INDEX

TESTIMONY.

For Plaintiffs.

NOTICE OF APPEAL.

Filed January 9, 1926.

ESSEX COUNTY COURT OF COMMON PLEAS.

FANNY OEHLER and WILLIAM OEHLER, *Plaintiffs,* *vs.* L. BAMBERGER & COMPANY (a corporation), *Defendant.*	*Action at Law.* *Notice of Appeal.*

To Schneider & Schneider, attorneys for the defendant, 790 Broad street, Newark, N. J.

DEAR SIRS:

PLEASE TAKE NOTICE that the plaintiff appeals to the New Jersey Supreme Court from the whole of the judgment entered in this cause on the following ground:

1. The Court erroneously granted the motion of the defendant to direct a judgment of nonsuit in favor of the defendant and against the plaintiffs.

Respectfully yours,

GEORGE A. HENDERSON.

Service is hereby acknowledged this 7th day of January, 1926.

SCHNEIDER & SCHNEIDER,
Attorneys for Defenadnt.

SUMMONS.

ESSEX COUNTY COMMON PLEAS COURT.

The State of New Jersey to L. Bamberger & Company, a corporation:

(SEAL)

You are summoned to answer the annexed complaint of Fanny Oehler and William Oehler, in an action at law in the Essex County Court of Common Pleas. And take notice that unless you file your answer to said complaint with the Clerk of the Court of Common Pleas, at Newark, within twenty days after service upon you of this writ, and the annexed complaint, the plaintiff may proceed in the suit and judgment may be entered against you.

WITNESS, EDWIN C. CAFFREY, Judge of the Essex County Court of Common Pleas, at Newark, this 10th day of January, nineteen hundred and twenty-five.

JOHN H. SCOTT,
Clerk.

GEORGE A. HENDERSON,
Attorney.

COMPLAINT.

ESSEX COUNTY COURT OF COMMON PLEAS.

FANNY OEHLER and WILLIAM OEHLER, *Plaintiffs,* *vs.* L. BAMBERGER & COMPANY, a corporation, *Defendant.*	*Action at Law.* *Complaint.*

Plaintiffs, residing at 209 Thompson avenue, Roselle, Union County, New Jersey, say that:

FIRST COUNT.

1. Defendant on July 19, 1923, and for some years prior thereto, and subsequently, was and is now a corporation of the State of New Jersey, engaged in the retail sale of merchandise.

2. On or about the 19th day of July, 1923, defendant was engaged in the sale of, among other articles, vacuum cleaners. Defendant employed a salesman whose name is unknown to plaintiffs, and who, on or about the date mentioned above, visited the home of plaintiffs and sought to sell them, on behalf of defendant company, a vacuum cleaner, which he exhibited to plaintiff Fanny Oehler.

3. Plaintiff Fanny Oehler refused to purchase or consider the purchase of the said articles of merchandise. Then, on a pretext, the aforesaid salesman left this vacuum cleaner at the home

of the plaintiffs and promised to return for it the next day.

4. The said salesman did not return for this article, but plaintiff began to receive dunning letters from defendant corporation asking that payment be made to them for same. Plaintiffs refused to pay for the vacuum cleaner and have never at any time used same, or even removed it from the wrapping in which it was when left in their care. Subsequently, after December 11th, 1923, the package was called for by the defendant company's employees and delivered over to them.

5. On the 10th day of December, 1923, an agent, whose name is unknown to plaintiffs, employed by defendant corporation, and acting within the course of his employment and the scope of his authority, visited the home of the plaintiffs and sought to collect from them a sum of money for the article in question. Plaintiff Fanny Oehler, who was at home alone, refused, as she had always done, to pay any money for the vacuum cleaner.

6. The said agent, employee or representative of the defendant corporation, then in an effort to collect this money for the defendant corporation, and acting as an agent of defendant corporation, became abusive and threatening and maliciously used the following words, or words of similar import, to plaintiff Fanny Oehler: "Unless you pay this money I shall go out, get a warrant, have you arrested and thrown in jail." Neither of the plaintiffs had at any time in any dealings with defendant corporation done anything that would justify the above language or similar language.

7. The agent's threatening action and words so reacted upon and upset and frightened plaintiff Fanny Oehler that she immediately was stricken with a stroke of apoplexy, as a direct and proximate result of the actions and words of the above-described agent or representative of the defendant corporation.

8. Up until that very moment, plaintiff Fanny Oehler had been in good health; since then her health has been poor and as the natural consequence of this apoplexy stroke above described, she has endured considerable pain and suffering and her health and constitution have been weakened; she still continues to suffer and will suffer for some time to come, possibly for the balance of her natural life. She is unable to attend to her household duties in the manner of which she did before this occurrence and she no longer is able to participate in and enjoy the normal, healthy activities of a woman of her age. All this was the direct proximate result of the above-described malicious action of defendant's agent.

9. By reason of the premises, plaintiff Fanny Oehler asks that she be awarded punitive as well as compensatory damages against the defendant corporation, which ratified the conduct of its agent.

10. Plaintiff Fanny Oehler, by reason of the premises, on the First Count asks damages in the sum of one hundred and twenty-five thousand dollars, with costs to be taxed.

SECOND COUNT.

1. Plaintiff William Oehler is the husband of plaintiff Fanny Oehler and repeats paragraphs 1, 2, 3, 4, 5, 6, 7 and 8 of the First Count.

Complaint.

2. That by reason of the premises, said plaintiff William Oehler was deprived of the society and assistance of his said wife and was greatly inconvenienced in his mode of life, and paid large sums for doctor's bill and medicines and in other ways on her behalf.

3. By reason of the premises, plaintiff William Oehler on Second Count asks that he be awarded exemplary as well as compensatory damages, against defendant, which ratified the conduct of its agent.

4. Plaintiff William Oehler asks that on the Second Count he be awarded damages in the sum of twenty thousand dollars, with costs of suit to be taxed.

GEORGE HENDERSON,
Attorney of Plaintiffs.

I hereby appoint and depute Daniel Demarest, Jr., to serve the within writ.

Witness my hand and seal this 10th day of Jan., 1925.

Harry B. O'Connell,
Sheriff.

By Alfred C. Walker,
Under Sheriff.

Sheriff fees $3.78.

Served the within summons and complaint Jan. 14, 1925, personally upon Frank Liveright, "Treas." of L. Bamberger & Co., a corporation, within-named defendant, at his principal place of business, Market & Halsey Sts., Newark, N. J.

Harry B. O'Connell,
Sheriff.

By D. Demarest, Jr.,
Sp. Deputy.

ANSWER.

Filed March 7, 1925.

ESSEX COUNTY COURT OF COMMON PLEAS.

FANNY OEHLER and WILLIAM OEHLER, *Plaintiffs,* *vs.* L. BAMBERGER & COMPANY, a corporation, *Defendant.*	*Action at Law.* *Answer.*

The defendant, L. Bamberger & Co., a corporation of the State of New Jersey, having its principal office in the City of Newark, in the County of Essex and said State, answering the complaint filed herein, says that:

ANSWER TO FIRST COUNT.

1. It admits paragraph 1.

2. It admits paragraph 2 and says by way of addition to the allegations thereof that the vacuum cleaner mentioned in said paragraph was actually leased by this defendant through its agents and servant to the plaintiff Fanny Oehler, wife of the plaintiff William Oehler.

3. It denies paragraph 3.

4. It admits the allegation in paragraph 4 that "The said salesman did not return for this article," and denies the balance of said paragraph excepting that its admits that it attempted

to collect moneys due from the plaintiff Fanny Oehler in the usual course of its business.

5. It denies paragraphs 5, 6, 7 and 8.

6. It denies the allegations of paragraphs 9 and 10 and says that the plaintiff Fanny Oehler is not entitled to any damages whatever against this defendant.

ANSWER TO SECOND COUNT.

1. It has no knowledge or information sufficient to form a belief as to whether William Oehler is the husband of plaintiff Fanny Oehler and makes the same answer to paragraph 1 of this Second Count as to the paragraphs of the First Count referred to therein.

2. It denies paragraphs 2, 3 and 4 and says that the plaintiff William Oehler is not entitled to any damages whatever against this defendant.

POINT OF LAW.

The defendant will move at or before the trial of this suit to strike out the complaint on the ground that it does not set forth a cause of action.

SCHNEIDER & SCHNEIDER,
Attorneys of Defendant.

Consent is hereby given to the filing of the within answer as of due time.

GEORGE A. HENDERSON,
Atty. of Plaintiffs.

Reply.

REPLY.

Filed March 5, 1925.

ESSEX COUNTY COURT OF COMMON PLEAS.

FANNY OEHLER and WILLIAM OEHLER, *Plaintiffs,* *vs.* L. BAMBERGER & COMPANY, a corporation, *Defendant.*	*Action at Law.* *Reply.*

REPLY TO FIRST COUNT.

1. The plaintiffs join issue on the defendant's answer to first count.

REPLY TO SECOND COUNT.

1. The plaintiffs join issue on the answer to the Second Count.

GEORGE A. HENDERSON,
Attorney of Plaintiffs.

Judgment.

JUDGMENT.

ESSEX COUNTY COMMON PLEAS COURT.

37417

FANNY OEHLER and WILLIAM OEHLER,
Plaintiffs,

vs.

L. BAMBERGER & Co.,
Defendant.

Action at Law.

On Non-suit.
Costs $44.18.

Schneider & Schneider, by Jacob Schneider, attorney of defendant.

Judgment on non-suit in the above-entitled action was rendered on the twenty-first day of October, A. D., nineteen hundred and twenty-five, in favor of the defendant, L. Bamberger & Co., and against the plaintiffs, Fanny Oehler and William Oehler, for forty-four dollars and eighteen cents costs of suit.

Judgment entered and signed October 21, 1925.

EDWIN C. CAFFREY,
Judge.

Certificate of Clerk.

ESSEX COUNTY CLERK'S OFFICE.

STATE OF NEW JERSEY,
COUNTY OF ESSEX. } *ss.*

I, JOHN H. SCOTT, Clerk of the Court of Common Pleas, in and for the County of Essex in the State of New Jersey. Do HEREBY CERTIFY That the foregoing is a true and correct copy of all the pleadings in the notice of appeal in the case of Fanny Oehler and William Oehler, plaintiffs, *v.* L. Bamberger & Company, Defendant, and the same is taken from and compared with original copies of all pleadings and as the same now remain on the files of said office.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the (SEAL) official seal of said Court and County at Newark, N. J., this 18th day of January, A. D., 1926.

JOHN H. SCOTT,
Clerk.

Opening.

ESSEX COUNTY COURT OF COMMON PLEAS.

Wednesday, October 21, 1925.

FANNY OEHLER and WILLIAM OEHLER, *Plaintiffs,* *vs.* L. BAMBERGER & COMPANY, a corporation, *Defendant.*	*Action at Law.*

Before Hon. Edwin C. Caffrey, Judge, and a Jury.

Appearances:

For the plaintiffs appears George A. Henderson.

For the defendant appear Schneider and Schneider, by Jacob Schneider.

A jury is called and sworn.

Mr. Henderson opens for the plaintiffs.

Defendant's counsel moves that plaintiff be non-suited on the ground that in his opening he does not set forth any cause of action.

The Court: I will reserve decision in acting on the motion.

Mr. Schneider opens for the defendant.

Mr. Henderson: If your Honor please, in pursuance of a stipulation between counsel, we took the testimony of Mrs. Oehler, which we will read to the jury.

The Court: Very well.

Mr. Henderson reads direct examination of deposition taken Monday, June 8, 1925, in the presence of George Henderson, counsel for the plaintiff, and Jacob Schneider, counsel for the defendant, before Joseph S. Fishkind, Supreme Court Examiner, as follows:

"FANNY OEHLER, being duly sworn, testifies as follows:

Direct examination by Mr. Henderson.

Q You live at 269 Thompson avenue, Roselle, New Jersey? A Yes, sir.

Q And your husband is William Oehler? A Yes, sir.

Q How long have you lived here at this address? A Thirteen years.

Q How long have you been married to Mr. Oehler? A Twenty-three years the twenty-first of this month.

Q How old are you? A Forty-seven the twenty-ninth of November last.

Q Now, some time in 1923 did anybody bring you a vacuum cleaner? A Yes, Bamberger's man.

Q What did he say when he brought it? A He wanted me to buy it and I told him I could not buy it because I could not afford it, I had to pay the taxes, and he asked me to leave the vacuum cleaner here because he was going out that night with his girl and I said, 'I can accommodate you that much,' and I said, 'Remember, I am not buying it,' and he said, 'No, you are not buying it.'

Q Did he tell you who he was handling the vacuum cleaner for? A For Bamberger's.

Q And then did he go away? A He stopped and talked about when we lived up in the other house and then he went away.

Q Do you recall when that was in 1923? A No, I don't know when it was, I burned all the letters from Bamberger up.

Q After that you received some letters from Bamberger's? A Yes, them is the ones I am talking about, that I burned up. I went over to the telephone to Mrs. Drake, and telephoned for them to come and get the vacuum cleaner.

Q You telephoned for them to come and get it? A Yes, several times, I know one time I talked to them and it cost forty-five cents for one 'phone call.

Q And before that time, before you were taken sick, did anybody come for it? A No, sir.

Q And you received some letters from Bamberger's? A Yes, quite a good many, I kept a few of them and some I burned.

Q Did you ever order this vacuum cleaner? A No, sir, I never ordered.

Q November twenty-sixth you received this letter? A I cannot see it.

Q This is a letter dated November 26, 1923, addressed to Mrs. William Oehler, 209 Thompson avenue—

Mr. Schneider: Suppose you have it marked.

Q Look at it and see if you can remember if you received that, it is addressed to you? A I cannot just clearly make it out, some of it and that's all. I can't see it good, but I know I seen letters like that from Bamberger's.

Q See if you can make sure whether you received that one or not? A Yes, I think I did receive that.

Mr. Schneider: I offer it in evidence.

(The same is marked P. 1.)

Q Now, then, if you received, on December 11, 1923, this one, didn't you? A I don't remember receiving this one. I received a good many letters, but I burned a good many up, too. That might have been one of them, but I don't remember and I cannot say.

Q You don't remember receiving this one? A I received it, but you know my mind is a blank sometimes.

Mr. Henderson: Suppose we introduce it subject to Mr. Oehler's testimony in the trial.

Mr. Schneider: You can have it marked as an exhibit.

(The same is marked Exhibit P. 2.)

Q Did anybody call at your house with regard to the cleaner, with regard to collecting from you? A No, there is a man come here and asked me to buy the vacuum cleaner, but I told him I couldn't afford it.

Q Was that on December tenth? A Oh, no, I don't know when that was, that was later on.

Q Do you remember December tenth, the day you were taken ill? A I don't remember the date.

Q But you remember the day you were taken ill? A I remember the day, yes, sir.

Q Previous to that day, Mrs. Oehler, what was your physical condition, what had it been? A Good health.

Q When did you consult a doctor before then? A About six years before that.

Q You did not consult a doctor for six years? A No, sir.

Q And you were able to perform your household duties? A Everything.

Q And take care of the entire management of your home? A Everything, cooking, baking and everything.

Q And to go up and down stairs? A Yes, very easy.

Q And prepare meals for your husband? A Oh, yes.

Q And do all of the household duties? A I done everything, nothing was hired done until I was taken sick that time.

Q And on this day tell us just exactly what happened on that day. A Well, in the morning I came down and went out to tend to the chickens. We had chickens then and I went out and tended to them, and I thought it was such a nice day I will go in and do my housework, and I thought, because I go upstairs I will have a lunch and then I won't have to come down, so I sat down to ear and just then the door-bell rang and I said first, 'Oh, pshaw, what is he coming for,' and there was a man there at the door and I said, 'Well, what is it?' He said, 'L. Bamberger,' and I said, 'Wait a minute, and I will go get the vacuum cleaner, it is up in the attic.' He said, 'No, no, I came to collect'—

Mr. Schneider: I think before she goes on any further the man ought to be identified in some way, otherwise the conversation would not be binding on us.

Q Did he tell you he was from L. Bamberger & Company?

Mr. Schneider: I object to that because declarations of an agent are not binding on the principal."

Mr. Schneider: I withdraw that objection.

(Mr. Henderson continuing:)

"A He told me L. Bamberger and Company.

Q Did he have a wagon with him? A I don't remember whether he had a wagon or not.

Mr. Schneider: I will ask that the testimony of conversations with this man, thus far given, be stricken out, on the ground that he has not been identified sufficiently to bind the defendant."

Mr. Schneider: I withdraw that objection.

(Mr. Henderson continuing:)

"Q And did you receive any vacuum cleaner from anybody else before that day? A Oh, there was several here who wanted to leave a vacuum cleaner.

Q Before that day? A No, sir.

Q Had any vacuum cleaner been left here by anybody except by Bamberger's? A No, sir, not at all.

Q And did you know to which vacuum he referred?

Mr. Schneider: I object to that on the ground that that would be a conclusion of the witness."

Mr. Schneider: I withdraw that objection.

(Mr. Henderson continuing:)

"A One he left, it was all done up.

Q Was there any other vacuum cleaner at all in your possession at that time? A No, sir.

Q And that vacuum cleaner which had been left here, did you use that? A No, I did not, it was not out of the box at all.

Q Was it still wrapped up? A Just as he left it here, because he only left it here until he called for it.

Q When this man came, tell us, as well as you can, just what happened.

Mr. Schneider: I object to that, on the ground that it is incompetent, irrelevant, immaterial and not binding on the defendant, as it has not yet been established that the alleged man was an agent of the defendant, and therefore, these conversations would not be binding on the defendant."

Mr. Schneider: I withdraw that objection.

(Mr. Henderson continuing:)

"Q Tell us, now. A There was a rap came at the door, and a man was at the door and he said he was after the vacuum cleaner, first he said he came to collect and I said, 'Oh, no, I don't intend to pay at all,' and I said, 'It is up in the attic and I will get it,' and he said, 'Oh, you have to keep it and pay for it,' and I said, 'Oh, no, I do not.' And I told him to come into the front room and sit down.

Q Did he come in? A Yes, and I sat by the window and he sat right there talking to me asking wouldn't I take it, 'Don't you want

to buy it, it ought to be in every house, a vacuum cleaner.'

Q Then what happened? A I said, 'No, I don't intend to buy it, I cannot afford it, I got to pay my taxes.' And he said, 'I will have Mr. Oehler turned into the company,' and he said, 'You, I will have you arrested.'

Q Indicating with your hand how he pointed? A Yes, this way (indicating).

Q Pointing directly at you? A Yes, sir, and as soon as that happened I felt something tingling in my limbs, and I said, 'Oh, I cannot sit here,' and I went to get a drink of water and I felt like falling all the time.

Q Did he go out, too? A Yes, I felt like stumbling.

Q Where was he? A He was right after me, he followed me.

Q To the kitchen? A Yes, and I went there and I started to cry because I felt terrible, and I turned around and started walking back and I fell right here by the piano.

Mr. Schneider: I want to renew my objection to this entire testimony and to all the details described by the witness on the ground that it is incompetent, immaterial and irrelevant and not binding on the defendant in this case, because it has not been established that the alleged man is our agent or servant or authorized in any way to act for us.''

Mr. Schneider: I withdraw that objection.

(Mr. Henderson continuing:)

''Q You fell at the point nearest the kitchen? A Yes (indicating), I keeled over and I was

there about five or ten minutes, and then I turned around and I got ahold of the bench here and then I got up.

Q What did this man do? A He said, 'Here is a chair,' and I sat in the rocking chair, and he said, 'Well, shall I call your neighbors?' and I said, 'No, I am not in the habit of bothering any of my neighbors,' and he said, 'Well, I ain't got time to sit here all day,' and I said, 'Nobody asked you to, you can go any time you want to,' and he went out and went to the door and let himself out.

Q Didn't you go to the door with him? A No, I did not go off the rocking chair, because I was afraid I would fall again, and then I kept getting weaker and I felt weaker, and I thought, 'Well, if I could only get to that table, if I could only get around to that table and around to that window.'

Q That is the table in the dining-room? A Yes, and I went to the window and called Mrs. Drake and she said, 'I will be right over'—

Mr. Schneider: I object to any conversation.''

Mr. Schneider: I withdraw that objection.

(Mr. Henderson continuing:)

''Q Did Mrs. Drake come over? A She was upstairs getting dressed and came over and said, 'What is the matter with you'—

Mr. Schneider: I object to any conversation on the ground that it is immaterial, irrelevant, incompetent and hearsay.''

Mr. Schneider: I withdraw that objection.

(Mr. Henderson continuing:)

"Q What was your condition then, Mrs. Oehler? A Oh, I was in terrible condition, and Mrs. Drake said, 'What is the matter—'

Mr. Schneider: I object to any conversation with third persons as not binding on this defendant, as being hearsay, being incompetent, irrelevant and immaterial, and I move that the conversation be stricken out."

Mr. Schneider: I withdraw that objection.

(Mr. Henderson continuing:)

"Q How did you feel then, as to your arms and limbs? A My arms and my limbs felt all limp.

Q Could you use them? A No, not at all; I cannot use them even yet; I cannot use them.

Q What was the condition of your face? A All puffed out on one side, and my eye was sunken in my head and everything.

Q Did it pain any? A No, I can't say it pained.

Q It did not pain? A No, I can't say that.

Q What time was this about? A To make sure, about eleven o'clock in the morning, and at night when Will came home—

Q What time did Mr. Oehler come home? A Half-past six.

Q And what was your condition at half-past six? A He got me ready to go to the doctor's right away.

Q What was your general physical condition, did you have control of your arms? A None at all, no control at all.

Q Did you have control over your legs? A None at all.

Q Did you have control over your bowels? A None at all.

Q Could you control them? A No, sir.

Q Was it your left side? A On my left side.

Q And when Mr. Oehler came home, where were you? A I was sitting on the rocking chair in the front room, just where he left me; I went right back after being at the table, sitting on the rocking chair, and I sat there.

Q What did he do? A Well, he went and got me clean, dry clothes and put them on me and then he called for Jake Bashill to come and take me to the doctor in an automobile.

Q Did he take you to the automobile? A He carried me out.

Q Mr. Oehler carried you out to the automobile? A Yes, sir.

Q And took you to the doctor? A Yes, sir.

Q Did the doctor examine you? A Yes, sir.

Q That was Dr. Epler? A Yes, sir.

Q Where is his office? A In Newark.

Q Do you remember what happened there? A No. I went all out of my mind. I could not remember a thing; I did not even know who was there or anything.

Q Did you completely lose your memory? A Everything, when I got there everything was gone.

Q Did you find before that that anything had been happening to your memory? A I felt it going while I was sitting in the rocking chair; I felt so weak and funny and when Will came home at night my memory was gone.

Q And before you got to the doctor's, do you recall what was the last thing you remember? A The last thing I remember was sitting in the rocking chair.

Q But at the doctor's? A I don't remember anything there.

Q Do you remember going into the automobile? A I remember going in here at the house but not at the doctor's.

Q Do you remember reaching the doctor's? A No.

Q And after that what was the first thing you remember? A Oh, it was a long time after, weeks after.

Q You didn't remember anything for weeks? A Not a thing.

Q It was weeks before you could collect your thoughts or remember anything at all? A Even now sometimes I cannot collect my thoughts together, and if I go to speak it leaves me, everything leaves me.

Q And when you first came to, as you remember, where were you? A Up in bed.

Q Remembering that this happened on or about the 10th day of November, can you tell me approximately when your memory first came back? A I don't know the date.

Q Was it December or January? A I don't know whether it was December or January or when it was; all I know is a couple of women came in to see me and that was the first thing I remember; they brought something there, but I don't remember what it was.

Q How long did you stay in bed that day? A Oh, I don't know, a good many days afterwards.

Q Can you tell how many days or weeks or months it was? A Oh, no, I can't remember as to that; all I can remember is when I got to remembering anything, when I got out of there.

Q And I suppose you came downstairs after that? A Will helped me down when I got so I could come down.

Q And have you ever been restored to your former health? A Never.

Q Can you perform your household duties now? A No, sir.

Q Who has to take care of that? A Mr. Oehler has to do it now, but we had a woman for a week to clean up the house all through, and Mr. Oehler does everything; he gets up and gets his own breakfast—

Q Don't you cook breakfast? A No; I don't even get out of bed.

Q Does Mr. Oehler take care of the house? A Everything in the house, washing, and the ironing and everything.

Q What time does he get up? A Three o'clock in the morning.

Q And who takes care of the household duties? A He does when he comes home in the evening.

Q What is your physical condition today? A Well, I am helpless on one side all down.

Q Is your eyesight as good as it was? A No, it ain't. I can't see near as good as I could.

Q Which eye is the better and which is the worst? A This is the best one on the right, but they are both bad now.

Q Can you use both your hands yet? A No, I cannot use this hand at all.

Q You cannot use your left hand? A Not at all.

Q Can you close it up and open it rapidly? A That's all I can do, using my other hand against it (indicating a slow clenching of the fist with the aid of the other fist).

Q Now, the right hand, can you open and close it rapidly? A Yes, rapidly; that hand is all right.

Q How about your left leg? A It is hard to move, and at times it feels as if there is a weight on it all the time.

Q Are you able to go up and down stairs yet? A With help.

Q You don't go up and down yet? A No; Mr. Oehler has got to help me, and when he goes to work the boy helps me, and then I lie on the lounge until he comes home again.

Q You spend all day on this floor? A Yes, sir.

Q Either sitting in the chair or lying on the lounge? A Yes, sir.

Q How many times have you gone to the doctor since that day? A All that I can tell you is that it is pretty nearly every day.

Q After you got out of bed? A Oh, he came over every day when I first got out of bed.

Q Of course, you don't know how often he came? A No.

Q And after he came every day, for how long a period was that? A I really don't know. I never kept no dates nor anything.

Q Then, did you go over to the doctor? A Yes, I did a couple of times.

Q How many times have you gone to the doctor? A That I don't know, either.

Q Could you give us some idea? A It is about once a week or twice a week, but I know it affected me terribly every time I would go over there in the car.

Q When was the last time you went over there? A I really don't remember.

Q When was the last time the doctor was here? A He was here last week.

Q Do you know how much he charged you for each visit? A At the house he charged me five dollars for every visit.

Q Do you know how much he charged you for calls at his office? A Two dollars at the office.

Q How is your memory today? A It ain't as good as it was.

Q Do you remember things clearly? A Not clearly.

Q Now, before the accident, before this occurrence, did you go to church regularly? A Not regularly, once in a while.

Q How often would you go, for instance? A I can't tell you that, either.

Q Have you been there since December 10, 1923? A No, sir.

Q Have you been able to go? A No, I have not been able to go.

Q Now, before this occurrence that you mentioned, how was your appetite? A Well, I didn't each very much.

Q Since, do you eat the same things that you did before? A No, I cannot eat the same things.

Q Are you on a diet now? A I am on a diet and have been on a diet ever since I have been sick.

Q What can you eat now? A I can eat Jewish rye bread, one of those small slices cut very thick, one slice, and drink milk, that's all.

Q Nothing else besides that? A Only a drink of water, that's all.

Q And you can eat nothing but what? A Jewish rye bread, only a thin slice like that (indicating).

Q And that with a glass of milk comprises your meal? A Yes, three times a day."

Mr. Schneider reads from the same deposition as follows:

"*Cross examination* by Mr. Schneider.

Q Mrs. Oehler, Dr. Epler has been treating you? A Yes, sir.

Q Is he your family physician? A Yes, sir.

Q How long has he been your family physician? A I can't tell you how long, a good many years.

Q Since you are married? A Not exactly since we are married; ever since we live in this house, about thirteen years.

Q And you are married how long? A I am married twenty-three years the twenty-first of June.

Q Before you lived in this house for thirteen years, where did you live. A We lived up on Westfield avenue.

Q In Roselle? A In Roselle Park.

Q How long did you live there? A About twelve years.

Q Did you live there before you were married? A Yes—no, we went to housekeeping in that house.

Q You went to housekeeping in that house? A Yes, sir.

Q That is, when you married Mr. Oehler you went in there? A No, we lived down with his mother first before that.

Q When you were married you lived with Mr. Oehler's mother? A For a year.

Q Where was that? A On Tenth avenue.

Q In Roselle? A Yes, sir.

Q Roselle or Roselle Park? A Roselle.

Q Where did you live when you were single? A I can't tell you where I lived, I was here and there and all over.

Q Around this section? A Up in Pennsylvania and all over.

Q Did you live in Roselle for any length of time? A No, when I married I came here to live.

Q Where did you live before you married Mr. Oehler? A In Easton, Pennsylvania, I was born in White Haven, Pennsylvania.

Q And he brought you to Roselle when he married you? A I came down to Bayonne first and when he married me he brought me to Roselle.

Q You lived a little while, while you were single, in Bayonne? A Yes, sir.

Q And when you were married he brought you to Roselle and you have been here ever since? A Yes, sir.

Q And just at those two addresses? A Yes, sir.

Q What was the first one again? A 54 Westfield avenue.

Q And what is this address? A 209 Thompson avenue.

Q And you have been living here about thirteen years? A About thirteen years.

Q How many children have you? A I have only one, he is eighteen years old.

Q And Dr. Epler has always treated your family for the last thirteen years? A Yes, sir.

Q Who was your physician before that time? A I don't know, I had Dr. Browne for awhile and Dr. Willoughby.

Q Where was Dr. Browne's office? A She lives up on Chestnut street in Roselle Park.

Q And Dr. Willoughby? A He lives up on Westfield avenue.

Q In Roselle? A In Roselle Park.

Q Did you ever have any other physicians? A No, sir.

Q Has any other physician, except Dr. Epler, treated you for your present trouble? A No, sir.

Q Has any other physician seen you at all in your present trouble? A Not that I know of, they have not.

Q He is the only doctor that has been treating you? A He is the only doctor.

Q What remedies does he give you, any medicine? A Yes, he gives me medicine and he says the main thing is on a diet, stop eating.

Q Does he give you liquid medicine or powders? A He gives me both kinds. He gave me liquid medicine and pills.

Q Are you taking those now? A Yes, sir.

Q Which, the powders or the pills? A The pills.

Q How often do you take them? A After each meal and before bedtime.

Q Were you ever sick at all before this trouble? A Not to amount to anything, never.

Q How long before that trouble were you sick? A About six years, I think.

Q What doctor did you have then, Dr. Epler? A Dr. Epler.

Q What was your trouble at that time? A Heavy colds.

Q And you got over that? A Oh, yes, sir.

Q In the last six years you have had no trouble at all? A I had no doctor until I saw a doctor for this case.

Q And before this, did you ever have any physician? A Colds, and things like that.

Q Minor ailments? A Yes, sir.

Q Nothing besides colds at all? A That's all.

Q Do you know how much you weighed before the accident, Mrs. Oehler? A 210.

Q How tall are you? A Well, I never measured that.

Q Can you give us some approximation about how tall you are? A I don't know, really, I never measured myself, I can stand up, though, and let you see.

Q Will it cause you much trouble to stand up with some help? A No.

(It is conceded that the witness is five feet four inches tall.)

Q Mrs. Oehler, this vacuum cleaner, you say, was never unpacked at all? A Never unpacked.

Q Was there a demonstrator of Bamberger's here on one occasion? A No, the only man who was here was the man who left the vacuum cleaner and the man who wanted to have the voucher that it was left here.

Q Wasn't there a demonstrator from Bamberger's here at one time to demonstrate its working to you in this room here? A Never.

Q And didn't this man tell you that the boards were in a certain position where the vacuum cleaner would not work? A No, not to me he did not.

Q Is there any other lady in this house besides yourself? A Only me, that's all.

Fanny Oehler, cross.

Q You are the only lady in the house? A Yes, sir.

Q Did you pay anything on account of this vacuum cleaner? A I paid nothing, because I did not intend to buy it.

Q You never bought it at all? A No, I never even said I would buy it.

Q Did you ever make application to buy it? A No, I never did at all.

Q Are you sure of that? A Yes, sir.

Q Did you ever pay anything at all on account of the vacuum cleaner? A Nothing at all.

Q Did you pay the slightest amount on account of this; on the vacuum cleaner? A Never, Mr. Oehler is the only one who buys anything in this house—

Q Did you ever pay anything to Bamberger's on account of this vacuum cleaner? A No, sir.

Q Did you ever pay them five dollars on account of this vacuum cleaner? A No, never.

Q Are you sure of that? A I am sure of it.

Q Did you ever ask for the return of five dollars paid on account of the vacuum cleaner? A I never did.

Q You are sure you never asked for a five dollar return? A I never did. They did not owe it to me, how could I ask for it?

Q If you did not pay the five dollars, naturally you would not ask for it, would you? A No, indeed.

Q Suppose it was shown to you, Mrs. Oehler, that you had asked for the five dollar return, would that show you that you had paid it? A Yes, if I had paid it I would ask for it.

Q Did you ever apply verbally or in writing for the purchase of the vacuum cleaner? A

Never, the only paper I signed was the voucher that was left here, that's all.

Q Did you get a copy of that voucher? A No, I did not.

Q You say you had quite a few documents from Bamberger's which your burned up? A Yes, sir.

Q What were these? A Oh, dun bills which they kept sending me to buy the vacuum cleaner, and I went over to Mrs. Drake's and telephoned them to get it.

Q Did you ever write to them at all? A No, I never did. I always telephoned.

Q Are you sure you did not write a single letter to Bamberger's? A No, sir.

Q And you say that it is a voucher that you signed from Bamberger's? A That he had left the machine here, they were taking an inventory and they wanted to know where the machines were, and they called here for a voucher of it.

Q How long after it was left was that? A Oh, it was about two months.

Q You say about two months after that the cleaner was left here someone called and asked you to sign a voucher for it here? A Yes, and he even asked me to buy it and I said I could not afford to buy it because I had my taxes to pay.

Q And when the vacuum cleaner was left here did you sign any paper? A Nothing at all.

Q You are sure of that? A I did not sign nothing on it.

Q You are sure of that? A Yes, sir.

Q Do you remember signing some paper when the vacuum cleaner was left here? A Nothing at all.

Q Did you get any copy of a paper that you signed when the vacuum cleaner was left here? A No.

Q You write English, of course, Mrs. Oehler? A Yes, sir.

Q And you would know your own handwriting? A Yes, sir, I would.

Q You would recognize that without any trouble? A Sure.

Q And you write your own letters, don't you, whenever you have occasion to write them? A Yes, when I have occasion.

Q You never had anybody write letters for you? A Never did ever since I have been, since I had Mr. Oehler.

Q I mean before the accident, you did your own writing? A Yes, sir.

Q When you were writing a letter, say, a business letter, how would you sign it, by what name? A Mrs. William Oehler.

Q How do you spell the William, do you abbreviate it or write it out? A Write it out, I always did.

Q And you put the prefix 'Mrs.' in front of it? A Yes, sir.

Q Do you remember when the vacuum cleaner was left here? A No, I do not.

Q Do you remember what month it was left here? A In December.

Q I asked you when the vacuum cleaner was left here originally? A I don't remember that.

Q About what month? A I really don't know.

Q Was it in the spring, summer, fall or winter? A It was in the spring.

Q Now, all the writing you received from Bamberger's were dunning letters, you call them? A Yes, sir.

Q What did you burn them for? A As soon as I got them and looked at them I went to the kitchen and dumped them in the stove, because I know I did not buy it and did not want the vacuum cleaner.

Q You would burn them as soon as they came in? A Yes, as soon as they came in.

Q You never replied to their letters, did you, Mrs. Oehler. A No, I never answered them, I only went to the telephone and called them up every time I got a letter; every time I got one I would go over to the telephone and call them up to come and get the machine.

Q Whom did you call up? A Bamberger's I would ask for.

Q Didn't a demonstrator from Bamberger's call here at your home in September to demonstrate the machine to you? A There was no demonstrator here at all.

Q Wasn't there some man from Bamberger's here in September to show you how to use the machine? A Never.

Q You are sure of that? A Yes.

Q No man was ever here to show you the workings of the machine? A No, sir, because I did not intend to buy it, but I would look every day for the man to come after the machine, though.

Q Didn't you ask Bamberger's in August or September, sometime after the vacuum cleaner was left here, to take the vacuum cleaner back and give you credit for it on the purchase of other articles? A I never asked for no credit; I asked them to take it back.

Q You are sure you did not ask them to take it back and give you credit for it on something? A No, because I did not pay anything on it.

Q Didn't the demonstrator that called here work this machine in every room in the house? A There was never anyone here; no.

Q And didn't she show you that it did not work well in this bedroom because the floor was uneven? A No, sir.

Q You are sure of that? A Yes, sir.

Q And wasn't a man here who worked the machine in the different rooms of the house? A No, sir.

Q And didn't that man show you that it would not work in the bedroom because the floor was uneven? A No.

Q Didn't you tell a representative from Bamberger's that in September or October, the vacuum cleaner did not pick up lint? A No.

Q And didn't you tell him at that time to call and take it back because it would not pick up lint? A No, sir.

Q Nothing of that kind occurred? A No.

Q And didn't a thing of that kind occur on Monday, November 5, 1923? A No, sir.

Q And didn't the man call here on that day? A There was no man called.

Q Didn't a man call on that day to investigate your complaint and you told him that the machine would not pick up lint and you asked him to take it back? A No, I had not made any complaint at all.

Q And nothing occurred as to its not picking up lint or anything of that kind? A Nothing at all.

Q And you say the machine was never unpacked? A Never unpacked.

Q And it was never in use in this house for cleaning? A No, he just brought it in and he went out again.

Q It was never in use in this house for cleaning? A I never used it in this house at all.

Q They wrote you numerous letters, didn't they? A Yes, they wrote a good many to me, but I always stuck them in the stove.

Q And the letters were not always about the money, they were also about the machine, weren't they? A They always sent me dun bills. They always asked me if I did not want to buy the machine and I would take all the letters and put them in the stove.

Q You are sure they asked you in those letters to buy the machine? A Yes, sir.

Q And didn't they ask you to send the money that was due on the machine? A No, there was nothing due on it.

Q Didn't they ask you to send the money that they said was due on the machine? A They never did.

Q They never said that in any of the letters? A Never did.

Q Did you read the letters? A I read them and throwed them in the stove.

Q Would you read all the letters before you burned them up? A Yes, sir.

Q And they never sent you any letters asking for money? A No.

Q And there wasn't any mention made at all of that? A No, sir.

Q Did you ever buy anything from the Pease Piano Company? A Yes, we bought a piano.

Q Where are they located? A In Newark.

Q In January, 1923, you lived in this house, you had lived in this house about eleven years, hadn't you? A Thirteen years.

Q Thirteen years today, isn't it? A Yes, sir.

Q And this is 1925? A Yes.

Q So, in 1923, you had lived here about eleven years, hadn't you? A I would have to count that up. 1923?

Q Yes. A Yes, I think it would.

Q Your husband at that time, in July, 1923, was a brakeman? A On the Central Railroad, yes, he is today.

Q And he was a brakeman at that time? A Yes, sir.

Q At the freight house? A On passenger service.

Q At the terminal of the Central Railroad of New Jersey? A Yes, sir.

Q His telephone number at that time was Bergen 9795? A I don't know any telephone; I did not have any.

Q I mean his telephone number at that time was Montgomery 4400, wasn't it, your husband's telephone number at the Central Railroad? A I really don't know.

Q He had been working for the Central Railroad for thirty years or so? A I don't know whether it is thirty years, but I know it is a long time.

Q In 1923 your husband owned property? A Yes, sir.

Q This property here? A Yes, sir.

Q No. 209 Thompson avenue, Roselle? A Yes, sir.

Q Do you know whether at that time your husband banked at the Roselle Park Trust Company? A I don't remember.

Q When did you buy that piano from the Pease Piano Company?

Mr. Henderson: I object to this; it is absolutely immaterial.

Mr. Schneider: It is preliminary and will be connected up."

Mr. Henderson: I withdraw that objection.

(Mr. Schneider continuing:)

"A About seven years ago.

Q And you stopped paying on that piano about in 1921, you completed all your payments?

Mr. Henderson: My objection goes to this whole line."

Mr. Henderson: I withdraw that objection.

(Mr. Schneider continuing:)

"Yes, sir.

Q Did you know a man in 1923 named C. B. Trimmer? A Yes, I know him well.

Q He is a notary public? A Yes, in Roselle.

Q Where does he live in Roselle? A Up on First avenue.

Q 115 First avenue? A Yes, sir.

Q On July 19, 1923, was that about the time when the vacuum cleaner was left here? A I really don't know what time it was.

Q It was in July, about? A I don't know whether it was in July, or what month it was; I never interested myself, because I did not intend to buy it and I just put it away until the man came after it.

Q Didn't you give a deposit of five dollars on that vacuum cleaner on July 19, 1923? A No, sir.

Q Didn't you agree to pay fifty-one dollars on July 19, 1923, for this vacuum cleaner? A No, sir; I did not agree to pay anything.

Q And didn't you pay five dollars on account? A No, sir; I did not.

Q And didn't you agree to pay six dollars a month thereafter? A No, sir; I did not.

Q And four dollars on the eighth month? A No, sir.

Q I will ask you if this is your signature, Mrs. Oehler (producing paper). A Yes, that is my handwriting; that is where I signed the paper to let him know I had it here.

Q Is this your signature (pointing to the signature 'Mrs. William Oehler,' lessee)? A Yes, that is it.

Mr. Schneider: I ask to have it marked for identification opposite the signature referred to by Mrs. Oehler.

(The paper is marked D. 1 for identification.)

Q Are both of these signatures, 'Mrs. William Oehler,' yours? A They look like it, yes, sir.

Q Are these your signatures? A They look like it; I cannot say if they are both mine, because I don't remember making them, but they both look like mine.

Q Then, these are your signatures? A Yes.

Q On November 5, 1923, Mrs. Oehler, didn't you say to Bamberger's representative that you were willing to lose your deposit and wanted them to take back the machine? A No, sir, I did not pay no deposit.

Q And didn't you at that time contend that the machine would not pick up lint? A No, sir.

Q When did you sign that paper, how long after the machine was left here? A About two months after.

Q And at the time it was left here you signed nothing? A Nothing at all at the time it was left here.

Q And between the time that it was left here, that day, two months later, you signed nothing? A No, sir.

Q You signed nothing in between? A Nothing in between.

Q You are sure of that? A I am sure of that.

Q Did you ever call at the store about the vacuum cleaner? A Yes, I did; I went over there one day and asked them to take it back.

Q How many times did you call? A Only once I called at the store.

Q Do you know when that was? A I don't know; whenever I called over there with Mrs. Birmingham, I was over there, and I said, 'While I am over there I think I will go in to Bamberger's.'

Q Is this your signature, Mrs. Oehler? A That is my address.

Q This right here (indicating). Is that your signature? A I don't think it is.

Q Will you look at it very carefully? A I can't see it—no, that ain't my signature; that ain't wrote the way I do, the beginning of it ain't mine.

Q I will show you the signature that you identified before as being yours on Exhibit D. 1 for identification; just look at it? A Yes, sir.

Q Now, I will show you this signature on the new paper and ask you if that is not the same signature? A No, that is not wrote the same way.

Q I will just show you this handwriting; is that your handwriting? A No, I did not write that.

Q Is that your handwriting? A No, it is not my handwriting at all.

Q Are you sure it is not your handwriting? A Yes, I am sure.

Mr. Schneider: I ask that this letter be marked Exhibit D. 2 for identification.

(The same is marked D. 2 for identification.)

Q Did you have high blood pressure before this accident? A I never did.

Q Did you ever have Bright's disease before this accident? A I never did.

Q You are sure you did not? A I am sure I did not.

Q Were you ever treated for any of these sicknesses? A Never.

Q Did you ever have your blood tested for pressure? A Never.

Q Did you ever have your urine examined for kidney trouble by any doctor at all? A No, sir.

Q You had rather a considerable fire next door here some time ago? A Yes, sir.

Q When was that, Mrs. Oehler? A Last Christmas, a year ago.

Q That did not affect you in any way, did it? A That made me very nervous.

Q But it did not make your condition worse in any way? A For a few days it did.

Q Did you get any stroke as a result of it? A No, sir.

Q And it was a big fire? A Yes, sir.

Q And the man who owned the house was really burned in the house? A Yes, he was.

Q And you saw the fire? A Yes, I was helped out to the hall; my son took me out; they thought maybe our house would catch.

Q And it was a very disastrous fire? A Yes, sir.

Q You did not get any stroke as a result of it? A No, I got excited over it.

Q Are you sure you never had any sickness before this accident, the cold you mentioned? A Colds, or a cold, something like that, and when I was a child I may have had children's sickness, but I don't remember that.

Q You are sure you never had high blood pressure? A No.

Q Or nephritis or kidney disease or Bright's disease? A No, sir.

Q You are sure you never had anything of that kind? A Nothing of that kind.

Q What is your boy's name? A William Oscar Oehler.

Q He lives here with you? A Yes, sir.

Q Where does he work? A He works in New York, in the Chatham & Phoenix Bank.

Q What does he do there? A I don't know for sure—assistant rack clerk.

Q Do you know what school your boy is a graduate from? A The Roselle High School.

Q When this man that called here on December 10, 1923; when he came here, as you say, did he ring the bell or knock at the door? A He rang the bell.

Q Were you alone in the house? A Yes, at that time.

Q About what time was it? A Eleven o'clock in the morning.

Q And you went to the door? A Yes, sir.

Q And did any conversation occur at the door? A I went to the door, and he said, 'Bamberger's,' and I said, 'I am awful glad you came. I will go up and get it; come in and sit

down.' I wanted to go to the attic and get the vacuum cleaner, and he said, 'Oh, no, it is not necessary,' and I said, 'I don't intend to pay for it,' and when I said, 'I don't intend to pay for it—'

Mr. Henderson: Just a moment, please; is that responsive?

Q Tell us what occurred between you and him during the whole time he was here? A I told him to come in and sit down, and he said, 'I came to collect for the vacuum cleaner,' and I said, 'I don't intend to pay for it, because I got my taxes to pay and I cannot pay for it,' and he got real mad, and he said, 'I will turn Mr. Oehler in to the company and have you arrested.'

Q Pointing his index finger at you? A The other one.

Q The one next to the thumb?

(The witness makes a motion of some kind, pointing with the index finger.)

Q What else? A I felt a tingling all through me, and I said, 'Oh, I feel bad. I want to get a drink of water,' and I got up and got a drink and felt it all through me on one side, and it was on one side more than the other, and I went out to the kitchen and he went after me.

Q When he pointed his finger at you was he sitting or standing? A This chair in the front room.

Q In the rocking chair? A Yes, sir.

Q Where were you? A I was sitting by that window, this window here (indicating).

Q At the end of the room? A At the end of the room next to the door.

Q At the southerly end of the room? A Yes, sir.

Q You were sitting at the other side of the room? A I was sitting here at the end of the room and he was sitting at the rocking chair right at the end of the pavement.

Q He was about eight feet from you? A Just about the same length as I am from you.

Q About six feet? A About.

(It is stipulated that the distance indicated is between five and six feet.)

Q He was sitting in that chair? A Yes, and I was in the other chair.

Q And that is the chair he pointed his finger at you? A Just like that (indicating).

Q His index finger? A Yes, sir.

Q And said what? A "I will turn it in to the company and have you arrested.'

Q And he pointed his index finger at you? A Yes, sir.

Q And sat in the chair? A Yes, and I said, as I told you, I felt a tingling and I was trembling and I went to get a drink of water, and when I came back I fell by the piano.

Q When you went out he was sitting in the chair? A He went right after me.

Q He went to help you? A -He never offered to help; he never touched me at all.

Q Was there anything said, anything else, as you sat in the chair there? A First he asked me, 'Shall I call some of the neighbors in?' and I said, 'No, I am not in the habit of bothering my neighbors.'

Q That was after you fell, wasn't it? A Yes, when I came in from getting the drink of water. First, I fell to the floor and I wiggled myself

around and sat on the chair, and when I sat on the chair he said, 'Shall I call in the neighbors?' and I said, 'I am not in the habit of bothering none of my neighbors,' and he said, 'I ain't got all day to sit here all day with you,' and I said, 'You can go any time you want, you can go any time,' and he got up and he went out the door.

Q This was, I believe you said, a little before noontime on that day? A Yes, a little before noon, and I sat in the chair and called my neighbor woman.

Q Didn't you give the Pease Piano Company and Mr. Trimmer as references when the vacuum cleaner was left here? A I did not buy the vacuum cleaner whatever, no.

Q Did you give them as references? A I did not give no reference.

Q Didn't you give the name of the Pease Piano Company to Bamberger's representative? A No.

Q Didn't you give the name of Mr. Trimmer to Bamberger's representative? A No.

Q You did not give them those names at all? A No, I did not.

Q Not for any purpose whatever? A No, sir.

Q Did you ever mention those names to Bamberger's man or any of them? A No.

Q Did you ever mention the name of the Pease Piano Company to any of Bamberger's men? A I never did, I had no occasion to ever mention that.

Q Did you, for any purpose mention the name of Mr. Trimmer to Bamberger's man? A Well, different people came in here and I said Mr. Trimmer was Mr. Oehler's friend when he was sick, but not to any of the agents that came here.

Q Did you ever say it to any of Bamberger's men? A No, sir.

Q Did you ever mention the name of Mr. Trimmer to any of Bamberger's men? A No, not that I know of.

Q Did you ever give the name of the Pease Piano Company? A No, sir.

Q For reference? A No, not at all."

Mr. Henderson reads re-direct examination from the same deposition as follows:

"*Re-direct examination* by Mr. Henderson.

Q Each time, Mrs. Oehler, in describing his pointing his finger at you, you raised your voice. Did he raise his voice when he spoke to you? A That I don't remember now.

Q Now, the fire Mr. Schneider has spoken about that was about two or three weeks after you had the stroke, wasn't it? A About two weeks, I think it was, I know they got me out of bed and took me out front.

Q And when you spoke of some letters you received from Bamberger's, you said they never asked you to send money? A They never did.

Q You are depending on your recollection of the present time, aren't you? A Yes, sir.

Q And those letters you did receive you immediately burned? A I burned them up, yes, sir.

Q And each time you communicated with Bamberger's and asked them to remove the vacuum cleaner it was over the telephone? A Yes, sir.

Q And each time you did that you asked them to take back the vacuum cleaner? A Yes, sir.

Q You said something about a paper, Mrs. Oehler. Did you sign some papers for Bam-

berger & Company? A I signed a paper that I had the machine here.

Q Tell us the circumstances of that. A Well, a man came in and said—I don't know none of the people—but I sat here on the chair, we have a chair there, and they asked me to sign a paper, they were taking an inventory or something from Bamberger's and they did not know, they had so many of these machines and they did not know where they had them and they wanted an account of where they were.

Q He said that they were taking an inventory? A Yes, that is what he said, and he asked me to sign a paper that it was here. I said to him at that time, 'Why don't you take it along with you?' and he laughed and said, 'Sign it, I don't ask for nothing else but to sign it,' and I started to laugh when he went out of the door and I said, 'They ought to pay me something for leaving it here,' and he said, 'What do you mean?' 'You are putting it in storage here, that is what you are doing, having it in here.'

Q How soon after this man from Bamberger's said that he was going to have you or Mr. Oehler or both of you arrested did you take sick? A Immediately, right after, it seemed as though it started in my feet going up.

Q What was your sensation? A All I can describe it as a kind of trembling sensation and feeling as if I was falling and losing my mind, that is the way I thought.

Q What was the effect of his saying that he would have you arrested?

Mr. Schneider: I object to that as incompetent, irrelevant and immaterial and not

proper re-direct examination, and calling for a conclusion."

Mr. Schneider: I will ask your Honor to rule on that objection.

The Court: I will sustain that objection and the answer may be stricken out.

(Mr. Henderson continuing:)

"A Trembling as though every nerve in my body was on the move.

Q You have never been arrested? A No, sir.

Q Your reputation is unblemished?

Mr. Schneider: I object to that. The lady's reputation is not in issue here and we do not attack it in any way."

Mr. Schneider: I will ask your Honor to rule on that objection.

The Court: I will sustain that objection and the answer may be stricken out.

(Mr. Henderson continuing:)

"A The thought of being arrested, as I was saying, to be arrested—

Mr. Schneider: I object, and ask that it all be stricken out on the ground that it is not an answer to any question."

Mr. Schneider: I will ask your Honor to rule on that objection.

The Court: I will sustain that objection and the answer may be stricken out.

(Mr. Henderson continuing:)

"Q What was the thought of being arrested, what did it have to you?

Mr. Schneider: I object to that as not a proper question. Improper re-direct examination, incompetent, irrelevant and immaterial and it calls for a conclusion."

Mr. Schneider: I will ask your Honor to rule on that objection.

The Court: I will sustain that objection and the answer may be stricken out.

(Mr. Henderson continuing:)

"A Well, to tell the plain truth, it has done plenty to me.

Q What did it do to you at that time? A At that time it sent like a chill all over me."

Mr. Schneider: I object to that and ask that the answer be stricken out.

The Court: I will overrule your objection as there is no objection noted on the record.

(Mr. Henderson continuing:)

"Testimony closed."

SECOND DAY.

Thursday, October 22, 1925.

Appearances as before stated.

Letter offered in evidence and marked Exhibit P. 1 and envelope and letter offered in evidence marked Exhibit P. 2.

MAUD I. DRAKE, sworn in behalf of the plaintiff.

Direct examination by Mr. Henderson.

Q Where do you live? A 554 Second avenue, East Roselle.

Q And that is very near to Mr. and Mrs. Oehler's home? A They live right in back of me.

Q And you have a telephone in your house? A I have.

Q There is no telephone in the Oehler home, as far as you know? A No.

Q And does Mrs. Oehler ever come over to your house to use your telephone? A Oh, yes, several times.

Q Can you tell us to whom she telephoned?

Mr. Schneider: I object.

The Court: Objection sustained. It is too general.

Q Did you ever hear Mrs. Oehler telephone to L. Bamberger & Company?

Mr. Schneider: I object.

The Court: I will allow that.

A I heard part of the conversation.

The Court: No. Answer the question.
Witness: Yes, I did.

Q And can you tell us what you heard?

Mr. Schneider: I object to that.
The Court: Sustain the objection.

Q How do you know it was L. Bamberger & Company? A Well, she didn't exactly know how to use the telephone and she called central two or three times before she got Bamberger's, and I helped her get Bamberger's. Her eyesight was rather poor.

Q Did you look up the telephone number? A I did.

Q And was that the number given for L. Bamberger & Company? A I called L. Bamberger & Company. I do not recall what the telephone number was.

Q And when there was an answer, what was said on the other end of the wire? A I don't know.

Q You got the number for her? A As soon as they were connected, I turned the telephone over to her.

The Court: What is it that you want to prove, that Mrs. Oehler talked to L. Bamberger & Company?

Mr. Henderson: Yes, sir.

The Court: I do not think they will object.

Mr. Schneider: Well, if it is connected properly.

The Court: Well, subject to being connected properly.

Mr. Schneider: I will withdraw the objection.

Q What was said at that time? A Well, she had quite an argument with him. I cannot tell you exactly what she said or they said that provoked her at the other end, and she said, "I want you to come and take the vacuum cleaner back." She got quite excited.

Q Was there anything else said that you remember? A No. I was not particularly interested in it. I was doing my work.

Q Now, did she 'phone to L. Bamberger & Company again? A I know she 'phoned twice and I think she 'phoned the third time.

Q And did you hear her speak about the vacuum cleaner each time? A Each time she 'phoned in connection with the vacuum cleaner.

Q You went into Mrs. Oehler's home on the day that she had this illness, didn't you? A Yes.

Q And how did you happen to go in there? A She called me from her dining-room window.

Q And you went in? A I did.

Q What did you find? A I found her sitting in a large chair in the living-room, very sick.

Q And what else? A Well, I didn't know what was the matter with the woman, but I knew she was very sick and I asked her what was the matter.

Mr. Schneider: I object to that.

The Court: Do not tell us what she said, tell us what you saw.

The Witness: Well, her mouth was drawn up on one side and her tongue was very thick

in talking and she cried when I asked her what was said, what had happened, and I wanted to get a doctor immediately, and she wanted to wait until her husband came home, and she didn't know where to locate him, because of the man being located on the railroad, but she fell back and I stayed the rest of the afternoon with her except to get my own dinner, and I sent my daughter in for about ten minutes and I stayed until Mr. Oehler came home and I said something had happened to his wife, I didn't know what it was, and I stayed there the whole afternoon there, afraid to leave her alone.

Q Can you tell us what her condition was with reference to clothing at that time? A Well, I do not know how to explain it, but her urine was running away from her, she had no control of that, and I could not do anything with her at all myself, because she is a large woman and I could not move her, and I simply stayed there until Mr. Oehler came, and she should have had the doctor at once, I thought, but she would not let me go back and telephone for him.

Cross examination by Mr. Schneider.

Q When you came into the house, where was she? A She was in this armchair in her living-room.

Q She sat in her armchair all the time? A Yes, she sat there all the time. She tried to get up once, but fell over, and I said, "If there is anything you want to get, let me get it for you instead of trying to get it yourself."

WILLIAM OEHLER, sworn.

Direct examination by Mr. Henderson.

Q Mr. Oehler, you are one of the plaintiffs in this suit? A I am.

Q And the husband of Fanny Oehler? A I am.

Q When were you married? A June 21, 1902.

Q Where? A New York City.

Q And you and Mrs. Oehler have lived together ever since then? A Yes.

Q And are now living in Roselle? A 209 Thompson avenue.

Q How long have you lived at that address? A Since 1912; in April, 1912.

Q Where are you employed? A Central Railroad of New Jersey.

Q As what? A As a passenger trainman.

Q And what are your wages? A My wages there is $4.70 for ten hours.

Q That is, $4.70 for ten hours? A Yes.

Q And are there any changes on Sundays? A Yes. I usually work Atlantic City runs or Philadelphia, one of which pays me in the neighborhood of $8 and the Atlantic City will pay me about $8.50. It all depends upon the time that is made.

Q Now, do you recall the day your wife was stricken? A December 10, 1903 or, 1923, rather.

Q And what time did you leave home that morning? A Three o'clock.

Q And what time did you arrive home in the evening? A Half-past six.

Q Now, when you left home in the morning was there anything wrong with your wife, as far

as you could see? A Absolutely normal. She got my breakfast that morning.

Q And had she been ill or well? A Well.

Q For a long time past? A Yes, for a long time.

Q Did she go up and down stairs? A Perfectly normal.

Q And attended to all her household duties? A Everything.

Q Not under the care of any physician, was she? A No.

Q Now, when you returned in the evening, tell us what you found, Mr. Oehler. A Upon entering the kitchen door and walking into the dining-room, I saw my wife sitting in the rocking chair, armchair, and Mrs. Drake taking care of her, and I was wondering what happened to her, so Mrs. Drake explained to me and I found my wife in a very deplorable condition. Mrs. Drake had to go home to take care of her household duties and I proceeded immediately to take care of my wife. I did the best I could and got her up stairs.

Q How did you get her up stairs? A Partly carried her and partly drug her up.

Q Then what did you do? A Laid her on the floor and took her clothing off and washed her and redressed her and brought her downstairs again.

Q What was the condition of her clothing before you did that? A She had lost complete control of her bowels and everything.

Q And you brought her downstairs again? A I did.

Q Then what did you do? A I got a friend of mine by the name of Jake Bashill with his automobile and took her to Newark to Dr. Epler's office.

Q And the doctor has been treating her ever since? A The doctor looked her over—

The Court: No. Treating her ever since.

The Witness: He has.

Q And has she completely been able to resume her household occupation? A No.

Q Who takes care of the household now? A Your humble servant, I do.

Q What do you do around the house? A I do everything, the washing, the cooking and the house-cleaning and everything that is to be done by a woman in the house, and man, I do it all.

Q And you have been doing that since December 10, 1923? A I have been doing that since my wife was taken ill.

Q Who takes care of your wife? A I leave her alone during the day. I cannot get anybody to horse her around.

Q Where is your wife today? A She is home in bed with a neighbor's daughter looking after her until I get there.

Q How long has she been in bed? A She has been in the bed now since the fourth of this month.

Q Has she been able to go up and down stairs? A She has, with assistance.

Q Has she ever been able to take care of the household duties? A No, she has not.

Q You have taken care of them for the two years? A I have. I beg your pardon! For one week I had a woman from Wilkes-Barre there.

Q And you paid her? A I paid her.

Q How much did you pay her? A I think it was $12 I gave her.

Q Now, before the accident, how many days a week did you work? A Seven days a week.

Q And since the accident have you worked every day? A No. I had to lose every Sunday, except such Sundays as the railroad compelled me to work on account of the shortage of men.

Q Can you tell us how many Sundays you missed? A No. I cannot off-handed unless I look into my time book. I can count it up.

Q Have you your book here? A Yes.

Q Could you approximate how many Sundays you lost? A Hardly. I know it is in the neighborhood of 141 to 145. Well, with this last probably 155 days altogether.

Q That you have lost? A All due to this sickness.

Q And of that 145 or 150 can you tell us approximately how many were week days and how many were Sundays? A No, I cannot, unless I refer to my time books, which I have.

Q Well, suppose you look through them as rapidly as you can. A In December, 1923—

Q Just take the Sundays first. A Up until October eleventh was seventy-two Sundays.

Q And what did you do on Sunday at home? A Sunday at home I do the washing, ironing, clean the house in general and look after my wife and give her an alcohol rub and change her clothing and kind of set her straight for the week.

Q Cook the meals? A Cook the meals.

Q And the balance of the days you have off have been week-days? A Yes.

Q Your salary Sundays was about $8 a day? A Yes, about $8, with an average of $8.

Q Now, can you tell us how often you went to Dr. Epler's? A Well, if you were to aver-

age it up, it would be about twice a week we would go there.

Q And what has Dr. Epler charged you? A $2 at the office.

Q And has he ever visited your wife at your home? A Yes.

Q What does he charge for those visits? A $5.

Q Can you tell us approximately how much you have paid to the doctor? A No, I could not because I paid cash when I have the money.

Q Who did the buying at your house? A I did, outside of provisions.

Q Did your wife ever buy any of the household paraphernalia? A Nothing.

Q Anything of any sort whatsoever? A Probably a pot or pan or something like that.

The Court: What is the purpose of this?

Mr. Henderson: I would like to prove Mrs. Oehler did not order that machine.

The Court: Well, husbands and wives, living together, the presumption is that the wife has a right to buy household things.

Q Now, can you tell us how much you have paid for medicines in the last two years? A No, I cannot.

Q You cannot approximate it? A No, I cannot. I pay cash when I get it.

Cross examination by Mr. Schneider.

Q You say your wife has been in bed since October fourth? A Yes.

Q And just previous to that she took an automobile trip somewhere? A Out for her health, trying to recuperate.

Q To where? A To Wilkes-Barre, Pennsylvania.

Q Wasn't that against the doctor's orders? A No. I had his permission to take her, driving slowly.

Q It was not against his orders? A No, it was not, not that trip.

Q Sure about that? A Positively.

Q Now, your wife, before December 10, 1923, you say was in complete perfect health? A She was.

Q Didn't she ever have trouble with high blood pressure? A No.

Q Didn't she ever talk to or consult Dr. Epler about her high blood pressure? A Not to my knowledge.

Q And didn't he advise her? A Not to my knowledge.

Q Didn't he tell her to be careful of her diet and things like that?

Mr. Henderson: I object.

The Court: Suppose he knows.

Mr. Henderson: He might ask if he knew.

Q Do you know whether she had any trouble at all with blood pressure before this? A No, I don't.

Q Would you say she did not have it? A I would say she did not have it.

Q And you do not know of any talks with Dr. Epler about it? A No.

Q Do you know whether she had any kidney trouble before this accident? A Not to my knowledge. I never knew her to have.

Q Would you say she did not have it? A I would.

Q And do you know whether she talked to Dr. Epler about her kidney trouble before the accident? A No, sir.

Q Would you say that she did not talk to him or that you do not know? A I do not know.

Q You wouldn't say that she did not talk with him? A No, I wouldn't.

Q At any rate, you did not know about it? A I didn't.

Q Did she have trouble with hardening of the arteries before the accident? A Not that I know of.

Q Would you say that she did not or you don't know? A I don't know.

Q Well, do you know whether she consulted or spoke to Dr. Epler about hardening of the arteries and whether he told her what to do and advised her in any way? A Not to my knowledge.

Q Would you say that she did not speak to him or that you do not know? A I don't know; not to my knowledge.

Q Do you know whether she had before the accident Bright's disease, or anything like that? A I don't.

Q Do you know whether she spoke to Dr. Epler about it? A No.

Q Well, would you say that she did not speak to him, or that you did not know? A I don't know.

Q She might have spoken to him about it without your knowing? A She might have.

Q And also about kidney trouble, she might have spoken to him without your knowing it? A She might have.

Q And also about hardening of the arteries, she might have spoken to him without your knowing it? A She might have.

Q Also about the blood pressure? A She might have.

Q In other words, she might have spoken to Dr. Epler and he might have advised her about these things before the accident without your knowing it? A No.

Re-direct examination by Mr. Henderson.

Q You do not know anything about medicine or diagnosis? A Absolutely nothing.

Q Just an ordinary layman, and if a person appears well and happy you think they are well and happy?

Mr. Schneider: I object to that.

Mr. Henderson: I will withdraw it.

Q You cannot tell whether a person has hardening of the arteries or not? A I cannot.

Mr. Schneider: I object to that on the ground it is very leading and not proper re-direct—well, I will withdraw my objection.

Q Do you know how hardening of the arteries manifests itself? A No, I don't.

The Court: That is not a proper question to this witness.

Q Now, when was the last time she consulted Dr. Epler professionally, if you know—well, had she consulted him recently before her illness? A No.

Re-cross examination by Mr. Schneider.

Q She might have consulted him before her illness recently without your knowing it? A Well, I believe she would have told me.

Q You think she would have told you? A I am pretty positive she would.

Q You think the wife always tells her husband everything? A I would say that about this woman.

Q You received that letter that is marked P. 2? A I did.

Q Registered mail? A Yes.

DON A. EPLER, sworn in behalf of the plaintiff.

Direct examination by Mr. Henderson.

Q You are a practicing physician in this County? A I am.

Q And where is your office located? A 45 Hillside avenue, Newark.

Q How long have you been practicing?

Mr. Schneider: I will admit the doctor's qualifications.

Mr. Henderson: All right.

Q Now, you are the family physician for the Oehler family, are you not? A I have been called by them at intervals in the last eight years.

Q And you have been treating Mrs. Oehler ever since this occurrence on the tenth of December, 1923? A At intervals, yes.

Q Now, previous to that had Mrs. Oehler consulted you professionally for any long period? A Previous to 1923?

Q Yes. A Not for any long period.

Q How long before 1923, if you can tell us, did Mrs. Oehler last consult you professionally? A Why, I cannot tell you that definitely, but she was to see me possibly once in a month or two months for a little cold, or something like that, just prior to that time.

Q Just prior to 1923? A Yes, as I remember it.

Q For a little cold? A Nothing more serious than that at that time.

Q Now, Mrs. Oehler was brought to your office by her husband on the night of the tenth? A I think that was the time.

Q And can you tell us what you diagnosed her trouble as at that time? A I made a very hurried examination, because I realized that Mrs. Oehler was a very sick woman, and I told them that I thought she had had a stroke and to get her right home and put her to bed and outlined the treatment and that I would see her the next day at her home.

Q That is a stroke of apoplexy? A I told her I thought that was what she had at that time.

Q And all the evidence indicated that, her symptoms showed that? A My examination was very hurried, as I say, and the superficial examination that I did make prompted me to tell her what I did at that time.

Q From the examination you made, you diagnosed it as a stroke of apoplexy? A I told her I thought she had a stroke that night.

Q And you have been treating her ever since?

The Court: Well, did you see her the next day?

The Witness: I told her I would see her the next day.

The Court: Did you see her?

The Witness: Yes, at her home.

The Court: Did you make a thorough examination?

The Witness: I did.

The Court: What was the result?

The Witness: I made a diagnosis of arteriosclerosis, chronic interstitial nephritis, and a possible stroke.

The Court: Now, doctor, the first time or after that, did that indicate hardening of the arteries?

The Witness: That is what it means, hardening of the arteries.

The Court: And the second part of that, is it Bright's disease?

The Witness: It is a form of Bright's disease.

The Court: Is it a kidney ailment?

The Witness: Chronic.

The Court: What do you mean by chronic as distinguished from another kind?

The Witness: A condition of long standing.

Q And, doctor, by a stroke what do you mean by that? A A cerebral hemorrhage; that is, a hemorrhage into some part of the brain.

Q Would that account for the distorted condition of the face?

Mr. Schneider: Well, the witness is a doctor and a very intelligent man and I think he should testify.

The Court: Well, it is proved in the case that that was her condition.

Q Would that account for her distorted face? A It could do so.

Q And those other two, arteriosclerosis, would not account for it, would it?

Mr. Schneider: I object to that as leading.

The Court: Sustain the objection.

Q And to what would you ascribe—was her side or arms or legs paralyzed? A Her left arm was almost totally useless. Her left leg, she had some slight control over.

Q What did that indicate to you, doctor? A Why, it indicated to me that there was probably pressure in some portion of the brain.

Q In some portion of the brain? A Yes.

Q Is that or is that not concomitant of a stroke? A If we have a stroke we have pressure due to the blood that is exuded.

Q And those are the usual manifestations of a stroke, are they, of paralysis?

Mr. Schneider: I object.

Q Well, is or is not that paralysis the usual manifestation of a stroke? A Not necessarily. It depends upon where the hemorrhage is. You may have a hemorrhage of the brain without it, without affecting the motor area.

Q You might have a hemorrhage of the brain without that paralysis? A You may. It is possible.

The Court: Doctor, with the subject in hand, what relation would you say that paralysis bore to the hemorrhage?

The Witness: Well, if there was hemorrhage, it was probably over a portion of the cerebrum; that is a part of the brain where the motors lie, and the nerves take their origin that are distributed to these parts, the arm and the leg.

Q And, doctor, is pressure, or is it not, or is there a change in the blood pressure usually caused by excitement? A Blood pressure is very apt to be changed due to that.

Q And if the person were threatened could you tell us it could cause a change in the blood pressure? A It could cause a change in the blood pressure.

Q And could it temporarily increase that blood pressure, or could it not? A It could.

Q Now, in a woman of Mrs. Oehler's age and build, is such a woman more prone to blood pressure than the average, considering that Mrs. Oehler is about forty-seven and weighed around two hundred and ten pounds and is about between five feet five and five feet six?

Mr. Schneider: Five foot four.

Mr. Henderson: Five foot five.

Mr. Schneider: No, five foot four we agreed on.

Mr. Henderson: All right, five foot four.

Q Could you say a woman of that type would be more prone to blood pressure than the average? A I should say yes.

Q Now, you got a history of the case from Mrs. Oehler, I assume, did you not, to some extent? A Not until several days afterwards.

Q And what did she tell you? A Well, she told me that there had been, I think she said, a collector from Bamberger's there. I do not recall the details of the conversation. She said she got very much excited and during his visit there she felt this strange feeling come over her limb and her head and that she fell and finally collected herself enough to get out into the kitchen and get a drink of water and then dragged herself back to this chair and that she was found in that condition by some neighbor, whose name I do not recall.

Q And, doctor, can you tell us whether you treated her for blood pressure and for urine trouble of any sort during the year previous to this occurrence? A I did not treat her for it, no.

Q You did not treat her? A I did not.

Q Had she consulted you with regard to it? A No, she had not.

Q Now, can you say whether she had blood pressure or whether you believe she had blood pressure? A I believe she did.

Q You believe she did, doctor? A I believe she did.

Q And a person having blood pressure, assuming that she had blood pressure, would excitement, then, tend to increase that? A It could do so.

Q And assuming, doctor, that she went along normally without any excitement, might she have gone on for a long period without any stroke? A That is possible.

Don A. Epler, cross.

Cross examination by Mr. Schneider.

Q Now, doctor, arteriosclerosis is hardening of the arteries, in plain English, isn't it? A Yes.

Q And that is a chronic disease? A Chronic condition.

Q And that comes on gradually? A Yes.

Q It never takes place suddenly? A Not to my knowledge.

Q Well, there is not any case on record where it takes place suddenly? A Not to my knowledge.

Q It is a condition none of the other doctors know of?

Mr. Henderson: That is a conclusion.

Mr. Schneider: All right.

Q You have had considerable experience in practicing medicine? A Practically so.

Q How long have you practiced? A Nineteen years.

Q And in all your experience you have never seen a case of that kind where arteriosclerosis would come on suddenly? A No.

Q It is an organic disease? A Yes.

Q And it is incurable? A No.

Q If a person has arteriosclerosis, hardening of the arteries, all he can do is take care of himself and look out? A Keep his blood pressure down, but we cannot change what has gone before. Any changes that have taken place are there permanently.

Q Now, did Mrs. Oehler have a long standing case of arteriosclerosis? A She did not consult me about anything of that kind up until

this examination, but I have reason to believe she did.

Q Well, what gave you reason to believe she had a case of long standing of arteriosclerosis? A Because her blood pressure at that time was something over two hundred—I do not recall just what it was—and also judging from the condition of the arteries.

Q The appearance of the arteries would show it was a long standing condition? A Yes.

Q Now, as to chronic interstitial nephritis, now, nephritis is kidney trouble? A Yes.

Q And that is a pretty bad disease? A According to the degree it has advanced.

Q It is an organic disease? A It is.

Q And that also creeps on gradually in a person? A Yes.

Q It does not happen suddenly? A It does not happen suddenly, but it may manifest itself suddenly.

Q That is, a person may find out some day he has it and not know it before? A Yes.

Q And you say Mrs. Oehler's condition was chronic? A Yes.

Q Of long standing? A As far as those two conditions were concerned, yes.

Q How long would you say it was of long standing? You could not tell exactly? A No, I could not say exactly, but I think it probably was some years.

Q Did you ever operate on Mrs. Oehler prior to December, 1923? A Yes.

Q When was that, about when? A I think about—it was 1917, and I think in the month of June.

Q Did you find her blood pressure high at that time? A This was an emergency operation

and a life-saving affair and the analysis of her blood pressure was not taken until after the operation.

Q Was her blood pressure high? A Her blood pressure, I think, the day following was one hundred and fifty, which was not very high, but still a little more than normal for a woman of her age at that time.

Q Would that indicate that she had high blood pressure before that time? A It would lead one to think so.

Q That is, before 1917? A It would lead me to think so, but, of course, she was operated for a very serious condition the day before.

Q Now, kidney trouble would increase blood pressure? A Well, we might say yes. We think it is the other way around. Blood pressure eventually produces kidney trouble.

Q And then the kidney trouble makes blood pressure worse? A They may work in conjunction with each other; probably do.

Q Did you ever speak to her about taking precautions on account of her high blood pressure? A Well, as a matter of routine, after the operation and having a urinalysis made, we found about one per cent. of albumen in the urine.

Q That would show the beginning of Bright's disease and kidney trouble? A Not necessarily. This albumen in the urine may occur from other things. It may follow ether, narcotics, that is, taking ether, as she did, the day before, but we look upon it usually as a sign of approaching trouble with the kidneys, and after Mrs. Oehler recovered to a certain extent, I spoke to her about it and I said after she got over the operation and all, that that is a condition she should look into.

Q Mentioning possible kidney trouble? A Yes.

Q And also high blood pressure? A Yes.

Q Did you ever speak to her after that about it? A Why, she never consulted me for the condition.

Q I do not mean officially, but did you ever speak to her in any way, unofficially? A Well, I might have said at times, "You ought to look out for this or that," but I do not recall on what occasion. After she recovered from the operation she appeared to be perfectly well, and the only condition she consulted me about were more or less trivial affairs, colds or, possibly, a grippe affection, and she seemed to be very well and she did not consult me as to the kidney condition or the arterio condition.

Q Well, her appearance at those times, her weight, as related to her height, would put a doctor on his guard that she might have kidney trouble? A Yes, we always expect a patient of that build, if they do not have it at that time, they will eventually develop it.

Q That is two hundred and ten pounds for five feet four, and it is over-weight? A Yes.

Q A fellow like me should watch his weight? A Yes, it is just as well to.

Q And you would caution her at times about her possible blood pressure and kidney trouble and tell her to look out for it? A I would not say I used the term—

Q Well, what did you say? A I remember one time I said, "Do not forget what I told you." That was shortly after she went home, and I regulated her diet along those lines as we would.

Q Regulated her diet along kidney trouble? A That and the blood pressure.

Q You advised her to follow that diet? A I did, for the time being.

Q And at different times you called it to her attention unofficially? A I probably did. After she recovered from the operation I did not see her for a long time. My dealings were more with other members of the family.

Q And when you did see her you probably cautioned her about herself? A Possibly I did.

Q Your diagnosis was she had a possible stroke? A On December tenth?

Q Yes. A I believe she had a slight stroke along with the uremic condition.

Q The uremic condition is the kidney condition? A Passing through the kidneys.

Q And that is the old kidney trouble, Bright's disease? A Yes.

Q That is what you call the chronic interstitial nephritis? A Yes.

Q You believe she had a slight stroke along with it? A I think she did.

Q Now, a person having arteriosclerosis of a chronic nature and chronic interstitial nephritis and being five feet four in height weighing two hundred and ten pounds, such as Mrs. Oehler, might have gotten that trouble from almost anything, might she not? A What trouble?

Q What happened to her on December 10, 1923. A I do not just understand that.

The Court: I do not get it clearly.

Q Well, for instance, if something she ate did not agree with her—

The Court: You mean might have produced the results?

Mr. Schneider: Yes.

Don A. Epler, cross.

Q Almost anything that happened out of the ordinary might have produced that result? A I would not say almost anything. Something might have produced it.

Q For instance, if she had some disarrangement of the stomach or indigestion, that might have caused it? A It could have done so; it is possible.

Q Almost one hundred and one things might have caused it? A I can simply say it is possible.

Q Now, a person who has a stroke which involves the rupture of a blood vessel and hemorrhage of the brain, they would go right down, wouldn't they? A Not necessarily. It is a matter of degree.

Q Well, having a real stroke, a person would just be down and out immediately? A Not necessarily, no.

Q And they could not sit around for a whole afternoon with a real stroke? A It is a matter of degree entirely.

Q You mean the stroke would have to be a very slight stroke to enable a person to do that? A It would have to be a very slight stroke.

Q If it was any kind of stroke a person would go down and out and be out? A If it were a pronounced condition.

Q And could not sit around and could not be taken to a doctor, it would be an extremely urgent case? A Unless it were a slight stroke.

Q And it would have to be a slight stroke for a person to sit in an armchair all the afternoon and be taken to the doctor's. A Slight at the time, but sometimes the hemorrhage continues for forty-eight hours, or possibly longer,

and the more the hemorrhage continues, the more grave the condition, the more the pressure on the brain.

Q The stroke itself would have to be very slight? A It would probably be a rupture of some small branch of the principal blood vessel.

Q Now, a stroke of that kind and rupture of a blood vessel comes very, very often from hardening of the arteries, doesn't it? A Yes.

Q In fact, a person who has hardening of the arteries always has to fear that as eventually occurring to him, does he? A That is the ultimate outcome.

Q That is one of the dreadful things that a man of that kind has to look forward to? A Yes, he has to fight against it.

Q And if a man has hardening of the arteries, aggravated by chronic kidney trouble, Bright's disease, such a thing is well nigh unavoidable? A I would not say it is unavoidable; possible.

Q No, not unavoidable, but it is very probable? A I think we can say probable.

Q Very probable? A I will say probable.

Q You would not say very? A No.

Q It is a common occurrence, isn't it, in a case of that kind? A Yes.

Q In your experience, as a practicing physician, you have them very often? A We do.

Q And there is one hundred and one causes that may cause that condition to become acute and lead to such an event? A Lead to hardening?

Q Lead to an unavoidable stroke? A Yes.

Q Did you advise Mrs. Oehler that she could take that automobile ride to Wilkes-Barre? A I did not advise her to take it.

Q Did you advise against it? A No, I did not advise against it.

Q Did you say that she ought to take it? A I said that I thought under certain conditions that it would not do her any harm, that is, to go slowly and keep away from the main traffic and have no exciting conditions, or as much as could be avoided. It might do her good to get away, change of scene, and so forth.

Re-direct examination by Mr. Henderson.

Q Can you tell us whether in this particular case the hemorrhage did continue and did grow more severe after the stroke occurred? A Why, I don't think so. As I remember, the next day, when I called upon Mrs. Oehler, at her home, I found the paralysis of the arm and the leg just about the same as it appeared to be in my office the night before.

Q And how long did she stay in bed, do you remember? A I think she was in bed that time in the neighborhood of three weeks, or a little over; between three and four weeks.

Q And her condition ever since has been vacillating up and down? A Well, the leg cleared up fairly well; the arm not so well, although it cleared up to a certain degree, but she did not have the same control over it that she had over the right arm.

Q And about her eyesight, her eyesight in the left side?

Mr. Schneider: I do not think he ought to lead him.

Q Can you tell us what happened to her eyesight, if anything? A Why, to a certain extent

she lost her eyesight, that is, it was not as clear as it had been before, but that also cleared up to a certain extent, but not as good as it was before this thing happened.

Q When did you see her last? A I think it was a week ago today.

Q And what was her condition on that date? A Her condition at that time was a partial paralysis of the left arm, a partial paralysis of the left leg, and not so severe as the arm, and also quite a disturbance with her vision. Her eyesight is very poor at the present time.

Q She was in bed when you saw her last? A She was in bed and has been for some time.

Q What is the condition of her nerves? A Well, she is highly nervous at present, very easily disturbed, and wrought up with the least little thing.

Q How does that show itself? A It manifests itself by extreme excitement and by crying. Well, that is about all. Those two things. Sometimes her incoherent speech.

Q Can you say approximately how much Mrs. Oehler or Mr. Oehler has paid you for doctor's bills? A Since that, do you mean?

Q Yes. A Well, I can tell you approximately. I imagine something between four and five hundred dollars.

Re-cross examination by Mr. Schneider.

Q So she had a relapse after her return from her trip to Wilkes-Barre, didn't she? A Well, relapse—yes, she is worse, if that is what you mean, than when she went. That is what you mean by a relapse? Yes.

Motion for a Non-suit.

WILLIAM OEHLER, recalled.

Direct examination by Mr. Henderson.

Q On that trip to Wilkes-Barre, did anything at all happen to your wife? A Nothing unusual on the trip.

Q And when you arrived home, what was her condition? A All right.

PLAINTIFF RESTS.

Mr. Schneider: I move for a non-suit on the following four grounds: first, on the ground that there has been no cause of action shown either by the pleadings or by the evidence; secondly, on the ground that the injury seems to have been by threat only and that there was no physical contact and there is no cause of action under the ruling in *Ward* v. *West Jersey Railroad Company,* 65 N. J. L. 383; thirdly, on the ground that it has not been shown that the alleged injury was caused by a servant or agent of the defendant in the scope of his duty and, fourth, on the ground that it has not been shown by legal evidence that the alleged injury was caused by the alleged wrongful act.

The Court: (After argument.) I will rule that there is no fraud that would justify any changing of this agreement as indicated by the writing.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

EDWIN C. CAFFREY,
Judge.

Exhibit P. 1.

The Court: I feel I am bound by the cases of *Wiley* v. *West Jersey R. R.*, 44 N. J. L. 247, and *Migliacelo* v. *Public Service,* 130 Atl., where the Court held that the Trial Court should have directed a verdict.

Under the circumstances, I will grant the motion of the defendant for a non-suit.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

EDWIN C. CAFFREY,
Judge.

Exhibit P. 1.

Louis Bamberger, President

Felix Fuld, Vice President

L. BAMBERGER & CO.
NEWARK, NEW JERSEY

November 26, 1923

REF. Dept. of Accounts
Mrs. William Oehler,
209 Thompson Avenue,
Roselle, New Jersey.

Dear Madam:

On November 9th and 14th we wrote to you with reference to settlement of your overdue electrical appliance account.

Thus far we have not even received a reply to our communication.

We are very much surprised at your silence in this matter and we should dislike very much

Exhibit P. 2a.

at this late date to resort to other measures to enforce collection of that which is owing on this account.

We believe that it would be to your advance to call at our office to see the writer within the next five days.

Yours very truly,

L. BAMBERGER & CO.

E. A. Wieland,
B-2 Divisional Credit Manager.

Exhibit P. 2a.

(Registered Envelope)

12 cent stamp.

After 5 days return to
L. BAMBERGER & CO.
NEWARK, N. J.

Mrs. William Oehler,
209 Thompson Avenue,
Roselle, New Jersey.

REGISTERED
122827

Return Receipt Required.
(Stamped on back.)

Exhibit P. 2b.

Exhibit P. 2b.

Louis Bamberger, President

Felix Fuld, Vice President

L. BAMBERGER & CO.
NEWARK, NEW JERSEY

December 11, 1923.

REF. Dept. of Accounts
Mrs. William Oehler,
209 Thompson Avenue,
Roselle, New Jersey.

Dear Madam:

Our representative has reported conversation held with you on Monday, December 10th.

We know of no reason why we should not receive a remittance of $25.00 to bring your electrical appliance account in an up to date condition and we hereby give you due notice that unless we hear from you in a satisfactory way on or before Monday, December 17th, we shall reluctantly be obliged to refer our claim to our legal representative for collection.

Yours very truly,

L. BAMBERGER & CO.

E. A. Wieland,
Divisional Credit Manager.

B-2

OPINION OF SUPREME COURT.

Filed November 24, 1926.

NEW JERSEY SUPREME COURT.

No. 23 May Term, 1926.

FANNY OEHLER and WILLIAM OEHLER, *Plaintiffs-Appellants,* *vs.* L. BAMBERGER & Co., *Defendant-Appellee.*	*Appeal Essex Common Pleas.*

Argued May Term, 1926; decided October Term, 1926.

George A. Henderson, for plaintiffs-appellants.

Schneider & Schneider, for defendant-appellee.

Argued before the Chief Justice, Trenchard and Minturn, *JJ.:*

PER CURIAM:

The trial court directed a non-suit upon the following facts: A salesman of the defendant company visited the residence of the plaintiff for the purpose of selling to Mrs. Oehler a vacuum cleaner. She refused to purchase it, but he left it with her and promised to return and take it away. Some four or five months later he returned and instead of removing it, demanded payment for it, which Mrs. Oehler refused. The agent in his persistence threatened her arrest if she did not pay the purchase price. In this situation Mrs. Oehler became so frightened

that she was stricken with an attack of apoplexy, which she alleges was the direct and proximate result of the agent's conduct, and for that personal injury she with her husband brought this suit to recover damages from the agent's principal.

We think the ruling of the trial court was legally correct. The physical ailment which may result from mental worry in such situation is not comprehended within the settled rule of damages which limits the liability of a tort feasor to such damages as may be anticipated as the natural and proximate consequence of the tort. A threat of the character alleged, where the tort feasor is not in possession of knowledge which would lead him to reasonably anticipate that the person involved is other than normal, cannot be made the basis for abnormal damages such as are alleged here.

Justice v. *P. R. R. Co.*, 92 N. J. L. 257.

The judgment appealed from will therefore be affirmed.

RULE OF AFFIRMANCE.

NEW JERSEY SUPREME COURT.

FANNY OEHLER and WILLIAM OEHLER, *Plaintiffs-Appellants,* *vs.* L. BAMBERGER & COMPANY, a corporation, *Defendant-Appellee.*	*Action at Law.* *On Appeal from Essex County Common Pleas.* *Rule of Affirmance.*

This case having been duly argued at the May term, 1926, of this Court by George A. Henderson and Harry Kalisch, of counsel for the plaintiffs-appellants, and Jacob Schneider, of counsel for the defendant-appellee, and the Court having considered the same and finding no error in the record or proceedings in the Essex County Court of Common Pleas, it is thereupon,

ORDERED AND ADJUDGED that the judgment of the Essex County Court of Common Pleas, removed by the appellee in this case, be affirmed with costs, and it is further

ORDERED that the record be remitted to the Essex County Court of Common Pleas to be proceeded with in accordance with this judgment and the practice of said Court.

On motion of

SCHNEIDER & SCHNEIDER,
Attorneys of Defendant-Appellee.

NOTICE AND GROUNDS OF APPEAL.

NEW JERSEY SUPREME COURT.

FANNY OEHLER and WILLIAM OEHLER, *Plaintiffs-Appellants,* *vs.* L. BAMBERGER & Co., *Defendant-Appellee.*	*Notice of Appeal.*

To Schneider & Schneider, attorneys of defendant.

SIR:

TAKE NOTICE that the plaintiffs-appellants appeal to the New Jersey Court of Errors and Appeals from the whole of the judgment entered in this cause on the following grounds:

1. That the Supreme Court erred in refusing to set-aside and reverse the judgment of non-suit entered in the Essex County Common Pleas Court.

2. The Supreme Court erred in affirming the judgment of the Essex County Court of Common Pleas.

GEORGE HENDERSON,
Attorney of Plaintiffs-Appellants.

Service of a copy of the within notice of appeal is hereby acknowledged this 6th day of December, 1926.

SCHNEIDER & SCHNEIDER,
Attys. of Defendant-Appellee.

Arthur W. Cross, Law Printer, 55-57 Lafayette Street, Newark, N. J.

New Jersey Court of Errors and Appeals

FANNIE OEHLER AND WILLIAM OEHLER, *Plaintiffs-Appellants,* *vs.* L. BAMBERGER & Co., a Corp., *Defendant-Appellee.*	*Action at Law.* *On Appeal from Supreme Court.*

BRIEF OF PLAINTIFFS-APPELLANTS.

Statement.

Sometime in the summer of 1923, the exact date does not appear in the evidence, one of defendant's salesmen called at plaintiff's home, 269 Thompson avenue, Roselle, N. J., to sell her a vacuum cleaner, and after an unsuccessful effort to induce her to buy, he asked plaintiff, Fannie Oehler, to permit him to leave the vacuum cleaner with her that night, which she consented to do, at the same time saying to him, "Remember, I am not buying it," to which he replied, "No, you are not buying it." See p. 13, l. 30.

Subsequently plaintiff telephoned defendant several times to come and get the vacuum cleaner (see p. 34 and p. 52).

On November 26, 1923, defendant wrote the following letter to plaintiff (see Exhibit P. 1, p. 78):

Louis Bamberger, President,
Felix Fuld, Vice-President.
L. BAMBERGER & CO.
Newark, New Jersey.
November 26, 1923.

REF. Dept. of Accounts.

Mrs. William Oehler,
209 Thompson Avenue,
Roselle, New Jersey.

Dear Madam:

On November 9th and 14th we wrote to you with reference to settlement of your overdue electrical appliance account.

Thus far we have not even received a reply to our communication.

We are very much surprised at your silence in this matter and we should dislike very much at this late date *to resort to other measures to enforce collection* of that which is owing on this account.

We believe that it would be to your advance to call at our office to see the writer within the next five days.

Yours very truly,
L. BAMBERGER & CO.,
E. A. WIELAND,
Divisional Credit Manager.

On December 10, 1923, one of defendant's employees called at plaintiff's home (see p. 47, p. 42 and p. 43), and the following conversation ensued:

"Q When this man that called here on December 10, 1923; when he came here, as you say, did he ring the bell or knock at the door? A He rang the bell.

Q Were you alone in the house? A Yes, at that time.

Q About what time was it? A Eleven o'clock in the morning.

Q And you went to the door? A Yes.

Q And did any conversation occur at the door? A I went to the door, and he said, 'Bamberger's,' and I said, 'I am awful glad

you came. I will go up and get it; come in and sit down.' I wanted to go to the attic and get the vaccum cleaner, and he said, 'Oh, no, it is not necessary,' and I said, 'I don't intend to pay for it,' and when I said, 'I don't intend to pay for it—'

Q Tell us what occurred between you and him during the whole time he was here? A I told him to come in and sit down, and he said, 'I came to collect for the vacuum cleaner,' and I said, 'I don't intend to pay for it, because I got my taxes to pay and I cannot pay for it,' and he got real mad, and he said, '*I will turn Mr. Oehler in to the company and have you arrested.*'

Q Pointing his index finger at you? A The other one.

Q The one next to the thumb? (The witness makes a motion of some kind, pointing with the index finger.)

Q What else? A I felt a tingling all through me, and I said, 'Oh, I feel bad. I want to get a drink of water,' and I got up and got a drink and felt it all through me on one side, and it was on one side more than the other, and I went out to the kitchen and he went after me."

As a result of this threat the plaintiff, Fannie Oehler, suffered a stroke of apoplexy. She became paralyzed in her left arm and leg; her arm became almost totally useless; her left leg she had some slight control over. Plaintiff's condition while it has improved somewhat leaves her with a partial paralysis of the left arm and left leg and impairment of eyesight. Suit was instituted by the plaintiff against the defendant, L. Bamberger & Co., and the case was tried October 21, 1925, and resulted in a non-suit upon the ground that the injury was by threat only and that there was no physical contact; that it did not appear that the alleged injury was caused by the servant of the defendant in the scope of his duty; and that it was not shown

that the alleged injury was caused by the alleged wrongful act.

The Court Erred in Granting a Non-suit.

The four grounds urged by the defendant in support of his motion for a non-suit were:

1. There was no cause of action shown by the pleadings or the evidence.

2. The injury was by threat alone; there was no physical contact and there is no cause of action under the ruling in *Ward* v. *West Jersey Railway Co.*, 65 N. J. L. 383.

3. It was not shown that the alleged injury was caused by a servant of the defendant in the scope of his duty.

4. It was not shown by the legal evidence that the alleged injury was caused by the alleged wrongful act.

A discussion of Point 1 will also dispose of Point 2. In *Corpus Juris,* Vol. 17, pp. 839-840, appears the following:

> "The rule allowing a recovery for mental suffering alone in cases of wilful tort will it has been held permit a recovery for injury following from fright alone, caused by the *wanton* and *wilful acts of defendant.*"

On page 831 same Volume of *Corpus Juris,* appears the following:

> "The general rule supported by the weight of authority is that mental pain and suffering will not alone constitute a sufficient basis for the recovery of substantial damages. Certain exceptions to this rule are recognized in actions for breach of contract of marriage and certain cases of *wilful wrong,* especially those affecting the *liberty of personal security,* etc."

In *Wilkinson* v. *Downton* (1897), Q. B. p. 57, the facts and the opinion of the Court were as follows:

> On April 9, 1896, Thomas Wilkinson, the husband of the plaintiff, went to a race-meeting, and on the evening of the same day the defendant came to the plaintiff's house and represented to her that her husband, while returning in a wagonette with some friends from the races, had met with an accident and had both his legs broken, that he was lying at The Elms public house at Leytonstone, and had desired the defendant to request the plaintiff to go at once with a cab and some pillows to fetch him home. These statements were false. They were meant by the defendant to be believed to be true, and the plaintiff so believed them, with the result that she became seriously ill from a shock to her nervous system. She also on the faith of the defendant's statement incurred a small expense for railway fares of persons whom she sent to Leytonstone to see after her husband. The jury assessed the expense of the railway fares at 1s. 10 1/2d., and the damages for the injury caused by the nervous shock at 100£.
>
> It was contended on behalf of the defendant that so far as the damage caused to the plaintiff by nervous shock was concerned the action could not be supported.
>
> Wright, *J.* In this case the defendant, in the execution of what he seems to have regarded as a practical joke, represented to the plaintiff that he was charged by her husband with a message to her to the effect that her husband was smashed up in an accident, and was lying at The Elms at Leytonstone with both legs broken, and that she was to go at once in a cab with two pillows to fetch him home. All this was false. The effect of the statement on the plaintiff was a violent shock to her nervous system, producing vomiting and other more serious and permanent physical consequences at one time threatening her reason, and entailing

weeks of suffering and incapacity to her as well as expense to her husband for medical attendance. These consequences were not in any way the result of previous ill-health or weakness of constitution; nor was there any evidence of predisposition to nervous shock or any other idiosyncrasy.

In addition to these matters of substance there is a small claim for 1s. 10 1/2d. for the cost of railway fares of persons sent by the plaintiff to Leytonstone in obedience to the pretended message. As to this 1s. 10 1/2d. expended in railway fares on the faith of the defendant's statement, I think the case is clearly within the decision in Pasley *v.* Freeman. (1) The statement was a misrepresentation intended to be acted on to the damage of the plaintiff.

The real question is as to the 100£., the greatest part of which is given as compensation, for the female plaintiff's illness and suffering. It was argued for her that she is entitled to recover this as being damage caused by fraud, and therefore within the doctrine established by Pasley *v.* Freeman (1) and Langridge *v.* Levy (2) I am not sure that this would not be an extension of that doctrine, the real ground of which appears to be that a person who makes a false statement intended to be acted on must make good the damage naturally resulting from its being acted on. Here there is no injuria of that kind. *I think, however, that the verdict may be supported upon another ground. The defendant has, as I assume for the moment, wilfully done an act calculated to cause physical harm to the plaintiff—that is to say, to infringe her legal right to personal safety, and has in fact thereby caused physical harm to her. That proposition without more appears to me to state a good cause of action, there being no justification alleged for the act.* This wilful injuria is in law malicious, although no malicious purpose to cause the harm which was caused

nor any motive of spite is imputed to the defendant.

It remains to consider whether the assumptions involved in the proposition are made out. One question is whether the defendant's act was so plainly calculated to produce some effect of the kind which was produced that an intention to produce it ought to be imputed to the defendant, regard being had to the fact that the effect was produced on a person proved to be in an ordinary state of health and mind. I think that it was. It is difficult to imagine that such a statement, made suddenly and with apparent seriousness, could fail to produce grave effects under the circumstances upon any but an exceptionally indifferent person, and therefore an intention to produce such an effect must be imputed, *and it is no answer in law to say that more harm was done than was anticipated, for that is commonly the case with all wrongs.* The other question is whether the effect was, to use the ordinary phrase, too remote to be in law regarded as a consequence for which the defendant is answerable. Apart from authority, I should give the same answer and on the same ground as the last question, and say that it was not too remote. Whether, as the majority of the House of Lords thought in Lynch *v.* Knight (1), the criterion is in asking what would be the natural effect on reasonable persons, or whether, as Lord Wensleydale thought (2), the possible infirmities of human nature ought to be recognized, it seems to me that the connection between the cause and the effect is sufficiently close and complete. It is, however, necessary to consider two authorities which are supposed to have laid down that illness through mental shock is a too remote or unnatural consequence of an injuria to entitle the plaintiff to recover in a case where damage is a necessary part of the cause of action. One is the case of Victorian Railways Commissioners *v.* Coultas (1), where it was held

in the Privy Council that illness which was the effect of shock caused by fright was too remote a consequence of a negligent act which caused the fright, there being no physical harm immediately caused. That decision was treated in the Court of Appeal in Pugh *v.* London, Brighton and South Coast Ry. Co. (2) as open to question. It is inconsistent with a decision in the Court of Appeal in Ireland: see Bell *v.* Great Northern Ry. Co. of Ireland (3), where the Irish Exchequer Division refused to follow it; and it has been disapproved in the Supreme Court of New York: see Pollock on Torts, 4th ed. p. 47 (n). (4) *Nor is it altogether in point, for there was not in that case any element of wilful wrong;* nor perhaps was the illness so direct and natural a consequence of the defendant's conduct as in this case. On these grounds it seems to me that the case of Victorian Railways Commissioners *v.* Coultas (1) is not an authority on which this case ought to be decided.

A more serious difficulty is the decision in Allsop *v.* Allsop (5), which was approved by the House of Lords in Lynch *v.* Knight. (6) In that case it was held by Pollock, *C. B.*, Martin, Bramwell, and Wilde, *B. B.*, that illness caused by a slanderous imputation of unchastity in the case of a married woman did not constitute such special damage as would sustain an action for such a slander. That case, however, appears to have been decided on the ground that in all the innumerable actions for slander there were no precedents for alleging illness to be sufficient special damage, and that it would be of evil consequence to treat it as sufficient, because such a rule might lead to an infinity or trumpery or groundless actions. Neither of these reasons is applicable to the present case. Nor could such a rule be adopted as of general application without results which it would be difficult or impossible to defend. Suppose that a person is in a precarious and

dangerous condition, and another person tells him that his physician has said that he has but a day to live. In such a case, if death ensued from the shock caused by the false statement, I cannot doubt that at this day the case might be one of criminal homicide, or that if a serious aggravation of illness ensued damages might be recovered. I think, however, that it must be admitted that the present case is without precedent. Some English decisions—such as Jones *v.* Boyce (1); Wilkins *v.* Day (2); Harris *v.* Mobbs (3)—are cited in Beven on Negligence as inconsistent with the decision in Victorian Railways Commissioners *v.* Coultas. (4) But I think that those cases are to be explained on a different ground, namely, that the damage which immediately resulted from the act of the passenger or of the horse was really the result, not of that act, but of a fright which rendered that act involuntary, and which therefore ought to be regarded as itself the direct and immediate cause of the damage. In Smith *v.* Johnson & Co. (5), decided in January last, Bruce, *J.*, and I held that where a man was killed in the sight of the plaintiff by the defendant's negligence, and the plaintiff became ill, not from the shock from fear of harm to himself, but from the shock of seeing another person killed, this harm was too remote a consequence of the negligence. But that was a very different case from the present.

There must be judgment for the plaintiff for 100£. 1s. 10 1/2.

Judgment for plaintiff.

In *Jeppsen* v. *Jensen,* a much-cited Utah case, 155 Pacific Reporter, page 429, the following facts appeared: The defendant came to the home of the plaintiff at night and cursed and abused plaintiff's husband and drew a pistol from his pocket and pointed the same over and across plaintiff's shoulder and threatened to shoot and kill her husband. By reason of the

wilful, wanton and malicious conduct of said defendant plaintiff became greatly frightened and terrified and was attacked by a nervous chill and her nervous system so gave way that she became prostrated and was confined to her bed, etc.

Defendant's counsel contended that in as much as the alleged injuries were caused from terror or fright alone without bodily contact, the case came within the rule that no recovery is permitted where the alleged injuries are caused alone by terror or fright, whereas plaintiff contended that the case came within the rule of wilful or wanton and intentional wrongdoing committed by the wrongdoer and that the authorities permit a recovery although the injuries complained of were the result of fright or terror alone. In disposing of this phase of the case the Court said on page 430:

> "In the case of Brownback *v.* Frailey, 78 Ill. App. 262, the allegations of the complaint were substantially the same as in the case at bar. The only difference between the complaint in that case and the one before us is that the alleged assault and threats in that case were directed against the plaintiff although her husband who was absent seems to have been the inciting cause thereof the same as here. We can see no legal distinction from the standpoint of civil redress between making an assault upon the plaintiff and in making one in her presence upon her husband."

and on page 431 the Court in that case said:

> "We are of the opinion therefore that the acts described in the complaint are such as bring this case clearly within the rule that damages may be recovered for injuries to health or for shock to the nervous system, although caused by terror or fright alone, and where there was no actual bodily

injury inflicted upon the injured person and none such intended by the wrongdoer. Such acts cannot be considered as merely ordinary negligent acts for which no recovery, from fright alone is as a general rule permitted. Counsel for defendant refer us to the following cases in which it is held that a recovery is not permitted for fright alone without some bodily or physical injury either direct or indirect such as miscarriage of a pregnant woman, etc." (Here follows a long list of citations.)

The Court then continues.

"*Every one of the foregoing cases was determined upon the theory that the acts complained of constituted merely acts of ordinary negligence and hence a recovery was denied.* We are of the opinion therefore that the complaint states a cause of action and that the Court erred in sustaining the defendant's motion for non-suit."

In the case of *Dunn* v. *Western Union Tel. Co.*, 59 Southeastern Rep., on page 191, the Court says:

"This arbitrary rule is generally applied only to those cases where the injury is the result of mere neglect. The leading case of Chapman *v.* Western Union Tel. Co., 15 Southeastern 901, as well as the cases which have followed it puts this state in line with those that hold that in actions on account of wrongs merely negligent mental suffering unaccompanied by other injury cannot be the basis of a recovery. Those Courts however who assert this doctrine even most strenuously, do not extend the application to *those intentional injuries of which insult, humiliation and mental suffering are the natural consequences.* As Allen, *J.*, in the Spade case, 47 Northeastern Rep., p. 88, says, "*It is hardly necessary to add that this decision does not reach those classes of actions where an intention to cause mental distress or to hurt the feelings is shown or is reasonably to be inferred.*"

The case of *Ward* v. *West Jersey Railroad Co.*, 65 N. J. L. 383, cited by the defendant on his motion for a non-suit, is without doubt correctly decided but that was a case of simple negligence and should not be confounded with the principle contended for in the case at bar.

That there has been a departure from the earlier cases on the question of liability for damages for injuries resulting from nervous shock, fright, etc., no one who has read the recent decisions can doubt. See Vol. II American Negligence Reports, p. 250.

In Waton on Personal Injuries the learned author in speaking upon the question as to the right to recover damages for nervous shock alone says:

> "The preferable rule on this subject is, in our opinion, that if a nervous shock is a natural and proximate consequence of a negligent act, and physical injuries result directly from the mental disturbance, there should be a recovery for the anguish of mind and its consequent physical ills, irrespective of contemporaneous bodily hurt. And this doctrine is by no means unsupported by authority." Citing among other cases, the following:

R. R. Co. v. *Lockhart,* 79 Ala. 315; *Sloane* v. *So. Cal. R. Co.,* 111 Cal. 683, 8 Am. Neg. Cas. 76; *Smith* v. *Overby,* 30 Ga. 241; *Purcell* v. *St. Paul City R. Co.,* 48 Minn. 134; *Mack* v. *South Bound R. Co.,* (S. C.) 29 E. Rep. 905; *Wells* v. *Fuller,* 13 Tex. Civ. App. 610; *McKeon* v. *Chicago, etc. R. Co.,* 94 Wis. 477, 7 Am. Neg. Cas. 290.

The early leading English case upon the subject was *Victoria Railway Com'rs* v. *Coultas,* L. R. 13 App. Cas. 222, in which the gate keeper of a railway company, had negligently invited the plaintiffs to drive over a level crossing when

it was dangerous to do so, and the jury although an actual collision was avoided nevertheless assessed damages for physical and mental injuries occasioned by the fright; it was held that the verdict could not be sustained and that judgment must be entered for defendant because damages for a nervous shock or mental injury caused by fright at an impending collision are too remote. This case is cited and relied upon by Gummere, *C. J.*, in a Supreme Court opinion in *Ward* v. *West Jersey & Seashore R. R. Co.*, 65 Law p. 385.

The Coultas case, however, has not been followed in England. See *Dulieu* v. *White & Sons* (Kings Bench Division June, 1901), 70 L. J. K. B. Div. 837, in which it was held that damages for injuries resulting from a nervous shock caused by fright may be recovered in an action for negligent driving although there has been no actual physical impact upon the plaintiff's person. In that case Justice Kennedy criticised and disapproved of the Coultas case in the following language:

> "A judgment of the Privy Council ought, of course, to be treated by this Court as entitled to very great weight indeed; but it is not binding upon us, and in venturing most respectfully not to follow it in the present case, I am fortified by the fact that its correctness was treated by Lord Esher, *M. R.*, in his judgment in Pugh *v.* London, Brighton & South Coast R'y (1896) 65 L. J. Q. B. 521, 2 Q. B. 248 (1896) as open to question; that it was disapproved by the Exchequer Division in Ireland in Bell *v.* Great Northern R'y Co. of Ireland 26 L. R. Ir. 428, where, in the course of his judgment Chief Baron Palles gave a reasoned criticism of the Privy Council judgment, which, with all respect I entirely adopt; and lastly by the fact that I find that the judg-

> ment has been unfavorably reviewed by legal authors of recognized weight, such as Mr. Sedgwick, Sir Frederick Pollock, and Mr. Beven. Why, I venture to ask, is the accompaniment of physical injury essential, as, if I read aright the passage which I have quoted, the Privy Council judgment asserts it to be? For my own part I would not like to assume it to be scientifically true that a nervous shock which causes serious bodily illness is not actually accompanied by physical injury, or although it may be impossible, or at least difficult, to detect the injury at the time in the living subject. I should not be surprised if the surgeon or the physiologist told us that nervous shock is in itself truly an affection of the physical organism."

The Coultas case having thus been discredited as an authority, the leading New Jersey case *Ward* v. *West Jersey & Seashore R. R. Co., supra,* loses one of its main supports.

The foregoing observations and citations have reference only to cases of ordinary negligence; we, of course, insist that the case *sub jud.* being one of wilful *injury,* we are not met by any of the objections urged in ordinary negligent cases. It is our contention that the stroke of apoplexy suffered by the plaintiff was an injury resulting from fright for which damages may be recovered. See Corpus Juris, Vol. 17, p. 839, in which the following appears:

> "The rule allowing a recovery for mental suffering alone, in cases of willful tort will, it has been held, permit a recovery for injury flowing from fright alone caused by the wanton and willful acts of defendant."

And here I wish to stress the point that the gravamen of the present suit is "*malice.*" Referring again to the case of *Wilkinson* v. *Down-*

ton, supra, the gist of that action was malice. Quoting from the opinion the Court said:

> "This *willful* injuria is in law malicious although no malicious purpose to cause the harm which was caused nor any motive of spite is imputed to the defendant."

Certainly if what the defendant told the plaintiff in that case had been true and he actually had been told by plaintiff's husband to report the accident to plaintiff defendant could not be held responsible for the result of conveying such news to plaintiff however distressing it may have been. It is, therefore, contended that in that case it was the malice which the law imputed to the defendant which was the basis of the cause of action.

The Supreme Court Decision Discussed.

The Supreme Court in the case *sub jud.* absolutely failed to decide the question presented to it. The opinion says that "The physical ailment which may result from mental worry in such a situation is not comprehended within the settled rule of damages which limits the liability of a tort feasor to such damages as may be anticipated as the natural and proximate consequences of the tort. A threat of the character alleged where the tort feasor is not in possession of knowledge which would lead him to reasonably anticipate that the person involved is other than normal cannot be made the basis for abnormal damages such as are alleged here."

This opinion suggests a new test for determining whether a right of action exists or not. It says "that the liability of the tort feasor is limited to such damages as may be anticipated as the natural and proximate consequences of the tort." This rule of law in so far as it relates to the

subject of damages may be unobjectionable. But the proceedings in the Supreme Court did not bring up for review the question of damages or the elements that enter into the subject; it was an appeal from a judgment of non-suit which judgment said that the plaintiff had no right of action whatever; that there was no invasion of her right. This judgment of non-suit the Supreme Court attempts to justify by holding that since the physical ailment which resulted from mental worry is not comprehended within the settled rule of damages, that therefore, the plaintiff has suffered no invasion of her right. If the appeal to the Supreme Court had been on a rule to show cause why the verdict should not be set aside because the damages were excessive or inadequate then the rule invoked by that Court might have been properly applied, but not to determine whether a right of action existed.

There are many cases where it is impossible to prove any damages and yet judgments are recovered for the invasion of the right. In Cooley on Torts, 2nd Edition, p. 67, the distinction between the violation of a right and the damages flowing therefrom is pointed out:

> "Although damages is a necessary element in an actionable wrong it is sometimes damages merely implied or presumed; not damages shown. There are many cases in which in point of fact a showing of pecuniary damage is impossible and some where it would be easy to show that none had been sustained, in which nevertheless the law adjudges that a tort has been committed."

and on pages 68 and 69 in the same volume appears the following:

> "The ground of liability is that from every distinct invasion of right some damage is presumed; and the law, therefore, makes some award though no damages are

proven and none are susceptible of proof. If the reason for this is sought for, we are not left in perplexity or doubt. The method chosen for the protection of rights being an action for the recovery of damages for their invasion, it is manifest that when a party is convicted of the invasion, the conviction must be followed by some consequences disagreeable to himself, or it could not possibly operate as a restraint. As damages are the only penalty which the law provides for the commission of a tort, it is obvious that a recovery of these must be allowed in every case in which a wrong is committed, or those wrongs for which no damages are awarded will be committed with impunity. Subject every man to the necessity of pointing out in what manner a trespass had caused him a pecuniary injury, and for many of the most vexatious there might be no redress and for the rights invaded no protection. Under such a rule the eavesdropper might with impunity invade the privacy of one's home, by listening at key-holes and playing the spy at windows, since acts like these, however annoying and reprehensible, could not in any manner tend to impoverish the family, or deprive them of food, or drink, or clothing, or diminish their current revenue."

Lord Holt has endeavored to express the legal foundation of recovery in these cases as follows: "The damage is not merely pecuniary, for if a man gets a cuff on the ear from another, though it cost him nothing, no, not so much as a little diachylon, yet he shall have his action, for it is a personal damage."

The idea here is, that it is a damage in contemplation of law though followed by neither loss nor pain, because the man's right to personal security has been invaded. As is, perhaps better expressed by Buller, *J.*, in another case, an action may be supported because "the right has been injured." And here there is no room for the application of the oft quoted but little understood

> maxim *de minimis non curat lex.* It is a maxim that may usefully be applied where a party demands that which is insignificant for mere purposes of vexation; but it "is not an applicable answer to an action for violating a clear right."

In *Webb* v. *Portland Mfg. Co.*, 3 Sum. 192, Cooley on Tort, 2nd Edition footnote, p. 71, Mr. Justice Story says as follows:

> "From my earliest reading, I have considered it laid up among the very elements of the common law, that whenever there is a wrong, there is a remedy to redress it; and that every injury imports damage in the nature of it, and if no other injury is established, the party injured is entitled to a verdict for nominal damages. *A fortiori* this doctrine applies where there is not only a violation of a right of the plaintiff, but the act of the defendant, if continued, may become the foundation, by lapse of time, of an adverse right in the defendant; for then it assumes the character, not merely of a violation of right, tending to diminish its value, but it goes to the absolute destruction and extinguishment of it. Under such circumstances, unless the party injured can protect his right from such violation by an action, it is plain that it may be lost or destroyed without any possible remedial redress. In my judgment the common law countenances no such inconsistency, not to call it by a stronger name. *Actual perceptible* damage is not indispensable as the foundation of an action. The law tolerates no further inquiry than whether there has been the *violation of a right.* If so, the party injured is entitled to maintain his action for nominal damages, in vindication of his right, if no other damages are fit and proper to remunerate him."

Therefore, to support, a cause of action plaintiff was only required to show an invasion of a right and if the stroke of apoplexy which the

plaintiff suffered was an improper element of damage it did not warrant a granting of a nonsuit, for it only had to do with the subject of damages. Certainly the plaintiff suffered some mental distress as a result of and at the time of the threat such as fright, worry, etc., and for such damages defendant could not disclaim responsibility as they were intentionally inflicted by the defendant for the very purpose of frightening the plaintiff into the payment of a disputed claim. We, therefore, maintain that the Supreme Court did not meet the question raised on the appeal and its opinion should have no weight in this Court.

POINT II.

It is urged by the defendant that the plaintiff did not prove that the act of the defendant's agent was within the scope of his employment or in the course of the master's business. Upon that subject I wish to quote from Law of Negligence by Wharton on p. 162, par. 171.

> "It makes no difference that the negligence was in direct disobedience to Master's private instructions. * * * Where the servant is acting within the scope of his employment, the master is responsible, even for an act 'the very reverse of that which the servant was actually directed to do.' Thus, in an English case, the evidence was that a servant, employed by the defendants to drive their ominbus, drew his omnibus across the road in front of a rival omnibus of the plaintiff to block the latter, and in so doing collided with and injured the plaintiff's omnibus. It was proved that the defendants' servant had express directions from his masters not to obstruct other omnibuses; and he proved that he did it on purpose, and to serve the plaintiff's driver as the latter had served him. On the trial

of the case the judge (Martin, *B.*) directed the jury that if the defendants' driver acted *carelessly, recklessly, wantonly, or improperly,* but in the course of his employment, and in doing that which he believed to be for the interest of the defendants, then the defendants were responsible for the act of their servant, and that the instructions given by the defendants to the driver not to obstruct other omnibuses, if he did not observe them, were immaterial as to the question of the master's liability; but that if the true character of the driver's act was, that it was an act of his own, and in order to effect a purpose of his own, then the defendants were not responsible. Upon this direction being expected to, the exchequer chamber held that it was correct. Willes, *J.*, in giving his judgment, said: 'It appears clearly to me that this was (and it was treated by my brother Martin as) a case of improper driving, and not a case in which the servant did anything altogether inconsistent with the discharge of his duty to his master, and out of the course of his employment, a fact upon which it appears to me that the case turns. This omnibus of the defendants was driven in before the omnibus of the plaintiff. Now, of course, one may say, that it is no part of the duty of a servant to obstruct another omnibus, and that in this case the servant had distinct orders not to obstruct the other omnibus. I beg to say, in my opinion, those instructions were perfectly immaterial. If they were disregarded, the law casts upon the master the liability for the acts of his servant, in the course of his employment, and the law is not so futile as to allow the master, by giving secret instructions to a servant, to set aside his liability. I hold it to be perfectly immaterial that the masters directed the servant not to do the act which he did. As well might it be said, that if a master, employing a servant, told him that he should never break the law, he might thus absolve himself from all li-

ability for any act of the servant, though in the course of the employment.' 'I am also of opinion,' said Byles, *J.*, 'that by brother Martin's direction in this case was correct.' He uses the words, 'in the course of his employment,' which, as my brother Willes has pointed out, are expressions directly justified by the decisions. His direction, as I understand it, amounts to this: that if a servant acts in the prosecution of his master's business with the intention of benefiting his master, and not to benefit or gratify himself, then the master is responsible, although it were in one sense a *wilful* act on the part of the servant. Now it is said, that this was contrary to the master's instructions. That might be said in ninety-nine cases out of a hundred, where actions are brought against the master to recover damages for the reckless driving of a servant. It is said that it was an *illegal* act. So, in almost every case of an action against the master for the negligent driving of a servant, an illegal act is imputed to the servant.''

We now beg leave to refer the Court to the evidence. On page 50 the letter and envelope marked Exhibit P. 2 was offered and received in evidence. That letter reads as follows:

Exhibit P. 2b.

Louis Bamberger, President
Felix Fuld, Vice President.
L. BAMBERGER & CO.,
Newark, New Jersey.
December 11, 1923.

REF. Dept. of Accounts.

Mrs. William Oehler,
209 Thompson Avenue,
Roselle, New Jersey.

Dear Madam:

Our representative has reported conversation held with you on Monday, December 10th.

We know of no reason why we should not receive a remittance of $25.00 to bring your electrical appliance account in an up to date condition and we hereby give you due notice that unless we hear from you in a satisfactory way on or before Monday December 17th, we shall reluctantly be obliged to refer our claim to our legal representative for collection.

Yours very truly,
L. BAMBERGER & CO.
E. A. Wieland,
Divisional Credit Manager.

This piece of evidence shows that the person who is charged with having committed the act complained of was the agent of the defendant, for the letter begins "Our representative has reported conversation held with you on Monday, December 10th," this is an admission that the person charged was the representative of the defendant, and the rest of the letter concerned the same subject matter which caused the malicious act. This also appears from a previous letter sent by the defendant to the plaintiff on November 26, 1923. It is marked Exhibit P. 1, and is to be found on page 78 of case, it reads as follows:

Exhibit P. 1.

Louis Bamberger, President,
Felix Fuld, Vice President.
L. BAMBERGER & CO.
Newark, New Jersey.

November 26, 1923.

REF. Dept. of Accounts
Mrs. William Oehler,
209 Thompson Avenue,
Roselle, New Jersey.

Dear Madam:

On November 9th and 14th we wrote to you with reference to settlement of your overdue electrical account.

Thus far we have not even received a reply to our communication.

We are very much surprised at your silence in this matter and we should dislike very much at this late date to resort to other measures to enforce collection of that which is owing on this account.

We believe that it would be to your advance to call at our office to see the writer within the next five days.

Yours very truly,
L. BAMBERGER & CO.
E. A. Wieland,
Divisional Credit Manager.

And on page 16 is the following testimony:

"Q Did he tell you he was from L. Bamberger & Company?

Mr. Schneider: I object to that because declarations of an agent are not binding on the principal.

Mr. Schneider: I withdraw that objection.

(Mr. Henderson continuing.)

A He told me L. Bamberger and Company.

Q Did he have a wagon with him? A I don't remember whether he had a wagon or not.

Mr. Schneider: I will ask that the testimony of conversations with this man, thus far given, be stricken out, on the ground that he has not been identified sufficiently to bind the defendant.

Mr. Schneider: I withdraw that objection."

It will be observed that the foregoing testimony was objected to by the defendant, but the objections were withdrawn, so the evidence remains part of the case and when considered in the light of the statement in the letter marked Exhibit P. 2, *supra,* that "Our representative has reported conversation held with you on

Monday, December 10th," that evidence shows that all the conversation had with the person charged was really a conversation with the defendant.

On page 19 it appears that the defendant renewed his objection to the testimony of the plaintiff particularly to the conversation which she had on the ground that it was incompetent, immaterial and irrelevant and not binding on the defendant in this case because it has not been established that the alleged man is our agent or servant or authorized in any way to act for us. This objection was, however, also withdrawn. From all the evidence it unquestionably appears that the person who committed the acts alleged was the agent of the defendant and was acting in the scope of his employment.

We, therefore, submit that the judgment of the Supreme Court affirming the judgment of the Court of Common Pleas should be reversed.

KALISCH & KALISCH,
Attorneys for Appellants.

HARRY KALISCH,
Of Counsel.

Arthur W. Cross, Law Printer, 55-57 Lafayette Street, Newark, N. J.

New Jersey Court of Errors and Appeals

FANNY OEHLER and WILLIAM OEHLER, *Plaintiffs-Appellants,* *vs.* L. BAMBERGER & COMPANY, a corporation, *Defendant-Appellee.*	*Action at Law.* *On Appeal from Supreme Court.*

BRIEF OF DEFENDANT-APPELLEE.

Statement of Case.

This is an appeal from a judgment of non-suit entered in the Essex County Common Pleas Court on October 21, 1925, in favor of the defendant and against both plaintiffs (see p. 10). The plaintiffs appealed from the whole of this judgment on the sole ground that the Court erroneously granted defendant's motion for said non-suit (see p. 1). The Supreme Court affirmed this judgment (see pp. 81-82) by a per curiam opinion; (see p. 83 for rule of affirmance) and an appeal was taken to this court (see p. 84).

In the complaint (pp. 3 to 6, inclusive), it is alleged that the defendant was in the business of selling, among other things, vacuum cleaners; that on or about July 19, 1923, a salesman of the defendant attempted to sell one to the plaintiff Fanny Oehler at her residence; that she refused to purchase and that he thereupon left the vacuum cleaner on a pretext, promising to return for it; that instead, the defendant sent dunning letters demanding payment for the same, which the plaintiffs refused; that on December 10, 1923, an agent visited the home of

the plaintiffs in an effort to collect payment for the article in question; that Mrs. Oehler refused to pay and that the agent thereupon, in an effort to collect this money, maliciously used the following words or words of similar import to Fanny Oehler: "Unless you pay this money, I shall go out, get a warrant, have you arrested and thrown in jail." The plaintiff then alleges (p. 5) "that the agent's threatening action and words so reacted upon and upset and frightened Fanny Oehler that she immediately was stricken with a stroke of apoplexy, as a direct and proximate result of the actions and words of the above described agent," etc. The wife sues to recover for personal injuries and the husband for disbursements, etc., and loss of services. Punitive damages are demanded.

The answer alleges that the vacuum cleaner was leased to the plaintiff Fanny Oehler, the lease being the usual method of sale on the installment plan. The defendant denies all the allegations as to the pretext and the fraud and the threats, etc., and says in effect that it was a usual sale and that when the plaintiff refused to make the payments, the defendant sought to collect the same in its usual course of business. It flatly denies any threatening words or actions.

The pertinent testimony is as follows; literal excerpts will be given on the crucial point. The plaintiff Fanny Oehler states (p. 13, ll. 25 to bottom) that sometime in 1923 Bamberger's man brought to her home a vacuum cleaner, that he wanted her to buy it, and that she refused on the ground that she could not afford it, that he asked permission to leave it, to which she agreed, telling him that she was not buying it, to which he agreed. On November 26 she received a letter from L. Bamberger & Company marked "Ex-

hibit P. 1" (see p. 78), in which they called her attention to her overdue account, to the fact that she had not replied to their communication, that they were surprised at her silence, and they expressly stated that "We should dislike very much at this late date to resort to other measures to enforce collection of that which is due on this account." On December 10, 1923, the day when the injury occurred, Bamberger's man called at her home. The plaintiff's recital of the occurrence will be found on page 18, line 29, to page 20, line 16.

"Q Tell us now. A There was a rap came at the door, and a man was at the door, and he said he was after the vacuum cleaner; first he said he came to collect and I said, 'Oh, no, I don't intend to pay at all,' and I said, 'It is up in the attic and I will get it,' and he said, 'Oh, you have to keep it and pay for it,' and I said, 'Oh, no, I do not.' And I told him to come into the front room and sit down.

Q Did he come in? A Yes, and I sat by the window and he sat right there talking to me, asking wouldn't I take it, 'Don't you want to buy it, it ought to be in every house, a vacuum cleaner.'

Q Then what happened? A I said, 'No, I don't intend to buy it, I cannot afford it, I got to pay my taxes.' And he said, 'I will have Mr. Oehler turned in to the company;' and he said, 'You, I will have you arrested,'

Q Indicating with your hand how he pointed? A Yes, this way (indicating).

Q Pointing directly at you? A Yes, sir, and as soon as that happened I felt something tingling in my limbs, and I said, 'Oh, I cannot sit here,' and I went to get a drink of water, and I felt like falling all the time.

Q Did he go out, too? A Yes, I felt like stumbling.

Q Where was he? A He was right after me, he followed me.

Q To the kitchen? A Yes, and I went there and I started to cry because I felt terrible, and I turned around and started walking back and I fell here by the piano."

(Mr. Henderson continuing.)

"Q You fell at the point nearest the kitchen? A Yes (indicating), I keeled over and I was there about five or ten minutes, and then I turned around and I got ahold of the bench here and then I got up.

Q What did this man do? A He said, 'Here is a chair,' and I sat in the rocking chair, and he said, 'Well, shall I call your neighbors,' and I said, 'No, I am not in the habit of bothering any of my neighbors,' and he said, 'Well, I ain't got time to sit here all day,' and I said, 'Nobody asked you to, you can go any time you want to,' and he went out and went to the door and let himself out."

The plaintiff then sat in a chair and a neighbor, Mrs. Drake, came and helped her (p. 20); this was about 11 A. M. In the evening, she was taken by automobile to Dr. Epler (p. 22), who treated her.

On cross examination, she further testified (p. 42, l. 28 to bottom) that on December 10 Bamberger's man rang the bell, that she went to the door and said, "I am awful glad you came; I will go up and get it; go in and sit down." Her recital of the crucial part of the occurrence here is as follows (p. 43, l. 10, to p. 44, l. 32):

"Q Tell us what occurred between you and him during the whole time he was here? A I told him to come in and sit down, and he said, 'I came to collect for the vacuum cleaner,' and I said, 'I don't intend to pay for it, because I got my taxes to pay and I cannot pay for it,' and he got real mad, and he said, 'I will turn Mr. Oehler in to the company and have you arrested.'

Q Pointing his index finger at you? A The other one.

Q The one next to the thumb? (The witness makes a motion of some kind, pointing with the index finger.)

Q What else? A I felt a tingling all through me, and I said, 'Oh, I feel bad. I want to get a drink of water,' and I got up and got a drink and felt it all through me on one side, and it was on one side more than the other, and I went out to the kitchen and he went after me.

Q When he pointed his finger at you was he sitting or standing? A This chair in the front room.

Q In the rocking chair? A Yes, sir.

Q Where were you? A I was sitting by that window, this window here (indicating.)

Q At the end of the room? A At the end of the room next to the door.

Q At the southerly end of the room? A Yes, sir.

Q You were sitting at the other side of the room? A I was sitting here at the end of the room and he was sitting at the rocking chair right at the end of the pavement.

Q He was about eight feet from you? A Just about the same length as I am from you.

Q About six feet? A About.

(It is stipulated that the distance indicated is between five and six feet.)

Q He was sitting in that chair? A Yes, and I was in the other chair.

Q And that is the chair he pointed his finger at you? A Just like that (indicating.)

Q His index finger? A Yes, sir.

Q And said what? A 'I will turn it in to the company and have you arrested.'

Q And he pointed his index finger at you? A Yes, sir.

Q And sat in the chair? A Yes, and I said, as I told you, I felt a tingling and I was trembling and I went to get a drink of water, and when I came back I fell by the piano.

Q When you went out he was sitting in the chair? A He went right after me.

Q He went to help you? A He never offered to help; he never touched me at all."

On page 46, lines 14 to 20, on re-direct examination by her counsel, the following question and answer occurred:

"Q Each time, Mrs. Oehler, in describing his pointing his finger at you, you raised your voice. Did he raise his voice when he spoke to you? A That I don't remember now."

Dr. Epler testified that he was the family physician for the Oehlers and that he had treated her from December 10th (p. 62, ll. 30 to bottom). On the night of the accident he made a hurried provisional diagnosis that she had had a stroke of apoplexy (p. 63, ll. 20 to bottom). He saw her the next day at her home and made a diagnosis of arteriosclerosis, chronic interstitial nephritis and a possible stroke (p. 64), explaining that the first term meant hardening of the arteries, the second being chronic kidney ailment known as Bright's disease, a condition of long standing; the third he explained as a celebral hemorrhage, a hemorrhage in some part of the brain. Her left arm was almost totally useless and she had slight control of her left leg (p. 65, ll. 15 to 25), indicating pressure in some portion of the brain. On the same page, he said, moreover, that a person might have a hemorrhage of the brain without paralysis. He said further on page 66 that excitement or being threatened might cause a change in the blood pressure. He said further on page 67, bottom, that it might have been *possible* for her, without any excitement, to have gone for a long period without a stroke.

On cross examination (pp. 68-69), the doctor stated that arteriosclerosis is a chronic disease,

an organic disease, which is incurable, which comes on gradually, and that he had reason to believe that Mrs. Oehler had a long-standing case of arteriosclerosis. He also stated that the chronic nephritis was a gradual organic disease that Mrs. Oehler had had for a long time. On page 70, lines 15 to 25, he said that blood pressure eventually produces kidney trouble and that both troubles work in conjunction with each other. The doctor testified on page 71 that he warned Mrs. Oehler about her condition and, in fact, regulated her diet. On page 72, line 10 to bottom, he testified that he believed that on December 10th she had a slight stroke along with the uremic condition, meaning the kidney condition. As to the causes of the slight stroke, he testified as follows, on page 73, lines 1 to 15:

"Q Almost anything that happened out of the ordinary might have produced that result? A I would not say almost anything. Something might have produced it.

Q For instance, if she had some disarrangement of the stomach or indigestion, that might have caused it? A It could have done so; it is possible.

Q Almost one hundred and one things might have caused it? A I can simply say it is possible."

On page 74, lines 5 to bottom, he testifies to the causes of the injury as follows:

"Q The stroke itself would have to be very slight? A It would probably be a rupture of some small branch of the principal blood vessel.

Q Now, a stroke of that kind and rupture of a blood vessel comes very, very often from hardening of the arteries, doesn't it? A Yes.

Q In fact, a person who has hardening of the arteries always has to fear that as eventually occurring to him, does he? A That is the ultimate outcome.

Q That is one of the dreadful things that a man of that kind has to look forward to? A Yes, he has to fight against it.

Q And if a man has hardening of the arteries, aggravated by chronic kidney trouble, Bright's disease, such a thing is well nigh unavoidable? A I would not say it is unavoidable; possible.

Q No, not unavoidable, but is very probable? A I think we can say probable.

Q Very probable? A I will say probable.

Q You would not say very? A No.

Q It is a common occurrence, isn't it, in a case of that kind? A Yes.

Q In your experience, as a practicing physician, you have them very often? A We do.

Q And there is one hundred and one causes that may cause that condition to become acute and lead to such an event? A Lead to hardening?

Q Lead to an unavoidable stroke? A Yes."

It should be noted that nowhere in his testimony does the doctor say, either definitely or indefinitely, or in any way that the actions or words of the defendant's servant were the probable or even the possible cause of the alleged stroke. No hypothetical question was put to him and neither he nor anybody else proves that the occurrence on December 10th caused the injury. As he puts it, a hundred and one things could have caused it. This will be discussed later on the point of proximate and natural cause and effect. There are no other witnesses as to the occurrence or as to the result.

At the close of the case, counsel for defendant moved for a non-suit on various grounds. In this brief, the grounds supporting the non-suit will be discussed under three heads; firstly, that

the case of the plaintiff did not disclose a legal cause of action; secondly, that there is no proof that the injuries alleged to have been suffered by the female plaintiff were the proximate and natural results of the alleged wrong-doing of the defendant's agent, and thirdly, on the ground that it was not proven that the agent of the defendant was acting within the scope of his employment.

ARGUMENT.

POINT I.

The evidence adduced by the plaintiffs does not constitute a legal cause of action, either under the common law or by statute.

The gist of the action is that the defendant's agent, while seated in a chair at least five feet distant from the plaintiff, who likewise was seated in a chair, shook his index finger at her and said (and there is no evidence that he raised his voice above its natural tone) that he would turn her husband in to the company (whatever that may mean) and have her arrested.

If the complaint were a declaration drawn in accordance with the old forms of pleading in this State, it would name the cause of action or use such stereotyped words or phrases that it could be labeled and named immediately as a certain definite action. Our Practice Act has abolished the old form of pleadings, but has not abolished the actions themselves. What cause of action, then, does the complaint in the case *sub jud.* allege?

Cooley, in his work on Torts (3d Edition, page 3) says:

> "An act or omission may be wrong in morals or it may be wrong in law. It is

scarcely necessary to say that the two things are not interchangeable. No government has undertaken to give redress whenever an act was found to be wrong, judged by the standard of strict morality; nor is it likely that any government ever will," etc.

He further says (on page 81):

"An act contemplated but not yet accomplished, although it may be ground for preventative remedies, cannot support an action as a tort. A tort supposes a wrong actually committed and thus implies a right invaded or in some manner hindered or abridged. The mere intent cannot constitute actionable matter."

On page 34, he speaks as follows:

"A threat to commit an injury is also sometimes made a criminal offense; it is not an actionable private wrong. Damages cannot be recovered for mere threatened injury. Many reasons may be assigned for distinguishing between this case and that of an assault, one of them being that a threat only promises a future injury, and usually gives ample opportunity to provide against it, while an assault must be resisted on the instant. But the principal reason, perhaps, is found in the reluctance of the law to give a cause of action for mere words. Words never constitute an assault, is a time-honored maxim. Words may be thoughtlessly spoken; they may be misunderstood; they may have indicated to the person threatened nothing but momentary spleen or anger, though when afterwards reported by witnesses they seem to express deliberate malice and purpose to injure. Even when defamation is complained of, the law is very careful to require something more than expression of anger, reproach or contempt, before it will interfere, justly considering that it is safer to allow too much liberty than to interpose too much restraint; and comparing assaults and threats, another important difference

> is to be noted. In the case of threats, as has been stated, preventative remedies are available, but against an assault there are usually none beyond what the party assaulted has in his power of physical resistance."

In the case *sub jud.*, there is no allegation in the pleadings and no proof in the testimony of an *assault* or of an *assault and battery.* Cooley, in the same work, on page 278, defines an assault as "An attempt with unlawful force to inflict bodily injury upon another, accompanied with the apparent present ability to give effect to the attempt, if not prevented." There is nothing in this case of this kind by any stretch of the imagination. In fact, the plaintiff, *Mrs. Oehler, expressly testifies that the defendant's agent never touched her.*

It is not a case of *trespass vi et armis,* as the testimony is that the agent rang the bell, was invited into the house, was never ordered out and, in fact, was present at all times with the consent and at the invitation of Mrs. Oehler.

It is not a case of *slander* as there is no allegation in the complaint to that effect and no proof.

It is not a case of *false arrest* or *malicious prosecution.* The best that can be said is that it is a threat of these acts, and this is not actionable.

Counsel for the plaintiff has attempted to invent a new action, which has no precedent either under the common or statutory law of New Jersey. In fact, this is the first case on record in this State; at least, a diligent search of the reports of our State has failed to disclose another one. Furthermore, a search of the authorities in other States has failed to disclose a precedent wherein it has been laid down that an action will lie for mere words or threats.

A case directly in point, which bases its decision on and actually quotes the above excerpts from Cooley on Torts is *Brooker* v. *Silverthorne,* 99 S. E. 350; (South Carolina Supreme, 1919).

In this case the defendant outrageously abused a telephone operator, because he could not get his connection quickly, used most abominable language to her and, in fact, said, among other things, "You are a.....liar. If I were there, I would break your.....neck." Her nervous system was shocked and wrecked and she sued for damages. The opinion cites *Rankin* v. *Sievern, etc.,* 58 S. C. 532; 36 S. E. 997, and approves its decision that *mere words would not be civilly actionable where no assault nor trespass were proven and that no action would lie for abusive and threatening language.* This case also points out that the carrier's liability for abusive language to a passenger is exceptional on account of the special and peculiar relations, obligations and duties existing between the carrier and passenger, which differ in kind and degree from almost every other legal or contractual relation since the carrier is in duty bound to protect its passengers from assault or insult by its servants and to afford them courteous and respectful treatment. The cases are, therefore, not analogous. This case uses the following language:

> "If it should be conceded that the language of defendant contained a threat, it was not of such nature or made under such circumstances as to put a person of ordinary reason and firmness in fear of bodily hurt * * * Webster defines a 'threat' as 'the expression of an intention to inflict evil or injury on another.' The law dictionaries give practically the same definition. A threat, therefore, looks to the future. As Judge Cooley says in the passage above

quoted, 'a threat only promises a future injury.' The language merits severest condemnation, but it is not civilly actionable. A diligent search has failed to discover any case or authority to the contrary, but many in support of the conclusion we have reached."

Braun v. *Craven,* 51 N. E. 657 (Illinois Supreme, 1898).

In this case, the defendant, a landlord, came into the premises of plaintiff's sister, the tenant, and in plaintiff's presence, waved his arms and shouted, "What are you doing here? If you attempt to move, I will have a constable here in five minutes. I refuse to take possession of these premises." The defendant was very close to the plaintiff, talked in a loud and angry voice, wildly gesticulating, and rushed out. The plaintiff was stricken with chorea or St. Vitus' dance, a diseased physical condition, and sued. The opinion uses the following language:

"Under the pleadings in this case, mere words and gestures are sought to be made actionable because of the nervous temperament of the plaintiff, without which such words and gestures would not be actionable. This would introduce and incorporate in law a new element of damage—a new cause of action—by which recovery might be had on an injury resulting to one of a peculiarly nervous temperament, while no injury would result to another in identically the same position. Of such a cause of action and liability for damages, a dangerous use could be made. *No recovery is authorized under the common law and no statute gives it."*

The following language is also used:

"These acts could not, in the ordinary course of things, have been reasonably anticipated to cause the diseased condition of appellant, to create in her the seriously diseased condition. Appellee might have

> reasonably anticipated that his acts would cause excitement or even fright; but fright and excitement so seldom result in a practically incurable disease that from the ordinary experience of mankind, such a result could not have been anticipated."

Rankin v. *Sievern & K. R. Co.*, 36 S. E. 997 (South Carolina Supreme, 1900).

In this case, the defendant railroad company had a gang of workmen engaged in laying tracks and putting up poles and in the course of their work came upon the land of the plaintiff without any right of way and were attempting to cut down two trees of great beauty when the plaintiff approached them and requested them not to do so, whereupon the foreman of the gang cursed the plaintiff (an old woman) threatened to strike her and to put her in the penitentiary. The opinion used the following language:

> "While the allegation of the complaint that Rutledge, the foreman of the hands, cursed the plaintiff, an old woman, ordered her to get away from there or he would put her in the penitentiary, threatened to strike her, frightened and intimidated her and otherwise maltreated her and abused her placed said Rutledge in an unenviable and contemptible position, does said complaint in any way allege an actionable act or assault against said plaintiff or injury of any kind to her person or her character, which is actionable? I think not, for the reason that the language and conduct complained of were outside of the scope and employment of Rutledge and the defendants are not responsible for any voluntary assault or trespass which Rutledge may have committed. If defendants were persons and not corporation, and had spoken and acted as the plaintiff charges against Rutledge, as their agent, plaintiff could not maintain an action against them, similar to the present action, *for the reason that curses and threats, while im-*

> *moral, are not actionable in law.* If a principal would not be liable for personally committing a certain act, he would not be liable for that act if committed by an agent."

The plaintiffs, in their brief, set out Exhibit P. 1, a letter from L. Bamberger & Company to Mrs. Oehler, dated November 26, 1923 (see page 2 of plaintiffs' brief). In their brief in the Supreme Court, they raised a hullabaloo (It was abandoned in this court) about this letter and contended that the words—*"Resort to other measures"*—in the following quotation, under the circumstances in this case, indicate clearly a wanton and wilful act on the part of the defendant.

> "We should dislike very much at this late date to resort to other measures to enforce collection of that which is owing on this account."

This letter was writen on November 26, and the defendant's agent visited Mrs. Oehler on December 10. The testimony shows that Mrs. Oehler is a person of ordinary intelligence, American, and that she has been living in this vicinity for a long time; moreover, she appears to be a person of sound mind. Moreover, she apparently was not in the slightest terrified by this letter, as she did not even mention it to the agent of the defendant when he called and, in fact, gave him almost a joyous welcome. It is very clear that the letter was not in her mind and that she did not have any fears or apprehensions on account of it; otherwise she would have mentioned it in her conversation with the agent. Furthermore, the ordinary person knows that an expression of that kind would indicate an intention to resort to law for the collection of the alleged debt. If she had been terror-stricken in any way, she had ample time to inquire about

the matter and ascertain that she could not be arrested for the debt. The plaintiffs own property; they had a bank account (p. 37, ll. 25-35); they had as an intimate friend Mr. Trimmer (p. 45, ll. 35-40), who was a Notary Public (p. 38, ll. 20-25). In fact, the testimony shows throughout that the Oehlers were not foreigners or ignorant, but the average enlightened Americans. The argument that she was terrorized by the letter and the conduct of the agent, in view of the circumstances, is far-fetched, to say the least, and would not apply to people of this type, but possibly to people with an abnormal or diseased mind, the highly imaginative type, approaching almost unsoundness of mind.

Furthermore, even if we were to assume the correctness of this contention, *still a definite tort has not been alleged or proven* and I presume it will be admitted that there is no contractual relationship between the parties, but that the plaintiff attempts to allege an action in tort.

Authorities cited by the plaintiffs in their brief in the Supreme Court do not conflict with our contention, as a reading of the references and cases will show that they apply either to cases where a definite tort has been alleged and proven or to cases where the relationship of carrier and passenger is involved. In this court, they abandoned most of these authorities excepting *Jeppsen* v. *Jensen,* 155 Pac. Rep. 429. It is interesting, however, to briefly review these authorities, as they really dove-tail with our contention.

The case of *Jeppsen* v. *Jensen,* which is referred to in plaintiffs' brief as "a much-cited Utah case" *involves most definitely and clearly the definite tort of trespass.* The complaint in

that case recites that defendant came into the house of the husband and wife unbidden, knocked at door and burst in and threatened to shoot the husband. The evidence also shows that the wife was in a delicate condition, had been confined to the house for six weeks, which the defendant knew. Moreover, the defendant remained in the house, although begged to leave, and, in fact, after leaving, tried to break in again, which was prevented by the wife fastening the latch of the door. Moreover, in this case, there was a definite *assault* against the husband. In fact, the opinion, page 430 (middle) says that "*prima facie,* the acts complained of and testified to constitute unlawful assault. We must assume that the defendant intended just what it is said he did."

Similarly, another case cited by the plaintiffs in their brief in the Supreme Court, *Watson* v. *Diltz,* 89 N. W. 1068 (Iowa 1902), when the opinion is read, sustains our above contention. In fact, it is very similar to the Utah case and *likewise involves the definite tort of trespass.* It moreover, definitely rules that the home of the husband and wife is as much the home of the wife as the husband and when a person breaks in, he is committing a trespass against her as well as against the husband. In this case, the defendant unlawfully entered the home of the Watsons; the wife followed him upstairs, where she witnessed an encounter between the defendant and her husband and became sick as the result of a fright. On page 1069, the opinion says:

> "It was an unlawful and lawless trespass on his part (meaning the defendant's) * * * nor does it matter, in our judgment, that the trespass was committed on property belonging to the husband. It was her home as well as that of her husband and her right

> to its peaceful and quiet enjoyment was equal to that of her husband, and any unlawful entry or invasion thereof, which produced physical injury to her, was a wrong for which she ought to recover."

The case of *Chapman* v. *Western Union Tel. Co.*, 15 S. E. 901 (cited in the plaintiffs' brief in the Supreme Court); is a public utility case analogous to the case involving carrier and passenger and holds that no suit will lie for grief caused by not receiving a message as to a brother's death and so not being able to be present at the funeral. *Dunn* v. *Western Union Tel. Co.*, 59 S. E., page 191 (plaintiff's brief in this court, p. 11), involves the case of a public service corporation analogous to case involving carrier and passenger and does not support plaintiff's contention at all.

Plaintiffs in their brief in the Supreme Court quote from the Spade case, 47 N. E., page 88 (Mass.), as follows:

> "It is hardly necessary to add that this decision does not reach the causes of actions where an intention to cause mental distress or to hurt the feelings is shown or is reasonably to be inferred." *On reading the opinion, we find that the quotation proceeds as follows:* "As, for example, in cases of seduction, slander, malicious prosecution or arrest or some others. Nor do we include cases of acts done with gross carelessness or recklessness, showing utter indifference to such consequences when they must have been in the actor's mind."

Reading both quotations, it can be seen that the contention raised in this brief of defendant is correct, namely, that there is no cause of action unless a definite tort is shown, that there must be what Judge Cooley calls an invasion of the legal right and not merely of the moral

right, *and that words and threats in themselves, as he says, do not constitute a cause of action.*

Priser v. *Wielendt* (62 N. Y. Supp. 890) cited in plaintiff's brief in the Supreme Court. In this case tenant's wife was sick and confined to bed. Defendants were told about it and nevertheless illegally proceeded to tear the house down and caused her death. The opinion, on page 892, says:

> *"If the act complained of was not in itself actionable, the gravity of the consequences would not make it so. In this case, however, the act of the defendants was in itself wrongful. It was a wilful and violent trespass on the plaintiff's house, for which an action will lie, and if the death of the plaintiff's wife could be clearly and directly traced to it as a natural and necessary consequence, which they might or should have reasonably anticipated, defendants are liable,* even though no actual blow was struck in the course of the destruction of the building. The defendants knew her condition and the risk to her, which was involved in their contemplated act, and it would be ridiculous to say that, without the shadow of a right, they could tear the house down from over her head with no liability for the consequences unless she chanced to be hit by a falling beam."

This case confirms our contention and furthermore holds that the injury must be the natural and necessary consequence of the unlawful act, which they might or should have contemplated. This view supports the contention to be raised under Point II.

May v. *Western Union,* 72 S. E. 1059, cited in plaintiff's brief in Supreme Court. *This case involved the definite tort of trespass.* The servants of the defendant, although warned and told about the sickness of the plaintiff, entered the house

without any right, came into her private chamber, where she lay in bed in a delicate condition, sang lewd songs, "hollered," and came in again, although warned. On page 1061, the opinion says, "Even in wilful wrong, the wrong-doer is responsible for the direct and proximate causes of his act." Furthermore, on page 1061, "The fact that defendant's servants did not commit an assault or a battery upon the plaintiff cannot change the result. They unlawfully trespassed upon their property, and if their other acts did not, in themselves, constitute an actionable wrong, the jury could at least consider them in aggravation of damages." *The trespass clearly appears to be the gist of the action.*

William v. *Underhill,* 71 N. Y. Supp. 291, cited in plaintiffs' brief in Supreme Court. *This is a definite assault case,* where the defendant assaulted a young girl; to use the language of the opinion, "Assaulted and laid violent hands on her."

Meagher v. *Driscoll,* 99 Mass. 281, plaintiffs' brief in Supreme Court. *This is a definite case of trespass quare clausum fregit.*

The above cases are all cited either in the Supreme Court brief or in the brief in this court of our opponent, but do not support plaintiffs' contention at all; in fact, the contrary is true, that they support defendant's theory as elaborated above, and as based on the quotations from Judge Cooley and the cases cited.

The plaintiffs, in their brief, (page 14) also quote from *Corpus Juris,* Volume 17. The quotation refers to the case of *Jeppsen* v. *Jensen,* the Utah case discussed above, which, as shown above, is a definite action in trespass.

If the context of this quotation is read, namely, pages 838, 839 and 840, in connection with the cases cited in the foot-notes, the more important of which have been discussed above, it will appear that the rule enunciated is as the defendant-appellee claims and as set forth above. *Even a mere reading of the text will show that the offense, if actionable, must be a definite tort and not just any kind of a morally wrong act or an act which might not appeal to our sense of justice or of what is fitting and proper.*

The plaintiffs-appellants quote at length from an English case, *Wilkinson* v. *Downton,* (See p. 5 of plaintiffs' brief). This is a case where the defendant played a practical joke on plaintiff by telling her that her husband had met with an accident in which he had broken both his legs. She became sick and was allowed to recover damages. This case may be differentiated on the ground that the plaintiff informed the defendant of an accomplished fact in such a manner that she had a perfect right to rely upon it; she naturally and reasonably would believe him. Moreover, the defendant could have foreseen that the natural and logical effect on a wife hearing such news would be to make her sick. It almost amounted to striking her down. In the instant case, the agent of the defendant is alleged to have threatened the female plaintiff with arrest for a debt. *As shown above, it would not be reasonable for her to believe this.* Moreover, the defendant's agent could not reasonably and logically apprehend that she would be stricken by a statement such as he made, as argued above.

The plaintiffs, moreover, in their brief (See pp. 12, 13 and 14) argue at length that the leading case of *Dulieu* v. *White & Sons,* (p. 13 of plaintiffs' brief) overrules the Coultas case, one of the

authorities cited in *Ward* v. *West Jersey Railroad Co.*, 65 N. J. L. 383.

In the first place, the *Ward case,* in its well considered and rather elaborate opinion, cites as authorities the leading states in this country, including Maine, Pennsylvania, New York and Massachusetts, in addition to the Coultas case.

In the second place, the *Dulieu case* can be differentiated from the instant case. This case of Dulieu *v.* White & Sons may be found in 1901 K. B. Div. No. 2, p. 669. In this case the defendant's servant negligently drove a vehicle into part of a public house and the plaintiff, who was tending bar, was so frightened that she sustained physical injuries. On page 672, the following language is used:

> "The negligent driving of defendant's servant reasonably and naturally caused a nervous or mental shock to the plaintiff by her reasonable apprehension of immediate bodily hurt."

Moreover, on page 675, the following language is used:

> "The shock, where it operates through the mind, must be shock which arises from reasonable fear of immediate personal injury to oneself."

The opinion, on page 676, moreover quotes Pollock on Torts as follows:

> "Where a wrongful negligent act of A, threatening Z with immediate bodily hurt but not causing such hurt, produces in Z a sudden terror or nervous shock, from which bodily injuries result, etc."

It can readily be seen that even these English cases contemplate a reasonable fear of immediate personal injury to the plaintiff. Certainly, in the instant case, there is no such element. This has

been discussed at length above and need not be repeated.

Moreover, New Jersey thus far has not followed these English cases, nor has the great majority of the states of this country. The *Ward case* and the *Justesen case* (discussed later in this brief) stand for the prevailing opinion.

The defendant-appellee, therefore, respectfully submits that neither the pleadings nor the proof of the plaintiffs set forth a cause of action founded either on precedent or sound reason. It would be highly dangerous to establish a new action of this kind for the same reason as is given in the case of *Mitchell* v. *Rochester Ry. Co.*, 151 N. Y. 107, in referring to cases involving mere fright without physical injury in negligence cases. This reasoning is quoted verbatim in our own case of *Ward* v. *The R. R. Co. (supra)*, on page 386:

> "If the right of recovery in this class of cases should be once established, it would only result in a flood of litigations in cases where the injury complained of may be easily feigned without detection, and where the damages must rest on mere conjecture and speculation. The difficulty which often exists in cases of alleged physical injuries in determining whether they exist and, if so, whether they were caused by the negligent act of the defendant, would not only be greatly increased, but a wide field would be opened for unrighteous or speculative claims."

POINT II.

The plaintiff did not prove that any injuries were sustained by the female plaintiff, which were the natural and proximate results of the alleged wrong-doing of the defendant's agent.

The testimony pertaining to the injuries, especially that of the only physician produced by the plaintiff, Doctor Epler, has been set forth previously in this brief, the crucial parts having been set forth verbatim. It nowhere appears in the testimony by any kind of legal proof that the stroke alleged to have been suffered by Mrs. Oehler was caused by the words of the defendant's agent. Mere proof by sequence in time is not sufficient. It is true that Mrs. Oehler herself testified that as soon as the agent uttered the alleged words, she felt a peculiar sensation, went to the kitchen for water, and immediately became sick and remained so; thusly a sequence of time between the words and the injury was proven, and it appears that the injury followed immediately upon the utterance of the words. Although the plaintiffs denied, in their testimony that Mrs. Oehler had ever been sick before and deny specifically that she had chronic arteriosclerosis and nephritis, still it appears from the testimony of the family physician, produced by the plaintiffs themselves, that Mrs. Oehler had been sufferng from these chronic, and in her case, incurable organic diseases for a long period of time, that he had, in fact, warned her of them and prescribed for the same. No hypothetical question was asked of the physician concerning the cause of the slight stroke of which he testifield; he was not even asked whether the words and actions of the defendant's agent, as described and set forth by the plaintiff, Mrs. Oehler, would probably have caused the stroke under the cir-

cumstances. Moreover, the physician did, in fact, testify that one hundred and one things could have caused the stroke to Mrs.Oehler in her then condition, afflicted as she was by those two chronic diseases; he said specifically that indigestion might have done it or some such similar cause. This is all set forth in the part of the testimony of the physician, which is quoted verbatim in this brief, and it is not necessary to repeat it here.

Therefore, at the end of the case, there was not a scintilla of legal evidence upon which the jury could have based a finding that the words and actions of the defendant's agent were the probable causes of the injury. It is elementary that the law does not deal, in this respect, with possibilities, but only with probabilities, and that there must be some legal evidence upon which the jury could base a finding of this kind; they are not allowed to conjecture or speculate and mere sequence of time, no matter how immediate, is not sufficient for them to base a finding that the words and actions were the cause and the injury the effect.

It is held in some of the cases cited above and those which we intend referring to below that in order for a plaintiff to recover from defendant for personal injury it must be proven that such injury was the proximate and natural cause flowing from the act of evil-doer, an effect that would naturally and probably flow therefrom. *And it is only necessary to picture the scene at the time of the alleged wrong-doing to see how far-fetched the contention is in this case.* The two parties, Mrs. Oehler and the defendant's agent, are seated five feet apart in arm chairs, talking naturally, and apparently in the usual tone of voice, about a debt which the defendant

claims from the plaintiff, she denying the same. She wants him to take back the vacuum cleaner and he refuses and finally is alleged to state, shaking his index finger, but without rising or making any other unusual motion, that he would turn her husband in to the company and have her arrested. And it is claimed—without legal proof however—that her subsequent ailment was caused thereby.

It is contended that if the wrong was wilful and wanton, the plaintiff can recover for all consequences, no matter how remote. This is not so, as in the cases previously cited, even where the wrong was wilful and wanton and constituted a specific tort, an actionable civil tort, the language is that the injury must be such as is natural and proximate under all the circumstances.

To repeat the quotation from *May* v. *Western Union Telegraph Co.,* 72 S. E. 1059, at page 1061: "Even in wilful wrong, the wrong-doer is responsible for the direct and proximate consequence of his act."

Justesen v. *Pennsylvania R. R. Co.,* 92 N. J. L. 257 at p. 259, 106 Atl. Rept. 137.

> "The rule is entirely settled that the damages chargeable to a wrong-doer must be shown to be the natural and proximate effects of his delinquency. The term 'Natural' imports that they are such as might reasonably have been foreseen, such as occur in an ordinary state of things; the term 'Proximate' that there must be no other culpable and efficient agency intervening between the defendant's dereliction and the loss."

Ward v. *West Jersey and Seashore R. R. Co.,* 65 N. J. L. 383.

In this case, the second paragraph of the syllabus reads as follows:

> "In the general conduct of business, and the ordinary affairs of life, although a person is bound to anticipate and guard against consequences which might be injurious to others, he has a right to assume, in the absence of knowledge to the contrary, that those who will be affected by his actions are of average strength, both of body and mind."

This case holds that there is no recovery for fright only, in a negligence case and discusses the authorities throughout the country and in England. On page 385 it asserts that the doctrine of non-liability, affirmed in the several opinions already referred to, rests upon the principle that a person is legally responsible only for the *natural* and proximate results of his negligent act. Physical suffering is not the probable or natural consequence of fright in the case of a person of ordinary physical and mental vigor; (Paragraph 2 of syllabus follows): "This would seem to apply to damages in all tort cases; at any rate, as far as requirements that the injuries should be the natural and proximate result of the wrong act."

This case is followed and elaborated upon in the following cases in New Jersey: *Porter* v. *D. L. & W. R. R. Co.*, 73 N. J. L. 405, and *Migliaccio* v. *Public Service R. R. Co.*, 130 Atl. Rep. 9. In this last-named case, the claim was that tuberculosis had been caused by the lowering of the vitality of the injured party. The Court went into a long discussion of the facts and found that the effects sought to be proven were too remote from the cause and that plaintiff, in his proof, did not eliminate many other causes that might have produced the tuberculosis. *Similarly, in the case sub jud., there was no legal*

proof at all that the apoplexy was caused by the words, and according to the testimony of Doctor Epler, there were one hundred and one causes therefor; and the rest of the causes were not reasonably eliminated by the plaintiff by proof of any kind.

In the case of *Preiser* v. *Wielondt,* 62 N. Y. Supp. 890, cited by plaintiffs in their brief in the Supreme Court, the action of the defendant, as quoted above, *was a wilful and violent trespass on the plaintiff's house, causing her death.* Even in that case (on page 892) the opinion says, *"If the death of the said wife can be clearly and directly traced to it as a natural and necessary consequence, which they might or should have reasonably anticipated, the defendants are liable." In this case, the defendants tore down a house wherein the decedent, plaintiff's intestate, was lying sick in bed, which fact the defendants knew, and of which they had been warned. And still the opinion speaks of the natural and necessary consequence as an element which must be proven before recovery. Certainly, this was a most wanton and wilful and wrongful act, and still the law requires that the injury be a natural and necessary consequence.* As stated above, the plaintiffs seem to rely on this case in their brief.

The defendant-appellee, therefore, respectfully urges that no legal injury was proven, that the injury proven was related to the act of the defendant only by a sequence of time and was not proven to have been the natural and proximate cause of the alleged act of the defendant.

POINT III.

The plaintiff did not prove that the act of the defendant's agent was within the scope of his employment or in the course of the master's business.

It is argued by the plaintiffs (see plaintiffs' brief, page 8) that the defendant ratified the agent's act because on December 11th, they sent a letter to Mrs. Oehler (see Exhibit P. 2, page 80 of State of Case) in which it was stated that the representative had reported the conversation of December 10th and in which they stated further that they would be obliged to refer their claim to their legal representative for collection unless she paid to date. This does not constitute a ratification, as it does not appear that the account given to the defendant by the agent of the occurrence between him and Mrs. Oehler on December 10th was as related by her at the trial; and there can be no inference as to this. Surely, they could not ratify a thing of which they had no knowledge. Furthermore, it was not proven that it was within the scope of the agent's duties to threaten debtors with arrest. There is nothing to show that he had this authority or that he had the indicia of the same. The Court will take judicial notice that in ordinary debt cases, the debtors cannot be arrested. It will, therefore, logically follow that collectors and similar agents of concerns like Bamberger & Company do not, in the course of their master's business, arrest people. *The power to arrest, and incidentally the power to threaten to arrest, would not, therefore, be either within their express or implied powers and any action on their part of such a kind would not be binding upon the principal.* A recent case decided in the Supreme Court in the 1924 October term is in point, the

case of *Julius Bielecki* v. *Max Hertz Leather Co.*, 3 N. J. Misc. Rep. 375.

(This case was recently affirmed in a per curiam opinion in the Court of Errors, 131 Atl. Rep. 921.)

In this case, the defendant company contracted with a window-cleaning company to have its windows cleaned. A workman of the latter fell through a window and sustained serious injuries. The plaintiff claimed that the general superintendent of the defendant company stood by and said nothing, although he heard the manager of the window-cleaning company instruct the plaintiff incorrectly as to the manner in which the window worked, thereby causing the accident. The proof was that the defendant company had imparted full knowledge previously to the window-cleaning company as to the workings of the various windows. The Court held that since the defendant company had fulfilled its duty thereby and was under no obligation to instruct the servants of the cleaning company, it was not within the scope of the superintendent's duties to so instruct; and, therefore, the defendant company would not be bound by any act of commission or omission on his part in that respect. *Similarly, in the case sub jud., it was not within the scope of the duties of the agent of L. Bamberger & Company, either express or implied, to arrest or to threaten with arrest.*

Moreover, it should be noted that under the laws of this state, the female plaintiff could not have been arrested for the debt. Knowledge of the law is imputed to persons; they are presumed to know it, especially such an ordinarily known fact. The alleged statement of the agent was, therefore, simply an idle threat, which he

had no authority to make and which would not reasonably impress anyone.

For the above reasons, it is respectfully submitted that the judgment of the Supreme Court affirming the judgment of the Essex Common Pleas should be affirmed.

SCHNEIDER & SCHNEIDER,
Attorneys of Defendant-Appellee.

JACOB SCHNEIDER,
Of Counsel.