New Jersey Court of Errors and Appeals.

CHARLES FLECKENSTEIN, JR., by Charles Fleckenstein, Sr., his next friend, and CHARLES FLECKENSTEIN, SR., individually, *Plaintiffs-Appellants.* *vs.* THE GREAT ATLANTIC & PACIFIC TEA COMPANY, a corporation, *Defendant-Respondent.*	Action at Law. On Appeal from Supreme Court.

BRIEF FOR PLAINTIFFS-APPELLANTS

This is an appeal from a judgment of nonsuit entered in this cause at the trial held in the Supreme Court Circuit, before the Honorable Frederic Adams, to whom the case had been referred, which judgment of nonsuit was entered after plaintiffs had submitted their case.

FACTS

Charles Fleckenstein, Jr., who was a few days less than twelve years old on November 30, 1915, accompanying a friend of his, Anthony Young, entered the store of the defendant, The Great Atlantic & Pacific Tea Company, at Bergen street, near Avon avenue, Newark. Fleckenstein's friend was at the store to make purchases, but Fleckenstein himself did not intend to buy anything.

It was about 6:30 o'clock in the afternoon when the boys entered the store. While Fleckenstein's friend was being waited on, Fleckenstein, as he was looking at the boy employed by the defendant, opening a box in the center of the store of the defendant, was suddenly hit in the eye with a particle of steel which had separated itself from the hammer or box which was being opened by the employee of the defendant. The injury resulted in great pain to the plaintiff, Fleckenstein, Jr., and further resulted in the permanent loss of the use of his right eye. The plaintiffs' contention at the trial was that Fleckenstein, Jr., was in the store on business, and entitled to have the store kept in a safe condition while there; that there was no negligence on his part, but that the defendant was negligent in opening a box of canned goods in the store, and near to where the plaintiff was standing, and that the defendant should be held liable for damages, and that there was evidence to prove these facts, which evidence should have been submitted to the jury.

On the motion for a nonsuit a judgment of nonsuit was granted.

The grounds of appeal from the judgment of the Supreme Court advanced by the appellants are, briefly, that negligence of the defendant was shown; that there was evidence to show negligence on the part of the defendant and no evidence to show contributory negligence; that the question of the existence of negligence should have been submitted to the jury, and that it was error for the court to decide as a matter of law that there was no negligence, and that the judgment is contrary to the law governing the facts proven.

POINTS

(1) The plaintiff, Charles Fleckenstein, Jr., was lawfully in the place of business of the defendant,

upon its invitation, and entitled to the same care as a customer.

(2) The question as to whether or not there was negligence on the part of the defendant was for the jury, and therefore the court should not have ordered a nonsuit.

(3) The judgment of the Supreme Court should be reversed.

BRIEF OF THE ARGUMENT

The question to be determined is whether or not the trial judge committed error in directing a nonsuit (page 54, line 14), and in order to determine whether or not his judgment was correct, it will be necessary to ascertain:

First—To what degree of care was the plaintiff, Charles Fleckenstein, Jr., entitled?

Second—Did he receive that care?

POINT I.

The plaintiff, Charles Fleckenstein, Jr., was lawfully in the place of business of the defendant, upon its invitation, and entitled to the same care as a customer.

He was there at the invitation of the owner, The Great Atlantic & Pacific Tea Company, and as such owner, The Great Atlantic & Pacific Tea Company owed a duty to exercise ordinary care to render the premises reasonably safe for the invitee.

In the case of *Phillips* v. *Library Company*, 55 N. J. L. 307, the court held that the owner or occupier of lands, who, by invitation expressed or implied, induces persons to come upon the premises, is under a duty to exercise ordinary care to render the premises reasonably safe for such purposes, or at least to abstain from any act that will

make the entry upon or the use of the premises dangerous.

This case dwells upon the question of whether or not a person is a mere licensee or an invitee, and the duty of the owner of premises toward such licensee or invitee.

On page 315 the court says:

> "In such cases, if there be evidence intended to show inducement or invitation, it becomes a question of fact for the jury, whether the conditions exist under which a legal duty is imposed upon the owner of the premises to exercise care for the plaintiff's safety."

It is true that the owner's liability is only coextensive with his invitation, and in the case under consideration there is evidence to show that the place of the defendant was a store (p. 19, line 8, etc.; p. 45, line 23, etc.). The testimony of both Anthony P. Young and Charles F. Fleckenstein, Jr., covers this point.

In the case of *Danbeck* v. *The New Jersey Traction Company*, 57 N. J. L. 463, a boy ten years old was invited by a conductor to enter a street car. The court held the defendant responsible for the injuries which he received. Citing *Lynch* v. *Nurdin*, 1 Q. B. 422.

Whether or not young Fleckenstein was in the building by invitation, or as a mere licensee, must depend on the facts presented, and it was a fact for the jury to determine.

This was held to be so in the case of *McCormick* v. *Anistaki*, 66 N. J. L. 211. Chief Justice Depue, at p. 217, said:

> "It is sometimes difficult to determine whether the circumstances make a case of in-

vitation or of a license only. The proof necessary to sustain the action must be found in the circumstances of the particular case. In such cases, if there be evidence tending to show inducement or invitation, **it becomes a question of fact for the jury whether the conditions exist under which a legal duty is imposed upon the owner of the premises, to exercise care for the the plaintiff's safety."**

In the case of *Turess* v. *N. Y., S. & W. R. R. Co.*, 61 N. J. L. 314, Chief Justice Magie, citing *Phillips* v. *Library Co.* case, at p. 318, says that the invitation which creates a relation of duty may be expressed or implied, and in the latter case, the implication comes from the acts or conduct which lead another to believe that the land or something thereon was to be used by them.

In the present case the store of the defendant was public, open to customers. The plaintiff was in the store ostensibly on business, for he was with a person who was actually a customer, and there should be no difference between the liability to one person who happens to be purchasing, and another who is accompanying him. It would be absurd to think that the plaintiff, Fleckenstein, should have remained outside because he was not actually a purchaser.

See Case, page 38, ll. 16, *et seq.*

In the case of *McDermott* v. *Sallaway*, 198 Mass. 517, the duty of a store or shopkeeper toward a customer, as to the condition of the premises, is very clearly indicated; and the court holds also in the case of *Kalus* v. *Bass*, 89 Atl. 731, 122 Md. 467, that a twelve year old boy while accompanying his father, who was examining rooms in the building of the defendant, was not a trespasser or a licensee, but was there at the implied invitation of the

owner. The boy was not there to rent the place but was merely accompanying his father, who had intentions of renting. This same case holds that the natural and probable consequence of an act was presumed to have been intended, and the fact that the father visited the defendant's building with the view of occupying it with his family as tenants, would necessarily imply an invitation to include plaintiff's visit with his father. The court held that the matter of inducement or invitation should have been submitted to the jury.

The question of implied invitation creating the obligation to use reasonable care is covered in 29 *Cyc.* p. 454.

There can be no doubt that Young, with whom Fleckenstein went into the store (p. 19), went there as a customer (p. 20, line 2; p. 47, line 8).

It would therefore appear that Fleckenstein was entitled to such care to which any invitee would be entitled.

POINT II.

The question as to whether or not there was negligence on the part of the defendant was for the jury, and therefore the court should not have ordered a nonsuit.

The testimony submitted in this cause concerning negligence of the defendant, and its agent, is not contradicted. The facts are very plainly put before the court. From the testimony of Anthony Young, it would appear that the store of the defendant (p. 19, line 34) has a counter on the right side of the entrance, a butter counter in the rear, and cracker cans and the like on the lefthand side; that the entrance was in the middle of the front of the store; that Mr. Weber (p. 20, line 20) told the boy employed in the store to open a box which was

located (p. 21, line 12) "right about in the centre of the store"; that the boy (p. 22, line 11) took a hammer and hatchet from underneath the counter and went to where the box was and proceeded to open it; that both Fleckenstein and Young were leaning against the counter, or were very near it (p. 23, line 2-3); that the box was one or two feet away from Fleckenstein (p. 23, line 20-21).

The testimony of Fleckenstein himself (p. 45, and beginning at line 34 to p. 47, line 5) shows that the store was about 21x17 feet; that the box was half way between the front and the rear; that on the one side there was a counter and on the left-hand side boxes of biscuits, and that right near where Fleckenstein and Young were standing, the Italian boy began to open the box.

There is no uncertainty as to how the accident happened (p. 48, line 6):

"Q. What were you doing at this time when he came to open the box? A. I was watching.

"Q. You were watching him? A. Yes, sir.

"Q. Did you see how he opened the box? A. Well, he put the hatchet in the box, and hit it with a hammer, and just then I saw a spark.

"Q. From where? A. From the hatchet.

"Q. You say you saw a spark? A. Yes, sir.

"Q. (By Mr. Ritger)—And what happened then? A. Then I couldn't see.

"Q. Did you feel anything, or what happened? A. Right away I saw black.

"Q. In which eye? A. The right.

"Q. The right eye? A. Yes, sir.

(at line 25):

"Q. What did you do? A. I said, 'Something flew in my eye.'

And the testimony of Young (p. 26, line 2):

"Q. Did you hear anything happen? A. I only heard when he struck on the hatchet with the hammer; that is all I heard.

By the Court:

"Q. You heard the Italian strike on the hatchet with the hammer, you say? A. Yes, sir; I heard that.

"Q. More than once? A. Yes, sir.

By Mr. Ritger:

"Q. Did you hear when the Italian stopped hammering? A. Yes, sir; he stopped when the boy said, 'Something flew in my eye.'

(p. 27, line 4):

"Q. By the Court: How did he say it? A. He started to cry and told me something flew in his eye."

With these facts uncontradicted the court held, by granting a nonsuit, that the jury could not infer negligence. It is a well-settled rule of law that where the facts are such that negligence could be inferred from them, then the question as to the existence of negligence should be left to the jury.

This is an unusual case, and there seem to be no authorities covering this exact situation, but there are cases covering the question of negligence in not keeping a place of business in proper repair. By comparing these cases with the present one, and applying the rules adopted in cases dealing with condition of premises to the facts herein shown, and admitting that where it would be found that, if the premises were in an unsafe condition, the question of negligence should be submitted to the

jury, then surely where there was a positive act on the part of the owner or its agent from which injury happened and from which negligence can be inferred, there can be no doubt of the necessity of referring the question to a jury.

In the case of *Shortridge* v. *Scarritt Estate Co.*, 130 S. W. page 126, where a boy eleven and a half years old accompanied his mother to the defendant's building, which was not entirely finished, and there were holes in the elevator doors, and the boy impelled by curiosity thrust his head into one of the holes, and was injured by being struck by a moving elevator, the question of the defendant's negligence was held to be one for the jury.

Also the court in the case of *Devaney* v. *Otis Elevator Co.*, 95 N. E. 990, 251 Ill. p. 28, held that it was a jury question as to whether the method of construction of the defendant's building, or the means to remove accumulations of ice from a platform, from which cases were being lowered, and from which one had fallen and injured the plaintiff, was one which in the exercise of ordinary care should have been adopted by the defendant.

See also case of *Russell* v. *Stewart's Dry Goods Co.*, 56 S. W. 707; 22 Ky. Law Reports 121.

Our question is:

Is it a proper exercise of the care due to Fleckenstein, who was lawfully in the store as an invitee, to allow a small boy to open a wooden box in the centre of the store, not more than two or three feet from Fleckenstein, by hitting a hatchet with a hammer, from which a piece of steel flew into Fleckenstein's eye?

And under these facts, **Should not the jury decide whether or not there was negligence?**

The case of *Owens* v. *Associated Realties Corporation,* 80 Atl. 325; 81 N. J. L. 586, deals with facts much less favorable to the plaintiff in that case, and the matter of negligence was held to be one for the jury.

The Court of Errors and Appeals in its opinion by Chancellor Pitney, says (at p. 586):

> "Plaintiff's right to visit that part of the pier where he was injured must rest, if at all, upon an invitation, express or implied, from the owner. Upon this point the case shows that the defendant owned and controlled a large structure known as 'The Million Dollar Pier,' extending for a distance of one thousand feet or thereabouts into and over the waters of the Atlantic Ocean, and there conducted amusements and exhibitions of various kinds, and that the pier was open to the public upon payment of admission fees. There was evidence from which the jury was warranted in finding that employees of defendant in charge of admissions to the pier had given to the plaintiff (who was a boy about fifteen years of age) the privilege of entering the pier and visiting the various parts of it without paying the ordinary admission fee, in compensation for services performed by him as an attendant upon some of the exhibitions held upon the pier. It was objected that those who had given to the plaintiff this permission had no right to give it, because not authorized by the defendant to do so. The evidence, however, if believed, showed such a continued practice of employing the plaintiff and compensating him as mentioned that it was open to the jury to infer that those who gave him the admission privilege had the implied authority of the defendant to give it in exchange for the services that plaintiff rendered.

"Since he was there by defendant's invitation, the law imposed upon the defendant the duty of exercising care for his safety while going about upon the pier within the scope of the invitation.

"As to this, we think the evidence does not show a limitation of the invitation to the ground floor or to any other particular part of the pier, but that it was open to the jury to find that it extended to the tower of the cupola.

"There was also, we think, clear evidence of negligence on the part of the defendant in permitting highly-charged electric wires to be in such a position that one going into the tower, as the plaintiff went, might come into contact with the wires and receive a harmful electric shock.

"The question of plaintiff's negligence likewise was at the utmost a question for the jury.

"The judgment under review should be affirmed."

A very recent case is that of *Deronet* v. *F. W. Woolworth Co.*, decided November 20, 1916, in the Court of Errors and Appeals, reported in volume 99 of the Atlantic Reporter, Advance Sheets, Section No. 3, page 126.

The only question presented to this court was whether there was any evidence warranting the submission of the case to the jury. The plaintiff had entered defendant's store to make purchases, and following the saleswoman, walked through an open space between two railings and fell down a flight of stairs which she did not see. The opening was flush with the floor. The opening between the two rails through which the plaintiff had fallen was protected by a gate which opened and shut by a spring lock. The plaintiff had testified that when brought up from the cellar she saw a gate and it was closed.

The Court, at page 127, by Kalisch, J., says:

"As the evidence then stood, it was permissible for the jury to draw either of two inferences: That the saleswoman in passing opened the gate to let the plaintiff follow her in order to point out the sugar box, or that the gate was found open and left so by the saleswoman in order that the plaintiff could follow her for the purpose stated.

"We think there was evidence, though meager, yet sufficient, from which a jury might properly have found that the saleswoman, by her conduct, invited the plaintiff to the spot where the latter met with her mishap.

"The question whether the defendant exercised reasonable care to keep and maintain its store in a reasonably safe condition, and the question whether the plaintiff used reasonable care for her own safety, were, under the evidence, jury questions and were properly submitted to them."

It will be seen that in this case the question of invitation, the question of care of the defendant, and also the question of the care used by the plaintiff, was held to have been properly submitted to the jury.

POINT III.

It is respectfully submitted that the judgment of the Supreme Court should be reversed with costs.

Respectfully submitted,

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and
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Attorneys of Appellant.

FREDERIC C. RITGER,
Of Counsel.

June Term, 1917.

New Jersey Court of Errors and Appeals

CHARLES FLECKENSTEIN, JR., by Charles Fleckenstein, Sr., his next friend, and CHARLES FLECKENSTEIN, SR., individually,
Plaintiffs-Appellants,

against

THE GREAT ATLANTIC AND PACIFIC TEA COMPANY, a corporation,
Defendant-Respondent.

On Appeal from Supreme Court.

BRIEF FOR DEFENDANT-RESPONDENT.

Statement.

Action at law for damages on account of injuries alleged to have been sustained by the negligence of the defendant. Tried in the Supreme Court before Hon. FREDERIC ADAMS. Appeal by the plaintiffs from a non-suit at the close of plaintiffs' case.

The Facts.

This is an action by a son and by his father for damages for injuries sustained by the former through the alleged negligence of the defendant.

On November 30th, 1915, Charles Fleckenstein, Jr., aged about 12, accompanied his friend Anthony Young, who was about 15 years of age, into the defendant's store (pp. 19, 20-30, 45). Young intended to make purchases and did so, but Fleckenstein did not intend to buy anything, in fact bought nothing, and merely accompanied his friend on the latter's business (pp. 19, 23, 45; Plaintiffs-Appellants' Brief, p. 1). The store is about 17 feet from

side to side, and is about 21 feet deep (pp. 24, 46). To the right-hand side on entering is a counter, and to the left are a number of boxes and cracker cans but no counter (pp. 19, 30-40, 46). Standing on the floor about half way down the depth of the store and somewhat to the left of the center line of the store (pp. 20-35) was a box of Campbell's Pork and Beans. This box was about one foot square.

The boys entered the store, turned to the counter on the right-hand side, and stood there about half way down the depth of the store on a line nearly parallel with the box (pp. 23, 46). While Young was being waited on at the right-hand counter (pp. 35, 38), the store manager directed an Italian boy to open the box of pork and beans (p. 20). The opening of the box was in nowise connected with either of Young's purchases, and neither Young nor Fleckenstein had any interest whatever in the box (pp. 20-40). At this time Fleckenstein was standing beside Young at the counter and the box was about 3 feet away from Fleckenstein (pp. 40-47). Fleckenstein was watching the boy (pp. 23-31, 48), who was stooping down to open the box, on the side of the box away from Fleckenstein (p. 48). The boy did not change in any way the position of the box (pp. 20-30), but proceeded in the usual manner to pry off the lid of the box by inserting the hatchet under the lid and by striking the hatchet head with a hammer (pp. 22, 52). The plaintiff testified on direct examination that the hammer was swung up and down, and that the Italian boy struck "pretty hard, not so hard, not very hard" (p. 52). In some way for which no explanation whatever was offered by the plaintiff a fragment of metal flew into Fleckenstein's eye and destroyed the sight.

The foregoing constitutes all the evidence in the case as to how the accident happened. At the close of the plaintiffs' case the Court granted a motion for non-suit.

POINT I.

The plaintiffs were properly non-suited upon the ground that there was no evidence of negligence upon the part of the defendant, and this is true even though the plaintiff be held to be an invitee rather than a mere licensee.

One of the grounds of the motion for non-suit was that the plaintiff was a licensee, and not an invitee. The Trial Court refused to so hold. But leaving this question for the moment (see Point II, *infra*), even if the plaintiff be held to be an invitee, there is no evidence whatever of negligence on the part of the defendant and the case was properly taken from the jury.

If the plaintiff was an invitee, then unquestionably the defendant was obliged to use "ordinary care to render the premises reasonably safe for the purposes embraced in the invitation."

> *Smith* v. *Jackson,* 70 N. J. L., 183;
> *Phillips* v. *Library Co.,* 55 N. J. L., 307, 311.

And it is unquestionably true that "the trial judge cannot order a non-suit unless the proof in the case is so clear that no other *reasonable legitimate* conclusion can be reached by the jury."

> *King* v. *Zierz,* 73 N. J. L., 134.

But the *scintilla evidentiae* doctrine does not obtain in New Jersey.

> "It is not enough to say that there was some evidence; a *scintilla* of evidence or mere surmise that there may have been negligence on the part of the defendant clearly would not justify the judge in leaving the case to the

> jury; there must be evidence on which they might *reasonably and properly* conclude that there was negligence."
>
> *Dotson* v. *Erie R. R. Co.*, 68 N. J. L., 679, 689.

Tested in the light of these principles, where in the case at bar is the alleged negligence of the defendant to be found? In what respect did the defendant fail to use "ordinary care to render the premises reasonably safe" for the plaintiff?

No claim is made that the tools used in opening the box were in any way defective, and the testimony of Fleckenstein himself shows affirmatively that the hammer was not swung with excessive force (p. 52).

There was nothing unusual in the *manner* in which the box was opened and the plaintiffs do not contend that there was, but rest their entire case upon the proposition that the jury might "reasonably and legitimately" have found as a fact that the mere opening of the box, by means of hammer and hatchet, three feet away from plaintiff constituted negligence on the part of the defendant.

In support of this contention the plaintiff cites no authority whatever, other than certain alleged analogous cases which will be considered *infra*. It may be conceded that where a person does an act the natural and logical consequence of which is to injure another, and the probability of this injury occurring might reasonably be foreseen by the doer of the act, the doer is guilty of negligence. But in the case at bar what likelihood was there that a piece of metal from one of the tools (assuming that the spicula was from one of the tools) would fly off and injure the plaintiff? It is hard to imagine any accident which would in the mind of a reasonably prudent and careful man be less likely

to occur. The opening of boxes in the manner in which this one was opened is certainly an ordinary occurrence in the life of any man, whether or not he be a shopkeeper, and this Court does not need the aid of a jury to say that under the circumstances disclosed there is no evidence that the defendant failed to use "ordinary care to render the premises reasonably safe" for the plaintiff. The very dearth of authority admitted in the brief of plaintiff's assiduous counsel is a circumstance bearing strongly upon this contention.

> "Failure to guard against that which has never occurred, and which is very unlikely to occur, and which does not naturally suggest itself to prudent men as something which should be guarded against, is not negligence."
>
> *Ryan* v. *Cortland Carriage Co.,* 133 App. Div. (N. Y.), 467, 469.

In any other view the defendant would become an insurer of the safety of its customers.

> *Schnatterer* v. *Bamberger,* 81 N. J. L., 558;
> *Phillips* v. *Library Co., supra;*
> *Smith* v. *Jackson, supra.*

The cases cited in the plaintiffs' brief are not applicable to the situation presented in the case at bar.

In *Owens* v. *Associated Realties Corporation,* 81 N. J. L., 586, 80 Atl., 325, the defendant maintained in a place to which the plaintiff was invited some electrically charged wires, and the Court held it a fit question for the jury to decide whether or not this constituted negligence.

In *Deronet* v. *F. W. Woolworth Co.,* 99 Atl. Rep. Advance Sheet, No. 3, p. 126, the question was whether or not the defendant was negligent in maintaining a staircase flush with the floor,

guarded by a gate which was open at the time plaintiff passed through the railings.

The case of *Shortridge* v. *Scarritt Estate Co.,* 130 S. W., 126, was decided upon the theory of "attractive lures" for children, and the Court specifically says that a different conclusion must have been reached had the plaintiff been an adult. This theory does not exist in New Jersey.

Delaware, L. & W. R. R. Co. v. *Reich,* 61 N. J. L., 635.

In *Devaney* v. *Otis Elevator Co.,* 251 Ill., 28, 95 N. E., 990, the plaintiff was one of a number of men engaged in transporting a 900-pound crate of steel down a slope. The defendant's exhaust pipe froze in the cold weather and the slope was invariably icy in winter, and by reason of the presence of this ice the crate of iron slid down too fast and injured the plaintiff.

POINT II.

The plaintiff was not an invitee but a mere licensee, and the defendant merely owed him the duty to abstain from wilfully injuring him. It is not contended that the defendant wilfully inflicted injury upon the plaintiff and the non-suit should have been granted upon this ground.

The action does not sound in negligence at all, since Fleckenstein was not an invitee but a mere licensee. And to a mere licensee the defendant is under no obligation provided it abstains from wilfully inflicting injury upon him.

Delaware, L. & W. Co. v. *Reich,* 61 N. J. L., 635;

Fitzpatrick v. *Cumberland Glass Mfg. Co.,* 61 N. J. L., 378.

In the latter case the Supreme Court says:

"This is an action to recover damages for personal injuries, received by the plaintiff at the defendant company's glass works under the following circumstances: the plaintiff's father was an employe of the defendant company, and plaintiff (who was a boy of 12 years of age) was accustomed to carry his father's dinner to him at the company's works. The evidence justified the conclusion that this was done not only with the knowledge of, but by the permission of the company.

On the day upon which the plaintiff received his injuries, he carried his father's dinner to the works, as usual, and, as he passed through the main gateway, one of the gates which had been allowed by the company to get out of repair, fell upon him crushing his leg.

These facts having been proved by the plaintiff and not having been controverted by the defendant company, a verdict in his favor was rendered by the jury.

The chief question presented by this rule is whether the defendant, at the time of the injury, owed the plaintiff any duty with regard to keeping the entrance to its works safe for his ingress and egress. If it did, the jury properly found in favor of the plaintiff, but if it did not, the verdict must be set aside, for, unless the plaintiff's injuries were the result of the neglect of duty on the part of the defendant which it owed to him, no legal responsibility rests upon the defendant to compensate him for those injuries.

The question of the liability of the owner of land for injuries received by a person entering thereon, by reason of the unsafe condition of the premises, came before the Court of Errors and Appeals in the late case of *Phillips* v. *Library Company,* 26 Vroom, 307. Mr. Justice DEPUE, who delivered the opinion of the Court, after considering and discussing the cases on the subject, declares the rule to be this: 'That the owner or occupier of lands who, by invitation, express or implied, induces per-

sons to come upon the premises for any purpose, is under a duty to exercise ordinary care to render the premises reasonably safe for such purpose, or at least to abstain from any act that will make the entry upon or use of the premises dangerous' but that 'mere acquiescence in such passage for the benefit or convenience of the licensee, creates no duty on the part of the owner except to refrain from acts wilfully injurious.'

The same rule had previously been enumerated by this Court in the case of *Vanderbeck* v. *Hendry,* 5 Vroom, 467; and Chief Justice BEISLEY in the case of *Matthews* v. *Bensel,* 22 Vroom, 30, declares that there is no legal principle that imposes upon the owner of property, with respect to a mere licensee, the duty of keeping it in a safe condition.

Applying the rule established by these cases to the case in hand, it will at once be perceived that the defendant company was under no obligation to keep its premises safe for the use of the plaintiff. He was not there by invitation of the Company, express or implied. He was there about a matter in which the company had no concern, *i. e.,* the bringing of his father's dinner, and was saved from being a mere trespasser only by the fact that the company permitted him to come upon the premises for that purpose. He was a mere licensee. His presence on the company's land being merely permissive, and not by invitation, the only duty which the company owed him was to abstain from acts wilfully injurious. That they failed in the performance of any such duty is not pretended in this case.

The rule to show cause should be made absolute, and a new trial directed."

The basis of "invitation, express or implied," is benefit to the person inviting, and if there be no possible benefit, then there can be no invitation.

Fitzpatrick v. *Cumberland Glass Mfg. Co., supra.*

And in *Northwestern El. R. R. Co.* v. *O'Malley,* 107 Ill. App., 599, it is said that "an invitation exists where some benefit accrues or is supposed to accrue to the one who extends the invitation."

And in *Cooley on Torts,* Vol. 2, page 1265, the distinction between invitation and license is phrased as follows:

> "An invitation may be inferred where there is a common interest or mutual advantage; a license when the object is the mere pleasure or benefit of the person using it."

But in the case at bar there never was any possible benefit which the defendant could obtain through the presence of Fleckenstein since *it is conceded that on entering the store Fleckenstein "did not intend to buy anything"* (Plaintiffs-Appellants' Brief (p. 1). And there is nothing in the record to conflict with this concession of counsel. The defendant did not *invite* Fleckenstein to enter the store, it merely *permitted* him to enter and to remain with his friend Young as a *licensee* within the meaning of the *Fitzpatrick* case, *supra.*

In fine, the defendant's invitation was to those who came in to buy, its permission or license was extended to their friends. The line is sharply drawn.

See

Holbrook v. *Aldrich,* 168 Mass., 15;
Vanderbeck v. *Hendry,* 34 N. J. L., 467, 473.

LASTLY.

The judgment of non-suit was proper and should be in all respects affirmed with costs.

Respectfully submitted,

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Attorney for Defendant.

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The Dispatch Printery & Bindery Corporation
New York

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TESTIMONY.

NEW JERSEY SUPREME COURT.

Essex Circuit.

CHARLES FLECKENSTEIN, JR., by CHARLES FLECKENSTEIN, SR., his next friend, and CHARLES FLECKENSTEIN, SR., individually, *Plaintiffs,* *vs.* THE GREAT ATLANTIC AND PACIFIC TEA COMPANY, a corporation, *Defendant.*	*Action at Law.* *Notice of Appeal and Grounds.*

To Edward T. Magoffin, Attorney of Defendant:

Take notice, that plaintiffs appeal to the Court of Errors and Appeals from the whole of the judgment of non suit entered in this cause, on the following grounds:

1. Because there was evidence to show negligence of the defendant.

2. Because negligence could be found from the evidence produced by the plaintiffs.

3. Because the evidence produced caused the existence of negligence to become a question of fact for the jury.

4. Because the question of the existence of negligence should have been submitted to the jury.

5. Because the Court treated the existence of negligence as purely a question of law.

6. Because the evidence did not warrant this judgment.

7. Because the judgment is contrary to the law and facts.

WILLIAM PENNINGTON,
Attorney of Appellant.

CHARLES C. PILGRIM,
Of Counsel.

The defendant in this cause was summoned to answer the plaintiffs in an action at law upon the following complaint:

NEW JERSEY SUPREME COURT.

CHARLES FLECKENSTEIN, JR., by CHARLES FLECKENSTEIN, SR., his next friend, and CHARLES FLECKENSTEIN, SR., individually,

vs.

THE GREAT ATLANTIC AND PACIFIC TEA COMPANY, a corporation.

Action at Law.

Complaint.

Plaintiff, Charles Fleckenstein, Jr., who resides in the City of Newark, County of Essex and State of New Jersey, by Charles Fleckenstein, Sr., of Newark, in said County, who is admitted by our said court as the next friend of plaintiff, Charles Fleckenstein, Jr., an infant under the age of twenty-one years, to prosecute this action at law, for the said Charles Fleckenstein, Jr., and Charles Fleckenstein, Sr., as an individual, of Newark, in said County, say that:

FIRST COUNT:

1. The defendant, by its agents or servants, conducted at the time of the happenings hereinafter described, a grocery store in the building known as No. 824 Bergen Street, near Hawthorne Avenue, in the City of Newark, State of New Jersey.

2. Plaintiff, Charles Fleckenstein, Jr., on or about the thirtieth day of November, nineteen hun-

dred and fifteen, was lawfully in said store, conducted by the said defendant, its agents or servants, on business.

3. While plaintiff, Charles Fleckenstein, Jr., was in said store as aforesaid, defendant's employee, agent or servant, disregarding the plaintiff's rights, negligently proceeded to open a case or box in said store, and proceeded so negligently that a particle of metal or some other substance became separated from the article being opened or the instruments used, in such a manner that it was thrown into the right eye of the plaintiff, Charles Fleckenstein, Jr., cutting the same and remaining imbedded there, until removed by surgical aid.

4. As the result of said particle of metal or other substance cutting said eye and becoming lodged therein, the eye was injured to such an extent that the plaintiff became totally and permanently deprived of the use of the said eye.

5. That as a result of this injury plaintiff has had great pain and mental suffering, and will continue to have pain and mental suffering for the rest of his life.

SECOND COUNT:

1. All the statements in the first count are made part of this count.

2. Plaintiff, Charles Fleckenstein, Sr., is the father of Charles Fleckenstein, Jr.

3. As the result of said injury, plaintiff, Charles Fleckenstein, Sr., was put to great expense in procuring medical treatment for his son, Charles Fleckenstein, Jr., and in having proper nursing and care for him while incapacitated, also for medicines used for him.

Plaintiff, Charles Fleckenstein, Jr., claims Fifteen Thousand Dollars ($15,000.) damages on the first count, and plaintiff, Charles Fleckenstein, Sr., claims Five Thousand Dollars ($5,000.) damages on the second count.

WILLIAM PENNINGTON,
Attorney of Plaintiffs.

The defendant answered as follows:

ANSWER (Filed March 30, 1916).

NEW JERSEY SUPREME COURT.

Essex County.

CHARLES FLECKENSTEIN, JR., by CHARLES FLECKENSTEIN, SR., his next friend, and CHARLES FLECKENSTEIN, SR., individually, *vs.* THE GREAT ATLANTIC AND PACIFIC TEA COMPANY, a corporation.	*Action at Law.* *Answer.*

The defendant, a corporation of the State of New Jersey, having its prinicpal office and doing business at No. 150 Bay Street, Jersey City, New Jersey, says that:

ANSWER TO FIRST COUNT.

1. It admits Paragraph 1 of the first count of the complaint.

2. As to the statements in Paragraph 2 of the first count of said complaint, it has not any knowledge or information thereof sufficient to form a belief.

3. It denies Paragraph 3 of the first count of said complaint.

4. It denies Paragraph 4 of the first count of said complaint.

5. It denies Paragraph 5 of the first count of said complaint.

ANSWER TO SECOND COUNT.

1. The allegations of this defendant's answer to the first count are hereby made a part of the answer to the second count as fully as if herein set forth.

2. As to the statements in Paragraph 2 of the second count of said complaint, it has not any knowledge or information thereof sufficient to form a belief.

3. It denies Paragraph 3 of the second count of said complaint.

FIRST DEFENSE TO FIRST COUNT.

1. Whatever damages and injuries were sustained by the plaintiff Charles Fleckenstein, Jr., at the time and place mentioned in the complaint were caused and contributed to by his negligence, and he negligently exposed himself to the risk of such an accident and neglected to take precautions or to exercise care to guard and protect himself against such an accident, and at the time and place mentioned in the complaint he was conducting himself in a careless and reckless manner and was not exercising care or taking precautions in said store.

FIRST DEFENSE TO SECOND COUNT.

1. Whatever damages and injuries were sustained by the plaintiff Charles Fleckenstein at the time and place mentioned in the complaint were caused and contributed to by the negligence of the

plaintiff Charles Fleckenstein, Jr., and the said Charles Fleckenstein, Jr., negligently exposed himself to the risk of such an accident and neglected to take precautions or to exercise care to guard and protect himself against such an accident, and at the time and place mentioned in the complaint the said Charles Fleckenstein, Jr., was conducting himself in a careless and reckless manner and was not exercising care or taking precautions in said store.

EDWARD T. MAGOFFIN,
Attorney for Defendant.

The plaintiff replied as follows:

REPLY (filed April 4, 1916).

NEW JERSEY SUPREME COURT.

Essex County.

CHARLES FLECKENSTEIN, JR., by CHARLES FLECKENSTEIN, SR., his next friend, and CHARLES FLECKENSTEIN, SR., individually,	*Action at Law.*
vs.	*Reply.*
THE GREAT ATLANTIC AND PACIFIC TEA COMPANY, a corporation.	

REPLY TO FIRST DEFENSE TO FIRST COUNT.

The plaintiffs deny the allegations contained in this defense.

REPLY TO FIRST DEFENSE TO SECOND COUNT.

The plaintiffs deny the allegations contained in this defense.

WILLIAM PENNINGTON,
Attorney of Plaintiffs.

NEW JERSEY SUPREME COURT.

Essex County.

CHARLES FLECKENSTEIN, JR., by CHARLES FLECKENSTEIN, SR., his next friend, and CHARLES FLECKENSTEIN, SR., individually,

Plaintiffs,

against

THE GREAT ATLANTIC AND PACIFIC TEA COMPANY, a corporation,

Defendant.

Postea.

This action was tried before Judge Frederic Adams, to whom the same was referred for trial by the Chief Justice, with a jury in the presence of the counsel of the respective parties at the Essex Circuit Court on December 6th and 7th, 1916.

And the plaintiffs having submitted their evidence, and the court, being of the opinion that it was not sufficient to entitle them to recover, ordered judgment of non-suit to be entered against them.

Dated December 13th, 1916.

FREDERIC ADAMS,
Circuit Court Judge.

NEW JERSEY SUPREME COURT.

GREAT ATLANTIC AND PACIFIC TEA COMPANY, *ads.* CHARLES FLECKENSTEIN, JR., by CHARLES FLECKENSTEIN, SR., his next friend, and CHARLES FLECKENSTEIN, SR., individually.	*Action at Law.* *On Postea.*

It is ordered that judgment of non-suit be and hereby is entered in favor of defendant and against the plaintiffs, with costs to be taxed nisi.

Entered December 19, 1916.

On motion of

EDWARD T. MAGOFFIN,
Attorney.

A True Copy.

WM. C. GEBHARDT,
Clerk.

SUPREME COURT OF NEW JERSEY.

Essex Circuit.

December 6, 1916.

CHARLES FLECKENSTEIN, JR., by CHARLES FLECKENSTEIN, SR., his next friend, and CHARLES FLECKENSTEIN, SR., individually, *vs.* THE GREAT ATLANTIC AND PACIFIC TEA COMPANY, a corporation.	*Action at Law.*

Transcript of shorthand notes of testimony taken in the above entitled matter before his Honor, Frederic Adams, Judge, and a jury, at the Court House, Newark, New Jersey, in the presence of William Pennington, Charles C. Pilgrim and Frederic C. Ritger, Esqs., for Plaintiffs, and Martin Conboy and Howard R. Pfluckiger, Esqs., of New York, for the Defendants.

On motion of Mr. Pilgrim, Mr. Conboy and Mr. Pfluckiger are admitted *pro haec vice.*

A jury is called and sworn.

Mr. Ritger opens for plaintiffs, as follows:

OPENING

Mr. Ritger: May it please the Court and gentlemen of the jury. This is an accident case; it is a claim for damages against the Atlantic & Pacific Tea Company, who owns a store on the easterly side of Bergen street, near Avon avenue. The plaintiff, Charles Fleckenstein, Jr., was at the time of this accident, which was November 30, 1915, just about a year ago, a few days less than twelve years old. That afternoon he had been out with a friend of his, Anthony Young, who will be here, after school. They were playing together, and then the mother of Young sent him to the Atlantic & Pacific Tea Company to get something for supper that evening or for the next morning. It was about six-thirty in the afternoon when he went to this store. Young and Fleckenstein went in the store, and I will give you an idea as to what the store looked like. The entrance is in the middle of the front of the building, and to the right there would be a counter, and then in the rear of the store another counter, and on the left the arrangement is that they keep the crackers and canned goods, and then, of course, in the front of the store they have the show window.

These two boys entered the store, and going back to the rear, Young was being waited on by a little Italian boy, who later was replaced by the man in the store. I do not know what his name was, but

the man took charge of the store, and while this gentleman was waiting on Young he gave orders to this little Italian boy, who was employed in the store, to open some cases of canned goods in the store. The boy took a hammer and hatchet from underneath the counter somewhere, and went out into the store near the front door, right in the center of the store—the boys will explain as to where it took place—and began to open this box. Young Fleckenstein was in the store with his friend, Young, and was to the right of the store, near the counter, and was watching things going on there, and was standing a few feet away from where the box was being opened. Of course, he had a right to be there. This young Italian boy began opening the box in such a way, he was using the hammer and hatchet in such a negligent manner and with so little experience, that, somehow or other, a piece of steel from the hammer or hatchet, or something there, flew into Fleckenstein's right eye. He was not any too near there; he was not bothering with the Italian who was opening the box, but happened to be in the store with his friend. The splinter went into Fleckenstein's right eye. Of course he let out a yell at the time and began to cry, and, of course, the man who was in the store, having charge of it, came out and asked him what was the matter and looked in his eye, and, of course, they could not see anything there, although he was crying.

Young Fleckenstein went home with his friend. He was still crying, and his eye hurt him, but they could not tell what it was; they could not see anything in there that would cause the hurt; but Fleckenstein went home and told his mother—all the time he had been crying—and his mother said,

"Well, we had better take him to the doctor." And they went to Dr. Webner, and he examined the eye, but could not do anything with it that night, and the next morning he told Mrs. Fleckenstein to take the boy up to the Newark Eye and Ear Infirmary, and up there with the magnet they drew out this piece of steel.

The boy was suffering terribly during this time, and afterwards continued to suffer. He was kept in the house for about three months, kept from school, could not go out and play with his companions, and was just simply there suffering from this eye; and at the present time he cannot see at all and never will be able to see with that eye, and there is a question as to whether the other eye, through the influence of the sympathetic nerves existing between the eyes, may not follow the other. But even now the eye at times hurts him—that is, the right eye. I cannot say much about the left, but the right eye is totally blind and hurts him.

The plaintiff has spent little for medicine and doctor's care, because of the treatment accorded in the eye and ear infirmary, which is free. Of course, they have not much money, and you will notice that not much money has been expended in care, but the time he has spent at home and the care of his mother has been considerable.

You will see by the boy and by both witnesses that it was not the fault of the plaintiff, but the fault of the Atlantic and Pacific Tea Company.

Mr. Conboy: Although it is rather unusual, in view of the opening, if the Court please, I make a motion to dismiss the complaint on the ground that the facts as stated in the opening do not constitute

a cause for action; that is, the statement made by counsel is that the boy who was injured happened to be in the store with his friend, putting the boy upon the plane of a licensee. The law in this State is well settled that in the case of a licensee the owner of the premises is not responsible for anything except wilful injury. Now, there is no assertion of any wilful injury in this case.

The Court: I notice that the complaint says that he was lawfully in the store.

Mr. Conboy: Of course, he may be a licensee and be lawfully in the store.

The Court: Undoubtedly.

Mr. Conboy: The opening of counsel simply identifies the lawfulness of his being in the store.

The Court: You do not claim that he was a trespasser?

Mr. Conboy: No, but the rule with respect to care is the same both with respect to trespassers and licensees; that is, the owner of the property only owes them a duty to refrain from any wilful conduct. The rule both with respect to trespassers and licensees is the same in that respect.

The Court (after argument): I am not prepared to rule on this question now. The cases that I am familiar with, I think, are all cases where the premises were dangerous, for some reason or other.

Mr. Conboy: That is the usual case. I made the motion at this time because it seemed to me to be appropriate, in view of the statements made in the opening of counsel, and in order that your Honor might have the question before you. I think there

will be other questions of law that will develop during the course of the trial. I presume your Honor will withhold the determination on this motion for the present?

The Court: I will do so.

Mr. Conboy opens for defendant.

CHARLES JOSEPH FLECKENSTEIN, SR., sworn in behalf of plaintiffs.

Direct examination by Mr. Pilgrim.

Q. Mr. Fleckenstein, you are the father of the plaintiff in this case? A. Yes, sir.

Q. How old is your boy now? A. He is twelve years old.

Q. Does he go to school? A. Yes, sir.

Q. Was he a schoolboy in November, 1915? A. Yes, sir.

Q. What is his general physical condition outside of the injury to his eye—what was it in November, 1915? A. Perfect.

Q. How about his eyesight at that time? A. His eyesight was perfect.

Q. Since that time what has been the condition of his right eye, if you know? A. Totally blind.

Q. How soon after the injury which he received, or is alleged to have received, did you take him to a physician? A. Well, your Honor, I let the wife do all that, because I was working at night.

Q. What is your business, Mr. Fleckenstein?

Objected to as immaterial.

The Court (after argument): Well, it is a question that is very generally asked, almost universally, I think—not because it has any logical bearing on the facts of the case, but as part of the general situation.

(Question withdrawn.)

Q. Mr. Fleckenstein, have you been put under any expense as a result of this injury to your boy's eye? A. Yes, sir.

Q. About how much expense and with whom? A. With Dr. Webner.

The Court: How much?

Q. How much? A. Well, my wife can explain that, your Honor.

Q. Oh, you do not know about that? A. No.

Cross-examination waived.

ANTHONY P. YOUNG, sworn in behalf of plaintiffs.

Direct examination by Mr. Ritger.

Q. How old are you, Mr. Young? A. Sixteen years old.

Q. How old were you when this accident took place? A. Fifteen.

Q. Where did you live at that time? A. 386 Chadwick avenue.

Q. Do you remember the day that this accident took place? A. Yes.

Q. Do you remember what day it was? A. It was November 30th.

Q. This year? A. 1915.

The Court: What day of the month did you say?

Witness: November 30, 1915.

Q. Did you go to school that day? A. Yes, sir.

Q. Will you tell us what you did after school on that day? A. After school I went outside,

about half-past four, and I was around the house, and Charles Fleckenstein was with me all the while. About five o'clock my mother called me to go to the store. So I went to this store, and he asked me if he could come along, and I said, "All right."

Q. What store did you go to? A. The A. & P.

Q. (By the Court): Where is that? A. On Bergen street, about three doors from Hawthorne avenue.

Q. (By Mr. Ritger): Which side of the street? A. The lefthand side as you go over.

Q. (By the Court): Did you say Bergen street? A. Bergen street; yes, sir.

Q. (By Mr. Ritger): Was there anything wrong with young Fleckenstein when you were playing with him that afternoon? A. No, sir; everything was all right.

Q. You went to the store? A. Yes, sir.

Q. Who went with you? A. Charles Fleckenstein.

Q. Who is that? Who is Charles Fleckenstein? Is that the plaintiff there? A. What?

Q. Is that— A. That is the boy.

Mr. Conboy: That is the young boy; that is not the man who was on the stand, I presume, is it?

Q. That is who you mean? A. Yes, sir.

Q. Now, will you tell how that store appeared inside as to arrangement of counters and boxes at that date? A. Why, as you go in the store, on the right there is a counter, and in the back is a little butter counter, and on the left is cracker cans and things.

Q. Where is the entrance to the store? A. In the middle.

Q. Will you tell what you did when you went in the store? A. I went in the store and I asked for my things.

Q. Who waited on you? A. Why, a little boy there; the Italian boy waited on me.

Q. Did he do all the waiting that you had? A. No.

Q. Who else waited on you? A. The head man of the store waited on me. He told the Italian boy to go and open a box.

The Court: Do you know his name?

Q. Do you know what his name is? A. Who?

The Court: The head man.

Witness: Mr. Webner, I think his name is.

Mr. Pilgrim: Weber.

Witness: Weber.

By the Court:

Q. You say he told the boy to open the box? A. Yes, sir.

Q. To open what box? A. To open a box of Campbell's beans.

By Mr. Ritger:

Q. Where was the box that he told the boy to open? A. Right in back of us, in back of me. He was standing right alongside of me.

Q. Well, in the store—well, tell where it was in the store. A. Right in the center of the store —no, a little bit to one side, near the cans, a little bit to one side of the center.

By the Court:

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

Q. Perhaps I did not ask the right question. Was it in front or was it on one of the sides? A. On one of the sides, the lefthand side as you go in.

Q. The righthand side? A. The left.

Q. The lefthand side of the front door? A. Yes, sir.

By Mr. Ritger:

Q. Was it near the front of the store?

Mr. Conboy: You can lead him.

A. Right about in the center of the store.

By the Court:

Q. I do not quite understand. You say the front door was in the middle, and then the store had two sides and a rear. Now, did the front door take up all the front of the store, or was there a counter on either side of it? A. Two big show windows on the sides; there was a window on each side.

Q. Show windows? A. Yes, sir.

Q. Now, was this box that the young man was opening either on the righthand side or the lefthand side of the store as you went in? A. The lefthand side.

Q. About halfway down, you say? A. Yes, sir.

By Mr. Ritger:

Q. Do you know what the boy's name was? A. No, sir.

Q. Had you ever seen him there before? A. I saw him there before; yes, sir.

Q. What was he doing there? A. Waiting on people.

Q. How often had you seen him there—many times? A. Quite a—whenever I went past, I guess, he was in there and on Saturdays.

Q. Had he ever waited on you before? A. I don't think so. I wasn't in that store many times.

Q. Had you ever seen Mr. Weber there before? A. Yes, sir.

Q. Was he waiting on the people there? A. Yes, sir.

Q. What did the Italian boy do when he was told to open the box? A. He got a hammer and a hatchet from underneath the counter and went over there and stuck it in one end of the box.

By the Court:

Q. Describe a little more particularly just what he did. He got a hammer and a hatchet, and just tell us what he did with them. A. He went to open the box, so he took the hatchet and struck it with the hammer.

Q. In what way? Suppose that is the box (handing witness a pasteboard box). A. He went to cut the lid off.

Q. Where did he put the hatchet? A. One end of the box. The box was up like this, and he went to pry the lid off (indicating).

Q. What use did he make of the hammer? A. Why, he stuck the hatchet in and he struck on it with the hammer.

Q. What part of the hatchet did he hit with the hammer? A. The head of it.

By Mr. Ritger:

Q. Where was Fleckenstein when this young boy was opening the box? A. Right alongside of myself.

Q. Right near you? A. Yes, sir.

Q. Well, where were you standing at this time? A. Well, I was standing right alongside of the counter, and he was right there alongside of me.

Q. Which way was he looking? A. He was watching the fellow open the box.

Q. And were you watching him, too, all the time? A. No, sir; I wasn't watching him.

Q. What were you doing during that time? A. I was waiting for sweet oil, I think it was. Mr. Weber went in the back room to get it.

Q. (By the Court): Waiting for what? A. Sweet oil.

Q. (By Mr. Ritger): Did you see anything happen to Fleckenstein while you were in the store? A. No, sir.

Q. Where was Fleckenstein standing when the Italian was opening the box? A. Right alongside of me.

Q. I mean how far away from the box was he? A. About a foot away.

Q. Well, where were you standing? A. Well, I was standing about a foot away from the counter.

Q. Where was he standing with reference to the counter, how far from the counter was he standing? A. About two foot.

Q. How far from the box that was being opened was Fleckenstein standing while the Italian was opening it? A. Right alongside of it.

Q. Well, then, how far from the counter was the box at the time it was being opened? A. About two foot.

Q. And was Fleckenstein between you and the Italian opening the box, or was he on the side of the Italian opening the box? A. He was on the side of him.

Q. On the side of him. So that there was no one between you and the Italian? A. No, sir.

By the Court:

Q. Where was the Italian standing? Was he behind the counter? A. The Italian?

Q. Yes. A. He was right in the middle of the store.

Q. Right in the middle of the store? A Right by the boy, where he opened the box.

By Mr. Ritger:

Q. Was Fleckenstein helping him open the box? A. No, sir.

Q. What was he doing? A. Just standing there, watching him.

By the Court:

Q. Well, now, am I right in saying that you testified that the box was on the lefthand side of the store, about halfway down; is that right? A. Yes, sir.

Q. What, on a shelf, or where? A. On the floor.

Q. On the floor? A. Yes, sir.

Q. Was it there when you first saw it? A. Yes, sir.

Q. And then was it drawn out into the middle of the store? A. It stayed right where it was.

Q. You just told us that the Italian when he was working on the box was in the middle of the store, did you not? A. Not in the middle; a little this side of the middle.

Q. How wide is that store? Can you give us some idea? A. About 20 foot.

Q. Twenty feet wide? A. Yes, sir.

Q. That would be from you over to the first seat, perhaps, or maybe a little more. And the box was on the floor when you first saw it? A. Yes, sir.

Q. About halfway down towards the rear; is that right? A. Yes, sir.

Q. And how near to the wall, how near to the left wall? It was on the left side, you say. Do you remember? A. Just a little this side of the middle it was.

Q. Was there any counter there? A. No, sir.

Q. No counter? A. No, sir.

Q. And where was it while the Italian boy was working at it? A. The same place.

Q. The same place? A. Yes, sir.

Q. Then he did not move it? A. No, sir.

Q. When you say that he was in the middle of the store, you mean from front to back, halfway back? A. Yes, sir; that is what I mean.

Q. You did not mean out in the center of the floor? A. No, sir.

By Mr. Ritger:

Q. What happened, if anything, to Charles Fleckenstein while you were in the store?

Mr. Conboy: Well, he says he did not see anything happen to him there. He can only tell what he heard, I presume, now.

Mr. Pilgrim: He does not really know.

Mr. Conboy: If he does not really know, he cannot testify to it, you know.

A. What happened?

Q. Yes.

The Court: What did you see happened, if anything?

Witness: I didn't see anything happen. He came to me and said, "Something"—

Mr. Conboy: I object to what he said to him. It think it is irrelevant and incompetent.

The Court: The witness has answered the

question: he said he did not see anything happen. Now ask another question.

Q. Did you hear anything happen? A. I only heard when he struck on the hatchet with the hammer; that is all I heard.

By the Court:

Q. You heard the Italian strike on the hatchet with the hammer, you say? A. Yes, sir; I heard that.

Q. More than once? A. Yes, sir.

By Mr. Ritger:

Q. Did you hear when the Italian stopped hammering? A. Yes, sir; he stopped when the boy said, "Something flew in my eye."

Q. Did you hear the boy say—

Mr. Conboy: I move to strike out the answer, if the Court please, on the ground that it is not responsive, in the first place, and, in the next place, it is incompetent.

Mr. Pilgrim: If your Honor please, you will recognize that that is part of the transaction as to which the witness is testifying, all of which occurred in the presence of the defendant, and it is bound to be relevant, because it is part of the actual transaction and forms the very crux of the whole controversy. What is said and what occurs at the actual happening of the event that is inquired about is always relevant.

The Court: The question that occurred to me was whether it was not a part of the *res gestae.*

Mr. Conboy: That would be the only ground upon which that would be admissible, I take it.

The Court: It does not yet appear in what way it was that the boy said that something flew in his eye, whether it was in an exclamatory way or in a historical way.

Q. (By the Court): How did he say it? A. He started to cry and told me something flew in his eye.

The Court: I think it is part of the *res gestae,* Mr. Conboy.

Q. (By Mr. Ritger): Did the Italian stop opening the box then? A. Yes, sir; he stopped.

Q. During this time where was the man in the store? A. In the back room.

Q. Well, did he come out? A. He came out after he had what I wanted, my sweet oil.

Q. Did anybody tell him about—did you say anything to him about this accident?

Mr. Conboy: That is immaterial, if the Court please. I object to it on the ground that it is incompetent, irrelevant and immaterial. That certainly is not part of the *res gestae.*

The Court: No, that is not part of the *res gestae;* but is it not competent to show that the attention of the defendant's representative was called to the accident of which complaint is now made?

Mr. Conboy: That would only be relevant, I take it, in case it was sought to follow it up with some statement made by him, which, of course, would be entirely incompetent.

The Court: It seems to me to be proper.

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

Exception noted as ground of appeal.

(Question read as follows: "Did you say anything to him about this accident?")

A. No, sir.

Q. What did Mr. Weber do when he came in the store? A. Told him to stop crying.

Q. Did he do anything about the eye? A. Told him to stop crying.

By the Court:

Q. "Told him." You mean told—. A. The boy.

Q. Fleckenstein? A. Yes, sir.

Q. He was crying, was he? A. Yes, sir.

By Mr Ritger:

Q. Did he do anything about the boy's eye? A. No, sir.

Q. Did he look at it? A. No, sir.

Q. What did you do then? What happened then, when he told the boy to stop crying? A. Why, we were just going out of the store then.

Q. Who was going out? A. We were.

Q. After you left the store, what did you do? A. Took him home.

Q. Could he see his way? What do you mean by "took him home"? A. He walked home with me all right, but he said his eye was hurting him.

Q. Was he crying all this while? A. Yes, sir.

Q. Did he ask you to come with him? A. When, when he went home?

Q. When he went home. A. Well, we lived right near each other, so I went with him that way home.

Q. Well, could he find his way alone? Could he see at that time, do you know?

Mr. Conboy: He could not tell whether he could see or not. He said the boy went along with him all right, but he was crying.

Q. Did the boy ask you to go home with him? A. Well, I took him along, so I took him home again.

Q. When this Italian boy stopped hammering what did he do? A. When he stopped hammering?

Q. Yes. A. I don't know what he did then. He stood there, I think.

Q. Do you know whether he was there when you left or not? A. Yes, he was there when I left.

Q. Did he say why he stopped, or do you know why he stopped? A. No, sir.

Q. Did he look into Fleckenstein's eye after this accident? A. No, sir.

Q. Well, did you? A. Yes, I did.

Q. What did it appear like? A. There was all water in it; the water ran out of his eye.

By the Court:

Q. When was that? A. When I looked into it.

Q. And when did you look into it? A. When we got outside of the store.

By Mr. Ritger:

Q. Did he cry out suddenly or did he walk over to you and tell you? A. He came over to me; first he yelled, and then he came over to me and told me something flew in his eye.

Q. Now, you say he yelled. Where was he when he yelled? A. Right alongside of me.

Q. And he turned to you, did he? A. Yes, sir; and told me something flew in his eye.

Q. Now, you were standing a foot away from the counter. Now, how far from you was the box and the Italian at the time that the Italian was opening the box? A. Why, right alongside of young Fleckenstein; that takes about a foot.

Q. How far away from you was it? A. About a foot.

Q. Now, which side of the box was the Italian as he was opening it in the store, which side of the box was he, on your side or on Fleckenstein's side or toward the side of the store? A. On Fleckenstein's side.

Q. Was he between the box and the wall where the cans were—the cakes?

The Court: Was who?

Mr. Ritger: Was the Italian.

A. Yes, he was right between the box and the wall.

Q. Was he nearer the front of the store or nearer the back of the store, with relation to the box? Was he in front of the box or in back of it or to the side of the store? A. I couldn't tell you that; I didn't see where he was, if he was standing in front of the box or in back of it; I didn't take notice of that.

Q. You do not know where he was when he stopped hammering? A. No, sir.

Q. Did you turn around when you heard this cry? A. Yes, sir.

Q. And when you did that did you see what the Italian was doing? A. He wasn't doing anything; he just stopped hammering then.

Q. Well, what did he appear to be doing? What did he stop doing? A. Stopped opening the box.

Q. And when you turned around what did you see him doing? A. See who, Fleckenstein?

Q. No, what did you see the Italian doing? A. He stopped opening the box when that happened, when I turned around.

Q. At that time where was the hatchet that you were talking about? A. Sticking in the box.

Q. And where was the hammer? A. He had it in his hand.

Q. And after that he did not attempt to open the box, did he? A. No, sir.

Q. Now, as you saw the Italian with the hammer and the hatchet, with the hatchet sticking in the box and the hammer in his hand, just where was Fleckenstein? A. Right alongside of me.

Q. Between you and the front of the store, or where? A. Between me and the front of the store.

Q. And which way was Fleckenstein facing at this particular time? A. He had his back turned toward the left.

Q. Towards what? A. Towards the left of the store.

Q. Was he facing towards the left of the store? A. Yes, sir.

Q. And in the direction of the box? A. Yes, sir.

Q. You say he had his back towards what? A. His back towards me.

Q. Well, had he been standing that way while you were being waited on? A. No, he turned that way when the fellow went to open the box.

Q. Was he standing that way when he cried out? A. No, he turned around.

Q. I mean at the time that he cried out? A. Oh, yes, at the time he cried out he stood that way.

Q. And at the time he cried out which way was he facing? A. Facing the box.

Q. Was there anyone else in the store while you two were there? A. No, sir.

Q. I mean referring to customers? A. No, sir; a lady came in when we went out, that is all.

Q. Do you know how old a boy the Italian boy was? A. What?

Mr. Conboy: There is nothing in the pleadings that makes that competent, if your Honor please; there is nothing in the complaint that makes such a question relevant.

The Court: I know, but they may want to find him.

Mr. Conboy: Oh, if they have not been able to find the boy, that is another matter.

The Court: I do not know. There is nothing to account for it.

Q. Do you know how old a boy he was?

Mr. Conboy: I object on the ground that it is immaterial and irrelevant, and besides that it is incompetent.

The Court: I think it is one of those descriptive features that may properly be inquired about. You may answer.

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

Exception noted as ground of appeal.

Q. (By the Court): How old do you think he was?

A. About fourteen.

Q. (By Mr. Ritger): Did he live near there?

A. Yes, sir; his father kept the barber shop at Jeffrey place and Bergen street.

Mr. Pilgrim: Counsel agree that the place about which the witness has been speaking is 824 Bergen street, Newark.

The Court: You mean the barber shop?

Mr. Conboy: No, the tea company's store.

Mr. Pilgrim: The tea company's place.

The Court: The defendant's store?

Mr. Pilgrim: The defendant's store.

Q. You say that on the lefthand side of the store there were boxes. Were there many there? A. Boxes?

Q. Yes. A. That was the only box that was there.

Q. What do they keep on the lefthand side of the store?

Mr. Conboy: I understood him to say that on the lefthand side of the store there were shelves.

Q. What was on the lefthand side of the store? A. Why, they kept canned goods there and cracker boxes, but they were on shelves.

Q. Do you know what the distance is between the counter on the righthand side and these shelves on the lefthand side of the store, about? A. About 10 foot.

Q. Was there any room between the space where the box was being opened and the other wall?

The Court: And the lefthand wall, you mean?

Mr. Ritger: And the lefthand wall.

Witness: Yes, sir.

Cross-examination by Mr. Conboy.

Q. About how much space was there there, Anthony, between the box and the lefthand wall? A. Well, I should say about two foot.

By the Court:

Q. How big was the box? A. How big?

Q. Yes, do you know? A. About a foot square.

Q. Did it have any labels on it, that you remember? A. Labels?

Q. Yes. A. Why, it had—I read the name on the box; it was "Campbell's Pork and Beans."

Q. And what was it that you ordered? A. I couldn't tell you what I ordered.

Q. Well, you ordered something that the Italian was getting, did you not? A. Yes, sir.

Q. Do you remember what it was that you ordered? A. No, sir.

Q. You did not know what he was getting—you knew then, I suppose? A. Yes, sir.

Q. But you do not remember now? A. No, sir.

Q. Did he get the box open enough for you to look into it, to see inside of it? A. No, sir; he only just about pried it open about an inch; the cover was off about an inch.

Q. Then you did not get what you went for? A. Yes, sir; I got what I went for.

Q. Did you get anything out of that box? A. No, sir.

Q. Well, you went for something in that box? A. I didn't go for anything in that box; no, sir.

Q. No, you did not. You went with him; you were merely his companion; is that it? A. Yes, sir.

Mr. Conboy: This was the boy who went to make the purchases, your Honor; he was making the purchases, under instructions from his mother, and young Fleckenstein went along with him.

The Court: I understand.

Q. And he did not get anything out of that box? A. Not for me; no, sir.

Q. From the Italian? A. No, sir.

Q. And you do not remember what he ordered?

Mr. Ritger: Your Honor, we are not trying to prove that he was trying to get something out of that box for this boy. That was done while they were in the store, but had nothing to do at all with the order that they gave.

Q. Well, was the Italian opening this box for either of you? A. No, sir.

Q. He had not anything to do with your orders? A. No, sir.

Q. What was it that you ordered? A. I couldn't tell you; I know—the only thing I can remember, I was waiting for my sweet oil.

Q. Yes, you told us about that. You do not remember now whether you ordered anything else? A. I ordered something else, but I can't remember it.

Q. Well, was it in your mind at the time when the boy was working at this box that he was getting something for you? A. Yes, sir.

Q. But you do not remember what you ordered? A. I didn't order anything for the boy to get it out of the box.

Q. Then what makes you think he was getting something for you out of the box? A. He wasn't getting nothing for me out of the box.

Q. You did not think he was? A. He was not.

Q. You had not any interest in what he was doing? A. No, sir.

By Mr. Conboy:

Q. You and Charles were over at the counter, were you not? A. I was by the counter and he was standing alongside of me.

Q. And it was over at the counter where your order was to be filled, was it not? A. Yes, sir.

Adjourned until tomorrow, Thursday, December 7, 1916, at ten o'clock A. M.

SECOND DAY.

THURSDAY, DECEMBER 7, 1916.

Met pursuant to adjournment.

Present, counsel as before stated.

(By direction of the Court, the jury withdraws from the courtroom.)

The Court: I have had very little time to examine the matters suggested by the motion to direct a verdict for the defendant on the opening. So far as possible, I have looked at the cases to which I have been referred, and I do not find, nor, I think, have counsel found, that any case is quite like this. The cases almost invariably relate to a dangerous condition of the premises, which is not the case here.

The general language of the case of *Turess* v. *The New York, Susquehanna and Western Railroad Company,* 32 Vroom 314, gives a definition of invitation which was borrowed from a Massachusetts case, adopted by the Court of Errors in the Phillips case and repeated in the case of *McCormick* v *Anistaki,* 37 Vroom 211. I shall read the whole passage from the Anistaki case: "The law on this subject is entirely settled in this state. A mere licensee has no cause of action on account of the dangers existing in the place he is permitted to enter. Mere permission to pass over dangerous lands, or acquiescence in such passage for the benefit or convenience of the licensee, creates no duty on the part of the owner, except to refrain from acts wilfully injurious. But the owner or occupier of lands who, by invitation, express or implied, induces persons to come upon the premises, is under

a duty to exercise ordinary care to render the premises reasonably safe for such purposes, or at least to abstain from any act that will make the entry upon, or use of, the premises dangerous." Then comes a quotation from the Turess case, which was itself borrowed from a Massachusetts case: "Invitation which creates such a relation may be express, as when the owner or occupier of land, by words, invites another to come on it, or make use of it or something thereon; or it may be implied, as when such owner or occupier, by acts or conduct, leads another to believe that the land, or something thereon, was intended to be used as he uses them, and that such use is not only acquiesced in by the owner or occupier, but is in accordance with the intention or design for which the way or place or thing was adapted and prepared or allowed to be used."

Here we have a store, what may be called a shop, with open doors, into which anyone may enter without any questions asked. The store exists for the purpose of selling tea and other things. But it is a place into which a person can go unhindered to ask a question, to look at the stock, and depart without criticism if he does not buy. The boy who was injured in this case was injured in that store. He went in with a companion, another boy, who was a customer. He had been sent there to buy something. While he was waiting for it to be delivered the plaintiff stood near him, waiting, and in their vicinity an Italian boy, about twelve years old, an employee of the establishment, was engaged in opening a box by a method somewhat familiar. The box was about a foot square. He had a hatchet and a hammer. He inserted the edge of the hammer between the cover of the box and the side of the box,

or the end of the box, and then with a hammer he struck on the head of the hatchet to drive it further in, to get a leverage sufficient to enable him to pry the cover off. Before he got that far the plaintiff suddenly gave a scream; he made a cry, and put his hand up to his right eye, and it then appeared that his right eye was injured. The case has not yet gone far enough for the facts to be developed any further, but it is claimed—and the motion that was made was entirely proper—by the plaintiff that some particle or piece of metal perhaps, thrown off by the action of this boy in opening the box, entered the plaintiff's eye, and ultimately destroyed the sight.

The question that suggests itself to me is whether in such a place there was not evidence of an invitation to enter on which the boy who was hurt might act, though not himself a customer, but merely going with a customer, and might rely upon the premises being kept reasonably safe.

Here are two men; one smokes and one does not. They go into the cigar establishment on the corner of Broad and Market streets. The one who smokes says, "I want a cigar." The other man goes in with him; he has been walking with him, and he walks in with him, and stands there with him. He is not a purchaser himself; he is with a purchaser. While he is standing there at the counter the ceiling falls down, we will say, through negligence of the proprietor. The man who wants to buy the cigar has a remedy. The other man, supposing that they are both hurt, has not, unless the proprietor wilfully threw the ceiling down. That does not look to me like a very reasonable proposition. I am rather inclined to think that the non-smoker might assume that, as he had walked with his friend along the

sidewalk, he might walk with him through the open door of a shop and stand by his side while his friend made a purchase, and that he would be under the protection of ordinary law in such cases.

Even if I were not in doubt about the proposition that Mr. Conboy advances, if I were more inclined to lean toward it than I do, I should hesitate to lay down a rule at the Circuit which, so far as I can find out, is not supported by any case applicable to closely similar facts. I have this question, and that is why I asked the jury to go out: whether I ought to treat this as a question of law or whether I ought to treat it as a question for the jury. If I were to treat it as a question of law, I think I should overrule the motion. If I ought to treat it as a question for the jury, I should put it to them to say, whether, in their opinion, the plaintiff might reasonably think that he was justified in going with his companion in that shop, and might rely on the proprietor of the shop using reasonable care to keep it in a safe condition, not only as to his companion, but as to him. I am in doubt as to whether I ought to take charge of the question or whether I ought to leave it to the jury.

(Counsel argue.)

The Court: Well, I shall do this. The Circuit follows cases. I deny the motion to direct a verdict for the defendant upon the plaintiff's opening, upon the ground that I can find no reported case which goes so far as to hold that a person who accompanies a customer to a shop is a mere licensee.

Defendant's counsel pray an exception to this ruling of the Court.

Exception noted as ground of appeal.

(The jury returns into court.)

FRED C. WEBNER sworn in behalf of plaintiffs.

Direct examination by Mr. Ritger.

Q. Dr. Webner, how long have you been practicing? A. Twenty-eight years.

Q. What school did you study in? A. Physicians and Surgeons, New York.

Q. What profession do you follow now? A. Eye, ear, nose and throat.

Q. Have you been taking care of that exclusively for any length of time? A. Seventeen years.

Q. Where do you practice? A. 96 Clinton avenue. That is, you mean the residence, the office?

Q. Yes. Anywhere else? A. The Eye and Ear Infirmary, Newark, New Jersey.

Q. How long have you been working there? A. Twenty-eight years.

Q. Have you ever attended Charles Fleckenstein, Jr.? A. I did.

Q. The boy standing up there (indicating)? A. Yes.

Q. Do you remember when he first came to you? A. If I can refer to my notes?

Q. Well, to refresh your memory, you may.

Mr. Conboy: Certainly.

A. (Referring to memoranda): He was brought to my office November 30, 1915.

Q. Will you tell what you found wrong with him, if anything? A. I found a traumatic cataract, a hemorrhage in the anterior chamber.

By the Court:

Q. A cataract resulting from injury? A. I haven't given you the history yet.

Q. I thought you said "traumatic." A. Yes. That is an injury; traumatic is from an injury.

By Mr. Ritger:

Q. Did you determine what the injury was? A. He came in with the following history—I have got to give you the history of the case—he was struck and swollen, the cornea was injured, and he had a hemorrhage in the vitreous. That means in the back of the lens he had a hemorrhage. This was in the right eye by a nail. The lens was cataractous the history, but I wasn't sure whether there was a foreign body in the eye or not, so I told him to go over to the Eye and Ear Infirmary and I would put a magnet to his eye. We have a very large magnet there, run by a 500 volt current, direct, that will pull almost anything out of the eye that is in there, providing it is steel or iron. Of course it won't have any effect on any non-magnetic matter.

Q. Did you treat him that night? A. It was December 1st I treated him there; the magnet was applied December 1, 1915, and extracted a small piece of iron, probably a portion of a head of a nail; I couldn't tell what it was, it was a small piece of iron, larger than a pin's head. The record of the Eye and Ear Infirmary informs us what the operation is, right here in my own hand.

By the Court:

Q. Let me be sure that I understand you correctly. Were you present when the magnet was applied? A. I applied it myself.

Q. And you saw this particle come out? A. I certainly did.

By Mr. Ritger:

Q. Can you tell us how this piece of steel was extracted from the eye? A. With a magnet.

Q. Can you explain more than it was larger than a piece of pinhead the size of this piece of steel? Can you give us any measurements of it? A. I have a little drawing here of the size of it; that is all I can tell you. It was larger than a pin's head, not much larger than a pin's head.

Q. (By the Court): Let me see just what kind of a pin's head you have in mind. There are a lot of pins there, Doctor (handing box of pins to witness). A. That is the size (indicating the head of a pin).

The Court: This pin is at the service of counsel.

Q. (By Mr. Ritger): Which eye did you find to be injured? A. The right eye.

Q. Have you a drawing of this piece of steel? A. Wait a minute, now. I have a drawing right here of the piece of steel.

By the Court:

Q. I thought you said it was iron. Was it iron or steel? A. Iron or steel. We can't tell what it is, you know. Iron and steel are practically the same thing—different processes.

Q. They belong to the same family, anyway. A. That is the idea.

By Mr. Ritger:

Q. Do you know where the piece of steel is at this time? A. I looked for it high and low. We usually keep those things—I looked for it at the infirmary and at my office, and I couldn't find it.

Q. You say that it was about the size of this pin's head? A. The size of the top of the pin, yes.

Q. That is not an ordinary pin, used in every day work, is it? A. No.

The Court: It is what is called a bank pin.

Witness: No, that is not an ordinary pin; that is very much larger.

Q. Showing you this bank pin, it gives you the idea as to the size of the steel? A. The head of it.

Q. Did you examine the boy since that time? A. Very often.

Q. About how often? A. Oh, every other day.

Q. For how long? A. For a period of six or eight weeks.

Q. Did you do the examining always at the Eye and Ear Infirmary? A. Almost always; once in a while I saw him at the office.

Q. Did the piece of steel have any effect on his eye as to sight? A. He lost his sight.

Q. When did his eyesight fail? A. Immediately.

Q. Have you examined the boy lately? A. Well, I think I saw him less than a month ago.

Q. Could he see at that time? A. Not at all.

Q. Can the sight be restored? A. Never.

Q. Will you tell what happened in the eye to prevent it being restored? A. Why, the eye was destroyed. This boy had a foreign body in his eye, which caused a hemorrhage. How far this piece of steel went in, or this piece of iron went in, we couldn't see, or, rather, I couldn't see, on account of the hemorrhage, but the chances are it went back far enough to tear the coats of the eye and produce this hemorrhage, and in doing that it destroyed the eye.

Q. Have you examined his left eye?

Mr. Conboy: I object to that, if the Court please, because there is no allegation in the complaint with relation to the left eye at all.

The allegations of the complainant are confined to the right eye.

The Court (reading from the complaint): The locality of the pain is not indicated, and I suppose that any pain anywhere that is traceable to this injury to the right eye would be within the terms of the complaint, but the complaint would not cover any injury to the left eye.

(Question withdrawn.)

Q. Do you know whether the eye hurts or not at the present time? A. Pain is a subjective symptom. We do not know; we have got to take their word for it.

Q. Can you tell us now whether the injury has ceased to enlarge itself or whether the pain might increase? A. I don't know anything about the pain.

Q. Have you sent a bill to Mrs. Fleckenstein for your services so far? A. No; they paid cash.

Q. Will you tell us if you have a record of how much should be paid? A. No.

Q. (By the Court): You say you have no record of the amount paid? A. No record of the amount paid; no.

Q. (By Mr. Ritger): What is your charge per visit? A. It depends on the patient entirely.

Mr. Conboy: It depends upon the person, like it does with all of us.

Witness: At the Eye and Ear Infirmary we charge nothing.

Mr. Conboy: If you will tell me how much it is, you will not even have to put the woman on the stand. I will stipulate it. Tell me what it is and we can agree on it.

Cross-examination waived.

CHARLES FLECKENSTEIN, JR., sworn in behalf of plaintiffs.

Direct examination by Mr. Ritger.

Q. How old are you? A. Thirteen years old.
Q. Thirteen? A. Yes, sir.
Q. When did you reach thirteen. A. Monday.
Q. Do you go to school? A. Yes, sir.
Q. Where? A. St. Charles.
Q. What kind of a school is that? A. It is a little stucco school.
Q. It is a parochial school, or a Catholic school. A. Yes, sir; Catholic.
Q. Did you go there last year? A. Yes, sir.
Q. Do you remember November 30, 1915? A. Yes, sir.
Q. Did you go to school that day? A. I went to school that day, and then I got hurt.
Q. Well, after school were you playing around with this Anthony Young? A. Yes, sir.
Q. What did you do after you were playing with him awhile? A. He asked me to come to the store with him.
Q. And did you go? A. Yes, sir.
Q. What store did you go to? A. Atlantic and Pacific.
Q. Where was it? A. Bergen street.
Q. Near where? A. Near Hawthorne avenue.
Q. Did you go into the store? A. Yes, sir.
Q. Will you tell us how big the store was, or what it looked like inside? (No response.)
Q. Use this room as your measurement, and tell us how wide it was and how long. A. I guess about from that wall to that chair (indicating).

By the Court:

Q. From that wall over there (indicating)?

A. Yes, sir; to that chair (indicating).

Q. To where? A. To that chair.

(The distance indicated by witness is measured by an officer and announced to be 17 feet.)

Q. Which measurement was that, Charles; from the front door back to the back of the store, or across? A. Across.

Q. Across? A. Yes, sir.

Q. From side to side? A. Yes, sir.

Q. Is that it? A. Yes, sir.

By Mr. Ritger:

Q. How far was it from the front of the store to the back, about? A. I guess about from that entrance there to this here (indicating).

By the Court:

Q. From the railing, you mean? A. Yes, sir.

Q. From the railing to this (indicating)? A. Yes, sir.

(The distance indicated by witness is measured by an officer and announced to be 21 feet.)

By Mr. Ritger:

Q. Will you tell the arrangement of boxes and counters and things in the store? A. On one side was a counter and on the other side was boxes of biscuits.

Q. Which side as you go in was the counter? A. The righthand side.

Q. And on the lefthand side the biscuits? A. Yes, sir.

Q. Where did you go when you went in the store? A. Pretty near in the center.

Q. Do you mean pretty near half-way toward the back? A. Yes, sir.

Q. What side of the store were you on? A. I was on the righthand side, looking toward the left.

Q. Well, were you standing near the counter or—— A. I was standing right by the counter, leaning on it.

Q. Where did the boy you were with go? A. He was right beside me, waiting for orders.

Q. Who was waiting on him? A. First the Italian boy was waiting on him, and then I think Mr. Weber told him to open a box.

Q. Did you hear Mr. Weber tell the boy to open a box? A. No, sir.

Q. What makes you say that you think Mr. Weber told him to open a box? A. Well, he was waiting on him, and he went over and took a hatchet and a hammer and started to open a box.

Q. The Italian boy? A. Yes, sir.

Q. Where did he get the hatchet and hammer? A. Behind the counter.

Q. Were there many boxes in the store. A. I don't know.

Q. Where was the box he went toward? A. It was right near the door.

Q. Right near the door? A. Near the door.

Q. The door to where? A. Coming in.

Q. Did the Italian boy move the box? A. No, he didn't move it; he just took the hatchet and hit it with the hammer.

Q. How far away from him were you when he began to open the box; can you tell by measuring here? A. About 2 feet.

Q. Well, how far away? Just show something that is away from you 2 feet. A. I was leaning against the counter, and he was about over there (indicating).

Mr. Pilgrim: Counsel are willing to agree that it was about 3 feet.

Mr. Conboy. Yes, as the boy indicates.

Q. Was he on the opposite side of the box or on the same side of the box that you were? A. He was on the other side of the box, in back of the box.

Q. What were you doing at this time when he came to open the box? A. I was watching.

Q. You were watching him? A. Yes, sir.

Q. Did you see how he opened the box? A. Well, he put the hatchet in the box and hit it with a hammer, and just then I saw a spark.

Q. From where? A. From the hatchet.

Q. (By the Court): You say you saw a spark? A. Yes, sir.

Q. (By Mr. Ritger): And what happened then? A. Then I couldn't see.

Q. Did you feel anything, or what happened? A. Right away I saw black.

Q. In which eye? A. The right.

Q. The right eye? A. Yes, sir.

Q. Did it hurt you? A. Yes, sir.

Q. (By the Court): At that time? A. Yes, sir.

Q. (By Mr. Ritger): Just then? A. Yes, sir.

Q. What did you do? A. I said, "Something flew in my eye."

Q. Did he stop work then? Do not be afraid. We are all here, just the same as you are. Just answer right out. What did you do then? A. Then I walked over toward Anthony.

Q. You went over to him and told him about it? A. Yes, sir.

Q. Did the Italian boy keep on working? A. No, he stopped right away.

Q. What did he do then? A. I don't know.

Q. You went over and told Anthony, and then what happened? Did you tell the man in the

store? A. He said, "What is the matter?" And I said, "Something flew in my eye."

Q. Did he do anything about it? A. He looked at it, and he said, "There is nothing in it."

Q. Did your eye hurt you during this time? A. Yes, sir.

Q. What did you do after the man said there was nothing in it? A. I went home.

Q. Did you go home alone? A. With Anthony.

Q. And then what did you do? Did you do anything about the eye? A. I went upstairs and told my mother that something flew in my eye; that I couldn't see.

Q. And did you go to the doctor? A. We went to the doctor that night.

Q. To Dr. Webner, who was here? A. Yes, sid.

Q. Did he do anything to the eye that night? A. He looked at it and he said we should come over to the clinic.

Q. Then you went to the clinic the next day? A. Yes, sir.

Q. Do you remember what happened up there? A. He put some stuff in my eye, and then put my eye in the magnet.

Q. Did it hurt? A. Not so much.

Q. He put some stuff in your eye first, did he? A. Yes.

Q. Could you see all right with your left eye at that time? A. Yes, sir.

Q. Did you see anything come out of the eye or see anything after that was supposed to be in the eye? A. I couldn't see; it stayed in the magnet.

Q. It stayed on the magnet? A. Yes, sir.

Q. Did you see the magnet afterwards? A. Yes, I saw it, but I didn't see the steel.

Q. Is your eye better now, or can you see out of the eye now? A. No, sir.

Q. Which eye can't you see out of? A. The right eye.

Q. Does it hurt you at all? A. Sometimes.

Q. Does it hurt you much, or is it just a little pain? A. It hurts me sometimes real hard.

Q. Is that often? A. Sometimes it is often.

Q. Does it hurt you now, while you are up there? A. No, sir. When I look at the lights it does.

Q. Have you ever been able to use your eye since that time? A. No, sir.

Q. Before the accident did you ever have any trouble with your eye? A. No, sir.

Q. Before you went into the store did your eye hurt you that day? A. No, sir.

Q. You said you go to St. Charles school. Do you have to do any studying down there. A. Yes, sir.

Q. Before the accident did you have to study at home? A. Yes, sir.

Q. Did you do much studying? A. Yes; every night.

Q. And at the time this accident happened did you keep on going to school? A. No, sir.

Q. Well, why? A. I stayed home and go to the doctor.

Q. Do you remember how long it was that you stayed home? A. I think from November 30th until the middle of January, when they was having their examinations.

Q. Did you go to the examinations? A. No, sir; after examinations I went.

Q. Did you go to school regularly after that? A. Only when I didn't have to go to the doctor.

Q. Then you kept on going to the doctor for awhile? A. Three times a week I had to go.

Q. Do you remember how long that kept up? A. I don't know. It kept up quite long, though.

Q. Do you go to the doctor now with it? A. I didn't go this month; I went last month.

Q. Why did you go last month; did it hurt you? A. Yes, sir.

Q. Does anything else hurt you besides the eye? A. No, sir.

Mr. Conboy: Well, there is nothing else in the case.

Q. Do you do any studying now? A. Sometimes.

Q. Well, do you keep up your regular studies of the school? A. Yes, sir.

Q. What do you mean that you study sometimes? A. Well, sometimes I study and sometimes I didn't.

Q. Well, why do you not study regularly? A. I don't know.

Q. Did you ever have to stop studying on account of your eye? A. Well, when I look at the book too long it hurts.

Q. Which eye hurts; is it the right eye? A. Yes, sir.

Q. You try to use it, then? Do you try to use it? A. What?

Q. Your right eye? A. I can't use it.

Q. Were you in that store before that night that you were hurt? A. What do you mean, was I in the store before?

Q. Yes. A. I guess I was; I think I was there about two times. We never dealt in there.

Q. Did you know the Italian boy that was in there? A. No, sir.

Q. Did you ever see him before? A. No, sir.

Q. When the Italian boy was waiting on Young in the store where were you standing? A. I was standing right by Anthony.

Q. And where was the Italian boy at that time? A. Waiting on Anthony.

Q. Where? A. Waiting on Anthony.

Q. Where was he doing the waiting? A. Back of the counter.

Q. Do you remember whether Young bought anything that day in the store? A. He bought something.

Q. Do you know what it was? A. I don't know.

Q. Did he take anything with him when he went out? A. Yes, sir.

Q. Did you ever see Mr. Weber in the store before? A. Yes, sir.

Q. Do you know what he did in there? A. Well, all I know, he waited on people.

Q. Was there ever anybody else besides these two in there when you went in? A. I don't know; I wasn't in there a lot of times.

Q. Were there other customers in there when you and Young were in? A. When I was hurt?

Q. Yes. A. There wasn't nobody in, but just when I was going out a lady come in.

Q. Will you tell us just how the Italian boy was hitting the hatchet and where the hatchet was when he was hitting it? A. He put the hatchet in the crack and hit it with a hammer.

Q. How did he hit the hatchet? A. I don't know; I can't tell you that.

Q. Well, in what way was he swinging the hammer? A. He went like this (illustrating).

Q. Up and down. Was he hitting it hard or easy? A. Pretty hard; not so hard; not very hard.

Q. Did he keep ahold of the hammer after? A. I don't know; I wasn't paying no attention to that.

By the Court:

Q. How far were you from the Italian boy when your eye first hurt you? A. About 2 feet.

Q. About 2 feet? A. Yes, sir.

Q. Was he standing down or stooping down or kneeling down? A. Yes, he had to stoop down a little bit to reach the box.

Q. He was stooping down? A. Yes.

Cross-examination waived.

Mr. Ritger: Counsel stipulates that the amount of doctor's fees paid at Dr. Webner's office was $26, and the amount paid for medicines was $1.75.

Plaintiffs rest.

MOTION FOR NON-SUIT

Mr. Conboy: May it please the Court, I move to dismiss upon the state of facts shown by the plaintiffs' case, on the ground, first, that there has not been shown here that wilful misconduct which the law requires in the case of a licensee upon the premises of the defendant. It is not necessary for us to argue that proposition with your Honor to any greater extent than it has already been presented. In the second place, on the ground that there has not been any negligence shown on the part of the defendant or any of its servants from which the injury resulting to the plaintiff occurred. The case is devoid of anything showing negli-

gence at all on the part of the defendant under the pleadings in this case. In the third place, that the plaintiff has failed to show that he was not guilty of contributory negligence, but, on the other hand, has shown that he was guilty of contributory negligence.

I make those propositions of law, and I should be pleased to consider them with your Honor.

RULING OF COURT

The Court (after argument): I am very sorry for little Charles Fleckenstein, but I am bound to say that I do not see the slightest evidence of negligence. I do not think there is anything to go to the jury. I therefore grant the motion.

EXCEPTION

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

Exception noted as ground of appeal.

CHARLES FLECKENSTEIN, JR., by CHARLES FLECKENSTEIN, SR., his next friend, and CHARLES FLECKENSTEIN, SR., individually,

vs.

THE GREAT ATLANTIC AND PACIFIC TEA COMPANY, a corporation.

I, John MacLauchlan, one of the stenographers of the Essex County Courts, do hereby certify that the foregoing transcript contains the entire record of the proceedings and testimony taken by me at the trial of the case of Charles Fleckenstein, Jr., by Charles Fleckentsein, Sr., his next friend, and Charles Fleckenstein, Sr., individually, vs. The Great Atlantic & Pacific Tea Company, which trial was held before the Honorable Frederic Adams, Judge, on the 6th day of December, 1916.

JOHN MACLAUGHLAN.

CERTIFICATE.

To the Judges of the New Jersey Court of Errors and Appeals:

I, Frederic Adams, Judge, to whom the foregoing case was referred by the Supreme Court for trial, do hereby certify that the foregoing is the stenog-

rapher's transcript of shorthand notes of the testimony taken before me at the trial of the within cause.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed my seal this 17th day of January, nineteen hundred and seventeen.

[L. S.] FREDERIC ADAMS,

Circuit Court Judge.