INDEX

FOR DEFENDANT:

EXHIBITS.

Summons.

(Filed)

THE STATE OF NEW JERSEY to GOTTFRIED C. KRUEGER.

YOU ARE HEREBY SUMMONED to answer the annexed complaint of Margaret Egan, an infant, by James B. Egan, her father, as next friend and James B. Egan, in an action at law in the New Jersey Supreme Court, Hudson County. AND TAKE NOTICE, that unless you file your answer to said complaint with the Clerk of the New Jersey Supreme Court, at Trenton, within twenty days after service upon you of this writ and the annexed complaint, the plaintiffs may proceed in the suit and judgment may be entered against you.

WITNESS, WILLIAM S. GUMMERE, Chief Justice of the Supreme Court, at Trenton this twelfth day of November, One Thousand Nine Hundred and Twenty-five.

EDWARD J. KELLEHER,
Clerk.

ROBERT H. DOHERTY,
Attorney.

Complaint.

(Filed)

NEW JERSEY SUPREME COURT.

MARGARET EGAN, an infant by JAMES B. EGAN, her father as next friend and JAMES B. EGAN, *Plaintiffs,* **vs.** GOTTFRIED C. KREUGER, *Defendant.*	**Action at Law.**

The plaintiffs, Margaret Egan, an infant. by James B. Egan, who is admitted by the Court to prosecute as next friend of the said Margaret Egan and James B. Egan individually say that:

FIRST COUNT.

1. The defendant at all the times hereinafter mentioned was the onwer and had control of the five story building and premises known and designated as the Harrison Apartments at #145 Harrison Avenue, in the City of Jersey City, County of Hudson and State of New Jersey, which building was occupied by many families and which was rented out by the defendant to various persons as places of abode.

2. For a long time prior to May 4th, 1925, the date of the happening of the injuries to the plaintiff Margaret Egan, an infant, hereinafter more particularly set forth, the plaintiff James B. Egan with his family occupied apartment #301, paragraph.

3. That the defendant was the owner of the screens in apartment #301 of the lands and premises referred to in the first paragraph.

4. That the defendant furnished screens for apartment #301 on the lands and premises referred to in the first paragraph.

5. That the defendant reserved to himself control over the screens in the windows of the various apartments of the said lands and premises referred to in the first paragraph installing the said screens in the various apartments in the early spring of each year and removing them after the summer of each year.

6. That on May 4th, 1925, and for a long time prior thereto the screen in one of the bedrooms of said apartment #301 was not properly fitted, so that the same was in a loose, dangerous, dilapidated and defective condition, in that the groove of the screen did not mesh with the tongue constructed on the side of the window. of which defective condition the defendant had due notice.

7. On May 4th, 1925, at about 2:00 P. M. the plaintiff Margaret Egan, an infant, of two and one-half years of age came in contact with the screen referred to above, when said screen fell out of said window and plaintiff was precipitated three stories to the yard below, by reason of the negligence of the defendant in failing to repair the said screen in the said bedroom of apartment #301 as he was in duty bound to do.

8. By reason of the negligence of the defendant, the plaintiff Margaret Egan sustained a bridal fracture of the parietal bone, injuries to her left side and was otherwise injured in divers parts of her body, has suffered from nervous shock and will

suffer from nervous shock for a long time in the future, all of which injuries are of a permanent character.

Plaintiff Margaret Egan by James B. Egan, her next friend demands $10,000.00 on the First Count.

SECOND COUNT.

The plaintiff James B. Egan, father of the plaintiff Margaret Egan, an infant says that:

1. He repeats paragraphs 1, 2, 3, 4, 5, 6, 7 and 8 of the First Count.

2. By reason of the negligence of the defendant the plaintiff James B. Egan has paid out large sums of money for medicines and medical aid, x-ray and Hospital bills in an endeavor to effect a cure of the plaintiff Margaret Egan, an infant, and has likewise been compelled to rent a cottage in a quiet neighborhood in Springlake, N. J. in an endeavor to effect a cure of the nervous condition of said plaintiff Margaret Egan, an infant.

Plaintiff James B. Egan demands $3000.00 on the Second Count.

THIRD COUNT.

Plaintiff Margaret Egan, an infant, by James B. Egan, her next friend says that:

1 She repeats paragraphs 1, 2 and 3 of the First Count.

2. That sometime prior to May 4th, 1925, the defendant through his agents and servants, undertook the work of installing the screen in one of the windows of a certain bedroom of said apartment #301, and did such work of installation in such a negligent and careless manner that the said screen did not properly fit the said window, that the same was in a loose, dangerous, dilapi-

dated and defective condition, in that the groove of the said screen did not mesh with the tongue constructed on the side of the window of which defective condition the defendant had due notice.

3. On May 4th, 1925, at about 2:00 P. M., the plaintiff Margaret Egan, an infant, of two and one-half years of age came in contact with the screen referred to above, when the said screen fell out of said window, and the infant plaintiff was precipitated three stories to the yard below, by reason of the negligence of the defendant in having undertaken to install the said screen in said window referred to and having negligently performed the said work in the manner set forth in the second paragraph of this count.

4. She repeats paragraph 8 of the First Count.

Plaintiff Margaret Egan by James B. Egan, her next friend demands $10 000.00 on the Third Count.

FOURTH COUNT.

The plaintiff James B. Egan, father of the plaintiff Margaret Egan, an infant, says that:

1. He repeats paragraphs 1, 2, 3 and 8 of the First Count.

2. He repeats paragrphs 2 and 3 of the Third Count.

3. He repeats paragraph 2 of the Second Count.

Plaintiff James B. Egan demands $3000.00 on the Fourth Count.

ROBERT H. DOHERTY,
Attorney of Plaintiffs.

Answer.

(Filed December 16, 1925.)

NEW JERSEY SUPREME COURT.
HUDSON COUNTY.

MARGARET EGAN, an infant by JAMES B. EGAN, her father as next friend and JAMES B. EGAN,

Plaintiffs,

vs.

GOTTFRIED C. KREUGER,

Defendant.

Law. Action at

Defendant, answering the Complaint herein, says:

ANSWER TO FIRST COUNT.

1. He admits paragraphs one (1) and three (3).

2. He denies paragraphs two (2), four (4), five (5), six (6) and eight (8).

3. He has no knowledge as to the matters set forth in paragraph seven (7) and therefore denies the same.

ANSWER TO SECOND COUNT.

1. He repeats his answers to paragraphs one (1), two (2), three (3), four (4), five (5), six (6), seven (7) and eight (8) of the First Count.

2. He denies paragraph two (2) of the Second Count.

Answer.

ANSWER TO THIRD COUNT.

1. He repeats his answers to paragraphs one (1), two (2) and three (3) of the First Count and makes them part of the answer to this Count.

2. He denies paragraphs two (2) and three (3).

ANSWER TO FOURTH COUNT.

1. He repeats his answers to paragraphs one (1), two (2), three (3) and eight (8) of the First Count.

2. He repeats his answers to paragraphs two (2) and three (3) of the Third Count.

3. He repeats his answer to paragraph two (2) of the Second Count.

FOR SEPARATE AND DISTINCT DEFENSES TO EACH OF SAID COUNTS, DEFENDANT SAYS:

1. That said plaintiffs did not suffer any injury or sustain any loss by reason of any negligence on the part of defendant, his servants or agents.

2. That said plaintiffs did not suffer the injury or sustain the loss alleged.

3. That plaintiff, James B. Egan, was guilty of contributory negligence (a) with knowledge that said screen was defective and out of repair (if the same was defective and out of repair) in leaving said infant alone in the room where said screen was; (b) that James B. Egan was guilty of negligence as set forth in (a) above in leaving said infant alone, with knowledge that said infant could reach said defective screen (if the same was defective) and become injured.

EDWARDS & SMITH,
Attorneys of Defendant.

Reply.

(Filed December 14, 1925.)

NEW JERSEY SUPREME COURT.

HUDSON COUNTY.

MARGARET EGAN, an infant by JAMES B. EGAN, her father as next friend and JAMES B. EGAN, *Plaintiffs,* *vs.* GOTTFRIED C. KREUGER, *Defendant.*	Action at Law.

The plaintiffs for a reply to the Answer of the defendant filed herein, say that they deny paragraphs "1", "2" and "3" of the SEPARATE AND DISTINCT DEFENSES TO EACH OF SAID COUNTS.

ROBERT H. DOHERTY,
Attorney of Plaintiffs.

Testimony.

NEW JERSEY SUPREME COURT.

MARGARET EGAN,
Plaintiff,
vs.
GOTTFRIED KRUEGER,

Before:

HON. WILLARD W. CUTLER, J.
and a Jury.

Jersey City, N. J. April 8. 1926.

APPEARANCES:

ROBERT H. DOHERTY, Esq.,
Attorney for the Plaintiff.
MESSRS. EDWARDS & SMITH,
(By Edwin F. Smith, Esq.)
Attorney for Defendant.

(A jury was empanelled, declared satisfactory and sworn).

Mr. Doherty opens on behalf of the plaintiff.
Mr. Smith opens on behalf of the defendant.

MRS. MARGARET EGAN, sworn as a witness, testifies.

DIRECT EXAMINATION BY MR. DOHERTY:

MR. DOHERTY: I understand that counsel for the defendant will admit that Gottfried -

C. Krueger, the defendant in this action, acquired 145 Harrison Avenue, which is the property involved in this suit, by deed dated November 2, 1923, whch deed was recorded in the Register's Office of Hudson County on the 9th day of November, 1923.

MR. SMITH: Yes.

Q. Where do you reside? A. 151 Clinton Avenue now.

Q. On May 4, 1925, where did you reside? A. At 145 Harrison Avenue.

Q. How many apartments are there in that house, do you know? A. 25, I believe.

Q. What apartment did you occupy? A. Apartment 301.

Q. How many rooms were there in that apartment. A. There were five rooms.

Q. Will you describe to the jury just how those rooms were located with reference to the hallway, etc.? A. We came into a long hall, and the first bedroom was the first room on the right, which was a small one; the children's room was next, and going along through a large bedroom you come into a sort of foyer hall, leading into a sitting room, and then a dining room, kitchen and bath.

Q. Where were the bedrooms? A. To the right as you came in, that is, facing the west.

Q. In which direction did these bedrooms face? A. Towards the west.

Q. How many stories from the ground was your apartment? A. Three and a half stories.

Q. Will you describe, if you can, the approximate size of the windows in the bedroom? A. Well, the ordinary sized apartment window

Q. And were there window panes in the windows? A. Yes.

Q. What sort were they, one piece or various panes of glass? A. No, one piece.

Q. How did those windows operate? A. Up and down.

Q. And at or about that time was anything else connected with the windows in the bedrooms facing west? A. Yes, there were three in the room.

Q. When did you move into this apartment? A. October 1, 1922.

Q. At that time were there screens in the apartment? A. Yes sir.

Q. Were the screens taken out from October 1, 1922 until the fourth day of May 1924? A. Yes, they were taken out in 1922 and taken out in 1923.

Q. When was the last time prior to October 1, 1925, that these screens were put in? A. They were put in in May some time, May 1, 1924.

Q. Who put them in, do you know? A. Mr. Armstrong, the superintendent, put some in, and Mr. Lockwood put in others.

Q. Where was it Mr. Armstrong put these screens in? A. In the living room, one in the kitchen, two in the bedroom, and one in the children's bedroom, and two were missing that I never had.

Q. How many windows were there in the bedroom? A. Two in each bedroom.

Q. On May 4, 1925, did anything unusual happen at the apartment? A. Yes; my little daughter, Peggy, fell out of the window.

Q. Do you know which window she fell from? A. My room.

Q. How many windows are there in that room? A. Two windows.

Q. And they faced west? A. Yes.

Q. What time of day was it that she fell out, do you remember? A. A little after two, five or ten minutes after two in the afternoon.

Q. Were the windows up or down at the time? A. The windows were up.

Q. Both of them up? A. Both of them.

Q. Was there anything in the window at the time? A. There were screens in the window.

Q. What screen was in the window, was this the same screen that had been put in May 1924? A. Yes.

Q. Will you describe to the jury how that screen appeared to you on the day it was put in, in May 1924? A. There was a groove in each screen—that is a groove in which each screen ran, but the screen did not fit, they fitted about one quarter of the way, about one quarter cut in the tongue.

Q. One quarter cut in the tongue? A. Yes, caught.

Q. Which part did it catch? A. The drop part.

Q. How far from the bottom was it caught? A. About three quarters down.

Q. And how far did this tongue extend into the groove at that time? A. Just about a quarter way into the groove, at the top.

Q. Describe to the jury what you could see in that screen. A. You could see the space, about a quarter of an inch space, where a mosquito or a fly could get in.

Q. Which one of the windows are you describing in the bedroom? A. The window where the accident happened.

Q. Did that condition exist at the time the screens were put in? A. Yes.

Q. Did anything happen to those screens after

the time they were installed in May 1924? A. Yes; they blew out of the window several times.

Q. Do you know the first time they blew out after May 1924? A. They blew out of the window about June 1st, and I found the janitor and spoke to him about it.

Q. Who was the janitor? A. Mr. Lockwood.

Q. Is he here in court now? A. No.

Q. Did the janitor come up to see you about it? A. He brought up the screen.

Q. What did you tell Mr. Lockwood? A. I told him the screen did not fit.

MR. SMITH: I object to that and move to strike out the answer.

THE COURT: Objection sustained.

MR. DOHERTY: I will withdraw the question and answer.

Q. As a result of what you told Mr. Lockwood, did you afterwards see Mr. Lockwood? A. I did.

Q. Where? A. Right in the apartment, when he came up.

Q. What was he doing there? A. He came up to place the screen up.

Q. Did he have the screen with him? A. Yes.

Q. Did he put it up again? A. Yes.

Q. What did it look like afterwards? A. The same way.

Q. Did you call his attention to the condition of the screen? A. Yes.

Q. What did you tell him?

MR. SMITH: I object to what she told him.

MR. DOHERTY: I submit Mr. Lockwood was the agent of this building at the time,

and the court has held that notice to the janitor was notice to the landlord.

MR. SMITH: I have not seen anything to show that Mr. Lockwood was agent.

Q. Who was this Mr. Lockwood? A. He was the superintendent of the apartment.

Q. What did he do around the place? A. Took care of all things, anywhere.

Q. Among other things anywhere—that does not mean anything,—what did he do in the apartment? A. He attended to the furnaces, cleaned the hallways, put in screens and ran the elevator and did different things.

Q. When you wanted anything in the apartment, whom did you get in touch with? A. The superintendent.

Q. Was he known as the superintendent around that building? A. Yes.

Q. Do you remember what time he came there as superintendent? A. He came in the spring, about May I think it was.

Q. What year? A. 1924.

Q. Was it this same man you spoke to about the screen? A. Yes.

Q. I now ask you, what did you tell Mr. Lockwood at the time he came back with the screen, regarding these screens?

MR. SMITH: I just made the objection, I have not seen anything that would justify a conversation between this lady and Mr. Lockwood, in order to bind the owner.

THE COURT: She said he was the man in charge.

MR. SMITH: I take an exception.

A. I told him the screens did not fit and couldn't he fit them properly.

Q. Did you call his attention to the condition of the screen as it then existed in the window? A. Yes, I did.

Q. As a result of that conversation, did anything happen to the screen? A. No, nothing.

Q. What do you mean by nothing? A. He never attended to it, just placed it in the window in the same condition.

Q. Did anything after that happen to that screen? A. It blew out again.

Q. When did it blow out again? A. In the fall of 1924.

Q. Do you remember about what month it was that it blew out? A. Between September and October.

Q. Was anything done about it at that time? A. It was put back.

Q. Was the screen put back in the window? A. Yes.

Q. Who put it back? A. Mr. Thomas, the superintendent then.

Q. When did he come there? A. Some time in the fall; I was away all summer and don't remember exactly, he was there when I returned.

Q. When you got back in the apartment he was there? A. Yes.

Q. What time was that? A. Some time in the late summer of 1924.

Q. What was Mr. Thomas's duty, running the building? A. Superintendent.

Q. Did he do the same kind of work that Mr. Lockwood did? A. Yes.

Q. Did you see him doing that work? A. Yes. I did.

Q. Did you see him doing that work yourself? A. Yes, I did.

Q. When he brought the screens up, did you have a conversation with him? A. Yes.

Q. What was it? A. I asked him if he could fix the screens, that they did not fit.

Q. What did he say? A. He said nothing fitted in the apartment.

Q. What was the condition of that screen when they put it back? A. The same condition.

Q. The same condition that you first observed when it was first installed? A. Yes.

Q. Did anything happen to that particular screen between that time and the time of May 4, 1925? A. No; it only fell out of the window with my daughter.

Q. The next time it went out, your daughter went out with it? A. Yes.

MR. DOHERTY: I would like to have this photograph which I produce marked for identification.

(Photograph produced is marked P-1 for identification.

Q. I show you Exhibit P-1 for identification and ask you if you recognize that? A. Yes.

Q. What does it portray? A. The window in my apartment, third floor bedroom.

Q. Will you kindly mark a place on that to indicate your apartment?

(Witness marks on P-1 for identification.)

Q. Does this portray the west view from your apartment? A. It does.

Q. Which you have just described to the jury? A. It does.

MR. DOHERTY: I would like to offer that in evidence.

MR. SMITH: No objection.

(Photograph received and marked Exhibit P-1.)

(Second photograph produced and marked P-2 for identification.)

Q. I now show you P-2 for identification and ask you if you know what that photograph portrays? A. The window that Peggy fell out of.

Q. When did you first see the window after Peggy fell out? A. Right after I heard her cry, when she fell out of the window.

Q. You went over to the window? A. Yes.

Q. And did you notice the condition of the window? A. Yes.

Q. Does that correctly represent the condition of the window? A. It does.

Q. What do these side lines indicate, the furthermost part, and the dark space on either side?

MR. SMITH: I object to that, the jury can find that.

THE COURT: Yes.

(Third photograph produced and marked P-3 for identification.)

Q. I now show you P-3 for identification and ask you if you know what that photograph portrays? A. The window in my bedroom.

Q. Is that the window the baby fell out of? A. Yes.

MR. DOHERTY: I offer in evidence P-2 and P-3 for identification.

No objection, and P-2 and P-3 for identifi-

caton are received and marked, respectively, exhibits P-2 and P-3.

Q. Did you see the condition of the screen before the baby fell out of the window at any time? A. Not until I came home from the hospital with her.

Q. How long was that afterwards? A. Ten days.

Q. What time was it the baby fell out of the window? A. Five after two or ten after two, as near as I can recollect.

Q. Where were you at the time? A. I was dressing in my bedroom at the time of the accident.

Q. Where was the baby at that time? A. She was playing around the floor watching me dressing.

Q. How was she dressed? A. Fully dressed.

Q. Did she have her street clothes on? A. She didn't have her street clothes on, she was waiting for me to get dressed.

Q. Just what was she doing when you left the room? A. I only left the room for a moment, to go to the phone.

Q. But you did leave the room? A. Yes.

Q. Well, what was she doing at the time you left the room? A. She was playing on the floor with a doll or something that she had.

Q. Was she sitting or standing there? A. Sitting down on the floor, I think.

Q. Will you describe to the jury what the condition of that inside room was at the time, where the furniture was placed with reference to this window? A. In the room was a bed, a dresser, dressing table, chiffonier and night table; when

you came into the room, there were two chairs, and over to the right of the dresser and my bed was a chair against the table, and a night table between the two windows, and a rocking chair in the corner.

Q. Where was the radiator with reference to this particular window? A. Away over to the left.

Q. Near the other window? A. Yes.

Q. What was the particular piece of furniture near this particular window that we are discussing? A. A night table.

Q. How close to the window was that? A. Right between the windows.

Q. Was there any other piece of furniture near the window? A. A chair between the wall and the dresser, fitted in.

Q. How close to the window was the chair? A. Well, the chair was about two or three feet from the window.

Q. How many other chairs were in the bedroom? A. One other chair.

Q. What was that? A. A rocking chair.

Q. Where was that? A. By the radiator.

Q. With reference to this window, in what way was this chair facing, back or to the side of the window? A. Back.

Q. How far from the window? A. About two feet, two or three feet.

Q. How many children have you, Mrs. Egan? A. Three.

Q. What are their ages? A. The boy is four and a half now, Peggy just three, and the baby 17 months.

Q. How old was Peggy when this accident happened? A. She wasn't two and a half years old.

Q. When was she born? A. December 10th.

Q. When would she have been two and a half years old? A. The 10th of June.

Q. After she fell out of the window when was the first time you saw the baby? A. When she was carried up by the elevator boy.

Q. Carried up into your apartment? A. Yes.

Q. What did you do with the baby or what became of the baby, did she stay there? A. I took her from the boy and called an ambulance, and a doctor came.

Q. What boy took her into the apartment? A The Thomas boy.

Q. Is he here to-day? A. Yes.

MR. DOHERTY: Is the Thomas boy here?

(A boy stands up.)

Q. Is that the boy? A. Yes.

Q. Did he carry her up? A. Yes.

Q. And what happened? A. She was taken to the City Hospital.

Q. Did you go with the baby? A. No, I did not go with the baby, my husband went.

Q. What was the baby's condition when she was brought into the apartment? A. Well, her face was terribly abrased, and a little purple, or black on her, and her mouth was bleeding and she was crying pitifully.

Q. Were there any marks on her face? A. Yes, the mesh of the screen was on her face and ear.

Q. On which side? A. On the left side.

Q. When did you first see her in the hospital? A. About an hour later in the hospital.

Q. While she was at the hospital, do you know whether or not she gave any evidence of being in pain? A. She was in pain, she went through a terrible treatment.

MR. SMITH: I object to that last part and move to strike it out.

MR. DOHERTY: Consented to.

Q. Just describe to the jury how the baby acted, so the jury may determine for themselves whether she suffered pain or not. A. She woold scream at different intervals, and she could not be quieted, they had to give her some bromide to quiet her nerves.

Q. Did you see them give her that? A. Yes.

Q. For how long? A. Five or six days.

Q. Were you at the hospital all of that time? A. Yes, I stayed there ten days, in and out.

Q. And during that time was there any other evidence that she was suffering from these injuries other than the fact hat she was screaming; did she sleep well? A. No.

Q. Did she eat? A. She took a little nourishment, milk.

Q. Is that all she took? A. That is all she took.

Q. How long was she in the hospital? A. Ten days.

Q. And during her stay in the hospital who treated her? A. Dr. Bortone.

Q. And after the ten days what happened to her? A. She was taken home, and Dr. Sullivan then took charge of her.

Q. Where were you living at that time? A. 145 Harrison Avenue.

Q. At the same place? A. Yes, at the same place.

Q. How long did Dr. Sullivan treat her? A. Until the 29th day of May.

Q. And did Dr. Bortone come to see her after

that? A. No, he went to Europe.

Q. Had he seen her since that day? A. Yes, he has.

Q. When was that that he saw her? A. He took her in the fall to his office for an examination.

Q. How has this baby acted since this accident? A. She has been extremely nervous.

Q. How do you know that? A. Why, when there are different sounds, such as a fire apparatus, when she hears these sounds she gets hysterical, or if she hears an air plane.

Q. Where did you get evidence of her being nervous about those things? A. When I was down at the shore.

Q. What did she do? A. She would scream and cry.

Q. When was it that you first noticed that? A. When an air plane came along and flew over the house.

Q. What would she say or do? A. She would scream and hold on to me.

Q. What other evidences of nervousness did you observe? A. She did not sleep well, she was wakeful and would start crying.

Q. When she would wake and scream, would she go back to sleep right away? A. No, not for a while.

Q. When did that first condition begin to crop up? A. When she came home from the hospital.

Q. How long did it continue? A. For three or four months straight.

Q. How about that condition of hers to-day? A. She is very nervous.

Q. How do you know that? A. Because I can't leave her.

Q. Did you give instructions—or rather did

you have instructions given to you to give the baby any treatment for her nerves? A. Yes; she was given bromide all summer long.

Q. How often did you give her bromide? A. Three times a day.

Q. Were there any other evidences of nervousness that you observed? A. I couldn't take her among people, she was so nervous.

Q. When did you begin to notice that? A. A short time after, in the summer time when I took her out down at the beach.

Q. What would she do? A. She would cry and did not want to see people, she would cry, "Mamma, mamma."

Q. Did she ever before this time of the injury do that? A. No, she never did.

Q. Did she ever cry when she heard an air plane before this accident happened? A. No.

Q. Did she ever wake at night and scream? A. No, she slept wonderful.

Q. Recently has she at your home given any evidence of nervousness? A. Yes, she has.

Q. Will you describe what happened? A. I was called away to a funeral and when I got home my other children greeted me and she got hysterical and cried.

Q. Had she ever done that before prior to May 1925? A. Never.

CROSS EXAMINATION BY MR. SMITH:

Q. That time, I understand you, that you went out you were gone some time, and after you came back the child cried? A. Yes.

Q. And every time when you were down at the shore and an aeroplane flew over the house, she cried? A. Yes.

Q. How many times did that occur? A. That?

Q. Yes? A. Most every day.

Q. And every time an air plane flew over the house she cried? A. Yes.

Q. Every time an air plane flew over the house, she cried? A. Yes.

Q. And when she heard a fire engine she cried? A. Yes.

Q. Do you mean to say the child never waked at night and cried before this accident happened? A. Never; she slept soundly.

Q. In other words, from the time she was born that baby never wakened at night and cried? A. Oh, I wouldn't say that, a baby is never perfect.

Q. You did not see the baby fall out of the window, did you? A. No, I did not.

Q. Did you know the child was in the bedroom? A. She was in the bedroom with me, yes.

Q. You knew the screens were in the window? A. Yes.

Q. And you knew they did not fit? A. Yes.

Q. You knew the wind would blow them out? A. Yes.

Q. And you knew that child had been driving that chair by the window? A. I did not say that.

Q. Didn't you tell Mrs. Arthur, a woman who lives in the house, when you came back from the hospital, that the child had climbed up on a chair which was in front of the bedroom window? A. I did not.

Q. One moment please,—when you were in the hospital and you came back home, didn't you tell her that you had told the child to get off the chair, and the child obeyed you? A. No.

Q. You did not? A. No.

Q. All you know is you left the child in the

room? A. Just for one second, to answer the phone.

Q. And there was no one else in the room with her at the time? A. No.

Q. And you were gone one second? A. Yes, it seemed that to me.

Q. How long do you really think you were gone? A. Well, I only had said, "Hello" when I heard a scream.

Q. How far away from the window was the child playing at the time? A. She was playing at the end of my bed, about six feet from the window.

Q. The window was the ordinary window in an apartment house? A. Yes.

Q. How far was the floor from the sill of the window, how high was the floor from the sill? A. About three feet or three feet and a half.

Q. Well, it was up above the child's head, wasn't it? A. Yes.

Q. And there was nothing against the window at all? A. No.

Q. So, so far as the window ledge was concerned, or the sill, there was nothing against it, no chairs? A. No.

Q. And nothing for the child to climb on? A. No.

Q. Nothing at all? A. Nothing at all

Q. And you had been gone one second? A. Yes.

Q. And yon heard some commotion, I suppose? A. Yes.

Q. And went into the bedroom? A. And I screamed, she was gone.

Q. And the child was gone? A. Yes.

Q. Was there nobody in the room at the time? A. No.

Q. And you were in the next room? A. In the hall.

Q. How far was the hall away? A. A few steps from the bedroom.

Q. What is that distance about, as far as from you to Mr. Doherty? A. About that distance, I think.

MR. SMITH: What distance do say that is?
MR. DOHERTY: About 18 feet or 15 feet.
MR. SMITH: All right.

Q. And you had only said "Hello"? A. Yes.

Q. And you had not heard the child do anything? A. Not a thing.

Q. Was anybody else in the apartment with you at that time? A. Yes.

Q. Who? A. A girl, washing in the kitchen.

Q. How far away from the bedroom that this child was in was the kitchen? A. A good distance, about 30 feet I guess.

Q. What was she doing, washing? A. The girl was washing.

Q. Was anybody else in the apartment with you? A. My baby five months old.

Q. Well, there was you, a baby five months old and anybody else? A. No one.

Q. And the little girl? A. And Peggy.

Q. So you three, plus the girl washing, in the kitchen, were the only people in that apartment? A. Yes.

Q. And the baby was five months old? A. Yes.

Q. And Peggy was two and a half years? A. Yes.

Q. And those were the only four people in the apartment? A. That is all.

Mrs. Margaret Egan—Cross.

Q. Now, the nearest object to the window was what? A. A night table.

Q. How high was the night table? A. About four feet, an ordinary short table.

Q. How close to the window was that? A. It was between the two windows.

Q. Was there any chair in front of the night table? A. No.

Q. And there was not any chair near that window at all? A. There was a chair beside the dresser, between the dresser and the wall.

Q. How close was that to the window? A. About two feet from the window.

Q. What kind of a chair was that? A. An ordinary chair.

Q. Well, were there any rungs on it? A. No. just a fancy seat.

Q. Just the legs and seat? A. Yes.

Q. And that was about two feet from the window? A. Yes.

Q. And it was built into the wall? A. No, it is my chair, part of my furniture.

Q. Mrs. Egan, didn't you tell Mrs. Miller, another lady who lived in your house, that you had ordered the child, who was standing on the chair, from the window? A. No, I did not,

JAMES P. EGAN, sworn as a witness, testifies

DIRECT EXAMINATION BY MR. DOHERTY:

Q. You are the husband of the last witness? A. Yes.

Q. Do you remember the fourth day of May, 1925? A. Yes sir, I do.

Q. Were you in the apartment that day? A. No, I was at my office; I was at my desk at the office when I got a telephone message to come home.

Q. Where is your office? A. I am on the Jersey Observer, one of the editors.

Q. Did you go home? A. Yes.

Q. When you came home did you see Peggy? A. She was lying on the bed in my bedroom.

Q. What was she doing? A. Crying and the doctor was at the head of the bed; I ought to remember it.

Q. Did you see her then? A. Yes.

Q. Did you see her face? A. Yes.

Q. How was it? A. The mesh of the screen I guess had grazed her and she was crying and saying, "Dadda".

Q. What time of day was that? A. When I got the telephone call it was about two o'clock and I made rather a fast trip from Hoboken, and I should say it was about ten minutes after two when I got there.

Q. What happened to Peggy? A. When I saw Mrs. Egan—she had kept the baby there until I got home, and the ambulance doctor and the policeman picked up the baby and put her in the ambulance and took it to the hospital.

Q. Were you in the hospital and did you see the child there? A. Yes, I saw her about two minutes when they catheterized her.

Q. During that time you were with her, will

you describe to the jury how she acted? A. Every minute when they tried to treat her in the apartment, she wouldn't let me go out of her sight; I had to go down in the hallway room and she was crying all the time "Dadda".

Q. Did she give any evidence that she was suffering from pain? A. That is what I drew from the crying.

Q. When did you next see her? A. I stayed that afternoon, and I went home and came back that night, and stayed at the hospital till about midnight, and then went home.

Q. Did you notice how the baby has acted since that date? A. We went to the shore, to Spring Lake, on the 29th of May.

Q. Why did you go down there? A. We were going down there and we wanted the baby to get the sea shore benefit.

Q. Was the baby ordered to go to the sea shore? A. No, she wasn't ordered but we thought it would do her good, and then down to the Shenandoah. We used to go up and down to the ocean and if there was a horn blown from a car or a fire alarm—the fire apparatus used to go by once in a while—and if there was a fire alarm she would cry, and if a plane flew over.

Q. Would she cry in the ordinary way? A. No; that was the first time. We were giving her bromide.

Q. She would cry when she heard the sirens, would she? A. She would cry and get hysterical and call for "Mamma".

Q. Did she do that at home before you went to the shore, go through these antics? A. She was a normal child, as far as I know.

Q. Did you have two other children? A. Yes.

Q. Did they go on in this way when they heard the siren? A. No; the young baby is rather small, but Jimmy, the boy does not.

Q. How old is he? A. He was four last October.

Q. Now, Mr. Egan, prior to May 4, 1925, did you see screens in your apartment? A. Yes.

Q. In this particular bedroom too? A. Yes.

Q. When was the first time you observed the screen in the window? A. They were in the window as part of the equipment, and I knew they had been in all winter. My babies had been sick that winter and they were placed there all that winter, they never took them down; and they never fitted down at the bottom; there was a tongue there that they didn't fit, and I recollect that the lower part of the screen the light was visible through when you looked.

Q. Did you observe how the screen at the top was fastened to the top? A. It was fastened to this wooden piece that is fitted permanently to the wall, and the screen runs up and down the groove.

Q. There is a socket in the screen with a tongue in the side? A. Yes.

Q. As you observed it, how did the socket fit into the tongue? A. I could see the light there at the bottom.

Q. Up at the top, how did it fit? A. It measured all right for a while after the break at the bottom, and then there was another three or four inches open on the top of the window as you look out on the Boulevard.

Q. Were you ever in that apartment when the screen was not in? A. Yes; I was there one time when the screen fell out.

Q. When was that? A. One Sunday afternoon, I don't remember what Sunday.

James P. Egan—Direct.

Q. What happened to the screen when it fell out? A. It went down in the yard. and Mrs. Egan I think went to the hall phone and notified Mr. Thomas, the superintendent, I think it was at the time, and he came up in a few minutes with this screen.

Q. Did you hear Mrs. Egan say anything to Thomas about the screen at that time? A. No; I think I was reading at the time.

Q. What room were you in? A. In the living room at the end of the hall.

Q. How far is that away from the bedroom? A. About 15 feet.

Q Is that nearer the door? A. No, further away.

Q. The remotest part of your apartment? A. That room is, yes.

Q. Did you see the screen that day? A. Well, I didn't see it. I heard the door open and Mr. Thomas come in.

Q. You don't know what he did with the screen, I suppose? A. He went in the bedroom and put it up; I recollect the screen was there later.

Q. Did you come back any time later than Sunday to observe that screen? A. I noticed it later on.

Q. Was it any different then from the first time you had seen it, after it had been put back? A. I did not pay particular attention; I supposed it was the same screen.

Q. I don't mean that. Did you notice the way it fitted into the window after you saw it had fallen out? A. I didn't give it any particular attention.

Q. Were you in that apartment any other time when you observed that? A. Not that particular

window where the accident occurred, but I was sitting in a chair in the room during that previous summer and my elbow hit the other window—that is not the window where the accident occurred but the other one.

Q. Did you ever notify the owner of this apartment about the condition of these screens? A. Not the owner; I am positive I notified Mr. Harris, the agent.

Q. Is Mr. Harris sitting in court? A. Yes.

Q. This gentleman here (pointing)? A. Yes.

Q. What did you tell him? A. I told him—we had been negotiating with Mr. Harris about the apartment and things generally, and we told him the screens didn't fit.

Q. Did you tell him that? A. I don't know; Mrs. Egan may have told him.

MR. SMITH: Then I object to that, I object to what anybody else told him and move to strike it out.

THE COURT: Yes.

Q. Was Mrs. Egan there when you told Mr. Harris? A. She was standing with me at the end of the hall. We would see Mr. Harris when he came for the rent at the end of the month, and would stand and chat, and we would tell him about the screens.

Q. But these screens were never fixed? A. Never.

Q. Did you spend any money for medicines or for doctor's services, doctor's bills, to effect the cure of the injury to the baby? A. When the baby was taken to the hospital, of course I got medical bills of both doctors, and my bill for the room at the hospital, and we had a special nurse at night.

Q. What did you pay at the hospital? A. The bill is not paid; I think it is fifty odd dollars for nine or ten days. I have given you the bill.

Q. And the man from the hospital has just handed me a bill. (paper shown witness.) To refresh your recollection, I show you what purports to be a bill from the hospital; is that what you mean? A. Yes.

Q. What is it, what does it amount to? A. $58.

Q. What other money did you expend? A. We had a pivate nurse at night, and I think they are $49 a week, plus three more days, I don't know what the bargain was.

Q. Did you pay that? A. Yes.

Q. How many weeks did you pay the nurse? A. Ten days at the hospital.

Q. At the rate of $49. a week? A. Yes.

Q. That is seven dollars a day? A. Yes.

Q. Any other expenses? A. Dr. Sullivan's bill.

By The Court:

Q. How much was the nurse?

Mr. Doherty: $70.

A. About that.

By Mr. Doherty:

Q. It was seven dollars a day for ten days? A. $70, yes; and there is Dr. Sullivan's bill for treatment after she came from the hospital.

Q. (Paper shown witness.) I show you the bill. A. He was in every day after she came home.

Q. For how many months or weeks or days?

A. From the 11th to the 28th of the month.

Q. And, of course, he was paid for it at the hospital too? A. Yes.

Q. Did he submit a bill? A. Yes.

Q. Do you remember how much it was? A. I don't remember how much it was.

Q. Were there any other bills you had other than Dr. Bortone's? A. Dr. Bortone's Dr. Sullivan's, and the nurse and the hospital.

Q. Any other, any prescriptions? A. We paid for bromide.

Q. How much money did you spend for medicines during the summer? A. I was at the shore four months and we renewed the prescription about twice—about twice a month I should say.

Q. About eight times? A. Yes.

Q. How much did the prescription cost? A. I think it was a dollar twenty, I am not sure, each time for bromide.

Q. Any other expenses than Dr. Bortone's? A. I can't remember.

CROSS EXAMINATION BY MR. SMITH:

Q. What was this bromide? A. It was a prescription of Dr. Sullivan's when we came home.

Q. You know it was some prescription which you call a bromide? A. Dr. Sullivan told me it was a nerve medicine.

Q. He said it was a bromide? A. For her nerves.

Q. Did he use the word "bromide"? A. Oh, he certainly did.

Q. You say there was a siren there that she cried at, what was that? A. A fire alarm siren, or something like,—a most unearthly noise.

Q. When did you first hear it? A. The first night I was in the place, I think.

Q. And you heard it? A. It woke me up.

Q. You say it was an unearthly noise? A. Yes.

Q. And the first time you heard it you wanted to know what it was? A. Yes.

Q. And the baby got frightened, you say? A. Surely.

Q. You do not wonder, do you, that a baby two and a half years of age, would get frightened at that? A. Absolutely not, no sir.

Q. And you say the Shenandoah used to go over? A. The big dirigible, yes, both of them.

Q. And areoplanes used to go over? A. Yes.

Q. And they make a big noise when they are low down? A. Sure.

Q. You were not the least surprised at a little child of two and a half years old being scared at the noise of the motor,were you? A. No, I guess not.

DR. FRANK BORTONE, sworn as a witness, testified.

DIRECT EXAMINATION BY MR. DOHERTY:

Q. What is your profession, Doctor?

MR. SMITH: The Doctor's qualifications are admitted.

Q. On or about May 4, 1925, did you see Margaret Egan, the infant plaintiff in this action? A. I did.

Q. Where did you see her? A. At the City Hospital in a private room.

Q. What time of day was it, would you say?

A. I don't recall the exact time.

Q. You examined her, I presume? A. I did.

Q. What did you find on your examination? A. At that time, the child was in a shock, what we call shock, and no diagnosis was made, and we teated her for shock.

Q. You had been told what happened to her? A. Yes.

Q. What treatment did you give? A. Hot water baths, while you could treat her for shock, and when she was recovering from the shock we had her x-rayed.

Q. When were they taken? A. The same day.

Q. What did the x-ray show? A. They showed a fracture, a multiple fracture.

Q. What was that? A. A crack going from ear to ear over the top of the head.

Q. That is what is known as a multiple fracture, is it? A. Well, it is not a simple fracture, it is a fracture, just a fracture.

Q. That is, there are simple fractures and compound fractures.

By The Court:

Q. Will you give us a definition of a multiple fracture? A. Instead of one bone being fractured there are two or more bones fractured.

By Mr. Doherty:

Q. What is it, Doctor, it means what? A. It means it is just, adopting ordinary describing term, instead of having one bone fractured you have both bones, and you have a multiple fracture.

Q. What treatment did you give her? A. She showed some signs of pressure on the brain; that is due to the swelling and the shock, and we put her on a treatment of magnesia sulphate.

Q. How long did you give her that treatment? A. That I can't be exact about, I can't be exact as to my dates, I think we figured that the child—only we treated her until the child had no further evidences that she needed any compression.

Q. Was there anything else the matter with the child? A. She had bruises on the arm and the chest and the face.

Q. How pronounced were these bruises? A. They were black and blue marks.

Q. Did you treat her for that too? A. Yes; she had wet dressings applied to those.

Q. How did the bruises afterwards clear up? A. They cleared up all right.

Q. Well, while she was at the hospital did you observe whether she was suffering pain resulting from this fracture? A. I don't quite understand the question.

Q. Does a subject probably suffer pain from that? A. They are semi-conscious and under delirium, I don't know whether they suffer pain or not at that time.

Q. In any event, they are not normal, not as free from pain as you are presumably at this time? A. No.

Q. You do not remember when this baby was discharged from the hospital? A. No, the date I don't recall.

Q. What treatment did you give her? A. I put her on a treatment to reduce any swelling and take care of the shock, gave her magnesia sulphate, and sought to prevent any increased pressure on the brain from the shock. We gave her magnesia sulphate in order to treat the edema of the brain which occurs in these things, and then bromide right along, and prescribed absolute rest in bed.

Did you notice how long this condition of continued? A. That lasted for about six or eight hours, as they usually occur in these cases; I can't give the exact time

Q. Have you seen this infant recently? A. No.

Q. When did you see her last? A. I do not recall when I saw her last.

Q. I mean since this accident, did you examine her at any time? A. Not recently.

Q. Did you see her last October? A. I don't know; I know I have seen her twice.

Q. Well, the last time you saw her, what was her condition then? A. The last time I saw her she was a type of child that cried and muttered when you examined her, and I figured it was all a nerve condition. The second time I saw her she had an abscess on the nose.

Q. Was that absess due to this fall? A. No, I do not believe so.

Q. What evidence did she give you of being nervous then—this crying you have described, what other evidence did she give you of being nervous than that; did you examine her more minutely to discover anything? A. I did. My findings were negative outside of the crying and the muttering.

Q. Was she suffering any ill effects at all, as far as you could observe, from that accident at that time; would you say she was a perfectly normal child at that time? A. It is impossible for me to answer that question, because I have not observed the child long enough.

Q. You have not observed it? A. I don't know what her condition is now. Those results are late results, and I have not observed the child.

MR. DOHERTY: I would like permission to withdraw the doctor and let him examine her.

THE WITNESS: You can't do that now in a short space of time. You would have to take her to the hospital and go to work and get your x-rays, and observe her for weeks. You can't do that now.

MR. DOHERTY: I see.

Q. What do you say as to the probability or likelihood of this condition resulting in any permanent impairment?

MR. SMITH: I object to any likelihood. I do not object to probabilities.

Q. Well, probabilities—I do not know whether there is any distinction between the two or not. A. The probability—you mean is there any permanent injury?

Q. Yes, either one way or the other? A. That question is impossible to answer.

Q. What is the probability, Doctor? A. I don't know.

Q. What would you say was a reasonable charge for the services which you rendered to this infant child? A. I put in a bill of $250.

Q. I know you did, but do you consider that a reasonable charge? A. I do, yes.

CROSS EXAMINATION BY MR. SMITH:

Q. You did not just stick in a bill for the purpose of getting paid, did you, Doctor? A. I want to get paid, of course.

Q. You say the bill was a reasonable bill? A. Yes.

Q. The fracture you found was a linear fracture? A. Yes, on the profile.

Q. There is a line there to note a separation? A. No, the fracture was not separated.

Q. You found the child in a condition of shock? A. Yes.

Q. Did you give it bromide for the condition of shock? A. Oh, no.

Q. What did you give for the shock? A. We treated her with hot water baths and prescribed rest.

Q. And after that you x-rayed it? A. Yes, and then x-rayed it and found a fracture of the parietal bones.

Q. Yes, and then? A. That was to control the swelling that occurred in the brain, so we did not have to operate due to compression.

Q. You prevented that? A. Yes.

Q. And then the child was in the hospital ten days? A. Yes.

Q. And you discharged her? A. I did not discharge her, but her people wanted her home.

Q. She left the hospital? A. Yes.

Q. How many times did you see her while she was in the hospital? A. Probably three or four times a day.

Q. And then she left and you saw her twice afterwards? A. Yes.

Q. And so far as you know, from your examination after she left the hospital, were there any further complications? A. No, I don't that.

Q. I say as far as you know. A. I don't know.

Q. In other words, you have not any opinion on it either way? A. No, I have not followed the child.

RE-DIRECT EXAMINATION BY MR. DOHERTY:

Q. You went to Europe shortly after, didn't you, Doctor? A. Yes.

MRS. AMY HUTCHINS, sworn as a witness, testified.

DIRECT EXAMINATION BY MR. DOHERTY:

Q. Mrs. Hutchins, you worked for the Egans, didn't you, at 145 Harrison Avenue? A. Yes, I did.

Q. And when did you go to work for them? A. In 1922.

Q. What month? A. I think it was September.

Q. And how long did you stay there? A. I stayed until 1925.

Q. Were you there at the time the baby fell out of the window? A. I was not.

Q. How long before that had you left? A. I left in December; no, in January of that year.

Q. During any time that you were at the apartment working, did you see the superintendent of the building in the apartment? A. I did.

Q. Who was that? A. Mr. Armstrong and Mr. Harris.

Q. Did you ever hear any conversations between Mrs. Egan and Mr. Armstrong regarding screens or anything? A. Yes.

Q. You did hear conversations between them? A. Yes, I did.

Q. What did Mrs. Egan say to Mr. Armstrong about the screens? A. He put in the screens and they didn't fit good, and I was going to wash the windows and they fell out, and she called him up and he put them in again, and he said: "Nothing fits around here."

Q. When was it the screens fell out? A. When we were washing the windows; that was the first year we were there; that was the following spring, 1924 I think it was.

Q. How many times had that happened; was it just once? A. It happened once because I had taken them out myself next time because I didn't want them to fall out.

Q. Did you have any trouble about getting them out? A. If you just touched it, it fell out, all I had to do was just to touch it with my hand and it would fall.

Q. How many times did you see the screen fall out? A. Just once.

Q. And that was at the time when you touched it? A. Yes, I was going to clean the window.

Q. Did the screen go up after that? A. Yes.

Q. You did get it back, did you? A. Mr. Armstrong brought it.

Q. Did you see him put it in the window on that occasion? A. Yes.

Q. Did you hear Mrs. Egan say anything to him after he came back? A. She did.

Q. What did she say? A. She asked him when he was going to fix those screens.

Q. What did he say? A. When he got time.

MR. DOHERTY: That is all.

MR. SMITH: No questions.

EUGENE THOMAS, sworn as a witness, testifies:

DIRECT EXAMINATION BY MR. DOHERTY:

Q. Thomas, you are the son of the superintendent at 145 Harrison Avenue? A. Yes.

Q. Are you still over there as janitor? A. Yes.

Q. When did you first go there, what year? A. I don't know but about two years.

Q. Were you janitor over there at the time this baby fell out of the window? A. Yes.

Q. And you picked the baby up? A. Yes.

Q. Where did you pick the baby up? A. Down in the court.

Q. (paper shown witness.) I show you Exhibit P-1 and ask you if you know what that photograph represents? A. Yes, I do.

Q. What does it represent? A. The west part of the house.

Q. And is the Egan apartment represented in that photograph? A. Yes.

Q. Whereabouts? A. On the third floor.

Q. At the point marked X on this window? A. Yes, that is one of them.

Q. Do you know where with reference to this window this baby was picked up, was it right under there (indicating)? A. Right here indicating on P-1.)

Q. Will you mark with a lead pencil where the baby was picked up, with reference to this window; mark it with "Z" or something.

(Witness marks on P-1.)

Q. You think it was a little over to the left? A. A little to the left of the window.

Q. And did you carry the baby upstairs? A. Yes sir.

MR. DOHERTY: That is all.

MR. SMITH: No questions.

James P. Egan, Recalled—Direct.

JAMES P. EGAN, recalled, testifies:

DIRECT EXAMINATION BY MR. DOHERTY:

Q. Mr. Egan, I show you Exhibit P-1 and ask you what that represents? A. The side of the apartment where I lived.

Q. Facing in what disection? A. West toward the Boulevard.

Q. What does this point marked X indicate? A. One of the windows of our bedroom.

Q. And what is the point down here? A. The court, that makes a half story depression on there, a kind of extension.

Q. And what is this ground, how is it made up, of dirt or cobblestones or what? A. My recollection is it was part flagging and part concrete.

Q. Where do those three windows lead to, do you know? A. Into the cellar way.

Q. Is that an area way? A. You can get into that cellar from that entrance, yes.

Q. (P-2 shown witness.) I show you Exhibit P-2 and ask you what that represents? A. That is a picture of our apartment, of our bedroom window.

Q. When did you first see this window after the baby fell out? A. On my return from the hospital that evening of the accident.

Q. And you looked at the window? A. Yes.

Q. Does that picture correctly represent the condition of the window as you saw it then? A. Yes sir.

Q. I show you Exhibit P-3 and I ask you what that represents? A. Another picture of the same window.

Q. And does that correctly represent the condition of the window as you saw it? A. With

the exception of the lines down the side of the picture.

Q. Do you refer to those marks? A. Those white marks.

Q. Were those put on after you saw it? A. They were put on long after.

Q. Do you know what those marks are? A. Marks put on the tongue where the screen went up and down the window.

Q. What are they? A. Chalk marks.

BY THE COURT:

Q. When did you see those put on, if you did see them? A. The night before we left the apartment.

MR. DOHERTY: That is our case.

Motion for Non-Suit.

MOTION FOR NON-SUIT.

MR. SMITH: I move for a non-suit, your Honor, first, on the ground that there has been no negligence shown on the part of the defendant attributable in any way to the accident to this young child; and secondly, if the screen was defective, that has not been shown to have been the proximate cause of the injury to this child; and third, if the screen was defective and if the accident happened in the way I assume, by reason of the child climbing up on the window sill and putting its hand on the window screen, thereby forcing the screen out, that does not put any negligence on the landlord which in any way contributed to this accident; fourth, a screen is not intended for the purposes used in the way it was used at the time of this accident, that is, if the child climbed up on the window sill and put its weight on the screen and forced the screen out, that was not such use as it should have been put to; there is absolutely no proof in this case as to what caused this child to go out of this window, or as to how it went out, or what, if any, force was applied to this window, or whether the screen went out before the child went out, or whether they both went out together, there is absolutely no proof in this case as to how this accident happened. The mother says she was in the room and saw the child sitting on the floor, and she went out for a moment and when she came back both screen and child were gone.

MR. DOHERTY: And the screen was there when she left.

MR. SMITH: I say under those circumstances there is absolutely no proof of any negligence on the part of this defendant which could in any wise make him liable for this accident.

THE COURT: What have you to say, Mr. Doherty?

MR. DOHERTY: To begin with, this case was brought on the theory that where one assumes to do something, and fails, he is liable; another theory is that they kept control over these screens, and if we can show any negligence as the proximate cause of this accident, then there is a jury question. Now, is there any evidence of negligence? The evidence is that when this mother left this room—and it took her but a second to get to that phone—that window was open and the screen in the window and when she got back the screen was gone and the baby was gone. They had a right to assume that these screens were put in there as ordinary screens are put in.

THE COURT: To keep the flies and mosqnitoes out.

MR. DOHERTY: Yes, if you will. Now, the evidence is that this screen fell out. The evidence is that it was not even capable of performing the function of keeping a fly out, and there is not a scintilla of evidence here that any force was applied against that screen, because the evidence is that the sides were intact, showing there was no pressure, that it was not due to a structural defect, but it was due to a defect which negatived the very purpose for which it was put there. Certainly, these tenants had a right to assume it could be used for the same purpose and in the same way as ordinary persons would expect to use it. If the baby touched that with its hands,

would anyone expect it to fall out? It is for the jury to say whether, in the opinion of any reasonable man, such would be the case.

THE COURT: You have to come down to the question of whether or not the owner was liable.

MR. DOHERTY: The only way we can get at that question is to determine whether or not his negligence was the proximate cause of these injuries.

THE COURT: Exactly.

MR. DOHERTY: Now, is not that a jury question? Here is an infant playing in a room in this home; the mother has two other babies. Would any reasonable man say that this woman had to tag along with these babies every moment of the day, or wouldn't it be more reasonable to say if a landlord does not keep his apartment in a proper state of repair, he must be responsible for what happens.

THE COURT: But it was not put there for the purpose of keeping people from falling out. How did the baby get up on to the window?

MR. DOHERTY: There was a chair within two feet of it. We can't expect that a miracle happened, that it was catapulted through the window.

THE COURT: Why did the mother leave it in this room?

MR. DOHERTY: That is another question. The mother may have been guilty of contributory negligence, I am not arguing that, but I say there is at least a jury question as far as the negligence of this landlord is concerned.

THE COURT: I am going to let it go to the jury. Never mind about arguing it now. I refuse to grant the nonsuit.

MR. SMITH: Does your Honor refuse it without hearing my argument?

THE COURT: I will hear you, of course.

MR. SMITH: There is no use saying anything if your Honor has made up your mind. I can only call your attention to the decision in this case in the Court of Errors and Appeals (handing up book). My contention is that these screens were put in there to keep flies out and let air in; they were not there for the purpose of holding the weight of children or anything else. I take an exception to the refusal of the non-suit.

DR. NICHOLAS FEURY, sworn for the defense testifies.

DIRECT EXAMINATION BY MR. SMITH:

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

Q. And you have been practicing for how long? A. 29 years.

MR. DOHERTY: The Doctor's qualifications are admitted.

Q. You examined this child, did you? A. I did.

Q. When and where did you examine her? A. At her home, on the 17th day of May 1925, in the presence of her grandmother.

Q. You had been told what had happened to the child? A. I had found out the history of the case.

Q. Will you just tell me what symptoms you found? A. I made an examination of the child from head to foot, going over the child thoroughly,

looking for any signs of trauma. I found no evidences, no objective evidences—that is, evidence which I myself could appreciate or observe, such as discolorations, swelling, scars; there was nothing I could find on the child which would prove to me that she had been injured. I did, however, see the radiograph which had been taken of this little girl at the Jersey City Hospital, and that showed—

MR. DOHERTY: I object to the Doctor testifying on that.

MR. SMITH: Have you any objection to our using the radios you talked about?

MR. DOHERTY: I did not talk about them. He may have seen some other radio.

Q. Well, you examined the child? A. Yes, and I found no objective evidence of injury; she seemed to me to be the normal child; she was going around there on the carpet, apparently normal, heart normal. pupils normal, and there was nothing I could observe or ascertain without some other aid.

Q. What is a linear fracture, assuming she had one, Doctor? A. That means a crack, there is no separation of the two fragments, as in an ordinary fracture; there is a crack there, and in the course of seven or eight days that crack comes together, nature comes in and throws out a callus and brings it together.

CROSS EXAMINATION BY MR. DOHERTY:

Q. How do you know there was a linear fracture did you examine her? A. There is no possible way of ascertaining that this child had fractured skull, for the reason that it gave no ob-

jective evidence of any, pathologically—I mean by that, diseased condition. There is only one way of ascertaining this, and that is by aid of the radiograph.

Q. You did not take that radiograph, did you? A. I did not.

Q. You are tesifying then to what you saw from x-rays? A. I have not testified to any x-rays.

Q. You have testified to a linear fracture and you have testified that, as far as you know, you could not tell whether there was a fracture or not?

MR. SMITH: I object. Mr. Doherty declined to let me use the photographs and I put my question on an assumption.

THE COURT: You may cross examine him as to what he saw, if you like.

Q. Well, Doctor, did you examine this child to determine whether or not she had a fracture? A. I did.

Q. And you could not well be mistaken as to whether she had or not? A. There is no evidence of any.

Q. And the way it looked to you, she was a perfectly normal child? A. Yes.

Q. And you would not say she had a fracture? A. No.

Q. And she is the same as any ordinary child on the street? A. Yes.

Q. That is the best evidence you can give in this case as to her condition? A. Yes.

RE-DIRECT EXAMINATION BY MR. SMITH:

Q. And that is the fact, Doctor? A. It is, and the whole truth and nothing but the truth.

RE-CROSS EXAMINATION BY MR. DOHERTY:

Q. But you could not tell whether she was in pain or not? A. I can't and neither could any human being.

Q. You would not say there was not a fracture there, would you? A. No, I couldn't swear to that.

BY MR. SMITH:

Q. But, Doctor, when I asked you assuming there had been a linear fracture there,—that is a crack you say? A. Yes.

Q. And there is no separation of the part? A. No.

Q. In course of time the parts come together? A. Yes.

BY MR. DOHERTY:

Q. Now, when there is a crack there is a separation of the parts, to some extent, you say? A. Certainly, to some extent.

Q. If there is a crack there must be a separation? A. Yes, but as we commonly use the term, there was no appreciable separation, it was so infinitesimal it could not be measured but with the very most adequate instrument.

Q. You do not know whether there was any separation there at all, because you do not know if there was a fracture or not. A. I do know it.

Q. How do you know it? A. Because I examined the radiograph.

Q. We are not asking about the radiograph;

you did not make it, did you? A. No, I assumed that those who took it were telling the truth.

Q. I assume they were too, but the objection made, Doctor, is that you may not have been looking at the radiograph of this child; somebody showed you a radiograph and said it was the radiograph of this infant's head. A. Yes, and I assume they were telling the truth.

BY THE COURT:

Q. What is a multiple fracture, Doctor, as I understand the Doctor produced by the plaintiff, he used that term, multiple fracture, as a recognized term, apparently. A. Yes. A multiple fracture is a fracture or variety of fracture in which there are two or more lines of fracture of the same bone not communicating with each other; It means a fracture that involves more than one bone.

GEORGE A. FLAGG, sworn as a witness, testifies.

DIRECT EXAMINATION BY MR. SMITH:

Q. What is your business? A. Architectural engineer.

Q. Do you design houses? A. Yes.

Q. Apartments and so forth? A. Yes sir.

Q. Did you examine the windows in this apartment at 145 Harrison Avenue? A. Yes.

Q. And did you examine the screens? A. Yes.

Q. Will you describe the screens that you found there, how they fitted in, and so forth? A. You mean how the screens ran on the slot?

Q. Yes. A. Well, on the side of the window there is what we call a backstop; on the face of the backstop there is a bead, which is in the form of a tongue.

MR. DOHERTY: This examination was on May 4, 1925, do I understand?

MR. SMITH: No, subsequently.

MR. DOHERTY: Then I object to it.

MR. SMITH: I will prove there has been no change at all.

THE COURT: Then if that is not shown I will strike it out.

Q. Proceed. A. On each side of the screen there is a cut or groove, which fits into the tongue on the side of the backstop, and the screen works up and down the groove, over the tongue.

Q. What is the size of that tongue? A. The tongue is approximately, I think, half an inch—that is, projects out into the opening.

Q. What are the purposes of screens in windows?

MR. DOHERTY: I object on the ground that he is not an expert for that purpose, but is just a common ordinary witness.

THE COURT: He is an architect.

MR. DOHERTY: An architect has not any knowledge of what a screen is used for any more than you or I or any member of the jury.

MR. SMITH: Then do you mean a screen, as a matter of ordinary common sense, is used for the keeping of flies out from an apartment or room? If so, I am satisfied.

THE COURT: I will admit it. He is an architect.

MR. DOHERTY: I ask for an exception.

THE COURT: You may take an exception.

MR. DOHERTY: I take an exception on the ground that it is a matter of common knowledge what screens are used for.

A. A screen in a house, in a window in a house, is used as a substitute for the glass in weather where they need to let outside atmosphere into the room and at the same time prevent insects from getting into the room.

Q. Are those screens able to sustain a weight pressed against them?

MR. DOHERTY: I make the same objection to that.

THE COURT: Objection overruled.

MR. DOHERTY: I take an exception.

A. They are not to my knowledge.

HARRY H. HARRIS, sworn as a witness, testifies.

DIRECT EXAMINATION BY MR. SMITH:

Q. Mr. Harris, what is your business? A. I am in the real estate business and in the law business.

Q. Were you the agent in charge of this apartment in May 1925. A. I was.

Q. Are you still in charge of it? A. Yes sir.

Q. Do you know whether there has been any change in the condition of the carpentering work in relation to the screens in the apartment that Mrs. Egan occupied in 1925? A. There has been no change.

CROSS EXAMINATION BY MR. DOHERTY:

Q. No change there at all? A. No change in the method of the screens.

Q. You mean down to the present time? A. Yes.

Q. Weren't there inspectors around there to inspect these screens?

MR. SMITH: I object to that.

THE COURT: I do not think that makes any difference.

MR. DOHERTY: That is all.

MRS. MOLLIE ARCHER, sworn as a witness testifies.

DIRECT EXAMINATION BY MR. SMITH:

Q. Mrs. Archer, you lived at 145 Harrison Avenue when Mrs. Egan lived there, didn't you? A. Yes sir.

Q. Do you remember seeing her shortly after the accident to her daughter? A. Yes, I do.

Q. At that time did she tell you that her daughter was climbing upon a chair in front of the bedroom window while she was in the bedroom, and that she told the child to get down off the chair and that the child obeyed? A. I can't recall that.

Q. See if this refreshes your recollection (handing paper to witness) that is your signature, isn't it? A. Yes.

Q. Will you please read that and see if it refreshes your recollection at all? A. (Reads paper). I could not take oath on it.

Q. What do you mean by that? A. Well, I couldn't recall it as the exact truth.

Q. That is what you signed, isn't it? A. Yes.

Q. And in that paper you say just what I have asked you, don't you? A. No, I wouldn't say that.

Q. Suppose you read it? A. While the infant child was confined to the hospital directly following Mrs. Egan's return from the hospital. I met Mrs. Egan and spoke with her in her apartment, and she told me her daughter was climbing up on a chair in front of the window, while Mrs. Egan was in the bedroom, and Mrs. Egan told the child to get down off the chair, and the child obeyed. Mrs. Egan said she then left the child

playing in the bedroom, and Mrs. Egan then went into another room and a commotion, which followed immediately after she walked out of the bedroom, attracted her attention, at which time she first realized that her child had fallen out of the window, and the only explanation was that the child had climbed on a chair and reached the screen, which fell out under the child's weight.

Q. And that bears your signature, does it not? A. Yes.

Q. You would not sign anything that was not the truth, would you? A. Well, I wouldn't say that.

Q. Well, do you mean to say you would sign it if it was not the truth? A. No, I wouldn't say that.

Q. Then your signature is attached to this paper? A. Yes.

Q. And in that paper is stated just what you have read, isn't it? A. Just what I have read.

Q. Now, I ask you, having seen your signature and having read the paper itself, does it refresh your recollection that Mrs. Egan did tell you what is in that paper over your signature? A. Well, it happened two years ago, and at the time it was a small matter to me how the child fell out of the window.

Q. That does not answer my question. A. Well, I don't recollect it.

Q. But you did recollect it at that time, which was November 6, 1925, you recollected it sufficiently to sign this paper, didn't you? A. Yes, I know I signed the paper but I couldn't tell you before I read the paper what was in it.

Q. You mean you signed the paper without knowing what was in it? A. Yes, I did at the time.

Q. But you knew what was in it? A. Yes.

Q. And it is a fact that you said that? A. That I stated that, but I might have been misunderstood.

Q. Have you been talking with Mrs. Egan since this accident? A. No; she moved away, and we had never been very friendly.

Q. When did she move away? A. After the accident, about a month or so after the accident.

Q. And between the time of the accident and the time she moved, were you talking together quite frequently? A. I said we were never very friendly.

Q. Weren't you in her apartment at that time? A. The man put that in. I didn't say I talked about it in the apartment, but she talked about it to me.

Q. Where were you at the time? A. I don't know; it must have been in the street or somewhere.

Q. You do not know whether it was in the street or in her apartment or where it was? A. No.

CROSS EXAMINATION BY MR. DOHERTY:

Q. Do you know whose handwriting that is, is that your handwriting? A. Yes.

Q. Is this your signature? A. Yes

Q. Did you write this out? A. No, I didn't write out the statement.

Q. Was the person who came to you and heard what you were talking, writing in pen and ink at the time, or how did he take it down? A. I couldn't tell you; he was writing with pencil or ink, I don't remember which.

Q. And do you know what he was putting down when you were talking? A. No.

Q. Was it a man or a lady who came to you? A. A man.

Q. He came to your apartment to get this? A. Yes; he told me Mrs. Egan had given my name to him.

Q. And he asked you a few questions and then started to write? A. Yes.

Q. Where was he seated at the time? A. At the dining room table.

Q. How long did it take him to get up this statement? A. I really don't know, it took long enough anyhow.

Q. Did he continue writing and you talked, or after he had had a conversation with you did he write it down? A. While he was conversing with me I think—I really couldn't tell that.

Q. Did you read this statement over before you signed it, or after you talked to him did you sign it without reading it? A. I remember signing it, that's about all.

Q. Do you remember reading it? A. No, I don't remember that.

Q. And this was taken November 6, 1925? A. Yes.

RE-DIRECT EXAMINATION BY MR. SMITH:

Q. Did you ever see the man to whom you gave that statement before that time? A. No.

Q. He was a stranger to you? A. Absolutely.

Q. And he came into your room and asked you some questions about this accident? A. Yes.

Q. And he said Mrs. Egan had given him your name, did he? A. Yes.

Q. And he asked you what you knew about it? A. Yes sir.

Q. And then sat down and wrote it out, after you had talked to him? A. Yes.

Q. And you looked at it and read it after he did that? A. I cannot say.

Q. Do you mean to say you would sign a paper for a strange man and not know what was in it? A. I knew what I was talking about, I suppose.

Q. Yes, and after it was all written out, it was given to you wasn't it? A. It looks like that.

Q. And a pen was given to you? A. Yes.

Q. And you remember putting your name to it? A. Well, it is my signature.

Q. Haven't you any knowledge that you put your name to it? A. Oh, yes, I think I had.

Q. And this strange man that you have never seen before, do you want to tell us that he just wrote out a paper and said, "Put your name to this million dollar note," and if he did that you would do it? A. No.

Q. Don't you know you read it all over yourself? A. Yes, I suppose I did, but I can't recall the conversation.

Q. But at the time you were telling the truth? A. I hope so.

Q. You did not have occasion to tell him any lies about it? A. No.

MR. SMITH: That is my case, sir.

MR. DOHERTY: Plaintiff rests.

MR. SMITH: I move for the direction of a verdict, your Honor, on the same grounds that I made on my motion for a nonsuit.

THE COURT: I deny it.

MR. SMITH: I take an exception.

Mr. Smith sums up for the defendant.

Mr. Doherty sums up for the plaintiff.

Charge.

The Court thereupon charged the jury as follows:

THE COURT: Members of the jury, the defendant in this case, Gottfried C. Krueger, was the owner, on May 4, 1925, of 145 Harrison Avenue, Jersey City, N. J. known as the Harrison Apartment Building, occupied by many families as his tenants, and he had owned this building for some time prior to that date. Among the tenants who were in the building on that day was Mr. James B. Egan and his family, which consisted of himself, his wife and three children, one of them a little girl by the name of Margaret, who was then two and one-half years old.

The plaintiff in this case contends that there was a screen in one of the bedroom windows; there were screens also in the other windows, but you are concerned only with the screen in the window from which this child is alleged to have fallen; that the screen became defective, and that by reason of such defect the child, Margaret, fell through the screen, out of the window, to the ground, and was injured.

This girl, through her father—being an infant she cannot bring the suit herself—brings this suit against the landlord to recover damages for this fall, alleging that the proximate cause of the fall was the negligence of this landlord.

The father also joins in this action which he brings on behalf of his daughter, to recover damages which he sustained by reason of this accident and the amount of money he had to expend in the endeavor to cure his daughter from the injuries she incurred in this fall.

Charge.

Before the plaintiffs can recover they must satisfy you by a preponderance of the evidence that the proximate cause of this accident was the negligence of this landlord. If they have failed to prove this fact, there can be no recovery, for negligence is never presumed, it must always be proved by the party alleging it, and the mere fact that the girl had an unfortunate accident, and was injured, does not of itself entitle either the girl or the father to recover. Any recovery must be because the defendant was negligent and such negligence was the proximate cause of the accident,—not that he was negligent, that is not sufficient, but that his negligence was the proximate cause of the accident of which complaint is made.

Now, it is a well-settled principle of law in this state, that the landlord, unless there is a covenant in the lease to the contrary, is not obliged to make any repairs to the inside or outside of the leased premises, and that the tenant cannot recover from the landlord for any damages suffered by reason of the defective condition of the building. But if the building is leased to many tenants—that is, if it is an apartment or tenement house building—and those tenants have the common use of a hallway or stairway, the landlord is under a duty to use reasonable care to keep the portions of the building he so reserves to himself, or for the use of those tenants, reasonably safe for the use of the persons who have the right to use them.

The duty of the defendant in this case was to use reasonable care to see that the portions of this building he reserved for the joint use of the tenants were reasonably safe for the purposes for which they were intended

Charge.

But, members of the jury, the tenants of this building, so far as the evidence shows, had nothing whatever to do with the use of the window or the screen out of which this child fell, and so far as that element of the law is concerned, it would not apply. There was no liability on the part of the landlord to do anything to this window, or to the screen. But if the case stopped there, the Court would have been obliged to grant a nonsuit or direct a verdict, because there would have been no liability on the part of the landlord.

There is, however, another principle of law which would apply if you find the facts warrant it, and that is, although the landlord was not under any obligation to repair or replace this screen, if he voluntarily attempted to do so, and did it in such a negligent way or manner that this child was injured by such neglect, there could be a recovery if the screen was used for the purpose for which it was intended.

So you see, if you find from this evidence that the landlord assumed the duty of making repairs to this screen, and he did it in such an improper and negligent way that the child was injured by such neglect, then, of course, there can be a recovery so far as these plaintiffs were concerned.

What was the intention of that screen? If the screen was not intended for the purpose of protecting this child, or any other person in that building, from falling out of that window, the mere fact that it may not have been put in such a position to keep them from falling out but that flies could not get in, for it might fall out itself, that would not be the proximate cause of this accident, because the question is, was the screen there to protect this child, or any other person in

that building, from falling out of the window? If the screen was not properly placed in this window and the wind had blown it out, and it had struck the child and had injured the child by falling from the window in which it had been located, then, you see, there would be responsibility on the part of the landlord if he had assumed the duty of putting it properly in place. That was not the case here. The question is, was the screen placed in the window to protect the people in that room from falling out? You have to determine that, members of the jury.

If you are satisfied from the evidence that the screen was placed there for the protection of the people living in that room, for the purpose of keeping them from falling out of that window, that that was the intention of the landlord in placing it there, and that it was not properly installed and by reason of that negligence the child fell and was injured, then there can be a recovery.

But if the screen was put there for the sole purpose of keeping out insects or anything from coming into that room, and not for the purpose of protecting the children and the other members of that family from falling out of the window, and the landlord was negligent in the way he put it there and fastened it in the window, there can be no recovery because it was not the intention of the landlord to have the screen used in any way except for the purpose for which it was generally intended.

That, members of the jury, is the case.

If you find that the landlord was negligent and that his negligence was the cause of this child falling out of the window, then there can be a recovery.

If you find that the screen was not put there for the purpose of protecting and preventing the child from falling out of that window, then there can be no recovery, and it would be immaterial how much damage they suffered.

If you find the landlord is liable, then the child is entitled to a sum which will compensate her for the injury which she sustained. She cannot be guilty of contributory negligence because she was under the age of two and one-half years and a child of that age is not presumed to have intelligence sufficient to find her guilty of contributory negligence. If she can recover, she would be entitled to compensation for her pain and suffering, and she would be entitled to compensation for any injury you find there is—but you cannot guess at it, and unless there is some evidence that she will suffer in the future, all the child is entitled to is for pain and suffering. If you find that the child is nervous, and if you find she is nervous as a result of this accident, she is entitled to be compensated for that; and she is entitled to be compensated for all the pain and suffering she has endured from this accident, which has been proved before you,—not for you to guess at it, but you have to determine the extent of the liability for the injury which the child has suffered.

In case you find for the child, then the father is entitled to a sum which will compensate him for his expenses in endeavoring to cure the child of her injuries, which would be money that he laid out for the hospital and money which he paid or became liable to pay for doctors and for medicines for the child.

Charge.

That is the case you have to determine. It is not a question of sympathy, it is a question of what you are satisfied the witnesses have testified, and the effect of their testimony, applying to the evidence you have heard, the facts you have heard, the law which the Court has laid down for your guidance.

Now, if you find, as I have said before, that there was negligence on the part of this landlord which was not the cause of this accident, there cannot be any recovery. There can only be recovery if the negligence of the landlord was the cause of this child's fall.

If you find that the landlord was negligent and that his negligence was the cause of this accident, both the father and child can recover, and there must be a separate verdict, one for the father and one for the child, because their awards cannot be computed in the same way and manner.

If, on the contrary, you find there was no negligence on the part of the landlord that was the cause of this accident, then the landlord is entitled to your verdict.

(The jury retire).

MR. SMITH: I except to the Court allowing the jury to find that the negligence of the landlord, if any, was the proximate cause of the injury to the plaintiff.

Also to the Court leaving it to the jury to assume the landlord reserved the control of the screen.

THE COURT: I did not say that.

MR. SMITH: That the landlord reserved the control of the screen, or to what the Court said on that subject.

THE COURT: Take your exception to what I said, but that is not what I said.

MR. SMITH: I except to the Court allowing the jury to find that if the landlord was under no obligation to repair or replace the screen if the screen was used for the purpose for which it was intended, yet, if the landlord assumed to repair it and did it so negligently that the child was injured, the jury could find liability on the part of the landlord.

THE COURT: You can except to what I said on that.

MR. SMITH: I except to the Court allowing the jury to find that the screen was there for the purpose of protecting persons inside the room from falling out.

MR. SMITH: I except to that part of the charge where the Court said, if the jury find that the screen was placed there for the protection of the people living in the room, and that it was the intention of the landlord to protect and prevent people from falling out, there could be liability.

I except to that part of the charge where the Court said if there was negligence and such negligence was the cause of the child falling out, there could be a recovery.

Also to that part of the charge where the Court said if the jury find for the child, then the father is entitled to recover, because that excludes from the jury the question of the contributory negligence of the father.

MR. DOHERTY: I except to that part of your Honor's charge where you say, if it was the intention of the landlord that it should be used for the purpose of keeping people from falling out, on the ground that it is a question for the jury to

say for what intent the screen was there, not what intention a particular landlord might have in mind but what it is generally assumed to be put in for.

I also ask an exception to the first part of the charge, where the Court said—or rather, where the Court took away the first question from the jury entirely; I understood you said there was no liability on the part of the landlord to do anything to the screen.

THE COURT: Yes.

MR. DOHERTY: I except to the part where it took from the jury entirely the first count, that it was a jury question to say whether or not the landlord, in having assumed control over the screens, whether or not they were used by other tenants, was still a jury question.

As to the landlord's liability, I take exception to that part of the charge where you say, was the screen placed in the window to prevent people in that room from falling out. I say that is one of the reasons, that may have been one of the purposes in using it, together with the fact that it was there to keep out flies, insects and other things, or for any other purpose or requirement you might say it was placed there for.

(The jury sent out for further instructions and were escorted back to the court room).

Mr. Doherty, attorney for plaintiff, was present, the attorney for the defendant being absent.

THE COURT: Gentlemen, the Court has received a communication from you that you wanted some further instruction. What is it?

THE FOREMAN: On the question of negligence of the landlord. Is he responsible for those

screens, the upkeep of them, keeping them in good condition?

THE COURT: As I said to you before, the landlord is not responsible for any repairs that may be required to be made during the time that the tenant occupies the place, but if he assumes the liability, if he assumes the duty of putting the screens in their place and he does it in such a negligent manner that there is an injury resulting from such negligence, then he is responsible for the negligent act. But in this case, and in all cases, the negligence must be the cause of the accident. If these screens were put there for the purpose of keeping out bugs and flies and not to protect persons from falling out of that window, and the child fell out of the window, that would not make the landlord liable. If they were simply there to keep the flies out and dirt and dust out, and things from coming in, and not for protection, you see the landlord would not be liable if somebody fell against the screen. It is for you to say what they were put there for.

(The jury again retired).

MR. DOHERTY: I want to take exception to that part of the supplemental charge where the Court said, "Unless you find that it was put there for protection and to keep people from falling out, then there was no liability", because I contend that one of the questions the jury may consider—that may be one of the reasons together with the other reasons that the Court detailed—is that it might be for the purpose of keeping out flies and mosquitoes and also for the purpose of keeping people in the apartment safe.

THE COURT: Yes, you may take your exception to whatever I said, and I also allow an exception to Mr. Smith, who is not here.

Postea.

NEW JERSEY SUPREME COURT.
HUDSON COUNTY.

MARGARET EGAN, an infant by JAMES B. EGAN, her father as next friend and JAMES B. EGAN, *Plaintiffs,* *vs.* GOTTFRIED C. KREUGER, *Defendant.*	Action at Law.

This case was tried before Judge Willard W. Cutler, with a jury in the Hudson Circuit, on Wednesday, April 7th, 1926 and continued over to Thursday, April 8th, 1926.

The jury returned a general verdict against the defendant and in favor of the plaintiff Margaret Egan in the sum of $500.00, and in favor of the plaintiff James B. Egan, in the sum of $400.00.
Signed April 12, 1926.

WILLARD W. CUTLER,
Judge.

Notice of Appeal.

(Filed)

NEW JERSEY SUPREME COURT.
HUDSON COUNTY

MARGARET EGAN, an infant by JAMES B. EGAN, her father as next friend and JAMES B. EGAN,
Plaintiffs,
vs.
GOTTFRIED C. KREUGER,
Defendant.
Action at Law.

TO ROBERT H. DOHERTY, ESQ.:
Attorney of Plaintiffs:

TAKE NOTICE that the defendant appeals from the whole of the judgment entered in the above entitled cause, to the Court of Errors and Appeals in the Last Resort in All Causes.

Dated: April 13th, 1926.

EDWARDS & SMITH,
Attorneys of Defendant.

Stipulation Staying Execution.

(Filed April 14. 1926.)

NEW JERSEY SUPREME COURT.
HUDSON COUNTY.

MARGARET EGAN, an infant by JAMES B. EGAN, her father as next friend and JAMES B. EGAN, *Plaintiffs,* *vs.* GOTTFRIED C. KREUGER, *Defendant.*	Action at Law. On Appeal

It is hereby stipulated and agreed by and between the attorneys of the parties in the above entitled action that execution on the judgments heretofore recovered herein by the plaintiffs be stayed until the determination of the appeal taken by the defendant, and that security or bond on appeal be, and the same is hereby waived.

Dated: April 13, 1926.

ROBERT H. DOHERTY,
Attorney of Plaintiffs.

EDWARDS & SMITH,
Attorneys of Defendant.

Grounds of Appeal.

(Served May 2d, 1926.)

NEW JERSEY COURT OF ERRORS AND APPEALS.

MARGARET EGAN, an infant by JAMES B. EGAN, her father as next friend and JAMES B. EGAN, *Plaintiff-Appelles.* *vs.* GOTTFRIED C. KREUGER, *Defendant-Appellant.*	Action at Law. On Appeal

The Defendant-Appellant writes down the following grounds upon which he intends to rely on the argument of the appeal in the above entitled matter:

1. Because the Court refused to non-suit the plaintiffs on motion of the defendant, although a non-suit should have been granted, upon the following grounds:

(a) There was no proof of any negligence on the part of the defendant, causing or contributing, in any manner, to the injury or loss to the plaintiffs, or either of them.

(b) Any defect in the screen, if any such existed, was not the approximate cause of the injury to the infant plaintiff.

(c) If the screen was defective, and if the accident happened by the child climbing up on the wndow sill, and leaning, or falling against the screen, or placing its weight against the same, thereby forcing the screen out, such does not make the landlord liable in an action of negligence.

(d) That a screen such as the one in question is not intended for use as a protection to one leaning against it.

(e) There was no proof as to what caused the infant child to fall out of the window.

(f) There is no proof that the defect in the screen, if any, had anything to do with the accident wherein the child was injured.

2. Because the Court refused to direct a verdict for the defendant when requested so to do, upon the same grounds as was set forth in the motion for non-suit.

3. Because the Court erred in charging the jury as follows:

"What was the intention of that screen? If the screen was not intended for the purpose of protecting this child, or any other person in that building, from falling out of that window, the mere fact that it may not have been put in such a position to keep them from falling out but that flies could not get in, for it might fall out itself, that would not be the proximate cause of this accident, because the question is, was the screen there to protect this child, or any other person in that building, from falling out of the window? If the screen was not properly placed in this window and the wind had blown it out, and it had struck the child and had injured the

child by falling from the window in which it had been located, then, you see, there would be responsibility on the part of the landlord if he had assumed the duty of putting it properly in place. That was not the case here. The question is, was the screen placed in the window to protect the people in that room from falling out? You have to determine that, members of the jury.

"If you are satisfied from the evidence that the screen was placed there for the protection of the people living in that room, for the purpose of keeping them from falling out of that window, that that was the intention of the landlord in placing it there, and that it was not properly installed and by reason of that negligence the child fell and was injured, then there can be a recovery.

"But if the screen was put there for the sole purpose of keeping out insects or anything from coming into that room, and not for the purpose of protecting the children and the other members of that family from falling out of the window, and the landlord was negligent in the way he put it there and fastened it in the window, there can be no recovery because it was not the intention of the landlord to have the screen used in any way except for the purpose for which it was generally intended.

"That, members of the jury, is the case."

4. Because the Court erred in charging the jury as follows:

"In case you find for the child, then the father is entitled to a sum which will compensate him for his expenses in endeavoring to cure the child of her injuries, which would be money that he laid out for the hospital and money which he paid or became liable to pay for doctors and for medicines for the child."

5. Because the Court erred in charging the jury as follows:

"There is, however, another principle of law which would apply if you find the facts warrant it, and that is, although the landlord was not under any obligation to repair or replace this screen, if he voluntarily attempted to do so, and did it in such a negligent way or manner that this child was injured by such neglect, there could be a recovery if the screen was used for the purpose for which it was intended.

"So you see, if you find from this evidence that the landlord assumed the duty of making repairs to this screen, and he did it in such an improper and negligent way that the child was injured by such neglect, then, of course, there can be a recovery so far as these plaintiffs were concerned."

Respectfully yours,

EDWARDS & SMITH,
Attorneys of Defendant-Appellant.

Exhibit P-1.

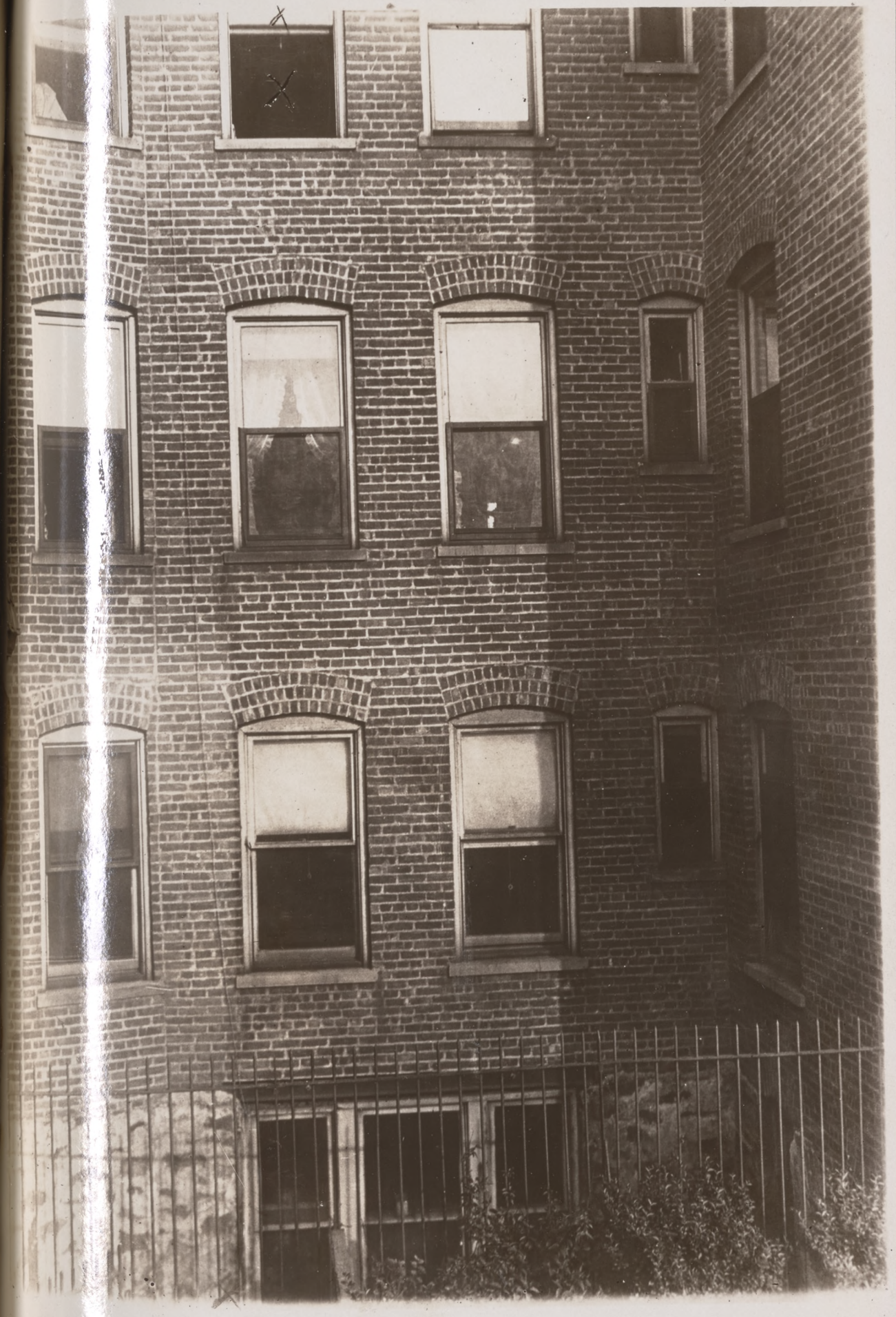

Exhibit P-2.

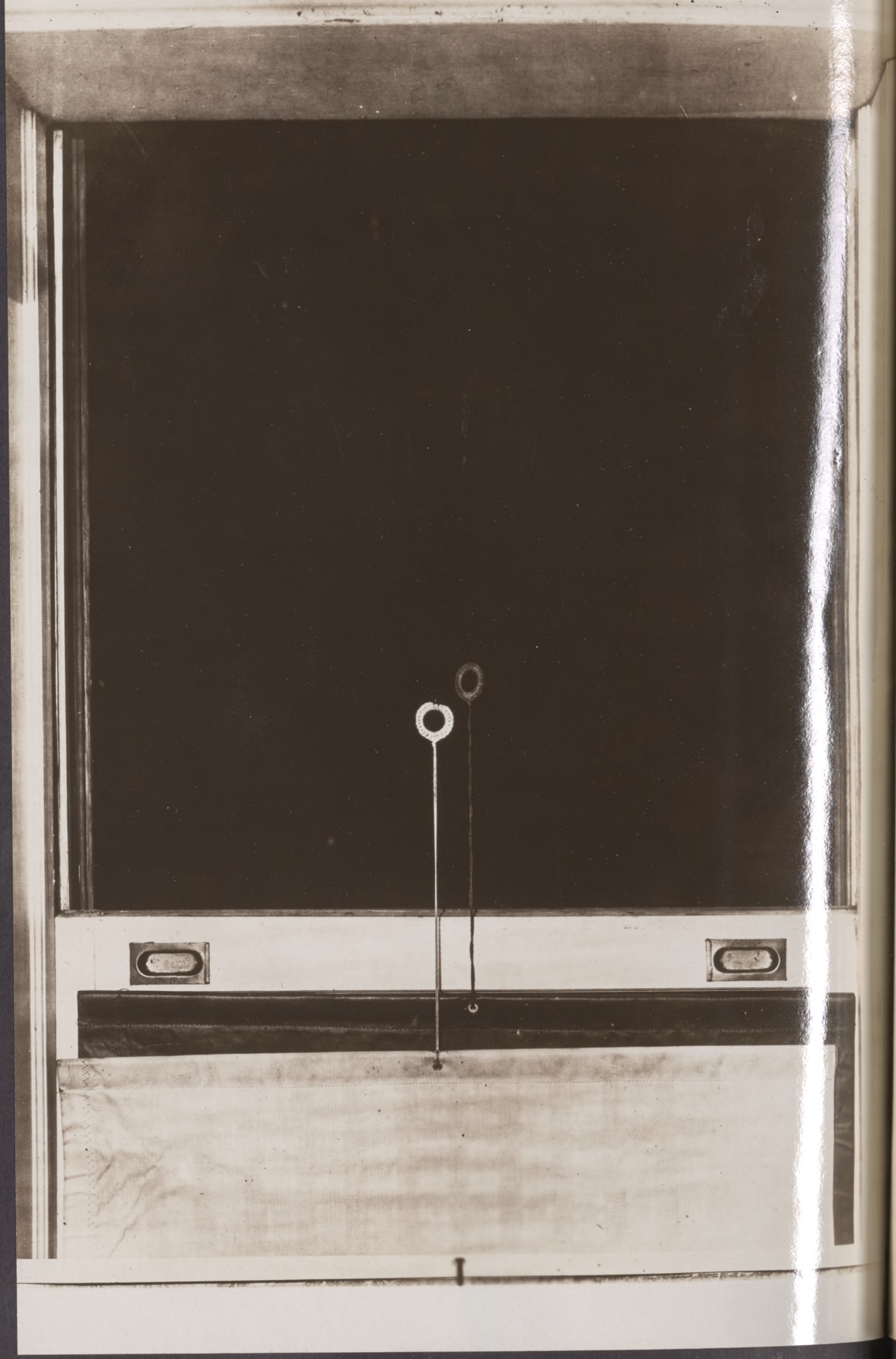

Exhibit P-8.

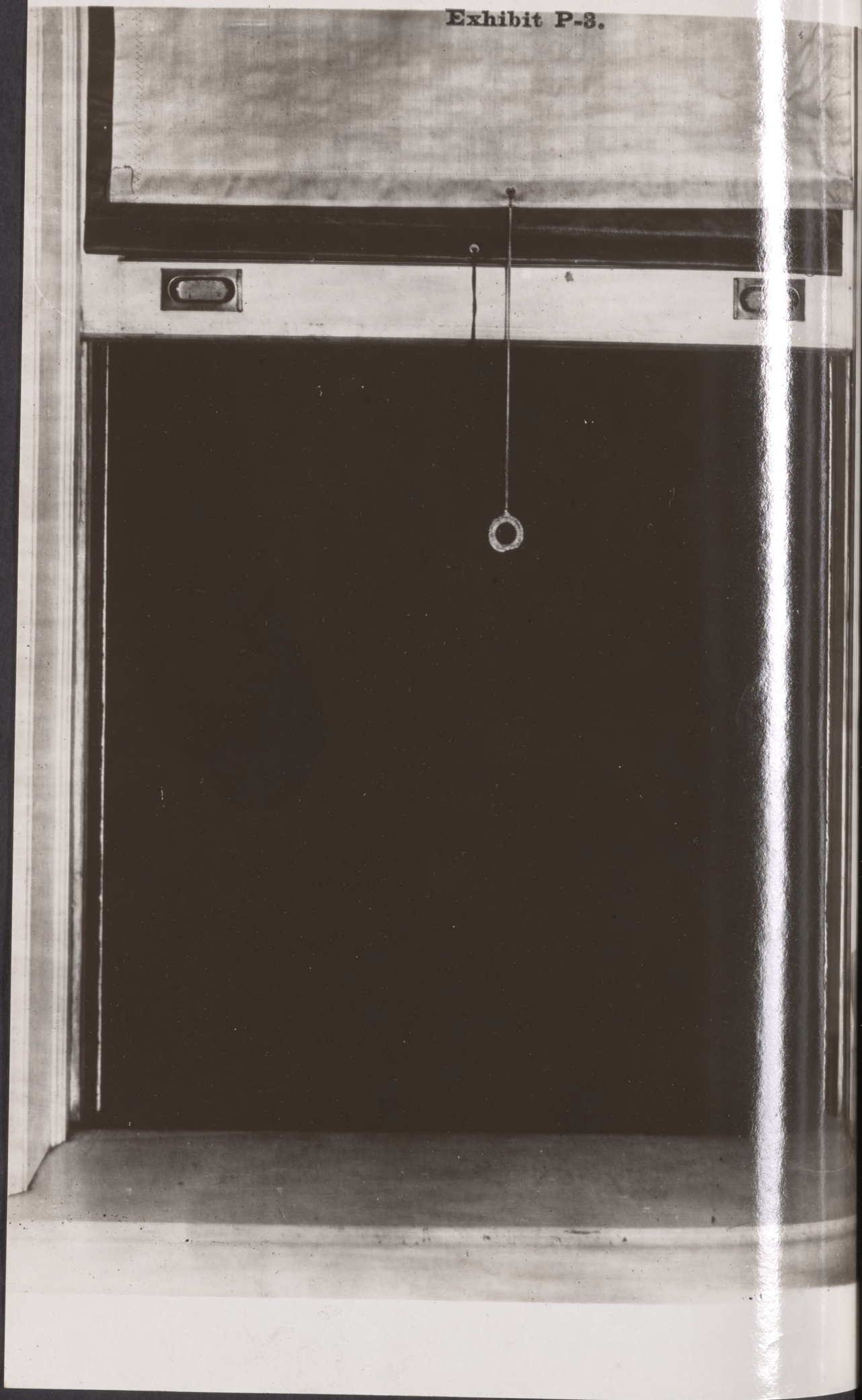

Exhibit P-4 for Identification.

New Jersey Court of Errors and Appeals

MARGARET EGAN, an infant by next friend, and JAMES B. EGAN, *Plaintiffs-Respondents,* *vs.* GOTTFRIED KRUEGER, *Defendant-Appellant.*	Action at Law. On Appeal from Supreme Court.

BRIEF FOR DEFENDANT-APPELLANT.

Statement.

The above entitled action was tried in the Supreme Court, Hudson Circuit, before the Honorable Willard W. Cutler, Judge, to whom the same had been referred for trial, and a jury. It resulted in a verdict of Five Hundred ($500) Dollars for the infant plaintiff and Four Hundred ($400) Dollars for the father, James B. Egan. Judgments were accordingly entered. It now comes before this Court on appeal.

Facts.

Defendant is the owner of the premises, No. 145 Harrison Avenue, Jersey City, N. J., an apartment house, occupied by about twenty-five (25) families. Plaintiffs, father and daughter, resided in Apartment No. 301 in said premises. Defendant, as landlord, furnished window screens for the windows of the apartment. These

were what are known as half screens,—in other words, they covered only the lower portion of the window. These screens were the usual window screens, being partically square, having a frame work of wood, with wire screening affixed thereto. The frame work was beaded on either side, the bead fitting into a groove in the sides of the window frame.

On May 4, 1925, the infant plaintiff, then two and one-half (2½) years of age, was with her mother in the bedroom at the rear of the house. In this room were two windows, each containing a screen as above described. The mother left the child playing on the floor, about six feet away from one of the windows, while she went into the next room, or hall, to answer the phone.

The bottom of the window, or window sill, was about three to three and one-half (3-3½) feet from the floor, and was above the child's head.

The mother had just taken up the phone when she heard a commotion in the bedroom. She ran into the bedroom and found the child gone and the screen out of one of the windows. The child had, in some manner not disclosed, fallen out of the window.

No other persen was in the bedroom. No one saw the child fall out of the window, and just how she fell out does not appear.

The testimony showed that the screen did not tightly fit the window, but, on the contrary, was loose and would fall out at a touch, and even had been blown out by the wind.

It is supposed that the child, in some manner, climbed up on the window sill, leaned against the screen, and it giving way, she fell out of the window, although there is no evidence of such.

The Pleadings.

The complaint alleges the negligence of the defendant to be:

First: That he, being the landlord reserved to himself the control of the screens in the windows, installing them in the early spring of each year, and removing them after the summer of each year; that on May 4, 1925, and prior thereto, the screen in the bedroom of the apartment of the tenant (plaintiff) was loose and in a defective condition in that the groove of the screen did not mesh with the tongue of the window, of which defective condition defendant had noticed that on May 4, 1925, infant plaintiff came into contact with the screen which fell out of the window, and she was thrown to the ground.

> by reason of the negligence of the defendant in failing to repair the said screen in said bedroom of apartment No. 301, as he was in duty bound to do.

Secondly, the complaint alleges that under the circumstances above, defendant undertook the work of installing the screen in one of the windows of a certain bedroom of said Apartment No. 301, and did such work of installation in such a negligent and careless manner that the screen did not properly fit the window and was in a loose and defective condition; that on said date (May 4, 1925) infant plaintiff came into contact with the screen, which fell out, and she was thrown to the ground

> by reason of the negligence of the defendant in having undertaken to install the said screen in said window referred to and having negligently performed the said work in the manner set forth * * *

The answer is a denial of the matters set up

in the complaint and in an allegation that the father was guilty of contributory negligence in leaving the infant above in the bedroom with knowledge (a) that the screen was defective and out of repair (if it was so defective and out of repair), and (b) in so leaving the child with knowledge that the infant could reach such defective screen.

The Evidence.

The mother, Margaret Egan, testified that she lived at the time at No. 145 Harrison Avenue, which is an apartment house, having twenty-five (25) apartments, No. 301 of which she occupied; it consisted of five (5) rooms, two of which were bedrooms; her apartment was three and one-half (3½) stories above the ground (10); she had moved into the apartment on October, 1922; there were screens in the apartment then; they were put in last in May, 1924, by the employees of defendant (11).

There were screens in the windows of each bedroom, one in each window (there being two windows); each screen had a groove, which fitted to a tongue; on one of the screens, however, the tongue did not fit tightly into the groove for the whole distance, but for about one quarter, at the top, the tongue fitted only about one quarter into the groove, leaving about a quarter of an inch space open through which a fly or mosquito could enter (12); they were so loose they blew out of the window several times (13), about June 1, 1924, and witness spoke to the janitor about it; he brought the screen up and put it in place (13); again it blew out in the Fall of 1924; it was put back again in the same condition (16); it remained in place until the date of the accident, May 4, 1925. At the time of the accident, witness and the baby were in the bedroom, the

baby playing on the floor, watching witness dressing (18); witness left the room to go to the phone, leaving the baby playing on the floor, sitting down (18); she was not yet two and one-half (2½) years old (19).

The elevator boy carried the baby upstairs after she had fallen out. She was abrased, black and blue, her mouth was bleeding and she was crying (20). She was taken to the hospital, and she remained there ten (10) days (21). She was nervous and when she heard a fire apparatus or an airplane, she screamed; this was observed when she was at the shore (22). On cross examination she said the evidences of nervousness she observed were that when she went out and was gone for some time, and returned, the baby cried, and at the shore, when an airplane flew over the house the baby cried, and when she heard a fire engine, she cried (23-24).

She did not see the baby fall out of the window; she knew the baby was in the bedroom; that the screens did not fit; that the wind would blow them out (24); yet she left the room and the child in it alone (25); the window was the ordinary window in an apartment house, the window sill about three (3) or three and one-half (3½) feet from the floor, and was above the child's head (25); there was nothing against the window, no chair, nor anything for the child to climb upon (25); that she went out of the room for a second, heard the commotion in the bedroom, ran in, and the child was gone (25); the nearest object to the window was the night table, about four feet high, which stood between the two windows (27).

James B. Egan, the father, testified that he was not home at the time of the accident, was 'phoned for and came home and found the child in one of the bedrooms (28); she was taken to the hospital.

About May 29th, they took the child to Spring Lake; it was their vacation (29); the child cried if an airplane flew over the house, or if a fire apparatus went by (29); if the siren blew she cried (29).

The screens were in the windows all winter; they never fitted at the bottom (30). He was there once when the screen fell out; it went down into the yard, Mrs. Egan phoned to the superintendent and he brought it up and put it in place.

On cross examination he stated that the siren at Spring Lake made an unearthly noise; it woke him up (35), and he does not wonder that it frightened the baby, nor was he surprised that when the Shenandoah went over the house the baby cried (35).

Dr. Bortone testified that he saw infant plaintiff about May 4, 1925, she was in shock, then X-rayed her and found a crack going from ear to ear over the top of the head (36), gave her magnesia sulphate, and treated her until she had no further evidence that she needed any compression (37); she had black and blue marks on her arm, chest and face, which cleared right up (37); the treatment for shock lasted about six or eight hours (38).

Amy Hutchins stated she heard Mrs. Egan speak to the superintendent about the screens and heard him say, "Nothing fits around here"; that the screen fell out while she was washing the windows (41); if you just touched the screen it fell out (42).

Eugene Thomas stated he is the janitor (43); he picked up the baby in the yard after it fell and carried it upstairs.

DEFENDANT'S WITNESSES:

Dr. Nicholas Feury stated he examined the child May 17, 1925, at her home, having heard the history of the case; examined her from head to foot, thoroughly (49); found no evidences of injury; she seemed normal, was going around like a normal child (50).

George A. Flagg, an architect, stated that he examined the window and screen and that on the side of the window there is what is called a backstop and on the face of the backstop there is a bead which is in the form of a tongue; on each side of the screen there is a groove which fits into the tongue on the side of the backstop and the screen works up and down; the tongue is about half an inch (54); the purpose of screens in windows is as follows: the screen is used as a substitute for the glass in weather where they need to let outside atmosphere into the room and at the same time prevent insects from getting into the room (35); they are not able to sustain a weight pressed against them (35).

Harry H. Harris stated he is the agent of the the premises and that there has been no change in the screens since Mrs. Egan lived in the apartment (56).

Mollie Archer stated that on November 6, 1925, she gave a statement, which she signed, and in which she said that Mrs. Egan

> "told me her daughter was climbing up in a chair in front of the window while Mrs. Egan was in the bedroom, and Mrs. Egan told the child to get off the chair and the child obeyed. Mrs. Egan said she then left the child playing in the bedroom and Mrs. Egan went into another room, and a commotion which followed immediately after she walked out of the bedroom attracted

her attention, at which time she first realized that her child had fallen out of the window, and the only explanation was that the child had climbed a chair and reached the screen, which fell out under the child's weight."

That she gave such a statement and read it over and signed it (61).

POINT I.

(a) The Court should have non-suited, and its refusal to do so was error.

(b) The Court should have directed a verdict for defendant and to refuse to do so was error.

The case is peculiar. There is absolutely no evidence as to just how the child came to fall out of the window, nor as to what caused her to fall. She was last seen by the mother playing on the floor about six feet from the window (p. 25); the mother then left the room for an instant, heard a commotion, and running into the room, saw that the child was gone and the screen out of the window, and looking out, saw the child had fallen out of the window. No one saw the child fall. No one knows how she came to fall. That she climbed upon the window sill is left to inference. It is so asserted because it seems to be the only reasonable inference that could be drawn. There was no one in the room with her. The mother insists, however, that there was nothing for her to climb up on. Yet she must have climbed up on something. The window sill was higher than her head and certainly she could not have jumped up. Assuming she climbed up on the window sill, there is nothing to show that she was caused to fall to the yard below by the giving way of the screen.

It is in evidence that the slightest touch (42), or even the wind (13), would cause the screen to fall out. Did the child, in climbing upon the window sill, touch the screen and cause it to fall out? Did the screen *first* fall out and then the child lose its balance and fall out afterward? Or, did the child climb upon the window sill and place its weight upon or against the screen and cause it to fall, and the child fall with it? None of these questions are answered by the evidence We are left to conjecture and speculation. Just how the accident occurred is not shown.

The plaintiff relies upon the assumption, although there is no evidence to sustain such assumption, that the child climbed upon the window sill and *leaned upon,* or *against,* the screen, which fell out because it was loose and defective, and that the landlord is liable because, (as set up in the First Count), he reserved control of the screens and permitted them to become defective and dangerous (to his knowledge) and did not repair them, as he was in duty bound to do; and, (as set up in the Second Count), because he installed the screens and did so negligently and carelessly, and, having undertaken to install them, he was liable for his negligence in doing so carelessly.

The Trial Judge held there was no evidence to sustain the First Count, and so charged the jury, and submitted the case to them only upon the facts set up in the Second Count (p. 64).

Before arguing the question as to whether the landlord would be liable, assuming the facts to be as asserted by the plaintiff in the Second Count, to wit, that the landlord undertook to install the screens and did so carelessly, so that they did not fit and would fall out at a touch, or upon slight pressure made upon them, we submit there is not in the evidence any testimony justifying a submission of the case to the jury.

(a) Because there is absolutely no proof as to what caused the child to fall out of the window.

No proof is offered as to this. The cause of the child's falling out of the window rests entirely upon surmise or assumption.

(b) Because there is no proof that the defective screen (if the same was defective) had anything to do with the accident wherein the infant plaintiff was injured.

No proof was offered as to just what happened, The plaintiff's case is based entirely upon assumption. It is *assumed* the child and the screen fell outward *together*. No proof is submitted of that fact. The screen might well have fallen out, or been blown out, or even been pushed out, *first* and the child have *climbed up afterward*, lost its balance and fell. It was incumbent upon plaintiff to *prove* the child came into contact with the screen which gave way under its weight.

(c) Because there is no proof that the negligence of the defendant in failing to properly install the same, or, having installed it, to keep it in repair, caused or contributed to the injury to plaintiff.

See argumet under (b) above.

(d) Because any defect in the screen, if any such existed, was not the proximate cause of the injury to the infant plaintiff.

Assuming the screen to have been defective, and such defect to have been caused by the negligence of the defendant, no proof was submitted to show that such negligence was the proximate cause of the injury to infant plaintiff. No causal connection has been shown between the negli-

gence of defendant and the injury to the infant plaintiff. The screen may very well have been defective, in that it did not fit snugly into the groove of the window, and such defect be due to the negligence of defendant, but such alone is not sufficient to justify permitting a jury to find a verdict against defendant. If, notwithstanding the defective condition of the screen, it would have remained in the window and served its purpose, and fell out into the yard because of the action of the wind or other force than by the act of the infant, or was caused to fall out into the yard by some act of the infant, the defective condition was not the proximate cause of the accident to the infant.

The cause of the accident was the climbing of the infant upon the window sill and there losing its balance so as to fall outward and down to the yard below. The defective screen, if the same was defective, only gave way under the strain or weight of the body of the infant.

Having considered the reasons above set forth, we now pass to the further reasons that

(e) If the screen was defective, and if the accident happened by the child climbing upon the window sill and leaning, or falling, against the screen, or placing its weight against the same, thereby forcing the screen out, such does not make the landlord liable in an action of negligence.

(f) A screen such as the one in question is not intended for use as a protection to one leaning against it.

As we have seen, the theory of the happening of the accident which evidently plaintiff relies upon, is that the infant plaintiff in some way climbed up on the window sill and leaned upon

or against the screen, which, under the weight or pressure of the child's body, gave way and fell, causing the child to be precipitated to the yard below. It is our contention that if such be the manner of the happening of the accident, although there is no evidence to support such theory and the same rests only upon mere surmise and conjecture, still there is no liability upon the part of the defendant.

Assuming the landlord installed the screens and installed them negligently and did not repair them, yet he is only liable for injury resulting from the use thereof *in case they are being used in the manner he invites the tenant to use them.* See 30 A. L. R. 1390 for statement of the genral rules and numerous cases holding the same, etc.

It is clearly apparent that screens such as the one in question are placed in windows to let air into the room and to keep out insects. If testimony were required as to this it is found in the evidence of Mr. Flagg, an architect, who so testifies (p. 55). *Screens of this kind are not intended to sustain weight applied to them.* (Flagg 55). They are of necessity light, frail objects. The screen itself (as distinguished from the frame) is thin and fragile. Such screens are not guards against one falling out of the window. They are not supports of the human body, nor intended to sustain a person's weight.

The purpose of the landlord in supplying and installing such screens, is to afford means of allowing fresh air to enter the room in warm weather, and at the same time, to keep insects out. To this extent, having supplied and installed the same, he invites the tenant to the use thereof. Had the screen been blown inward by the wind, or had it fallen inward because of

some jar or other shock, which, had the screen been in proper condition, it would not have done, and the infant, while in the room, had been injured thereby, liability might be found upon the part of defendant. But the landlord, by installing window screens of this character, does not invite the application of force to the same laterally, nor does he invite use of the same as a protection against a person falling out of the window.

To hold that he did is to violate the known purpose of the screen.

The duty of the landlord in this case was to see that the screens were in proper shape to be used for the purpose for which they were intended and furnished.

In the case of *Telephone Co.* vs. *Speicher,* 59 N. J. L. 23, a case where a lineman, in climbing a telephone pole, supported himself by one of the cross-bars which gave way with him, causing him to fall, the Court said:

> "But the sole object of the cross-bars is to carry the wires. He who maintains the cross-bars does it for that purpose, and his duty is thus limited. It is not perceived how his duty in that respect is extended by proof that linemen, in climbing, usually lay hold of and rely upon the cross-bars for support, in whole or in part. That custom is not, in this case, brought home to the knowldege of the telephone company, but if it were it could not operate to compel them to make cross-bars intended for one purpose sufficiently strong for another purpose for which they were never intended. No invitation to use the cross-bars can be deemed to be extended to the lineman. When, therefore, a lineman makes use of a cross-bar in climbing he steps beyond the limits of his invitation, and he who invited him to climb by the pole has no liability for any resulting injury."

In the case of *Saunders* vs. *Eastern Hydraulic Brick Co.*, 63 N. J. L. 554, the Court of Errors and Appeals, in a case where a workman was repairing a skylight and placed his hand upon a mullion dividing the frame and sustaining the contiguous parts of the panes of glass, and leaned so much of his weight upon it as to break it, which caused him to fall through the skylight, said:

> "But the purpose of the mullion in this skylight was to aid in the support of the panes of glass. The master's duty was to have it so constructed as to reasonably answer that purpose, but it is impossible to discover any ground in reason for imposing upon the master any duty to have it so constructed as to bear the weight or any part of the weight of a servant, although engaged in repairing it.
>
> "The duty of the master in this respect is like that of one who invites another to make use of some place or appliance and is limited to the care requisite for the reasonable use thereof for the purpose for which it is designed. (*New York and New Jersey Telephone Co.* v. *Speicher*, 30 Vroom 23; S. C., 31 Id. 242.)
>
> "Doubtless the work of replacing the glass would have required the use of some force upon the mullion to remove the old putty. The case indicates that the mullion broke under plaintiff's pressure before he had begun to exert force for that purpose. In that aspect it is plain that defendant was not liable for plaintiff's injury, because, at just stated, it owed him no duty to furnish a mullion strong enough to bear his weight or any part of it."

In the case of *Gavin vs. O'Connor*, 99 N. J. L. 162, the Court of Errors and Appeals, where it appeared that a young boy was killed by the fall of a clothes pole in the backyard of a two-family

house, on the first floor of which he lived, and where it appeared that the fall of the pole was caused by the strain placed thereon by a boy hanging on a clothes line attached to the pole, said:

"The rule is thoroughly established in this state that the liability of the owner or occupier of premises who expressly or implied ly invites others to enter thereon is only co-extensive with his invitation; his duty of care is limted by that, and when the limits of the invitation are exceeded, it ceases, except as to acts willfully injurious. The cases of *Phillips* vs. *Library Co.*, 55 N. J. L. 307, and *Ryerson* vs. *Bathgate,* 67 Id. 337, are enough to illustrate the principle. To these might be added *Furey* vs. *New York Central Railroad Co.* 67 Id. 270. In the *Phillips* case, plaintiff used a path not regularly laid out, and saved a nonsuit only because the path she did use was a beaten track, justifying an inference by the jury that it was held out as proper for her to use. In the *Ryerson* case, plaintiff, instead of putting her cat through the door opened expressly for that purpose, undertook to go through herself and was injured. A nonsuit was sustained on the ground that she had exceeded the limits of her invitation. In the *Furey* case, the plaintiff was similarly barred because the opening between cars was not held out expressly or impliedly as one for him to use.

"The rule has been uniformly applied by our courts in cases where some structural appliance has given way, and injury has resulted. The question in each case is, was the party injured invited, expressly or by implication, to make use of the appliance, whatever it was, in the way in which he did use it? If he was, a duty of care was raised, otherwise not.

"In *New York and New Jersey Telephone Co.* vs. *Speicher,* 59 N. J. L. 23, in the Su-

preme Court, plaintiff, a telephone lineman, climbed a pole to do some work, and relied for support upon a cross-arm, which broke with him. A judgment for plaintiff was reversed, the court saying that the sole object of the cross-bars was to carry the wires, and while the company was under a duty to use care that the poles should not fall under a lineman's weight, it was under no such duty touching the cross-bars. The duty as respects the pole itself was considered by this court in *Moersdorf* vs. *New York Telephone Co.*, 84 N. J. L. 747, and the two cases well illustrate the distinction between keeping within and overstepping the limits of the invitation.

"Another illuminating case is *Saunders vs. Eastern Hydraulic Brick Co.*, 63 N. J. L. 554, in this court. The plaintiff was repairing a skylight on defendant's roof, and put so much of his weight on the framework of the skylight that it broke with him. We said (at p. 556):

"But the purpose of the mullion in this skylight was to aid in the support of the panes of glass. The master's duty was to have it so constructed as to reasonably answer that purpose, but it is impossible to discover any ground in reason for imposing upon the master any duty to have it so constructed as to bear the weight or any part of the weight of a servant, although engaged in repairing it.' A nonsuit was sustained. So, also, in *Carey* vs. *Gray*, 98 N. J. L. 217, where plaintiff exceeded the bounds of his invitation by undertaking to use a disused privy in the backyard.

"In *Smith vs. Mountain Ice Co.*, 74 N. J. L. 26, in the Supreme Court on rule to show cause, the plaintiff, handling ice on a runway slipped and fell back against a railing which gave way with his weight. The trial court, in charging the jury, assumed that the rail had been placed there for plaintiff's protection, but the Supreme Court held that it

was no more than a jury question whether the railing had been intended and furnished to meet such a strain, and sent the case back for a new trial.

"In the case at bar, the evidence raises no such question. Obviously, a clothes pole is not erected in the backyard of a tenement. and clothes lines extended thereto, for boys to swing on. If one of these boys had been sliding down the baluster rail of the front stairs, and it had broken with his weight, or if he had climbed to the top of the pole and it had fallen with him, we venture to say that no court would hold that there was any duty of the owner to provide a stair rail that would hold a sliding boy, or a clothes pole that would be appropriate and adequate for him to climb. If the boys were invited to use the yard, and the pole had broken under the strain of a normal amount of clothes on the lines, a different case would be presented: but we are unable to see in this case anything beyond a use of the pole for a purpose never contemplated by the defendant, and as to which use he was under no duty of care."

The illustrations given in the above opinion are applicable to the case sub judice with equal force.

If the landlord in the case cited would not be liable had one of the boys been sliding down the baluster rail of the front stairs and it had broken under his weight, and if he would not be liable had the boy climbed to the top of the clothes pole and it had broken and fallen under his weight, how could the landlord in the case sub judice be liable because the window screen fell out under the weight of the child?

POINT II.

The Court erred in charging the jury as follows:

"What was the intention of that screen? If the screen was not intended for the purpose of protecting this child, or any other person in that building, from falling out of that window, the mere fact that it may not have been put in such a position to keep them from falling out but that flies could not get in, for it might fall out itself, that would not be the proximate cause of this accident, because the question is, was the screen there to protect this child, or any other person in that building, from falling out of the window? If the screen was not properly placed in this window and the wind had blown it out, and it had struck the child and had injured the child by falling from the window in which it had been located then, you see, there would be responsibility on the part of the landlord if he had assumed the duty of putting it properly in place. That was not the case here. The question is, was the screen placed in the window to protect the people in that room from falling out? You have to determine that, members of the jury.

"If you are satisfied from the evidence that the screen was placed there for the protection of the people living in that room, for the purpose of keeping them from falling out of that window, that that was the intention of the landlord in placing it there, and that it was not properly installed and by reason of that negligence the child fell and was injured, then there can be a recovery.

"But if the screen was put there for the sole purpose of keeping out insects or anything from coming into that room, and not for the purpose of protecting the children and the other members of that family from falling out of the window, and the landlord was negligent in the way he put it there and

fastened it in the window, there can be no recovery because it was not the intention of the landlord to have the screen used in any way except for the purpose for which it was generally intended.

"That, members of the jury, is the case."

The screen in question was an ordinary window screen. (See Ex's. P 2, 3 and 4). The purpose of such a screen is plain, i. e., to permit the entrance of air into the room and at the same time keep out insects. It is not intended to resist pressure laterally applied, nor to sustain weights placed against it. Nor is it intended as a protection for persons from falling out of the window. Its construction, the material out of which it is made, the manner of its insertion into the window, all plainly indicate that it is not so intended. It is not a question upon which the minds of reasonable men might differ.

This was so clearly presented as to require a finding by the Court.

See cases of *Saunders* v. *Eastern Hydraulic Brick Co.,* supra and *Gavin vs. O'Connor,* supra, *Speicher v. Telephone Co.,* supra.

To leave the question to the jury was error.

POINT III.

The Court erred in charging the jury:

> "There is, however, another principle of law which would apply if you find the facts warrant it, and that is, although the landlord was not under any obligation to repair or replace this screen, if he voluntarily attempted so to do, and did it in such a negligent way or manner that this child was injured by such neglect, there could be a recovery if the screen was used for the purpose for which it was intended.
>
> "So you see, if you find from this evidence that the landlord assumed the duty of making repairs to this screen, and he did it in such an improper and negligent way that the child was injured by such neglect, then, of course, there can be a recovery so far as these plaintiffs are concerned."

There was absolutely no testimony submitted by the plaintiff that tended to establish that the landlord ever made any repairs, or attemped to do so, to the screen involved in the accident. Nor is there any proof that he assumed so to do. The proof is to the contrary. The mother states that the landlord never made nor attempted to make repairs (15). There was, therefore, no jury question presented, but rather a Court question. To submit such a question to the jury was error.

Further, to charge the jury that if *they* should find "that the landlord assumed the duty of making repairs to this screen, and did it in such a negligent way that the child was injured by such neglect, then, of course, there can be a recovery so far as these plaintiffs are concerned," was to permit the jury to find that the landlord *did* assume the duty of *making repairs* to the screen, when there was no evidence upon which to base such finding. This was error.

POINT IV.

The Court erred in charging the jury:

> "In case you find for the child, then the father is entitled to a sum which will compensate him for his expenses in endeavoring to cure the child of her injuries, which would be money that he laid out for the hospital and money which he paid or became liable to pay for doctors and for medicines for the child."

It is our contention that if the landlord was negligent in improperly or negligently installing the screens, and such negligence caused the injury to the child, there could still be no recovery for the father because he was guilty of contributory negligence, or at least the jury could find him so guilty upon the evidence.

If the screen was defective and improper, and if it was in a dangerous condition, to the knowledge of the landlord, and he assumed to install it and d'd so negligently, the defective and dangerous condition thereof was fully known to the parents of the child, and appreciated by them.

The mother states that on the day the screen was put in, in May, 1924, she noted that the tongue extended only a quarter of the way into the groove (12), and it was so loose the wind blew it out (13) several times (15); the father states that he also knew that the screen did not fit (30), and he knew it had fallen out (31), and that he complained to the superintendent.

The mother states that she knew when she left the child alone in the room that the screen did not fit and that the wind would blow it out.

If it was the duty of the landlord to anticipate that the child might climb up on the window sill and fall out of the window, it was just as much the duty of the parents to so anticipate.

The jury were entitled to have explained to

them that if they, under the evidence, believed the father guilty of contributory negligence he could not recover for loss of services nor for expenses in endeavoring to cure the child, and defendant was entitled to have the jury so informed.

The charge of the Court excluded the question of the contributory negligence of the father from the consideration of the jury, and, in effect, instructed them that if the child could recover, the father could recover. This was error.

For the errors above set forth, the judgment should be reversed and set aside.

WALTER L. GLENNEY,
EDWARDS & SMITH,
Attorneys of Defendant-Appellant.

WALTER L. GLENNEY,
EDWIN F. SMITH,
Of Counsel.

New Jersey Court of Errors and Appeals

MARGARET EGAN, an infant, by JAMES B. EGAN, her next friend, Plaintiff-Respondents, *vs.* GOTTFRIED KREUGER, Defendant-Appellant.	Action at Law, On Appeal from New Jersey Supreme Court, Hudson Circuit.

BRIEF OF PLAINTIFF-RESPONDENTS.

This is an appeal from the New Jersey Supreme Court, Hudson Circuit, wherein a judgment was entered in favor of the plaintiff, Margaret Egan, an infant, in the sum of Five Hundred ($500.00) Dollars, and in favor of the plaintiff James B. Egan, in the sum of Four Hundred ($400.00) Dollars and against the defendant, who appeals to this Court, upon the trial court's refusal to nonsuit the plaintiffs on motion of the defendant, and for a refusal to direct a verdict for the defendant upon motion therefor, and for three alleged errors in the trial court's charge to the jury.

Facts.

The infant plaintiff, Margaret Egan, two and a half years, occupied a five room apartment with her mother and her father, one of the plaintiffs herein, at #145 Harrison Avenue, Jersey City, N. J., the property of the defendant, which was a

modern building, consisting of twenty-five apartments and the plaintiffs' apartment was on the third floor (Exhibit P-1). The plaintiffs' bedroom faced the west. The defendant had installed in the windows of this bedroom wire screens with wooden frames, which screens operated in an upward and downward direction. These screens were so constructed and installed that the grooves on the frame of the screen did not mesh with the wooden tongue constructed on the side of the window. The tongue on either side of the window is indicated by the inner white lines (Exhibit P-3) which were made with chalk (p. 45, ll. 10-14). The screen in the bedroom window had fallen out of the window repeatedly due to this defective condition of which the defendant had knowledge. Although the defendant was not obliged under the contract of letting to repair or adjust these screens, on each occasion when the screen fell from the bedroom window, the Superintendent of the building, the agent of this defendant, placed it back in its defective condition, although he had knowledge of its defect. In fact, he had knowledge that on two or three occasions, the wind had blown this particular screen out of the window into the court yard below.

On May 4th, 1925, at about 2 P. M. the mother of the infant plaintiff left the bedroom for a moment to answer the 'phone, which was located out in the hall, near the bedroom, when the infant plaintiff was playing on the floor of the bedroom with a doll. At the time the mother left the room the defective screen was in the window. In the moment of the mother's absence from the bedroom, the infant plaintiff had fallen through the screen in the bedroom marked "x" (Exhibit P-1) to the court yard below. The tongue in the side of the window (Exhibits P-2 and P-3) and the

groove on the frame of the screen (Exhibit P-4) were not broken nor disturbed as the infant plaintiff fell through the screen from said window. When she was picked up, the screen (Exhibit P-4) was near her. The imprint of the screen was on her face and ear (p. 20, l. 34).

The child sustained a multiple fracture running from ear to ear over the top of the head (p. 36, ll. 18-21) and bruises on the arm, chest and face (p. 37, ll. 10 and 11). The bill for medical expenses was Two Hundred and Fifty ($250.00) Dollars.

Statement.

The plaintiffs filed their complaint for damages sustained and rely upon the third and fourth counts therein (pp. 4 and 5), that the defendant undertook the work of installing the screens in the apartment, although he was not legally bound to do so and performed this work so negligently and had knowledge of such defective condition of screen in the bedroom, that he is legally answerable for all of the damages that proximately flow from such negligence.

The plaintiffs adduced testimony to show that the screen did not properly fit the window and that only the lower ¼ section of the screen viewed vertically was caught (p. 12, l. 22), the upper ¾ did not mesh and there was ¼ of an inch space running this distance, where a mosquito or a fly could get in (p. 12, ll. 31-33, also p. 30, ll. 18-21).

After the screen was installed it blew out of the window several times (p. 13, ll. 5-6) and was put back by the agent (Superintendent) of the defendant in the same condition (p. 13, ll. 13-16). Afterwards the screen blew out again (p. 15, l. 15) and was put back in its defective condition.

The defendant had notice of the defective fitting through his agent, the superintendent (p. 14, l. 39, also p. 15, ll. 5-6).

POINT I.

The motion for non-suit and direction of verdict were properly denied.

The facts as set forth in respondents' brief as aforesaid are in no manner contradicted, and the negligence of the defendant in the particulars enumerated are therefore conceedingly admitted.

The only question involved is whether the negligence set forth in the complaint and confirmed by the testimony adduced at the trial, was the proximate cause of the injuries complained of.

The respondents contend that the defendant was charged with the duty of exercising ordinary care to so construct this screen as to render it reasonably safe for the ordinary uses to which the screen in an apartment of this character is adapted. A breach of that duty implies a legal liability for all damages which are thereby proximately caused.

We contend that in a modern apartment, that the infant plaintiff, had a right to use every square inch within the confines of this bedroom, and that in addition to the fact, that the screen was installed for the purpose of keeping out flies and mosquitoes, it had a concurrent function of marking by its very presence the confines of the apartment at the window space. That a screen in a bedroom window three stories from the ground in a modern apartment, where children are obliged to play, and have a right to play, is put

there as a factor of safety and that a landlord might reasonably forsee that a child would come in contact with the screen and that under the conditions existing in the instant case, might fall through the said screen, in the exercise of a reasonable use of said screen, is not such a preposterous contention that it can be said as a matter of law, that no reasonable person would say it was placed there for such a purpose, in addition of course, to its primary purpose and use.

The question therefore in this case is, "Did the plaintiff have a right to use that part of the premises in the manner in which she did? Every mother raising a family in a modern apartment reasonably expects and has a right to assume that a screen of the type as in the instant case, has a function to perform of keeping with a reasonable degree of use, a child of the age of two and a half years from falling out of a window, if left for a second to attend to a household duty.

There is no direct testimony as to how the child fell out the window and the law will not infer negligence on the child's part or that she leaned or put her weight against the screen. The presumption is that she was using the screen in a lawful manner when she fell through it into the yard below.

The defendant argues in this case that the screen in this bedroom window was not constructed to sustain the weight of any person or persons including an infant. We contend that the evidence shows conclusively, and is uncontradicted that the screen had fallen repeatedly without the application of any force and in fact that this screen had blown out with the force of the wind, and there is no evidence that the baby leaned against the screen. The defendant did not introduce a scintella of evidence on this point.

The uncontradicted testimony is that the screen went out with the slightest gust of wind, and on the motion for non-suit and direction of verdict, every fact and inference of fact had to be resolved in favor of the plaintiff and that therefore, the infant plaintiff did not necessarily lean against the screen but that the screen gave way under her baby touch in her lawful use of said screen.

We further maintain at this juncture that at the conclusion of the plaintiffs' case and as the facts then stood, there was a case of *res ipsa loquitur* and the burden was then cast upon defendant of going forward with evidence to exculpate itself from the charge of negligence in the management and installation of this screen. The only explanation the defendant makes is that the child *must have* leaned against the screen. This is innuendo and conjuncture and not proof.

It was a jury question upon all the facts in the case.

In determining whether or not a non-suit was properly directed, every presumption of fact must be resolved in favor of the plaintiff.

Thornton vs. *Cater,* 111 Atl. Rep. 158.

From all of the surrounding circumstances within the knowledge of the defendant, as a prudent man, he must have foreseen or reasonably anticipated that injury would result to the infant plaintiff by being precipitated into the court yard below if she came in contact with the screen in a lawful use thereof.

> "Where an act is negligent it is not necessary to render it the proximate cause that the person committing it could or might have foreseen the particular consequence or the precise form of the injury, or the particular manner in which it occurred, if by the exercise

of reasonable care it might have been foreseen or anticipated that injury might result."

De Mott vs. *Knowlton,* 126 Atl. Rep. 327—29 cyc. 495.

The question therefore is whether under the circumstances the defendant might reasonably have foreseen that the infant plaintiff might come in contact with the screen and fall out of the window in the lawful exercise of the use of the apartment.

The general rule is that a person is liable for those injuries from his negligence which are reasonably to be anticipated.

Guinn vs. *Del. Tel.* Co. 72 N. J. L. 276.

This same doctrine is true of those cases involving negligence in selling or giving children fireworks or other dangerous weapons or explosives. In most of these cases where injuries ensue and negligence is shown, the liability is based upon the ground that the defendant should have foreseen the consequences.

23 L. R. A. p. 253.

The respondents from the facts in the instant case maintain, to make their position clear.

1st. That the infant did not lean (or place her weight) against the screen, but was using the same in a lawful manner.

2nd. That she fell through the screen in the said window by touching it or using it in a reasonably normal manner, and that the law must presume this in the absence of proof by the defendant to the contrary.

On the first point the evidence is uncontradicted that the screen was not normal and could not withstand the least pressure without falling out. It

had been blown out by the wind on several occasions.

On the second point, the respondents contend that the infant plaintiff was impliedly invited as a member of the tenants' household to come near and in contact with the screen in a reasonable and lawful use thereof.

The question of law involved in this case has been discussed at some length in the cases collated by this court in *Gavin* vs. *O'Connor*, 122 Atl. Rep. p. 482. In that case a young boy was killed by the falling of a clothes pole in the backyard of a two family house, on the first floor of which he lived. The only assignable cause of the fall of the pole was the strain put on one of the clothes line by a boy hanging thereon, trying to make his knees touch the ground and it was held that a non-suit was proper.

The respondents contend that no one would maintain that there was an implied invitation by anyone to use the pole in the manner as above.

This however is not the situation here. The infant plaintiff had an implied invitation to use and go to the window screen and touch it in a normal and lawful manner and under the ordinary circumstances of looking out the window. When she did this the inference is that the screen fell out and did not perform the first function it had, namely, of remaining in place and sustaining its own weight.

In the Gavin case above, this Court said at p. 843, last few lines.

> "If the boy were invited to use the yard, and the pole had broken under the strength of a normal amount of clothes on the line, a different case would be presented."

We maintain again, that where a screen gives way under a normal gust of wind that it necessarily gave way under the normal touch of the baby's hand, and that therefore, the landlord is liable because of the failure of the screen to reasonably withstand the lawful use to which he should have foreseen the screen would be put.

The question of proximate cause is sometimes a question of law, and sometimes a question of fact, according to the circumstances of the particular case. *Opreska* vs. *Shapiro*, 122 Atl. 761.

In the instant case the question was one of fact and was submitted to the jury and determined in favor of the plaintiffs. As was said by this Court in the case last cited p. 762, the subject of proximate cause is one of the troublesome questions in the law of negligence.

On the question of invitation, the present case can be distinguished from the cases cited in the Gavin case above referred to. The respondents are further mindful of the rule that is thoroughly established in this state, that liability of the owner or occupier of the premises who expressly or impliedly invites others to enter thereon is only co-extensive with his invitation; his duty of care is limited by that, and where the limits of invitation are exceeded it ceases except to acts willfully injurious.

Phillips vs. *Library Co.*, 55 N. J. L. 307;
Ryerson vs. *Bathgate*, 67 N. J. L. 337;
Feury vs. *N. Y. Central*, 67 N. J. L. 270.

In the Phillips case above, plaintiff used a path not regularly laid out and the case was allowed to go to the jury because the path she did use was a beaten track, justifying the inference by the jury, that it was held out as proper for her to use.

In the Ryerson case, the plaintiff exceeded her authority in going through a door and falling down the staircase, when the door leading to a closet was merely opened sufficiently wide to allow her to put a cat through the door.

In the Feury case, the plaintiff was barred because the opening between the cars was not held out expressly or impliedly as one for him to use. In the present case therefore, it was a jury question to say whether the infant plaintiff did not have a right to use the screen in the manner presented by the evidence, which was a lawful use and having the right to use the screen in the manner in which she did, whether the negligence of the defendant was the proximate cause of her injuries.

This case likewise differs from *N. Y. and N. J. Tel. Co.* vs. *Speicher,* 59 N. J. L. 23 (Supreme Court) where the plaintiff a lineman climbed a pole to do some work and relied for support upon a cross-arm, which broke with him, when it was held he could not recover.

We repeat there was no evidence that the baby leaned or put her weight against the screen.

The instant case is in line with the case of *Moersdorf* vs. *N. Y. Tel. Co., et al,* 87 Atl. Rep. 473.

> 1. "Where a telephone company issues an express or implied invitation to linemen in the municipal employment to go upon its poles, it owes them a duty to use reasonable care to see that such poles are reasonably safe for such use, and for a neglect of this duty a liability arises to respond in damages for a resulting injury."
>
> 2. "Where a telephone company has a pole in the public highway as a part of its telephone system, under a franchise from the municipality upon condition that it maintain

> such pole, not only for its own use, but also for the use of the municipality, there is a clear invitation by such company to the appropriate employes of the municipality to go upon such pole to the extent usual and necessary for its use by the municipality in the manner contemplated."

Justice White speaking for this court in the case just referred to says:

> "This doctrine, which is established by abundance of authority, leads to the inevitable conclusion that where a telephone company has a pole in a public highway, as a part of its telephone system, under a franchise from the municipality upon the condition that it maintain such pole, not only for its own use, but also for the use of the municipality, there is a clear invitation by such company to the appropriate employes of the municipality to go upon such pole to the extent usual and necessary for its use by the municipality in the manner contemplated. Under such circumstances the city's lineman is neither a trespasser nor a licensee."

If the municipality had a right to use the pole for its wires, then there was an implied invitation by its employees to climb the pole, and for the failure of the pole to support the weight of the lineman, the defendant is answerable in damages.

The argument could well be made, that the pole was not constructed to maintain the weight of the lineman but to support the wires that the municipality might erect for its police and fire purposes.

The appellant in the present case argues that the screen was installed for the purpose of keeping out flies and mosquitoes and not for the purpose of keeping tenants from falling out the window, but he overlooks the fact that the tenant

and his family had an implied invitation to have the infant plaintiff use the screen for the lawful uses to which the family under their contractural relation with the landlord might put the screen, and one of its lawful uses is that in the ordinary course of every day life, that a tenant in an apartment may use the bedroom of his apartment for the personal use of his family and this includes the right of an infant in the household to come in close juxtaposition with the screen without being precipitated through the screen into the court yard below.

Common experience teaches us that there is not a mother of an infant in a modern apartment more than one story above the ground anywhere in the State of New Jersey, who does not expect that a screen will reasonably stay in the window of an apartment where reasonable and lawful use is made thereof.

The defendant in the Moersdorf case had a right to assume that a lineman would climb the pole for the purpose of using the same to make repairs, etc. The landlord in the present case had the same right to anticipate and foresee and assume that in an apartment where there were infants that the lawful use of the apartment by the tenant carried with it the right to use the screen in a reasonable manner, and the law must assume that it was so lawfully used in the absence of proof to the contrary.

From all of the foregoing the plaintiffs maintain, that it was a question of fact for the jury to decide whether or not the plaintiff made such use of the screen in the lawful use of the apartment.

Even conceding for the sake of argument that pressure was used upon the screen, our position is in harmony with *Smith* vs. *Mountain Ice Co.*, 74 N. J. L., p. 26 in the Supreme Court, where on

Rule to Show Cause, "Plaintiff handling ice on a runway slipped and fell back against a railing, which gave way with his weight. The trial court in charging the jury assumed that the rail had been placed there for plaintiff's protection, but the Supreme Court held that it was no more than a jury question whether the railing had been intended and furnished to maintain such a strain and sent the case back for a new trial.

There Was No Error in Trial Court's Charge As Alleged in Ground of Appeal No. 3.

Referring to defendant's exception herein to the trial court's charge, from all of the foregoing and particularly relying upon the Moersdorf case, the trial court imposed too harsh a burden upon the plaintiff, wherein he charged that the plaintiff had to prove that the screen was put there for the purpose of keeping tenants from falling out the window. If any complaint is made, complaint upon this phase of the case should come from the plaintiff. This was equivalent to stating that the jury had a right to determine whether the plaintiff had a right to use the screens in the manner in which she did, and imposed an additional burden upon the plaintiff in allowing the jury to determine whether the defendant himself had placed the screens there for the purpose of keeping tenants from falling out the window.

There Was No Error in Trial Court's Charge As Alleged in Ground of Appeal No. 4.

Appellant's exception under this heading is not well taken for the reason that the negligence of the mother, if any were shown, could not be imputed to the father, who sought to recover for medical expenses etc.

There Was No Error in Trial Court's Charge As Alleged in Ground of Appeal No. 5.

The language used by the Court in this part of the charge was in conformity with the established rule of law in this state following *Charney* vs. *Cohen,* 110 Atl. Rep. 698, where it was held that, where a landlord assumes the duty to repair, although under no obligation to do so, he is liable for damages in case of injuries if he does not use due care in the matter of such repair.

This last case follows the earliest reported case of *Coggs* vs. *Bernhard,* 2 Ld. Roym. 909, before Lord Holt, where it was held, "That where one voluntarily undertakes to perform a task and performs it negligently he is liable.

Also under this particular part of the charge, the Court properly left the question to the jury to say whether or not the screen was used for the purpose for which it was intended.

For all of the reasons heretofore stated we maintain that the judgment of the trial court should be affirmed.

Respectfully submitted,

Robert H. Doherty,
Attorney for and of counsel
with the Respondents.

Pandick Press, Inc., 22 Thames St., New York, U. S. A.

(8800)