friend, and JACOB
L. FEINGOLD, individu-
ally,

Plaintiffs,

v.

S. S. KRESGE COMPANY, a
corporation,

Defendant.

Action at Law.
Postea.

This case was tried before Judge Samuel M. Shay with a jury at the Gloucester Circuit on June 4 and June 5, 1935. The jury rendered a general verdict against the defendant, S. S. Kresge Company, a corporation, and in favor of Seymour Feingold,

by Jacob L. Feingold, his father and next friend in the sum of one thousand dollars (\$1000.00) and against the defendant and in favor of the plaintiff, Jacob L. Feingold, individually, in the sum of six hundred dollars (\$600.00).

SAMUEL M. SHAY,
Judge.

	<hr/>		
Damages	\$1000.00	S. F.	
“	600.00	J. L. F.	
	<hr/>		
	\$1600.00		
Costs	75.09		
	<hr/>		
	\$1675.09		

10

20

30

RULE FOR JUDGMENT.

NEW JERSEY SUPREME COURT.

10	SEYMOUR (or SEYMORE) FEINGOLD by JACOB L. FEINGOLD, his father and next friend and JACOB L. FEINGOLD, individually, <i>Plaintiffs,</i>	Action at Law. On Postea. \$1000.00 S.F. 600.00 J.L.F.
	v.	\$1600.00 75.09
20	S. S. KRESGE COMPANY, a corporation, <i>Defendant.</i>	\$1675.09

It is ordered that judgment be and hereby is entered against the defendant in favor of Seymour (or Seymore) Feingold by Jacob L. Feingold, his father and next friend, plaintiff, for the sum of one thousand dollars, and in favor of Jacob L. Feingold, individually, plaintiff, for the sum of six hundred

30 dollars, besides costs to be taxed *nisi*.

Entered June 25, 1935.

On motion of

JAMES B. AVIS and

FRANK SAUL,

Attorneys.

JUDGMENT.

This case was tried before Judge Samuel M. Shay with a jury at the Gloucester Circuit on June 4 and June 5, 1935. The jury rendered a general verdict against the defendant, S. S. Kresge Company, a corporation and in favor of Seymour Feingold, by Jacob L. Feingold, his father and next friend in the sum of one thousand dollars (\$1000.00) and against the defendant and in favor of the plaintiff, Jacob L. Feingold, individually, in the sum of six hundred dollars (\$600.00). 10

Whereupon it is adjudged that the plaintiff, Seymour (or Seymore) Feingold by Jacob L. Feingold, his father and next friend do recover of the said defendant S. S. Kresge Company, a corporation the sum of one thousand dollars damages and that the plaintiff, Jacob L. Feingold, individually do recover of the said defendant, S. S. Kresge Company, a corporation the sum of six hundred dollars damages together with their costs which have been taxed at the sum of seventy-five dollars and nine cents, making in the whole the sum of one thousand six hundred seventy-five dollars and nine cents. 20 30

\$1000.00	S.F.
600.00	J.L.F.
<hr/>	
\$1600.00	
75.09	
<hr/>	
\$1675.09	

Judgment entered and signed June 25, 1935.

THOMAS J. BROGAN,
Chief Justice.

TESTIMONY.

NEW JERSEY SUPREME COURT.
GLOUCESTER COUNTY.

10

SEYMOUR FEINGOLD by
JACOB L. FEINGOLD, his
father and next friend,
and JACOB L. FEINGOLD,
individually,

Plaintiffs,

Action at Law.

v.

20 S. S. KRESGE COMPANY, a
corporation,

Defendant.

 June 4, 1935.

30

 Before SAMUEL M. SHAY, J., and a jury.

APPEARANCES:

For the plaintiffs, FRANK A. SAHL, ESQ., JAMES
B. AVIS, ESQ.

For the defendant, GEORGE B. MARSHALL, ESQ.

Lillian Feingold—Direct

(Mr. Avis made an opening statement to the jury on behalf of the plaintiff, and Mr. Marshall made an opening statement to the jury on behalf of the defendant.)

LILLIAN FEINGOLD, called as a witness on behalf 10
of the plaintiff, being first duly sworn, testified as
follows:

Direct examination:

By Mr. Avis:

Q. Mrs. Feingold, you live in Woodbury?

A. I do.

Q. How long have you lived in Woodbury? 20

A. Five years.

Q. You are the mother of Seymour?

A. I am.

Q. How old is he?

A. Three and a half years old.

Q. When is his birthday?

A. August 14.

Q. He will be four years old this coming August
14?

A. That is right. 30

Q. Mrs. Feingold, have you any other children?

A. Yes.

Q. How many other children have you?

A. Two other children.

Q. How old are they?

A. One is nineteen months and the other is twelve years old.

Q. Do you remember the day of November 3, 1934?

A. I remember it very well.

Q. What day of the week was it?

A. I don't remember exactly the day of the week.

10 I believe it was Thursday.

Q. On the third day of November, the date the accident happened, were you on Broad Street in Woodbury before you went into the store?

A. That is right.

Q. Who, if any one, was with you?

A. I had the baby in the baby coach and the boy in my arm.

Q. By the boy, you mean Seymour?

A. Yes, sir.

20 Q. Do you know where Kresge's store is in Woodbury?

A. I do.

Q. Did you have occasion to go into Kresge's store?

A. I just walked in to purchase some candy for the boy.

Q. Did you take the boy into the store with you?

A. I did.

Q. Which door did you go in?

30 A. The first door I came to.

Q. What door?

A. There are two doors. I went in the first one.

Q. Where did you go when you got inside the store?

A. I went to the candy counter.

- Q. At that time do you know where Seymour was?
A. He was right at my arm, and he went to the rack.
- Q. Did you keep your eye on him?
A. Yes.
- Q. Did you notice where he went?
A. He walked over to the rack of pictures. He wasn't close enough when it fell. 10
- Q. How close?
A. He wasn't very close to the rack. He walked over to see the pictures but the thing fell that quick.
- Q. Did you see it fall?
A. Right.
- Q. Is it true that the boy had his foot on the rack?
A. I didn't see anything like that.
- Q. What did you first see about the rack?
A. The first thing I saw was right here ——— 20
- Q. Did you see it before it fell?
A. It had big pictures on the top, baby pictures. I remember the rack very well.
- Q. Did you see the rack fall on the boy?
A. I saw it fall right on him.
- Q. Did you notice whether the rack was on the child?
A. Yes.
- Q. Where was it on the child?
A. It was opened right here and a man hollered 30
down to remove the rack, "It will break his neck."
- Q. How high was that rack?
A. It was taller than I am.
- Q. Did it make any noise when it fell?
A. It made a crash, made a terrible noise.

Q. After the rack had fallen was the child on the floor?

A. He was this way (indicating). It pinned him right here (indicating) and he could not move, although the manager—I remember him well ——

Q. Who took the rack off the child?

A. There was another man. This man picked up
10 all the glass. There was another manager—I don't know where he is—who took my name and wanted me to go to a doctor.

I said, "I'm not going up to any doctor's place, I don't believe ——

Mr. Marshall: I move that that be stricken out.

The Court: Strike it out.

20

By Mr. Avis:

Q. Did the child cry?

A. Well, the child did not cry, but he was as pale as a ghost.

Mr. Marshall: I ask that the latter part be struck out as not responsive.

30 The Court: Yes.

By Mr. Avis:

Q. Did the child cry? Yes or no.

A. No, they gave him a stick of chocolate candy.

Q. You say some one took the rack off his head?

A. They certainly did.

Q. Where was the rack resting on his body?

A. Here (indicating) it was.

Q. That is where?

A. On the shoulders.

Q. Did you notice what happened to the pictures
and picture frames? 10

A. I certainly did.

Q. Where were they?

A. All on the floor. All fell on the boy.

Q. Did they remain there?

A. This man came along with a large basket and
put all the broken glass and everything else in it.

Q. After that time did you take the child home?

A. I walked home.

Q. After that time, after you got him home what
if anything did you notice about the boy? 20

A. Well, at night when I undressed him there
were black and blue marks on the shoulder and I
rubbed it. That is all I could do.

Q. A few days after did the child seem to be all
right?

A. He did not seem to be all right. He had blue
circles in his eye and he appeared nervous.

Q. When did you notice that?

A. A couple of days after.

Q. When did you first take him to the doctor? 30

A. The next day.

Q. That was what day.

A. That was Sunday.

The Court: Madam, you ought to speak a little
louder.

A. (Continuing) I rode to my mother's, and I took him to the doctor the next day, and he said —

Mr. Marshall: I object to what the doctor said.

The Court: The objection is sustained.

10 By Mr. Avis:

Q. When did you first take him to a doctor in Woodbury, as near as you can remember?

A. Three and a half weeks after the accident.

Q. Who was the doctor?

A. Doctor Moore. I saw him in his office.

Q. At that time what was the boy's condition?

A. Doctor Moore said —

20 Mr. Marshall: I object to what the doctor said.

By Mr. Avis:

Q. What did you see about the boy?

A. He had a high fever. He could not move his arm and shoulder. He was kind of stiff.

Q. Was there any swelling?

A. Not as yet.

Q. When did you first notice any swelling?

30 A. It was right after Christmas I noticed the swelling.

The Court: One purpose for your being here is to tell your story so the ladies and gentlemen of the jury can hear you. If they cannot hear it, they cannot pass upon the case.

By Mr. Avis:

Q. When did you first notice any swelling?

A. Well, there wasn't any swelling as yet.

Q. When did you first notice any swelling, if at all?

A. It was right after Christmas, January third.

Q. What did you do about that? 10

A. Well, I had been having a doctor in for a week, and when this swelling appeared I thought —

Mr. Marshall: I object to what the witness may have thought.

The Court: Yes.

A. (Continuing.) I called the doctor in, and he ordered him right to the hospital. 20

By Mr. Avis:

Q. At that time where was the child? Did you keep him home or when was he first taken to the hospital?

A. A week. When it was swollen they took him right away.

Q. Do you know what month of the year?

A. I think he entered the hospital January 7. 30

Q. What hospital was it?

A. The Underwood Hospital.

Q. How long did he remain in the Underwood Hospital?

A. About eight weeks. I don't remember exactly the time. They can give you the time.

Q. Do you remember the Christmas of 1934, after the accident?

A. I do.

Q. How was the boy on that day?

A. He didn't eat his meals. He didn't play with his toys.

Q. That was on Christmas?

10 A. Yes.

Q. How long before Christmas did you notice that the boy wasn't swollen?

A. Two or three weeks before Christmas.

Q. What did you notice about him?

A. Well, he did not seem to be well. I gave him a physic. I thought he would come around all right. I didn't know it would lead to anything like this.

Q. After he was in the Underwood Hospital, do you know how long he was there?

20 A. He was there almost two months.

Q. Then what happened? Where was he after that time?

A. We brought him home and then we brought him back. He was home about a week and then we had to take him back again.

Q. From the Underwood Hospital where did you go?

A. To the Jefferson Hospital.

Q. Philadelphia?

30 A. Yes.

Q. How long was he in the Jefferson Hospital? When was he released from that hospital?

A. He was there four or five weeks. I don't remember exactly.

Q. He has been home ever since that time, since he has been released from the Jefferson Hospital?

- A. That is right.
- Q. What did you do with him then?
- A. I took him to the clinic three times a week.
- Q. The clinic is where?
- A. Philadelphia, Jefferson Hospital.
- Q. What days of the week do you take him to the clinic?
- A. Tuesday, Thursday, and Saturday. 10
- Q. Is the child in court?
- A. Yes.
- Q. Will you call him down here?
- A. (The witness brought a child to the witness box.)
- Q. I notice that he walks with his left leg differently than with his right leg. Have you noticed that long? How long has that been?
- A. Since he took sick. I can't remember how long. Ever since that operation. 20
- Q. Has he any other trouble except his leg?
- A. His shoulder.
- Q. Right shoulder?
- A. Left shoulder.
- Q. Now, Mrs. Feingold, before the accident, November 3, how was the boy's health?
- A. Nothing wrong with him.
- Q. Was he in good health?
- A. Yes.
- Q. As far as you could see, did he appear to be strong and healthy? 30
- A. I say he was.
- Q. What is his condition now?
- A. He is a shadow now.
- Q. Does he look better or worse?

A. He looks terrible.

Q. How about now as compared with a few months ago?

A. He has picked up a little.

Q. How about the other two children?

A. Fine, perfect health.

Q. Who lives at home besides this boy and your
10 other two children? Does your husband live there?

A. He certainly does.

Q. Is your child able to play?

A. Not as he should. He gets very tired.

Q. Has he been able to play with the other children since the accident?

A. He gets tired. He needs certain times to rest. He needs rest.

Q. Who treated the boy at the Jefferson Hospital?

A. Doctor Davidson operated on him.

20 Q. Were you in the hospital when he was operated on, if you remember?

A. I don't remember now.

Q. When you go and take him to the clinic three times a week, how long do you stay there?

A. It is from ten o'clock in the morning until one o'clock in the afternoon.

Q. Do they treat the child in your presence?

A. Yes, they do.

Q. What do they do?

30 A. Take the bandage off his leg and off his shoulder, redress it and wash it.

Q. As I understand it, first the trouble was with his shoulder and now I understand he has trouble with his left leg and ankle?

A. That is right.

Cross-examination.

By Mr. Marshall:

Mrs. Feingold, you said that you lived in Woodbury for five years

A. That is right.

10

Q. I am going to stand back of the rail and I want you to talk so everybody can hear you. You live in North Woodbury?

A. I do.

Q. What is your address in North Woodbury?

A. 1105 North Broad Street.

Q. Have you lived at that place ever since you have lived in Woodbury?

A. I have.

Q. November 3, 1934, wasn't the first time you had been in the Kresge store, was it?

A. No, I had been in the store several times before.

Q. Several times?

A. Yes.

Q. When you approached the store that morning, you stopped there on your way from home, did you not?

A. I did.

Q. So you entered the store at the north door? 30

A. The first door I came to.

Q. That would be on the north end of the store?

A. Yes.

Q. The store faces west?

A. I guess it does.

Q. The store is on the opposite side of the street and faces that way? (Indicating.)

A. Yes.

Q. You came down this way (indicating) and went into the first door you came to?

A. Yes.

Q. When had you been in the store before November third?

A. I can't remember. I have been there several times.

Q. Was it the day before, week before, or two weeks before?

A. A few weeks before.

Q. The candy counter that you went to and made your purchase was on the south side of the store?

A. On the other side of the store.

Q. So when you went into the store through the north door you crossed the store?

A. Crossed the aisle that went over to the candy counter.

Q. That counter at which candy was being sold was up near the stair of the store?

A. Up near the stair.

Q. At the end of the candy counter, near the door way, was the rack upon which small pictures and picture frames were placed, wasn't it?

A. They were large pictures and frames.

Q. Were there also some smaller pictures and picture frames?

A. Each shelf had three rows of pictures, the lower shelf had the smaller and the higher shelf had the larger pictures. They were these pictures with the baby. That is a large picture frame.

Q. Then on this rack, as you recall it that day, at the bottom there had been placed the very small miniature pictures and the further up on the rack the bigger pictures came?

A. Each row had three pictures.

Q. The further up the rack went the larger the pictures were?

A. There were larger pictures on top and smaller 10 pictures on bottom.

Q. Weren't the larger pictures on the bottom of the rack?

Mr. Avis: I think she answered they were all makes.

A. There were all sized pictures on the rack.

By Mr. Marshall:

20

Q. Were there all sizes of pictures on the rack?

A. All sizes of pictures.

Q. On all shelves there were different sized pictures?

A. Different size of pictures.

Q. Were there large ones and small ones both on the same shelf?

A. There were little pictures first, there were three rows of pictures, larger pictures in the back. 30
Three rows of pictures on the shelf.

Q. Three rows of pictures on the shelf?

A. Yes.

Q. How many shelves were there?

A. There were quite a few.

Q. Five or six feet high?

A. It was taller than I am.

Q. Did you notice how far the first shelf was from the floor?

A. It wasn't close to the floor. It was a foot ,a foot and a half above the floor.

Q. A foot and a half above the floor?

10 A. Yes.

Q. Are you sure of that?

A. I am not sure, but I remember it was about that.

Q. That is what it was according to your best recollection, but you are not sure?

A. Yes.

Q. Did you notice that there was no back to the rack?

A. I didn't examine the rack.

20 Q. You examined the rack?

A. Yes.

Q. Do you remember whether there was a back?

A. There couldn't very well be a back if the thing fell right over him.

Q. Was there any back on the rack as you remember it?

A. I don't remember any back.

Q. Can you tell how far apart the shelves were?

30 A. They weren't apart. They went up, consequently they weren't shelves. The shelves held the pictures.

Q. Didn't the shelves of the rack run horizontally across the rack?

A. They did not.

Q. Then, do I understand you to say they run perpendicular?

A. They run up this way. (Indicating.)

Q. Do you mean to say that this would be the position of the rack (indicating), and up here (indicating) would be the shelves upon which the pictures and picture frames were placed? How were the pictures placed on the rack?

A. There were shelves there, and then there was this wood in front to hold the pictures in. 10

Q. Weren't there shelves running across?

A. I guess they were, and then there were shelves running this way (indicating) to keep the pictures there.

Q. That was just a small groove to keep the pictures there?

A. That was part wood, a piece of wood.

Q. The shelves ran across from one side to the other?

A. It was to hold pictures. 20

Q. When you made the purchase of candy, you came up to the far end of the candy counter?

A. I went to the candy counter.

Q. I say you went to the candy counter which was further removed from the door, didn't you?

A. The candy counter was right there.

Q. As you stood in the store that day and made your purchase of candy, how far would you say you were away from the rack containing the pictures and picture frames? Ten or fifteen feet? As far as we are from the Judge now? 30

A. No. Here is the rack. (Indicating.) I was right over there near the counter, at the end of the counter.

Q. Were you struck by any of the frames?

A. No, I wasn't struck by any of the frames.

Q. The boy had strayed away from you, hadn't he?

A. Yes, he was away from me.

Q. Did you pay any attention to the boy as you made your purchase and paid for your candy?

A. I kept my eye on him all of the time.

10 Q. You say that at no time, and you did not take your eye off the boy, did that boy touch the rack?

A. He certainly did not touch that rack.

Q. Did you know a sales girl in the store by the name of Miss Herman.

A. I don't know the names. I know them by faces.

20 Mr. Marshall: (Addressing a person in the court room.) Miss Herman, will you stand up?

By Mr. Marshall:

Q. Did you see that girl in the store at the time you went into the store?

A. Are you speaking to me?

Q. Yes.

A. I don't remember that lady, but I remember the next one. That is the one I purchased the candy from.

30 Q. That is the lady you purchased the candy from and know her very well?

A. As far as going in the store.

Q. How long would you say in your opinion had you observed this rack in the position it was in on November third?

A. What do you mean?

Q. How many weeks before had you gone into the store and seen this rack in that position?

A. Well, I remember the rack. I bought pictures at times.

Q. It hadn't been a question of months?

A. I don't know how many months. I couldn't say that.

10

Q. You could not say how many months?

A. I couldn't say.

Q. Would you say that it had been a matter of three or four months?

A. I should say two or three weeks.

Q. Two or three weeks?

A. No, it wasn't a rack that I bought the pictures from. It was a shelf. I distinctly remember they had a shelf. This rack was just put there.

Q. When was the rack put there?

20

A. I don't know.

Q. You say it wasn't there?

A. The last time.

Q. When were you there the last time, and the rack was not there?

A. I purchased pictures some time ago. I don't remember.

Q. When were you in the store before November third to make a purchase of pictures?

A. I really don't remember. I can't remember 30 all these things.

Q. Do you remember making your purchase from the rack, Mrs. Feingold? I don't want to tire you unnecessarily, but if you will just answer —

A. I don't remember the rack. I purchased pic-

tures from the shelf. I noticed that very distinctly every time I ——

Mr. Marshall: I ask that it be stricken out as not responsive.

The Court: If you say it was not responsive, I
10 will strike it out. I did not hear the answer.
Madam, you will have to speak louder.

By Mr. Marshall:

Q. Do you remember having made a purchase from the rack?

A. Not from the rack.

Q. Your purchase of frames had been from the shelf. Was it in the same position as the rack?

20 A. This other shelf was toward the wall.

Q. Was this shelf in the same position as the rack?

A. I didn't see the rack at the same time. I can't remember that far back.

Q. Were the pictures that you purchased from the shelf in the same position as the rack was?

A. No.

Q. Where was it?

30 A. They were shelves and they ran there in this manner (indicating) and when this rack fell on him all the pictures were in the rack.

Q. Would you say it was within a month of November third and this rack wasn't there?

A. I don't remember.

Q. You can't remember?

- A. I just don't know.
- Q. You went to your doctor in Philadelphia the next day?
- A. I did.
- Q. That was Doctor Berstein?
- A. Right.
- Q. Is Doctor Berstein in court?
- A. No. 10
- Q. You say that the boy following the time of this alleged accident had some black and blue marks on his left shoulder?
- A. He did.
- Q. Did he have any black and blue marks on his leg?
- A. He did.
- Q. Right leg?
- A. Left leg.
- Q. How long did those black and blue marks remain visible? 20
- A. Yes. This doctor that I went to the next day saw them.

Mr. Marshall: I move that the answer be stricken out as not responsive.

The Court: Strike it out.

By Mr. Marshall: 30

- Q. How long did the black and blue marks remain on the boy so they were visible?
- A. About three or four days.
- Q. After that there was no evidence of black and

blue marks or signs of any injury that were visible to the eye?

A. Not to my knowledge.

Q. Were the places of black and blue marks tender to touch?

A. I should say they were.

10 Q. How long did those places remain tender to touch, if you are able to remember.

A. The black and blue marks left, but when I dressed him he shrieked hard. The day when I put his sock on, it hurt.

Q. How long did that last?

A. What?

Q. How long did that last?

A. It lasted right along.

Q. It never subsided?

A. It lasted right along.

20 Q. But the black and blue marks went away in three or four days?

A. They did.

Q. Did they leave the shoulder as well as the leg?

A. Yes.

Q. The day that you were in the store did you see anybody in the store that you knew?

A. I didn't take notice.

30 Q. Do you recall, sitting on the stand, seeing anybody in the store that day that you knew?

A. I knew the sales girl that I bought the candy from. I said, "Halloo."

Q. Is that sales girl the only one in the store that you knew?

A. I told you there might have been more people in the store.

Mr. Marshall: I move to strike out the answer as not responsive.

The Court: Right. Strike it out.

By Mr. Marshall:

Q. Mrs. Feingold, you said on your direct examination that you had at sometime consulted Doctor Moore at the Underwood Hospital and that you recalled that Christmas. Now, did you take the boy to the Underwood Hospital before the latter part of December, 1934? 10

A. Did I take him to the hospital?

Q. To the Underwood Hospital at any time?

A. Before?

Q. Yes.

A. Well, I don't remember the dates when I took the boy to the hospital. When the boy was admitted to the hospital. 20

Q. Will you please listen? Did you take the boy to the Underwood Hospital before the latter part of December, 1934?

A. I don't remember when I brought him there.

Q. You didn't take the boy to Doctor Moore until you first observed this swelling?

A. I took him a week before that.

Q. About a week, did you say? 30

A. About a week before that. I had Doctor Moore treating him right along.

Q. You say Doctor Moore was treating him from what time?

A. I don't remember dates. I can't remember dates.

Q. You remember the date of the accident, November third?

A. Yes, November third.

Q. Did you take the boy to Doctor Moore at any time during the month of November?

A. I took him in December, I think it was.

Q. Sometime in December?

10 A. No, it was after Christmas when I noticed he was feeling bad, that he didn't look right after Christmas.

Q. Christmas was the determining time? At Christmas, December 25, after that you took the boy to Doctor Moore?

A. I remember that now.

Q. From that time you went to the hospital for additional and further treatments, and X-rays were taken to your knowledge, weren't they?

20 A. I remember now.

Q. X-rays weren't taken until some time in January?

A. Right. They weren't taken until he was taken to the hospital.

Q. After the time of the injury on November third up to the time that you took the boy to the Underwood Hospital for treatment, the boy played around, didn't he?

30 A. He played around, but he acted funny. He acted very wild.

Q. Acted very wild?

A. Doctor Clark was there.

Q. Did he act wild?

A. He jumped in his sleep and he hollered in his sleep.

- Q. Do you remember when Doctor Clark came?
A. I really don't remember whether it was a week after the accident.
Q. Was it two weeks after the accident?
A. I don't remember.
Q. You were at home with the boy when Doctor Clark examined the boy?
A. Surely. 10
Q. That was on November 26, wasn't it?
A. What?
Q. That Doctor Clark made his examination?
A. I don't know.
Q. At that time you had not taken the boy to anybody but Doctor Berstein?
A. That is right.
Q. You had not gone back to Doctor Berstein, except November 4, and you had not gone to any other doctor or obtained any treatment for the boy? 20
A. I doctored him myself. At that time I thought I'd treat him that way and then I went to Doctor Moore.
Q. Do I understand now that the boy now seems to be picking up?
A. A little bit.
Q. Did the black and blue marks on the shoulder reappear at all after they had left?
A. Not to my knowledge.

JACOB FEINGOLD, the plaintiff, called as a witness on his own behalf, being first duly sworn, testified as follows:

Direct examination.

10 By Mr. Avis:

Q. Mr. Feingold, you are the father of Seymour Feingold?

A. Yes, sir.

Q. Where do you live?

A. 1105 North Broad Street.

Q. In Woodbury?

A. Yes, sir.

20 Q. You were not in the Kresge store the day this accident happened?

A. No, sir.

Q. When did you first see the boy after the accident?

A. When she brought him home from the store a few hours afterward.

Q. Did you notice anything about him at the time?

A. He appeared to me to be all right.

Q. What have you to say about his condition after that? Tell the Court and the jury.

30 A. From that time I just would pray. For a few weeks after he appeared normal.

Q. He was all right?

A. He was all right. Close to a month after that he was getting black in his eye. I thought he was going off his mind. If that is my son I don't know

what is going to become of him. There was something wrong, but I couldn't figure what it was.

Q. That was around what time?

A. A few days after or say a month.

Q. After that time what did you notice?

A. His appetite suddenly decreased and his activity decreased.

Q. Before the accident what kind of boy was he? 10

A. He was always a sensible boy.

Q. Would he stand around or sit, inactive?

A. He would at times. He had a great habit of listening to people if he could listen. If you took him on a ferryboat he could tell you what ran the boat.

Q. A month after the accident, according to your mind, he wasn't all right. Did he improve?

A. He appeared to be slightly. He became real inactive. He really laid in bed. I really don't believe he could. 20

Q. What did you do for him?

A. He woke up at night. There were three or four days that I don't think we got two or three hours sleep. He hollered.

Q. Did he complain?

A. Once in a while he hollered about his shoulder. I didn't have any idea of what disease he had.

Q. Whom did you consult?

A. I talked to my wife and my child had been to Doctor Moore on January third. I heard he was highly recommended by people for getting results from him, better than from anyone else in town. We inquired before we took him. 30

Q. At that time what was the child's appearance?

A. He was listless and afraid of people, and I later found out that is a symptom —

Mr. Marshall: I object.

The Court: Yes.

10 By Mr. Avis:

Q. Do you know when that was?

A. January third.

Q. Had Doctor Moore seen the child before that time?

A. Not to my knowledge. It is possible. I am not at home.

Q. The first time you know about is January third?

20 A. Yes, sir.

Q. As I understand your testimony, the child seemed to be all right for about a month after the accident?

A. Around a month.

Q. After the third of January was the child left in the hospital or did you bring him home?

A. We treated him at home.

Q. When did Doctor Moore see him?

A. The day after. We made three visits between
30 January 3 and 7.

Q. January 7 he was taken to the hospital?

A. Yes.

Q. What did you see about the child's eyes?

A. In fact my wife called me.

Q. Did your wife call your attention to the child's eyes?

A. I was in Philadelphia.

Q. You didn't see that?

A. No.

Q. He was taken to the hospital on January 7?

A. Yes.

Q. How long was he at the hospital?

A. Between six and seven weeks, outside of being out of there for two or three days that they thought 10
he would behave better.

Q. After that what did you do?

A. Doctor Moore recommended that we take him to the Jefferson Hospital.

Q. When was that?

A. I had the date down but it slipped my mind. It was thirty-seven days before he was taken to the hospital. He was at the Jefferson thirty-seven days.

Q. Before you went to the Jefferson Hospital did 20
you consult any other doctor?

A. Doctor Buzby. I took him to Doctor Buzby. I really wanted to do all I could for the boy. I went to as good a doctor as I could.

Q. Then you took him to the Jefferson Hospital?

A. After Doctor Buzby ordered him to the hospital that time.

Q. Did you take him?

A. We took him to the Underwood after Doctor 30
Buzby saw him.

Q. Then, after he was taken to the Jefferson Hospital?

A. Later.

Q. How often did you see the boy in the Underwood Hospital?

A. Pretty nearly every day, sometimes twice a day.

Q. Where was he in the hospital?

A. In the children's ward.

Q. In bed or up and about?

A. In bed all the time.

Q. How old was he?

10 A. At that time he was around three and a half, somewhere around that.

Q. How often did you see him in the Jefferson Hospital?

A. We go Tuesday, Thursday and Saturday. I usually went Tuesday and Thursday and she went Saturday.

Q. Where was he in the Jefferson Hospital?

A. In the children's ward.

Q. In bed or out of bed?

20 A. In bed.

Q. Did he like it?

A. No, that is why we had to go away.

Q. What was the trouble?

A. He is not a boy who likes to be away from home.

Q. How old is the child?

A. He is past three and a half years. In fact he cried so much it worried us.

Q. When did he come home from the hospital?

30 A. We brought him home.

Q. How long ago?

A. Six or seven weeks.

Q. Seven weeks ago?

A. Something like that.

Q. How often do you take him to the hospital now?

A. Tuesday, Thursday and Saturday.

Q. Who takes him?

A. I usually do because I have to drive the car. It is rather risky to my wife's health. She has kind of a weak heart.

Q. How much do you have to pay?

A. The first time it was fifty cents. After that it is thirty-five cents for the service in the dispensary. There we get the service, I believe. 10

Q. Was there a bill rendered to you by the Jefferson Hospital?

Q. This shows that the boy was there from March 4 to April 11?

A. Yes, sir.

Q. Is that the bill that the hospital rendered to you?

A. They gave me a final bill.

20

Mr. Avis: I offer in evidence the bill.

The Court: It may be marked.

(The paper referred to was received in evidence and marked "Plaintiff's Exhibit P1.")

By Mr. Avis:

Q. After the boy was taken to the Jefferson Hospital, Mr. Feingold, you saw him several times a week as I understand it? 30

A. Around that.

Q. Did he seem to get better or worse as you saw him?

A. He was there about three days when I believe he was operated on. Of course, I saw him probably two days after, probably four days after. A week after, it seems to me somewhere around a week after, I saw the boy, and he looked very bad to me. Then I went downstairs to go out, and I thought I better call up the doctor, you know, to make sure,
10 and he told me he needed a blood ——

Mr. Marshall: I object to any conversation he may have had with the doctor.

The Court: The objection is sustained.

By Mr. Avis:

Q. Has he been able to play with the other
20 children?

A. He does not play with them because it is liable to hurt his leg.

Cross-examination.

By Mr. Marshall:

Q. The boy, of course, prior to this alleged accident did not attend kindergarten?

30 A. No, sir.

Q. Too young for that?

A. Yes.

Q. You are away from home most of the time?

A. No, I go away at ten o'clock and probably stay away until five.

Q. Where were you employed?

A. I am not now.

Q. At that time, where were you employed.

A. We have run a dry-goods store in North Woodbury and you have to hunt bargains.

Q. So you go to town frequently?

A. It if it a question of making fifty cents.

Q. You go to town for the purpose of buying 10 supplies for your North Woodbury store?

A. Yes, sir.

Q. You were operating it on November 3, 1934, and you are operating it now?

A. Yes, sir.

Q. If your wife had taken the boy to Doctor Moore on January 3, you would have known it?

Mr. Avis: I object.

20

By Mr. Marshall:

Q. The first intimation that the boy had been injured was when the boy was taken to Doctor Moore?

A. Except that Doctor Clark came. He looked at him in between.

Q. Doctor Clark came the latter part of November?

A. I was in the store when he came in, but I didn't go up with him when he examined the child. 30 I don't know what it was all about. I suppose she was with him and examined the child.

Q. Prior to the time of this alleged accident, I assume that the little lad was an active boy?

A. He was an active boy.

Q. He played with the other boys in the street?

A. Yes, but we have always watched him. That is a bad street, you know.

Q. What I am endeavoring to learn is this: Did he do everything that the average and normal boy did?

A. Yes, sir.

10 Q. Lots of time they can get into mischief?

Mr. Avis: I object to the question and ask that it be stricken out.

The Court: Yes.

By Mr. Marshall:

20 Q. That was characteristic of the boy down to the forepart of December, 1934?

A. That he was active?

Q. Yes.

A. Up to when?

Q. Up to the forepart of December. Didn't you say it was about a month, beginning a month after November 3 that he showed —

A. He was more or less as he previously was. I couldn't tell you exactly. I don't know enough about it.

30 Q. For a period of a month after November 3 you didn't treat the incident of November 3 seriously?

A. I did the first time, but I really left it to my wife.

Q. You knew that the boy had been taken to Doctor Berstein?

A. Yes, she took him to Doctor Berstein while she visited her mother. Her mother told her to do it.

Q. From that time on for at least a period of a month the boy played around as he had formerly?

A. Correct.

Q. Then it was about a month after, sometime in December, that he began to show, what you call, signs of being bad?

10

A. Yes.

Q. He had been playing as he had before and then he finally stayed in bed and then you took him to the Underwood Hospital?

A. That is correct.

RALPH MOORE, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows: 20

Direct examination.

By Mr. Avis:

Q. Doctor Moore, you are a practicing physician of this state?

A. I am.

Q. And have been for how long?

A. 1931.

30

Q. Of what institution are you a graduate?

A. Hahnemann, Philadelphia.

Q. Are you connected with the Underwood Hospital in Woodbury?

A. I am.

Q. Were you connected with that institution on November 3, 1934?

A. I was.

Q. And have been since?

A. I have.

Q. Doctor, was the Feingold boy brought to you or did you see the Feingold boy sometime after November 3, 1934?

A. I saw the Feingold boy first on January 3, 1935.

Q. Where did you see him, Doctor?

A. In my office in the hospital.

Q. He was brought there by his parents?

A. By his mother.

Q. At that time did you examine the child?

A. I did.

Q. What did you find, Doctor?

A. May I refer to my office record of the case?

Mr. Avis: I think so. You have no objection, Mr. Marshall?

Mr. Marshall: No.

A. His chief complaint was pain in the left shoulder area, and the history of the present illness was that he wasn't well around Christmas and that he had complained since an injury previously, said to have occurred, I believe the history on that is November 3. I don't have it on the card.

Q. Were you advised that on November 3 the child has suffered an injury?

A. That is my impression of the history.

Mr. Marshall: I ask that the answer be stricken out.

Mr. Avis: I think it is part of the history.

The Court: He is a physician.

By Mr. Avis:

10

Q. What did you find, Doctor?

A. I found that he had limitation of the left upper extremity and pain in the shoulder area in general. There was no definite sign of any redness or swelling—just had pain in the shoulder area. He was tender all over on pressure. He had an elevation of temperature, I don't recall the exact amount. He had bronchitis, and I attributed the temperature to the bronchitis at the time.

20

Q. First of all, what did you do in the way of treatment?

A. I put the arm in a Jones' position.

Q. When did you see the child next?

A. I next saw the child on January 7 at his home.

Q. What was his condition at that time?

A. At that time I recall distinctly he had a swelling in the region of the left shoulder, posteriorly. It is a little back of the center. There was tenderness, pain, and swelling and the child had quite a high temperature. I recall it was over 103.

30

Q. That is pretty high, I take it?

A. Yes. He still had his bronchitis. He had no other symptom. There was nothing about the case that seemed abnormal. He did not have normal

tonsils at the time when he had the bronchitis. He had some enlargement. I ordered an X-ray picture taken.

Q. Who took the X-ray picture?

A. The X-ray department at the hospital. I don't recall whether it was Doctor Downs or Miss Cram.

Q. At that time what did the X-ray disclose, if
10 anything?

A. The first X-ray report was negative.

Q. Will you explain that to us, Doctor?

A. That is from the standpoint of bone enlargement it was negative, and there was no evidence of bone injury in the left shoulder girdle.

Q. When was the next X-ray taken?

A. January 18.

Q. What did that disclose?

A. Showed a distinct change in the acromion pro-
20 cess of the left scapula. It had the appearance of osteomyelitis. There is more to it.

Q. Is this your report?

A. It is the X-ray report given to the doctor.

By Mr. Marshall:

Q. I presume the doctor treated the boy from the X-rays?

A. Yes.
30

By Mr. Avis:

Q. From the X-ray what did you find the ailment of the child to be?

A. You want from the time I first saw him?

Q. Yes.

A. He had some limitation. I don't know what the exact condition was in the left shoulder arm. On the seventh, when I saw him he had a definite abscess or bone enlargement. At that time the X-ray showed bone enlargement was negative, and the soft tissue area was then deemed responsible for the swelling. On January 9, that is two days 10 after admission, this soft tissue and swelling of the shoulder girdle was increased in size.

Q. What do you mean?

A. An incision was made in the second area—made an incision in the abscess and there was pus in that region. Following that operation drainage progressed, but apparently the child was not satisfactory so we had a re-examination of the picture and it showed a change.

Q. What do you mean by that? 20

A. Osteomyelitis. If you want to know the pathological definition of it I can tell you that osteomyelitis is an inflammation in the medullary cavity of the bone.

Q. Doctor, how long did he remain in the hospital?

A. He was admitted January 7, and was returned home on the 17th day of February.

Q. Did he come back after that?

A. I treated him at his home and he returned on the 18th day of February for treatment, and he was moved to the Jefferson Hospital on March 4. 30

Q. At the time before he was removed, did he have any other place infected except the shoulder blade?

A. He was operated the second time. He was operated on the 5th day of February to give better drainage to this area.

Q. Is he able to use both the arm and shoulder?

A. He has limitation in his left arm.

Q. Will you demonstrate to the jury just what you mean by limitation?

10 A. (The witness demonstrates to the jury.)

Q. Will you explain the limitation of the shoulder or arm that you speak of.

A. Moving your arm straight out to the side and back of you and forward, right in front of you. It seems to be in the upper portion particularly.

Q. Is there a definite need to raise the arm?

A. There is a definite need. He can't get it straight out.

20 Q. Doctor, I notice the boy walks in rather a peculiar fashion?

A. Yes.

Q. Have you noticed that?

A. Yes.

Q. What explanation have you for that?

A. Our last X-rays, February 28, showed osteomyelitis of the left tibia, and that was operated, I believe, at the Jefferson Hospital.

30 Q. Doctor, how do you explain that first it originated in the shoulder blade and afterward it progressed to the tibia?

A. Osteomyelitis spreads from one bone to the other.

Q. Doctor, from your experience and from your examination and treatment of the child, can you say whether or not he will be cured of his present condition?

Ralph Moore—Cross

A. I could not say he could be cured. That, of course, is a prognosis I could not answer.

Q. If he is cured, can you give any opinion as to the length of time it will take for him to recover?

A. No.

Q. Doctor, from the history that you have and from the injury he received by a rack falling on his shoulder blade, and that about a month thereafter he developed a temperature and did not seem to be well, and then on 3rd of January when you saw him he was in that condition, and from that time this condition developed, can you say whether his condition at the present time is the result of the injury he received on November 3, 1934? 10

A. I would like to answer that in two parts.

Q. You know the history of the case and you have examined the child. What is the cause of his present condition? 20

A. The injury.

Q. If he had that injury on November 3, 1934, such as has been described, a rack falling over and hitting him, is that the probable cause of his present condition?

A. That is the probable cause.

Cross-examination.

By Mr. Marshall: 30

Q. Doctor, in getting up your history of the boy, of course, you were told by the family what had happened?

A. Yes.

Q. Independent of what was told to you, you did not feel it necessary to get any other information?

A. I took the history of the case as the parents gave it to me.

Q. Did you also get from the boy's family the fact that he was a very active boy?

A. I believe he was considered normal.

10 Q. Prior to the time he consulted you on January 3?

A. My history—all that I have—I have a history of the dates here. Of course, there are a few things that occur in the best personal history that you are unable to determine.

Q. There is, among other things, osteomyelitis which you are unable to determine how it started?

A. There are a few cases where the origin is not traceable, but in the majority of the cases it is the
20 result of an injury.

Q. In some cases it comes from tuberculosis?

A. I can't answer that in that form.

Q. Does it sometime come from an infection?

A. It is a definite infection, and after an acute state there is a bacteriological development.

Q. Any other infection that will start up osteomyelitis?

A. I would not know of it.

30 Q. Have you ever seen osteomyelitis in the scapula?

A. No.

Q. Generally osteomyelitis occurs in the long bones?

A. Yes.

Q. The long bone of the arm or the long bone of the leg?

A. That is right.

Q. You are not treating the young boy now?

A. No, but I re-dressed his shoulder yesterday.

Q. On January 3, the boy was suffering from bronchitis?

A. Yes, sir.

Q. He had enlarged tonsils?

A. Yes.

10

Q. Were they diseased tonsils?

A. I would consider them enlarged. I don't know about the center. I have no way of knowing. My diagnosis would be that they were enlarged.

Q. Would there be any possibility of osteomyelitis resulting from bronchitis?

A. That is difficult to say. Osteomyelitis is generally secondary to an injury.

Q. The only type of osteomyelitis is, in your opinion, from an injury?

20

A. That is the existing cause.

Q. Doctor, you have not been of the opinion that osteomyelitis dates from the date of his alleged injury on November 3, 1934?

A. I didn't see the accident, and I can't answer questions as to it.

Q. You have discussed the matter with Doctor Clark?

A. Doctor Clark approached me whether I thought this injury cause the osteomyelitis, and I said it was the probable cause. Any injury prior to within a reasonable time is a probable cause.

30

Q. Did you not tell Doctor Clark prior to May 13 that you did not think change in the bone came

from the injury, but you said it was possible? Do you recall that?

A. I don't recall giving Doctor Clark that information, not directly as you have told me.

10 B. FRANKLIN BUZBY, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. Avis:

Q. Doctor, you are a practicing physician in the State of New Jersey?

20 A. Yes.

Q. How long have you been such a practicing physician?

A. Twenty-one years.

Q. You are a graduate of what institution?

A. University of Pennsylvania.

Q. Your office is in Camden?

A. 414 Cooper Street, Camden.

Q. Doctor, do you specialize in any particular branch of medicine?

30 A. I do.

Q. What?

A. Orthopedic surgery.

Q. What is orthopedic surgery?

A. Orthopedic surgery deals with all bodily deformities and diseases of the bones and joints.

Q. How long have you specialized in that particular branch of medicine?

A. Since 1917.

Q. Doctor, suppose you tell the Court and jury what osteomyelitis is.

A. Osteomyelitis is an infection in the bone localized by an injury and caused by bacteria terminating in pus formation in the bone with sequestrum of 10 the bone.

Q. Doctor, did you see Seymour Feingold?

A. I did.

Q. When?

A. 21st of February, 1935.

Q. Where did you see him?

A. He was brought to my office by his mother.

Q. Did you examine him?

A. I did.

Q. What did you find?

20

A. I found he had osteomyelitis of his left shoulder blade with two draining sinus over it, and I found also that he had osteomyelitis of the left shin bone just above the ankle. There was no draining or pus but a swelling. The child was quite ill at that time. I urged that he should have his left shoulder blade X-rayed and re-admitted to the hospital.

Q. Why was the child brought to you?

A. He was brought to me for an opinion.

30

Q. You went away on a vacation two days after?

A. Yes.

Q. What was your recommendation about the child?

A. On my recommendation he was admitted to

the Underwood Hospital, but I don't know why he went to the Jefferson Hospital.

Q. After that did you have occasion to see the child?

A. I saw the child while in the Underwood Hospital, after he was admitted at that time.

Q. When did you last see him?

10 A. I last saw him on May 31, 1935.

Q. At that time did you make an examination?

A. I did.

Q. What did you find on your examination?

A. I discovered that he had a draining wound over his left shin bone about two inches long above his ankle. He had two incisions over his shoulder, one of which was approximately two inches long.

Q. What does that indicate?

A. That indicated that the boy will have to have
20 further surgical treatment.

Q. Doctor, how many cases of osteomyelitis have you treated.

A. I know I have five cases involving the scapula now.

Q. How many cases a year?

A. Three or four hundred.

Q. Where does it occur?

A. It usually develops in the long bones, tibia, humerus, and femur.

30 Q. Is there any explanation for that, Doctor?

A. Osteomyelitis occurs in those bones which are most commonly injured.

Q. Doctor, in this case from your examination and from your experience, if the Feingold boy on November 3, 1934, suffered an injury to his shoulder

blade by reason of a rack four or five feet high falling on him, and that thereafter, approximately four or five weeks, he became ill, that on January 3 there was a marked swelling in his left shoulder, that on January 7 an X-ray was taken which was negative, that on January 18 another X-ray was taken and showed osteomyelitis in the shoulder, in your opinion was the injury received by him on November 3, 1934, the probable cause of the osteomyelitis?

A. It could be.

Q. Doctor, from your experience is there anything else that you can attribute the osteomyelitis to?

A. I would not attribute it to anything else.

Q. Doctor, are there some authorities on osteomyelitis which you have brought to court today?

A. I have.

Q. Will you give us the name of the book? 20

A. This book that I have here is on osteomyelitis published by MacMillan and written by Doctor Wilensky, of Mount Sinai Hospital.

Q. Is Doctor Wilensky recognized as an authority on osteomyelitis?

A. Yes.

Q. Doctor, can you tell me what he has to say as to when osteomyelitis will develop after an injury?

A. I will read from his writing, "Incubation period and premonitory period. It is difficult to establish any incubation period in cases of acute osteomyelitis except in those in which there is a history of a definite trauma. In such cases, Huebler could in some measure determine the approximate 30

incubation period in 52 cases. It was 1 day in 8 cases, 2 days in 13 cases, 3 days in 6 cases, 4 days in 5 cases, 5 days in 3 cases, 7 days in 6 cases, 8 days in 2 cases, 14 days in 4 cases. In 1 case each it was 17 days, 21 days, 4 weeks, 5 weeks, and 3 months. The premonitory period is, therefore, a very short one, usually from 12 to 24 hours, and very rarely 3 or 4 days or longer. When such long periods exist, it seems that there must be some relationship to a lack of virulence, or insufficiency of dosage of the attacking bacteria—elements which are usually comprised in the term ‘latency of infection.’ During this premonitory period the patient is made aware of infection by the general feeling of apathy, anorexia, malaise, and exhaustion, which are followed usually by a profound chill, or, in the case of young children, by a convulsion; at this time the actual signs and symptoms referable to the local focus in the bone begin to appear.”

Q. What does incubation period and premonitory period mean?

A. That means the period from the time of the injury until the disease appears.

Q. Now, what has the book to say as to the injury question, cause of the condition?

A. There is another paragraph in the book, “History of injury. The history of the patient must be thoroughly investigated. In many instance there is definite history of an injury in the general neighborhood of the joint. This injury is sometimes so definite that there is interference with function; and the latter—a limp, for example—may last

for a few hours or a day. After this time a recovery in function occurs, and the patient is generally apparently well until local symptoms occur at the site of the trauma."

Q. Doctor, as I understand it, that means that the patient may have an injury today and for a day or two have no trouble with it?

A. Yes.

10

Q. Then there may be a period of five or six weeks before the osteomyelitis may appear?

A. It causes a lessened resistance in the bones.

Q. Doctor Moore has testified that this boy has only part use of his arm. Have you noticed that?

A. I have.

Q. What do you say about that?

A. He has a thirty degree limitation of both the internal and external rotation of his shoulder. Thirty degrees limitation means that he can raise his shoulder only at right angles.

20

Q. Doctor, will that get better?

A. If there is not too much sequestration of the shoulder itself. I can't answer that question.

Q. Doctor, can you give an opinion as to what will happen in the future?

A. In the immediate future it would seem to me that the shoulder should be operated and the dead bone removed, the sequestrum. Then within a few months, a maximum of six, he should be recovered from his bone infection. We do know that osteomyelitis may occur in the future, in five years, ten years, or even longer. The disease may break out in the same place or some other place.

30

Q. Doctor, did the patient suffer any pain?

A. Now?

Q. Yes.

A. I don't believe he has so much pain at the present time.

Q. How about before?

A. He was in tremendous pain when I saw him before.

10

Cross-examination.

By Mr. Marshall:

Q. When did you first examine the boy?

A. February 21, 1935.

Q. That examination was made in the Underwood Hospital?

A. No, in my office.

20

Q. Then you next saw the boy a couple of times while he was at the hospital?

A. I saw him on March 2 and then I was on my vacation.

Q. Then you made your next examination on May first?

A. May 31.

Q. Is that when you formed your opinion as to the percentage of loss in the use of arm?

A. I have not expressed any loss in the arm?

30

Q. I thought you had.

A. I testified he had a thirty degree limitation in motion.

Q. The thirty degree limitation of motion, did you ascertain that on May 31?

A. That is right.

Q. Quite frequently isn't it true that you, as an orthopedic surgeon, are called upon to treat cases where you are unable to determine what caused it?

A. Well, we know always that it is caused by an infection. Localization of that infection is felt, by most people, to be the result of an injury, whether that injury be great or less.

Q. And the injury may have been so slight that 10 the person complaining might not be conscious of having received any injury that he could report to the doctor?

A. That is correct.

Q. If osteomyelitis comes from an injury, that injury may be one of a hundred different bumps that a child receives while playing?

A. Greater or less.

Q. Three or four years ago?

A. That is right.

20

Q. A person falling on a steep banister or bumping into another child at play might set up that condition?

A. That is right.

Q. At some later time this osteomyelitis develops?

A. That is correct.

Q. According to my recollection of your testimony you said that osteomyelitis generally develops in that part of the body where the long bones are? 30

A. That is right.

Q. I am wondering about injuries to the head. It is not common to have osteomyelitis in the cranium?

A. It is much more common than in the shoulder

bone. As a matter of fact there is an entire chapter on osteomyelitis of the skull.

Q. Doctor, will you refer to the paragraph that you read as to the number of days, which you called incubation period and premonitory period?

A. Just the last sentence in regard to the number of days?

10 Q. Yes.

A. In one case each it was 17 days, 21 days, 4 weeks, 5 weeks, and 3 months.

Q. In one case each?

A. Yes.

Q. Doctor, your experience has shown you that osteomyelitis generally becomes apparent within say thirty days?

A. Most commonly it occurs within a month.

20 Q. If a case involving osteomyelitis was referred to you, you would act on your own experience that you have had in treating orthopedic cases involving osteomyelitis rather than be inclined to feel that the history of the injury, which you knew occurred two months prior, was the cause of it?

A. I would take both into consideration.

Re-direct examination.

30 By Mr. Avis:

Q. Doctor, when you first examined the boy on the twenty-seventh, I understood you to say that the left shin bone was involved?

A. It was infected, and I insisted that the boy go to the hospital to have it taken care of.

(A recess was taken until one thirty o'clock P. M.)

AFTERNOON SESSION.

ELWOOD E. DOWNS, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination. 10

By Mr. Avis:

Q. Doctor Downs, you are a physician in the State of New Jersey?

A. Yes, sir.

Q. How long have you been a practicing physician?

A. 1914.

Q. Of what institution are you a graduate? 20

A. Hahnemann, Philadelphia.

Q. Do you specialize in any particular branch?

A. Roentgenology.

Q. That means the taking of X-ray pictures of the various parts of the body?

A. That is one of the divisions of it.

Q. You are connected with the Underwood Hospital in Woodbury?

A. I am.

Q. Did you take X-rays of Seymour Feingold? 30

A. I did.

Q. On what dates, Doctor?

A. January 7.

Q. 1935?

A. 1935, January 18, 1935, and the thirty-first.

Q. January 31, 1935?

A. Yes.

Q. Doctor, won't you tell me please what the X-rays showed?

10 A. In the first examination which was made on January 7, I reported no evidence of bone change or bone injury in the shoulder girdle. In the second examination there was the beginning of bone change in the acromion process of the scapula. You could see the bone was becoming tubercular. Then in the last examination, which I have here, the entire bone, practically the entire scapula, is involved in this process which absorbs lime salts.

Q. Is the scapula what is commonly called the shoulder blade?

A. Yes, sir.

20 Q. Did you show the X-rays to Doctor Moore?

A. Why, it was reported to him, put on his chart. There is a regular form for it on the report and it is placed in the chart. If it is from the outside it is sent to the doctor.

Q. What portion of the bone was involved?

A. Acromion process. That is the point which comes out of the shoulder.

Q. Is that the upper part of it?

A. Yes.

30 Q. Is that the part nearest the surface?

A. It is the process which comes around and articulates and is attached to the clavicle, which is the collar bone.

Cross-examination.

By Mr. Marshall:

Q. Did you make more than one picture on January 7 of this boy?

A. I made a stereoscopic study of the films, but having no stereoscope here I cannot do it in court. 10

Q. Did you do any more than take the pictures?

A. And reported them.

Q. Did you give any history of the case?

A. No.

Q. Simply took the picture of what you were told?

A. Yes.

Q. Were you consulted about the photographs that you took on January 7, 18, and 31 with respect to treatment? 20

A. I don't remember.

Q. Were you told at all in connection with the X-rays that you were taking that there was an alleged injury to this boy a little over two months prior to the date that the pictures were taken?

Mr. Avis: I object to that as being entirely immaterial, what somebody else may have told him.

The Court: I think that is so, Mr. Marshall. 30

Mr. Marshall: In order to save time I would like to use him as my witness.

Mr. Avis: I do not object at this time, but I don't know what the purpose is.

By Mr. Marshall:

Q. You took no pictures beyond the 31st?

A. Not that I recall. I asked for the films and that is all that was given to me, so I suppose that is all.

10 By Mr. Avis:

Q. Doctor, I understand you want to keep them in your possession?

A. I will let them here as evidence, but I would like to have them returned.

Mr. Avis: I offer them in evidence.

(The X-rays were received in evidence and
20 marked "Plaintiff's exhibit P3.")

ARTHUR J. DAVIDSON, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination.

30 By Mr. Avis:

Q. Doctor, you are a practicing physician of the State of Pennsylvania?

A. Yes.

Q. How long have you practiced in Pennsylvania?

- A. Twenty-eight years.
- Q. You are a graduate of what medical institution?
- A. Jefferson Medical College.
- Q. At the present time are you attached or connected with any hospital in Philadelphia?
- A. Yes, sir.
- Q. Which hospital? 10
- A. Jefferson Hospital.
- Q. Are you connected with any other hospitals?
- A. I am consultant in quite a few hospitals in Philadelphia and elsewhere.
- Q. Have you specialized in any particular branch of medicine, Doctor?
- A. Orthopedic surgery.
- Q. Doctor, you have with you the records of the Jefferson Hospital with relation to Seymour Feingold? 20
- A. I have.
- Q. Did you examine this young boy in the hospital?
- A. I did.
- Q. Can you say when you first saw him?
- A. I first saw him the day I operated on him, which was the 6th of March, 1935.
- Q. At that time what was his condition?
- A. He had an acute osteomyelitis of his left tibia. The boy had been admitted to the hospital two days 30 previous to this and had been studied. I was called on the 'phone by the interne the day of the sixth who told me that the child was desperately ill and that the child should be operated on immediately. I had not seen the child but my associates had

seen the child and the same decision had been made, so I told the interne—

Mr. Marshall: I object to any conversation between the doctor and the interne.

The Court: Objection sustained.

10

By Mr. Avis:

Q. Doctor, when you saw the child and operated on him, where was the operation? On his shoulder or leg?

A. Leg.

Q. At that time do you know whether or not he had some evidence of the same disease in his arm or shoulder blade?

20

A. He did.

Q. Doctor, what did you do when you operated on the boy?

A. Made a wide incision over the bone to the extent of four or five inches over the center of the leg bone. The bone was exposed, and the medullary cavity for that extent was cleaned and then packed with a vaselin dressing. No stitches were put in so the bone could heal from the bottom up.

30

Q. After the operation what was the condition of the child?

A. Seriously ill.

Q. What do you mean?

A. The child had a high temperature, fever of 102 or 103. He was a very sick child.

Q. Did you continue treating him after that time?

A. He was treated under my supervision.

Q. Doctor, how about the condition of the left shoulder blade? Did you have occasion to study **that?**

A. We studied it and had X-rays taken of it, but we felt that the leg condition was draining and the other was something to be taken care of at our leisure. 10

Q. How often would you see him after the operation?

A. Every day.

Q. Was it necessary to dress the leg or shoulder blade?

A. Yes, it was necessary to dress both.

Q. Doctor, do you know from your experience whether the child, at the time it was in the hospital, suffered any pain?

A. A great deal of pain. 20

Q. Where was that pain as you found it?

A. The pain was in the leg.

Q. You operated on no other occasion?

A. No, sir.

Q. Have you examined the child recently?

A. I have.

Q. What is his present condition.

A. The leg is healing very nicely. It is not entirely healed but is doing entirely well.

Q. What is your idea as to the future of this boy? 30

A. It is very uncertain.

Q. From your experience, I take it you have had other cases, can you tell whether the child will fully recover?

A. The child will not fully recover.

Q. Have you had any occasion to notice the movement of his left arm?

A. I have.

Q. What have you say about it?

A. There is a definite limitation of motion.

Q. Is that permanent or not?

A. Part of it will be permanent.

10 Q. In your opinion he will not regain the complete use of it?

A. No.

Q. I also notice that he walks in a peculiar fashion. Have you noticed it?

A. I have.

Q. What in your opinion causes that?

A. I believe that is due more to weakness and the operation.

20 Q. When you spoke of the marrow of the bone, do I understand that is the center of the bone?

A. Yes.

Q. So far as the shoulder blade is concerned, what have you to say as to the future treatment of it?

A. That will have to be operated.

Q. When will that have to be done?

A. Most any time.

30 Q. Is there any difference in the shoulder blade and the leg so far as treatment is concerned in its present condition?

A. The difference is merely the difference between starting the treatment.

Q. Doctor, if an operation is performed on the shoulder blade will that cure the bone?

A. I have no definite assurance.

Q. In other words he may get well or continue ill for a long time?

A. There is that possibility.

Q. Doctor, in your opinion, how long will it take before the boy is cured, if there is a cure?

A. That is difficult to say. That depends on the resistance of the individual and when the treatment is started. 10

Q. Are there any cases where the cure is not effective?

A. Oh, yes.

Q. Are there cases which take ten or fifteen years to cure?

A. I know of one case where it lay dead fifty years.

Q. So the future is indefinite, and you cannot say anything in regard to the future?

A. I could not. 20

Q. Doctor, when the boy came into the hospital was there a history taken of his case?

A. There was.

Q. Referring to your records of the hospital, what does that history disclose?

A. Discloses that there was an injury to the left shoulder.

Q. Does it say when?

A. It does not say definitely at what date.

Q. Assuming that his boy was injured on November 3, 1934, by reason of a rack or case falling on his shoulder—you heard that testimony in court? 30

A. I have.

Q. That for a period of approximately a month after that time nothing developed, after that child

became ill and on January 7, 1935, the shoulder was swollen, an X-ray taken which was negative, and another was taken on January 18, 1935, which disclosed the presence of osteomyelitis, what in your opinion was the cause of the osteomyelitis?

A. I would assume the injury.

10 Cross-examination.

By Mr. Marshall:

Q. First you would exclude possibilities in order to arrive at any injury after November 3, 1934?

A. Yes.

Q. In other words, if you were told that the boy had been injured at that time you would say that the possibility of two months would not be too long
20 for evidence of osteomyelitis not showing on the X-ray plates?

A. I don't believe I quite follow your question.

Q. Your opinion has been based on the theory that there was a definite finding of injury on November 3, 1934?

A. Yes.

Q. And that the first picture, which was taken over two months after, showed negative?

A. Yes.

30 Q. Is that not an unusual period of time between the injury and the X-ray not to show some evidence of osteomyelitis? Should it not have showed some evidence of injury or bone decomposition?

A. Cases vary. That is always a possibility.

Q. There is such a difference that it makes it rather improbable?

A. I would not say it is improbable. It makes it a little out of the average, but still there is always that possibility.

Q. If the boy had been injured on November 3, 1934, but that during the course of the month following he had played around as a normal child three years old plays—I am taking the activities of a normal healthy child which enter into his play, 10 including falls and tumbles—and that during that period of time the child sustained any injury to his shoulder, would you not take that injury as being one of the producing causes?

Mr. Avis: I object to the question because there is no evidence of another injury.

Mr. Marshall: That is important.

20

Mr. Avis: It must be based on evidence.

The Court: It must be based on previous evidence. There is no evidence of another injury.

Mr. Marshall: It may appear to be unusual to frame a hypothetical question this way, but it seems to me that the witness can answer it. I only seek to find out probabilities. That is all he has testified on.

30

The Court: Of course, the hypothetical question would have to involve all the testimony and be confined to the testimony. So far there is no evidence of an injury other than the one on November 3, 1934.

Mr. Marshall: That is quite true.

The Court: But I think possibly there would be no objection if there was an injury. I will allow the question.

Mr. Avis: Will your Honor allow me an excep-
10 tion?

The Court: Yes.

By Mr. Marshall:

Q. Do you understand the question?

A. I would not know how to answer it. I assume it would be due to the injury if they are both located in the same spot.

20 Q. Would you look for the injury?

A. Yes, sir.

Q. The period of time between the time the injury was sustained and the date of the first evidence of osteomyelitis to show up has some bearing on it?

A. You have to base it on something.

Q. Taking your normal experience in treating osteomyelitis, what time do you find that the evidence of osteomyelitis first appears after an injury?

A. Usually within thirty to sixty days.

30 Q. More likely thirty days than sixty days?

A. In most cases.

Q. Would you not as a practical proposition say that sixty days is rather an exception to the rule?

A. Yes.

Q. I understand, Doctor, that you opened the boy's left leg? You called it the tibia?

- A. The tibia.
- Q. And that is the only operation you performed on the lad?
- A. Yes.
- Q. To all appearances that has healed?
- A. It is in the process of healing.
- Q. At the present time there is nothing which you are able to say except that it will be anything other than a complete recovery, so far as his leg is concerned? 10
- A. We hope it is.
- Q. Is there anything to cause you alarm?
- A. No.
- Q. In other words the process is thoroughly satisfactory?
- A. Yes.
- Q. The improvement is progressive? 20
- A. Yes.
- Q. With the kind of treatment that the boy had in connection with the leg it is likely that the shoulder will respond as satisfactorily?
- A. We have a different proposition in dealing with the shoulder. With the leg we are dealing with a long bone, no joint is involved. In the shoulder we are dealing with a highly specialized joint which is involved.
- Q. The joint being involved makes it a little more troublesome than the long shaft of the bone? 30
- A. Yes.

Re-direct examination.

By Mr. Avis:

Q. In your opinion what percentage of osteomyelitis originates in the shoulder blade?

A. Very small.

10 Q. Have you any idea? You say very small.

A. I have no idea of the percentage I have seen of osteomyelitis cases originating in the shoulder blade. I don't believe I could count all the scapula cases that I have seen.

Re-cross examination.

By Mr. Marshall:

20 Q. They are unusual cases of osteomyelitis?

A. Yes.

Q. Can you tell us when you last saw one?

A. I could not.

Q. So far back that you can't remember?

A. Yes.

Q. Tell me this, Doctor, is the presence of osteomyelitis more prevalent in children than in adults?

A. Yes.

Q. How do you account for that?

30 A. Because the bone is in a more pregnable condition. In other words, the bone is not as highly organized in children as in adults. Osteomyelitis is a disease of the bone marrow and the infection is probably in the body at some time or other. In fact, it is always in the blood. It is localized by an injury.

Q. You mean the bacteria?

A. It is in the system to begin with.

Q. All it needs ——

A. Some exciting cause to give it a start.

Q. Is it true, Doctor, that osteomyelitis is more prevalent in boys than girls?

A. It is.

Q. For what reason is that?

10

A. Because boys are more prone to injury.

Q. By that do you mean that they are more apt to get hard knocks in rough and tumble play?

A. I do.

By Mr. Avis:

Q. Doctor, the fact that the first X-ray showed negative, does that have any significance to you?

A. Not at all.

20

Q. Why is that, Doctor?

A. Because the amount of bone destruction in order to show on an X-ray must be quite extensive.

In other words, you must have bone destruction before it shows in the X-ray.

GUSTAV SCHOETTLE, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination.

10 By Mr. Avis:

Q. Mr. Schoettle, where do you live?

A. Colonial Manor.

Q. What is the address?

A. 1301 Lincoln Avenue.

Q. Do you know Mr. and Mrs. Feingold?

A. Yes, sir.

Q. Directing your attention to the 3rd day of November, 1934, did you have occasion to be near
20 Kresge's five and ten cent store?

A. Yes, sir.

Q. Where were you?

A. Outside at the curb.

Q. At the curb?

A. Yes.

Q. Where were you with relation to the front of the store?

A. About, I should judge, facing the store door,
30 north door.

Q. Facing the north door?

A. Yes.

Q. What happened?

A. I was talking to a man there in a car.

Q. Who was he?

A. Pike. While we were discussing something I heard a crash. I didn't know where it came from.

Q. What kind of crash was it?

A. Sounded like glass falling. After talking a while I went into the store.

Q. Why did you go into the store?

A. I always go in. When I was in I saw a basket of glassware and pictures, and I seen a crowd around, and I seen Mrs. Feingold and the boy. 10

Q. At that time did you see any rack?

A. The rack was standing up at that time.

Q. What kind of looking thing was it?

Mr. Marshall: I object to that. It is a rack.

The Court: I suppose a rack is a thing.

A. In my mind it is about six foot high and five foot wide. 20

Q. Were there any shelves in it?

A. I don't know.

Q. What color was it?

A. Sort of red color.

Q. Did you stay there?

A. No, we came out again.

Q. Where you say you saw glass what else did you see?

A. There was a basket. It was all piled in the basket. 30

Q. Where was that?

A. Right inside the door, south door.

Q. Was that in the aisle or off the aisle?

A. Off against the window.

Q. Was it open to people or close if people came in the store?

A. Closed off.

Cross-examination.

By Mr. Marshall:

10

Q. When you came into the store, Mr. Schoettle, that was after you heard the noise of falling glass and after you heard the falling glass you say you stood at the curb and finished your conversation with the man you were engaged in conversation, and after you finished that you walked into the store because you were intending to purchase something?

A. It is also customary to go into the store.

20

Q. In other words you went into the store because you were going to make a purchase rather than because you heard the falling glass?

A. I always go in. Sometimes I go in there three and four times a week.

Q. You didn't go in there because of the falling glass?

A. No.

Q. How long after you heard the falling glass?

A. I was in there five minutes.

30

Q. How long was it before you decided to go into the store?

A. Ten minutes.

Q. You stayed outside talking ten minutes after you heard the noise before you went into the store?

A. Yes.

Q. When you went into the store did you see the boy?

A. With the mother.

Q. Did you see any marks or bruises?

A. I didn't notice them?

Q. You didn't see them?

A. No.

Q. Did the boy cry? 10

A. I didn't hear that.

Q. Did he have the appearance that anything was wrong with him?

A. Not that I know of.

Q. Did you know Mr. and Mrs. Feingold and the boy before?

A. Yes.

Q. When you saw them in the store where were they? In the front or back?

A. In the front of the store. 20

Q. The rack that you saw was six feet high and probably five feet in width but you can't recall whether there were shelves on it?

A. No.

Q. Do I understand that you frequent the store three or four days a week? Had you seen this rack before?

A. I never paid any attention to it.

Q. At the time you saw that rack that afternoon or after this noise that you heard, was the rack 30 on the floor or was it standing up?

A. Standing up about five feet from the wall.

Q. And the pictures were off the rack?

A. A lot in the basket.

Q. Were all the pictures off the rack?

A. That I didn't notice.

Q. There were pictures in the basket?

A. There was a basket with three or four dozen pictures.

Re-direct examination.

10 By Mr. Avis:

Q. You say you were standing near the north door?

A. Yes.

Q. When you went into the store, where did you find this rack and glass frames?

A. The basket and frames were right around the corner as you came in.

Q. North or south door?

20 A. South door.

Q. How far from where you were standing?

A. Probably twenty-five feet.

Re-cross examination.

By Mr. Marshall:

Q. The basket in which the pictures were being collected was near the south door?

30 A. What is that?

Q. The basket in which the pictures were being collected was near the south door?

A. Yes.

Q. Were all the pictures and frames off the floor?

Gustav Schoettle—Re-cross

- A. That is all I saw what was in the basket.
Q. Did you see Mr. Sharon there?
A. I don't remember.
Q. Did you see Mr. Hutchin?
A. I don't know him.
Q. Did you see the rack moved while you were there?
A. I didn't see it. 10
Q. The rack when you got there was practically in the way when you came in the south door?
A. It was five feet away from the wall.
Q. Was it in the aisle?
A. That I can't recall.
Q. Did you ever see it in that place before?
A. I went right out of the door.
Q. Previously did you see that rack in that position before?
A. No. 20
Q. It wasn't in the customary place?
A. Yes.
Q. It was in a different place than you ever saw it before?
A. After they picked it up.

GEORGE HUMES, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination.

10 By Mr. Avis:

Q. Mr. Humes, where do you live?

A. Colonial Manor.

Q. Do you know Mr. and Mrs. Feingold?

A. Yes.

Q. On November 3, 1934, were you in the vicinity of the Kresge store?

A. Why, I was about thirteen feet away from the north entrance of the door.

20 Q. On the sidewalk?

A. On the sidewalk toward the curb.

Q. Did you hear anything?

A. Heard a crash.

Q. What kind of noise?

A. Pretty loud crash, something like broken frames and glass.

Q. What did you do?

A. I ran in to see what was the matter.

Q. What did you see?

30 A. I seen them picking up a lot of glass and picture frames and putting them in a basket.

Q. Did you see Mrs. Feingold.

A. I seen Mrs. Feingold have hold of her son.

Q. She had hold of him? He was by her?

A. Yes.

- Q. Did you see this rack?
A. Yes, I seen the rack.
Q. Where was it?
A. Right close to the door when I seen it.
Q. Was it standing up or how was it?
A. Standing up.
Q. Any pictures on it?
A. Not that I noticed. They were all over the 10 floor.
Q. Where was it standing? Was it in the aisle or out of the aisle?
A. I don't recall exactly. I know it was standing up.

Cross-examination.

By Mr. Marshall:

- Q. You came in promptly, Mr. Humes? 20
A. Yes, pretty promptly I was in there.
Q. Were you talking to Mr. Schoettle?
A. I wasn't talking to him.
Q. Did you and Mr. Schoettle go in together?
A. About the same time.
Q. Did you go to the same counter in the store?
A. I didn't buy anything myself, personally.
Q. You went in and looked around?
A. Like anybody else when you hear a crash. 30
Q. The boy was with his mother?
A. Yes.
Q. Did you see any marks or bruises on the boy?
A. None at all.

Q. Did you hear the boy or mother make any complaint while you were there?

A. No.

Q. Was a basket being filled or was it then filled?

A. There was a lot of stuff in it. I couldn't say whether it was filled.

Q. Were there any frames or pictures still on the
10 floor?

A. I didn't see.

Q. But the frames were on the rack?

A. I didn't see any frames.

Q. You didn't see the frames or the rack?

A. The rack was standing up.

Q. How big was the rack?

A. It was about six feet high and five feet wide.

Q. That was standing on a heavy bottom base?

A. I didn't examine it at all.

20 Q. Had you been in the store before?

A. Been in many times.

Q. Had you ever noticed this rack before?

A. No.

Q. Had you been accustomed to go out this same door, south door?

A. No, sometimes came out the north door.

Q. You never saw this rack before in that same position that you saw it that afternoon?

A. I never saw it before.

30 Q. Had you gone in and out of that south door before?

A. I might have. I generally go in the north door. I come down Broadway and go in the nearest door.

EDWARD BOTHNER, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. Avis:

10

Q. Edward, where do you live?

A. Woodbury Heights.

Q. How long have you lived there?

A. About fifteen years.

Q. On November 3, 1934, were you in Woodbury?

A. I was.

Q. Were you in the neighborhood of the Kresge store?

A. Yes, sir.

20

Q. Whereabouts were you?

A. In the doorway on the sidewalk.

Q. Were you on the sidewalk or in the store?

A. On the sidewalk.

Q. What did you hear, if anything?

A. I heard the crash.

Q. What did you do then?

A. I turned around to see what it was all about.

Q. What did you see?

A. I saw this rack on the floor.

30

Q. Did you see Mrs. Feingold?

A. I didn't know her at that time.

Q. Did you see the boy?

A. I seen a lady pick a boy up but I don't know whether it was the mother.

Q. This rack was where?

A. On the floor.

Q. What, if anything, was around it?

A. Picture frames of some kind.

Q. Had you seen this rack before the accident or hadn't you noticed it?

A. It was in the store.

10 Q. Where was it located in the store?

A. I think it was the corner, west, near the candy counter.

Q. It was in such a position that it was open to the public? In other words, if a person came into the store to buy, was there anything to stop him from going up to this rack?

A. No, sir.

Cross-examination.

20

By Mr. Marshall:

Q. There is nothing to keep you from walking to any counter, is there?

A. No.

Q. The merchandize is on display on counters in the store as well as on racks?

A. Yes.

30 Q. Now, the position of this rack, you had seen it before, had you not?

A. Yes, sir.

Q. And the rack was sufficiently back from the door that anyone coming in and going out would pass it without striking the rack?

A. Yes.

Florence Batten—Direct

Q. And it was back, as you allege, in the corner between the wall facing the street and the end of the candy counter?

A. Yes, sir.

Q. In other words, it was in such a position that unless a person would go up to the rack and inspect it or purchase a picture he would walk right by it and go out? 10

A. Yes.

FLORENCE BATTEN, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. Avis: 20

Q. Where do you live, Miss Batten?

A. North Woodbury.

Q. What is the street address?

A. 36 Hessin Avenue.

Q. On the 3rd of November, 1934, were you employed by the S. S. Kresge Company?

A. I was.

Q. Where did you work?

A. At the candy counter. 30

Q. That is, in the store in Woodbury?

A. Yes.

Q. Did you know Mrs. Feingold?

A. Yes.

Q. You had seen her in the Kresge store?

A. As a customer.

Q. On that day do you remember seeing her?

A. I waited on her.

Q. Who was with her, if any one?

A. Well, I didn't take notice of anyone being with her.

10 Q. Do you know whether or not she had a child with her?

A. She didn't show any attention to the child.

Q. I didn't ask you that. I asked you if she had the child with her?

A. She did.

Q. What did she do that you saw after she came into the store?

A. She came up to the counter and she purchased some candy, which I waited on her, and then suddenly I heard the crash.

20 Q. You suddenly heard a crash. Did you look in the direction from which the crash came?

A. Yes.

Q. What did you see?

A. I had to go to the other end of the counter to see. The picture framerack had fallen and I saw the boy's head and shoulder through the back of the rack.

Q. Could you tell what part of the rack was resting on the child?

30 A. No.

Q. Did you at any time see whether the rack was resting on the child's shoulder?

A. It wasn't

Q. Are you still working for the S. S. Kresge Company?

A. Yes.

Q. Did the boy's head stick through the shelves?

A. Head and shoulder.

Q. Did you see what happened to the rack after that time?

A. I don't take particular notice of it because I was so excited at the time.

Q. Don't you know what happened to the rack 10 after that time?

A. It was picked up. I know that Mr. Sharon, our manager, and Mr. Hutchins, assistant manager, came and picked up the rack.

Q. What did they do with it?

A. They stood it up and took it downstairs.

Q. Took it down to the cellar, is that right?

A. Yes.

Q. Do you remember signing a statement as to how the accident occurred? 20

A. Yes.

Q. Do you remember Mr. Sahl talking to you?

A. Yes.

Q. This is the statement that you signed at that time?

(Mr. Avis handed the witness a paper.)

A. Yes.

Q. Do you remember saying, speaking about the 30 rack, "It had been leaning back against the corner and the boy's head was sticking through it"? Do you remember saying that? Isn't that what you told Mr. Sahl?

A. I don't remember.

Q. Who is the manager of the store?

A. Mr. Sharon.

Q. Is he the gentleman sitting there? (Indicating).

A. Yes.

Q. What did he tell you about this case.

10 Mr. Marshall: I object to the question.

Mr. Avis: I have a statement made by this witness in which she says something entirely different to what she says now.

Mr. Marshall: You read the statement.

The witness: That is what I told Mr. Sahl.

20 Mr. Avis: She does not say that the head and shoulder was sticking through.

The Court: The head and shoulder was sticking through. That is what she testified to.

Mr. Marshall: I submit that counsel has no right to cross-examine his own witness.

30 The Court: Unless he declares her a hostile witness, and that would be to neutralize her testimony.

By Mr. Avis:

Q. Are you still working for the Kresge Company?

A. I am, yes.

Cross-examination.

By Mr. Marshall:

Q. The statement that has been shown to you by counsel was written by whom?

A. It was written by Mr. Sahl.

Q. It was not written by you at all? 10

A. No.

Q. Were there any portions in the statement that you insisted he strike out before you signed it?

A. Yes.

Q. When Mr. Sahl came to see you, did you know that Mr. Sahl was an attorney?

A. He explained that when he came down.

Q. That he was an attorney?

A. If I can remember him, he said he came to ———
I don't remember. 20

Q. Do you recall whether he told you that he was an attorney?

A. No, I don't recall.

Q. Did you tell him that you were employed at that time by the Kresge store?

A. Yes.

Q. Did you talk with him because you felt that you were obliged to talk to him?

A. I did.

Q. When you were working in the store that day, 30
Miss Batten, the counter that you were working at was the candy counter?

A. Yes.

Q. Did you see the little boy when Mrs. Feingold came into the store with him?

A. I didn't notice the boy until after the accident.

Q. When you were waiting on Mrs. Feingold, she was then at the candy counter?

A. Yes.

Q. How far would you say that the candy counter was, where you were standing and waiting on Mrs. Feingold from the rack?

10 A. From ten to fifteen feet.

Q. Between you and the aisle, of course, in front of you, stretching entirely to your left was your counter, wasn't it?

A., Yes.

Q. While you were waiting on this lady at this point, the boy wasn't with her?

A. I didn't notice him.

Q. How long had that rack been standing in that same position, as near as you can recall.

20 A. As long as I had been there.

Q. As near as you can recall, how long had the rack, which was holding the picture frames, been standing in that corner between the doorway and candy counter?

A. I would say —

Q. Maybe I can help you. How long had you been working there before this alleged accident?

A. I had been working there since August.

Q. That is August, 1934?

30 A. Yes.

Q. And the accident occurred in November, 1934?

A. Yes.

Q. Do you remember whether the rack was there when you started working at the Kresge store?

A. I don't think it was.

Q. You don't think it was, but you can't remember how long it was there?

A. I would say a month and a half.

Q. Did you wait on the picture rack at any time?

A. Yes.

Q. You had served customers from that?

A. Yes.

Q. Will you describe how the pictures were on the rack, if you know? 10

A. Yes, we kept the larger picture frames at the bottom, and as it went up the smaller pictures were on the top. The frames on the top were really small frames.

Q. How high would you say the last rack was from the floor?

The Court: Maybe you can show us with your hands with respect to the arm of the chair? 20

A. (The witness indicated with her hands the distance.)

Mr. Marshall: She indicates a distance of fifteen or eighteen inches.

By Mr. Marshall:

Q. You think fifteen or eighteen inches was the distance between the floor and the bottom of the last rack? 30

A. Yes.

Q. When you heard the noise and you went over to the front of your counter, did you go outside of the aisle?

A. No, I went to the left end.

Q. When you got there was the little boy standing up or sitting down?

A. All I could see was the top of his shoulder and head.

Q. Could you tell us what part of the rack or between what shelves he was protruding through?

10 A. Around the third.

Q. Around the third shelf?

A. Yes.

Re-direct examination.

By Mr. Avis:

Q. As you stand back of the counter, how high is the counter? As I understand it, you stand back
20 of the counter?

A. Yes.

Q. How high is the counter? Is it up to here (indicating) up to your wrist?

A. It is about to here (indicating).

Q. That is above your wrist?

A. Yes.

Q. Did you notice Mrs. Feingold before she came to the candy counter? Did you see her walk across the store?

30 A. No.

Q. The first you saw her was that she was buying something?

A. Yes.

Q. If the child had been standing alongside of her, would you have seen him?

*Florence Batten—Re-cross
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A. My counter is glass. I could see.

Q. Do you make a practice of looking?

A. I do.

Re-cross examination.

By Mr. Marshall:

10

Q. Do you recall that day that the boy wasn't there with his mother?

A. I didn't see the boy.

Q. Did you see the boy at all that day before you heard the crash?

A. No.

Q. You are not able to tell us what the boy was doing before you heard the crash?

A. I didn't see the boy until after the crash. 20

Mr. Avis: Mr. Marshall has agreed that the bill for \$273 and \$29 may be admitted in evidence.

(The bills referred to were received in evidence and marked "Plaintiff's exhibits P3 and P4.")

Mr. Avis: We rest.

(The plaintiff rested.)

30

Mr. Marshall: If the Court please, I move for a non-suit in this case upon the ground that no negligence has been shown by the plaintiff, and that he has failed to show a violation of any duty which we

owed to the plaintiff, and on the further ground that he has failed to show anything more in this case than that an accident happened, which I contend is not sufficient.

The Court: I shall deny the motion.

10 Mr. Marshall: Will your Honor grant me an exception?

The Court: Yes.

OTTO F. SHARON, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

20 Direct examination.

By Mr. Marshall:

Q. Mr. Sharon, where do you live?

A. 111 Jackson Street, Woodbury, New Jersey.

Q. How long have you resided there?

A. Since December, 1930.

Q. During the time that you have lived in Woodbury, where have you been employed?

30 A. As manager of Kresge Company's store, 66 South Broad Street.

Q. Were you such manager of the store of S. S. Kresge on November 3, 1934?

A. Yes, sir.

Q. Were you actually in attendance at the store on that day?

A. Yes, sir.

Q. Who on that date was your assistant superintendent?

A. Mr. Hutchins.

Q. He has terminated his employ here and is now working for the same company in one of the New York stores?

A. Yes, he has been transferred to Brooklyn. 10

Q. You remember the happening of an accident in the store on November 3, 1934?

A. Yes, sir.

Q. Did you prior to that date know Mr. and Mrs. Feingold?

A. No, sir.

Q. Did you see Mrs. Feingold or the boy, Seymour Feingold, on that day?

A. Not until after the accident.

Q. What was there that first attracted your attention to the accident? 20

A. I was working in the back end of the store when I heard a crash, glass breaking, and I immediately rushed to the front end where the noise originated, and I noticed the rack of pictures was on the floor with pictures all over the floor.

Q. Did you see the young boy there, Seymour Feingold?

A. Mr. Hutchins had arrived there before I did, and the boy was out of the rack by the time I got there. 30

Q. Now, with respect to this rack, Mr. Sharon, who made the rack?

A. I and my stock-man, Mr. Schroeder.

Q. How long has Mr. Schroeder been with the company?

A. It will be two years next month.

Q. How long before the happening of this accident was the rack built?

A. I believe we built it in August. We had a rack previous to this that was unsteady, it was too clumsy to be servicable, so we built this rack in question along in August. I am not positive of the date.

10 Q. The rack that you built with Mr. Schroeder, for what purpose was it used?

A. To display pictures.

Q. From the time the rack was completed and you commenced using it, was it continuously used up to the time of this accident or had you prior to that day ceased using it?

A. No, it had been used continuously from the time we built it.

20 Q. After you completed it and brought it upstairs, where did you place the rack?

A. As I recall it, when we first used it it was in the back end of the store next to the office. It wasn't a saleable fixture, it wasn't producing results, so I moved it to the front end of the store next to the candy counter. There is a space four feet deep and five feet wide between the end of the candy case and number one window.

30 Q. After you placed the rack, can you tell us how long the rack had been placed in that position before November 3, 1934?

A. I would say about the middle of September.

Q. From the middle of September?

A. Right.

Q. From that time on until the time of the accident that was the position of the rack?

A. Yes.

Q. From the position of the rack, was it or was it not placed in such a position that it would be struck or collided with by patrons going in and out of the door?

A. Customers could not possibly hit it coming in or out. It was at an angle, possibly like this (indicating). One side was at the back end, if you get what I mean, and one side was at the back end of the candy case, and the other end was at the door at an angle. 10

Q. Did that close up the opening to the candy counter on the street end of the counter?

Q. Yes, you couldn't get through. There was a fire extinguisher which was against the wall that effectively blocked off the entrance.

Q. On this rack you displayed pictures and picture frames? 20

A. Yes, sir.

Q. Will you tell us of what you constructed the base or bottom of this case.

A. I believe it was one by ten lumber, white pine, with two two by four side uprights in order to give it a heavy base, to be solid and durable. On the side I had a frame one by ten, and I believe there were five shelves of ply wood to lay pictures on. That was put on with corner braces in such a way to have the top of the pictures to the back, if you get what I mean. 30

Q. For what reason did you do that?

A. In order to have the wood going backward instead of forward.

Q. How high was it?

A. I think it was seventy-two inches high.

Q. Did you tell us how many shelves it had?

A. I think there were five shelves.

Q. Can you tell us your recollection of the distance between the shelves?

A. The bottom shelf where the base is was about five inches from the floor and the shelf sloped up
10 toward the back, and the shelves between them were around fourteen inches. I have forgotten the exact measurements.

Q. On these shelves that you placed pictures and picture frames, were they all the same size?

A. We tried to —

Mr. Avis: I think we ought to limit it to this particular day, if he knows.

20 The Witness: As I recall it —

Mr. Avis: I think he ought to say, if he knows.

By the Court:

Q. Do you know on that particular day?

A. I know the different sized pictures on the shelf from experience, and having asked the girl to fill it every day.

30

By Mr. Marshall:

Q. On this particular day — I first asked you whether they were all the same sized pictures on the shelves?

A. No.

Q. What pictures were placed on the bottom of the shelves?

A. The larger pictures, twelve by sixteen, which we call a special picture. They were the twenty-five cent size. The next shelf had the twenty cent pictures, which usually run eight by ten. The fifteen cent pictures were on the third shelf, and the ten cent pictures on the two top shelves. The top shelves were to take care of the miniature pictures. They are two by three and three by four. 10

Q. Were the sides of this rack perfectly perpendicular?

A. Yes.

Q. What made the bottom shelves larger than the top?

A. I cut it about six inches wide and put it at an angle so the customers would not have to climb up to see the top shelf. 20

Q. Had that shelf or rack been in constant use from some time in September?

A. Yes.

Q. When it was placed in this position?

A. Yes.

Q. Between that time and November third had it ever fallen down?

A. No, never had any trouble with it at all.

Q. Placing it on the floor, can you tell us what the condition of the floor was where the base of this rack rested? 30

A. It was perfectly level when I put it there. I tried to ascertain whether it was solid.

Q. Who had charge of the candy counter?

A. Miss Betten.

Q. On the same day you had in your employ a Miss Herman?

A. Yes, sir.

Q. What counter was she employed at?

A. Second girl on the fountain counter.

Q. On the same side?

10 A. On the same side with the candy counter further back in the store.

Q. When you came out from the back of the store after hearing the crash, the little boy was off the floor?

A. Yes, at the time I got there.

Q. Where was the boy and the mother?

A. As I recall it, the mother wasn't with the boy at the time I got there. Mr. Hutchins was talking to the boy, brushing him off when I got there.

20 Q. Did you see anything of Mrs. Feingold?

A. Not other than to get her name and address when the rack was picked up from the floor.

Q. Did she have anything to say as to what happened?

A. She said she didn't think the boy was hurt. When I got there I picked the boy off the floor as he was just whimpering a little as if from fright.

30 Mr. Avis: I move to strike out "as if from fright."

The Court: Yes.

A. (Continuing) I carried him over to the candy counter with the idea of appeasing him. I gave him a Hershey bar. I put him on the floor and I asked

him if he was cut, and he shook his head, and then he ran over to his mother.

By Mr. Marshall:

Q. What time of the day did this happen?

A. Right after lunch in the afternoon, if I recall right. I am positive on that. 10

Q. The rack that had been used there fell to the floor. You didn't see what caused it to fall?

A. No.

Q. In the falling of that rack all the pictures and picture frames fell from the rack?

A. Yes.

Q. What did you do with that rack?

A. After we picked it off the floor I told Mr. —

Mr. Avis: No, not what you told somebody. 20

By Mr. Marshall:

Q. Just what you did.

A. I insisted that the rack be taken off the sales floor.

Q. Why?

A. Because I felt that after such a crash as that it possibly would not be safe to use in the future until I had a chance to look it over. 30

Q. You are still superintendent of the store?

A. Manager.

Q. And this young lady that I have referred to, Miss Herman?

A. She is still at the store. She works on Saturday.

A. After the rack had been straightened out and placed back on its base again, after having fallen, was it then in the same position that it had stood before it fell?

A. I could not say as to that positively. It was back in the recess. It wasn't sticking out in the aisle, but I can't say it was in exactly the same position back in the recess.

Q. What would you say, Mr. Sharon, that this base, and set of shelves weighed?

A. I would say between twenty-five and thirty pounds. Not over that.

Q. Are you a carpenter?

A. Well, an amateur carpenter. In our training we are forced to do this and that in carpentering work.

Q. Is it part of your work as superintendent to do what was done in this case, build racks?

A. If necessary, yes.

Cross-examination.

By Mr. Avis:

Q. Mr. Sharon, was this rack ever used afterward in your store?

A. No, sir.

Q. Are there any other racks in your store today that are the same kind?

A. Yes, we have a picture rack.

Q. Did you make it?

A. No, sir.

Q. Who made it?

A. Made by the Moore Lumber Company.

Q. Is that rack fastened to the wall?

A. No.

Q. Where is it located?

A. In back of the store, back of the office. That is the only place large enough to accommodate that size rack.

Q. How big is that rack?

10

A. That is about six feet high, six feet wide, and ten inches deep on the bottom, sloping to five inches at the top, if you get what I mean. It has a back on it and the shelves are straight.

Q. It is straight?

A. The sides of it where it goes out from the wall curve like this (indicating). Do you see what I mean?

Q. No.

A. It is about this wide (indicating) at the bottom, and each side of it curves like that (indicating) and the shelves on the top are only five inches.

20

Q. Five inches wide?

A. Yes.

Q. As they go down they get wider?

A. About ten.

Q. What about the side boards?

A. The side boards were the same.

Q. What about the base?

A. One by ten, full board one by ten with two two by fours.

30

Q. You say the whole thing only weighed from twenty to twenty-five pounds?

A. I would say about that. I never weighed it.

Q. How much did the pictures and picture frames weigh?

A. That would be hard for me to say. I would assume about the same weight. Around thirty or thirty-five pounds. Not the picture frames, the two together.

Q. Was this rack fastened in any way to the wall?

A. No.

Q. You say the floor was perfectly level at that
10 time?

A. Yes.

Q. How often is the floor swept?

A. Two or three times a day.

Q. How about the night time?

A. Yes, sir.

Q. Who does that?

A. Mr. Schoeder.

Q. At that time was it necessary to move the
rack?

20 A. No, sir.

Q. Never moved?

A. There was nothing in back of it. Possibly once every two weeks it was moved to get into the window.

Q. On this particular day you didn't take any particular notice of this rack until after it fell?

A. Not particularly, except to make my daily inspection.

Q. You don't want the jury to think you know
30 what pictures were on that rack?

Mr. Marshall: I object.

By Mr. Avis:

Q. Do you know of your own knowledge where the pictures were on that rack on that particular day?

- A. I would say yes.
- Q. How do you know?
- A. That is one of my daily jobs, to see if the displays are filled.
- Q. Can you say that you inspected that rack and know what pictures were in it?
- A. Not by title.
- Q. What about the size? 10
- A. Yes, I could tell what size.
- Q. How many pictures were on the first shelf?
- A. I would say there were nine.
- Q. How many on the top shelf?
- A. There were possibly —
- Q. Not possibly. How many were there?
- A. I don't know every item. I would say there were at least three dozen on the top shelf.
- Q. This rack, I understand from you, was very secure? 20
- A. Yes.
- Q. If I walked over to it and pulled it like this (indicating) would it fall?
- A. I don't think so.
- Q. If it did, you would not think it was safe?
- A. No.
- Q. If a very young child pulled on it?
- A. It all depends upon how far he got on the rack.
- Q. You know that children come in the store? 30
- A. Yes.
- Q. All ages?
- A. Yes.
- Q. As a matter of fact, it is difficult to keep the children out of the store?

- A. Yes, sir.
- Q. This rack stood open to the public?
- A. No.
- Q. Was not fastened to the bottom?
- A. No.
- Q. Was not fastened to the side?
- A. No.
- 10 Q. Was not fastened to the back?
- A. No.
- Q. Just a home made rack that you stood there?
- A. Yes.
- Q. As I understand it, from the street you first come to this picture rack?
- A. Yes.
- Q. Then you come to the candy counter?
- A. Yes.
- Q. Then the soda fountain?
- 20 A. Yes.
- Q. From the nearest side of the fountain to the side nearest to the picture rack, how far was that?
- A. That was possibly twenty feet, I think it is.
- Q. That is the nearest portion of the fountain to the rack?
- A. Yes, sir.
- Q. A person standing back of the fountain, can he see the whole rack from the floor?
- A. I doubt if they can see it at all. We have the
- 30 root-beer barrel on the corner of the fountain.

Re-direct examination.

By Mr. Marshall:

Q. I presume on the various counters you have merchandise of all kinds on display?

A. Yes, sir.

Q. You don't have your merchandise nailed down? 10

A. No, sir.

Q. Did you have any reason for not nailing this case to the floor?

A. For not nailing it?

Q. Yes.

A. Only the necessity of moving it once every two weeks in order to trim that window.

Q. Were you of the opinion that it did not need nailing to the floor to make it more safe?

20

Mr. Avis: I object to that.

The Court: The objection is sustained.

Re-cross examination.

By Mr. Avis:

Q. These other counters, as I understand it, where your merchandise is displayed are about how high. 30

A. They are twenty-five and a half inches.

Q. They stand about the height of this table?

A. Thirty-one inches above the floor.

ALBERT HUTCHINS, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct examination.

10 By Mr. Marshall:

Q. Mr. Hutchins, you are at the present time employed by S. S. Kresge?

A. Yes.

Q. Where?

A. 2125 86th Street, Brooklyn, New York.

Q. Were you employed as assistant manager in Woodbury on November 3, 1934?

A. Yes, sir.

20 Q. Do you recall the happening of an accident in the store on that day?

A. Yes, sir.

Q. Prior to that date did you know Mr. and Mrs. Feingold or their boy Seymour Feingold?

A. No, sir.

Q. Do you recall having seen them in the store that day?

A. No, I do not.

30 Q. Do you remember seeing them in the store after the accident?

A. Yes, I do.

Q. What was there that first attracted your attention to the happening of an accident?

A. The noise of the pictures falling on the floor.

Q. Where were you at the time?

A. I was about in the center of the floor.

Q. When you heard the noise was there anything that you were able to see?

A. No, sir.

Q. Prior to having heard this noise did you have on display in the store picture frames and small pictures?

A. Yes, sir. 10

Q. Upon what were they placed?

A. Why, they were placed upon a rack made for the purpose.

Q. You were there while that rack was being used?

A. Yes, sir.

Q. Were you superintendent during the summer months of 1934?

A. Yes, sir.

Q. Do you remember when it was built?

A. Sometime in August. I couldn't give the exact 20 date.

Q. From the time it was built until November, 1934, do you know whether it was in constant use in the store?

A. Yes.

Q. Had it ever fallen down?

A. Not to my knowledge.

Q. You had been constantly employed there as assistant manager?

A. Yes, sir. 30

Q. Do you know how many shelves this rack had?

A. I should say five. I couldn't say exactly.

Q. You did not help to build it?

A. No, sir.

Q. Do you know what type of picture or picture

frames were placed on the different shelves of the rack?

A. Yes, sir.

Q. What pictures were placed on the rack?

A. Mostly wall pictures, twelve by sixteen. They are the large size picture.

Q. Is that your large size picture?

10 A. That is the largest picture we carry.

Q. Twelve by sixteen?

A. Yes.

Q. Are you able to tell us the distance between the shelves?

A. Well, I should say approximately fourteen inches.

Q. Do you know, with respect to the construction of those shelves, which way they were tilted?

20 A. Yes. They were tilted at an angle toward the rear of the rack.

Q. On the day in question, November 3, 1934, do you know where that rack was placed?

A. It was placed in the store near the south door.

Q. Do you know how long the rack had stood in the same position?

A. I should say at least three months or so.

Q. And the merchandise that you described, pictures and picture frames, had been on display during that entire time?

30 A. Yes, sir.

Q. Was the rack placed in such a manner so as to be free from being struck by patrons going in and out of the store?

A. Yes, there was no way of hitting it coming into the store.

Albert Hutchins—Direct

Q. You didn't see Mrs. Feingold before the crash?

A. No.

Q. After you heard the noise did you go over toward the front of the store?

A. Yes, sir, I went over there as quick as I could.

Q. What would be your opinion of the weight of the rack exclusive of the pictures?

A. Around thirty or thirty-five pounds. It wasn't 10 a heavy rack by any means.

Q. Do you know what the base of this rack was?

A. Two by four.

Q. Do you know the distance from the floor to the first shelf?

A. Yes, approximately four or five inches.

Q. What was there, if anything, to prevent the pictures from sliding off?

A. In front of each shelf there was thin ply wood, probably three inches wide, that was right across the front that kept the pictures from sliding out. 20

Q. When you heard this noise and went up to the front of the store, what did you see?

A. When I got up there, the boy was standing right in the center of the rack. He appeared to be standing. When I saw him you could see from practically here (indicating).

Q. Indicating the waist.

A. The waist was visible above the rack.

Q. You did not see the rack as it was falling? 30

A. No, sir.

Q. You were not in a position to locate what, if anything, caused the rack to fall?

A. No, sir.

Q. On that particular day, did you know Miss Herman?

A. Yes, sir, she was working at the store.

Q. Did you see her that day?

A. Yes, sir.

Q. Was she on duty that day?

A. Yes.

Q. Did you see her on the day of the accident or immediately after?

10 A. Immediately afterward.

Cross-examination.

By Mr. Avis:

Q. Did you see her before the accident?

A. Why, certainly. She reported for work before the accident.

Q. That was the only time you saw her that morn-
20 ing?

A. That was in the afternoon.

Q. What time was it when you saw her?

A. I couldn't say exactly. She generally came in around one o'clock.

Q. After one o'clock up to the time of the accident, did you observe what she was going?

A. I know just previous she had gone downstairs to get some ice-cream for the counter.

Q. Did you see her coming up with the ice-cream?

30 A. No, I did not.

Q. How long was that before the accident that she went down for ice-cream?

A. Perhaps three minutes.

Q. Where is the stairway located?

A. On the opposite side of the store.

Albert Hutchins—Cross

- Q. Near the front or back?
 A. Near the front.
 Q. Near the north side?
 A. Near the north center.
 Q. When you come upstairs are you facing toward the south?
 A. You are facing the other door.
 Q. How many picture racks have you made or help 10
 make for S. S. Kresge?
 A. I never have made a picture rack.
 Q. How many did you help make?
 A. None.
 Q. Didn't you help Mr. Sharon?
 A. No, sir.
 Q. You are not the man that helped make it?
 A. No, sir.
 Q. Have you ever seen any other racks?
 A. Just this one. 20
 Q. When did you leave Woodbury?
 A. February.
 Q. From the time of the accident up to February
 had you ever seen that rack?
 A. I had seen it in the store, but not in use.
 Q. Down in the cellar?
 A. Yes.
 Q. Where was it?
 A. Down in the basement.
 Q. On this particular day of the accident do you 30
 know what particular pictures were on the rack?
 A. Yes.
 Q. Are you positive?
 A. Yes.
 Q. I suppose you could give the exact number?

- A. No.
- Q. Could you tell me how many were on the bottom rack?
- A. I couldn't tell you.
- Q. How many were there according to your best judgment?
- A. I should judge ten or twelve large sized pictures.
- 10 Q. Taking a picture twelve by sixteen, how much does it weigh?
- A. I don't know. Probably a pound and a half.
- Q. How much do you say all the pictures on that rack weighed?
- A. That I could not give you an estimate on.
- Q. What is that?
- A. I couldn't tell.
- Q. Could you tell me how much the rack accom-
- 20 modated?
- A. The pictures weren't all the same size.
- Q. You know what was there?
- A. I knew what type of pictures were there.
- Q. I understand this rack weighed thirty-five pounds, and was six feet high. How many shelves were in the rack?
- A. Approximately five.
- Q. You said it was perfectly safe to put all these pictures on?
- 30 A. The way they were put on.
- Q. The base fitted to the floor?
- A. Yes, sir.
- Q. It wasn't fastened anywhere?
- A. No, sir.
- Q. Did you ever help move this rack?

A. Yes, sir.

Q. Isn't it a fact that you had to be very careful?

A. It slid quite easily.

Q. You mean that you could slide that rack around with pictures?

A. Yes.

Q. When?

10

A. Several times.

Q. When before the accident?

A. I couldn't give you the exact dates.

Q. You could push it all ways?

A. With the help of somebody else. You couldn't do it alone.

Q. It was only thirty-five pounds?

A. You needed somebody at the other end to guide it.

Q. It only weighed thirty-five pounds?

20

A. If you wanted to pull it you could, but not push. You had to have somebody to guide it at the other end.

Q. If I leaned up against that it could not fall over?

A. No.

Re-direct examination.

By Mr. Marshall:

30

Q. Were you anticipating that anybody would climb on it and it would still stand there?

A. No.

Re-cross examination.

By Mr. Avis:

Q. You knew that there were children of all ages and sizes coming in the store?

A. Yes.

10 Q. Selling things to them?

A. Yes.

Q. As a matter of fact, a good part of your trade is with children?

A. No, I would not say that.

Q. Isn't that a fact?

A. It is ladies and girls.

Q. Why aren't your counters covered?

A. Certain departments are.

Q. You have seen children in the store every day?

20 A. Yes, sir.

Q. Especially on Saturday?

A. Yes.

Q. You expected that the children that came into the store would be healthy and normal?

A. Yes.

By Mr. Marshall:

30 Q. You did not expect healthy and normal children to climb up on racks?

A. No, sir.

By Mr. Avis:

Q. You say these shelves were made of ply wood?

A. Yes, sir.

Q. What is that?

A. Thin wood.

Q. How thick is it?

A. Three-eighths of an inch.

Q. How was it fastened on the side? Screws?

A. Brackets.

Q. Brackets held it to the side?

A. Yes.

10

ARTHUR SCHROEDER, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct examination.

By Mr. Marshall:

20

Q. Mr. Schroeder, where do you live?

A. 63 East Porter Avenue, Woodbury.

Q. On November 3, 1934, were you employed by the S. S. Kresge Company?

A. Yes.

Q. You are employed by them now?

A. Yes.

Q. What position did you hold on November 3, 1934?

A. Stock boy.

30

Q. You still have that position?

A. Yes, sir.

Q. Prior to November 3, 1934, did you with the assistance of Mr. Sharon construct a picture rack?

A. Yes, sir.

Q. Was that part of your duties?

A. I am a general carpenter, general handy man. I do anything.

Q. In the construction of this rack, what size board did you use for the base?

A. One by ten. It is a heavy board for the base.

Q. For the standards on the side?

10 A. For the standards we had another one by ten.

Q. What did you use for constructing the shelves?

A. Light ply wood with some banding to keep the pictures from sliding off.

Q. The shelves were constructed in such a manner as to throw the weight of the picture toward the back?

A. Yes, so the weight would be more to the back than to the front.

Q. Do you know when this rack was built?

20 A. I would say somewhere around the first week in August.

Q. From the time that the rack was completed was it put in use right away?

A. It was put in use right after.

Q. Was it used continuously from that time up to the time of the accident?

A. Yes, sir.

Q. Do you know whether it was in the same position all the time?

30 A. It was in the back of the store and then we put it in the front. Mr. Sharon ordered it in the front.

Q. Did you assist in the moving of it from the back to the front of the store?

A. Yes, sir.

Q. How long would you say that the rack had been in the front of the store before November 3, 1934?

A. From the first of September.

Q. Had it been moved from that position in the front of the store before November 3, 1934, when the accident occurred?

A. Just to swing it out to get into the window.

Q. What, in your opinion, did the frame, exclusive of the pictures, weigh? 10

A. Twenty-five or thirty pounds.

Q. In placing the rack at the front of the store, it was placed near which door? North or south door?

A. South door.

Q. With respect to that door was it placed to the north or south of it?

A. To the south of it.

Q. Next to what counter?

A. It was included in the candy counter, toward the rear of the candy counter. 20

Q. Do you recall how far from the floor the first shelf was?

A. Oh, it would be five to six inches.

Q. How many shelves were on it?

A. Five.

Q. Were they made of the same heavy wood as the base?

A. Three-quarter inch ply wood. Not three-quarter, three-eighth inch ply wood. 30

Q. On the particular day in question, November 3, 1934, do you recall the happening of an accident there?

A. Yes.

Q. Where were you? What part of the store were you in?

A. Downstairs.

Q. After you heard the noise you went upstairs?

A. Yes, sir.

Q. You came up from the cellar?

A. I carried a basket coming up and I heard something crash.

Q. What did you see?

(1) A. There were a number of men picking the rack up. There was a crowd around.

Q. You came up from the cellar?

A. Yes.

Q. When you got over to where the rack had been standing, was it then standing or on the floor?

A. It was up on its base the way it ought to be.

Q. The pictures, were they all off the rack?

A. A few were still on the rack. The rest were crushed on the floor.

(2) Q. Had the rack been in that position from the first of September to November third? Had it ever fallen before?

A. Never.

Q. You didn't see Mrs. Feingold or the boy in the store before the accident, did you?

A. No, sir.

Cross-examination.

30 By Mr. Avis:

Q. How long have you worked for S. S. Kresge Company?

A. A little bit over two years.

Q. During that time how many racks have you built?

- A. That was the second picture rack.
- Q. The other was the same kind?
- A. It was a little heavier wood, but it wasn't good enough.
- Q. You wanted something lighter?
- A. Yes.
- Q. As I understand it, the base was made of a piece of wood one by ten? 10
- A. Yes.
- Q. The sides were made of the same material?
- A. Yes.
- Q. What went across?
- A. Crossing the top to keep it straight was this piece of slat.
- Q. How thick?
- A. A quarter inch thick.
- Q. Before you helped construct this rack, had you done carpentering work? 20
- A. Built some small things.
- Q. You never built any more racks than these two racks?
- A. No.
- Q. You were never called upon to build any?
- A. No.
- Q. This rack is still in the cellar?
- A. We had to find out if anything was coming out of it, and we threw it out.
- Q. Where did you throw it? 30
- A. Gave it to the trash man who used it for fire wood.
- Q. Did you have any plan to go by?
- A. Just the plans of Mr. Sharon.
- Q. Did you have any instruments to find out whether it was constructed properly?

A. We had our store level and a T-square.

Q. Did you have a level?

A. Yes.

Q. Who used that?

A. I did.

Q. How about the floor? What is that constructed of?

10 A. That is a hardwood floor.

Q. Is it level all over?

A. It is level where it was standing.

Q. I didn't ask you that.

A. It is not level all over.

Q. Isn't it a fact that you have to put something under the counters to make them true?

A. I don't know that.

Q. You never saw anybody put anything under them?

20 A. Yes.

Q. But you do know that the floor is not level all over?

A. It is not level all over.

Q. So far as the pictures are concerned, you don't know what was on the rack?

A. That is not my job.

Q. You don't know?

A. No.

30 Q. As the pictures are sold new ones are put on?

A. Yes.

Q. Do you know about that?

A. No.

Q. Do you have charge of the stock?

A. Yes.

Q. When they want pictures do they have to come downstairs for them?

Arthur Schroeder—Cross

A. Sometimes they get them.

Q. Where are they put? On the bottom or on the top shelf or don't you know?

A. No.

Q. You were down in the basement when the crash came?

A. Yes.

Q. You came up as fast as you could? 10

A. Yes.

(A recess was taken until Wednesday, June 5, 1935, at ten o'clock A. M.)

20

30

Woodbury, N. J., June 5, 1935.

(The trial was resumed.)

10

VIVIAN HERMAN, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct examination.

By Mr. Marshall:

- 20 Q. Miss Herman, where do you live?
A. 17 Euclid Street.
Q. Woodbury?
A. Yes.
Q. On November 3, 1934, where were you employed?
A. S. S. Kresge, 66 Broad Street.
Q. What counter were you employed at?
A. Soda fountain.
Q. Were you employed there at that time by the
30 week?
A. Just on Saturday.
Q. Are you employed there at the present time?
A. Yes.
Q. In the same capacity?
A. Yes.

Q. At the same counter?

A. No.

Q. Only on Saturday?

A. Yes.

Q. Do you remember November 3, 1934? Were you employed at the store on that day?

A. Yes.

Q. Do you remember whether that was Saturday or not? 10

A. It was a Saturday.

Q. For what period of time had you worked at the store? How many months had you worked at the store?

A. Nine months.

Q. Do you recall where the picture rack and small frames and pictures were placed in the store for a period of say two or three months prior to November 3? 20

A. The rack was placed on the south side of the store and the pictures were arranged according to size.

Mr. Avis: I object to that as not responsive.

By Mr. Marshall:

Q. Placed on the south side of the store?

A. Yes. 30

Q. Your counter is on what side of the store?

A. South side.

Q. What counter does that adjoin?

A. Candy counter.

Q. From where you were stationed in the store,

were you in a position to see and observe the rack upon which were placed the pictures and picture frames?

A. Yes.

Q. Will you please tell us from your observation in what manner the pictures and picture frames were arranged on the rack?

10 A. Arranged according to size, the smallest on the top and the largest on the bottom.

Q. Do you remember in the formation of this rack about how far the first row of pictures were from the floor? That would be the first shelf.

A. About four inches.

Q. On this particular day and before the happening of the accident to what part of the store had you gone?

A. Stock room.

20 Q. Where is the stock room?

A. In the basement of the store.

Q. What did you go to the basement for?

A. Ice cream.

Q. Were you returning with the ice cream that you had gone for?

A. Yes.

Q. What, if anything, did you see or hear as you were returning to your counter from the basement?

30 I withdraw that question for just a moment, and will ask this question: The entrance to the basement is where?

A. On the north side of the store.

Q. At the front or back?

A. At the front.

Q. The stairway leading to the basement in which

direction does it run? Does it run from the front or to the back?

A. The steps?

Q. Yes.

A. Runs to the back.

Q. So in your returning from the basement to the store floor again you would be coming up the stairs in this fashion (indicating) headed toward the front of the store? 10

A. Yes.

Q. Was there anything to interfere with your view at the stairway leading to the basement of the candy counter or the portion of the store where the picture rack and pictures were located?

A. No.

Q. As you were returning from the basement on this day you say you had some ice cream with you?

A. Yes.

20

Q. What did you see as you came up the stair leading on to the store floor?

A. I crossed the front of the store in front of the rack.

Q. Did you notice the boy?

A. I did.

Q. Did you see anybody else at the picture rack except the boy?

A. No.

Q. Where was the boy when you looked?

30

A. I noticed the boy on the first shelf, fingering one of the pictures.

Q. In what manner was he holding himself on the rack?

A. He was holding himself on the second rack.

Q. With what?

A. With one hand.

Q. Doing what with the other?

A. Fingering one of the pictures with the other hand.

Q. What happened then?

A. I got to the end of the toilet article counter
10 and the picture rack toppled over on the child.

Q. Where is the toilet article counter?

A. Across from the candy counter.

Q. Would that be on the south side of the store or would it be on the north side?

A. That is on the south side.

Q. In other words, you were coming up the stairway from the basement and then you would be on the north side of the store, would you not?

A. Yes.

20 Q. Is there an aisle across the front of the store?

A. Yes.

Q. It was across that aisle that you were going —

Mr. Avis: I object to the question on the ground that it is leading.

By Mr. Marshall:

30 Q. Is there anything placed in this aisle that runs across the front of the store?

A. No.

Q. As you came up the stair you observed, you say, the child standing on the rack?

A. Yes.

Vivian Herman--Direct

Q. With one hand on the second rack reaching up to the top?

Mr. Avis: I don't think that is what she said.

By Mr. Marshall:

Q. What was the child doing with the hand that 10 was not holding himself on to the rack?

A. He was fingering one of the pictures.

Q. As you came up you proceeded in what direction along the store floor?

A. South, toward the picture rack.

Q. Across this aisle?

A. Yes.

Q. You had gotten to the toilet article counter, you say?

A. Yes. 20

Q. When the rack tumbled over?

A. Yes.

Q. Were you able to keep your eye on the rack from the time you got to the top of the stair?

A. Yes.

Q. From the time you got to the top of the stair and seeing the child standing on the rack holding on with one hand and fingering one of the pictures with the other hand, did anybody else come to the rack?

A. No. 30

Q. Did you see the mother at the rack with the child?

A. No.

Q. At that particular moment did you see the mother at the candy counter?

A. No.

Q. With the other employee, Miss Batten?

A. No.

Q. When the rack fell, the child was under the rack, I assume?

A. Yes.

Q. As the rack fell, can you describe just what
10 happened? Can you tell us what the boy did? Did
he hold on to the rack?

A. He took a step back and before he could get clear of the rack falling it fell and his head was sticking up through it.

Q. Was the boy standing after the rack fell or was he sitting on the floor?

A. Before the rack fell?

Q. No, after the rack fell. As near as you can recall, was the boy sitting or standing on the floor?

20 A. He was almost in a lying position.

Q. I am endeavoring to learn whether the child was standing with the rack over him or whether he was sitting?

A. Sitting down.

Mr. Avis: Wait a minute. I move that that be stricken out. She said his head was protruding through the rack.

30 The Court: Where did you indicate?

The Witness: He was sticking through one of the shelves from here up.

Mr. Marshall: Indicating across the breast.

Mr. Avis: I would like the stenographer to read her previous answer.

The Court: All right.

(The stenographer read as follows:

“A. He took a step back and before he could get clear of the rack falling it fell and his head was 10 sticking up through it.”)

By Mr. Marshall:

Q. Miss Herman, are you able to tell us or do you recall as you saw the child that morning or afternoon —

A. It was in the afternoon.

Q. (Continuing.) —between what shelves the child was protruding? 20

A. It was the third shelf.

Q. There was no back in this rack, was there?

A. No.

Q. Do you recall or do you have any recollection of what the distance was between the shelves in this rack?

A. From fourteen to eighteen inches.

Q. Now, as the child was on the floor, can you tell us which way he was then facing?

A. He was facing toward the rack. 30

Q. Directly toward the rack?

A. Yes.

Q. And the rack, in what way had it fallen? Directly forward or toward one side to the other?

A. The rack was on a slant.

Q. Do you know whether the rack after it had fallen was resting on anything?

A. It wasn't resting on anything.

Q. Who came immediately to the scene and removed the rack and the child, if you recall?

A. Mr. Hutchin, our assistant manager.

Q. How long had you been in the cellar that
10 afternoon?

A. About three minutes.

Q. Had you observed Mrs. Feingold and the child at the candy counter before you went to the basement?

A. No, I did not.

Q. You had not waited on her?

A. No.

Q. Miss Herman, how long, according to your best recollection, had this rack stood in this position that
20 it was in the store before it fell?

A. As far as I know it was three months.

Q. To your knowledge had the rack ever fallen before?

A. No.

Cross-examination.

By Mr. Avis:

30 Q. Miss Herman, the steps that you came up, do I understand you to say as you came up the steps you were facing the front of the building?

A. I was facing south.

Q. You were not facing the front of the building? In other words, as you came up you did not face the front of the building?

Vivian Herman—Cross

A. The steps come up toward Broad Street.

Q. Are those steps close to the front of the building?

A. Yes.

Q. I show you a plan and ask you if it isn't a fact that on the side where the steps are it is some few feet from the front of the store?

A. No. 10

Q. You don't mean to say that as you come up —

A. It is about three or four feet.

Q. Isn't it further than that?

A. No.

Q. Only three or four feet from the steps to the door?

A. Yes.

Q. Are you sure of that?

A. Positive.

Q. Are there counters between that and the picture rack? 20

A. Yes.

Q. There are two, or more than that?

A. Two.

Q. So you mean you see over the top of them?

A. No, there is an aisle in front of them.

Q. As you come up the stairs and as you get to the top, could you see without the counters interfering with your vision?

A. Yes. 30

Q. Isn't it a fact that as you get to the top step you immediately turn and go back toward the soda fountain?

A. No, I went across the front of the store.

Q. When was it that you noticed that the child had his foot on the shelf?

A. When I reached the front of the store.

Q. When you came up to the top step did you notice the child?

A. Yes.

Q. What was he doing then?

A. He was on the first rack fingering pictures above.

10 Q. Were you watching him?

A. Yes.

Q. The first step was four or five inches from the floor?

A. Yes.

Q. He had one foot on that?

A. Both feet.

Q. He had both?

A. Yes.

20 Q. Yet when the rack fell he was clear of the rack entirely?

A. No.

Q. As I understand it he stepped back and the rack came on him?

A. Yes.

Q. Yet you say the rack was over him?

A. It was the third rack.

Q. Didn't you say it was the second rack from the floor?

30 A. It was the first rack that he was standing on and the third rack his head was sticking through.

Q. Didn't you say he had his head through the second shelf?

A. No.

Mr. Marshall: I refer to the testimony if there is any question about it.

By Mr. Avis:

- Q. The third shelf?
A. Yes.
Q. From the top or bottom?
A. From the bottom.
Q. That was at the time that you were at the toilet goods counter? 10
A. Yes.
Q. Did you talk to Mr. Sharon about it that day?
A. Yes.
Q. Did you tell him just what you told us?
A. Yes.
Q. When did you talk to him again about it?
A. It was three days later.
Q. Did you tell him at that time that when the case fell the child had taken a step back and was standing there and the rack fell on him? 20
A. Yes.
Q. So that I will be clear on it and the jury will be, is there one step or two steps to the entrance?
A. There is one.
Q. There is only one?
A. Yes.
Q. That one is from three or four feet from the door?
A. Yes.
Q. It comes and faces the door? 30
A. Yes.
Q. As you come up you turn to your left?
A. Yes.
Q. On this rack there were pictures of all character?

A. Yes.

Q. You have seen children looking at it?

A. Yes.

Q. Didn't you know that this case wasn't fastened?

A. Yes.

Q. You knew that?

A. Yes.

10 Q. How did you know that?

A. I knew it had been moved and they would not fasten it.

Q. Had you occasion to put pictures on it?

A. No.

Q. Isn't it a fact that the shelves slanted toward the front?

A. No, they slanted toward the back.

Q. Isn't it a fact that the shelves were made with a check to catch articles from falling off?

20 A. Yes.

Q. So that slant was toward the front, is that right?

A. The slant was toward the back.

Q. Let us take a shelf. Isn't it a fact that the part nearest to you was lower than the back of it. It was slanted like that? (Indicating.)

A. Yes.

Q. They were standing slanted on there, layer after layer?

30 A. Yes.

Q. Did you know where the other case was located in the store? The one in the rear of the store at the present time? Do you know whether it is fastened?

A. Yes.

Q. Secured right to the floor?

A. Yes.

Q. Do you know that the material of that case is light compared with the material of the rack that fell?

A. I couldn't say.

Q. You noticed the sides were one inch thick?

A. I haven't noticed the rack.

Q. Do you know of any other case that wasn't 10 secured to the floor?

A. No.

Re-direct examination.

By Mr. Marshall:

Q. You have nothing to do with the moving of the rack and frames about the store?

A. No. 20

Q. Your job is at the counter selling ice cream and root beer?

A. It was at that time.

Q. Before this day in question had you even seen children climb around on the rack?

A. No, I didn't.

Q. You have told us that you worked on Saturday regularly. Did you at any time during the period of your employment work extra?

A. Besides Saturday? 30

Q. Yes.

A. I have.

Q. But you regularly are employed on Saturdays?

A. Yes.

Q. Sometimes on other days?

A. Yes.

Re-cross examination.

By Mr. Avis:

Q. Isn't it a fact that Saturday afternoons the store is always crowded?

A. In between times.

10 Q. Wasn't it crowded this day?

A. No.

Q. After this accident wasn't there such a crowd that you could not get close to it?

A. No, it wasn't that crowded.

Q. How many people were gathered around that article?

A. I should say fifteen to twenty.

Q. Maybe more?

A. It would not be much more.

20 Q. There was nobody obstructing your view? You could see all this happening?

A. Yes.

Q. You could see this boy standing on the step?

A. Yes.

By Mr. Marshall:

Q. Do you recall what time this was that afternoon?

30 A. Between one and two.

Robert Stetser—Direct

ROBERT STETSER, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct examination.

By Mr. Marshall: 10

Q. Mr. Stetser, where do you live?

A. Sewell, New Jersey.

Q. Are you employed by the S. S. Kresge Company at the present time?

A. No, sir.

Q. Were you employed by the S. S. Kresge Company on November 3, 1934?

A. No, sir.

Q. Were you ever employed by the S. S. Kresge Company? 20

A. Never.

Q. On that day, that is November 3, 1934, were you at any time during that day in the store of S. S. Kresge Company at 66 South Broad Street?

A. The testimony was on that day that the rack fell? I was there the day that the rack fell on him.

Q. But you recall —

A. I couldn't tell whether it was a Saturday or what day. 30

Q. Had you been in the store before the rack fell?

A. Quite a few times.

Q. For what period of time in weeks or months had you frequented the store of S. S. Kresge prior to the day this rack fell?

A. Since the store opened.

Q. Prior to that time that you had come into the store previous to this day in question had you observed the particular location of the rack on which were placed pictures and picture frames?

A. Yes, sir.

Q. Where was the rack located, Mr. Stetser?

10 A. On the far side. I believe it is the south side. I would say thirty or sixty feet with respect to the south and west side of the building.

Q. Had you at any time entered the store from the south entrance?

A. Either door.

Q. Have you at any time entered the store from the south entrance?

A. Surely.

20 Q. Have you at any time left the store from the south entrance?

A. Certainly.

Q. Was the location of the rack in such a position as to prevent ingress or egress to the store?

A. Not that I can recall.

Q. Do you understand my question?

A. You could not enter or leave the store.

Q. Did it interfere in the position in which it was placed with anyone coming in or going out of the store?

30 A. No.

Q. For how long a period before the rack fell?

A. In weeks or days I couldn't tell. I know it had been there. I wasn't looking for a picture but I was looking for a particular mirror I had my eye on.

Q. You had occasion to go to the rack and expect the merchandise on the rack?

A. Yes, sir.

Q. What have you to say with respect to the strength of the rack?

A. Frankly, I didn't take much notice of the strength. I noticed the general principle.

Q. What was the general principle of the rack? 10

A. Slanting shelves so you could see the display.

Q. Which way were the shelves slanting?

A. I couldn't say forward or back. They were in such a way that the top of the picture would be back of the rack and the bottom would be toward the front.

Q. What was on the shelves to prevent the pictures from falling off?

A. There was some kind of ledge to hold them on. 20

Q. What was the base of this rack? Did you observe that?

A. I didn't.

Q. Were you able to observe or did you observe about how far from the floor the first shelf was?

A. It was quite close to the floor. I couldn't say in inches how far.

Q. Were you in the store on the afternoon of November 3?

A. At the time of the accident I was entering the store with my three months old baby in my arm. In fact I stepped back to prevent the rack from falling on my baby. 30

Q. You were entering the store from the south entrance?

A. Yes.

Q. Did you see anyone around or about this rack as you were entering the store?

A. I was entering, I can't say that I saw the child or anything. I don't consider myself small or tall, but as I came in a shadow was coming toward me. Of course, with a baby in my arm and seeing
10 anything coming towards me I wanted to ward it off, having the baby in my arm, and I stepped back and seen this rack coming down, and the way it appeared to be the child was riding the rack.

Mr. Avis: I think he ought to say what he saw.

The Court: Yes.

A. (Continuing.) I did see the child move at the
20 same rate of speed as the rack. The rack came down. Just how the child got between the shelves I couldn't say. It happened fast.

Q. This happened you say as you were about to enter the store?

A. The rack was probably a foot and a half from my face and I was stepping back.

Q. As you got into the store did you see anybody else around the rack but this child?

A. No one in the vicinity. My brother-in-law
30 was in back. I don't think he could see how it happened.

Q. Where does he live?

A. Bethelam. He refused to come to court.

Q. Was your wife with you?

A. Yes, sir.

Q. Your wife was with you?

A. Yes, sir.

Q. Did she precede you or were you ahead of her?

A. She was ahead of me.

Q. Already in the store?

A. Past the rack.

Q. You were coming into the store with your 10 baby?

A. Yes.

Q. After the rack had fallen, Mr. Stetser, tell me as near as you can, if you recall, what shelf or shelves had gone over the child?

A. I couldn't swear just what shelf, but I would say about the third.

Q. Was the child then standing or sitting, after the rack had fallen?

A. As I recall, the child was sitting down and the 20 rack was resting on his elbow.

Q. Was the rack at that time resting on anything else besides the child?

A. It is possible, but I didn't see it.

Q. At that time which way was the child facing?

A. I would say south.

Q. And the rack after it had moved from the position in which it had been was it moved directly forward or from one side to the other?

A. You mean had the rack moved? 30

Q. What I am endeavoring to learn is: The rack was in what position in the store? Was it flush with Broad Street?

A. No, it was on an angle with it. It wasn't exactly catercorner. It was more like that on an angle. Sort of slight angle.

Q. As you saw the child sitting on the floor with the rack on his elbow in what position was he with respect to the rack? Was he facing it or sideways?

A. He was still facing south, if that is south. Facing south.

Q. Facing the rack or away from the rack?

A. The rack was around him, you might say.

10 About the center of the rack.

Q. What?

A. Approximately the center of the rack as far as I could determine.

Q. Did you remain there while the rack was removed from the boy?

A. I seen it was a small child, and my brother-in-law, and myself, and another man, there was two of them—I had my baby in my arm, and I took hold of the nearest corner where I was standing and
20 lifted it off the child and left it standing.

Cross-examination.

By Mr. Avis:

Q. Do you know Mr. Sharon?

A. Yes, sir.

Q. How long have you known him?

A. Shortly after the store opened. I knew him
30 as manager.

Q. Did you make it a habit to go and stop at the Kresge store?

A. No, I didn't make it a habit.

Q. Did you talk to him the date of the accident?

A. Yes.

Henry Clark—Direct

Q. Did you tell him that your child had not been hurt in the accident?

A. Yes.

Q. At that time didn't you tell him that he ought to fasten it?

A. The rack?

Q. Did you say anything about that?

A. No.

10

Q. Did you know that the rack was not fastened?

A. I don't think that entered my mind.

Q. These shelves, isn't it a fact that the pictures were piled one on top of each other?

A. Yes, they were laying there.

Q. Isn't it a fact that the force of gravity would slide them toward the front?

A. Gravity?

Q. Wouldn't the pictures have a tendency to go to the front?

20

A. No.

HENRY CLARK, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct examination.

By Mr. Marshall:

30

Q. Doctor, you are a practicing physician?

A. Yes.

Q. In the State of New Jersey?

A. Yes.

- Q. You are a graduate of what medical college?
A. University of Pennsylvania.
Q. What year?
A. 1891.
Q. Since that time you have practiced in Woodbury?
A. Yes.
- 10 Q. Are you practicing at the present time?
A. Yes.
Q. Did you, at my request, make a physical examination of Seymour Feingold?
A. Yes.
Q. You may consult your records if you care to. When was it that you made your first examination of him?
A. At his parents' home, North Broad Street, Woodbury.
- 20 Q. Who was present when you made that examination?
A. His mother.
Q. What was the date of the examination?
A. November 26, 1934.
Q. You at that time had a history of an accident, did you not?
A. Yes.
Q. How long did you spend at the home that day making the examination of this boy?
- 30 A. Examination?
Q. Yes.
A. I would say around half an hour.
Q. Will you kindly tell the Court and jury what your examination consisted of on that day?
A. I examined the boy's head, arm, shoulder, and

upper part of his body. I found no evidence of any injury and found no bruises, no cuts, and found no tenderness.

Q. Was your attention at that time directed to any particular part of his body where it was alleged that he had had an injury? Either the shoulder or the arm or the shoulder blade?

A. No. 10

Q. Independent of that, did you make an examination of his shoulder blades?

A. I did.

Q. Did you at that time find any portion of the upper part of his body sensitive or tender to touch?

A. I found no tenderness or sensitiveness to any part of the body that I examined.

Q. The child was about three years old?

A. Yes.

Q. Did you question the mother and the boy as to 20 where he had any pain, if he had any at all?

A. I think the mother volunteered and the boy volunteered. I don't think I questioned him. He told me that he was not hurt anywhere.

Q. You didn't examine the boy again for some months?

A. No.

Q. When you went to examine the boy that time, do you remember what day of the week it was?

A. No. 30

Q. Do you remember what day of the week it was that you went to examine him?

A. No.

Q. Did you call at the house by reason of an appointment that had been made?

A. I can't remember whether an appointment was made or not. I know that you requested me to go there, but whether I made an appointment with them or stopped to see them I couldn't say.

Q. Did you in making your examination of the boy dispense with his clothing?

A. The upper part of the body.

10 Q. Was any complaint made at that time of any injury to his leg?

A. No.

Q. When did you next see the boy after November 26?

A. May 20, 1935.

Q. At that time just describe what you found? First, where did you make that examination?

A. I was able to make very little examination. The boy's left shoulder and left leg was bandaged.
20 I simply talked with the boy, looked at him, and felt his pulse, but I could not see the nature of the injuries or sores because it was bandaged, and I did not attempt to remove them.

Q. You observed on May 20, that the portion of the boy's body that was bandaged was his left shoulder?

A. Yes.

Q. Do you recall having examined that particular portion on November 26 when you examined the
30 boy?

A. What?

Q. You observed on May 20 that his left shoulder was bandaged?

A. Yes.

Q. Do you recall that on November 26 when you

last examined him making a careful examination of that portion of his body?

A. Yes.

Q. If there had been a bruise or injury to the shoulder, sustained on November 3 would it be probable that the area of that shoulder would have been tender to the touch on November 26?

A. If he had any injury amounting to anything 10
at all on November 3 and I examined him on November 26, he would have had some tenderness or he would have had some discoloration.

Q. There was no tenderness and no discoloration?

A. No.

Q. As a result of your examination made on May 20 are you able to tell us what the boy at the present time is suffering from?

A. I am not. 20

Q. You have been told what it was?

A. I have been told.

Q. You understand it to be what?

A. Osteomyelitis.

Q. Osteomyelitis? Have you treated cases of osteomyelitis?

A. Yes.

Q. What is the common cause of osteomyelitis? What would you say is a common cause of osteomyelitis? 30

A. There are numerous causes. It can come from a tubercular condition, staphylococcic condition, streptococcic condition, rundown condition, or come from any condition where the body is absorbing internal poison.

Q. Would it come from an injury?

A. It can.

Q. That is a frequent cause?

A. The most frequent.

Q. The most frequent cause is what?

A. A septic condition, absorbing poison.

10 Q. Are there or are there not cases of osteomyelitis that develop in which you are unable to determine the cause of the illness?

A. Yes.

Q. Ordinarily if osteomyelitis follows an injury within what period of time after the injury has been sustained would there be evidence of osteomyelitis?

20 A. That would depend a whole lot on the child or general condition of health. The injury to the bone must be severe enough to show externally, a blow sufficient to injure the bone which would cause inflammation of that bone. It must be severe enough to show on the surface.

Q. Doctor, if an injury had been sustained to the shoulder or shoulder blade, known by doctors as the left scapula, on November 3, 1934, would it be probable that an X-ray taken of that injury on January 7, 1935, would have disclosed destruction of bone structure?

A. I would say that it would.

30 Q. Doctor, considering that the child has sustained an injury on November 3, 1934, and considering that until January 7, 1935, the child had no medical attention, excepting such medical attention as is given by the way of home remedy, that an X-ray is taken on January 7 of that portion of the body alleged to have been injured and the picture shows

no destruction, no change in the bone structure; that later an X-ray is taken on January 18 and shows some evidence of change in the bone structure, and again a picture is taken on January 31 showing considerable advance in destruction of bone structure, indicating then evidence of osteomyelitis, is it probable that the injury which was then disclosed, as a result of these pictures, resulted from the injury sustained on November 3, 1934? 10

A. I would say that the picture on January 7 showing clearly no injury to the bone or change in the condition—that an alleged injury taking place on November 3 would have shown before January 7, some evidence of bone change.

Q. So to further answer my question, I want to put it this way. Considering the question I asked you, would it be probable that osteomyelitis which was not apparent on January 7, but which was apparent on January 18 and 31, is it probable that the injuries which the boy had at that time resulted from the injuries sustained on November 3? 20

A. It is not probable.

Q. How many cases of osteomyelitis would you say you have treated, Doctor?

A. Not less than forty or fifty.

Q. You are not a surgeon?

A. No.

Q. You have treated them in your ordinary practice as general practitioner? 30

A. Yes.

Cross-examination.

By Mr. Avis:

Q. Doctor, have you ever had occasion to see a lot of patients who have osteomyelitis and Doctor Buzby in Camden?

10 A. I have not.

Q. You know Doctor Buzby?

A. Yes.

Q. You know that he is an expert on that sort of disease?

A. I have heard.

Q. Don't you know?

A. Not from personal knowledge. From what I hear.

20 Q. Among the medical profession isn't he known as I have described him?

A. Yes, but if you ask me personally, I don't know because I haven't met him. I know his reputation.

Q. His reputation is good?

A. One of the best.

Q. He specializes in that sort of thing?

A. Yes.

30 Q. Doctor, you don't know, do you, that this boy's condition could not have come from an accident on November 3.

A. I don't say it could not have come from an accident on November 3.

Q. Your interest in this boy was not to cure him? It was for the purpose of testifying.

A. I would not say that.

Q. Do you know Doctor Davidson of Philadelphia?

A. I heard of him.

Q. Do you know him?

A. Yes, sir.

Q. Do you know his reputation?

A. Very good.

10

Mr. Marshall: I object.

By Mr. Avis:

Q. Is Doctor Davidson more qualified than you?

Mr. Marshall: I object to that question.

Mr. Avis: Doctor Clark is not an expert. Doctor Davidson is here as an expert.

20

The Court: He has already testified that he specializes in that line.

By Mr. Avis:

Q. Doctor, you know in cases of this character that before the disease develops X-rays will not show it?

A. Yes.

30

Q. How long after the disease started will it show on an X-ray, if you know?

A. It would depend upon the force of the injury and what caused the osteomyelitis.

Q. It is difficult to say, isn't it?

A. It is.

Q. You say if the X-ray did not show on January 7 in your opinion it wasn't probably from the injury on November 3. How about it if the X-ray showed on December 24?

A. I would say there must have been sufficient injury on November 3 to have shown evidence on December 24.

Q. Have you in your experience and study come across the proposition that a person sustained an injury which cleared and later developed osteomyelitis?

A. If the injury had been severe enough, injury to the bone.

Q. You have known of that?

A. Yes.

20 Re-direct examination.

By Mr. Marshall:

Q. If the injury on November 3 had been severe enough to have injured the bone, would you not have expected to find evidence of it on November 26 on your examination?

A. I would have expected to have an inflammatory condition of the bone, which would have produced tenderness possibly communicating to the tissues themselves, an inflammatory condition of the tissues, and some fever.

30 Q. Did you find any of these ailments present?

A. No.

Re-cross examination.

By Mr. Avis:

Q. Isn't the scapula an unusual place for this disease to develop?

A. No.

Q. It is not? 10

A. It can develop in any bone in the body.

Q. In your experience have you had any cases of osteomyelitis in the shoulder?

A. I have had at least two.

Q. As compared with forty or fifty would not that make it unusual?

A. What is that?

Q. Would not that make you state it was unusual?

A. I said at least two. I may have had more in my forty. 20

Q. You can remember two.

A. Yes.

By Mr. Marshall:

Q. That is two on the scapula?

A. Yes.

Q. Where is the most frequent site of osteomyelitis?

A. In the long bones of the arm or leg. 30

OTTO F. SHARON, recalled as a witness on behalf of the defendant, testified as follows:

Direct examination.

By Mr. Marshall:

10

Q. I don't know whether I asked you about it, but I would like to ask you with respect to this rack which you and Mr. Schroeder constructed if, after the accident on November 3, you examined it?

A. After I had made out my reports in regard to the accident I went down and examined the rack after it had been taken downstairs.

Q. At that time did you find anything faulty or defective in the construction of the rack?

20

A. Not definitely. It would seem to be a little bit shaky to what it was before but really nothing to speak of, but I did not want to use it in the future.

Q. Why didn't you expect to use it in the future.

A. I didn't want to take another chance. I didn't want another accident to occur.

Q. That is the reason why you discontinued the use of it?

A. Yes.

Q. At the time it fell it was loaded with pictures?

30

A. It had pictures on it.

Cross-examination.

By Mr. Avis:

Q. I asked you whether the rack which is located in the back of the store was fastened to the wall and you said, "No," and I ask you whether it was fastened to the floor?

10

A. Yes.

Q. It is secured to the floor?

A. Yes.

Q. This rack that you made was fastened to nothing?

A. No, may I qualify that.

Q. The rack which was installed and which was made by some other company, isn't it a fact that the sides are different?

A. No, it is about the same thickness as the one I had. 20

Q. An inch thick?

A. Yes.

Q. How was it fastened?

A. Two by two corner brackets.

Q. Secured to the case and the floor?

A. Yes.

Re-direct examination.

30

By Mr. Marshall:

Q. Who did you say made that case?

A. Moore Lumber Company, Detroit.

Q. In what respect do you desire to qualify your statement?

A. I probably would not have secured that to the floor because it is not required. We are told to do some things to protect ourselves against accidents. It is not necessary to secure it to the floor but having had one accident of that order I desired to take no chances at all and secured it to the floor.

Q. Is that the case which is at the back of the
10 store?

A. Yes.

Q. The one you now have is at the back of the store flush with the rear?

A. With the office wall.

Q. I meant to ask you a moment ago with respect to the stairway that comes up from the basement. Do you have more than one entrance?

A. Yes, we have another entrance to the back. That stair from the south side leads down. That
20 is very seldom used. Our merchandise for the counters we usually bring it up that way.

Q. Concerning the stairway, which side of the store is that?

A. North side.

Q. In starting downstairs do you go toward the rear or front?

A. Toward the front because your counters, your toilet article and notion counter, is about twenty feet long.

30 Q. What I am getting at is this: Is the stairway on the north side of the building?

A. Yes.

Q. Any one entering the stairway would go how?

A. Toward the back.

Q. How far would you say that is from the aisle that runs across, the front of the store?

A. The aisle runs right into the store door and leads downstairs. Say this is the front of the store (indicating) the door leads downstairs like this and like that (indicating) and the aisle like this (indicating).

Q. Is the stairway in the same position as it was on November 3 last?

A. Yes. 10

Re-cross examination.

By Mr. Avis:

Q. As I recall your testimony, you said it was impossible for any person from the soda fountain to see this case?

A. If they were behind the counter. I said it was improbable. 20

Q. You remember what Miss Herman said about seeing it from the soda fountain?

Mr. Marshall: I object to what Miss Herman said. We will refer to her testimony. Miss Herman said a lot.

Mr. Avis: But she did say she saw it from the soda fountain. 30

Mr. Marshall: She said she could not.

A. It would probably be improbable, but it is possible to see it. If you look up the aisle she could see one end.

THE DEFENDANT RESTED.

*Defendant's Motion for Direction of
Verdict*

Mr. Marshall: At this time I want to move for the direction of a verdict on the ground that no evidence of negligence has been shown. I feel that so far as the plaintiff is concerned the only evidence they had at the close of their case which could be
10 considered as establishing a *prima facie* case was that a rack fell without any evidence or proof of faulty construction or that the rack has been negligently placed or negligently maintained. I feel that the negligence, not necessarily the negligence of the child because the child is too young to be charged with contributory negligence, of the mother in supervising the child is imputable to the child.

The Court: I think under all the circumstances
20 of the case I shall be obliged to deny the motion for a directed verdict because there is a controverted fact as to whether or not the child climbed up on the rack and because under all the testimony, I think, there is a jury question involved.

The motion will, therefore, be denied.

Mr. Marshall: Will your Honor allow me an exception?

30 The Court: Yes.

(Mr. Marshall made a closing statement to the jury on behalf of the defendant and Mr. Avis made a closing statement to the jury on behalf of the plaintiff.)

CHARGE OF THE COURT.

SHAY, J.:

Ladies and gentlemen of the jury:

This is a suit by Jacob L. Feingold individually and a suit by him as the Father and next friend of Seymour Feingold against S. S. Kresge Company for moneys to compensate these plaintiffs, one for moneys that he has been obliged to spend or bills that he has been obliged to incur in the treatment of his son, and the other to compensate him for the pain and suffering he has endured. 10

This suit is based upon negligence, and that negligence must be proved by a preponderance of the evidence, not necessarily by a larger number of the witnesses but by a greater weight of the credible and believable testimony, by the quality of the testimony rather than the quantity of the testimony. 20

It is not disputed in this case that the little boy and his mother were invitees on the day of the accident, that is they were invitees in the store of the defendant, and the defendant owed them a duty to exercise ordinary care to render the premises reasonably safe for them.

Now, did this defendant carefully do that? Did it exercise ordinary care so that their premises were reasonably safe for this little boy? If it did, then this suit should fail and there should be a verdict of no cause of action for both of these plaintiffs. That is the crux of this case. 30

Now, in considering that, there has been a lot of

testimony offered concerning the size of this rack and what happened. There is a contradiction—there is a dispute in the testimony as to what the little boy did, and that is a matter that should be carefully considered by you so that you may determine whether reasonable care was used by the defendant company, because it surely does make a difference if a rack containing merchandise tumbles down and falls upon an invitee without the invitee touching it or if it falls down by being pulled or pushed, consider this together with all the other testimony pertaining to the rack and the conditions existing on this day in question—where the rack was placed and so forth—so you can honestly and intelligently determine whether or not this defendant company exercised ordinary care.

10
20 If the company failed to do that, and that was the proximate cause of the accident, then this defendant must pay. By proximate cause I mean the efficient or producing cause of the injuries.

The little boy was about three years old at the time of the accident, and the law very reasonably does not impose an obligation on a child of immature years such as would bar him from recovery on the ground of contributory negligence. The law says that a child of that age is not guilty of contributory negligence so this case differs somewhat to a case where you have adults as the plaintiff and the defendant. Contributory negligence is out of this case. That does not bar recovery in this case.

30 The element that you have to determine is: Did this defendant do something or did it fail to do something which indicates to you that they did not exercise

Charge of the Court

ordinary care for the safety of the invitee? After you pass upon that question and if you find that the company did, then your verdict should be one indicating a cause of action for both of these parties.

You then come to the question of damages. In determining that, the little boy is entitled to be compensated that is Seymour, in such sum as you think proper under the circumstances. 10

Now, there is some question about whether or not the injuries that he now suffers, apparently he does suffer injuries, were the result of this accident. Of course, if they were the result of something else, then he is not entitled to be compensated for them, but if they were the result of this accident and they were the result of negligence on the part of this defendant company, then he should be compensated in a reasonable sum to be determined by you as jurors, taking into consideration all the pain and suffering he has sustained in the past and any and all pain and suffering he may sustain in the future. You should consider any loss or partial loss of the function of his arm and shoulder, and compensate him in a reasonable sum for that along with the pain and suffering. 20

The father, if he is entitled to anything, is entitled to be compensated for all bills that he has been obliged to incur in the treatment of this child for the injuries arising out of this accident, and any and all bills that he may be reasonably expected to incur in the future for the proper care of his son. 30

Ladies and gentlemen of the jury, I have been requested to make six charges to you. I think I shall refuse the six requests because I feel that they have been amply covered in my charge to you.

Plaintiff's Requests to Charge

I just want to say, ladies and gentlemen of the jury, that there has been some little comment in this case about the negligence of the mother. Now, if the mother was a plaintiff in this case, then possibly her negligence, if there was any negligence on her part, would bar a recovery as far as she is concerned, but any negligence that she may have been guilty of, if any, will not bar the father nor will it bar the child.

With respect to the amount of the verdicts in this case, you, of course, first determine the facts, and after you determine the facts if you determine them against the plaintiff, then your verdict should be one of no cause of action, but if you determine them for the plaintiff, then you determine what is the proper amounts to award under all the testimony in this case, using and exercising your good judgment.

Mr. Marshall: I think that was a wonderful charge, and the only exception I desire to take is to that portion of the charge which referred to the negligence of the mother not being imputable to the child.

The Court: Yes.

(The following requests for charge were submitted by the plaintiff.)

1. The defendant in this case is under a duty to exercise ordinary care to render its premises reasonably safe for its invitees, including the plaintiff in this case.

2. If the jury should find that the defendant was

Plaintiff's Requests to Charge

negligent in the operation and maintenance of its said store and premises and failed to exercise due care in the operation and maintaining of said store and its fixtures, stock, and equipment and that such negligence was the proximate cause of the plaintiff's injuries, plaintiff should recover.

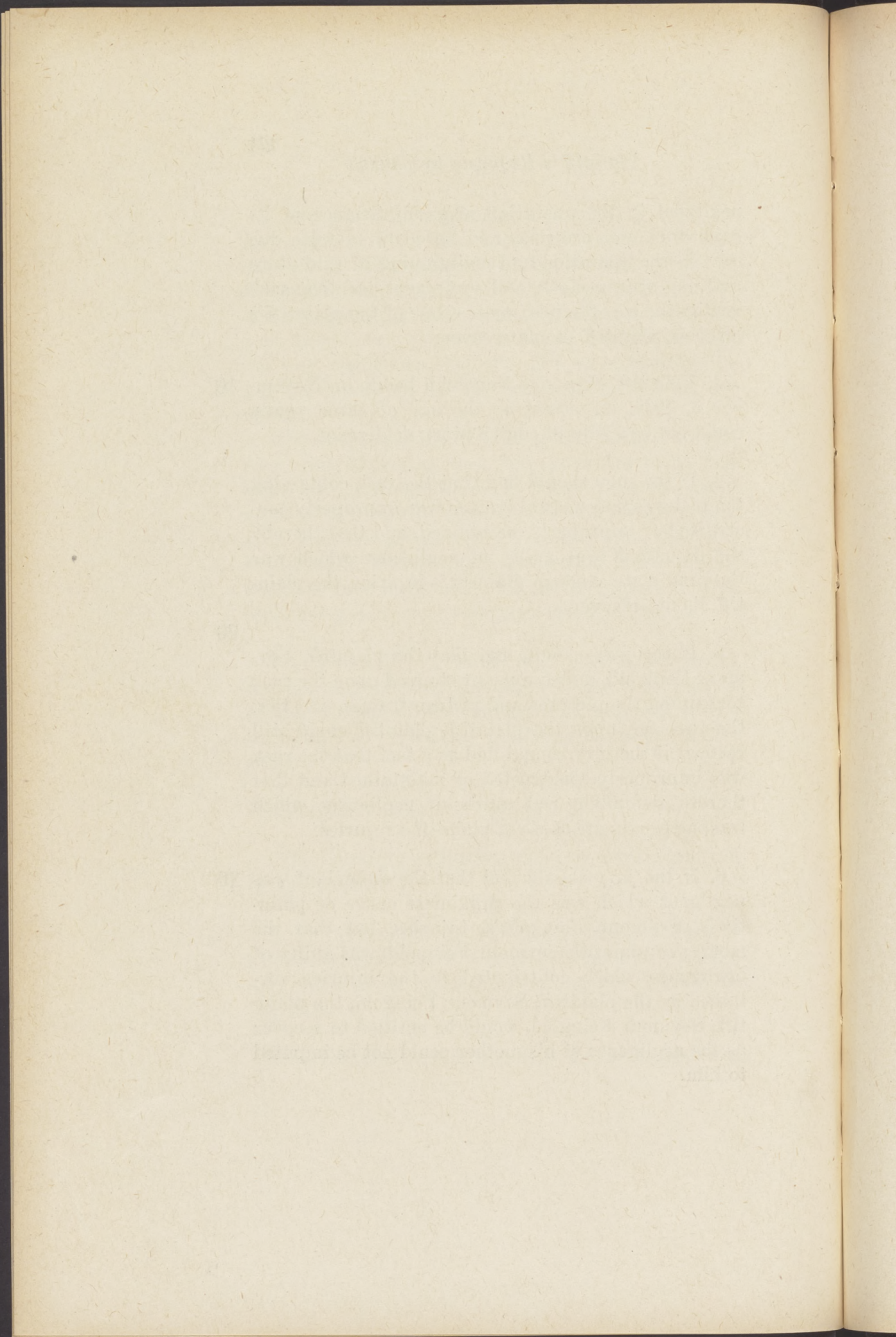
3. Plaintiff, Seymour Feingold, being, on November 3, 1934, an infant of the age of three years, could not be guilty of contributory negligence. 10

4. If the jury should find that the rack containing the pictures and picture frames was improperly constructed or improperly maintained, and that thereby the defendant was guilty of negligence which was the proximate cause of plaintiff's injuries, the plaintiff should recover.

20

5. If the jury should find that the plaintiff, Seymour Feingold, pulled upon or stepped upon the rack containing the pictures and picture frames, and that the rack fell upon the plaintiff, plaintiff could still recover if the jury should find as a fact that the rack was improperly constructed or maintained and that thereby defendant was guilty of negligence which was the proximate cause of plaintiff's injuries.

6. If the jury should find that the defendant was negligent which was the proximate cause of plaintiff's, Seymour Feingold's, injuries, but that the mother of plaintiff, Seymour Feingold, was guilty of negligence which contributed to the injuries sustained by the plaintiff, Seymour Feingold, the plaintiff, Seymour Feingold, would be entitled to recover as the negligence of his mother could not be imputed to him. 30



NEW JERSEY COURT OF ERRORS AND
APPEALS.

SEYMOUR FEINGOLD, by JACOB L. FEINGOLD, his father
and next friend, and JACOB L. FEINGOLD, indi-
vidually,

Plaintiffs-Appellees,

v.

S. S. KRESGE COMPANY, a corporation,
Defendant-Appellant.

BRIEF OF DEFENDANT-APPELLANT.

STATEMENT OF FACTS.

This action was tried in the Supreme Court, Gloucester County, before Judge Shay and a jury.

The facts as developed by the plaintiffs showed that on November 3rd, 1934, Seymour Feingold, an infant of the age of three and one-half years (S. C., p. 15, l. 25), entered the store of the defendant company under the care of his mother, a prospective purchaser. While in the store the infant plaintiff became separated from his mother, although she claimed him to be constantly within her line of vision (S. C., p. 17, ll. 1-10).

Brief of Defendant-Appellant

In a corner, to the front of the store, was placed a certain case or rack on which were displayed picture frames of various sizes (S. C., p. 27, ll. 18-31). While the infant plaintiff was in front of the rack, it fell upon him, causing certain injuries for which the infant and his father seek compensation. The mother testified that the child had not touched the rack before it fell (S. C., p. 30, l. 12), but this fact was later controverted by the defendant's proof (S. C., p. 133, ll. 30-35).

The plaintiff offered to prove only the circumstances surrounding the accident and damages. There was no proof of negligence. After the denial of a motion for non-suit, the defendant offered testimony as to the construction and placing of the rack, and merchandise thereon, to which there was no rebuttal.

The complaint did not allege general negligence, or negligence generally, but accused the defendant of certain acts of negligence specifically set forth, namely: in the placing of the rack and the merchandise thereon.

The trial Court further denied a motion for directed verdict in favor of the defendant, and the case was submitted to the jury. A verdict for the plaintiffs in the aggregate amount of \$1600.00 was returned, and this appeal is taken from the judgment entered thereon.

ARGUMENT.

I.

1. The trial Court refused to grant a non-suit in favor of the defendant, when thereunto moved, whereas said motion should have been granted for one or more of the following reasons:

(a) There was no proof of negligence on the part of the defendant.

As appears from the testimony, no attempt was made in the plaintiffs' case to prove negligence, generally or specifically, on the part of the defendant. The circumstances surrounding the accident were detailed, the extent of the injuries shown, damages proven, and the plaintiff rested.

It is elemental that negligence cannot be imputed from the mere happening of the accident (*Kingsley v. D. L. & W. R. R. Co.*, 81 N. J. L. 536, E. & A., 1911; *Garino v. Walker*, 7 Misc. 903, Sup. Ct., 1929). Any recovery by the plaintiffs, therefore, is predicated on and, as to the question of the presence of negligence, wholly dependent on the applicability of the doctrine of *res ipsa loquitur* to this case.

II.

(b) Specific acts of negligence were alleged by the plaintiffs, but no proof offered in support thereof.

The doctrine of *res ipsa loquitur* has been defined by this Court in the leading case of *Mumma v. Easton & Amboy R. R. Co.* (73 N. J. L. 653, E. & A., 1906), as follows:

“This principle is that when through any instrumentality or agency under the management or control of a defendant or his servants there is an occurrence, injurious to the plaintiff, which, in the ordinary course of things, would not take place if the person in control were exercising due care, the occurrence itself, in the absence of explanation by the defendant, affords *prima facie* evidence that there was want of due care.”

The question here arises whether under the pleading, which will be later considered, and the proof, this doctrine applies here.

Where negligence is alleged by the plaintiff he must bear the burden of proving it; and this burden may be eased, but is not shifted in cases where the above-quoted doctrine applies (*Bien v. Unger*, 64 N. J. L. 596, E. & A., 1900). In such cases the plaintiff must show

“the existence of the cause or thing which was alleged to have been the negligent act which produced the injury, or proof of such facts from which the existence of such cause or thing con-

Brief of Defendant-Appellant

stituting the alleged negligent act was the only reasonable inference that could be properly drawn, and that such negligent cause or thing producing the injury was in the possession of and under the control or management of the person charged with negligence or of his servant.”

(*Conover v. D. L. & W. R. R. Co.*, 92 N. J. L. 602, E. & A., 1919). The plaintiffs did not attempt to prove the negligent act, nor have they shown facts from which the negligent act is the only reasonable inference.

The testimony of Lillian Feingold, the mother, merely shows that the infant plaintiff was standing in front of the rack in question and that it fell upon him. Nothing appears to show that the rack was improperly placed in reference to the passing of customers through the store; in fact, the converse was admitted by the plaintiffs' witness, Edward Bothner (S. C., pp. 90-91, ll. 29-10). Nor is anything unusual shown as to the display of merchandise on the rack, and no evidence appears in the plaintiffs' case as to the manner of placing the rack.

If the reason for the falling of the rack is unknown to the plaintiff, it is as much a mystery to the defendant. The complaint filed in this action specifically alleged the causes of the accident, but proof failed at the time of trial. To stamp a defendant with *prima facie* negligence under such circumstances is to do so solely on the ground of ownership, a far cry from such negligence being the “only reasonable inference.”

In the case of *Bien v. Unger, supra*, the plaintiff, an employee of the defendant, was injured by a machine in the defendant's place of business. This Court held:

"In the present case it is not pretended that there was any direct proof of negligence. Indeed, it cannot be seriously contended that at the close of the case anyone could say what caused the machine to act as it is said to have done, still less to indicate what part of it was defective or out of order or whether any part of it was. An occurrence that remains unaccounted for after the extraordinary scrutiny to which this one has been subjected cannot, with any show of reason, be said to have been discoverable by the exercise of ordinary care.

"This is not one of those cases in which the plaintiff, in default of proof of the particular in which the defendants were negligent, may point to the occurrence by which he was injured and say that this of itself made the probability that the defendants had acted carelessly of greater weight than the presumption that they had not, which is the doctrine called *res ipsa loquitur*."

And again, in *Cook v. American Smelting and Refining Co.* (99 N. J. L. 81, E. & A., 1923):

"A plaintiff to succeed must show by evidence, not only such circumstances as would justify the inference of the defendant's negligence, but which would exclude the idea that the accident was due to a cause with which the defendant was unconnected."

As indicated by these rulings, the plaintiffs in the case at bar have not carried even the burden of proof imposed by *Conover v. D. L. & W. R. R. Co.*, *supra*.

Singularly enough, although there is no direct evidence of negligence, the plaintiffs' case shows familiarity with, and offers explanation of all the circumstances surrounding the accident. The mother, in whose care was the infant plaintiff, demonstrated a detailed knowledge of the rack in question (S. C., pp. 26-29), and was an eye-witness to its falling. (S. C., p. 17, l. 14.) All of the conditions under which the accident happened were shown, but the question of the defendant's negligent conduct still remained. In such a situation the doctrine of *res ipsa loquitur* has no application.

“* * * where all the facts and circumstances under which the accident occurred are disclosed by the evidence, and the question presented is whether, under the proof submitted, the conduct of the defendant was negligent, which is the present situation, there is nothing left to inference, and the rule *res ipsa loquitur* has no application.” (*Hochreutner v. Pfenninger*, 113 N. J. L. 317, E. & A., 1934; citing *Dentz v. P. R. R. Co.*, 75 N. J. L. 893, E. & A., 1908.)

The doctrine of *res ipsa loquitur* having no application, the plaintiff must rely on direct proof of negligence. There being no such direct proof, the motion for non-suit should have been granted by the trial Court.

III.

- (c) Specific acts of negligence were alleged by the plaintiffs by which they forfeited all right to rely on the doctrine of *res ipsa loquitur*;
- (d) Specific negligence having been pleaded by the plaintiffs, the doctrine of *res ipsa loquitur* does not apply.

As appears by the definition of the doctrine of *res ipsa loquitur*, it originated and is applied for the benefit of a plaintiff who suffers injury through a cause unknown to such plaintiff, but wholly under the management and control of the defendant, where such injury would not ordinarily have happened were it not for negligence on the part of the defendant. If the plaintiff is in a position to directly prove negligence, he cannot rely on this doctrine of inference; and such should be, and is, the better rule when the plaintiff, voluntarily and without hesitation, reveals and contends by his pleadings that he can thus directly prove negligence.

The burden placed upon a defendant by the rule of *res ipsa loquitur* is one of rebutting an inference by explanation. If the plaintiff contends that the defendant negligently did a specific thing, the defendant's position is one merely of negation, and he need not be prepared to affirmatively show due care, except as a defense nor, as is often the case, attempt to explain an occurrence not within his knowledge and understanding. No case directly on point ap-

Brief of Defendant-Appellant

pears in this State, but such is the ruling in numerous States as exemplified by the following cases:

- Roscoe v. Metropolitan St. R. Co.*, 202 Mo. 576, 101 S. W. 32 (1907);
Gibler v. Quincy O. & K. Cr. Co., 148 Mo. App. 475, 128 S. W. 791 (1910);
Mo. K. & T. R. Co. v. Thomas, 63 Tex. Civ. App. 312, 132 S. W. 974 (1910);
Wichita Valley Ry. Co. v. Helms, Tex. Civ. Ap. , 261 S. W. 225 (1924);
Pistorio v. Wash. Ry. & Elec. Co., 46 App. D. C. 479 (1917);
Sullivan v. Capital Traction Co., 34 App. D. C. 358 (1910);
Chicago Union Traction Co. v. Leonard, 126 Ill. App. 189 (1906);
O'Rourke v. Marshall Field & Co., 307 Ill. 197, 138 N. E. 625 (1923);
White v. Chicago G. W. R. Co., 246 Fed. 427 (1917);
The Great Northern, 251 Fed. 826 (1918);
Marovich v. Central Cal. Traction Co., 191 Cal. 295, 216 Pac. 595 (1923);
Connor v. Atchison T. & S. F. R. Co., 189 Cal. 1, 207 Pac. 378 (1922);
Byland v. E. I. Du Pont de Nemours Powder Co., 93 Kan. 288, 144 Pac. 251 (1914);
Pierce v. Great Falls & C. R. Co., 22 Mont. 445, 56 Pac. 867 (1899).

As is stated in *Roscoe v. Metropolitan St. R. Co.*,
supra:

“General allegations of negligence are permitted because plaintiff, not being familiar with the instrumentalities used, has no knowledge of the specific negligent act or acts occasioning the injury, and for a like reason the rule of presumptive negligence is indulged. But if plaintiff, by his petition, is shown to be sufficiently advised of the exact negligent acts causing, or contributing to, his injury, as to plead them specifically, as in this case, then the reason for the doctrine of presumptive negligence has vanished. If he knows the negligent act, and he admits that he does know it by his petition, then he must prove it, and, if he recovers, it must be on the negligent acts pleaded, and not otherwise. In other words, the burden of proof is upon plaintiff, as it would be in any other kind of a case. The rule of presumptive negligence and the rule of allowing the pleading of negligence, generally; are rules which grow out of necessity in cases of this character, and are exceptions to the general rules of pleading and proof. Where plaintiff, by his petition, admits that there is no necessity, the reason for the rule, *ex necessitate* fails, and with it the rule itself.”

In the case at bar the plaintiffs did not allege negligence generally, or general negligence, but in the complaint explained and offered to prove the accident and injury as follows:

“Notwithstanding said duty, the defendant on said date, November 3, 1934, carelessly and negligently and in violation of said duty, by its agents and servants, carelessly and negligently, maintained and permitted to stand a

Brief of Defendant-Appellant

certain box, shelf or rack, which was not fastened either to the floor or to the wall, and which was located in said store at a place open to the public and its invitees, including plaintiff, Seymour Feingold, and which said box, rack or shelf was placed in such a position that same was unsafe to the invitees and customers of the defendant, which said fact defendant knew, or should have known. Defendant further, negligently and carelessly, placed on said box, shelf or rack, numerous picture frames and/or other articles or merchandise in such a manner as to render said box, shelf or rack unstable and liable to fall.”

By such pleading, the defendant company was called upon to deny such specific acts of negligence only if they were proven. The doctrine of *res ipsa loquitur* was not invoked, and was erroneously applied by the trial Court in calling upon the defendant for an explanation of which they were not forewarned, and as to which they were in no better position than the plaintiff.

Two cases appear in this State which touch upon this point in argument, but are not in conflict herewith.

In the case of *Rapp v. Butler-Newark Bus Line* (103 N. J. L. 512; aff. 104 N. J. L. 444, 1927), negligence was generally charged by the plaintiff. On a demand for specification of negligence by a bill of particulars, the plaintiff detailed specific acts of negligence as appeared from the circumstances surrounding the accident. The Court held that the doctrine of *res ipsa loquitur* was not thereby forfeited,

since the plaintiff originally showed reliance on this doctrine for recovery and could not be forced from this position.

In *Trenton Passenger Ry. Co. v. Cooper* (60 N. J. L. 219, E. & A., 1897), the plaintiff alleged negligence of the defendant in failing to properly bond its rails, whereby electricity was caused to escape resulting in the injury complained of. The defendant contended that some particular defect in such bonding should have been proven, and that the doctrine of *res ipsa loquitur* could not apply. In denying this contention the Court said:

“* * * as it appeared in the case that such escape was only possible at the end of the rails, it was a necessary conclusion that, if it occurred, it must have been due to insufficient or defective bonding.”

The allegation of the complaint, therefore, though apparently specific, was actually general, since the nature of the accident and injury admitted of only one cause.

These rulings cannot determine the case at bar, where the plaintiffs originally and voluntarily admitted their knowledge of and ability to prove negligence of the defendant as to an accident of unknown and various possible and probable causes. It is submitted, therefore, that by their pleading the plaintiff forfeited all right to reliance on the doctrine of *res ipsa loquitur*, and the motion for nonsuit was erroneously denied.

IV.

- (e) That plaintiff failed to show any violation of any duty which defendant company owed to the plaintiff, and at the close of the plaintiffs' case, there was proof only of the happening of the accident complained of, and no evidence to show how it was occasioned.

Regardless of any proof of negligence, directly or by inference, the defendant company was not guilty of violating any duty owed to the infant plaintiff, Seymour Feingold. This case is predicated on the proposition that the defendant failed to use reasonable care as to an invitee, when, under the law of the State, the infant was a mere licensee to whom the defendant company owed only the duty of abstaining from acts wilfully injurious.

It cannot reasonably be contended, nor was it, that Seymour Feingold, an infant three and one-half years of age, was a prospective or intending purchaser. The case at bar, therefore, is controlled by the case of *Fleckenstein v. Great A. & P. Tea Co.* (91 N. J. L. 145, E. & A., 1917).

The plaintiff, twelve years old, entered the store of the defendant with one Young, who intended to make certain purchases. Plaintiff did not, and did not intend to, buy anything. Plaintiff was injured as a result of an employee of defendant opening a box of canned goods. A non-suit was granted, the Court holding:

“The question arises,—Was the infant plaintiff lawfully upon the defendant’s premises, and, if so, was he an invitee or licensee? In our judgment, he was lawfully in the store of the defendant, and not as an invitee, however, but only as a licensee.

“ Merchants invite the public to enter their stores to buy wares. It cannot be said that they invite the entrance of those who accompany them, but who have no intention of purchasing; such persons are mere licensees. While it may be that they invite those to enter, who, after inspecting their wares may become purchasers, such an invitation did not extend to young Fleckenstein, when he accompanied his friend Young into the store, as he, Fleckenstein, admittedly, had no intention of purchasing anything.

” And this Court, in *Del. L. & W. R. R. Co. v. Reich*, 61 L. 635 (at p. 643), held:

“ ‘The general rule with regard to the duty which a landowner owes to persons coming upon his premises is that where the entry is made by his invitation, either express or implied, he is required to use reasonable care to have his premises in a safe condition; but where the entry is made merely by his permission * * * the landowner is under no obligation to keep his premises in a non-hazardous state; his only duty to a licensee or a trespasser is to abstain from acts wilfully injurious. And this rule has been frequently enforced by the courts of this state. (Citing cases.)’ ”

The variation of duty owed to invitees and licensees is not affected by their ages.

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“* * * Whatever may be the course of division elsewhere, our own cases have uniformly applied the rule of non-liability except for wilful injury to licensees and trespassers, adults and infants alike.”

(*Faggioni v. Weiss*, 99 N. J. L. 157, E. & A., 1933; accord, *Friedman v. Snare & Triest Co.*, 71 N. J. L. 605, where the infant plaintiff was under five years of age.)

The infant plaintiff here, being a mere ~~invitee~~ licensee, could only recover compensation from the defendant company for injuries caused by wilful negligence. No attempt was made to show any act of the defendant's employees which was wilfully injurious; certainly the doctrine of *res ipsa loquitur* cannot be so extended.

The defendant having violated no duty owed to the infant plaintiff, there could be no recovery by him. If there can be no recovery by the person injured, there can be no recovery for consequential damages by the father, Jacob Feingold. (*Rossman v. Newton*, 112 N. J. L. 261, E. & A., 1933; *Folley v. United B. & L. Ass'n*, 13 Misc. 293, Sup. Ct., 1935.) It follows, therefore, that the trial Court erred in refusing to grant a non-suit in this case.

CONCLUSION.

For the reasons above stated the S. S. Kresge Company, defendant-appellant, respectfully submits that the trial Court erred in refusing to grant the motion for non-suit made in this cause, and that the said trial Court should therefore be reversed and a judgment of non-suit entered.

GEORGE B. MARSHALL,
*Attorney of Defendant-
Appellant.*

NEW JERSEY COURT OF ERRORS AND APPEALS

Seymour Feingold, by Jacob L. Feingold, his father and
next friend and Jacob L. Feingold, individually,
Plaintiffs-Appellees,

vs.

S. S. Kresge Company,

Defendant-Appellant.

On Appeal

BRIEF OF PLAINTIFFS-APPELLEES

STATEMENT OF FACTS

This action was brought by Seymour Feingold, an infant of the age of three and a half years, by his father, Jacob L. Feingold, and by Jacob L. Feingold, individually, against the defendant, S. S. Kresge Company, a corporation. The testimony showed that the infant plaintiff, Seymour Feingold, accompanied by his mother, entered the store of the defendant corporation in the City of Woodbury, Gloucester County, New Jersey, and while in the store, while his mother was making a purchase, a case or rack, on which were displayed picture frames, fell on said infant plaintiff. The action was tried and the case submitted to the jury who returned a verdict in favor of the plaintiff, Seymour Feingold by Jacob L. Feingold, his father and next friend, in the sum of One Thousand Dollars, and in favor of Jacob L. Feingold, individually, in the sum of Six Hundred Dollars. Judgment was entered thereon and defendant appeals.

ARGUMENT.

The defendant-appellant has written down as ground of appeal, the refusal of the trial court to grant a non suit in favor of defendant, and the fact that the trial judge charged the jury in substance that any negligence on the part of the mother of the infant plaintiff would not bar recovery at the suit of said infant or his father.

The grounds of appeal further set forth five alleged reasons why defendant's motion for a non suit should have been granted, the reasons being as follows:

"(a) There was no proof of negligence on the part of the defendant;

"(b) Specific acts of negligence were alleged by the plaintiffs, but no proof offered in support thereof;

"(c) Specific acts of negligence were alleged by the plaintiffs by which they forfeited all right to rely on the doctrine of *res ipsa loquitur*;

"(d) Specific negligence having been pleaded by the plaintiffs, the doctrine of *res ipsa loquitur* does not apply;

"(e) That plaintiffs failed to show any violation of any duty which defendant company owed to the plaintiff, and at the close of the plaintiff's case, there was proof only of the happening of the accident complained of, and no evidence to show how it was occasioned."

With relation to the first reason alleged by the defendant-appellant why a non suit should have been granted, it is the contention of the plaintiffs-appellees that the doctrine of *res ipsa loquitur* applied. The testimony produced at the trial in behalf of the plaintiff-appellees showed that the rack which was standing in the store fell upon the infant plaintiff, Seymour Feingold, through no fault or negligence on his part. The statement of the rule of *res ipsa loquitur*, as set forth in 45 **Corpus Juris**, page 1193, is as follows:

"Where the thing which caused the injury complained of is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen, if those who have its management or control use proper care, it affords reasonable evidence, in the absence of explanation by defendant, that the accident arose from want of care."

It is to be remembered in this case that the defendant-appellant operated a public store in the City of Woodbury, Gloucester County, New Jersey, which was open to the public and that the rack which fell was under the entire and complete control and management of the defendant-appellant. It is the contention of the plaintiffs-appellees that the mere fact that the rack fell upon the person of the infant plaintiff was proof of the negligent care, control and maintenance of same, and that these facts invoked the rule of *res ipsa loquitur*.

The testimony showed that the rack itself was seventy-two inches high and had five shelves (State of the case, page 104) and had placed thereon various pictures and frames of various sizes (State of the case, pages 104 and 105).

The testimony of the manager of the store, a witness produced by the defendant-appellant, on page 162 of the State of the Case, is as follows:

"Q. I don't know whether I asked you about it, but I would like to ask you with respect to this rack which you and Mr. Schroeder constructed if, after the accident on November 3, you examined it?

"A. After I had made out my reports in regard to the accident I went down and examined the rack after it had been taken downstairs.

"Q. At that time did you find anything faulty or defective in the construction of the rack?

"A. Not definitely. It would seem to be a little bit shaky to what it was before but really nothing to speak of, but I did not want to use it in the future.

"Q. Why didn't you expect to use it in the future?

"A. I didn't want to take another chance. I didn't want another accident to occur.

"Q. That is the reason why you discontinued the use of it?

"A. Yes.

"Q. At the time it fell it was loaded with pictures?

"A. It had pictures on it."

It is to be noted that the testimony of this witness showed that the only other rack in the store of the same nature was fastened to the floor. (Page 163 of the State of the Case).

It is a well established rule that a refusal to non suit for failure of proofs will not justify a reversal if the defect be supplied by evidence thereafter taken during the progress of the cause. **Maudlsey vs. Richardson and Boynton Company**, 101 N. J. L. 561.

The second, third and fourth reasons written down by the defendant-appellant why a non suit should have been granted, read as follows:

“(b) Specific acts of negligence were alleged by the plaintiffs, but no proof offered in support thereof;

“(c) Specific acts of negligence were alleged by the plaintiffs by which they forfeited all right to rely on the doctrine of *res ipsa loquitur*;

“(d) Specific negligence having been pleaded by the plaintiffs, the doctrine of *res ipsa loquitur* does not apply.”

These reasons will be considered together in this argument by plaintiffs-appellees.

The plaintiffs-appellees produced all facts in their knowledge concerning the cause of the injury to the infant plaintiff-appellee, Seymour Feingold. It is true that the proofs of specific acts of negligence were scanty and this can well be understood because of the fact that the premises, the stock, fixtures and equipment therein were entirely under the control and management of the defendant-appellant. The testimony of Otto F. Sharon, a witness produced by the defendant-appellant (State of the Case, page 110) was to the effect that the rack in question was not fastened. The plaintiffs-appellees, in their proofs, showed that the rack, which was described by the witness, Lillian Feingold, fell unto the person of the infant plaintiff-appellee. It is contended

by the plaintiffs-appellees that not only were specific acts of negligence pleaded but also that the complaint contained a general allegation of negligence.

Paragraph 3 of the complaint first sets forth that the defendant-appellant was under a duty "to operate and maintain said store and premises in a safe manner and condition and to exercise due care in the operation and maintaining of said store and its fixtures, stock and equipment for the safety of its invitees and customers and for the safety of the plaintiff, Seymour Feingold."

This allegation is then followed by the allegation "Notwithstanding said duty, the defendant on said date, November 3, 1934, **carelessly and negligently maintained** and permitted to stand a certain box, shelf or rack——"

Plaintiffs-appellees allege that this allegation is a general allegation of negligence and in any event would support a finding of *res ipsa loquitur*.

It is true that the further allegation or statement is made that said rack "was not fastened either to the floor or to the wall and which was located in said store at a place open to the public and its invitees, including plaintiff, Seymour Feingold, and which said box, rack or shelf was placed in such a position that same was unsafe to the invitees and customers of defendant, which said fact defendant knew or should have known." If such statements or allegations are in fact specific allegations of negligence, they too are facts which show the circumstances surrounding the happening of the accident which caused the injury to the plaintiff-appellee, Seymour Feingold.

45 *Corpus Juris*, page 1082. "Generally speaking the doctrine of *res ipsa loquitur* is a rule of evidence and ordinarily has no application to pleadings, but, as has been said, cases dealing with this doctrine as a rule of evidence are authority on the question of pleading in such cases.—Where the case comes within this doctrine in some jurisdictions, general allegations of negligence in the absence of objection thereto are sufficient, especially where the facts are such that plaintiff cannot be expected to be informed as to the causes of the injury, whereas defendant must be assumed to be fully informed;

and the specific acts of negligence need not be alleged, but, if alleged, may be disregarded as surplusage."

45 **Corpus Juris**, pages 1226 and 1227. "However, in other jurisdictions, where the circumstances under which an injury occurs are such as to raise a presumption of negligence on the part of the defendant, under the doctrine of *res ipsa loquitur*, and these facts are sufficiently set forth in general terms in the declaration or complaint, the fact that the charge also avers specific omissions of duty as the source of the injury does not deprive plaintiff of the benefit of the doctrine as such negligent acts are the ones which the legal inference, by operation of the doctrine, tends to establish."

Under this item in **Corpus Juris** is cited the case of **Trenton Passenger Railway Company vs. Cooper**, 60 N. J. L. 219. In this case cited, an action was brought against the Trenton Passenger Railway Company for damages arising from the injury to a horse owned and being driven by the plaintiff, which allegedly was injured by the escape of electricity from the rails of the defendant railway company. The complaint alleged that the negligence of the defendant was in insufficient or defective bonding of the rails permitting the escape of electricity. A motion was made to non suit the plaintiff upon the grounds that as the averments of negligence were limited to the bonding of the rails, the plaintiffs were obliged to prove or point out some defect or insufficiency in such bonding. The Court (Court of Errors and Appeals) said, page 220. "It would have been sufficient to aver that electricity was, through negligence, permitted to escape from the rails; but as it appeared in the case that such escape was only possible at the ends of the rails, it was a necessary conclusion, that, if it occurred, it must have been due to insufficient or defective bonding."

Defendant-appellant cites the above case in its brief, and contends that the allegations of the complaint in the Cooper case, although apparently specific, were actually general since the nature of the accident and injury admitted of only one cause. In the case at bar, the allegations or statements that the rack was not fastened and was placed in such a position as to be dangerous to the plaintiff-appellee, are allegations or facts which the legal

inference, by operation of the doctrine or *res ipsa loquitur*, tends to establish.

There are numerous authorities in other states holding that where a general charge of negligence is made and also specific omissions of duty that the doctrine of *res ipsa loquitur* applies.

Biddle vs. Riley, 176 S. W. 134.

Lippert vs. Pacific Sugar Corporation, 164 Pacific 810.

Southern Railway Company vs. Adams, 100 N. E. 773.

Heffter vs. Northern States Power Company, 217 N. W. 102.

Boyd vs. Portland Electric Company, 68 Pacific 810.

Nashville Railway Company vs. Gregory, 193 S. W., 1053.

Washington-Virginia Railway Company vs. Banknight, 75 S. E., 1032.

Kluska vs. Yeamans, 103 Pacific, 819.

Duerr vs. Consolidated Gas Company, 83 N. Y. S., 714.

Rosenzweig vs. Hines, 280 Fed. 247.

Firszt vs. Capital Park Realty Company, 98 Conn. 627.

All allegations in the complaint are entirely consistent with the doctrine of *res ipsa loquitur* as the rack in the course of human events would not have fallen had there not been some negligence on the part of the defendant-appellant.

The case of **Hochreutener vs. Pfenninger** reported in 113 N. J. L. page 317 and cited by defendant-appellant in its brief is entirely different from the case at bar. In that case, the plaintiff alleged that the doctrine of *res ipsa loquitur* was applicable but the court, on page 319, said

“The mere fact that the defendant drove the car off the concrete would not require a finding of negligence as such action may have been amply justified by the surrounding circumstances and the trial court properly allowed the jury to pass on that question.”

There is a vast difference between a case where circumstances render it necessary for a person to drive an automobile off the concrete highway and one in which a rack, maintained by the defendant in a store, falls on a child who is in the aisle or a portion of the store open to the public.

Plaintiffs-appellees agree that where specific acts of negligence are pleaded and which said acts of negligence are not ones which the legal inference, by operation of the doctrines of *res ipsa loquitur*, would tend to establish, that in such case the negligence alleged must be proved. If, for example, the plaintiffs-appellees had alleged in the complaint that the rack fell because of the fact that one of the employees of the defendant-appellant had pushed same over, then and in such case the burden of proving this negligence would be upon the plaintiffs-appellees. Any allegations or statements of negligence as contained in the complaint are ones which the legal inference by operation of the doctrine of *res ipsa loquitur* would tend to establish.

The case of **Rapp vs. Butler-Newark Bus Line**, 103 N. J. L., 512 and affirmed in 104 N. J. L., 444 and cited by defendant-appellant in its brief does not directly hold that the doctrine of *res ipsa loquitur* will not apply where specific acts of negligence are alleged in the complaint. It holds, however, that where specific acts of negligence are shown in a bill of particulars and not proved that even in such case the doctrines of *res ipsa loquitur* will apply.

In the case at bar it is alleged by the plaintiffs-appellees that there is a general averment of negligence.

20 R. C. L. page 187. "It is held by some of the authorities that, if the case is a proper one for the application of the doctrine (*res ipsa loquitur*) the plaintiff by pleading of the particular cause of the accident, in no wise loses his right to rely thereon."

There are ample authorities in the State of New Jersey which hold that happenings of the kind set forth in the complaint invoke the doctrine of *res ipsa loquitur*.

Crawford vs. American Stores Company, 136 Atl. 715. In this case cited, the plaintiff entered the grocery store of the defendant and, according to her testimony, while standing in front of the counter was injured by some falling cans of pickles which had been piled on the counter to the height of nearly three feet. The Court held that the doctrine of *res ipsa loquitur* applied and that it was a question for the jury.

Higgins vs. Georke Krich Company, 91 N. J. L. 464. In this case the plaintiff went into the defendant's store for the purpose of purchasing a refrigerator. While she had her hand on the upper part of the case the lid fell and hit her fingers. The Court held that the doctrine of *res ipsa loquitur* applied.

Zboian vs. Newark, 104 N. J. L. 258. The Court held in this case that the falling of a skylight on plaintiff raised an inference of negligence and it was a jury question.

Law vs. Morris, 102 N. J. L. 650. In this case the falling of plaster upon the plaintiff while in defendant's store raised an inference of negligence and the rule of *res ipsa loquitur* applied.

The last reason advanced by defendant-appellant is that "(e) That plaintiffs failed to show any violation of any duty which defendant company owed to the plaintiff, and at the close of plaintiff's case, there was proof only of the happening of the accident complained of, and no evidence to show how it was occasioned."

Defendant-appellant argued that the plaintiff-appellee, Seymour Feingold, was not an invitee but was a mere licensee. Plaintiffs-appellees contend that this question cannot now be raised in view of the fact that in the complaint, in paragraph 2, it is alleged that the said Seymour Feingold was an invitee and customer of the defendant-appellant and that the defendant-appellant, in its answer to said complaint admitted all of paragraph 2. It is to be remembered that the plaintiff, Seymour Feingold was an infant of the age of three and a half years and was accompanied by his mother, who actually made a purchase in defendant-appellant's store. The case at bar differs greatly from the case of **Fleckenstein vs. Great Atlantic and Pacific Tea Company**, 91 N. J. L. page 145, where the plaintiff was twelve years of age and was in the store merely as a licensee. In the case at bar the relationship of parent and child existed and it is perfectly

apparent that a child of such tender years must of necessity accompany his mother in the store where such purchase was to be made. It is also to be noted that this question was not raised at any time during the trial of the cause by the defendant-appellant and it is the contention of the plaintiffs-appellees that this question cannot now be raised.

In the grounds of appeal, defendant-appellant, under Section 2 alleged as a reason why a new trial should be granted the fact that the Court charged that if any negligence of the mother was present it would not bar recovery so far as the child and the father are concerned, who are the plaintiffs-appellees in this case. The defendant-appellant has not seen fit to argue this question so, as the plaintiffs-appellees understand it, has abandoned this ground. However, it would appear that there is no merit in defendant-appellant's contention.

Markey vs. The Consolidated Traction Company, 65 N. J. L. 82.

Bergen County Traction Company vs. Heitman, 61 N. J. L. 682.

Hedges vs. McManus, 159 Atl, 87.

Newman vs. Philipsburg Horse Car Company, 52 N. J. L. 446.

Plaintiffs-appellees respectfully submit that the appeal should be dismissed.

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