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WITNESSES

Plaintiffs':

NEW JERSEY

Court of Errors and Appeals

NOTICE OF APPEAL

(Filed May 11, 1926)

To Walter L. Glenney, Esq.,
Attorney for Defendant.

Sir:

TAKE NOTICE that the plaintiffs appeal to the Court of Errors and Appeals from the whole of the judgment entered in this cause.

Dated, May 7th, 1926.

Respectfully,
COLLINS & CORBIN,
Attorneys of Plaintiffs.

Service acknowledged May 7, 1926.
WALTER L. GLENNEY,
Attorney of Defendant.

GROUNDS OF APPEAL

(Filed May 21, 1926)

To Walter L. Glenney, Esq.,
Attorney for Defendant-Respondent.

Sir:

TAKE NOTICE that the Plaintiff-Appellants rely on the following grounds of appeal:

The Trial Court nonsuited the plaintiffs when thereunto moved by the attorney for the defendant, whereas said motion should have been denied and the issue submitted to the jury for their decision.

Dated, May 15, 1926.

Respectfully,
COLLINS & CORBIN,
Attorneys of Plaintiffs-Appellants.

Service acknowledged May 20, 1926.
WALTER L. GLENNEY,
Attorney of Defendant-Respondent.

COMPLAINT

(Filed, April 14, 1924)

Plaintiffs, residing in the City and County of Passaic and State of New Jersey, say that:

FIRST COUNT.

The plaintiff, Mary Nisky, says that:

1. The defendant, Childs Company, is a corporation organized, created and existing under and by virtue of the Laws of the State of New York, and was authorized to transact business in the State of New Jersey on May 21, 1910. Its principal office in this State is at No. 15 Exchange Place, Jersey City, Hudson County, New Jersey, and the agent in charge thereof upon whom process may be served is The Corporation Trust Company.

2. Said defendant, on or about October 19, 1923, maintained and operated a restaurant or eating house on the ground floor of premises known as 158 Market Street, in the City of Newark, County of Essex and State of New Jersey.

3. On said date, on said premises and in the said restaurant or eating house, the defendant, for value sold provisions, foodstuffs and victuals and food ready to eat and drink, and provided waiters and waitresses to take the order or orders of persons buying said provisions, foodstuffs and victuals and also for the purpose of serving said provisions, foodstuffs and victuals to the purchasers while on the said premises, and also provided tables, chairs and eating utensils for the use of the purchasers of

said provisions, foodstuffs and victuals so that the said provisions, foodstuffs and victuals could be served to the persons purchasing same and consumed on the said premises, all for a valuable consideration paid by the persons to whom sale of said provisions, foodstuffs and victuals was made; and in all respects operated and maintained what is commonly known as a public dining room or restaurant on the said premises aforesaid.

4. On said date the plaintiff, Mary Nisky, at the invitation of said defendant, entered said restaurant or eating house and for a valuable consideration a sale was made by said defendant of certain provisions, foodstuffs and victuals, which were consumed by the said plaintiff, Mary Nisky, on the said premises.

5. The said foodstuffs, consisting of a plate of clam chowder, half a dozen fried oysters and coffee, were served by the defendant, acting through its agents and servants, for immediate use, to be consumed on the said premises. The said foodstuffs were prepared by the agents and servants of the defendant in the kitchen or kitchens of the defendant on the said premises.

6. On said date, at said time aforesaid, for the said foodstuffs the defendant received through its cashier on the said premises the amount of money marked or punched on a check given by the employee of the defendant serving said food.

7. At said time it was then and there the duty of the defendant to furnish the said plaintiff with food fit to eat, food that was wholesome and merchantable and food that was not harmful or poisonous.

8. The said defendant, disregarding its said duty, prepared and served to the plaintiff, Mary Nisky, clam chowder, fried oysters and coffee which were not fit to eat, wholesome or merchantable, but said food was harmful, deleterious, dangerous to health and poisonous to the human body.

9. As a result the said plaintiff, Mary Nisky, immediately after eating same became sick and poisoned and suffered from excruciating pain, ptomaine poisoning and other disorders of the stomach. She had violent cramps, chills, sweats, fever and vomiting spells. She suffered great pain and mental anguish and has been permanently injured internally. From thence hitherto and for a long time in the future she will be unable to eat any heavy foods and will be limited to light foods, such as milk, eggs and cereal, and she continues to suffer and will for a long time in the future suffer great pain, vomiting spells and acidity of the stomach and intestines and other internal disorders. She has been prevented from carrying on her regular duties and also her work as a midwife from thence hitherto and will be for a long time in the future. She has been compelled to employ others to assist her in her said vocation. She has been compelled to expend large sums of money for medicines and medical aid.

The plaintiff, Mary Nisky, demands $25,000.00 damages.

SECOND COUNT.

The plaintiff, Mary Nisky, says that:

1. She reiterates all of the allegations of the first count.

2. The said food, consisting of clam chowder, fried oysters and coffee, was not fit to eat and was not wholesome or merchantable, but, on the contrary, poisonous as aforesaid because of the negligence of the defendant in failing to exercise reasonable care in the purchase, preserving, keeping, preparation and cooking of the said food, whereby it decayed and became impregnated with poisonous matters as aforesaid.

The plaintiff, Mary Nisky, demands $25,000.00 damages.

THIRD COUNT.

The plaintiff, Mary Nisky, says that:

1. The sale of the said food, consisting of clam chowder, fried oysters and coffee, was a sale within the meaning of the Sale of Goods Act, viz: "An Act of the Legislature known as 'An Act concerning the sale of goods and to make uniform the law relating thereto (P. L. 1907, p. 311).'" Under paragraph 15, subdivision 1, of said Act there was an implied warranty that the said food was reasonably fit to eat.

2. She repeats all the allegations of the first count.

The plaintiff, Mary Nisky, demands $25,000.00 damages.

FOURTH COUNT.

The plaintiff, Sylvester Nisky, says that:

1. He repeats all the allegations of the first count.

2. He is the husband of the plaintiff, Mary Nisky, and at the time of the occurrences set forth herein they were living together as husband and wife.

3. As a result of the acts of the defendant, as alleged herein, he was deprived of the services and consortium of his said wife, Mary Nisky, and was compelled to expend large sums of money for the services of other persons, such as nurses, housekeepers, etc., and will be for a long time in the future, and also will be compelled to expend large sums of money for medicines and medical aid for his said wife.

The plaintiff, Sylvester Nisky, demands $10,000.-00 damages.

FIFTH COUNT.

The plaintiff, Sylvester Nisky, says that:

1. He repeats all the allegations of the second count and paragraphs 2 and 3 of the fourth count.

The plaintiff, Sylvester Nisky, demands $10,000.-00 damages.

SIXTH COUNT.

The plaintiff, Sylvester Nisky, says that:

1. He repeats all the allegations of the third count.

2. He repeats paragraphs 2 and 3 of the fourth count.

The plaintiff, Sylvester Nisky, demands $10,000.-00 damages.

COLLINS & CORBIN,
Attorneys of Plaintiffs.

ANSWER

(Filed, April 4, 1924)

The defendant above named, a Corporation having its principal office in the State of New Jersey, at No. 15 Exchange Place, Jersey City, Hudson County, New Jersey, answering the complaint herein, says that:

ANSWERING THE FIRST COUNT.

1. It admits paragraphs 1, 2 and 3.

2. It denies that it has any knowledge or information thereof sufficient to form a belief as to the truth of the allegations contained in paragraphs 4, 5, 6 and 7, and therefore, denies the same and puts plaintiffs to proof thereof.

3. It denies paragraphs 8 and 9.

ANSWERING THE SECOND COUNT.

1. It repeats all of the allegations of its answer to the First Count.

2. It denies paragraph 2.

ANSWERING THE THIRD COUNT.

1. It denies that it has any knowledge or information thereof sufficient to form a belief as to the allegations of paragraph 1 thereof, except that it admits that sales of food by it in its restaurant constitute a sale within the meaning of the Sale of Goods Act.

2. It repeats all of the denials contained in its answer to the First Count.

ANSWERING THE FOURTH COUNT.

1. It repeats all of the denials contained in its answer to the First Count.

2. It denies that it has any knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 2.

3. It denies paragraph 3.

ANSWERING THE FIFTH COUNT.

1. It repeats all of its denials in answer to the Second and Fourth Counts.

ANSWERING THE SIXTH COUNT.

1. It repeats all of its denials in its answer to the Third and Fourth Counts.

WHEREFORE, the defendant demands judgment in favor of the defendant, with costs.

WALTER L. GLENNEY,
Attorney of Defendant.

AMENDMENT TO COMPLAINT

(Filed July 19, 1924)

Plaintiffs, with the consent of the defendant hereinafter noted, amend paragraph 2 of the first count of the complaint and also its reiteration in the other counts by striking out that part thereof which says "673 Broad Street" and inserting instead thereof the following: "158 Market Street."

COLLINS & CORBIN,
Attorneys of Plaintiffs.

We consent to the above amendment.

WALTER L. GLENNEY,
Attorney of Defendant.

RULE FOR JUDGMENT

(Filed May 1, 1926)

This cause having come regularly on for trial before Hon. Henry E. Ackerson, Jr., Judge of the Hudson County Circuit Court, and a jury, on April 22nd, 1926, in the presence of counsel for the respective parties, and at the close of the plaintiffs' case, on motion of the defendant, the Court granted a nonsuit.

It is on this 22nd day of April, 1926,

ORDERED that judgment of nonsuit be entered in favor of the defendant, Childs Company, a corporation, and against the plaintiffs, Mary Nisky and Sylvester Nisky, with its costs to be taxed.

On motion of Walter L. Glenney, Attorney of defendant.

FINAL JUDGMENT

(Entered May 1, 1926)

Non-suit in the above entitled cause was entered in this Court on the 1st day of May, 1926, in favor of the defendant, Childs Company, a corporation, and against the plaintiffs, Mary Nisky and Sylvester Nisky, in a plea of action at law for the sum of Dollars and cents damages and $43.78 costs of suit.

Judgment entered and signed this 1st day of May, 1926.

HENRY E. ACKERSON, JR.,
Judge.

Min. No. 72.
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TESTIMONY

HUDSON COUNTY CIRCUIT COURT

Thursday, April 22, 1926.

HON. HENRY E. ACKERSON, Judge, presiding.

MARY NISKY, *et al.*,
vs.
CHILDS COMPANY.
No. 19. At Law.

This cause having been called for trial this day, Mr. Charles W. Broadhurst, Attorney at Law, appeared for the Plaintiffs, and Mr. Raymond Dawson, Attorney at Law, appeared for the Defendant.

A jury was drawn, selected and sworn, and a statement of the claims of the parties made by their respective counsel.

Further proceedings were had as follows:

(Mrs.) MARY NISKY, called by the plaintiffs and sworn, testified as follows:

Direct-examination by Mr. Broadhurst:

Q. You are married? A. Yes.

Q. And your name is Mary Nisky? A. Yes.

Q. And your husband's name is Sylvester? A. Yes.

Q. Where do you live? A. Five Wall Street, Passaic.

Q. How long have you lived there? A. I live there about ten years.

Q. You resided there at the time of this occurrence for which you and your husband are suing here? A. Yes.

Q. What is your age? A. Thirty-three. I will be 33 July 16th.

Q. How long have you been married? A. Seventeen years, September.

Q. Have you children? A. My daughter fifteen and son thirteen.

Q. What is your occupation? A. Midwife.

Q. Are you licensed as such in New Jersey? A. Yes, sir.

Q. How long? A. From nineteen hundred and nineteen.

Q. Do you recollect October 19th, 1923? A. Yes.

Q. Was that the day on which this occurrence happened? A. Yes—in Childs Restaurant.

Q. What time was it you got to the restaurant at that time? A. I don't know the exact time. It was late in the afternoon after the theatre was out.

Q. Fix it as well as you can? Where had you been just before? A. At the theatre. It was after the theatre in the afternoon about five or quarter after.

Q. Going back to that day—when did you have breakfast? A. In the morning around eight or a little after eight.

Q. How did you feel when you got up that morning? A. All right and very good.

Q. Had you been ill a short time before that—say within a week? A. No. I had a little cold; it was winter time.

Q. Did you have any trouble with your stomach? A. No, sir. Nothing like that.

Q. What did you have for your breakfast that morning? A. It was Friday, and we don't eat meat that day—

Q. What did you have then for your breakfast? A. Some cereal, eggs and a cup of coffee.

Q. What did you do after that: attend to your housework? A. No. I went to my business. I did not do the housework.

Q. When did you have your lunch? A. A little after twelve o'clock.

Q. Did you eat lunch at home? A. Yes.

Q. Your breakfast—did you eat that at home? A. Yes.

Q. What did you have for lunch? A. It was Friday that day, and we don't eat meat on Friday, we are Catholic. I had toast and a cup of coffee, and intended to go to the theatre in the afternoon.

Q. You say you intended to go to the theatre? A. Yes.

Q. Did you go to the theatre after lunch? A. Yes, later in the afternoon.

Q. What time did you leave your home to go to the theatre? A. It was after one; ten or a quarter after.

Q. How did you go? A. In my machine.

Q. Who drove? A. I done the driving.

Q. Were you accompanied by some friends, or were you alone? A. I had company.

Q. Who was with you? A. Two friends.

Q. What theatre did you go to—the whole party went? A. Yes.

Q. To what theatre? A. Proctor's theatre.

Q. At what time did you get out of the theatre? A. After it was over.

Q. About what time? A. Five or quarter after, just as the show comes out.

Q. Where did you go from there? A. Right to the restaurant.

Q. What restaurant? A. Went right to Childs to have something to eat.

Q. Where was that store? A. Only a short distance from the theatre.

Q. Which way? A. Same side where the theatre is, on Market street.

Q. What city? A. Newark.

Q. How do you know it was Childs? A. There is a big sign there in the window—a big white sign.

Q. Do you recollect the number of the place? A. One hundred and fifty-eight Market street.

Q. How do you know? A. I went back there after that.

Q. I suppose you went to Childs to get something to eat? A. Yes.

Q. Were you hungry? A. I was.

Q. Did you feel ill? A. No. Very good.

Q. Were you ill at all before on that day? A. Not at all. Nothing at all the matter.

Q. Your friends went along with you into the restaurant? A. Yes.

Q. What did you order when you got inside? A. I ordered for myself a plate of clam chowder, and eat that.

Q. What did the others eat? A. The other two people had clam chowder also.

Q. Did you have any oysters? A. After I eat the clam chowder I ordered six of these oysters. They were fried in egg and cracker, and I begin to eat the oysters. I eat two of the oysters.

Q. Was there anything wrong about the chowder you had? A. No, sir.

Q. How about the oysters? A. The first oyster tasted very good; and then I tasted the second, and the third, and it was bitter when I chewed on it, it was like gall, so bitter; but I swallowed it; but I couldn't eat the rest of the oysters because I felt so bad in my throat. Then I called the waitress over,

a girl with a white dress on, and I told her, "I can't eat these oysters—they are not as good as I get in Childs—what is the matter with them?" Then she said, "I will get you a cup of coffee, and probably that will take away the bitter taste." But it did not take it away.

Q. Did she bring you a cup of coffee and did you drink that? A. Yes.

Q. Before you left did you notice any condition other than the bitter taste in your mouth? A. Beg pardon?

Q. Before you left the restaurant did you get any other symptoms than the bitter taste you mention? A. I got that bitter taste at the table, and I keep it right along.

Q. But did you have any other feeling other than the bitter taste before you left the restaurant? A. Yes. I got shaking and chilly, and I got fevers and I wanted to vomit and I couldn't—felt as though I wanted to vomit, and I couldn't vomit, and I felt very bad.

Q. You were nauseated? A. Yes, and I wanted to get home right away.

Q. How did you get home? A. By my machine.

Q. Did you drive home? A. Yes.

Q. Did you feel better on the way while driving home? A. No, but I was going home, though I felt worse.

Q. Symptoms more aggravated? A. Yes; and they were all the time getting more worse.

Q. Still have the chills and fever? A. Yes: and I felt as if I was getting swollen up, and I felt like vomiting, and as if I wanted to bust.

Q. Can you describe more minutely. Did you have any pain in your stomach? A. I felt pain right here (indicates).

Q. In the pit of the stomach? A. Yes.

Q. How about the chills and fever? A. Continually worse.

Q. How long did you take to get home that day from the restaurant? A. It was a rainy night and you couldn't go very fast.

Q. How long did it take you? A. It usually takes twenty minutes, but then it took me thirty to thirty-five minutes that night.

Q. You got home between half past six and seven? A. It was not seven. It was in my office hours.

Q. What were your office hours? A. Between seven and nine.

Q. When you got home did you attend to your office business? A. No. I couldn't. I was too sick to attend to them then.

Q. What did you do after that? Did you go to bed? A. I asked my husband—

Objected to.

Q. As the result of conversation with your husband what did you do? What occurred right after that conversation? A. My husband took me right up stairs, and my husband called a physician.

Q. Who was he? A. Doctor Phillip Simon.

Q. Had you known him before? A. Yes. He is a physician in Passaic.

Q. Did he examine you? A. Yes.

Q. As a result of his examination did he do anything? A. He went home and got a pump and pumped out my stomach.

Q. When was that? A. Right after he examined me.

Q. How did he operate on you? A. He had the pump and he had a rubber on it that he put in my mouth, and he pumped out my stomach, and everything came up.

Q. Did you observe what came out? A. Yes, I saw it all there.

Q. What was it? A. The clam chowder and oyster and everything was in the pan that I vomited from my stomach.

Q. What was the color? Did you notice the color of the oyster brought up? A. Yes. A sort of yellowish and greenish black.

Q. Were there any particles of food in this yellowish and greenish black fluid that you could recognize? A. Oysters and carrots and potatoes such as are in clam chowder.

Q. How long was the doctor there attending you? A. I think he was there more than an hour.

Q. Did you have any pain? A. Oh, yes.

Q. Was it severe pain?

Objected to.

A. Oh, yes. I screamed with the pain, and I was very sick and had pain all the night.

Q. Do you know whether the doctor gave you anything to relieve the pain? A. Yes.

Q. What was it? A. An injection.

Q. In the arm? A. Yes.

Q. Hypodermic? A. Yes.

Q. How about the other symptoms you had in your mouth, the taste, bitter taste in your mouth and throat as you described before? A. I felt that taste about a day.

Q. How about the feeling of swelling? A. I was getting worse.

Q. Were you actually swelling or just have that sort of feeling? A. Actually swelling right here at the stomach, terrible.

Q. After the stomach pump had been used, and during that same night, did you vomit more? A. I vomited right along after. If they gave me a little water I vomited right after.

Q. The next day or in the same night did you notice anything peculiar in the vomit? A. After washing my stomach out came greenish and black like phlegm.

Q. The following day did you observe anything else; did you observe any blood in it? A. Streaks of blood.

Q. On the following day did the doctor come and see you again? A. He came to see me the same night again about two o'clock or three, because I felt so terrible that my husband thought I would die—

Objected to.

Q. You got worse during the night and the doctor was sent for again? A. Yes.

Q. Did he come again after that? A. Yes. He used to come again. Two days after that Friday, on Saturday and Sunday, to pump me again.

Q. How long were you in your bed after that occurrence? A. I got sick on the nineteenth, and I got out of bed on the twenty-seventh of the same month, and I made a call but I got still worse after that call, and when I came back I had to go back to bed, and then I was sick two or three days after that.

Q. How did the doctor treat you during that time? A. He ordered the nurse to give me water bags and like that.

Q. Who was she? A. Miss Aulita.

Q. When did she come? A. The next day. I wanted to get a graduate nurse, Mrs. Schaumberg, but she was busy and could not come at that time.

Q. How long was Miss Aulita with you on that occasion altogether? A. Eight or nine days.

Q. What did she do, take care of you? A. Yes.

Q. How much did you pay her? A. For the nine days I paid her fifty dollars.

Q. You said you could not get another graduate nurse? A. Yes. She was busy, and so I couldn't get her at that time.

Q. Did you get another nurse after Miss Aulita? A. Yes. Miss Shanley.

Q. Did she come to take care of you? A. Yes.

Q. When did she come? A. Twenty-eighth of October.

Q. How long did she take care of you? A. You see I went to a confinement case, and I called her up from my office.

Q. What for? A. I called her up from my office if she would make a call for me.

Q. Who took care of it then? A. Mrs. Schaumberg.

Q. What arrangement did you have with Mrs. Schaumberg about taking care of your case?

Objected to.

The Court: The jury will understand it is what she lost necessarily in business that counts; not what she paid.

Defendant takes exception.

Q. How much did you pay Mrs. Schaumberg? A. I charge thirty-five and the nurse gets fifty.

Q. Do you recollect the case? A. October 27th, Mrs. Ritter, thirty-five.

Q. When you had Mrs. Schaumberg substituting in your place did you pay her so much for her services for handling the case? A. Yes, that is for afterwards.

Q. For the after attendance? A. Yes, sir. A midwife just goes out to deliver.

Q. The graduate nurse couldn't do the delivery? A. Well, it is this way. I take care of the delivery and she takes care of the child afterwards.

Q. If you had not been ill would you have done the attendance after the delivery? A. Yes.

Q. You were not able to do that? A. Yes. I couldn't do it at the time.

Q. So you paid Mrs. Schaumberg for this attendance after the delivery from what you received? A. Yes, sir.

Q. Did you pay Mrs. Schaumberg? A. Yes.

Q. How much did you get from the patient? A. Thirty-five dollars.

Q. How much did you pay Mrs. Schaumberg to finish the treatment? A. One half of my fee.

Q. You said you were afterwards in bed two or three days? A. Yes, two or three days.

Q. When you went back to bed for two or three days did you have any doctor? A. Yes.

Q. From whom you received treatment at that time? A. Yes.

Q. Who was the doctor? A. Doctor Holstein.

Q. Was there any other doctor attending you? A. At that time?

Q. Yes. A. No other.

Q. Was there any other doctor brought in later to examine you? A. Later I had a doctor from Newark, a specialist, who came to my house.

Q. Do you remember his name? A. Doctor Jussrum.

Q. How much did you have to pay him? A. Twenty-five dollars.

Q. When was it he examined you or treated you? A. I can't remember the date.

Q. Did you have any other doctor? A. I had another specialist from St. Mary's Hospital.

Q. Do you remember the name? A. Doctor Whalen.

Q. How many times did he treat you? A. Once.

Q. What did he charge? A. Twenty-five dollars.

Q. Did you have Doctor Ryan attend you? A.

He is a city doctor and he came to see me from the hospital.

Q. Did he charge you anything? A. Twenty-five.

Q. Doctor Ryan? A. No. Doctor Whalen.

Q. Had you any x-ray taken? A. Yes. By Doctor Roemer.

Q. How long after was the x-ray taken? A. I was there three times and he charged me fifty dollars. That was for the three times.

Q. Do you recollect going to New York to a doctor too? A. Yes.

Q. A specialist? A. Yes.

Q. Doctor Hetworth? A. Yes.

Q. Do you recollect when that was? A. I don't remember.

Q. How much did he charge? A. Twenty-five dollars.

Q. That was for how many visits? A. Just one visit.

Q. And Doctor Jesurum was also one visit? A. Two visits.

Q. At your home? A. One at my home, and once I went to him with my nurse.

Q. Doctor Whalen was how many visits? A. One.

Q. After the second attack, when you were confined two or three days you said, how did you feel after you got up after that attack? A. Weak and shakey and nervous and dizzy in the head, and I couldn't stand on my feet, and I walked unsteady.

Q. Did you go out to work? A. Yes.

Q. What did you do? A. I attended one patient only. I couldn't do more.

Q. And you remained in bed then three days? A. Yes, I was very sick.

Q. And you were confined in the house how long after that? A. I took care of this case on the third day and couldn't do more.

Q. Were you able to handle all the cases that you got during that period? A. No. This graduate nurse went with me.

Q. Why couldn't you do that alone? A. I was not able.

Q. Why not? A. I was too weak. I had nothing but water in my stomach, and milk.

Q. Were you kept on a special diet? A. Yes.

Q. By the doctor's orders? A. Yes.

Q. How long were you kept on that? A. I was kept on water and milk for a time, and I got very weak, and then it was a little chicken broth and some toast, and if I tried to eat anything heavier I got worse from it and suffered terrible pain.

Q. Prior to this attack were you able to take care of these cases yourself without the aid of anybody else? A. You mean before my illness?

Q. Yes. Before that day in Childs restaurant? A. Yes, sir, right along myself.

Q. How long after this occurrence did you find it necessary, because of your weakened condition, to have Mrs. Schaumberg assist you in taking care of the patients you got? A. She worked with me about a year, or may be more than a year—I just don't remember.

Q. She worked with you on every case during that period? A. Yes, on every case. And she would go in before the confinement and wait six or eight hours until the actual delivery was necessary, and then she would call me and I would make the actual delivery; and then I would go home and she would attend to the after treatment.

Q. And that would be for eight or nine days?

Objected to as leading.

A. Yes.

Q. How long after the delivery would Mrs. Schaumberg take care of the patient? A. Nine days.

Q. What is the customary time? A. Nine days, for the treatment after the delivery.

Q. What was the arrangement between you and Mrs. Schaumberg as to the division of the fee that you got from each patient? A. Half of the money went to her for her work.

Q. And you say that arrangement continued how long after your first illness in the restaurant? A. Over a year I am sure.

Q. You did not have anybody else but Mrs. Schaumberg doing that? A. Yes. When I got a terrible attack I couldn't go out, and I would have to telephone to Doctor Simon, and she would assist Doctor Simon.

Q. How long after the October 27th did you get the next attack? A. I got an attack off and on.

Q. In what way? A. With gas, and I would get terribly dizzy.

Q. When you say gas what do you mean? A. Gas in the stomach.

Q. How did that affect you? A. I would vomit. I always vomit to this day.

Q. Did you vomit before this occurrence? A. Never.

By the Court: Q. What caused you to vomit? A. The minute I eat or drink something, even water, I vomit.

By Plaintiffs' Counsel: Q. Did you eat any more oysters since that occurrence in Childs? A. My God, as long as I live I don't want to see them even.

Q. Has your appetite been affected with regard to food since that occurrence in October? A. I can't eat fish or oysters.

Q. What effect has it on you? A. I get that terrible vomiting.

Q. I notice you belch on the stand— A. I have that right along.

Q. Did you have that before you had this accident? A. Never.

Q. How frequently do you get sick so that you can't go out to attend your patients? A. Frequently. Some times before I get out of bed; some times five or ten minutes after I eat; and some times before my supper.

Q. How many cases did you have on an average prior to this occurrence, that you were able to take care of and attend yourself wholly? A. Do you mean before I was sick?

Q. Before you ate those oysters were you able to take care of yourself and work at all the cases offered you? A. Yes.

Q. How many a week? A. Probably seven, eight, or nine each week.

Q. Did you keep a record of them? A. Yes.

Q. Have you got that record? A. Yes. We only take normal cases down. Any abnormal cases the doctor takes a record of and I don't.

Q. Have you got your record here for the period between January 1922 and December of that year? A. Yes.

Q. Also for the year 1923 up to the date of the occurrence? A. Yes, sir.

Q. Please produce them?

(Witness produces slips.)

Q. Nineteen twenty-two: Have you got those? A. Yes.

Q. This is the part you keep after sending the original to the Bureau of Vital Statistics of New Jersey? A. Yes.

Q. That is required by law? A. Yes.

Q. Did you go through the year 1922 stubs for me so as to give me an idea as to how many normal births you had during that time? A. I did go through them, but I have forgotten them.

Q. How many are in a book of this kind? A. Ninteen or twenty or more, I don't know.

Q. Are they uniform, same number in each book? A. No.

Q. These are records of normal births in 1922? A. Yes.

Q. You have no record of the abnormal births? A. No.

Q. Can you give us an idea in your care of these cases as to how many abnormal births on an average you would run on to in a week? A. Some times one, some times three, and some times none.

Q. Taking it in the period of a year, what would you say the average would be—one a week, or two?

Objected to and question withdrawn, but answered.

A. It would be more than that.

Q. How much do you think would be the average, taking the whole year as a basis, of abnormal births? A. How do you mean?

Q. Taking all such births in a year and dividing the total by fifty-two weeks, how many do you think there would be on an average? A. Well, I don't know exactly how many.

Q. How many do you think you would have in the year 1922 of abnormal births? A. Sometimes one a week and sometimes two or three a week.

Q. These I have here are normal births, 1922? A. Yes.

Offered in evidence.

Objected to.

Objection sustained.

Q. Will you count for me the number of normal births you had in 1922?

Objected to.

Q. Are these records you have brought in your own handwriting? A. Yes, sir—some times my daughter would make them out.

Q. Where did she get the information? A. I would sit at the table with her and tell her.

Q. These slips you keep? A. Yes.

Q. And the other slip you turn in is signed by you? A. Yes.

Q. And does that slip correspond with this? A. Yes.

By Mr. Dawson: Q. Whose writing is this on this book of slips? A. My daughter's.

Q. Show me one of your handwriting? A. There is none in this book. (Pink book.)

Q. There appears to be different writing in this book? Are they the same writing by the same daughter? A. Yes, but they are all my records.

Q. Is this your daughter's writing? A. This is her writing here.

By Mr. Broadhurst: Q. How about the signatures? A. On each one I send in I sign. The one I fill up I sign my name.

Q. Your daughter is not present at the birth? A. No.

Q. After you have done work does she write these notes down according to your instructions? A. Yes. Sometimes my nephew will help me to make out some of these slips.

By Mr. Dawson: Q. Did anybody else but those two help you write them out? A. No.

Q. Whose is this? A. I can't tell whether it was my daughter's or nephew's.

Q. What does it indicate where there is a tearing out here? A. That is when they were made wrong, then we tear them out and make another. If there is anything wrong in the name or address you throw it all out.

By Mr. Broadhurst: Q. They are not numbered? A. No, sir.

Q. Will you count for me the number of normal births noted on these books?

Objected to.

Q. Are they made by your daughter in your presence? A. Yes. I take all the information; the name and age of the mother and father, and the number of the house, time of birth, male or female; and when I get home, if I am tired, I read those to my daughter, and she writes it out.

By Mr. Dawson: Q. You give her your notes to copy from? A. Yes.

Q. When you give those papers to your daughter or nephew who copies from them, what do you do with the papers? A. I throw them away.

Q. When do they copy them, in the evening? A. When my daughter comes from school.

Q. And if there is anything she don't understand of the spelling, does she ask you about it? A. No. I hold the paper over the table, and if she asks me anything about it I tell it.

Q. Why don't you write it? A. Because I am tired.

Q. Do you mean to say that each of those certificates that is signed there your daughter or nephew writes in the evening and that you sit there during all the time they are made out? A. Yes.

Q. There is an original of every record filed, is there not? A. Yes.

By Mr. Broadhurst: Q. When you say original

you mean the other part of this slip that goes to the Bureau of Vital Statistics in Trenton? A. Yes.

Q. Before you send that slip you compare it with your stub? A. Yes.

Q. Will you tell us whether or not you send it to the State Bureau after comparing the other part, if there are any differences between your stub and the one you send out?

Objected to.

Mr. Broadhurst: The purpose is to show the number of births she attended to in a given period of time.

The Court: I think you have done it already.

By the Court: Q. Referring to these papers can you say whether they are correct in the facts they represent? A. Yes. They are.

By Mr. Broadhurst: Q. Take 1923, and tell us the number of normal births.

The Court: She has said she continued on with her business, but she had to employ some one else to assist her and that diminished her profits.

Mr. Broadhurst: And that it seems to me makes it necessary for us to show the number of visits she had made before the accident and how many she made afterwards.

Q. Starting with October 1923 after you were ill, count them from that record until 1924 how many cases this nurse had to help you on? A. All that was after the 27th of October 1923.

Q. Now give us the number of cases she had to assist you during the year from that time—did she help you in every confinement case you had after October 27th, 1923, for a certain period of time or only help you in certain cases at various independent times?

Objected to as leading.

A. It was all one thing right along.

Q. How do you mean? A. She helped be after the 27th of October 1923—

Q. How long— A. And she worked for me about a year altogether steady, or over a year—on all my cases.

Q. Did she work with you in every case after that time or work only on part of the cases that you had during that period of time? A. Every case.

Q. Can you refer to these books and tell us the number of confinements after October 27th, 1923, that Mrs. Schaumberg assisted you? A. Let me understand you. Do you mean the date?

Q. No. The number of them. Just count them all together. Count the number in your book that she had to help you on? A. Twelve cases.

Q. In the book from October to November 1923? A. Yes, sir.

Q. Twelve cases she did help you? A. Yes, sir.

Q. How many in the next book of 1923? A. I count 18 in that book.

Q. Now see how many in the 1924 book she helped you on? A. There are eighteen here. Nineteen.

Q. That is March to May. You are now taking the 1924 books? A. Yes.

Q. Take the rest of the year? A. There are 15 in this one.

Q. How long after October 27th, 1923, the day you first brought Mrs. Schaumberg in, did she continue to help you? A. All the while I was sick then.

Q. How long a time? A. I was sick two weeks.

Q. After that how long did she help you or continue to help you? A. A year or over a year steadily right along.

Q. You have given us a summary of the number

of cases in three books. The last one you gave us brings up how far in the year 1924? A. She came sometimes afterwards.

Q. What is the last date you have just counted for us? The date of that particular book? A. I can't remember now when she stopped helping me.

Q. You gave us fifteen on this book? A. Yes, sir.

Q. You have given us three books. I notice one here is November 1924— A. Yes, and after that she still helped me.

Q. How many? A. On some, but not every day—not every case.

Q. The number you have given us in those three books are the numbers of the confinements she helped you on during that period of a year you were sick because of this accident? A. Yes, sir.

The Court: What is the total?

Mr. Broadhurst: Twelve, 18, 19, and 15—making 68.

Q. What should each of those confinements net you? A. From twenty-five to thirty-five dollars.

Q. And half of each fee you gave to Mrs. Schaumberg? A. Yes.

Q. That brings up to November 1924, and we are now in April 1926? In the meantime did she help you in any cases? A. Yes. In 1925.

Q. How many cases in 1925? A. I don't remember.

Q. One or more? A. More than one, but I don't remember just how many cases there were.

Q. Can you give us the inside figure of the least number? A. I couldn't.

Q. Can't you make some estimate?

Objected to.

A. No, I can't remember.

Q. How many visits did Doctor Philip Simon call

at your home, or you call at his office, for medical treatment because of this illness, do you know? A. May be one hundred and fifty or 160.

Q. Over what period of time did it cover? It started the night you got sick at Childs? A. Yes, sir. From that night after I got those oysters there.

Q. How long has it continued? A. I still go to him this day.

Q. How do you feel now? A. Terrible. I feel bad all the time.

Q. Does your stomach bother you at all now? A. Oh, yes, like vomiting.

Q. I notice you belch? A. Yes. While I am sitting here I think I will choke.

Q. Does it affect your appetite in any way?

Objected to as leading.

A. In eating. It affects my stomach, and I can only have a little chicken and vegetable.

Q. How much did you weigh before the accident? A. I used to weigh about one hundred and sixty pounds.

Q. How much do you weigh now? A. I don't know exactly now.

Q. About how much?

Objected to as leading.

A. About one hundred and thiry pounds.

Q. Have you lost weight since the accident because of its occurrence? A. Oh, yes. Twenty or thirty pounds.

Q. Can you give us some idea during those first eight or nine days, when you were in bed with the first attack, as to whether you had calls for cases during that time that you could not handle? A. I couldn't handle them and I sent them to Doctor Philip Simon.

Q. This is the week you were in bed? Did he

attend to them? A. I would send the Doctor; but some would not have a doctor—they are all Polish—and I would then send Miss Aulita.

Q. Can you give us an idea how many cases came in during the time you were so ill? A. I don't know. I was not keeping count then.

Q. You were not interested? A. No. I couldn't do that.

CROSS-EXAMINATION by Mr. Dawson:

Q. How long do you know Miss Schaumberg? A. I knew her when she went in Trenton. I don't know how many years.

Q. You had worked with her for some time before this accident? A. If some patients would want a nurse I would call her.

Q. She had been working with you some time? A. Working with me?

Q. Assisting you? A. No. She was just a graduate.

Q. She had been working with you for some time? A. No.

Q. Before this accident? A. No. Never worked on a case with me before unless they wanted a graduate nurse.

Q. She had worked with you before October 1923? A. Not in that way. She was a graduate nurse.

Q. She was a graduate nurse and you worked with her? A. Yes.

Q. How long had you known her before she graduated? A. Since she graduated here.

Q. When? A. She graduated I think 1923.

Q. Either 1922 or 1923 she was a graduate nurse? A. Yes.

Q. After this accident, when you employed a graduate nurse the graduate nurse got half of your

fee that you received in confinement cases? A. Yes.

Q. And that was irrespective of how many times the nurse had seen the patient? A. I don't understand.

Q. In some of these cases that you delivered you would call Miss Schaumberg too? A. That was after I went to business.

Q. In these cases before you ate the bad oyster you would visit the patient once or twice or several times? A. Yes. I would go a few days to attend my patient after the delivery before I got my poisoning.

Q. How often? A. I went every day to my patient. I had nobody to help me.

Q. How many times would it be necessary for you to visit the patient after the delivery was made by you? A. Nine times.

Q. Always nine times? A. Nine times or ten times.

Q. And sometimes less? A. Yes, sometimes, not often.

Q. And after this accident you gave the nurse half of your fee? A. Yes.

Q. Did you keep a record of those payments? A. No.

Q. How did you pay her? A. Cash money.

Q. How did you pay her, every day or week or month, or how? A. Every week just as many cases as you have.

Q. And sometimes you had one case and sometimes more? A. Yes.

Q. Were there no weeks in which you had only one case? A. No. Always had more than one.

Q. How many times did you have only one case? A. I never had one case only in a week. I have always had more cases in a week.

Q. You started to Newark when? A. On the day of the accident?

Q. Yes. A. I got in after twelve and I took my lunch.

Q. Where? A. Home.

Q. Where did you have breakfast? A. At home.

Q. Had you been out on a call in the morning? A. Yes.

Q. What time did you leave to go to Newark? A. After one.

Q. Did you have two people with you? A. Yes.

Q. Where did you get them? A. In my home.

Q. Did you all have lunch together there? A. No.

Q. Did you have lunch alone? A. Yes.

Q. Who prepared it for you? A. I have a young girl and a colored maid, and the colored girl prepared the lunch that day.

Q. What did you have for lunch? A. Two soft boiled eggs and toast and cup of coffee.

Q. Is that what you usually have for your lunch A. Yes, on Friday. We don't eat meat on Friday.

Q. What did you have on other days, meat? A. When?

Q. Just before going to Newark that time? A. Yes, meat and vegetables on other days.

Q. Did you have anything else but eggs on that particular day you went to Newark? A. Yes; a glass of water and coffee and toast.

Q. Who was in the car with you when you left your house to go to Newark? A. A gentleman and a lady.

Q. Are they married? A. No; single.

Q. When you got to Newark you went to Proctors Theatre first? A. Yes; because my daughter is a good toe dancer and I was told there is a wonderful toe dancer there that afternoon, and so I went there, and I was interested—

Q. Did you stop anywhere else before you got into Proctors? A. No.

Q. Where did you leave your car? A. I left my car on this side, just about two doors, by—near the Childs where I got my oysters in Market Street.

Q. You got out of the theatre about five o'clock? A. About that.

Q. Were you pretty hungry then? A. Yes, I was pretty hungry.

Q. When you came out you suggested getting something to eat? A. Yes.

Q. And you suggested that you go upstairs to the Chop Suey place next to Childs? A. No. The other party suggested it, I did not.

Q. Did you suggest that you go upstairs to the Chop Suey place? A. No, sir, I did not.

Q. But you did consider going up there? A. No.

Q. There was some talk about it? A. They said, "Let's go up here," and I said, "No, go to Childs." And the other party suggested the Chop Suey place instead of going to a cheap place.

Q. Did you not as a matter of fact go to the Chop Suey place? A. No, sir.

Q. Where is the Chop Suey place? A. It is in one part and Childs is in another.

Q. How do you know that? A. By reading that sign.

Q. Are you sure you did not go in the Chinese place? A. I am. I did not go there.

Q. Had you been in Childs before? A. Yes, because I was a graduate in Newark as midwife and I knew Childs was there.

Q. And you knew it was 158 Market Street? A. No. I went the second time to get the address.

Q. But you knew it was on Market Street on that block? A. Yes, because I always got my uniforms on the other side from Bambergers.

Q. In what part of the restaurant did you sit?

A. The first door from the side where the theatre is.

Q. To the right or the left? A. The theatre is here, and I came out of the theatre; and it was raining, and I went underneath where we would not get wet.

Q. Which door did you go in? A. The right-hand side nearer to the theatre.

Q. The theatre was on the same block? A. No; the next block.

Q. How far back in Childs did you go before you sat down? A. The middle part.

Q. It was a heavy, crowded day? A. It was not the middle of the day; no.

Q. A good many people there? A. Not so very many as you see Saturday and Sunday.

Q. It was pretty well filled up? A. Yes, sir.

Q. Who did the ordering, you or your gentleman friend? A. Beg pardon?

Q. Who did the ordering? A. The three of us ordered clam chowder. Then I ordered half a dozen oysters, and the other party ordered fish and potatoes.

Q. You eat the clam chowder? A. Yes.

Q. And then eat some of the oysters? A. Yes.

Q. There was nothing in the appearance of the oysters that indicated that they were not all right? A. No.

Q. You had eaten oysters there before? A. Yes.

Q. How many did you eat? A. Three, and a half of the fourth.

Q. What then? A. It was very bitter.

Q. Very bad? A. Yes.

Q. Did you swallow it? A. Yes.

Q. Why did you not throw it out? A. I did not think of it. It was very bitter.

Q. Why did you not spit it out after you noticed it was bitter? A. I did not know it was bitter until I bit into it.

Q. After you bit in it and noticed it was bitter you chewed it and swallowed it? A. Yes.

Q. Did it not occur to you if it was very bitter it might be bad? A. I did not think so.

Q. And you swallowed it though it was bitter? A. Yes.

Q. Did you eat some of the oysters after that? A. No. I left the rest on the table.

Q. But you stayed in the restaurant some time after that? A. Well, the waiter came—

Q. Please answer my question? A. My dear man, I was never on the stand.

Q. You were in the restaurant quite some time after you had tasted the bitter oyster? A. Yes, until the other people finished their dessert, and I finished my coffee, and then we went right out.

Q. You remained until after they had their dessert you say? A. Yes. The girl came to me—

Q. And they had coffee? A. Yes.

Q. You all had dessert? A. They had pie, and I couldn't take any dessert.

Q. But you had coffee? A. I took the coffee because I thought it might take the bitter taste away.

Q. You waited until they, the others had eaten their dessert? A. Yes.

Q. And you had coffee? A. Yes.

Q. You drank it all? A. Yes.

Q. You did not make any complaint to anybody that you were ill while in the restaurant? A. Yes, to the waitress.

Q. You told her you were sick? A. I said the oysters were bad and I felt like vomiting.

Q. When did you tell her so? A. She came to

ask what we were going to have for dessert—after I finished the three and a half oysters she came and asked that, and the other party said pie, and I said, "I could not have anything, because your oysters are bad"; and she went away and came back and brought coffee, and said the oysters were all right. After I drank it I felt worse yet.

Q. You don't mean you couldn't swallow? A. I felt the taste more bitter.

Q. You did not get sick right away? A. Yes, I did.

Q. In what way? A. I got chills and fever in the restaurant.

Q. Was it not a half hour afterwards before you felt ill effects? A. I felt pain about half an hour afterwards.

Q. Then you were on your way home? A. Yes.

Q. What did you do when you got home? A. I told my husband I was very sick.

Q. Did you call a doctor? A. No. My husband.

Q. You told him who to call? A. No.

Q. Had Doctor Simon treated you some time before? A. Some doctor serves you when—

Q. Had Doctor Simon attended your family some time previous to that?

Objected to.

Q. Doctor Simon has been your family doctor for some time? A. No. Once I had him for my son when he had bronchial trouble.

Q. How long before this accident was that? A. I think just a year before.

Q. So you did know him a year before? A. Yes.

Q. But you did not know him very well? A. Oh, yes. Sometimes people called him, and I had been working with him.

Q. You had worked with him some time before that? A. Yes, sir.

Q. And you worked with him about the time of this accident? A. Yes.

Q. How long had you been working with Doctor Simon prior to that time? A. I work with him now.

Q. How long have you been working— A. I work with him now if a doctor is needed.

Q. —For a year, as long as you were a midwife? A. I was a midwife before I knew him.

Q. You don't know how long you knew him before this accident, do you? A. About three or four years.

Q. Did you tell your husband to get Doctor Simon? A. He got him.

Q. And you did not suggest getting Doctor Simon? A. No.

Q. When Doctor Simon came in it was the same evening you had this experience? A. Yes.

Q. When did he commence to see you? A. The very same night. That was after twelve: it was between two and three.

Q. Do you know the Doctor's brother, a lawyer? A. Yes.

Q. Did you ever do work with him? A. Yes—Doctor Aaron Simon.

Q. You knew he was a doctor and also a lawyer? A. Yes, sir.

Q. And you had cases with him? A. Two or three cases.

Q. Had Doctor Simon referred you to this brother? A. Which brother?

Q. The lawyer? A. Do you mean whether Doctor Philip had referred me to his brother Aaron?

Q. Yes. Had he? A. No. I went to see Dr. Aaron of my own accord.

Q. You knew they were related? A. I knew they were brothers.

Q. And did you tell Doctor Aaron the whole facts? A. Yes.

Q. After you had seen the lawyer you were out about your business? A. I went to his office to see him.

Q. That was six or eight days after you had this bad fright? A. It was after. I don't know how many days.

Q. But it was a very short time afterwards? A. I don't remember.

Q. Have you not some idea? A. I couldn't remember the date.

Q. Did you ask him to write a letter about the case at the time? A. I did.

Q. Coming back to your—was it after the first two weeks you had to share your fees with Miss Schaumberg? A. Yes, sir.

Q. And that was irrespective of what number of visits she made? A. Yes.

Q. If you got twenty-five dollars she got half that, and so on? A. Yes.

Q. Is there anything in those books to show which cases she attended? A. No, sir.

Q. Nothing? A. No, but I can remember some.

Q. Is there anything in those books to show that? A. No.

Q. Can you give us a record of how many cases you had in 1924? A. Yes. I have given that.

Mr. Broadhurst: October 27th, 1923, to November 1924, 53 cases. I made a mistake in the addition when I said 68.

Q. What did you have for breakfast on the morning of this theatre party? A. Cereal and cup of coffee.

Q. What kind of cereal? A. Cream of farina.

Q. Who prepared it? A. Our maid, the white girl.

Q. Did you see it prepared? A. No. I was up stairs while she was making it.

Q. Did you have cream on it? A. No.

Q. Where do you get your milk? A. From Borden. We get three bottles of milk and a bottle of cream every day.

Q. Did you have any milk left over from the previous day? A. No. We generally give that to our two dogs.

Q. Did you notice anything wrong with the cereal that morning? A. No, sir.

Q. Or with the milk? A. No, sir.

Q. You drove your car all the way home? A. Yes.

Q. Did you put it away? A. No. I left it in front of the house, and my nephew put it away.

Q. Does he live with you? A. No. He is in New York City now.

RE-DIRECT by Mr. Broadhurst:

Q. Who were the two people in the restaurant in Newark with you? A. I don't know the gentleman's name, and I don't know the lady's name because he brought her along.

Q. Are they here in court? A. No. He is out in—

Q. Bermuda? A. Yes, Bermuda.

Q. Do you know whether they are married? A. I don't know.

Q. You knew him? A. Yes.

Q. But you did not know the lady? A. No, sir.

(MRS.) JEAN AULITA, called by the plaintiffs and sworn, testified as follows:

Direct-examination by Mr. Broadhurst:

Q. What is your name? A. Jean Aulita.

Q. Where do you live? A. 2093 Webster Avenue, Bronx, New York.

Q. Are you married or single? A. I am married.

Q. Did you know Mrs. Nisky prior to October 21st, 1923? A. Yes, sir.

Q. The lady that preceded you just now on the stand? A. Yes, sir. I knew her then.

Q. How long prior to that did you know her? A. I knew her six or seven months before.

Q. What is your occupation? A. Practical nurse.

Q. You are not a graduate nurse? A. No, sir.

Q. Were you called in to take care of Mrs. Nisky during her illness in October, 1923? A. I got a telephone call from her husband saying I should come right over—that was about half-past one in the morning—and I got there just twenty minutes to two in the afternoon—it was on Saturday, the day after she was made sick.

Q. How long did you take care of her? A. That was a hurry call, and at that time I was there from Saturday until the following Monday.

Q. Were you paid for your services? A. Oh, yes. I was paid of course.

Q. How much were you paid? A. Thirty-five dollars the week.

Q. And did that include your board? A. Besides I got my board there.

Q. How did you find her? A. I went right over to her house, and the minute I got there I went right up stairs, and she was

very bad and just like a maniac raving; and I told her to keep quiet.

Q. What did you do for her? A. I got her as quiet as I could and then I gave her an enema right away because her stomach was very bloated, and I put an ice water bag on it because it was very, very hard, and her feet were very cold.

Q. What happened? A. Well, that relieved her some—a little while; but in less that half an hour she started bad again, and I told her to keep quiet.

Q. What else did you do? A. And then I put a hot water bottle on her stomach, and that seemed as if it was better than the ice bag that I had put on before; and I kept on adding that hot application on, off and on and put it on through the night; but she was bad off and on.

Q. How was she in the morning? A. Then about six I called up Doctor Simon on the phone, and told him what I had done, and I asked him if my treatment was right, and he said—

Objected to.

Q. You called him up and asked if your treatment was right? A. Yes.

Q. Did he tell you to change it? A. No. He said it was all right and I had done all right—

Objected to.

Q. During all the time you were there was she in bed? A. Yes, sir.

Q. In pain? A. Very much.

Q. How did she show it? A. She worked her hands and feet and her eyes were so set that I thought she was going blind—

Objected to. What she thought is stricken out.

Q. What do you mean about her eyes? A. Glassy-looking.

Q. Did the doctor come in afterwards while you were there? A. Yes.

Q. Who called him? A. I had him call one day—it was then about half past three in the morning I had him because she was shaking, and she complained that her stomach was swollen, and I called Doctor Philip Simon, I don't know the date, it was two or three days after I was there.

Q. Was Mrs. Nisky fleshier or heavier than she is today before her sickness? A. She was much stouter.

Q. You got there Saturday afternoon? A. Yes, sir.

Q. About two o'clock? A. Yes, sir. About twenty minutes to two.

Q. Did the doctor come there the same day? A. Yes.

Q. He came after you got there? A. Yes; a little after I got there.

Q. Did you see what treatment he gave her? A. Yes.

Q. What was it? A. He got a stomach pump, and he worked on her, and some little green, and some very black, came out through the pump from her stomach, and the Doctor said, "What do you call that?"—

Objected to.

CROSS-EXAMINATION by Mr. Dawson:

Q. You are not a graduated nurse? A. No, sir.

Q. You are a practical nurse? A. Yes, sir.

Q. How long have you been such? A. Seven or eight years.

Q. Always in Passaic? A. New York and Passaic.

Q. How long in Passaic? A. I lived in Lodi at

the time, 80 Spring Street, Lodi, New Jersey—I can't speak very loud because I have a cold now.

Q. While living at Lodi you were called to Passaic? A. Yes, sir.

Q. Did you know the Niskys prior to that time? A. No.

Q. How came you to be called? A. I don't know. Mr. Nisky called me—I suppose because I had met Mrs. Nisky.

Q. You knew her then? A. No. I met her on cases, that's all. I did not know her to talk to. I had taken care of some cases after she was through with them—and that is the way I met her, and the only way I knew her.

Q. Did you make arrangements on price? A. Yes.

Q. With her? A. Thirty-five dollars a week—with Mr. Nisky.

Q. Did you know the Doctors—Simon? A. No, sir.

Q. You know some doctors in Lodi? A. I don't work through doctors.

Q. What day of the week did you get there? A. Saturday, the day after she got the trouble. I got there twenty minutes to two in the afternoon.

Q. Who was there, and whom did you see when you entered the house? A. Mr. Nisky, a young girl, and a colored girl; and I found her in bed, raving—I mean Mrs. Nisky.

Q. Then did it occur to you that you should call a doctor? A. After I gave her an enema I treated her stomach.

Q. Your first thought then was that you would give her treatment and then call a doctor? A. No. Mr. Nisky told me he had a doctor.

Q. But after you got through treating her you called up the doctor? A. Yes.

Q. Then you knew who he was? A. Yes, sir.

Q. And you asked the doctor if your treatment was all right on Saturday? A. No. That was a day or two after.

Q. Did you ask him if what you had done was all right? A. Not that way.

Q. How? A. I asked him if I had done what I should have done.

Q. After that you asked him again if you were treating her all right? A. No. After that he told me what to do.

Q. Over the wire? A. No, sir.

Q. By message? A. No. He came to the house, and told me there.

Q. Which day did he come? A. Saturday when I called him.

Q. After he said your treatment was all right then did he come to the house? A. Yes.

Q. How often? A. Two or three times I know he was there, and I saw him.

Q. When did he come the first day, that Saturday? A. I don't remember the time he came in.

Q. What part of the day was it? A. It was in the afternoon after I had given her the enema, and she was very bad at the time.

Q. When did he come again? A. He came again after.

Q. Did he come twice on Saturday? A. He came twice while I was there; he came twice that Saturday, I know.

Q. You were a week? A. I was there nine days.

Q. And you called Doctor Simon once during those nine days? A. Yes.

Q. That is all? A. But on that Saturday he called twice.

Q. What time? A. I can't remember the exact time of course.

Q. Give it as near as you can? A. It was after eleven; I remember that.

Q. And before what? A. Before twelve.

Q. Did he ever come there again at night? A. Yes, sir.

Q. When? A. I remember sending for him one night at half past two.

Q. When was that? A. That was a few days after I had gone there.

Q. Who called him? A. I called him that night.

Q. Your treatment was not good then? A. She was getting worse.

Q. Was she getting better while you were there? A. She was better some times.

Q. How was she generally? A. Worse. Getting worse.

Q. All the time you were there? A. Yes, sir.

Q. What was her trouble? A. Her stomach was swelling.

Q. And she was getting worse all the time you were there? A. She was a little better afterwards before I left.

Q. She was so well that she went out the day after you left, did she not? A. She went out while I was there. I don't know about after I left. The day before I left she went out. A taxi come for her.

Q. Did she go out on business at that time? A. I think so. She came back worse.

Q. Did you treat her again? A. Yes. I put her back in bed when she came back, because she had chills and fever from it.

Q. When was that? A. That was the eighth day I was there.

Q. And you left on the ninth day? A. Yes.

Q. And you never went back again? A. No, sir.

Q. You were not sent for again? A. No. She did not need me.

Q. On the ninth day did you get paid? A. Yes, sir.

Q. Thirty-five dollars? A. Yes. That was agreed with Mr. Nisky a week.

Q. Did you live in Lodi? A. I did at that time. Not now.

Q. Not now? A. No, sir. I live in the Bronx, New York.

Q. How long do you live there? A. The last two years I live in the Bronx.

Q. Are you still a practical nurse? A. No, because I don't feel well.

SYLVESTER NISKY, called by the plaintiffs and sworn testified as follows:

Direct-examination by Mr. Broadhurst:

Q. What is your name? A. Sylvester Nisky.

Q. You are one of the plaintiffs? A. Yes.

Q. Husband of Mary Nisky? A. Yes.

Q. The lady who was on the stand this morning? A. Yes.

Q. Where do you live? A. Five Wall Street, Passaic.

Q. Do you remember the day on which your wife came home sick in October, 1923? A. Yes.

Q. When had you seen her before on that day before she got sick? A. In the morning.

Q. At breakfast? A. Yes, sir.

Q. Was she sick then? A. No, sir.

Q. Did she eat her breakfast? A. Yes.

Q. You saw her eating? A. Sure. She eat some, but no meat.

Q. When was the next you saw her after break-

fast? A. I did not see her that day before she left home for Newark.

Q. Was she sick then? A. No.

Q. How long you been married? A. It will be now ten years.

Q. Before this day was she sick and laid up in bed? A. No, sir.

Q. Have trouble with her stomach? A. No, sir.

Q. Have the same symptoms she does now? A. No, sir.

Q. What time did she come home that night after she was in Newark that Friday? A. About a quarter to seven.

Q. Were you home then? A. Yes.

Q. Was she sick when she got home at that time? A. Yes, sir.

Q. Very much? A. Very sick.

Q. What did she do? A. Went right in bed.

Q. Did you have a doctor come? A. Yes.

Q. Who? A. Doctor Philip Simon.

Q. Did you see what he done for her that night? A. Yes.

Q. What did he do? A. He pumped her out from the stomach.

Q. How long was your wife laid up in bed from that sickness at that time? A. About nine days she was very sick.

Q. Until when? A. I did not take notice; I know it was about nine days.

Q. After that was she all right? A. No. Always sick.

Q. Never well? A. No. Never all right until today yet so far as I know.

Q. What is the trouble now? A. All the time she has pain and all the time vomit and everything comes out.

Q. Did she weigh more than now before this accident? A. Yes.

Q. What was her weight before? A. About around 160. She was a stout woman.

Q. Stouter than she is now? A. Yes. Much stouter, and more flesh.

Q. Do you know what she weighs now? A. No.

Q. Did you pay Doctor Simon anything on account of his bill? A. No, sir. I did not pay.

Q. Did you pay Doctor Philip Simon on account of his bill? A. I don't bother with that; my wife does that.

Q. Your wife is a midwife? A. Yes, sir.

Q. Does she do any work around your home, taking care of the house, besides doing work as a midwife? A. No. She has other people to do that work for her.

Q. After this occurrence was she able to perform the duties of a wife to you? A. No.

Q. For how long? A. From that time. I am going to tell the truth.

Q. That is what I want you to tell. How about before that? A. Then she was all right. We were happy all the time then.

Q. How old are you? A. Around thirty-eight or thirty-nine.

Q. You have two children? A. Yes, sir.

Q. A boy and a girl? A. Yes.

CROSS-EXAMINATION by Mr. Dawson:

Q. Do you work now? A. Yes, sir.

Q. At what? A. Embroidery.

Q. Where do you work? A. Passaic Park.

Q. How long do you live in Passaic? A. Twenty-four years.

Q. Your wife has been a midwife some years? A. Yes.

Q. And all that time you worked at embroidery? A. Yes.

Q. Who else lives in your house? A. My wife, two children and me, and two people to take care of the house—

Q. And take care of the children? A. Yes, sir.

RE-DIRECT by Mr. Broadhurst:

Q. Do you mean people that are hired to do that? A. Yes.

Q. Servants? A. Yes.

(Dr.) PHILIP H. SIMON, called by the plaintiffs and sworn testified as follows:

Direct-examination by Mr. Broadhurst:

Q. What is your name? A. Philip H. Simon.

Q. Are you a practicing physician of the State of New Jersey? A. Yes. I am.

Q. Of what school are you a graduate? A. St. Johns College and Fordham University as Doctor of Medicine.

Q. How long have you been practicing in New Jersey? A. About three years.

Q. Connected with some hospital? A. Yes. Several.

Q. What city do you practice in? A. Passaic.

Q. You are a brother of Aaron Simon? A. Yes.

Q. And he is a doctor, and lawyer also? A. Yes.

Q. Do you recall in October, 1923, being called to the home of Mrs. Nisky? A. Yes.

Q. And do you remember the time? A. The late part of the evening.

Q. You responded and went to the house and saw Mrs. Nisky? A. Yes.

Q. What condition did you find her? A. In a convulsive state, twitching, panting, semiconscious—had vomited—had rapid pulse, respiration rapid and feeble.

Q. Was she in bed or sitting up? A. In bed.

Q. Did you inquire for her symptoms? A. Her husband was right there and I asked what was the trouble; and he told me that she came home and stated that she had been poisoned by something she had eaten.

Q. What did you do then? A. I immediately ran home and got a stomach pump, and I washed out her stomach, and I found some mucous—it was a heavy black matter looked like mucous. I washed out her stomach with soda. We remove what we can from the stomach before we wash it out. I had to put bicarbonate of soda in the stomach before I could remove anything out, and I had to use a syphon to bring it out.

Q. How many times did you do that? A. Twice—once later.

Q. When? Why was that necessary? A. To wash out the stomach. She was in a pretty bad state I thought.

Q. Did you make a diagnosis of her condition, as to what she was suffering from? A. I thought of several things—I thought possibly of gastric ulcer—

Objected to.

Q. What was your diagnosis? A. My first diagnosis was poisoning, and my second was gastric ulcer.

Q. Did your later treatment confirm your diagnosis?

Objected to.

Q. Did you make any other diagnosis? A. Yes, sir.

Q. What was your final diagnosis? A. That there was oysters there that poisoned the stomach.

Q. Did you have x-ray made? A. Yes.

Q. By whom? A. Doctor Romer, of Paterson.

Q. When? A. Several weeks later; and that ruled out the gastric diagnosis, because none could be found.

Q. Did you give the patient any injection? A. Yes.

By the Court: Q. What did you find from her stomach? A. I found food particles, and I held them several days, and I brought them to Doctor * * * of Paterson, and I asked him to make of them a chemical analysis.

Q. Did you make an examination of them yourself? A. No, sir.

Q. What did you conclude? A. That it was a case of oyster poisoning.

Q. On what did you base that? A. On the history, the symptoms, and the food particles.

Q. What is oyster poisoning? A. Taking poisonous oysters in the stomach.

Q. How would the oysters become poisonous? A. It might be that the oysters have died in their shells; or there was a certain indigestible particle of matter that the oyster has taken in; or possibly it was a diseased oyster itself. An oyster may be diseased like any animal.

Q. Do you know whether such an oyster would present an odor before being cooked? A. I don't know. I think it would, but yet it might not.

DIRECT-EXAMINATION resumed by Mr. Broadhurst:

Q. What was the purpose of the x-ray? A. To discover the presence or absence of gastric ulcer.

Q. Does the x-ray show the character of the poison? A. No, sir.

Q. You say you got a history from the patient as to what she had eaten, etc.? A. Yes.

Q. And she told you about eating some oysters and then feeling sick? A. Yes, sir.

Q. How long did you treat Mrs. Nisky after that? A. On and off a long, long time, probably a year, and even today.

Q. How often did you visit her—say during the time she was confined to bed? A. I made a visit sometimes twice a day.

Q. Did you prescribe a diet with her treatment? A. Yes. I ordered cathartics of several kinds; gastric medicines, nitre paragon, nitre; also bismouth; cereal foods; soft grape nuts—food and medicines going on that type and acting as sedatives.

Q. Does she look the same now? A. She looks thinner to me.

Q. Was there any swelling of her stomach? A. Yes; marked distention.

Q. What is her trouble now with regard to eating of the oysters? A. Now the trouble is the after effects of that illness. The lining of her stomach is destroyed. The stomach is injured. The mucous epidermis of the stomach has a number of glands that act on the foods that are taken in the stomach, and when that is worn off the stomach has to rely on some of the intestines to mix it over in the way of digestion.

Q. Her trouble now is that she cannot digest her food? A. Yes; that is why she belches.

Q. What is the probability of her improving? A. Personally she is up a little bit, but I don't think she will ever be cured.

Q. Did you have her examined by any specialist on stomach trouble? A. Yes, sir. Doctor Whalen.

Q. Did he consult with you on the subject of her condition? A. Naturally he did as consultant.

Q. As the result of the conference with him did you and he come to a conclusion as to what course should be taken to relieve this condition?

The Court: Did he come to a conclusion as to what should be done to relieve her?

Q. Did he come to a conclusion as to what should be done to relieve her?

Objected to.

By the Court: Q. Did you change your conclusion?

The Witness: No, sir.

Q. What other doctor did you take her to? A. Dr. Ryan of Passaic.

Q. What is his position? A. Chief of the Medical Staff of St. Mary's Hospital.

The Court thereupon took a recess.

AFTERNOON SESSION.

PHILIP SIMONS, resumed:

Direct-examination by Mr. Broadhurst (continued):

Q. Before we went to lunch you had told us that you had taken Mrs. Nisky to Dr. Ryan, Chief of Staff of Saint Mary's Hospital. As a result of examination by Dr. Ryan, did you change your diagnosis? A. No.

Q. Did you take her to any other doctors besides Drs. Whalen and Ryan? A. Yes, C-u-l-p of New York.

Q. What is he? A. He is visiting surgeon at the Mount Sinai Hospital.

Q. Did he examine her? A. He did.

Q. What other doctor did you take her to, if she went to any others? Was there a doctor in Newark? A. Dr. Jessup, in Newark.

Q. Is he a specialist of any kind? A. He specializes in general medicine.

Q. Is Dr. Jessup here today? A. I called his home; he is sick in bed.

Q. As a result of your further examination with Dr. Jessup and Dr. Culp of New York, did you change your diagnosis?

Mr. Dawson: If your Honor please, I don't think that that is a fair question. Here is a doctor in bed and they are calling this doctor to testify by inference.

The Court: That is absolutely so.

Mr. Broadhurst: That is the reason; I want to find out if he changed his own diagnosis.

By the Court: Q. "Did you change yours?" That is competent.

The Witness: No.

By Mr. Broadhurst: Q. Did you change your diagnosis? A. No, sir.

Q. Have you rendered a bill to Mr. Nisky or to Mrs. Nisky for your services? A. I did.

Q. To whom? A. Mrs. Nisky.

Q. How much was that bill? A. Three hundred dollars.

Q. Do you know, exactly, the number of visits you had? Did you keep a record? A. Anywhere from 125 to 150.

Q. Do you feel, in your opinion, that the charge of three hundred dollars was a fair and reasonable charge for the services rendered? A. I do.

Q. Mrs. Nisky has testified that Dr. Jessup charged a twenty-five dollar fee. Can you tell us whether or not that was a reasonable charge for his services? A. You would have to ask them. Some charge $15; some $25; others $50; some $200.

Q. Have you ever used any of these men as consultants before? A. Yes, I have.

Q. Can you tell us how this charge compares with previous charges? A. Yes, it depends upon the location. Dr. Jessup came to Passaic and once to Newark. One trip was at night. There was only a ten dollar charge this day.

Q. Do they vary? A. Some night calls.

Q. Did you ever attend Mrs. Nisky previous to this? A. I did.

Q. What was her condition of health previous to this occurrence? A. I saw her several weeks before the other cases and then several months before that. General condition I would say was good.

Q. What did you treat her for? A. Cold in the chest. Heart was normal; general condition also good.

Q. Did she suffer at that time from this belching? A. No, she did not.

Q. Now, Doctor, assuming that Mrs. Nisky was in good health previous to October 19, 1923 and was not suffering from any stomach trouble and that she was a woman thirty-two years of age; having been married for a period of sixteen or seventeen years; having two children, one of whom is about fifteen years of age, the other thirteen; actively engaged in the profession of midwife, and assuming that on the 19th of October, 1923 she had for her breakfast some cereal, toast, and coffee in the morning around eight o'clock, and that she attended to her business during the forenoon and had lunch around twelve o'clock or shortly thereafter; that she had some eggs, toast, and coffee and then drove her automobile to the City of Newark; that she attended a matinee, approximately from two to four in the afternoon, and that after leaving the matinee that she went into a Childs restaurant feeling in good condition, and being hungry, that she ordered some clam chowder and half a dozen fried oysters, which were served; assuming that she ate the claim chowder, which tasted all right, and that she relished it; assuming that she ate three oysters; that the first one tasted all right, and that she relished it; assuming that on one of the following oysters—the third or fourth oyster—upon taking part of it into her mouth, chewing it and swallowing it that she felt a bitter taste in her mouth and throat; assuming that she then had a cup of coffee and that shortly thereafter, probably half an hour or more that she left Childs restaurant to go home and that she drove home, and assuming that after partaking of this oyster that she a short time after—which has been testified to as anywhere from

twenty minutes to half an hour or a little longer—felt nauseated with a desire to vomit, that she had a fever and chill and a feeling that she was beginning to swell, and assuming that upon arriving home, after making the trip from Newark to Passaic, that she went to bed; that during the trip home she grew worse, that the chills grew worse and that the fever grew worse and that she had a desire to vomit; assuming that shortly after you were called to the house and found the conditions which you did find, that you gave her the treatment which you did give her and to which you have testified to; that subsequently she was confined to bed for a period of seven or eight days or a week; that she has the physical condition which you have treated and which she now has, as disclosed by your subsequent treatment and examination, and considering further, the nature of material taken from her stomach by the stomach pump which you used on her and the other symptoms that I have just narrated, in your opinion was the oyster which caused the better taste in her mouth, with a reasonable degree or certainty the probable, efficient cause of her sickness?

Mr. Dawson: I object to that as a leading question; very leading.

The Court: It is leading.

Mr. Dawson: It is hypothetical; it is also leading.

Mr. Broadhurst: All right. Let me put it this way: Do you want me to put all my facts in my question, again?

Mr. Dawson: No.

Q. Assuming those facts, Doctor, what in your opinion, with a reasonable degree of certainty, was the probable, efficient cause of her illness? A. Poisoned oysters, by all means.

CROSS-EXAMINATION by Mr. Dawson:

Q. Doctor, did you ever know of a case of ptomaine from oysters? A. Yes.

Q. When and where? A. During my internship in various hospitals and in going around with various professors and in clinics, I saw one or two cases of oyster poisoning.

Q. You mean one or two that you heard about? A. One or two discussed with professors during visits—

Q. You never, yourself, had a case of that kind? A. No, sir.

Q. Only two that you have heard about? A. In the three years that I am out in practice.

Q. Where were those cases? Do you remember? A. I had one in Fordham Hospital and the other at—I think was at the Volunteer Hospital. I am pretty sure.

Q. You had a patient there who was suffering from poisoned food? A. Oysters.

Q. You concluded that it was oysters? A. That was the conclusion—that was the diagnosis.

Q. In this case you said, previously, that you had concluded it was poison in the oysters by reason of the history you got in the case. Do you mean by that what you were told? A. One thing; not solely.

Q. What do you mean "history"? A. "Condition"—she told me, "I had coffee, clam chowder, and fried oysters."

Q. That is the "history"—what you were told? A. Exactly.

Q. After arriving at the conclusion "poison", how did you eliminate the possibility of poison in other things that she had eaten during the day—cereal, milk, clam chowder, or soup? A. That is why the

history is important. Began at night, after supper —didn't begin before. She had a light lunch she said—cereal and milk. You can't get ptomaine from cereal and milk. From old stale milk you get poison but not ptomaine.

Q. Not from milk? A. No.

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

Q. Did you ever hear of tyrotoxicon? A. Yes.

Q. What is it? A. Tyrotoxicon are certain mono-acids—certain poisons, when, in the system, are the result of decomposition and putrefaction.

Q. You get that from milk. Is that so? A. Right.

Q. You always get that in milk and cheese? A. Cheesey milk. Never heard of it in milk. In cheese, decomposition has taken place.

Q. Cheese is made from milk, Doctor? A. That is right.

Q. You say that you were satisfied of oyster poison deposited from the history, and for some other reason that you have in mind— A. I don't think that you have got me right on that. I told you that I was satisfied of oyster poisoning by virtue of the reason of the history and by what I had produced by taking this stuff from the stomach.

Q. Mrs. Nisky said that pieces of clam chowder came out. Did you see those? A. I did not.

Q. You saw pieces of carrot? A. Yes, pieces of carrot. That is true.

Q. Would you be in a position to distinguish a clam from that of an oyster? A. No; in fact there is little difference between the two or the poison that would come therefrom. It was probably poison from the protein content in the oyster. There is 6.1 in the oyster; in the clam 8.2 protein material. It may come from the clam and it may come from the oyster.

Q. Do you know the name of the alkaloid causing the poison? A. In the oyster?

Q. Yes. A. It might be one of these six—

Q. The same with clams? Probably so; I wouldn't want to testify in the capacity of an expert on that.

Q. Have you ever heard of ptomaine poisoning arising out of eating clams? A. I haven't had cases; certainly can be.

Q. How do you eliminate, Doctor, the other food that she ate during the day being possible because of this condition? A. First, she states that she had this milk and cereal in the morning and a little water. Lunch very light. No symptoms of gastric distress at all. Right after supper one oyster smelled badly, with a feeling of great distress.

By the Court: Q. Where did you get the "smell" history? "Tasted"; not "smell."

The Witness: I withdrew the oysters from the stomach: The fact that it tasted so badly led me to believe it was the oysters. This fact I could not have satisfied until I withdrew the oysters from the stomach. No change at all; oysters looked soft—probably soft before—same as taken.

By Mr. Dawson: Q. You are sure no absorption of the oyster— A. When I saw the oyster itself, I knew the oyster wasn't in the intestine canal.

Q. The same observation? A. Same observation—

Q. Have you ever had ptomaine cases—ptomaine poisoning like this? A. Yes, sir.

Q. Isn't it the usual experience that they are violent within a short time unless relieved? A. I would say so.

Q. Relief comes in a few minutes? A. Sometimes no. A few minutes to less than two months.

Q. You say there might have been poisons in the milk. Would there be anything unreasonable in

the lapse of time, saying that the distress came from something in the milk that was wrong? A. Not necessarily. We have had cases of ptomaine poisoning taken ten to twelve or sixteen hours after the milk. That is one reason I had Doctor Ryan in on the case. I checked up for milk poisoning in the milk.

By the Court: Q, Never mind that. What time was it when you examined these particles of oysters?

The Witness: What time?

By the Court: Q. Yes. A. I can't say exactly. I got the history from the husband. Only in the house ten or fifteen minutes.

By Mr. Broadhurst: Q. Before you got there? A. Yes.

Q. How long a time did it take to take the stuff out of the stomach with the pump? A. Five minutes.

By Mr. Dawson: Q. Did you say you rendered a bill in this case? A. I did.

Q. It has not been paid? A. Yes, $150 is paid.

Q. Have you any interest in this case other than your bill? A. I will get paid all right; I manage to do that.

Q. Did you turn this case over to your brother? A. I did not.

Q. Did you recommend employment of your brother? A. No; I never did. Two or three days after—

Q. Is this brother in the office with you? A. One of them is.

Q. Very frequently you do hand cases to your brother to handle?

Mr. Broadhurst: That is immaterial.

The Court: Yes, it is too remote.

Q. You say, Doctor, that part of your education was at the Memorial Hospital? A. Yes.

Q. You were removed from that hospital because of your activity in accident cases? A. No, sir.

Q. You say you were not? A. Not by any means; absolutely no.

Q. You didn't finish your internship there? A. Yes, I did.

Q. The full term you are expected to do? A. You are expected to stay six months; I stayed three months after that.

Q. Upon the determination by the Board of Dismissal—

Mr. Broadhurst: That is immaterial. I don't see what difference that makes, unless it is to show that he is not a good doctor.

By the Court: Q. Doctor, I understand that this oyster that you mentioned—that it does not necessarily come from eating decomposed— A. It is due to an oyster which is diseased by itself or diseased by—

Q. An oyster, perfectly normal in every other respect, would have to be normal? A. No, not normal.

Q. That is what I am asking you. Eliminate poison and there is nothing to indicate poison. It is not the oyster itself that makes it a bad oyster. A. That is it.

Q. It does not have to be a rotten oyster? A. It does not.

Q. Lots of oysters may be decomposed and not have this poison in them? A. That is right.

Q. It wouldn't follow that a person eating an oyster that was slightly decomposed—kept too long or smelled—it wouldn't necessarily follow that that was a poisoned oyster? A. That would be a poisoned oyster—reason for having had decomposition or poison.

Q. Poison? A. Yes, not rotten.

Q. One might pick out a healthy one and it still might have this poison in it? A. Yes, but you can take the case of—

Q. No; not that.

By Mr. Dawson: Q. Doctor, you were practicing in Passaic in December, 1923? A. Yes, sir.

Q. You were convicted of a conspiracy to defraud an insurance company in 1923? A. No, sir.

Q. The Germania Insurance Company—in forging a death certificate of your brother-in-law? A. I never did.

Q. Do you know anything about the case?

By the Court: Q. Were you convicted of crime?

The Witness: Never convicted of crime, sir.

RE-DIRECT-EXAMINATION by Mr. Broadhurst:

Q. Was there ever any charge against you for that? A. Never in my life.

Q. You said something about particles of oyster brought out with the stomach pump. You said something about "smell." Tell us about that. A. Smelled very badly—sharp odor—pungent.

Q. Would that have been caused, if an oyster had been good in every respect, and had been eaten, for example, by Mrs. Nisky, and an interval of time had elapsed, an hour or so, from that time until it was removed from the stomach, would that smell be present in a normal, healthy oyster? A. No, sir.

By the Court: Q. In other words, if the oyster was in normal condition it would not have smelled after that length of time in her stomach? A. Not smelled as it did.

Q. What was meant by the condition of the oyster in the stomach? That smell would exist before eaten. A. After one is consumed, it causes the

same odor of food taken into the stomach, but poisoned oysters of this kind have a sharp, characteristic, nauseous odor.

Q. The odor which you noticed was one which would have been noticeable to one eating that oyster or preparing it for food, before taken into the stomach?

Mr. Broadhurst: You mean in the cooked state, Judge?

The Witness: It probably wouldn't break up upon chewing it, but it would be quite strong.

By the Court: Q. You mean to say that so far as anything that you found in your examination is concerned, you are not prepared to say that anything indicated that the odor existed before the oyster was eaten? A. It may and it may not.

Q. You wouldn't say definitely? A. Not definitely.

Mr. Broadhurst: Do you concede that the meal was paid for—three dollars and some change?

Mr. Dawson: I will concede that she did.

BERTHA SHAMBERGER, sworn:

Direct-examination by Mr. Broadhurst:

Q. What is your name? A. Bertha E. Shamberger.

Q. What is your occupation? A. Graduate maternity nurse.

Q. How long? A. September 12, 1923.

Q. Do you know Mrs. Nisky? A. Why, I knew her since I worked with her.

Q. How long have you known her? A. Three years; since the time I graduated.

Q. Did you perform any work for Mrs. Nisky in the care of her confinement cases since October, 1923? A. I had—I took part charge.

Q. You mean the care after delivery? A. Yes.

Q. How long after her illnes did you continue to take care of the work on her confinement cases after delivery? A. About a year or more.

Q. What was the arrangement with her financially as to the care of these cases? A. Each case fifty per cent—50-50 on everything.

Q. You each got half? A. Yes.

Q. Did you keep any record of the number of cases? A. I did not.

Q. What did the cases average? What was the price that was got on the average case? A. There was no special price on cases—$25 or $35—I don't know.

Q. You say that you continued for a period of about a year? A. Or more.

CROSS-EXAMINATION by Mr. Dawson:

Q. You say that you have known Mrs. Nisky for about three years? A. Almost three years.

Q. Are you a practical nurse?. A. I am a graduate maternity nurse.

Q. Were you such in 1923? A. From September 12, 1923.

Q. You are a maternity nurse, you say? A. I am.

Q. Where did you say— A. Maternity Hospital of Newark, on High Street.

Q. You have been a maternity nurse since 1923? A. After September 12th.

Q. While working with Mrs. Nisky? A. I was.

Q. Are you still practicing as a nurse? A. I am.

Q. The same sort of nursing? A. Not at the pres-

ent time. I am not on maternity work at the present time.

Q. How many visits did you usually make on a maternity case after that? A. I didn't keep any record.

Q. You didn't keep any record of it at all? A. No record.

Q. You just depend upon her to pay you? A. Absolutely.

Q. What is a maternity nurse? A. Maternity is the delivery of a new-born baby.

Q. That is not the same as a graduate nurse? A. Registered nurse.

Q. Not a graduate? A. No.

Q. What name is that called by? A. The name is graduate nurse.

Q. You say that your worked for Mrs. Nisky for about a year? A. Yes.

Q. When did you begin? A. The day after—about the 28th of October.

Q. Did you have an arrangement with her? A. She called me up and I came down to her home.

Q. When did you go out? A. First case went out about the 27th—right after she got out of bed.

Q. The 27th you say it was? A. I won't be exact—about that—the first case after she got out of bed.

Q. Don't you know whether it was the 27th or what? A. I don't know that.

Q. It might have been two or three days after she was ill? A. About two or three days.

RE-DIRECT-EXAMINATION by Mr. Broadhurst:

Q. Did you get a diploma? A. Yes.

Q. Where from? A. From the hospital; and I got a pin.

Motion for Non-Suit
Judgment of Non-Suit

Mr. Dawson: If your Honor please, I move for a non-suit of this case on grounds that there has been no proof of negligence, it seems to me, in any way, shape or manner. It seems to me that even though we had gone and finished the case that there is no proof that this oyster poisoned her.

The Court: Mr. Broadhurst, what do you say about your cause of negligence? What do you base your suit on? It is a case of implied warranty or negligence?

Mr. Broadhurst: The complaint is based on that of alleged implied warranty. Warranty that the food will be fit for the purpose for which it was ordered and bought.

The Court: I hate to take a case such as this from the jury for I think it should be awarded to them, but so far as this Court is concerned, I hold that the mere proof of the eating of "poisonous" food, if you please, is not sufficient upon which to rest a cause of action for damages based upon implied warranty, and as far as negligence is concerned, we have nothing here to which the doctrine of *res ipsa loquitur* applies. I shall allow you an exception.

Mr. Broadhurst: Note my exception to your ruling.

NEW JERSEY

Court of Errors and Appeals

MARY NISKY and SYLVESTER NISKY, Plaintiffs-Appellants, vs. CHILDS COMPANY, a corporation, Defendant-Respondent.	Action at Law. On Appeal from Hudson County Circuit Court.

BRIEF IN BEHALF OF THE APPELLANTS

(1)

STATEMENT OF THE CASE.

This appeal brings before this Court for review a judgment of the Hudson County Circuit Court in favor of the defendant-respondent (hereinafter referred to as the defendant) and against the plaintiffs-appellants (hereinafter referred to as the plaintiffs). The suit was brought by the plaintiff, Mary Nisky, to recover damages for personal injuries sustained by her; her husband, the plaintiff, Sylvester Nisky, joined in the suit to recover damages for the expenses incidental to effecting a cure of his wife's condition as well as for the loss of her society and service.

The complaint alleges that on October 19, 1923 the defendant owned and operated a restaurant or eating house in premises known as 158 Market Street, Newark, N. J., at which place, for value, it sold foodstuffs ready to eat and drink to persons while upon the premises (p. 3, ll. 20-40). On that day the plaintiff, Mary Nisky, entered the restaurant and for a valuable consideration a sale was made by the defendant to her of certain foodstuffs which were consumed by her on the premises. The foodstuffs so sold consisted of a plate of clam chowder and a half dozen fried oysters which food was prepared by the servants and agents of the defendant upon the premises. The complaint further alleges that it was the duty of the defendant to furnish the plaintiff with food fit to eat, wholesome and not harmful or poisonous. That the oysters were harmful, deleterious, dangerous to health and poisonous, as a result of which plaintiff, Mary Nisky, immediately after eating same became poisoned and grievously ill (pp. 4 and 5).

The first count of the complaint alleges the above cause of action on the theory that there was an implied warranty, irrespective of negligence, for an injury caused by the food served by the defendant, without regard to any statute. The second count alleges that the injury was due to the negligence of the defendant in failing to exercise reasonable care in the purchase, preservation, preparation and cooking of the food (p. 5, l. 35 to p. 6, l. 15). The third count reiterating all the allegations of the first count alleges that the sale of the food was a sale within the meaning of "The Sale of Goods Act" and that by virtue of paragraph 15, subdivision (1) of that act there was implied warranty that the food was reasonably fit to eat (p. 6, ll. 20-30). The fourth, fifth and sixth counts are causes of action for the husband on the same theories (p. 7). The

case was tried on the first and third counts of the complaint (p. 70, ll. 1 to 20). The trial judge at the conclusion of the plaintiffs' case granted a non-suit (p. 70, ll. 20-30; p. 10, ll. 30-40). It is from the judgment entered on that ruling that the present appeal is taken (p. 1).

(2)

GROUNDS OF APPEAL.

The grounds of appeal raise the legal propriety of the trial judge's decision holding as a matter of law that there was no implied warranty, irrespective of negligence, for the injury caused by food served by the defendant to the plaintiff.

They are limited to the single question of whether the trial court erred in granting the non-suit (p. 2). Exception was noted to that ruling (p. 70).

(3)

BRIEF OF THE ARGUMENT.

I

THE TRIAL JUDGE ERRONEOUSLY DECIDED THAT THERE WAS NO IMPLIED WARRANTY IRRESPECTIVE OF NEGLIGENCE FOR THE INJURY CAUSED BY POISONOUS FOOD SERVED TO THE PLAINTIFF BY THE DEFENDANT.

Mary Nisky, age thirty-three, was a duly licensed midwife of the State of New Jersey (p. 13, ll. 1-15). On October 19, 1923, at about eight a. m., she arose feeling in the best of health and partook of a light breakfast consisting of cereal, eggs and coffee (p.

13, l. 10 to p. 14, l. 10; p. 41, ll. 35 to 40). After attending to her work in the forenoon she had lunch about twelve o'clock consisting of toast, eggs and coffee (p. 14, ll. 10-20; p. 35, ll. 15-25). About one p. m., accompanied by two friends, she drove her automobile from Passaic where she resided to the City of Newark and attended the theatre until 5 p. m. (p. 14, ll. 20-40). After the performance she and her friends went to the restaurant of the defendant at 158 Market Street, Newark, N. J. She was hungry and felt in the best of health (p. 15, ll. 15-20). Mrs. Nisky's order consisted of a plate of clam chowder and six oysters, to be fried in egg and cracker dust. After consuming the chowder she began to eat the oysters, the first two seemed all right. Upon eating the third oyster it tasted bitter but she swallowed it, whereupon her mouth and tongue began to burn (p. 15, ll. 20-40). She complained to the waitress of the bitter and burning taste who suggested that a cup of coffee might relieve that condition. This was brought but did not have the desired effect (p. 16, ll. 1-15). The bitter taste continued and grew worse. She became nauseated and wanted to vomit (p. 16, ll. 15-30; p. 39, ll. 10-20). After her friends had finished their dinner she immediately drove home to Passaic. On the journey her symtoms grew worse and her stomach began to distend or swell. She developed chills and fever as well as severe pains in the abdomen (p. 16, ll. 30-40). Arriving home around 6:30 or 7 p. m., which would be one hour and a half after partaking of the food, her husband immediately put her to bed and called a doctor (p. 17, ll. 1-20). The doctor came at once and after making a cursory examination and obtaining a history of the case, he returned to his office and brought back a stomach pump which he used upon the plaintiff, removing from the stomach the clam

chowder and particles of the oysters (p. 18, l. 30 to p. 18, l. 10). The particles of the oysters were of a yellowish, greenish black. The doctor worked over her for about an hour and due to her severe pain and screaming, a hypodermic needle was used (p. 18, ll. 10-30). Her stomach continued to swell and all during the night she vomited intermittently, not being able to take even water (p. 18, ll. 30-40). A greenish, black phlegm came from her stomach and on the following day this was streaked with blood. The doctor was called again around two or three o'clock that night as her condition grew worse (p. 19, ll. 1-15). She was confined to her bed for eight days under constant medical care with a nurse in attendance (p. 19, ll. 20-40). For a long time under the dortor's orders she was on a special diet of milk and water and then a little chicken broth and toast. If anything heavier was eaten it caused terrific pain (p. 23, ll. 10-20). For a long time she was subject to continued attacks of dizziness due to gas forming in the stomach. Vomiting also continued off and on (p. 24, ll. 20-30). She has been left with a permanent condition of belching due to gas forming on the stomach (p. 25, ll. 1-10). At the time of the trial, over two years from the date of the occurrence she was still undergoing treatment to relieve this condition of continued belching (p. 32, ll. 10-20). Her weight decreased about 20 to 30 pounds (p. 32, ll. 30-40).

The nurse who attended the plaintiff testified that when she arrived in response to a hurry call she found the plaintiff like a raving maniac with her hands and feet twitching in spasms and her eyes set and glassy (pp. 43 and 44).

The doctor testified (p. 52, ll. 20-40), that he found her in a convulsive state, twitching, panting, semi-conscious, rapid pulse, and with respiration rapid and feeble. He inquired of her husband

and ascertained that she had become sick almost immediately after eating some oysters. He immediately got his stomach pump and washed out her stomach with a solution of bicarbonate of soda after which he removed the contents of the stomach with a syphon (p. 53, ll. 1-30). He diagnosed her condition as poisoned oysters in the stomach (p. 54, ll. 1-15 and ll. 25-40). There was a marked distention of the stomach (p. 55, ll. 25-30). As a result of the poisoning the lining of her stomach was destroyed, that is the mucous epidermis of the stomach containing a number of glands that act on foods taken into the stomach were destroyed by the poisoned oysters (p. 55, ll. 30-40). That condition causes poor digestion and creates gas and belching. He treated her for over a year from the time of the occurrence. In response to a hypothetical question containing all the facts testified to in the case, the doctor stated that it was his opinion based on reasonable probabilities that the oysters eaten by the plaintiff were poisonous and were the probable efficient cause of her illness and disability (pp. 55 and 60). The particles of the oysters that were brought out of the stomach had an unnatural sharp odor, even considering the length of time they had been in the stomach. The odor was not that of a normal, healthy oyster which had been in the stomach for the period of time in question (p. 66, ll. 20-40).

It was conceded in the case that the plaintiff paid over $3. for the meal for herself and two friends.

The plaintiff, Sylvester Nisky, testified to the expense incident to his wife's illness and the nature and extent as well as the value of the loss of her services (pp. 49 and 52).

The legal question for decision is whether a seller of foods at a public eating place, to be consumed on the premises, is liable in damages to a purchaser

who is made ill on account of the food being poisonous and unwholesome.

The general rule is stated in 26 *Corpus Juris* 786 that:

> "According to some of the authorities a keeper of a public eating place is liable upon an implied warranty, irrespective of negligence, for an injury caused by food served by him."

Also the same author says:

> "Liability upon an implied warranty is expressly denied by other authorities, some of which assign, as a reason for so deciding, that the transaction of furnishing food to a patron does not constitute a sale but a rendition of service. But this reasoning has been said to be inapplicable to restaurants and eating places into which any person may enter and order such food as is desired, paying a stipulated price therefor."

The question involved has not been decided by this Court or the Supreme Court so far as our search of the reports reveals.

An exhaustive examination of the authorities elsewhere, demonstrates that the weight of authority, as well as the better reasoning, establishes the rule that the keeper of a public eating place is liable upon an implied warranty, irrespective of negligence, for injury caused by poisonous food prepared by him and served in his restaurant. In a great many states the question has not been passed upon. We have eliminated from consideration all actions based on negligence and have included only cases where the cause of action was brought on the theory of implied warranty as between the restaurant keeper and his patron.

Massachusetts:

Friend v. Childs Dining Hall Co. (decided Sept. 11, 1918, 231 Mass. 65, 120 N. E. 407);
Barringer v. Ocean S. S. Co. of Savannah, 240 Mass. 405; 134 N. E. 265 (decided Mch. 1, 1922).

In the first case decided by the court of last resort the plaintiff sued Childs Company for an injury sustained to her teeth which were broken when they came in contact with stones in a dish of baked beans served to her in the defendant's restaurant. The plaintiff relied upon an implied warranty of food fit to eat in a contract for food to be eaten on the premises of the defendant. The question decided by the highest court of Massachusetts was whether, under that state of facts the plaintiff was entitled to go to the jury. The Court decided that there was an implied warranty, and that the case should have been submitted to the jury. Chief Justice Rugg in a very learned opinion, in part said:

> "There is strong ground for holding that the contract made between one who keeps a restaurant and one who resorts there for food to be served and eaten on the premises is a sale of food. The evidence in *Commonwealth v. Worcester,* 126 Mass. 256, was that on two or three different occasions people resorted to the defendant's dwelling house and there were served with meals; with these and as a part thereof intoxicating liquors were provided. The price paid was single including both food and drink. The complaint was sale and illegal keeping for sale of intoxicating liquors. It was held that:

"'The purchase of a meal includes all the articles that go to make up the meal. It is wholly immaterial that no specific price is attached to those articles separately. If the meal included intoxicating liquors, the purchase of a meal would be a purchase of the liquors. It would be immaterial that other articles were included in the purchase and all were charged in one collective price.' * * *"

"The defendant in *Commonwealth v. Warren,* 160 Mass. 533, 36 N. E. 308, was charged with selling milk not of good standard quality contrary to St. 1886, c. 318 §2. The evidence was that a guest at the inn of the defendant conducted on the American plan was served as a part of his breakfast, for which he paid a single price, with a glass of milk not of the quality required by the statute. It was said in the course of the opinion holding that the defendant might be found guilty: 'The milk bought by the witness Kelly was purchased by and delivered to him as a part of his breakfast, and was just as much a sale as if a specific price had been put upon it, or it had been bought and paid for by itself.' Similar decisions have been made by other courts. In *People v. Clair,* 221 N. Y. 108, 116 N. E. 868, L. R. A. 1917F, 766, it was held that the serving of partridges by a hotel keeper to guests who paid for board and room at the rate of $2. per day, was a sale as a matter of law in violation of a statute which provided that such game should not be sold, offered for sale or possessed for sale for food purposes. A similar decision was rendered in *Commonwealth v. Phoenix Hotel Co.,* 157 Ky. 180, 162 S. W.

823, with reference to the possession of quail by an innkeeper with intent to serve to his guests in violation of a statute which prohibited the sale of such birds. It there was said (157 Ky. at p. 185, 162 S. W. at p. 825):

> " 'The guest at the hotel or restaurant who is served with quail for compensation as certainly purchases it and the proprietor of the hotel or restaurant as certainly exposes it for sale and sells it as if it were purchased for compensation from a dealer who had it for sale and was carried home by the purchaser to be served on his table.'

"It was decided in *Commonwealth v. Miller,* 131 Pa. 118, 18 Atl. 938, 6 L. R. A. 633, that where the keeper of a restaurant served oleomargarine with a meal to a guest, who was charged and paid 50 cents for the meal, there was a sale within the terms of a statute which prohibited the sale of oleomargarine. In view of these decisions it would be difficult for this Court to hold that the transaction arising from a contract to serve to a guest food to be eaten by him upon the premises of the keeper of an eating house is not a sale. If it is a sale, then plainly it is governed by the Sales Act, St. 1908, c. 237, § 15 (1), which is in these words:

> " 'Where the buyer, expressly or by implication makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment, whether he be the grower or manufacturer or not, there is an implied warranty that the goods shall be reasonably fit for such purpose.'

"It is manifest that at least it might be inferred, from the relations of the parties, that the guest who asks to be served food upon the premises of one who is the keeper of a restaurant makes known as the particular purpose for which the food is required that it is then and there to be eaten, and that he relies upon the latter's skill or judgment in the selection and preparation of food. Hence there would be an implied warranty that it was reasonably fit for such purpose * * *." (p. 408.)

"The authorities already cited appear to show that by the common law of England it was an implied term of the contract that the guest should be furnished wholesome food by the proprietor of a public eating house to which he resorted for refreshment * * *."

"It would be an incongruity in the law amounting at least to an inconsistency to hold with reference to many keepers of restaurants who conduct the business both of supplying food to guests and of putting up lunches to be carried elsewhere and not eaten on the premises, that, in case of want of wholesomeness, there is liability to the purchaser of a lunch to be carried away founded on an implied condition of the contract, but that liability to the guest who eats a lunch at a table on the premises rests solely on negligence. The guest of a keeper of an eating house or innkeeper is quite as helpless to protect himself against deleterious food or drink as is the purchaser of a fowl of a provision dealer. The opportunity for the innkeeper or restaurant keeper, who prepares and serves food to his guest, to discover and provide against deleterious food is at least

> as ample as is that of the retail dealer in foodstuffs. The evil consequences in the one case are of the same general character as in the other. Both concern the health and physical comfort and safety of human beings. On principle and on authority it seems to us that the liability of the proprietor of an eating house to his guest for serving bad food rests on an implied term of the contract and does not sound exclusively in tort, although of course he may be held for negligence if that is proved. Without repeating the reasoning of *Farrell v. Manhattan Market Co.*, 198 Mass. 271; 84 N. E. 481, 15 L. R. A. (N. S) 884, 126 Am. St. Rep. 436, 15 Ann. Cas. 1076, we are of the opinion that, on sound legal principles, it bears with equal force upon the facts here presented. Even if there were no common-law authority (which there is, as already pointed out), it would not be practicable to establish a distinction upon this point which could be supported in reason, between the liability of a retail dealer in meat for immediate consumption and of a victualer who serves food to guests to be eaten forthwith at his own table. Every argument which supports liability of the former tends to sustain liability of the latter with at least equal cogency. They appear to us to rest upon the same footing in principle."

In the second case, the same court had before it for decision an action in contract where the plaintiff who was a passenger on the defendant's boat alleged that food served by the defendant and eaten by him was unwholesome whereby he was injured and made sick. Judgment was entered for the plaintiff and the defendant appealed. The evidence

disclosed that he ate some cold meat which did not taste very good to him and shortly thereafter he left the boat for his home. He had nothing else to eat or drink that evening and late at night awoke suffering from cramps. He called a physician who attended him for a number of days. He had a high temperature and could not retain food. The doctor who attended him died before the trial. A physician testified in answer to a hypothetical question containing the above facts that the plaintiff presented a practical picture of food poisoning and that it was due to the meat which had not tasted good. The Court citing the Childs case, affirming the judgment for the plaintiff, tersely saying:

> "The defendant contracted to furnish the plaintiff with proper food and if the defendant failed in this duty it was responsible to the plaintiff in damages."

It was contended in that case that there was not sufficient evidence to go to the jury on the question, whether the plaintiff's illness was due to the meat. The Court said that the plaintiff's testimony, coupled with that of the doctor's although meagre, was for the jury as was the credibility of the witnesses.

New York:

Race v. Krum, 222 N. Y. 410; 118 N. E. 853, (decided Feb. 5, 1918).
Temple v. Keeler, 230 N. Y. 344; 144 N. E. 635 (decided June 3, 1924).
Barrington v. Hotel Astor, 184 App. Div., 317, 320, 171 N. Y. S. 840.
Leahy v. Essex Co., 164 App. Div., 903, 148 N. Y. S. 1063.

In the first case the Court of last resort reviewed a judgment in an action wherein the

plaintiff recovered a judgment against the defendant, who was the operator of a drug store wherein he sold ice cream to be consumed on the premises. Plaintiff had some ice cream and was made violently ill. Exception was taken to the ruling of the trial judge that when the defendant sold the ice cream to the plaintiff he impliedly warranted it was made for human consumption. The Court said:

> " 'So in regard to the sale of food for * * * human consumption, the law annexes an implied warranty that the food is not in an unwholesome condition and unfit to be eaten.'
>
> "This rule is based upon the high regard which the law has for human life. The consequences to the consumer resulting from consumption of articles of food sold for immediate use may be so disastrous that an obligation is placed upon the seller to see to it, at his peril, that the articles sold are fit for the purpose for which they are intended. The rule is an onerous one, but public policy, as well as the public health, demand such obligation should be imposed. The seller has an opportunity, which the purchaser does not, of determining whether the article is in the proper condition to be immediately consumed. If there be any poison in the article sold, or if its condition render it unfit for consumption, and the consumer be thereby made ill, some one must of necessity suffer, and it ought not to be the one who has had no opportunity of determining the condition of the article, but rather the one who has at his command the means of doing so.
>
> "The present case is a good illustration.

> Plaintiff was seriously ill for several days. Serious consequences followed the illness. He had no opportunity of determining, when the purchase was made, whether the cream was good or bad. Defendant did have such opportunity. He could have ascertained whether the ingredients which went into the cream contained the poison referred to, or, after it was prepared, he could have so cared for it that it would have been impossible for filth, which it is conceded is the cause of the poison, to have gotten into it.
>
> "I am of the opinion, therefore, that the trial court did not err in the instructions given to the jury, and that the judgment appealed from is right, and should be affirmed with costs."

In *Temple v. Keeler, supra,* the same Court decided a case analogous with the case at bar. There the plaintiff sued to recover for an illness caused by eating poisonous fish in the defendant's restaurant. The Court said:

> "We hold that, where a customer enters a restaurant, receives, eats, and pays for food, delivered to him on his order, the transaction is the purchase of goods. We hold also that under such circumstances the buyer does by implication make known to the vendor the particular purpose for which the article is required, and, where the buyer may assume that the vendor has had an opportunity to examine the article sold, it appears conclusively that he relies upon the latter's skill or judgment. *Rinaldi v. Mohican Co.,* 225 N. Y. 70, 121 N. E. 471. Consequently there is an implied warranty that the food is reasonably fit for consumption.

"We have not before held that the owner of a restaurant sells the food which he provides for his guests. Indeed, in *Race v. Krum*, 222 N. Y. 410, 118 N. E. 853, L. R. A. 1918F, 1172, we refused to pass upon the precise question as not then before us. Yet we cannot logically differentiate the facts there involved from those in the case at bar. Miss Temple entered a restaurant, orders a portion of fish which the jury might find was unwholesome, receives it, eats it, pays for it, and later becomes ill, it may be inferred, as the result. Mr. Race enters a drug store, orders a portion of ice cream which was unwholesome, receives it, eats it, pays for it, and later becomes ill as a result. This, we said, was a sale. The names of the plaintiffs differ; one defendant owns a restaurant and the other a drug store. But these variances are not sufficient to lead us to distinguish the two cases. It has been said that a restaurant owner does not sell food but renders a service—that a seat is furnished, the services of a waiter and cook, the use of plates and silver. There are seats before an ice cream counter. A clerk takes the order and delivers the food. Mr. Krum made or prepared the ice cream. It is eaten from a plate or glass with a fork or spoon belonging to the proprietor. It has also been said that in a restaurant, while the customer may consume such portion of his order as he desires, he may not carry away with him the remainder. If this be so, the same rule must apply to ice cream bought to be eaten in a drug store. In any event, the consequences sought to be drawn from this proposition do not follow. Even if true, the

transaction may still be a qualified sale—a sale of what is actually used. We suppose a merchant might sell for a fixed price all of a pile of potatoes a customer might wish or be able to carry away.

"Apart, however, from *Race v. Krum,* we would still be compelled to reach the same result by an authoritative decision. Even in construing a criminal statute we have held that a hotel keeper who places before his guests at dinner partridges sells the birds, although the guests paid a total sum for board and lodging. *People v. Clair,* 221 N. Y. 108, 116 N. E. 868, L. R. A. 1917F, 766. Elsewhere, also, the same rule has been applied. *Friend v. Childs Dining Hall Co.,* 231 Mass. 65, 120 N. E. 407, 5 A. L. R. 1100."

In *Barrington v. Hotel Astor, supra,* the rule was applied where the plaintiff was made ill by eating kidney saute in defendant's restaurant. In that case the reasoning of the Court is of interest and demonstrates the soundness of the rule. It said:

"We are referred to cases in other jurisdictions having to do with the relations of hotelkeepers or innkeepers with their guests, to the effect that a hotel keeper is liable only for negligence, is not an insurer of quality of the goods which he supplies and does not sell such food. It is claimed that as an innkeeper does not lease his rooms, so he does not sell the food he supplies to his guests.

"* * * In my opinion these cases are not controlling in this State. They are based upon reasoning having to do in large measure with the earlier method of furnishing accommodation by innkeepers to their guests, where for a stipulated daily sum the host

furnished lodging, food and service. There, perhaps, it may have been properly said that there was no sale of any particular dish placed before the guest for his consumption, for the host was only bound to satisfy the guest's reasonable needs so far as food was concerned and the guest had the right to eat such food as he required in reason and no more, and could not carry away with him any food which he had not eaten. But even under the common law it was held as far back as Year Book. 9 Henry VI, 53, that: 'If I go to a tavern to eat, and the taverner gives and sells me meat and it is corrupted, whereby I am made very sick, action lies against him without any express warranty, for there is a warranty in law' (Cited and followed in *Wallis v. Russell* (1902), 2 Ir. 611). And Keilway (22 Henry VII, 91), said: 'No man can justify selling corrupt victual, but an action on the case lies against the seller, whether the victual was warranted to be good or not.' This reasoning would seem to be without application to modern conditions, *where any person, whether a guest of the hotel or not, may enter its restaurant and order such food as he desires, paying a stipulated price therefor. I can see no logical reason why this is not a sale and delivery upon the part of the hotelkeeper and a corresponding purchase upon the part of the guest.*"

In *Leahy v. Essex Co., supra*, the evidence showed that the plaintiff, immediately after eating her luncheon at the defendant's lunchroom, was taken sick. She had some pie for dessert which had an unusual taste and color and she stopped eating it after a few mouthfuls. The trial court took the case

from the jury and that was held error. The Appellate Court reversing said there was an implied warranty in the sale of the food and the question of whether plaintiff's illness was due to the pie was for the jury's decision.

Indiana:

Heise v. Gillette, 149 N. E. 182 (decided Oct. 29, 1925).

In the above case the plaintiff sued because of poisoning resulting from eating an unwholesome chicken sandwich. A judgment was recovered by the plaintiff and affirmed. Disposing of the contention raised by the defendant the Court of last resort of Indiana, said:

> "The only error assigned by appellant is that the Court erred in overruling his motion for a new trial. It is averred in the complaint so far as here involved that on or about January 1, 1923, and for several years prior thereto, appellant was the owner, lessee, manager and operator of a certain restaurant and confectionery, serving various foods, drinks, refreshments to the public, located in the basement of the department store of the Block Company, in Indianapolis, Ind.; that on or about said date appellee entered said restaurant and confectionery, and then and there purchased and paid for a certain minced chicken sandwich, which she then and there ate; that said chicken sandwich was unwholesome, spoiled, decomposed, decayed, poisonous, and unfit for food or for human consumption, in that it contained and was made up of certain poisonous and deleterious ingredients; that by reason of appel-

lee's eating said sandwich she became seriously and violently sick and ill from ptomaine poisoning, and was confined to her bed in great pain and suffering for more than a week, and was put to great expense for medical and physician's attention and services and medicine and fees, and was put to the expense and loss of a month's time from her position as a stenographer, by reason of all of which said appellee was damaged in the sum of $1000.

"Appellant's reasons for a new trial were that the decision of the Court was not sustained by sufficient evidence, and that it was contrary to law. It is appellant's contention that appellee, in order to recover, was bound to allege and prove negligence on the part of appellant, and he contends that she did neither, while appellee contends that the question of appellant's negligence is not involved, and relies upon an implied warranty which she says arises from the facts alleged and proven.

"Appellant says that one serving food to be immediately consumed on the premises is neither an insurer of the fitness and wholesomeness of the food so served, nor liable upon an implied warranty; that there is no sale of the food served or furnished; and that the law of sales relating to implied warranties does not apply, citing authorities to sustain his contention. But we are not favorably impressed with appellant's contention, nor with the force of the authorities cited. Certainly they can have no application to modern conditions and methods of service, where, as here the guest orders and pays for at a stipulated price, and has delivered to her,

such food as she desires. We see no reason why such a transaction does not constitute a sale, and why it is not accompanied by an implied warranty that the food sold is wholesome to eat, containing no deleterious substance. This seems to be in harmony with the great weight of modern authority."

Louisiana:

Joseph Doyle v. Fuerst & Kraemer, 129 La. 838, 56 So. 906, 40 L. R. A. (NS) 480, (decided Dec. 1911).

Action was brought by the plaintiff to recover damages for poisoning due to eating cakes and chocolate with whipped cream in the defendant's store. Judgment for the plaintiff was affirmed.

Missouri:

Smith v. Carlos, 247 S. W. 468, (decided Jan. 1923).

In the above case plaintiff was injured by eating unwholesome and putrid fish served by defendant. He recovered a verdict and defendant on appeal contended plaintiff could not recover unless negligence was proven. The Court on appeal disposed of that contention, as follows:

"The appellants main contention is that the only recovery against a defendant engaged in running a restaurant such as in this case, must be based on negligence, and that he is not liable on breach of implied warranty. No Missouri cases are found on this question. Other courts are divided on the proposition * * * (citing authorities). We think that the element of a sale of food enters into the transaction where one goes into a restaurant,

makes an order from a menu card upon which are marked different prices for different dishes. The fish in this case was ordered and delivered for immediate use, and the same reason that would hold a grocer, or the butcher, or the manufacturer, indeed, who never sees the ultimate customer on the theory of an implied warranty should also apply with equal force and reason to the restuarant keeper who hands out a fish produced, prepared and served by him to one of his guests.

"The trend of the times is to require eating houses to be as sanitary as possible and to protect the public as far as can be by inspections, tests, etc. The importance of pure food to the public, and the inability of a guest to see or examine his food prior to its preparation and cooking, of necessity requires that one who holds himself out as a public furnisher of food and an expert in producing and preparing the same be held as an insurer against injury occasioned by a failure to furnish wholesome and pure food to eat."

California:

The Supreme Court of California, in *City of San Francisco v. Larson,* 131 Pac. 366, 367, dealing with this question, said:

"On behalf of the appellant, the argument is that one who keeps a restaurant is engaged in the business of selling goods, and hence that he comes within the terms and prohibitions against the imposition of license taxes on a person who sells goods, wares, and merchandise at a fixed place of business. It

> cannot be denied that the eating of food by a customer at a restaurant, in the regular course of business, involves a sale of the food eaten. The price of the food alone is usually not specified, but it is included in a lump sum, with the charge for service and use of dishes, chair and table. It is nevertheless a sale of the food consumed, within the technical definition of that term."

Illinois:

Greenwood v. John R. Thompson Co., 213 Ill. App. 371 (decided 1919).

We pause to point out that the above case is of particular interest because most, if not all of the cases holding to the contrary, rely on an early Illinois case, namely, *Schaffer v. Willoughby,* 163 Ill., 518, 45 N. E. 253 (decided in 1896). That case was not decisive because the action was based on negligence and not upon contract. The Court of last resort of Illinois is now in exact accord with the other leading authorities on the subject.

In *Greenwood v. Thompson Co., supra,* the action was based on contract and the Court held that one who serves food to be consumed upon the premises impliedly warrants that it is fit to eat and wholesome. The plaintiff ate frankfurter sausages served in defendant's restaurant. After citing the cases in New York and Massachusetts, *supra,* the Court said:

> "It has been held repeatedly in this state that a retail dealer in foodstuffs, selling the same for domestic use and consumption, impliedly warrants that such foodstuffs are sound and wholesome and fit to be eaten, and he is liable in damages if they prove to be otherwise, whether he was aware of their

condition or not. These cases make an exception to the ordinary rule of *caveat emptor*, squarely upon the ground of public policy * * *. Among the cases that hold that, inasmuch as the transaction of the restaurant keeper and his patron amounts to a sale, the former is in the same position as a retail dealer in food, and must be held to impliedly warrant that the food he serves and sells his patron is fit and wholesome, are *Leahy v. Essex Co.* (1914), 164 App. Div., 903, 148 N. Y. Supp. 1063; *Barrington v. Hotel Astor* (1918), 184 App. Div., 317, 171 N. Y. Supp. 840; *Friend v. Childs Dining Hall Co.*, (1918) 231 Mass. 65, 5 A. L. R. 1100, 120 N. E. 407. In our opinion, this must be held to be the rule of law applying to restaurant keepers. Any other rule, as applied to modern restaurants, would be inconsistent with the decisions of our Supreme Court involving the liability of retail dealers. No reason can be advanced for holding, with reference to many keepers of restaurants who conduct the business both of supplying food to patrons for immediate consumption by them on the premises, and also to customers who carry it away and consume it elsewhere (such as we know the business of this defendant to be), that in the former situation the liability of the proprietor of the restaurant shall be limited to such damages as may be shown to result from his negligence, while in the latter situation he shall be liable under an implied warranty that the food he supplies the customers is wholesome and fit to be eaten, and shall thus be liable for damages if the food proves otherwise, whether he was negligent or not. The patron of the restaurant keeper

> who consumes his food on the premises is quite as helpless to protect himself against deleterious food as is the customer who takes the food he buys away from the premises and consumes it elsewhere. The opportunity for the restaurant keeper, who prepares and furnishes the food in both cases, to discover and provide against deleterious food, is as ample in one case as in the other. *Friend v. Childs Dining Hall Co.* (Mass.) *supra.* And, in either of those cases involving the restaurant keeper, his opportunity would seem to be more ample than in the case of the dealer who has nothing whatever to do with the preparation of the food."

The States of New York, Massachusetts and Illinois have adopted the Uniform Sales Act which is in force in New Jersey. That Act (4 Comp. St. 4650 par. 15), provides that where the buyer expressly or by implication makes known to the seller the particular purpose for which the goods are required and it appears that the buyer relies on the seller's skill or judgment (whether he be the grower or manufacturer or not) there is an implied warranty that the goods shall be reasonably fit for such purpose. The cases referred to in this brief dealing with the transaction under consideration hold that the serving of food for immediate consumption in a restaurant includes a sale within the meaning of the Sales Act and that the statutory implied warranty attaches. The transaction comes within the definition of "sale" as contained in that statute for the word is defined as "an agreement whereby the seller transfers the property in goods to the buyer for a consideration called the price (4 Comp. St. N. J. 4647)."

To hold that there is no implied warranty on the part of the restaurant keeper of the food that is

sold and consumed on his premises is absurd and such a ruling is unsustainable on reason, logic or principle. If a person purchases a quart of ice cream and takes it home to eat, then, under all the authorities, there is an implied warranty because that would be clearly a sale. If, on the other hand, the quart of ice cream is served to a guest on the seller's premises and there eaten by the former, under the defendant's contention, which has some few cases to support it, there is no implied warranty because all that is purchased is a mere service. Again, while it would be contrary to the statutes of the United States and of this State for a hotel keeper to sell intoxicating liquor, still, if the liquor was consumed on the seller's premises, then there would be no sale of the liquor because all that the buyer purchased would be a privilege to drink it. The mere statement of the proposition is its own refutation. The reason, if any, underlying the theory that a mere service or privilege was all that the inn keeper gave to his guest has long since like the inn keeper, ceased to exist. Today, we have the modern restaurant and a person purchasing a meal has the right, if he wishes, to carry away all or any part of the meal, either within or without himself. The trial court granted the defendant's motion for a nonsuit on the theory that there was no implied warranty and that the mere proof of the eating of poisonous food, causing illness, was therefore not sufficient to go to the jury but that, on the contrary, it was necessary to prove negligence upon the part of the owner of the restaurant (p. 70). He so decided notwithstanding that the defendant admitted in its answer that it had made a sale of food to the plaintiff in its restaurant within the meaning of the Sale of Goods Act (p. 8, ll. 30-40); so that it was undisputed that there was a sale. It follows as a matter of logic that if there

was a sale within the meaning of the Sale of Goods Act, there was an implied warranty of the violation of which a cause of action existed.

However, this Court should decide the issue on the broader ground based on logic, reason and principle. We respectfully submit that New Jersey should adopt the rule supported by the great weight of authority, namely, that there is an implied warranty that the food served in a restaurant for immediate consumption upon the premises is wholesome and reasonably fit for the purpose intended, and that if the purchaser is made ill because of its unwholesomeness or poisonous condition, a cause of action will lie for a violation of the implied warranty. Such a rule is needed for the protection of the thousands of persons who daily are compelled to eat in restaurants and rely implicitly upon the owners thereof serving good, wholesome food.

II

CONCLUSION

FOR THESE REASONS WE RESPECTFULLY SUBMIT THAT THE JUDGMENT BELOW SHOULD BE REVERSED AND A *VENIRE DE NOVO* AWARDED.

October Term, 1926.

EDWARD A. MARKLEY,
CHARLES W. BROADHURST,
Of Counsel.

Collins & Corbin,
Attorneys for Appellant.

Affirmed Court of Errors and App

New Jersey Court of Errors and Appeals

MARY NISKY and SYLVESTER NISKY, *Plaintiffs-Appellants,* *vs,* CHILDS COMPANY, a Corporation, *Defendant-Respondent.*	Action at Law. On Appeal from Hudson County Circuit Court

BRIEF ON BEHALF OF THE RESPONDENT.

Statement of Case.

Plaintiffs appeal from a non-suit granted at the conclusion of the plaintiff's case. The action was tried in the Hudson County Circuit Court. The sole ground of appeal is as follows:

> "The trial Court non-suited the plaintiffs when thereunto moved by the attorney for the defendant, whereas said motion should have been denied and the issue submitted to the jury for their decision." (p. 2.)

Facts.

Plaintiffs claim personal injuries sustained by the plaintiff Mary Nisky from eating unwholesome food in defendant's restaurant at 158 Market Street, Newark, New Jersey, on October 19th, 1923. At about 5 o'clock in the afternoon,

plaintiff, Mary Nisky, after attending a matinee, entered the restaurant of defendant and ordered clam chowder, which she ate (p. 13). She then ordered six fried oysters, as to which she testified:

> "The first oyster tasted very good; and then I tasted the second and the third, and it was bitter when I chewed on it, it was like gall, so bitter; but I swallowed it; but I couldn't eat the rest of the oysters because I felt so bad in my throat. Then I called the waitress over, a girl with a white dress on, and I told her, 'I can't eat these oysters—they are not as good as I get in Childs—what is the matter with them?' Then she said, 'I will get you a cup of coffee, and probably that will take away the bitter taste.' But it did not take it away." (P. 15.)

After drinking the cup of coffee, she waited for her friends to eat their dessert, and then left the restaurant and was driven to her home in Passaic (p. 39). Her husband then sent for Dr. Simon, who testified:

> "Q. What was your final diagnosis? A. That there was oysters there that poisoned the stomach" (p. 54).

BRIEF OF THE ARGUMENT.

The non-suit was not error.

While the complaint charges both negligence and breach of an implied warranty as to the wholesomeness of the oysters, no evidence was offered in support of the allegations of negligence, and the trial judge properly ruled that *res ipsa loquitur* could not apply to such a case. (*Ash vs. Childs Dining Hall Co.*, 231 Mass. 86.) At the close of the case, the following inquiry was made by the Trial Court:

"THE COURT: Mr. Broadhurst, what do you say about your cause of negligence? What do you base your suit on? It is a case of implied warranty or negligence?

MR. BROADHURST: The complaint is based on that of alleged implied warranty. Warranty that the food will be fit for the purpose for which it was ordered and bought." (p. 70.)

This appeal presents the single question, therefore, as to whether a restaurant-keeper may be held liable as for breach of an implied warranty where the only proof is that a patron has been made ill by unwholesome food purchased and eaten in the restaurant.

The appellants' counsel concedes on his brief that this question has never been presented for decision in this State, either in this Court or in the Supreme Court. It has, however, been decided in several other states, with varying results. The question is, therefore, an open one in this Court.

The courts of last resort in Massachusetts and New York have held that a restaurant-keeper may be held liable upon an implied warranty, without regard to negligence.

Friend vs. Childs Dining Hall Co., 231 Mass. 65;
Barringer vs. Ocean S. S. Co., 240 Mass. 405;
Temple vs. Keeler, 238 N. Y. 344.

In the *Friend* case, *supra*, the plaintiff broke a tooth while eating baked beans in defendant's restaurant by biting upon a stone in the beans. Even in that case, the court said:

"Apparently the larger number of decisions by courts of this country hold that the liability of the innholder and restaurant keeper for furnishing deleterious food rest upon negligence." (p. 410.)

Moreover, in that case, Judge Crosby has written a most exhaustive and convincing dissenting opinion. The majority in that case based their decision, in part at least, upon the ground that there had been a sale within the meaning of section 15, subdivision 1 of the Sales Act. Judge Crosby, however, points out that such a holding is inconsistent, but with the common-law holdings of the English courts and of most of the courts in this country, saying in part as follows:

> "I cannot agree with the decision of the majority in this case; and because I believe it to be wrong in principle and contrary to the great weight of authority, I feel constrained to express my dissent.
>
> "The decision in effect is that an innkeeper or the keeper of a restaurant who serves food to a guest is liable as an insurer of the safety of the person of his guest against injury, although he may be wholly free from any negligence in providing and serving such food.
>
> "The plaintiff testified that she entered the defendant's restaurant and there ordered of a waitress, 'New York baked beans and corned beef,' which were served to her. She further testified: 'I started to eat the food, and there were two or three dark pieces, which I thought were hard beans, that is, baked more than the others, and I put two into my mouth and bit down hard on them, and * * I was hurt. * * I took those things out of my mouth and found they were stones'.
>
> "There was no evidence of an express warranty or that the defendant knew of the presence of the stones in the food, and unless the plaintiff can recover upon an implied warranty that the food served to her was wholesome and fit for consumption, the defendant is not liable.

"The question then presented is whether the keeper of a restaurant is an insurer of the quality of the food which he serves or whether he is liable only for failure to exercise reasonable care in providing and serving food so furnished. Before the decision in this case, the question does not appear to have been decided in this commonwealth. The Sales Act, Stat. 1908, Chap, 237, sec. 15 (which is declaratory of the common law so far as pertinent to this case) cannot, in my opinion, be held to apply to a case where food is furnished by a keeper of a restaurant to a customer, or by an innkeeper to his guest, because food so served does not constitute a sale thereof; while the customer may consume as much as he desires. He has no right to carry away any portion thereof which he orders but does not eat, nor does the title to such food pass to him so that he can sell or give it to another. The charge made for the food is not limited to the food consumed, but includes the furnishing of a place where it may be eaten and the service rendered in connection therewith. Beale, Innkeepers, sec. 169; *Parker vs. Flint,* 12 Mod. 254, 88 Eng. Reprint, 1303; *Merrill vs. Hodson,* 88 Conn. 314 L. R. A. 1915B, 481, 91 Atl. 533, Ann. Cas. 1916D, 917; *Valeri vs. Pullman Co.,* (D. C.) 218 Fed. 519.

"Nor is the defendant a 'dealer' within the meaning of the Sales Act, or independently of it. A dealer is defined as a trader, especially a person who makes a business of buying and selling goods. In *Saunderson vs. Rowles,* 4 Burr. 2064, 2068, 98 Eng. Reprint, 77, it was said of a victualer: 'He makes no particular contract, like a trader. He cannot be said to get his living by buying and selling as a trader does. He buys, only to spend in his house, and when he utters it again, it is attended with many circumstances additional to the mere selling price.'"

Judge Crosby further points out that the weight of authority, not only in England but in

is against

this country, holding an inn-keeper or restaurant-keeper absolutely liable as an insurer of the quality of the food served to guests, citing many authorities.

Parker vs. Flint, 12 Mod. 254, 88 Eng. Reprint, 1303;

Crisp vs. Pratt Cro. Car, 549, 79 Eng. Reprint, 1072;

Beigelow vs. Maine C. R. Co., 110 Me. 105; 43 L. R. A. (N. S.) 627; 85 Atl. 396;

Merrill vs. Hodson, 88 Conn. 314; L. R. A. 1915B, 481; 91 Atl. 533; Ann Cas. 1916D, 917;

Sheffer vs. Willoughby, 163 Ill. 518; 34 L. R. A. 464; 54 Am. St. Rep. 483; 45 N. E. 253;

Travis vs. Louisville & N. R. Co., 183 Atl. 415; 62 So. 851;

Clancy vs. Baker, 49 L. R. A. 653; 61 C. C. A. 469; 131 Fed. 161; 16 Am. Neg. Rep. 664;

Valeri vs. Pullman Co. (D. C.) 218 Fed. 519;

16 Am. & Eng. Enc. Law, 2nd Ed. 547;

Beale, Inn-keepers, sec. 169;

Burdick Sales, 2nd Ed. 113;

22 Cyc. 1081.

In conclusion, Judge Crosby says:

"The general rule of law, which has always prevailed, so far as I have been able to discover, is that innkeepers and restaurateurs are not insurers of the safety of their guests whom they serve with food, but that their obligation is limited to their exercise of reasonable care in the furnishing and serving such food.

"It does not seem to me that public policy or justice demands that a restaurant keeper or innkeeper should be held to warrant impliedly the wholesomeness of food served by him, making him in effect an insurer of its fitness for consumption, no matter how carefully it may be prepared and served. I am of opinion that the absolute liability which the opinion of the majority of the court imposes is not necessary for the protection of the public, but is apt to result in the prosecution of groundless claims which it will be difficult, if not impossible, to meet.

"The fact that this is the first case that has ever arisen in this commonwealth where it has been attempted to charge the keeper of a restaurant or a hotel upon an implied warranty respecting the quality of food furnished would seem to make it plain that the rights of individuals and the public are amply protected by holding those engaged in those occupations liable only for negligence.

"If it be deemed necessary, for the protection of patrons of restaurants, hotels, and other places where food is served for immediate consumption upon the premises, to hold persons engaged in such occupations as insurers, it would seem to me to be a subject for legislative, rather than judicial, determination.

"I believe the decision of the majority is wrong in principle, and that it imposes an unjust and unnecessary burden upon a large number of persons engaged in a useful and necessary business. I am also constrained to dissent from the decision because I believe it is contrary to the rule as laid down by the English courts from the earliest times, and is at variance with the decisions of the courts of the United States, and of the courts of last resort in several states.

"So far as I am aware, the result reach-

ed in the opinion is not supported by the decision of any court of last resort where the precise question in the case at bar has been considered."

Both the majority opinion and the dissenting opinion in this case are very exhaustive in their review of the authorities, and it is earnestly urged upon the Court that it should read the opinions in the *Friend* case at length.

The only other jurisdictions following the Massachusetts and New York doctrine that a restaurant-keeper may be held liable upon an implied warranty for serving bad food, seem to be Indiana (*Heise vs. Gillette*, 149 N. E. 182, which is only a decision of a lower appellate court), and Missouri (*Smith vs. Carlos*, 247 S. W. 468. The appellants contend that Illinois is included among the states following the Massachusetts decision, citing *Greewood vs. John R. Thompson Co.*, 213 Ill. App. 371. There also the decision is that of a lower appellate court, whereas the Supreme Court of Illinois, in *Sheffer vs. Willoughby*, 163 Ill. 518, squarely said that a restaurant-keeper could not be held liable in such a case, although in that particular case the plaintiff based his action on negligence.

On the other hand, we find the following cases squarely holding that a restaurat-keeper is not to be held liable on an implied warranty:

Kenney vs. Wong Len, 128 Atl. (N.H.) 341, 348;
Merrill vs. Hodson, 88 Conn. 314.
Bigelow vs. Maine C. R. Co., 110 Me. 105;
Tafton vs. Davis, 110 Me. 318;
Travis vs. Loisville & N. R. Co., 183 Ala. 415;
Loucks vs. Morley, 39 Cal. App. 570;

Valeri vs. Pullman Co, 218 Fed. 519;
King vs. Davis, 296 Fed. 986;
Rowe vs. L. & R. Co., 29 Ga. App. 151.

In considering the liability of a restaurant keeper to patrons who are made ill by eating unwholesome food, the New Hampshire Supreme Court, in *Kenney vs. Wong Len*, 128 Atl. 348, said::

"In considering the claimed common law duty of an absolute character to serve fit food, the confusing conflict in the cases in other jurisdictions shows the law to be generally unsettled. In *Friend vs. Childs Dining Co.*, 238 Mass. 65, the Court, one of the judges dissenting, adopted absolute liability on the theory of an implied warranty. In *Temple vs. Keeler*, 238 N. Y. 344, there is a similar ruling; furnishing food to a customer at a restaurant being held to constitute a sale and the doctrine of implied warranty being invoked. In *Sheffer vs. Willoughby*, 163 Ill. 518, and *Merrill vs. Hodson*, supra, a contrary result is reached. In *Bigelow vs. Railroad*, 110 Me. 105, it is held that there is no warranty as to food served but not prepared.

"The fiction of a warranty implied by law when in fact there is none apears to account for much of the conflict in the cases. It is not helpful in determining the question without considering the reasons on which it is based. Implications arising from probabilities deserve attention. When they are contrary to or without probability, they tend to promote confusion of thought. Here no agreement that all food served by the defendant was fit to eat was made, nor is there any evidence the parties contemplated it. 'A contract implied by law rests upon no evidence. It has no actual existence. It is simply a mythical creation of the law. The

law says that it shall be taken that there was a promise when, in point of fact, there was none. Of course, this is not good logic for the obvious and sufficient reason that it is not true. It is a legal fiction, resting wholly for its support on a plain legal obligation and a plain legal right. If it were true, it would not be fiction. The common law supplies no act of duty as it does of assumpsit and trespass; and hence the somewhat awkward contrivance of this fiction to apply the remedy of assumpsit where there is no true contract, and no promise to support it.' In the development of the law which has brought about simple pleading and convenient procedure, the necessity of legal fictions and technicalities to promote justice has increasingly diminished and indirection has largely yielded to direction.

"The real question is whether a restaurant keeper is under legal obligation to serve only fit food to his customers, beyond this obligation to use due care in this regard. Is he under liability as though he had so insured it? If he is, it is because of some reason for a departure from the present policy of the law against absolute liability. * * * *

"The argument for the rule of absolute liability that it is important food should be fit to eat and the customer expects it to be, relies on the restaurant keeper for it to be, and has only limited opportunity to inspect and examine, is rational and to be weighed. It may be said on the other hand, that a large part of the food either as served or in its contents is not prepared by the restaurant keeper, and he, in turn, has to take for granted in some measure what he buys. Drawing a distinction between what he may and may not readily examine, obviously invites such difficulty of application as to make such a test an impractical rule. If the restaurant keeper has used due care

in furnishing a safe place in which, and with safe equipment with which, to eat, admittedly the limit of his duty in such respect, it is not reasonably consistent to hold that in furnishing food he shall be under a greater duty than to use due care it is fit to eat. The limited opportunity to inspect and examine food which a customer at a restaurant has, may relieve him from doing it in the exercise of care and may affect the restaurant keeper's care, but that it should be enough to warrant an exception to a general principle does not follow. Due care may call for the restaurant keeper to use every practical precaution available, but, if it is used, to throw on him the burden of mishaps not due to his fault in the ordinary sense is so contrary to principles of reasonable and practical justice as not to be done, unless some overcoming principle of judicial policy invites it. No such principle suggests itself. Negligence, malice and agreement are all absent. No exceptional elements appearing making justly insufficient the protection secured by the requirement of due care, generally adequate in all cases of exposure to danger encountered in the ordinary experiences of life, the trend of the law against absolute liability is to be followed."

Appellants' counsel, on page 22 of his brief, seeks to include California among the states adopting the implied warranty theory, citing, however, merely a case involving the imposition of a license tax. Reference to the case of *Loucks vs. Morley, supra*, will show that on the question involved in the case at bar, California stands with the majority in rejecting the implied warranty theory. Also, an examination of the decision in *Doyle vs. Fuerst*, cited by appellants' counsel as authority for including Louisiana among the states supporting the implied warranty theory will disclose the fact that the judgment in that case rests upon a finding of negli-

gence on the part of the defendant, and not upon implied warranty.

The Court is also urged to read at length the able opinion of Judge Augustus N. Hand, of the U. S. District Court for the Southern District of New York, in *Valeri vs. Pullman Co., supra.* It is true that that case was decided before the Court of Appeals of New York adopted the implied warranty theory, but it contains a very learned discussion of the common-law decisions, and Judge Hand reaches the following conclusion:

> "In my opinion there is no well-considered authority and no public policy which affords any justification for imposing upon the defendant the absolute liability of an insurer of its food, and I deem that the only obligation of the defendant, or any keeper of a restaurant or inn, is to exercise the reasonable care of a prudent man in furnishing and serving food.

Turning to the decisions of this State, there are two which indicate a similar attitude on the part of this Court. These cases are *Tomlinson vs. Armour,* 75 N. J. L. 748 and *Jones vs. Mt. Holly Water Co.,* 87 N. J. L. 106.

In the *Jones* case, plaintiff's children were made ill from drinking water supplied by the defendant company, and it was claimed that the water contained dirt and germs. The Court said, in referring to the *Tomlinson* case:

> "The legal principle laid down in that case is only applicable to the facts of the present case in so far as it requires the exercise of reasonable care that the water furnished shall be reasonably pure and wholesome, and that negligently furnishing water which is deleterious to the human body or health, will furnish a valid cause of action to a customer injured by the use of the water." (p. 109.)

There is no implied warranty under the Unifom Sales Act.

The Uniform Sales Act has been adopted by New Jersey, New York, Massachusetts, Illinois and New Hampshire. The Act of this State (4 Comp. St. N. J. 4650, par. 15) provides:

> "Subject to the provisions of this act and of any statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract to sell or of sale, except as follows:
>
> "1. Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment (whether he be the grower, or manufacturer, or not), there is an implied warranty that the goods shall be reasonably fit for such purpose."

It is argued by the appellants that New York, Massachusetts and Illinois have held the transaction between a restaurant-keeper and his guest to be a sale within the terms of this Act, but we have before pointed out that the New York courts, in designating such a transaction as a sale, attempted to follow the case of *Race vs. Krum*, in which case a druggist manufactured and sold his own ice cream, and the case of *Rinaldi vs. Mohican*, where a customer purchased meat at a public market. The court reasoned that these transactions were sales and carried an implied warranty and that, therefore, food supplied at a restaurant should also carry a similar warranty.

We have also pointed out that Massachusetts reached the same conclusion on an entirely different theory. That court cited a number of

cases where a restaurant-keeper or inn-keeper, in supplying game out of season, spirituous liquors and oleomargarine in violation of statutes, had been convicted of making a sale within the prohibition of such acts, and, therefore, reasoned that a restaurant-keeper, in the customary manner of supplying food to its guests, had also made a sale of the food suplied.

The Illinois case of *Greenwood vs. Thompson*, cited by the appellants, follows the Massachusetts case of *Friend vs. Childs Company*.

The restaurant-keeper is not a dealer. His business is not primarily that of buying and selling food. He fits up an eating place, often at great expense, with beautiful furniture, silver, china and table linen and cooking equipment, and prepares and serves food to the order of his guests. The guest enters, not to purchase food, but to receive service at the hands of the proprietor and his servants. The guest knows that the proprietor must go into the market to purchase his supplies. He has a right to expect and demand that he will use due care for the safety of the guest while on the premises. This, as has been pointed out, is the ordinary and reasonable rule applied between persons who must come in contact with each other.

Under these rules, a guest is protected against negligence or carelessness, and to increase the liability of a restaurant-keeper to an insurer, would only foster unwarranted claims and litigation.

We think the action of the Court in the case of *Kenney vs. Wong Len*, above cited, holding that the transaction is not a sale within the terms of the Sales Act, should be applied and followed by this Court.

See also:

Loucks vs. Morley, 39 Cal. App. 570;
Merrill vs. Hodson, 88 Conn. 314, and
Rowe vs L. & N. R. Co., 29 Ga. App. 151.

In *Loucks vs. Morley, supra,* the Court said at page 578:

> "We are satisfied, therefore, that the overwhelming weight of authority, both in England and America, supports our present conclusion, viz.: that in such cases as are supported by the facts under consideration here, that 'there is no implied warranty of the quality of food furnished by a restaurant keeper to a customer for immediate consumption, since the transaction does not constitute a sale but a rendition of service."

It is respectfully submitted that the only consistent conclusion which this Court can reach, following its own previous decisions and the English cases, as well as the decisions of a majority of the courts of last resort in this country, is to hold that the only basis of liability of a restaurant-keeper to a patron for furnishing unwholesome food, is negligence, and, there being no evidence in the case at bar of any negligence on the part of the defendant, the non-suit should be affirmed.

Respectfully submitted,
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