

ii

INDEX.

	PAGE
Notice of Appeal	1
Grounds of Appeal	2
Summons	3
Complaint	4
Answer	7
Reply	8
Judgment	9
Motion for Non-Suit	75
Motion for Direction of a Verdict	118
Charge	119
Defendant's Exceptions	122
Defendant's Requests to Charge	122
<i>TESTIMONY.</i>	
FOR PLAINTIFF:	
ANNA PAIEWONSKY:	
Direct	11
Cross	23
<i>Recalled—</i>	
Direct	41
FRANCISCO FILIC, M. D.:	
Direct	31
Cross	33

	PAGE
JOSEPH WELSH, M. D.:	
Direct	33
Cross	34
SAMUEL PREISER, M. D.:	
Direct	36
Cross	39
10	EMMA MANNE:
	Direct
	Cross
	Re-Direct
	REBECCA ALBAM:
	Direct
	Cross
20	MORRIS PAIEWONSKY:
	Direct
	Cross
	GUSSIE LIPKOWITZ:
	Direct
	Cross
	LOVINA GREEN:
	Direct
	Cross
30	MAX GOTTESMAN, M. D.:
	Direct
	Cross
	BARCLAY W. MOFFATT, M. D.:
	Direct
	<i>Recalled</i> —
	Direct
	Cross
	Re-Direct
40	

	PAGE
MAX MANNE:	
Direct	72
Cross	74
FOR DEFENDANT:	
ELBERT S. SHERMAN, M. D.:	
Direct	76
Cross	78
Re-Direct	81
JOSEPH M. RECTOR, M. D.:	
Direct	82
Cross	90
Re-Direct	96
Re-Cross	96
Re-Re-Direct	99
LOUIS MANDELBERG:	
Direct	103
Cross	107
DORA JOFFE:	
Direct	112
Cross	113
ALEXANDER JOFFE:	
Direct	113
Cross	114

REBUTTAL

FOR PLAINTIFF:	
MAX MANNE:	
Direct	116
EMMA MANNE:	
Direct	117

PAGE

MAX MANN: Direct 73
 Gross 74

FOR DEPENDANT:

ERBERT S. SHERMAN, M. D.: Direct 76
 Gross 78
 Re-Direct 81

JOSEPH M. RECTOR, M. D.: Direct 82
 Gross 86
 Re-Direct 88
 Re-Gross 89
 Re-Re-Direct 90

IGUR MANDERBERG: Direct 103
 Gross 107

DOBA JOFFE: Direct 112
 Gross 113

ALEXANDER JOFFE: Direct 113
 Gross 114

REBUTTAL

FOR PLAINTIFF:

MAX MANN: Direct 116
 EMMA MANN: Direct 117

Grounds of Appeal.

(Filed)

NEW JERSEY COURT OF ERRORS AND APPEALS

Notice of Appeal.

(Filed December 20th, 1924.)

NEW JERSEY SUPREME COURT.
MONMOUTH COUNTY.

10

ANNA PAIEWONSKY,

Plaintiff,

vs.

ALEXANDER JOFFE,

Defendant.

20

To Thomas P. Fay, Esq.,
Attorney of Plaintiffs:

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

Dated, December 19th, 1924.

EDWARDS & SMITH,
Attorneys of Defendant.

30

Edwards & Smith,
Attorneys of Defendant-Appellant.

40

Summons.

(Issued August 6th, 1924.)

**NEW JERSEY SUPREME COURT.
MONMOUTH COUNTY.**

THE STATE OF NEW JERSEY:

Greeting:

10

To Alexander Joffe,

You are summoned to answer the annexed complaint of Anna Paiewonsky, (Seal) in an action at law, in the New Jersey Supreme Court. And TAKE NOTICE that unless you file your answer to said complaint with the Clerk of the Supreme Court at Trenton, within Twenty Days after service upon you of this Writ and the annexed complaint, the plaintiff may proceed in the suit, and judgment may be entered against you.

20

(And see notice endorsed hereon.)

WITNESS, WILLIAM S. GUMMERE, Esquire,
Chief Justice of our Supreme Court,
at Trenton, this sixth day of August,
Nineteen hundred and twenty-four.

EDWARD H. KELLEHER,

Clerk.

30

THOMAS P. FAY,
Attorney.

40

Complaint.

(Filed August 30th, 1924.)

**NEW JERSEY SUPREME COURT.
MONMOUTH COUNTY.**

10

ANNA PAIEWONSKY,

Plaintiff,

vs.

ALEXANDER JOFFE,

Defendant.

Action at
Law.

20

Anna Paiewonsky, of Ocean and Sea View Avenue, in the City of Long Branch, County of Monmouth, and State of New Jersey, says that:

30

FIRST: On or about the fourteenth day of August, 1923, and for a long time prior thereto, the defendant was the owner of a certain automobile, and on or about the said date the plaintiff was lawfully in said automobile, by the invitation of said defendant on South Broadway, in the City of Long Branch, County of Monmouth, and State of New Jersey, between Second Avenue and the tracks of the Central Railroad of New Jersey, and about opposite First Avenue.

40

SECOND: That on or about said time, the defendant, by his agents and servants, did operate and drive said automobile along said South Broadway, and in a southeasterly direction, and the said defendant, by his agents and servants, at said time, did drive said automobile in a reckless manner, and without warning did negligently and carelessly strike an automobile located on the same side of the street, whereby the

Complaint.

plaintiff was thrown from said automobile, and badly injured.

The driver of said car was about the said defendant's business and was authorized to drive said automobile at the time by said defendant and said driver, after the plaintiff had taken her seat in said automobile, drove said automobile so negligently, carelessly and unskillfully that said automobile in which the plaintiff was then and there riding ran said automobile against said other automobile standing on the side of said road, with great force and violence, and the said plaintiff was thereby greatly hurt, cut, wounded and injured, in and about her eye, nose and face, and was cut and scarred, and the eye greatly injured, and was bruised in and about the body, arms, back, and she has scars and permanent injuries of a lasting nature; that she suffered a severe nervous shock, and has constant headaches as a result of said injuries. 10 20

THIRD: The said plaintiff was not guilty of negligence that in any way contributed to the aforesaid injuries.

FOURTH: Said plaintiff, by reason of said injuries lost a great quantity of blood, became and was sick, sore, lame and disordered, and has been compelled to secure glasses, and has suffered from the result of said injuries ever since said time. 30

FIFTH: That by reason of said injuries, plaintiff has suffered great pain and torment, both of body and mind, and still suffers therefrom.

SIXTH: By reason of said injuries said plaintiff was forced and obliged to pay and lay out large sums of money for medicine and doctor's bills in endeavoring to be cured of her injuries aforesaid. 40

Complaint.

SEVENTH: By reason of the injuries received by the plaintiff, aforesaid, she has been hindered and prevented from carrying out her necessary affairs and business most of the time, from the date of said accident until the present time.

10 Plaintiff demands from the said defendant, Alexander Joffe, the sum of Twenty-five thousand Dollars (\$25,000.) damages.

THOMAS P. FAY,
Attorney for Plaintiff.

20

30

40

Answer.

(Filed August 18th, 1924.)

**NEW JERSEY SUPREME COURT.
MONMOUTH COUNTY.****ANNA PAIEWONSKY,***Plaintiff,**vs.***ALEXANDER JOFFE,***Defendant.*

10

Action at
Law.

Defendant, residing in Long Branch, Monmouth County, New Jersey, answering the complaint herein, says:

20

1. He denies paragraphs one (1), two (2), three (3), four (4), five (5), six (6) and seven (7) thereof.

FOR SEPARATE AND DISTINCT DEFENSES TO SAID ACTION, DEFENDANT SAYS:

1. That said plaintiff received no injury and sustained no loss by reason of any negligence on the part of the defendant or his servants or agents.

30

2. That plaintiff did not receive the injury or sustain the loss alleged.

3. That plaintiff at the time she received said injuries, if any, was a licensee.

4. That plaintiff at the time she received said injuries, if any, was a trespasser.

EDWARDS & SMITH,
Attorneys of Defendant. 40

Reply.

(Filed August 20th, 1924.)

**NEW JERSEY SUPREME COURT.
MONMOUTH COUNTY.**

10

ANNA PAIEWONSKY,
Plaintiff,

vs.

ALEXANDER JOFFE,
Defendant.

Action at
Law.

20

1. The plaintiff denies every allegation in the answer.

2. As to the separate and distinct defenses in said answer:

FIRST: Defendant denies paragraphs One, Two, Three and Four thereof.

THOMAS P. FAY,
Attorney for Plaintiff.

30

40

Judgment.

(Entered December 4th, 1924.)

NEW JERSEY SUPREME COURT.**ANNA PAIEWONSKY,***Plaintiff,**vs.***ALEXANDER JOFFE,***Defendant.*

10

Action at
Law.

It is ordered that judgment be and hereby is entered in favor of plaintiff and against the defendant for the sum of two thousand dollars besides costs to be taxed nisi. 20

Entered December 4, 1924.

On motion of

THOMAS P. FAY,
Attorney.

80

40

Testimony.

NEW JERSEY SUPREME COURT.
MONMOUTH COUNTY.

10	<p style="text-align: center;">ANNA PAIEWONSKY, <i>Plaintiff.</i></p> <p style="text-align: center;">vs.</p> <p style="text-align: center;">ALEXANDER JOFFE, <i>Defendant.</i></p>	}	<p>Action at Law.</p>
----	--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	---	---------------------------

Freehold, N. J., December 1, 1924.

20

MR. FAY: I make a motion to amend the third line of the second paragraph of the first count of the complaint to read, instead of "southeasterly", change to "westerly." And in the reply say, "Plaintiff denies paragraphs 1, 2, 3, and 4," in place of saying defendant denies it.

30

THE COURT: The amendments will be allowed.

(Mr. Fay opens for the plaintiff.)

40

MR. DAWSON: If the court please, I wish to object to the introduction of any evidence on the question of custom of business. The allegation in the complaint is that the plaintiff was a passenger in the car at the invitation of Mr. Joffe, and if I am right in that I am entitled to a non-suit on the plaintiff's

Anna Paiewonsky—Direct.

opening. There is nothing in this case so far to connect the plaintiff with the party defendant in his automobile. Paragraph 1 alleges that she was in the car at the invitation of the plaintiff.

THE COURT: Well, is it your theory that an invitation could not arise from a custom, could not be implied? 10

MR. DAWSON: I think the custom ought to be alleged.

THE COURT: Well, they allege an invitation.

MR. DAWSON: He alleges an invitation.

THE COURT: Yes; well I will deny the motion.

(Mr. Dawson opens for the defendant.) 20

ANNA PAIEWONSKY, sworn for plaintiff.

DIRECT EXAMINATION BY MR. FAY:

Q. Mrs. Paiewonsky, on the 14th of August, 1924, where did you live? A. In Mrs. Manne's place.

Q. And where was that? A. In Ocean Avenue. 30

Q. In what city? A. Long Branch.

Q. And how long have you been in America?

A. Well, I came the 2nd or 3rd of July and I stayed in Mrs. Manne's place all the time.

Q. Where did you come from? A. From the West Indies, from San Domingo.

Q. Is that your home? A. That is my home.

Q. For what purpose are you here? A. For the children's education. 40

Q. On the 14th of August where did you go?

Anna Paiewonsky—Direct.

A. I went with Mrs. Manne, we went in Mr. Joffe's to shop, some meat, and we made some orders there and from there we left, and afterwards I went to the bank to deposit some money. Coming back we came in in Mr. Joffe's place there and as we stepped in Mrs. Manne went first in the place, I followed her, and the chauffeur followed us, until it was just one after another in the place. Then Mrs. Manne remarked to me, she says, "Mrs. Paiewonsky, you look tired."

10

(Objected to.)

Q. Don't say what she said. Whenever objection is made and the court says it is sustained you must not talk upon that. Don't say what Mrs. Manne said to you. Go ahead and say what happened in there. A. Well, we stepped in inside and Mrs. Manne remarked that I looked tired. So the chauffeur was standing just near my side and he says, "I will take you home."

20

(Objected to.)

THE COURT: You must not tell what any of these people said, just tell what they did and you did.

30

A. So he told us he would take us home.

MR. DAWSON: I object to what somebody said.

MR. FAY: That is the chauffeur.

A. The chauffeur told us he would take us home. Mrs. Manne says, "I wouldn't go now."

40

THE COURT: Mr. Fay, you will have to try to caution the witness not to repeat conversations.

Anna Paiewonsky—Direct.

Q. You must not give conversations. I take it that the chauffeur asking her to go home is competent. I will connect it up later. A. I told him I wouldn't go, I will go home. So he says, "No, come in the car. In two minutes I will take you home." I stepped out from the place, from Mr. Joffe's butcher place, and Mrs. Joffe passed me a bundle and she passed the chauffeur the next bundle and both stepped out from the store, and when I come out from the place I looked at the delivery wagon and he says, "Come in. In two minutes I will have you home." And I come up with the bundle, come up in the car, and he started to turn, to turn around in the street, and he turned with such speed that it flung me to the door and I grabbed to the door with both hands and he flung me so and then he flew into a standing car on the other side of the street. So I couldn't say what it was that hit me, but somebody said, "He killed her."

10

20

MR. DAWSON: I ask that that be stricken out.

THE COURT: Strike it out.

A. I couldn't say how I came to the doctor, but I found myself on the table and the doctor was stitching my temple and the chin. When he stitched the chin I felt it but the temple I didn't feel any stitching. I looked around, Mr. Joffe, Mrs. Joffe and Miss Joffe, all three was standing near me, and as I looked I started to cry, I asked for my children and then he said, "Don't worry, Mrs. Paiewonsky."

30

(Objected to.)

BY THE COURT:

40

Anna Paiewonsky—Direct.

Q. Who said? A. Mr. Joffe said, "Don't worry, Mrs. Paiewonsky. You will be all right."

BY MR. FAY:

Q. Mr. Joffe was there at the time? A. Mr. Joffe told me to the doctor on the table, "Don't
10 worry, Mrs. Paiewonsky. You will be all right."

Q. Was Mr. Joffe around when you went? A. He was just coming out from the store when I went in the store.

Q. Have you been down there before? A. I have been with Mrs. Manne once or twice. The weather was so warm I didn't want to go out.

Q. Had you seen Mr. Joffe there before? A. Yes, I did.

Q. Had you ever ridden home in the car be-
20 fore?

(Objected to as immaterial.)

THE COURT: I will allow that. I overrule the objection.

Q. Did you ever ride home in the car before?
A. No.

Q. Had Mrs. Manne ridden home?

(Objected to. Objection sustained.)
30

Q. Had you seen other people ride home in the car?

(Objected to.)

THE COURT: Yes, I think that is objectionable.

MR. FAY: I think to establish a practice, if the court please, I would have to show—

THE COURT: Well, I don't think you can
40 show that, so as to charge this defendant

Anna Paiewonsky—Direct.

with the fact that this woman had seen other people in the car. You will have to show more than that.

MR. FAY: Other customers.

THE COURT: How does she know they were other customers?

Q. You have seen other customers there? A. Yes, sir.

Q. Did you ever see any other customers driven home in the car?

MR. DAWSON: I object. The simple fact that somebody was driven in the car would not show invitation. They might have been there as guests or invitees of the driver or something of that sort. I think the fact that somebody had seen somebody else in the car would not prove an invitation to this party to ride in it.

MR. FAY: That would be true if you could ask all your case in one question. You will have to connect it up with this witness and other witnesses, and if it is not properly connected up it can be stricken out on motion. It has got to be done by several witnesses and not by one.

THE COURT: Are you proposing to show a custom by which the witness could infer an invitation?

MR. FAY: What had seemed to her to have been a practice indulged in there, for the customers to be taken home after their purchases were made, or whoever was with them. The question of licensee and invitee is set out in the pleadings and it becomes an issue in the case by the defendant. The de-

Anna Paiewonsky—Direct.

defendant sets up in his answer that the plaintiff in this case was a licensee.

MR. DAWSON: Or trespasser; both we set up.

10 THE COURT: I will overrule the objection at this time; the question being as to whether she had seen customers riding in this car.

MR. FAY: Yes.

(Objection noted for defendant as ground of appeal.)

Q. (Question repeated.)

A. Yes, I saw.

Q. Did you ever see Mrs. Manne drive home?

A. Many times.

20 Q. Now I want you to describe to these gentlemen your injuries, each one separately and fully. We will take first the injuries which occurred to you at the time. Just tell the jury what they were. A. I was injured in the temple and the chin.

Q. Now just take off your hat and show where you were injured in the temple.

(Witness indicates.)

30 Q. Now in the chin where were you injured?

A. Right here in the chin. (Indicating.)

Q. Where else were you injured? A. I was injured in my arm. I couldn't write a line. I can't lift. I can't hold a line for three minutes. I couldn't even comb my hair.

Q. Show the court where you were injured on your right eye there.

(Witness indicates.)

40 Q. And also on the chin.

Anna Paiewonsky—Direct.

(Witness indicates.)

Q. Now will you show the jury so they can see the injury to your right eye and chin? Stand down there so they can see.

(Witness exhibits to jury.)

10

Q. How about the injury to your shoulder? Which shoulder is it? A. The right shoulder.

Q. Will you take off your coat, please?

(Witness removes coat.)

Q. Now will you raise your arm?

(Witness complies.)

Q. Over your head, up as far as you can.

20

(Witness raises arm.)

Q. Why don't you raise this one? A. It starts right here to pain, just like pains.

Q. Now turn your back to the jury. Now raise your arms again.

(Witness raises arms.)

Q. Over your head, as high as you can. Now how long has that been that way? A. It is over a year. It is a year and ten months the 14th of August.

30

Q. Does it improve any? A. Well, when I lift my hand then I get the pain there. If I keep it quiet it doesn't pain me so much.

Q. Now how long were you confined to the bed at Long Branch after you received your injuries? A. Just I stayed from the 14th, and then it happened the 14th of August, till after Labor Day, when I had to go in the city to place the children in school, and I came over there and

40

Anna Paiewonsky—Direct.

there I had to be in most of the time in bed. I used to get up a little while and then go again in bed.

Q. And how long did you continue in bed in New York City? A. Oh, for three months, the least.

10 Q. And where did you live in New York City when you went back? A. I lived when I went back there in 147 Bay 25th Street, Brooklyn.

Q. Who did you have for your physician in Long Branch while you were there? A. I had Dr. Filic and then I had Dr. Welsh.

Q. How often did Dr. Welsh see you? A. Dr. Welsh only seen me twice.

Q. And how long had Dr. Filic attended you? A. Dr. Filic attended me till I had to go in the city, and he took me out the stitches.

20 Q. And who attended you after you went to the city? A. Dr. Gottesman.

Q. Did you have any other physician attend you except Dr. Gottesman? A. Dr. Gottesman when my headaches pain me terrible, and the eye, so he sent me to a specialist.

Q. And did you see a specialist? A. Yes, I did.

30 Q. Who was the specialist? A. Dr. Davidson.

Q. And did Dr. Davidson prescribe anything for you? A. Yes, he gave me glasses, and he said to see if they will help me. And then I went in succession about ten times at least to him and at last he told me he would advise me to take an X-ray picture.

MR. DAWSON: I move to strike that out.

40 THE COURT: That he told her to take an X-ray, that may stand.

Anna Paiewonsky—Direct.

A. And I went to a specialist and he took an X-ray and he found this broke. (Indicating.)

(Objected to.)

Q. Is the X-ray specialist here? A. Yes, sir.

Q. Now did you get glasses as a result of your— A. Well, sometimes the glasses help me but mostly— 10

THE COURT: She didn't hear the question.

Q. Did you get glasses? A. Yes.

Q. Did those glasses help you? A. Very little.

Q. Did you pay Dr. Gottesman for his services? A. Yes, I did.

Q. Did you get a receipt from him? A. Yes. 20

Q. Is that the receipt? (Paper shown witness.) A. Yes, this is the receipt.

Q. How much did you pay him? A. \$260.

MR. DAWSON: I object, and I object to the introduction of the bill.

THE COURT: Well, she may tell what she paid, unless she needs that to refresh her recollection.

Q. How much did you pay the eye specialist? A. Well, the first time— 30

Q. The one who got the eyeglasses for you? A. About \$50 or \$55, because the first visit took \$10, then he used to charge me \$5 for each visit.

Q. How much did you pay him altogether? A. About \$55 altogether.

Q. And what did your glasses cost you? A. About \$35.

Q. And what did the X-ray specialist cost you? A. \$25. 40

Anna Paiewonsky—Direct.

Q. Did you pay Dr. Filic for his services? A. Yes, I did.

Q. And how much was that? A. I think it was \$24.

Q. And did you pay Dr. Welsh? A. Yes.

10 Q. How much was his? A. I couldn't exactly say. It was \$10; yes, I think it was \$10.

Q. How many times did Dr. Welsh visit you? A. Twice only.

Q. Did you employ any special nurses or anything? A. Yes, I had a nurse. The doctor told me to massage the arm to see if that will help me, so I had a nurse there and she came frequently.

20 Q. How much did that cost you? A. That cost me \$60.

Q. Did you have any one else that was necessary to help you during the illness? A. Yes, a friend of mine took care of my home and the children and myself. She stayed home for three months with me, and actually she did everything free in my home; she didn't take any money for the service, but I made her good presents—

30 MR. DAWSON: I object and move that be stricken out.

THE COURT: Well, if she made her a present then she cannot recover for that, of course.

40 Q. About what was the expense of taking care of you? A. Well, she and a child of ten years old, both of them were home, and they had a room and everything free, and everything for about three months. All was at my expense for taking care of me and the children.

Anna Paiewonsky—Direct.

Q. How much? A. Well, at least I should say two or three hundred dollars.

Q. Well, you have got to pay one or the other. Say \$200? A. Well, \$200 at least.

Q. How long was it, Mrs. Paiewonsky, before the wound on your chin healed? A. Well, the doctor from the insurance company came in nearly three months and he found me, I was in bed yet, and the wound was raw and I felt very sick when he came to see me and I asked him if he could help me anything. 10

MR. DAWSON: If your Honor please, I object to that.

THE COURT: Yes, strike it out.

Q. Was it healed at that time? A. Not quite. 20
It was still bleeding.

Q. How do you mean, bleeding? A. Bleeding because the wound, when he took the stitches out, and after a long time it was very tightened, any little touch blood used to come from the chin.

Q. How about the eye? A. The eye pains me and the headache is frequently until now I get headache. There don't pass a week that I don't get it twice, very severe headaches. Only aspirin is what helps me. 30

Q. What do you call a very severe headache? A. Well, take right from here, this temple, starts in like pinching me in the temple, and it takes from my right eye and I can't lift my head, I must lie in bed and be compressed and take aspirin. And after a couple hours just I get a little rest, and then I have a couple days a week, and sick with that. Then I get again the same thing just frequently, mostly twice a week always, with them severe headaches. 40

Anna Paiewonsky—Direct.

Q. Now prior to the injury of August 14th last year did you ever have those headaches? A. No, I never suffered any headaches, never. I always was very healthy and I never in my life faint or anything at all. I was always very strong and very healthy till the accident happened to me.

10 Q. Did you attend to your own household duties? A. I always attend to my own home. I used to take in help for it; mostly I used to attend to my own house myself, but now I usually have to have some help.

Q. Have you any help at the present time? A. Yes, I have left a girl in charge.

Q. How many children have you? A. Two.

Q. What business is your husband in, in San 20 Domingo? A. He is in the import and export business.

Q. Now did you have any servant to look after you while you were down in Long Branch? A. Yes, I did.

Q. Who was that? A. That was the colored girl.

Q. Is she here? A. Yes.

Q. Who was in charge of the store while you were in there, Mrs. Paiewonsky, the butcher 30 shop? A. Miss Joffe.

Q. And what was she doing? A. She was standing inside the counter there where they are selling, and she passed out to me a bundle when we were going out.

Q. Did Mr. Joffe himself ever take you and your children home from the store? A. My children he did.

Q. Were you there? A. No, I was home when he brought them.

40 Q. When he brought them? A. Yes, my chil-

Anna Paiewonsky—Cross.

dren, he brought them home to Mrs. Manne's place.

Q. Did they have an order with them at the time? A. Yes, Mrs. Manne was with them and she had an order and she came together with them.

10

CROSS EXAMINATION BY MR. DAWSON:

Q. You say you came to Long Branch in July?

A. Yes.

Q. You came from San Domingo then? A. Yes.

Q. Where was your husband at that time?

A. My husband is there.

Q. You were at Long Branch at that time?

A. I was at Long Branch at that time.

20

THE COURT: Does she say her husband was in Long Branch?

THE WITNESS: No, my husband was in San Domingo.

Q. What did you say you came to New York for? A. For the education of my children.

Q. And just you and the children came? A. Yes, just myself and the children.

Q. How long did you expect to stay? A. We expected to stay a couple years.

30

Q. A couple years? A. Yes. Perhaps we will remain entirely here.

Q. How long had you been in San Domingo?

A. Sixteen years.

Q. Were you married there? A. Yes.

Q. Was your husband in business in San Domingo? A. At that time.

Q. In business in San Domingo? A. Yes.

Q. Were you living there at that time? A. I lived in San Domingo sixteen years.

40

Anna Paiewonsky—Cross.

Q. Were you living there at the time you were married or just visiting there? A. No, I married in San Domingo, and since I am married I am living in San Domingo.

10 Q. When you received this injury, Mrs. Paiewonsky, you were able to get out of the car and walk in the doctor's weren't you? A. I couldn't say anything.

Q. You know that you did do that, don't you? A. No, I don't, because I only know when I went to the table.

Q. You don't remember getting out of the car? A. No, I don't remember when I walked out of the car. I remember that when the car knocked into the other somebody hollered out, 20 "He killed her."

MR. DAWSON: I move that be stricken out as not responsive.

THE COURT: No, she has told all that she heard.

A. And I know that Mr. Joffe, Mrs. Joffe and Miss Joffe were with me at the time.

30 Q. You do know then that you walked to the doctor's? A. No, I didn't. I don't know who brought me up to the doctor, but I know some people must have brought me up, but I don't remember.

Q. Well, you remember leaving the doctor's don't you? A. Sure, I do remember leaving the doctor's.

Q. Then you went to Mrs. Manne's house, didn't you? A. No, Mrs. Manne came for me.

40 Q. You went to her home from the doctor's? A. Yes, Mrs. Joffe called Mrs. Manne to come for me.

Anna Paiewonsky—Cross.

MR. DAWSON: I move that be stricken out, and I think this witness ought to answer my question.

THE COURT: Just respond to the counsel's questions, please.

Q. From the doctor's office you went to Mrs. Manne's A. Yes. 10

Q. You stayed there for two weeks, didn't you? A. Yes, sir.

Q. And at that time the cut on your chin and on your forehead had healed, hadn't it? A. Not altogether.

Q. The stitches had been taken out? A. Yes, the stitches were taken out.

Q. Then you were up and about? You were out walking about the place and down on the shore? A. No, I was never out of the place walking. 20

Q. You went home right after that? A. I went after Labor Day, which I was obliged to go for the children's schooling. Then I went in the city.

Q. And prior to that time you only remember being at the Joffe store on two occasions, is that right? A. Yes, two or three occasions.

Q. Two or three? A. Yes. , 30

Q. You said two before, didn't you? A. Well, I said two I am sure of it.

Q. Two you are sure and maybe three? A. Yes.

Q. You never made a purchase in there in your life, did you? A. Well, usually on the way—

Q. Just answer the question. You never made a purchase of him in your life, did you? A. No, I was Mrs. Manne's guest.

Q. Just answer my question, will you? A. Yes. 40

Anna Paiewonsky—Cross.

Q. And the only times you had been there were on these two or three occasions that you had been there with Mrs. Joffe? A. Mrs. Manne.

Q. Mrs. Manne, I should say. A. Yes.

Q. And on that day you say you had been to the bank prior to going into Mr. Joffe's store?

10 A. Yes.

Q. And just as you were going in the store Mr. Joffe was leaving? A. Yes.

Q. Did you know him to speak to? A. Yes.

Q. Did you say, "How do you do," or did you speak to him? A. Many times.

Q. Then you didn't see him again until back in Dr. Filic's office? A. Yes.

Q. And he said you were all right; is that so? A. He told me, "Don't worry, Mrs. Paiewonsky. You will be all right."

20

Q. What is the next doctor you had after you left here? A. In Long Branch?

Q. After you left Long Branch. A. Dr. Gottesman in the city.

Q. And had he been your family doctor? A. I was recommended to him.

Q. Had he ever been your doctor before? A. No.

30

Q. You never saw him until that time? A. No.

Q. And how many times did Dr. Gottesman treat you? A. All the time. He is now treating me till now.

Q. Is he here? A. No. Perhaps he will be here at one o'clock, he said.

Q. And he is not an eye specialist, is he? A. No.

Q. And where is Doctor Welsh, is he in New York? A. No, Long Branch.

40

Anna Paiewonsky—Cross.

Q. He is in Long Branch? A. But he must be up here.

Q. How many times did he treat you? A. Well, I couldn't say. The time I was in bed about two weeks he used to come every second day and he used to change the wound, dress the wound.

Q. And was it Dr. Welsh that removed the stitches from your wound? A. No, Dr. Filic. **10**

Q. Dr. Filic removed the stitches? A. Yes.

Q. Was it after that that Dr. Welsh treated you? A. I was sick, in pain, so Mr. Manne decided to call Dr. Welsh.

MR. DAWSON: I object and ask to strike that out.

THE COURT: Yes, just answer the question. **20**

A. Dr. Welsh came twice.

Q. And that was after Dr. Filic had finished treating you? A. No.

Q. Was that at the same time? A. Yes, I think at the same time.

Q. When did you first observe you had any trouble raising your right arm? A. I observed immediately pain all over my body.

Q. Does it pain you very much when you raise it? A. It pains me very much, and I had a blue spot here for more than two or three months. It was all blue. **30**

MR. DAWSON: I move the answer be stricken out as not responsive.

THE COURT: What was the question?

Q. Does it pain you very much? A. It pains me very much.

Q. When you move your arm now it pains you? A. Yes. **40**

Anna Paiewonsky—Cross.

Q. Did it pain you when you were doing it here for the jury? A. Yes.

Q. It did pain you? A. Yes, I couldn't comb my hair with this hand for a long time.

Q. You just did, didn't you? A. Now I could, a little.

10 Q. Did that pain you when you were doing that for the jury? A. Like this? (Indicating)

Q. Yes. A. Not very much. But when I lift it like this it starts now here just like needles pinching me, just as I start in to lift a little, only if I start to pull something.

Q. But you can get it up to your head all right, can't you, now? A. Yes, certainly, I can get my hand up now.

20 Q. Now you say you had a bruise on your shoulder? A. Yes.

Q. And do you know what caused that? A. I don't know what caused it but I suppose the knock I gave in the car.

Q. Do you remember knocking anything? A. Yes, I do remember that it knocked into the door when he swung around the car with such a force he swung me to the door. And I knocked that on the handle or something, because I know I felt and I screamed out and I grabbed to the door. 30 But I hadn't time to say anything when he flew into a standing car.

Q. This was an automobile, wasn't it, that was doing this flying? A. What?

Q. It was an automobile you were in, wasn't it? A. A delivery wagon.

Q. A Ford delivery truck? A. Yes. I don't know how they are called.

40 Q. Was it the glass in the door that broke or

Anna Paiewonsky—Cross.

the glass in the windshield? A. I couldn't tell you.

Q. You don't know what cut you, do you? A. No.

Q. You think the car was going at a terrific speed, don't you? A. Yes, it was turning around from one side to turn to go into the little street, but he turned with such a speed that we nearly turned over in the car and that is where I flung to the door. 10

Q. How far did you go in feet, do you know, about? As far as from me to you, is that the distance the car went before you struck? A. I couldn't tell you the distance because it was so quick.

Q. You were not unconscious when you got in the car, were you? A. What do you mean, I was not unconscious when I went in the car? 20

Q. You knew the car went at a terrible speed? A. Certainly I knew it, because it swung me to the door when he turned around with the car.

Q. We all know all about that. How far did the car go, about as far as from here to you? A. Perhaps a distance like this or a little further, because I didn't have a chance to look.

Q. How much further would you say? A. I couldn't say because I know it was just near Dr. Filic's office there where the car was standing that he knocked in the car. 30

Q. And during that distance this car got up a terrific speed, did it? A. Yes.

Q. It struck the corner of the other car, didn't it? A. Yes, it struck in the other car.

Q. And at the time the car struck the glass broke, didn't it? A. I couldn't say. I don't know if the glass broke. I couldn't see anything. 40

Anna Paiewonsky—Cross.

Q. Well, you don't remember anything except seeing it hit the car; is that it? A. Yes, I know that he swung around very speedily and I grabbed on the door when he flung me, and he flew into a standing car.

10 Q. You thought he was pretty reckless at that time, didn't you? A. Yes, I am sure of it.

Q. Did you say anything to him? A. I could not say anything—

Q. Did you say anything to him? A. I had no time to say anything. When he twisted I screamed out like this very loud, but I hadn't time to say anything because he flew right into the standing car.

20 Q. All happened so quick from the time you started you didn't have time to say "Slacken up" or anything before you hit? A. Yes.

MR. FAY: I am going with the court's permission to take the doctors out of time as they come in, so they can go home.

THE COURT: No objection to that, is there, to having the physicians called out of turn?

30 MR. DAWSON: No, as long as they are called before my doctors, that is all, so we get them in the usual order. Any arrangement your Honor wishes to make is satisfactory.

MR. FAY: I have one doctor who is a specialist, who is in charge of ruptured and crippled patients in New York, who will not be able to get here until one o'clock, who will

40 come out of time as to the order of doctors.

Dr. Francisco Filic—Direct.

DR. FRANCISCO FILIC, sworn for plaintiff.

DIRECT EXAMINATION BY MR. FAY:

Q. Doctor, you are a practicing physician, are you? A. Yes.

Q. Of how many years? A. In Long Branch, you mean? **10**

Q. Yes. A. About fifteen years.

Q. And you were a practicing physician before you came to Long Branch, were you not? A. Oh, yes.

Q. And you are a graduate of what college? A. In Italy.

Q. You live right near the scene of this accident, do you not, doctor? A. Yes, I have an office on South Broadway. **20**

Q. Did you see the accident? A. Oh, no.

Q. And how soon after the accident did you see Mrs. Paiewonsky? A. Right away, I think; may be one or two minutes after. The accident happened right in front of my office.

Q. Right in front of your office? A. Yes.

Q. Did you see the car that was hit in front of your office? A. No.

Q. Was Mrs. Paiewonsky brought into your office? A. They came up, yes. **30**

Q. And did you take care of her there? A. Yes, I did.

Q. What did you do? A. Well, I stitched the two little cuts she had, the one on the right temple and the one on the chin.

Q. How many stitches did you take? A. I think I put three in the right temple and one in the chin.

Q. You saw her upon the witness stand today, did you? A. I saw her the last time that we **40**

Dr. Francisco Filic—Direct.

came over here in Freehold, I looked over the scar, that is all.

Q. How long did you take care of her after that? A. Well, I put the stitches and I think I saw her two or three times after that, till I took out these stitches.

10 Q. Where was she staying at that time? A. She was living on Ocean Avenue.

Q. At whose place, do you know? A. I think Manne's.

Q. And when did you take the stitches out, Doctor? A. About eight days after.

Q. About eight days? A. Yes.

Q. Do you know what you charged her? Do you know what your bill was? A. \$13.

20 Q. Did you render her a bill? A. Well, I think I did. But when she paid the bill I was not in Long Branch then.

Q. You were not in Long Branch when the bill was paid? A. No.

Q. Did you render the bill yourself? A. I think I did.

Q. Do you know whether you did or not? A. I don't remember that.

Q. No, you don't remember? A. No, sir.

30 Q. You say you think it was \$13? A. It is \$13.

Q. It is \$13? A. Sure, I am positive about it.

Q. Didn't she pay you more than once? A. More than once?

Q. More than once? A. She paid only once.

Q. I know, but I mean did she pay you your bill in more than one payment? A. No, no, paid me but once.

Q. Paid the whole bill at once? A. Yes, sir.

40 Q. Did you ever see her after? A. I never saw her again.

Dr. Francisco Filic—Cross.

Dr. Joseph Welsh—Direct.

Q. Well, you did see her again; when did you see her? A. Oh, I saw her maybe fifteen days ago.

Q. You saw the scar upon her chin? A. I was just talking with Mrs. Paiewonsky, yes, sir.

10

CROSS EXAMINATION BY MR. DAWSON:

Q. Doctor, the healing of those scars was normal, was it, no infection? A. No, no infection.

Q. And in eight days it was ready for the stitches to be removed? A. Yes, sir.

Q. There was a good recovery as far as those scars were concerned; that is, no adhesions? A. No, it recovered in the normal way.

20

DR. JOSEPH WELSH, sworn for plaintiff.

DIRECT EXAMINATION BY MR. FAY:

Q. Doctor, you are a practicing physician, are you not? A. Yes, sir.

Q. How many years have you been practicing? A. In the neighborhood of thirty.

30

Q. And where do you practice? A. At Long Branch.

Q. And you have been practicing there nearly all that time, have you not? A. Been practicing there twenty-four years.

Q. Do you know Mrs. Paiewonsky? A. Well, I met her at the time of a professional call, that is all I know of.

Q. Where was she at that time? A. On Ocean Avenue, Long Branch.

40

Dr. Joseph Welsh—Cross.

Q. In whose house? A. Mr. Manne's.

Q. And you were the family physician for Mr. Manne? A. I had attended Mr. Manne's family for some few years back.

Q. How many times did you attend Mrs. Paiewonsky at their house? A. I saw her but twice.

10 Q. And what condition was she in at that time? A. Why, may I say a word in explanation?

Q. Yes. A. I had nothing to do with the dressing of the wound at all. I found her in a pretty well upset and nervous condition. That is all I had anything to do with, was to relieve her temporary nervousness or to relieve her nervousness temporarily; that would be better.

20 Q. And how many calls did you make? A. Why, I called one day and the next day I called but with the understanding that—

BY THE COURT:

Q. Well, you saw her twice, didn't you, Doctor? Wasn't that your testimony? A. Yes, I saw her twice.

BY MR. FAY:

Q. And what was your bill, doctor? How much did you charge her, if you remember? A.

30 I don't remember exactly.

CROSS EXAMINATION BY MR. DAWSON:

Q. Doctor, did you make any charge for what you did there? A. I charged for the call, yes, sir.

Q. And for two calls, do you think? A. That I couldn't say positive.

Q. It might have been one or two, which? A. Yes, sir.

40 Q. And had the stitches been removed? A. Oh, I had nothing to do with that.

Dr. Joseph Welsh—Cross.

Q. But I say when you saw her had the stitches been removed? A. I didn't see the wound at all.

Q. Were they out when you saw her? A. I couldn't say, because the head was bandaged. It had been Dr. Filic's case, not mine.

Q. Do you know when you saw her, how many days after the accident? A. I couldn't say whether it was the day of the accident or the day after the accident, I couldn't say positive; but I can say positively that it was either one. **10**

Q. And she had the bandages on then? A. Yes, sir.

Q. And of course the stitches were still in at that time? You knew there were stitches in her face, didn't you? A. I can't say that I did.

Q. But you found her nervous at that time, did you? A. Yes, sir. **20**

Q. And where was she? Where did you see her that day? A. I saw her in Mr. Manne's house in bed.

Q. And when did you next see her? Or you don't recall seeing her but once; is that it? A. No, I didn't say that. I said I saw her once positively that I know professionally. The second time was—agreed that it was the case of Dr. Filic I didn't see her any further. **30**

Q. When was that second time, Doctor? A. I think it was the following morning.

Q. Then the two times that you saw her were right close together? A. Yes, sir.

THE COURT: Now the witness said—I understand him to say now that he saw the plaintiff once professionally; is that right, doctor?

THE WITNESS: Yes, as I remember, yes. **40**
The next morning was a discussion of the

Dr. Samuel Preiser—Direct.

case and I came to the conclusion that the case belonged to Dr. Filic, not me, that he had attended her in the first place.

10 DR. SAMUEL PREISER, sworn for plaintiff.

DIRECT EXAMINATION BY MR. FAY:

Q. Doctor, you are a practicing physician? A. Yes, sir.

Q. Where do you practice? A. New York City.

Q. Have you any specialty? A. Yes, sir.

Q. What is it? A. X-ray.

20 Q. Did you examine Mrs. Anna Paiewonsky, the plaintiff in this case? A. I did.

Q. Where did you examine her? A. October 11, 1924.

Q. And where? A. At my office.

Q. In New York? A. New York City.

30 Q. And what did the examination consist of? A. She was referred to me by Dr. Davidson for X-ray examination of the head; and on taking a few plates I found a stellate fracture of the orbital portion of the frontal bone on the right side.

Q. Now will you explain to these gentlemen of the jury what a stellate fracture is? A. A stellate fracture is one that is caused sometimes by a direct blow, something like a crushing fracture, with radiating lines in all directions.

Q. Have you the X-rays with you? A. I have them.

40 Q. Will you show them to the court?

THE COURT: Suppose you just show them to the jury and explain them.

Dr. Samuel Preiser—Direct.

(Witness exhibits X-ray plates.)

A. This is the right side and this is the left. On the right side you see just like a crushing fracture with radiating lines upwards. You see it over on the left side. And that corresponds to the place of the injury.

10

BY MR. DAWSON:

Q. Just come over here, doctor, will you? Where is there anything there that shows a fracture? Where is there a fracture there?

(Witness indicates.)

Q. That little white spot there? A. No, these lines.

Q. Above the spot? A. Right here. (Indicating.) It is not a wide gaping fracture that everybody can see.

20

Q. Where you say the fracture is then is to the left of the figures on this plate, approximately to the left of it? A. Yes, to the left of the figures.

BY MR. FAY:

Q. Have you another plate there? A. I have one.

30

Q. Taken at the same time? A. Yes.

Q. And the same fracture? A. Yes.

(First X-ray plate offered in evidence and marked Exhibit P-1.)

Q. Now will you explain that radiating fracture to the jury, just what it is and what the effect of it is? A. Well, there is not much to explain; it is self-evident. It is just like a crushing fracture, with radiating lines in all directions. It is not like an open fracture of the bone that you could see from a distance.

40

Dr. Samuel Preiser—Direct.

Q. What is the result of a fracture of that kind in that particular locality, doctor? A. Well, that will account for the pain that she has all the time, and there may be even some tumor formation later on on that bone.

10 Q. What is the effect on the eye, doctor?

MR. DAWSON: I object. This witness has not qualified.

THE COURT: Yes.

Q. You are a regular physician, are you? A. I am.

Q. Of what college are you a graduate, doctor? A. New York City, Long Island College.

20 Q. How many years have you been practicing? A. Fourteen.

Q. And outside of the X-ray specialty have you any other specialty? A. No, I am just limiting myself to X-ray at present.

Q. Have you the knowledge of a general practitioner on the effects of those fractures upon the eye? A. No, I am just limiting myself to X-ray.

Q. No, but you have as a physician? A. Yes.

30 Q. Now tell me what is the effect of a fracture of that kind.

THE COURT: I don't think he is qualified, Mr. Fay, as yet. I say that because I think he hesitated in saying when you asked him if he was qualified; he said he was confining himself to X-ray specialty.

40 Q. As a physician of fourteen years' experience are you qualified to pass upon the effect of a fracture of that kind upon the eye? A. I believe I am.

Dr. Samuel Preiser—Cross.

Q. And have you had experience of that kind?
A. I did.

Q. Where? A. Hospital experience.

Q. Where? A I was interne at Mount Sinai Hospital and Beth Israel, New York City.

MR. FAY: I think he is qualified.

10

THE COURT: It is admitted.

Q. Now will you tell me what the effects of a fracture of that kind is upon the eye? A. Well, the Gasserian ganglion is right close and it might press sometimes over the nose by pressure through the sympathetic system.

Q. Did you notice any effect upon Mrs. Paiewonsky? A. Well, I have only examined her for these X-rays.

20

Q. Oh, you only examined her for the X-rays?
A. Yes.

Q. How long have you known Mrs. Paiewonsky? A. Just a few months.

Q. And you made that X-ray in October? A. Yes, October 1924.

Q. What effect would a fracture of that kind have upon headache upon a person? A. Well, it would cause headaches, but of course headache is a subjective symptom.

30

Q. A subjective symptom? A. Yes.

Q. Wouldn't it be an objective symptom? A. No.

Q. Subjective symptom? A. Yes.

Q. Of a bruise of that kind? A. Yes.

CROSS EXAMINATION BY MR. DAWSON:

Q. When you say subjective symptom, doctor, isn't that something that the patient tells you, and you can't see? A. Yes.

40

Dr. Samuel Preiser—Cross.

Q. You just know it is there because she says so? A. Yes.

MR. DAWSON: Are you offering that other plate Mr. Fay?

MR. FAY: I didn't look at the other plate.

10 BY MR. FAY:

Q. Doctor, you made another plate or X-ray of this injury, did you? A. I did.

Q. Is this the plate? (Plate shown witness.)
A. It is.

Q. Will you show that plate to the jury and point out the lines of the fracture? A. This plate was taken on the side and the same lines that you saw there just frontally we see here radially, the
20 same thing.

Q. What are they, the dark lines? A. Yes, the dark lines.

Q. Just show where they extend to the jury.

(Witness exhibits to jury.)

Q. How many of those lines are there, doctor?
A. Well, there are just two of them running that way and then the other two intersecting.

30 Q. And which direction do they run? A. Upward.

BY MR. DAWSON:

Q. Doctor, you say that you took those exposures in October, 1924? A. I did.

Q. Is there anything to tell on your picture as to how long that condition has existed there? A. Well, I can tell it is an old fracture but not exactly how long.

40 Q. You can tell it is old? A. Yes.

Anna Paiewonsky—Direct.

Emma Manne—Direct.

(Second plate offered in evidence and marked Exhibit C-2.)

MRS. ANNA PAIEWONSKY, recalled.

10

BY MR. FAY:

Q. Mrs. Paiewonsky, did you ever have any other injuries to your head than this one? A. Before the accident?

Q. Yes. A. Never.

MRS. EMMA MANNE, sworn for plaintiff.

20

DIRECT EXAMINATION BY MR. FAY:

Q. Mrs. Manne where did you reside on August 14, 1924? A. Ocean Avenue, Long Branch.

Q. You live there during the summer? A. Yes.

Q. How many years have you occupied that place? A. Six years.

Q. Do you know Mrs. Paiewonsky? A. Yes.

30

Q. Was she with you last summer? A. Yes, 1923.

Q. And did she come to your house from her home? A. Yes.

Q. Where was her home? A. In San Domingo, West Indies.

Q. Did you know her there? A. Yes.

Q. And while she was residing with you did she go with you to Mr. Joffe's store? A. Yes.

40

Q. And what did you go there for, for what purpose? A. To market, to buy meat.

Emma Manne—Direct.

Q. And did Mrs. Paiewonsky go with you more than once? A. Yes, she came on several occasions.

10 Q. And on August 14th, how many times were you in the store that day? A. We stopped in as we came from home and I left my order and then we went on, we went up Broadway, went to the bank, and on our way back stopped in to see if my order was delivered, and as we stepped in Mr. Joffe stepped out and he says, "Your order is ready;" and we stepped in and the chauffeur followed us, or rather, the delivery boy; and I remarked, "Anna, you look tired." So the boy volunteered, "I will take you." I says, "Never mind me. I am going on some other errands. 20 You take Mrs. Paiewonsky and the packages."

Q. And what happened to the packages then? A. Mrs. Joffe gave a package to Mrs. Paiewonsky and the boy and I walked out the rear exit.

Q. And what did the boy say? A. He said that he would take—she demurred; she said she would go with me; and the boy says, "Oh, I will have you home in two minutes."

Q. Did Mr. Joffe have you taken home from there by the boy before? A. Oh, yes.

30 Q. Frequently? A. Yes.

Q. And were Mrs. Paiewonsky's children ever with you? A. Yes.

Q. Were they taken home? A. Yes.

Q. By the same boy? A. Yes.

Q. Under Mr. Joffe's direction? A. Yes.

(Objected to.)

THE COURT: Oh, yes.

MR. FAY: It is too late. It is answered

40 THE COURT: I will strike it out then.

Emma Manne—Direct.

Q. Did Mr. Joffe himself take customers home?

A. He has taken me many times.

Q. And any one else? A. Yes, I have seen others going.

Q. With Mr. Joffe? A. Yes.

Q. And have you been there when Mr. Joffe gave directions to the chauffeur to take other customers home? A. Well, I have seen him take them home. I didn't pay any attention.

10

Q. You have seen him take them home? A. Oh, yes.

Q. While Mr. Joffe was there? A. Yes.

Q. How soon were you there after Mrs. Paiewonsky was injured? A. Well, as soon as I got home I inquired where Mrs. Paiewonsky was and thereupon my girl told me that Mr. Joffe had phoned for me to come at once, so I immediately seen something and I got there just as soon as I possibly could, and I came into the store and Miss Joffe was there. I says, "What happened?" She says, "Nothing. Don't be frightened. Nothing very bad." I says, "Where is my friend?" She says, "Up in Dr. Filic's office." And when I came up there I found Mrs. Paiewonsky, Dr. Filic attending her, sewing up her wound. She was all a mass of blood, and of course I was very much frightened, thinking that she had been very severely injured. And I immediately washed her off or tried to wash her off, so she wouldn't see her condition. I picked up the hair that Dr. Filic had cut off so she wouldn't see it when she got up, and I called up Miss Corbett and asked her to come, because I was afraid to take a public conveyance to the home.

20

30

Q. Don't tell what you said. A. I called up Miss Corbett to come.

40

Emma Manne—Direct.

Q. Did she come? A. Yes, sir.

Q. Did she take Mrs.— A. Yes, she took us home.

Q. What condition was Mrs. Paiewonsky in at that time? A. She was very very much upset, sick.

10 Q. In what condition was she? A. Well, we had to help her in, we had to help her out

Q. Was she bleeding when you got there? A. When I got there she was a mass of blood, her clothes and underwear a mass of blood, her hands, everything; she was all full of blood.

20 Q. How about the wounds? What wounds did you see? A. The doctor was just finishing her, sewing her up. She was still on the slab when I came. Of course I was very much frightened. He told me to calm myself, that she would be all right, not to be frightened.

Q. Was Mr. Joffe there? A. No, Mrs. Joffe just left as I came; she left and she says to me not to be frightened. Mrs. Joffe was there when I came.

Q. Did you see Mr. Joffe? A. No, I didn't see Mr. Joffe there, but I saw Mrs. Joffe there.

Q. Oh, you saw Mrs. Joffe? A. Yes.

30 Q. What else did you see upon her at that time that you washed off? A. She had that cut on her temple, it was stitched up, and on her chin she had a scratch right across here, like a very deep scratch. It seemed from the glass.

Q. Did you observe anything else that you could see? Where was the bleeding from except those two wounds? A. Well, when I came she seemed just a mass of blood. It seemed to me she was bleeding from all over.

40 Q. Where was she bleeding from except those

Emma Manne—Direct.

two cuts? A. Well, they were sewed up and Dr. Filic was separating them so as to absorb the blood, and I busied myself washing off the blood so she would not be frightened at herself.

Q. Wasn't she bleeding from anywhere else?

A. Yes, she was bleeding from her nose.

Q. Now you saw her after she was brought home, didn't you? A. Yes. 10

Q. What wounds did you see upon her after she was brought home? A. She was all bruised on her body, on her side; she was all bruised on her head and all over. She was bruised on that side and complained particularly of her shoulder.

Q. Now what wounds or what bruises stayed the longest that you observed? A. Well, of course she complained mostly of her shoulder. 20

Q. And did you see the bruises there? A. Yes, I did.

Q. What kind of a bruise was it? A. Well, it was discolored and that is all I can say about it; it was discolored and sore; it was sore to the touch.

Q. How long did she stay in bed at your house? A. She stayed until she was, the day she went to the city.

Q. Do you remember how long that was? A. Yes, it was two weeks. 30

Q. And was she in bed all the time during that two weeks? A. Yes.

Q. She was not out walking on the beach? A. No, no, nothing like that.

Q. You saw her after she went to the city, didn't you? A. I did.

Q. And you saw her at her home there, did you? A. I did.

Q. How frequently? A. We go to the city in 40

Emma Manne—Cross.

October, I believe the 8th and 9th, and I made that one of my first calls; perhaps the 10th or 11th.

Q. Where did you find Mrs. Paiewonsky at that time? A. I found her in her home in bed.

10 Q. And how long after you went up to the city did you find her staying in bed? A. I found her whenever I come. Even if she was not in bed she would be just sitting around.

Q. How long, up till when? A. Well, I think it was for about three months, or even now she complains very often when I come to see her.

Q. About how long did she actually remain in bed? A. Three months or thereabouts.

20 MR. DAWSON: I object. This witness does not know that.

Q. How frequently did you visit her? A. I visited Mrs. Paiewonsky at least once a week.

Q. And how much oftener as a rule? A. Sometimes twice a week, whenever I had time. I go many an occasion and not one. I was concerned about her.

Q. Did you know her ever to wear glasses before? A. No.

30 Q. Did you ever know her to complain of headaches before? A. No.

Q. Has she complained of headaches since? A. Yes.

CROSS EXAMINATION BY MR. DAWSON:

Q. How long have you know Mrs. Paiewonsky? A. I know Mrs. Paiewonsky, I think it will be six years this December.

40 Q. And you spend the summers in Long Branch, do you? A. Yes.

Emma Manne—Cross.

Q. And you leave about the first of October?

A. No, not the first, but sometimes the first or second week in October, sometimes later.

Q. And was she down to visit you again this summer? A. Yes.

Q. Now Mrs. Manne, on the day that you went in the store to make those purchases you say that you had been in there and then returned again?

10

A. Yes.

Q. And your bundles were ready? A. Yes.

Q. And you remarked to Mrs. Paiewonsky, "You look tired"? A. Yes.

Q. And where was the chauffeur then? A. Just standing behind me.

Q. And did you ask him to take her home at that time? A. I didn't need to; he volunteered to.

20

Q. He volunteered? A. Yes.

Q. He says, "I will take her home"? A. He says he will take us home, and thereupon I said all right, he might take my friend and the packages.

Q. Was that all the conversation you had? You just said, "You look very tired"? A. That is all I did at that time, yes.

Q. Then the chauffeur said, "I will take you home"? A. "I will take you home."

30

Q. Didn't you say you were not going home or something of that kind? A. I said, "I am not going home," but he might take my friend home.

Q. You said that, that he might take your friend home? A. Yes.

Q. Did you give him a tip at that time? A. Yes, I always do.

Q. What did you give him? A. Usually give him ten cents.

40

Emma Manne—Re-Direct.

Q. Did you give him ten cents at that time?
A. Yes. And I always do when they take my things home.

Q. And he said, "I will take her home"? A. Yes.

10 Q. And that was the last you saw until you saw her at Dr. Filic's office? A. Yes.

Q. You left immediately? A. I left immediately.

Q. You didn't see the accident, of course? A. No. You see there are two exits, front, and then you get in that driveway. So I went out the back way, for my destination was in that direction, and they went out the front door.

20 RE-DIRECT EXAMINATION BY MR. FAY:

Q. You didn't see the accident? A. No.

Q. And you didn't know about it until you were called? A. Until I came home and the girl said that "They phoned from Joffe's, the butcher's phoned that you should come there at once."

30 Q. Now you always gave him ten cents when he brought your things home? A. I tip any one that brings my errands, when even Mrs. Joffe's children, I will give them a piece of candy, give them money.

(Objected to.)

Q. Never mind that.

Rebecca Albam—Direct.

REBECCA ALBAM, sworn for plaintiff.

DIRECT EXAMINATION BY MR. FAY:

Q. Miss Albam, where do you live? A. I live in Bensonhurst, Brooklyn.

Q. How long have you lived there? A. For the last two years. 10

Q. Are you acquainted with Mrs. Anna Paiewonsky, the plaintiff in this case? A. Yes.

Q. How long have you known her? A. About seven years.

Q. And where did she live when you knew her? A. San Domingo.

Q. In San Domingo? A. Yes, sir.

Q. And in August, 1924, did you live with her? A. No. 20

Q. On August 14 1923? A. I only stayed with her after the accident.

Q. 1923? A. Yes.

Q. And where did you live with her? Where did you stay with her? A. 147 Bay 25th Street.

Q. When did you go there? A. When did I go there?

Q. Yes. A. Right after she came from Long Branch. That was in September. 30

Q. Did you see her while she was at Long Branch? A. After the accident. I came to see her just once.

Q. From New York? A. I lived at that time at Rockaway.

Q. And where did you see her in Long Branch? A. At Mrs. Manne's.

Q. And what condition was she in when you saw her? A. It was right after the accident. She was very nervous and she was in bed yet. 40

Rebecca Albam—Direct.

Q. Did you see her just as soon as she came to New York? A. Yes, right after she came.

Q. How soon after she came to the city did you go to live with her? A. The very day she came.

10 Q. How long did you stay? A. I stayed with her for three months.

Q. And what did you do for her while you stayed with her there? A. Well, I took care of the house and the children.

Q. And what was her condition? A. Most of the time she was in bed and she couldn't do anything for herself, neither for the house. That is why I had to take charge of everything.

Q. Did you assist her in any way? A. Well, I used to help her in everything.

20 Q. What did you do for her? A. Well, I used to help her comb herself and everything that she needed, that she has to use her arm, I helped her along.

Q. Were you there when the doctor came? A. The company's doctor?

Q. Yes. A. Yes.

30 Q. Did you see Dr. Gasanski, is it? A. Well, I was not in the room with her at that time but I was when he came in the house.

Q. What did she seem to be suffering from all the time that you were there?

(Objected to.)

Q. What was she suffering from?

(Objected to. Objection sustained.)

40 Q. What did you observe about her? A. After the accident?

Q. Yes, while she was in New York, while you were living with her. A. She used to suffer from headache.

Rebecca Albam—Direct.

MR. DAWSON: I don't think this witness is competent to testify.

THE COURT: No, she is not answering. The question is what she observed.

BY THE COURT:

Q. What did you observe she was suffering from? A. She used to suffer from headaches. **10**

Q. You didn't observe that, did you? A. She used to complain about it.

Q. You didn't observe that, she showed you? A. Yes.

Q. You are asked about what you observed. A. And it was her nerves.

BY MR. FAY:

Q. What else? A. Then she used to complain about she couldn't use her arm. **20**

MR. DAWSON: I move that be stricken out, what she complained of.

THE COURT: She is testifying to conclusions. You can only tell what you saw about her arm or anything else.

Q. Tell us what you saw about her arm. A. She couldn't move it at all. **30**

(Objected to.)

THE COURT: Yes.

Q. What did you observe, what did you see? A. She couldn't do anything. She couldn't even comb herself.

Q. What did you do for her? A. Well, I used to comb her and I used to do everything for her wherever she had to use her arm. **40**

Rebecca Albam—Cross.

Q. When did you leave? A. After three months, when she seemed to be a little better, I left.

Q. You left? A. Yes.

Q. You stayed with her all the time, did you, during that time, three months? A. For the three months I lived in her house.

10 Q. And how long was she in bed? A. All this time she was in bed.

Q. All the time she was in bed? A. Yes.

Q. Do you know her family physician? A. No. She was here a very short time and she didn't have any.

Q. No, I mean in New York. A. In New York?

Q. Yes. A. No.

20 Q. You don't know? A. No.

CROSS EXAMINATION BY MR. DAWSON:

Q. Are you in business? Do you do any business? A. My husband is in business.

Q. And was he in business in 1923? A. No, he was in San Domingo at that time.

Q. Oh, he was in San Domingo? A. Yes, he was in San Domingo.

30 Q. Did you know Mrs. Paiewonsky in San Domingo. A. Yes, I did.

Q. And when did your husband go to San Domingo? A. Seven years ago.

Q. He has been there all the time? A. Yes.

Q. And you are living in New York? A. No, just for the last two years.

Q. Two years? A. Yes, sir.

Q. And when Mrs. Paiewonsky was hurt you went to see her, did you? A. Yes, sir; I did.

40 Q. Came down to Long Branch to see her? A. Yes, came down to Long Branch to see her

Rebecca Albam—Cross.

Q. Did you go down because you heard she was hurt or did you go down and call? A. No, I was supposed to call her, I phoned and I called her up, but Mrs. Manne answered me that she had an accident, so I immediately left for Long Branch.

Q. But you were going down any way? A. No.

10

Q. What did you say you called her up for?
A. Just called her up to see how she was feeling and so on. I used to call her up pretty often.

Q. You were a pretty close friend of hers, were you? A. Yes, I was. I am.

Q. While your husband was down in San Domingo you were living with Mrs. Paiewonsky? A. No, I was not. I stayed by myself.

Q. You stayed by yourself? A. Yes.

Q. But then after she came back you did go and stay with her for three months? A. Yes, because she couldn't do anything for herself and she didn't have anybody for her, to take care of her.

20

Q. You didn't pay any board? A. No, I didn't.

Q. Nor you didn't get any pay for staying there?
A. No, she just kept me up there and my little girl.

Q. And after three months you left? A. Yes, sir.

30

Q. You say that you don't know the New York doctor; is that it? A. No.

Q. Because he was only there a few times? A. I didn't say.

Q. What did you say about it? A. I said I was in the house when the company's doctor came but I was not in the room.

Q. How many times did you see the doctor there? A. Well, I can't tell you. I remember once when he came.

40

Rebecca Albam—Cross.

Q. Was there only the one there? A. From the company. I didn't see any other doctor.

MR. DAWSON: I move that be stricken out.

THE COURT: I may be.

10 MR. FAY: It is cross-examination and he brought it out.

THE COURT: Well, it has been repeated two or three times and it is rather dangerous to do it.

MR. FAY: I know, there is a line of cases in this state where the defendant himself brings it out that it is the company's doctor that it stands.

20 MR. DAWSON: I didn't ask anything about any company doctor, and you don't know of any company doctor nor I don't either.

Q. You only saw a doctor once at the house in New York; is that right? A. The company's doctor.

30 MR. DAWSON: I move that be stricken out and I ask for a mistrial. We have had this all the morning and during this case. The witness was not asked that and she knows it was not what I asked. I asked her if she saw a doctor once in New York.

THE COURT: It has been interjected three or four times in the case and this witness has constantly repeated it.

40 MR. FAY: I know, and it is merely a witness in the case and it has been brought out on cross-examination by the defendant's attorney himself and not done in the plaintiff's case in any way. And besides—

Morris Paiewonsky—Direct.

THE COURT: Well, gentlemen, don't discuss that question any further. I will deny the motion now and caution the jury.

MR. FAY: We don't want to know anything about any—just answer Mr. Dawson's question.

10

Q. You only saw a doctor once in New York; is that it? A. Yes.

RECESS TILL 1:30 P. M.

Trial of the cause resumed at 1:30 P. M.

20

MORRIS PAIEWONSKY, sworn for plaintiff.

DIRECT EXAMINATION BY MR. FAY:

Q. Morris, how old are you? A. Thirteen.

Q. Where do you live? A. 147 Bay 25th Street, Brooklyn.

Q. Mrs. Paiewonsky is your mother, is she not? A. Yes, sir. 30

Q. Were you down with your mother in Long Branch? A. Yes, sir.

Q. Last year? A. Yes, sir.

Q. Do you remember the time she was hurt there? A. Yes, sir.

Q. Do you know where Mr. Joffe's store is? A. Yes, sir.

Q. Did you ever go there? A. Yes, sir.

Q. How many times? A. I don't remember 40

Morris Paiewonsky—Direct.

how many times, but I went with Mrs. Manne many times.

Q. What did you go there for? A. To buy things.

Q. And did anybody take you home? A. Yes, sir.

10

Q. Who took you home? A. The chauffeur.

Q. And who told him to take you home?

(Objected to.)

A. Mr. Joffe.

MR. DAWSON: I move that be stricken out. I think it is imaterial and irrelevant. He asked this boy whom he called to take him home.

20

MR. FAY: I think it is quite material to the situation of the case, the practice of using that chauffeur to take people home who came there to purchase and their friends or whoever was with them when they went there to purchase.

(Mr. Dawson replies.)

(Objection overruled. Objection noted for defendant as ground of appeal.)

30

Q. Did your mother see you when you came home? A. Yes.

Q. How many times did he take you home when you were there with Mrs. Manne? A. I remember once he took us home.

Q. Who was with you besides Mrs. Manne? A. Nobody else.

Q. Was your brother with you? A. No, sir.

40

Q. Just you? A. Yes, sir.

Morris Paiewonsky—Cross.

Gussie Lipkowitz—Direct.

CROSS EXAMINATION BY MR. DAWSON:

Q. When was this that the chauffeur took you home, do you know? A. I don't remember the date.

Q. Well, was it along about the time your mother was hurt, just before that? A. Yes. 10

Q. How long before, can you tell us, a week or two weeks or a month? A. I can't exactly tell you how long it was.

Q. Some time though, was it? A. Yes.

Q. And that was the only time the chauffeur ever took you home, was it? A. Yes.

BY MR. FAY:

Q. Did your mother see you when you came home in the car? A. Yes. 20

MRS. GUSSIE LIPKOWITZ, sworn for plaintiff.

DIRECT EXAMINATION BY MR. FAY:

Q. Mrs. Lipkowitz, where do you live? A. I live at 1390 Prospect Avenue, the Bronx, New York City. 30

Q. Are you any relation of Mrs. Manne? A. I am a sister to Mrs. Manne.

Q. And have you visited her at Long Branch? A. Yes, I have visited her several successive years.

Q. Do you know where Mr. Joffe's store is? A. Yes.

Q. Did you ever go there? A. Yes, very often. 40

Q. Go there when they were purchasing things? A. Yes, sir.

Gussie Lipkowitz—Cross.

Q. And were you ever taken home in the car?

(Objected to. Objection overruled. Objection noted for defendants as ground of appeal.)

10 A. Yes, I remember one occasion in particular when I was taken home.

Q. And what were the circumstances? A. It happened it was raining, it was on Saturday night, and my sister made purchases there and we were all taken home at the time.

Q. In whose car? A. Oh, Mr. Joffe's car.

Q. Who took you home? A. The chauffeur.

Q. And at whose request did he take you home?

A. Well, I couldn't say, because I didn't make
20 any request, I was simply a guest. I came along with my sister.

Q. Do you know Mrs. Paiewonsky? A. Yes, I know her.

Q. And did you see her while she was down at Mrs. Manne's house? A. Well, in 1923 I was over to see my sister for a few days; I believe it was about the third week in August; and when I came I heard that Mrs. Paiewonsky had met with
30 an accident and I went up to see her and she was in bed.

Q. She was in bed at that time, was she? A. What say?

Q. Was she in bed at that time? A. At that time she was in bed.

CROSS EXAMINATION BY MR. DAWSON:

Q. When was it that you were taken home by
40 Joffe's chauffeur? A. Well, it was in 1922.

Q. 1922? A. Yes.

Lovina Green—Direct.

Q. Do you know who the chauffeur was? A. No.

Q. Don't know whether it was this present man or not, do you? A. No, I couldn't really say.

Q. And where did you see the man that took you home? Where did you first see him? A. Well, I saw him in the store. He helped us in with our purchases and we took our place in the car and he took us home. 10

Q. You don't know whether Mrs. Manne asked him to take her home or not? A. Well, I didn't hear the request.

Q. You don't know how you got in the car? A. I simply followed Mrs. Manne and the chauffeur and the purchases in the car.

Q. Nobody asked you to get in it? A. Nobody asked me to get in it. 20

LOVINA GREEN, sworn for plaintiff.

DIRECT EXAMINATION BY MR. FAY:

Q. Lovina, where did you live in the summer of 1923? A. With Mrs. Manne. 30

Q. With Mrs. Manne? A. Yes, sir.

Q. And where? A. In Long Branch, Ocean Avenue.

Q. And what were you doing there? What was your occupation? A. I was there with Mrs. Manne at that time.

Q. Did you know Mrs. Paiewonsky? A. Yes, sir.

Q. And was Mrs. Paiewonsky living there? A. In 1923 she was living there. 40

Lovina Green—Direct.

Q. And was she injured while she was there?

A. Was she what?

Q. Was she injured? A. In 1923, after she got in the accident she was hurt, but before that she wasn't sick.

10 Q. And did you help take care of her while she was there? A. Yes.

Q. What was the matter with Mrs. Paiewonsky while she was there? A. All I know, she had that accident, that is all I know of, when she was sick.

Q. What was the trouble? A. Well, she complained of headache and she had her chin and in her temple—well, she was complaining about that.

20 Q. Did you help take care of her? A. Well, I didn't do much, because—well, I couldn't do anything like that. I did the housework and everything else that is to be done.

Q. And what did Mrs. Paiewonsky do while she was in the house for the rest of that month in 1923? A. She didn't do anything.

Q. Was she in bed? A. Yes, sir.

Q. All the time? A. She was in bed until the day before she went to the city.

30 Q. And do you remember when she went to the city? A. No, I don't remember just when.

Q. Did you see her after she went to the city? A. Yes, sir.

Q. Did you go up to her house? A. Yes, sir.

Q. How long have you known Mrs. Paiewonsky? A. I know her a long time.

Q. Where did you know her? A. In the West Indies.

Q. Are you from the West Indies? A. Yes, sir.

40 Q. What part of the West Indies? A. San Domingo.

Lovina Green—Direct.

Q. San Domingo? A. Yes, sir.

Q. How often did you visit Mrs. Paiewonsky after she went back to New York? A. Well, I visited her often, because I had a friend there and I would like to see her and I would see Mrs. Paiewonsky at the same time.

Q. How often did you go there? A. Well, I can't say how often. **10**

Q. About. A. Well, when I would get a chance I would go.

Q. Did you go as often as once a week? A. No, just once a week I would go.

Q. What condition was Mrs. Paiewonsky in while she was living in New York? A. She kept closely in the home. When I would go ther my friend would say, "Mrs. Paiewonsky is sick," and I would see her looking sick. I knew her before when she was in the West Indies and she wasn't sick. **20**

Q. How long did you know her in the West Indies? A. I don't know. I can't say how long, but I know her and I know her for a long time, almost since she has been in the West Indies. I don't know how long but I know her a long time. **30**

Q. Was she then in her bed in New York when you got up there? A. She was then.

Q. Was she still in bed? A. In New York?

Q. Yes. A. Yes, sir.

Q. And do you remember when it was that you went to New York? A. I don't remember just when I went to New York.

Q. Do you remember the month? A. I don't remember the month we went either. **40**

Q. Don't remember the month? A. No, sir.

Lovina Green—Direct.

Q. Do you remember when Mrs. Paiewonsky got well enough to get up and go out? A. I wasn't there when she was well enough to go out.

Q. How long after you went to the city, can you tell me that? A. How long?

10 Q. Yes.

MR. DAWSON: I object to this, if your Honor please. If the witness doesn't know when she went there she can't tell when she saw her out.

THE COURT: I will allow the question.
(Question repeated.)

A. I don't know.

20 Q. I will put it this way. Do you know how many weeks she was in bed after you went to the city? A. I don't know how many weeks she was in bed.

Q. Was it more than one?

(Objected to.)

A. It must have been more than one.

30 THE COURT: Objection sustained. Strike out the answer.

Q. Do you remember how many weeks you went up to see her while she was in bed? A. How many weeks you went to see her?

40 Q. You went up to Mrs. Paiewonsky's house and saw her while she was in bed how many times? A. I don't remember how many times. It must have been about eight or nine times, but I don't know just how many times I went to see her.

Lovina Green—Cross.

Dr. Max Gottesman—Direct.

Q. How long have you been in this country?

A. I have been here since 1922, and this is 1924.

Q. Did you ever learn to speak English before you came here? A. No, sir.

Q. Do you know who Mrs. Paiewonsky's doctor was in New York? A. No, sir. 10

Q. Did you ever see the doctor? A. I don't know. I have seen a man there but I don't know if he was the doctor or who.

CROSS EXAMINATION BY MR. DAWSON:

Q. Miss Green, you knew Mrs. Paiewonsky in the West Indies? A. Yes.

Q. You speak English in the West Indies, don't you? A. Yes. 20

Q. And were you working for Mrs. Paiewonsky in the summer of 1923? A. Yes.

Q. Are you still working for her? A. Yes, sir.

DR. MAX GOTTESMAN, sworn for plaintiff.

DIRECT EXAMINATION BY MR. FAY: 30

Q. Doctor, you are a practicing physician? A. Yes, sir.

Q. Where do you practice? A. New York City.

Q. How many years have you been practicing? A. Since 1899.

Q. Are you connected with any hospital there? A. Yes, sir.

Q. What hospital? A. Peoples' Hospital, Flower and St. Mark's. 40

Dr. Max Gottesman—Direct.

Q. Are you a regular member of the staff of any of those hospitals? A. Yes, Peoples' Hospital.

Q. Do you know the plaintiff in this case, Mrs. Anna Paiewonsky? A. Yes, sir.

Q. Did you ever attend to her? A. Yes, sir.

10 Q. When did you attend her? A. Last year.

Q. And what did you attend her for? A. I attended her for pain in the head, mostly in the right side, pain shooting down to the lower edge of the eye on the right side, pain in the shoulder, pain all over the body and severe nervousness.

Q. Did she have any scars? A. Yes she had two scars on the right side of the face, one right near the temple about an inch or so from the right side, and the other one right on the chin, on the right
20 side, right near the middle.

Q. Did you have an examination made of the injury on her right eye? A. Did I make the examination?

Q. Did you make the examination? A. Yes.

Q. And also have other examinations made? A. Yes, sir.

Q. And what was the result of that examination, doctor? A. On examination I found that
30 she suffered from severe neuralgic pain on the right side of her face, right over the eyes, and also where the other scar is, and suffered pain over her right shoulder.

Q. Will you explain to the jury as fully as you can the condition of her right shoulder? A. The condition of her right shoulder was so that she suffered severe pain and dropping down there was due to relaxation of the ligaments that keep
40 the shoulder, or rather, that keep the bone of the upper arm in place in the joint.

Dr. Max Gottesman—Direct.

Q. Was there any evidence of injury to the shoulder when you first saw her? A. Yes.

Q. What was it? A. There was dropping down of the shoulder, there was still a little ecchymosis. That means discoloration of the shoulder joint.

Q. And did you recommend any particular treatment for that, doctor? A. I gave her treatment for that. 10

Q. Did you have any other kind of treatment given under your direction? A. Yes.

Q. What was it? A. Massaging, passive motion.

Q. How long did that continue, doctor? Oh, it continued for a long time, continued for pretty near three months.

Q. How many times did you visit her, doctor? A. I visited her in her house at least about twelve or fourteen times, then she came to my office for treatment. 20

Q. Did you direct any other examination by her for her eye? A. For her eye?

Q. Yes. A. No, I didn't bother to examine the eye directly.

Q. Did you send her to anybody else? A. I told her to see an eye specialist, and I didn't bother much about the eye. 30

Q. Do you know whether she did see an eye specialist or not? A. I think she did see an eye specialist and he supplied glasses.

Q. Is that your bill, doctor? (Bill shown witness.) A. Yes, sir.

Q. What did she pay you? A. \$260.

Q. What is the condition of her eye as you know it, doctor, and the bruise on her eye? A. The what? 40

Dr. Max Gottesman—Cross.

Q. The bruise on her eye as you know it. A. There is a scar left and according to my examination the scar tissue was pressing upon the nerve, which causes those acute pains, neuralgic pains.

10 Q. And has that continued all the time you have attended her? A. Yes, it continued and still continues.

Q. What is the prospect for the future? A. I can't tell.

Q. What is the probable result of injuries of that kind for the future? A. Well, sometimes they may absorb, sometimes not.

Q. And what are the probabilities if it does not absorb? A. If it does not absorb it will keep on paining and paining.

20 Q. Are there any other probabilities in it? A. Well, we have cases where sometimes after a scar forms there is a certain degeneration going on of the scar which forms a tumor, but that we can't tell.

Q. That is one of the things you can't tell? A. Yes, we can't tell that.

30 Q. What else is there about Mrs. Paiewonsky then as a result of this accident? A. Her nervousness, her nervous symptoms, sleeplessness, headache.

Q. What will be the result of that? A. You can't tell the outcome of these cases. It might last forever, it may last for a long time and gradually disappear, but we can never tell.

CROSS EXAMINATION BY MR. DAWSON:

40 Q. Doctor, when did you first see Mrs. Paiewonsky? A. I saw her a few days after Labor Day, September last year.

Dr. Max Gottesman—Cross.

Q. Where? A. In her house on Bay 25th Street.

Q. Was your attention called to scars on her face? A. Yes, sir.

Q. Were they healed at that time? A. They were practically healed. They were still reddish, a little, they were still granulating more or less, but they were practically healed. **10**

Q. And that was the only objective thing that you could see was the matter with her at that time, was it not? A. You mean there on the scars?

Q. Yes. A. Yes.

Q. But she did complain of a headache? A. She was complaining of headache, she also complained of pain on slight pressure over these scars. **20**

Q. But that was the only pain that she complained of, was the headache and the pain over the scars at that time? A. And the shoulder.

Q. She complained of a pain in the shoulder? A. The right shoulder, immobility. She complained of more pain when she tried to lift her shoulder up, which she could hardly do.

Q. And all that was subjective, was it not, that she complained of? A. Yes, that she complained of except a discoloration over the shoulder, which showed the site of an injury. **30**

Q. Where was that? A. On the right shoulder, right around the joints, but more outside, right here around the joints. (Indicating.)

Q. Did you prescribe any treatment when you first saw her? A. Oh, yes, sir. I had to stop her pains. **40**

Dr. Barclay W. Moffatt—Direct.

Q. Did you know that she had been treated by any other doctor? A. I didn't know.

Q. You didn't know that? A. I didn't ask her. I know she was treated in Long Branch by a physician and I don't know whether she was treated in New York.

10 Q. Do you know how long it had been since she had seen a doctor at that time? A. You mean prior to my treatment?

Q. Yes. A. I don't know; I think a few weeks before; a week or two, I believe, maybe less.

DR. BARCLAY W. MOFFATT, sworn for plaintiff.

20

DIRECT EXAMINATION BY MR. FAY:

Q. Dr. Moffatt, are you a practicing physician? A. I am.

Q. How many years have you been practicing, doctor? A. I was graduated in 1916.

Q. And where are you practicing now? A. In New York and in Red Bank.

30 Q. And where are you located in Red Bank? A. In West Front Street.

Q. Are you connected with any hospitals in the County of Mommouth? A. The Long Branch Memorial and the Ann May at Spring Lake.

Q. And are you regularly on the staff of those two hospitals? A. Yes.

Q. In what particular branch? A. Orthopedic and fracture surgery.

40 Q. And is that your specialty, orthopedic surgery? A. Yes.

Dr. Barclay W. Moffatt—Direct.

Q. Doctor, what college did you graduate from?
A. Harvard University.

Q. And what medical college? A. Medical school there too.

Q. Did you go anywhere else to study for your specialty? A. University of Paris.

Q. And how long were you in the University of Paris? A. About six months.

Q. And where did you go from there? A. Then I went to the Hospital for Ruptured and Crippled for an internship.

Q. Where is that? A. New York.

Q. Are you connected with the staff there at this time? A. Yes.

Q. How long have you been connected with the staff of the Ruptured and Crippled Hospital in New York? A. Since 1919.

Q. Did you go anywhere else in Europe to complete your studies besides the university to complete your course? A. The Caillaux clinics in Paris.

Q. Where else? A. A few scattered clinics, one at St. Malo. Well, that was the only other one.

Q. Did you make an examination, doctor, of the plaintiff, Mrs. Paiewonsky, in this case? A. I did.

Q. And where did you make that examination? A. At your office.

Q. And who was present at the time of the making of that examination? A. Dr.—I have forgotten his name.

Q. Rector? A. Rector, that is right.

Q. Do you see Dr. Rector in the room now? A. Yes.

Q. Sitting at the table here? A. Yes.

Dr. Barclay W. Moffatt—Direct.

Q. And when he finished his examination did you make yours? A. I did.

Q. And what did you discover was the trouble with Mrs. Paiewonsky from an orthopedic standpoint? A. I found that there was an obnormal looseness of the joints between her collarbone and her shoulder blade.

10

Q. Could you point out to the jury if Mrs. Paiewonsky stands up about where that trouble is?

(Witness indicates on Mrs. Paiewonsky.)

A. You see her shoulder blade lies in back here and it has a projection on it that comes up over the top of the shoulder here and then the collarbone acts as a sort of a strut between the breastbone on the front out to the shoulder blade on the side, and the collar-bone is fastened to the shoulder blade here by a ligament, and when these are stretched or else torn, the shoulder blade is not held back in its place by this strut as it should but drops forward and downward, and the collar-bone becomes a little prominent at this end.

20

Q. What condition did you find on Mrs. Paiewonsky at the time you examined her? A. I found that there was tenderness over this joint and a slight prominence at the outer end of the collar-bone and a dropping forward and downward of that shoulder, which gave an appearance of a body—that is, the two sides were unequal, apparently, because of this dropping forward and downward of the shoulder.

30

Q. Is that curable, doctor? A. By operation.

40

Q. What would be the nature of the operation

Dr. Barclay W. Moffatt—Direct.

that would have to be performed to make it curable? A. The joint would have to be opened and the joint surfaces removed and the two bones sewed together and the arm and chest put up in plaster until that is healed over.

Q. About how long would that take, doctor?

A. It would be a matter of six weeks in plaster and probably a matter of six or eight weeks afterward before the arm was very much used.

Q. Is there any certainty of that being a cure, doctor? A. No, nothing is certain, but it is pretty probable, fairly probable.

Q. Pretty probable? A. Yes.

Q. What would be the cost of an operation of that kind, doctor? A. Well, the hospital cost averages probably between \$6 and \$8 a day, depending on where she goes; and the operating room fee averages around \$10 in most any hospital, and laboratory work probably \$5 and surgeon's fee probably \$200.

Q. That would be the minimum, wouldn't it? A. Yes.

Q. And the maximum? A. Depending on who she went to.

Q. Whatever the surgeon would charge? A. Yes.

Q. Would you recommend an operation? A. I should, yes.

NO CROSS EXAMINATION.

10

20

30

40

Max Manne—Direct.

MAX MANNE, sworn for plaintiff.

DIRECT EXAMINATION BY MR. FAY:

Q. Mr. Manne, you lived in Long Branch in the year 1923 in the summertime? A. Yes, sir.

10 Q. Was Mrs. Paiewonsky a guest at your home?
A. Yes, sir.

Q. And did you trade with Mr. Joffe as a butcher and merchant? A. I did.

Q. Do you remember the time that Mrs. Paiewonsky was injured? A. I do.

Q. Just state what you know about it, will you?
A. I came home that evening from New York and I was informed by Mrs. Manne, who met me at the front, that Mrs. Paiewonsky was injured
20 that day, and I went up to see her in her room and found her all bandaged up in bed. Of course I had another gentleman waiting at the table for me. Of course she was in pain.

Q. Did you see what was the matter with her?
A. I simply seen her bandaged up and bruised up.

Q. How long did she remain in bed at your house? A. Approximately about two weeks.

30 Q. And when she went to New York did you see her after she went to New York? A. Quite often, sir.

Q. Did you call at her house? A. Yes, sir.

Q. And did you see her condition there? A. Yes, sir.

Q. What was her condition at home? A. Well, she seemed never to be the same woman as before the accident. She always seemed nervous, complained of headache.

40 MR. DAWSON: I object and move it be stricken out.

Max Manne—Direct.

THE COURT: What, the whole answer?

MR. DAWSON: Well, that she complained of headache and seemed to be nervous.

THE WITNESS: That was my observation.

THE COURT: What she complained of may be stricken out, but what he saw may remain. 10

THE WITNESS: She was in bed and she seemed to me a sick woman.

Q. How long did she remain in bed? A. She remained in bed about I think approximately three months, as far as I remember.

Q. Did you see a physician there? A. I met Dr. Gottesman there occasionally.

Q. Did you talk with Mr. Joffe about it? A. I went to Mr. Joffe the morning after the accident to find out how it really occurred, and I met the chauffeur there in the store and Mr. Joffe standing behind the counter and I asked the chauffeur how the accident occurred. So he told me that the gear was locked and he couldn't help it. 20

Q. And what did Mr. Joffe say? A. Mr. Joffe didn't make no comment whatsoever, simply told me he was sorry it happened.

Q. Did Mr. Joffe ever take you home when you made purchases there? A. Many a time, sir. 30

Q. Did you see him take other persons home when you purchased there?

(Objected to. Objection overruled.)

A. Yes, sir.

Q. And did he take any other members of your family home? A. Yes, sir.

Q. You have seen it, have you? A. Yes, sir. 40

Max Manne—Cross.

CROSS EXAMINATION BY MR. DAWSON:

Q. You say that Mr. Joffe has taken you home?

A. Many a time, sir.

Q. When was the last time prior to the accident? A. Possibly a week before that, as near

10 as I can remember.

Q. Did he drive the car himself, Joffe himself?

A. No, that time it was the chauffeur drove me home.

Q. It was the chauffeur drove you home? A. Yes, sir.

Q. And the chauffeur had driven you home a number of times? A. Yes, sir.

Q. Did you find him to be a pretty careful driver? A. Well, he used to go pretty fast.

20 Q. You never objected to it? A. No, sir, I didn't.

Q. Glad to ride home, weren't you? A. Yes, sir.

BY MR. FAY:

Q. Now did Mr. Joffe drive you home himself at times? A. Yes, certainly, sure.

30

PLAINTIFF RESTS.

40

MOTION FOR NONSUIT.

MR. DAWSON: If the court please, I move for a nonsuit on the ground that there had been no invitation shown by the defendant to give the plaintiff a status of an invitee in the defendant's car at the time of the accident. The plaintiff alleges an invitation by the defendant to ride in his car and the testimony shows that the defendant was not present at the time, that the whole arrangement was made through a chauffeur who said, "I will take you home." It doesn't appear that he was in any way acting for his master in the furtherance of his master's duties at the time, but it seemed to be a voluntary act on his part. There is nothing in the case, no allegation of willful negligence, and it seems to me that there should be a nonsuit at this time.

I base that motion on several cases that your Honor may be familiar with, particularly the case of *Burns Brothers vs. Karas*, where the Supreme Court held that a chauffeur was not an agent in order to take people in a car or passengers. That is, a man who was to deliver coal had no agency to cart people around in the car; that he was employed for a certain thing and that was the scope of his agency and when he did that he was acting on his own responsibility and did not bind the master. There are quite a number of those cases but that is the line. I have a list of them here. That is the gist of my argument.

(Mr. Dawson cites further authorities.)

10

20

30

40

Dr. Elbert S. Sherman—Direct.

THE COURT: I will have to deny the motion.

(Objection noted for defendant as ground of appeal.)

10

DEFENDANT'S TESTIMONY.

DR. ELBERT S. SHERMAN, sworn for plaintiff.

DIRECT EXAMINATION BY MR. DAWSON:

Q. Doctor, you are a practicing physician in the state of New Jersey? A. Yes, sir.

20 Q. And how long have you been practicing? A. About twenty-five years.

Q. And where are your offices? A. In Newark, New Jersey.

Q. Where did you derive your education from from what institution? A. My medical education, sir?

Q. Yes. A. In the medical department of the University of Pennsylvania.

30 Q. And have you been connected with any hospitals in Newark? A. Yes.

Q. What? A. I am attending surgeon at the Newark Eye and Ear Infirmary and Babies' Hospital and consulting surgeon at several other hospitals, the names of which I will give you if you want them.

Q. Have you specialized in any particular branch? A. Yes, for about fifteen or sixteen
40 years I have been treating the eye and ear exclusively.

Dr. Elbert S. Sherman—Direct.

Q. Did you make an examination of Mrs. Paiewonsky's eyes? A. Yes.

Q. And did you find anything there that was connected with the scar on the side of her temple? A. I did not.

Q. Just tell the jury what you found as to her eye condition, will you? A. I found nothing about the eyes, little abnormality that was or could have been caused by an injury. Her eyes are not exactly normal but they are very near normal. She has a slight, what I call a refractive error, and that is a condition such as a great many people have that require a simple pair of glasses, but is was something that was not and could not have been caused by an injury. 10

Q. Now doctor, that condition of the eyes, could you say what caused it, the refractory condition that you speak of? A. Why those things are usually the result of a slight faulty development of the eye; very common, there is nothing unusual about that. 20

Q. And corrected by glasses, isn't it? A. Corrected by glasses. Some cases are slight and do not need any glasses, and others sometime during the life between the thirties and forties, begin to need glasses. 30

Q. How old is this woman? A. I didn't ask the lady her age.

Q. Doctor, from her appearance would you judge that she was within that period of change? A. Yes, I would.

Q. And does that condition apply to both eyes that you found there? A. Yes.

Q. Was there anything about the eye condition that you found there that would cause headache? 40

Dr. Elbert S. Sherman—Cross.

Q. Why, that condition this lady has might in some conditions cause headache. Whether it causes her headache or not I can't say.

10 Q. And if the proper glasses were worn would that correct the headache? A. If the headache were due to eye strain from the eyes, trouble with the eyes, it would.

CROSS EXAMINATION BY MR. FAY:

Q. The headache was not due to eye strain, doctor, was it? A. That I don't know.

20 Q. And you say that every one of a certain age has a difficulty in their eye for which they should wear glasses, did I understand you to say that? A. No, sir, I didn't.

Q. What did you say about that? A. I probably said that most of us have such a defect.

Q. At what age? A. It usually appears somewhere between the age of thirty-five and forty-five.

Q. And that everybody should wear glasses at that age? A. No, not everybody, but I say most people.

30 Q. All these jurymen here, would you say they had arrived at the age when their eyes were affected, that they should wear glasses? A. Some of them surely have arrived at an age when they need glasses for reading and for close work.

40 Q. And you simply examined Mrs. Paiewonsky in the other room by putting a cardboard up about a distance from me to the wall there and asked her to read some letters on it; that was one of them, wasn't it? A. That was part of the examination.

Dr. Elbert S. Sherman—Cross.

Q. And you took an instrument and looked in her eye? A. Yes.

Q. That was another part of it? A. Yes.

Q. Now what else did you do? A. Well, I tested the movements of the eye muscles, that is, the ability to move the eyes in different directions.

Q. By holding the cardboard in front of one eye and asking her to look different directions? A. No, by having her follow my hand in different directions. **10**

Q. And what did you observe from that, when you held your hand over one side, as to her sight? What was it that you observed and saw? A. I didn't observe anything with regard to her eye sight. I came to the conclusion that she was able to move her eyes normally in all directions. **20**

Q. And what difficulty did you find about her eyes that you did observe? A. I didn't find any difficulty aside from what I have already mentioned.

Q. Well, what was that? A. There is a little hyperopia, or, in a more common name for it, is far sightedness, and possibly a little astigmatism; but the examination was not made under conditions which allowed me to be quite sure of that **30**

Q. You saw a scar on the right temple, did you, on the right side of her head? A. Yes.

Q. And it was a stellated scar, wasn't it? A. I would hardly describe it as stellate. It was an irregular shaped scar.

Q. And if an X-ray picture shows a stellated fracture under that scar what would you say about that? A. If an X-ray showed a stellated fracture immediately under the scar? **40**

Q. Yes. A. In the absence of any history of

Dr. Elbert S. Sherman—Cross.

former injury I would be likely to assume that the fracture was caused by the same injury which caused the scar in the scalp.

Q. But would you say that that would affect the eyesight? A. It would not affect the eyesight.

10 Q. A stellated scar right there near the right eye? A. That is, it would not affect the eyesight in the way that this lady's eyesight—in the slight way that her eyesight is affected.

Q. In what way would it affect it? A. An injury there might cause complete blindness in one eye.

Q. What else besides complete blindness? A. Practically nothing else in the way of injury to the eye.

20 Q. Nothing but complete blindness? A. The only damage to the eye I have ever seen from injuries in the temple—and I have seen a great many of them—has been in cases where there was a change or an injury to the optic nerve causing atrophy. That is a very few weeks after the injury causes complete, permanent blindness in the affected eye. This lady has practically normal vision in her eye and the optic nerve is normal.

30 Q. What is atrophy? A. What is atrophy?

Q. Yes. A. That is a condition in which a nerve has been injured so that it has completely lost its function.

Q. It can be a gradual development, can it not? A. In such cases as I have mentioned it all takes place in the course of a few weeks.

40 Q. Well, in such cases as you have mentioned, but there are cases which it takes years to do, aren't there? A. In cases caused by certain diseases, yes.

Dr. Elbert S. Sherman—Re-Direct.

Q. And by injuries too? A. I don't know of any such.

Q. Where the nerve is generally covered by a sort of velvet coating, is it not, that protects the nerve? A. I never heard of it.

Q. There is a covering to the nerve? A. I never heard of such thing. 10

Q. To the center of the nerve? A. I never heard of such thing.

Q. So doesn't that become enlarged, the coating of the nerve, and develop into injuries in later years in life? A. I don't think I quite follow you.

Q. Well, we will take the nerve that runs along the lid that is injured. In most cases it heals very fast and becomes all right. There are cases where it becomes thickened and there is pressure on the nerve and it destroys its function; that is a gradual thing, is it not? A. I don't know that I can answer that question. I don't fully understand what the gentleman is getting at, is one reason I don't desire to commit myself. 20

RE-DIRECT EXAMINATION BY MR. DAWSON:

Q. If there had been an injury to the nerve how soon after the injury would it develop? A. You are speaking now of the optic nerve? 30

Q. Yes. A. It would develop very quickly, and within a few weeks at the longest.

BY MR. FAY:

Q. There are other nerves besides the optic nerve, are there not, doctor, connected with the eye? A. Oh, yes. 40

BY MR. DAWSON:

Dr. Joseph M. Rector—Direct.

Q. Are there any nerves affected, doctor, that control the operation of the eye that you found there? A. No, I found no abnormality of any nerves connected with the eye.

10

DR. JOSEPH M. RECTOR, sworn for defendant.

DIRECT EXAMINATION BY MR. DAWSON:

Q. Doctor, you are a practicing physician and surgeon of the State of New Jersey? A. Yes, sir.

Q. With offices in Jersey City? A. Yes, sir.

Q. How long have you been practicing? A. Thirty-one years.

20

Q. And where did you obtain your education from? A. Columbia University.

Q. What recent practice have you had? What institutions are you connected with? A. Jersey City Hospital, Greenville Hospital, North Hudson Hospital.

Q. Did you have any experience in the war? A. Yes.

Q. As a surgeon? A. Yes.

30

Q. Where? A. Both the Mexican Border trouble and the World War. In the Mexican border trouble I was chief surgeon of all the New Jersey forces on the border. In the World war I was chief operating surgeon behind the battle lines in France during the major drives the last year, the St. Mihiel and Argonne drives.

Q. Since that time have you continued your practice? A. Yes.

40

Q. Did you make an examination of Mrs. Paiewonsky in this case? A. Yes.

Dr. Joseph M. Rector—Direct.

Q. And did you examine two scars that she had on her face? A. I did.

Q. Just tell us what you found as to those scars, doctor. A. One scar was on the outer side of the right eye at its angle, just within—that is, between the root of the hair and the outer angle of the right eye. That was a scar about an inch long, an irregular scar, which was the result of what we call a torn wound. That is, at the time the wound was made, instead of being cut clean with a knife, it was cut with some object which made an irregular or jagged wound. That wound went through the skin and the tissue between the skin and the muscle beneath. That is shown by the free movement of the scar upon the surface beneath. In other words, the scar showed that the injury did not extend below the soft structures, that is, the muscles, and down to the bone. In other words, it was a scar from a wound to the soft structures only, what we call a lacerated skin wound. This scar was not diseased, it had no complications or followings since the time that the wound had healed. There is no disfiguration, no contraction. The redness which appears immediately after the healing of a wound has disappeared and it shows now but an irregular white line at this time. Upon the chin, just to the right of the median line, there is a vertical wound somewhat of the shape of a half moon, in which one edge is raised above the other edge, that is, the edge to the right is raised about a sixteenth of an inch above the edge to the left of the line. This scar was also freely movable on the structures beneath, showing that at the time of the injury

Dr. Joseph M. Rector—Direct.

10 the scar did not penetrate into the soft structures at that portion. In other words, the bone itself nor the covering of the bone was not involved. The disfiguration which is present will in time—that is, the part that is in evidence because of hardness just in the line of the scar, softens down by absorption and then will level out and there will be nothing further at that point with the exception of a white line which will remain.

Q. Is there any disability connected with either of those scars, doctor? A. There is no disability connected with either scar.

20 Q. And what would be the usual period of healing in a scar of that kind or a wound of that kind? A. Well, that is a personal equation. That is, it differs with different people. They run along three to six months.

30 Q. If the stitches were removed in eight days would that indicate anything? A. Nothing except that there was not any severe suppuration. That is, it takes about five, seven or ten days, up to twelve days, for an injury of that kind to heal. If it takes longer than two weeks it is always the result of either diseased condition, a general disease of the body itself, or that there is an infection.

40 Q. And after it heals over, what further process is there, anything further than the bleaching out of the— A. Just an absorption of the products which were present during the injuries or during the time of the accident or the wound was caused. They absorb all the hardness and stiffness of the portion of the soft tissue which is involved and the scar passes away and then

Dr. Joseph M. Rector—Direct.

it softens down and becomes of the same structure as the surrounding tissue.

Q. Now, doctor, when you saw the plaintiff did she complain of any headaches? A. She did.

Q. Did you find anything in your physical examination which would cause those headaches? **10**

A. Well, I found that she had a furred tongue, discolored, deeply scarred throughout, that is undoubtedly what it was, clean on the edges; and also when I attempted to strip this woman in the presence of Mr. Fay and upon examination of the abdomen it was filled with gas; so that this woman has an auto-infection, so to speak, by which she has headaches as a result of disordered digestion through the stomach or the bowels, that will come on periodically. **20**

Q. Did you examine her shoulder, doctor? A. I did.

Q. What did you find as to that? A. There were no objective symptoms of any condition in the shoulder. The back part of it was—when I asked this woman to make the different motions which take place—the peculiar condition about the examination made of the motions of the shoulder was that when I asked this woman to make certain motions there was restricted movement; but when I changed on another part of my examination and then stood before this woman and asked her to follow me in the motions which I made, she included all the motions of the shoulder joint that were made with the same freedom, with no signs, subjective signs of pain or discomfort or limitation of motion. They were made just the same as I made them, **30**
40

Dr. Joseph M. Rector—Direct.

and my motions at the shoulder joint included all motions about the shoulder joint. Immediately when I was examining this woman for motions of the joint I took particular attention to take her pulse. There is a peculiarity when pain is present that there is a change in the rate, in the character and volume of the pulse, and it shows itself when there is a strain placed upon the nervous system, and that pulse changes its beat and its volume and its character. This woman's pulse was examined immediately after different motions, and after I had finished the pulse was taken and there was no difference in it while and after I was making these motions and activity of the joints than there was when I took it before and afterward. There was no limitation of motion, there is no dropping of that shoulder. It is the same line and the same level and the same plane of the shoulder on the left side.

Q. You say that you found it at the same level at the time that you examined her? A. Yes.

Q. And that was a couple of weeks ago, was it? A. It was the 25th day of October.

Q. In your examination of the movements did you have her raise her arm? A. I had her make all the motions which take place at the shoulder joint; that is, moving the arm to the body, away from the body, to the side of the body, then at right angles to the body, up to the top of the body, then bring it down upon the head, then make both motions, that is, comparing the right with the left, and then making the patient put her arms behind her, bring them up in this direction, moving them out, bringing them up in

Dr. Joseph M. Rector—Direct.

this direction, palms down, palms up, then bringing forward, bringing them up and then coming down in that direction; and all movements were accomplished with the same plane and same degree of agility.

Q. Is there anything that you found in her shoulder to cause it to droop or stoop as she is stooping now? A. None whatever, sir. 10

Q. Now, doctor, did you see these X-ray plates that were offered in evidence this morning? A. I did.

Q. Have you had any experience in interpreting X-ray plates? A. Yes, sir.

Q. How much? A. Oh, I guess every day of my life practically; practically, I said. Of course there are some days that I don't, but I am using them constantly in surgical work. 20

Q. You do a great deal of surgical work? A. Yes, that is all I do, is surgery.

Q. Now, doctor, showing you Exhibit P 1 of the plaintiff's exhibits, is there anything in there to indicate a fracture? A. In the first place that is not a correct X-ray of the antero-posterior position of that woman's head. That doesn't show the exact shadows which will take place if the ray is taken directly through the center line of the body. If you look at that radiograph you will see that there is a difference of from half to three-quarters of an inch from the right to the left side, which means that the patient's head was turned and the shadow—you all understand that the ray is nothing but a shadow—which was projected upon that sensitive plate went through at an angle, not straight directly through. Therefore the shadow which 30 40

Dr. Joseph M. Rector—Direct.

is cast upon that plate is not a direct shadow but is a distorted shadow. I take no cognizance of that radiograph. Whatever shows there is distorted.

10 Q. Is there anything to indicate a fracture there? A. There is nothing to indicate a fracture. What you can see there in the reach of the eye which is positive is the formation of the frontal bone, that is, the bone above on the side of the orbit, which is opposite to the cheek bone, which unites the side itself of the nasal bone, and back into the orbit, which is the upper part of the cheek bone, and the upper jaw on the side; the shadow is absolutely distorted, as upon one side there is about an inch and on the other
20 side there is nearly two inches. Therefore any shadow which is caused by the fossa, that is, the region on the side going from the upper part of the forehead at the margin of the hair down to below the arch at this point, at this portion which is below and above, or to the ear, would be a distorted shadow, and whatever happened to come in the path of that shadow would show itself upon that ray.

30 Q. As a shadow? A. As a shadow.

Q. Now look at this Exhibit P 2. Doctor, did you see that before? A. Yes, sir.

Q. Is there anything in that radiograph to indicate a fracture? A. None whatever. This is a lateral shadow, taken from side to side. That shadow shows at the top, it shows the vault of the skull. It shows the suture or lines of joining or junction between the frontal bone and the bone at the top of the head, and the line which crosses
40 the top of the head at the front. It shows the

Dr. Joseph M. Rector—Direct.

arch which passes across from the outer part of the eye to the angle of the ear and shows the nasal bone. It shows the lower jaw, etc. It shows also a clear, distinct shadow right directly through the portion which is beneath the arch, which is between the arch—that is, the angle of the eye and the back of the skull, the side, towards the back of the skull. There is no line of fracture at that point. The only shadow shown is the angle of the junction between the side of the skull and the frontal bone and the parietal, the temporal bone on this side, the frontal bone there and the parietal bone going upward. 10

Q. Was there anything which you found in the examination of this scar on the frontal bone that indicated that there was any disability there at that time? A. No, sir. 20

Q. Or anything to indicate that there had been a fracture there? A. No, sir.

Q. What do you say as to whether there had been any fracture of any degree there? A. I say I can't find any evidence of any fracture nor is there any evidence in that distorted radiograph of a fracture line either upon the side bone or upon the face bone which is immediately beneath the scar or in the immediate locality of the scar. 30

Q. There was something said about there might be a degeneration of tissue around that scar some time that might cause a pressure on some nerve. What would you say about that? A. Degeneration never causes anything to develop.

Q. You mean develop tissue? A. Develop tissue; or a nerve which is included in a scar. If any degeneration takes place in a nerve it is the same as degeneration in any other part of the body; it simply dies, atrophies. There is nothing left of it. 40

Dr. Joseph M. Rector—Cross.

Q. Would that manifest itself in the movement around the eye or muscles there? A. Loss of function around the seat of this fracture, or around the seat of the alleged fracture? A. No, sir.

10 CROSS EXAMINATION BY MR. FAY:

Q. Doctor, you were here when the X-ray expert was upon the stand, were you not? A. Not altogether, no, sir.

Q. Did you hear his testimony? A. Part of it.

Q. And you heard him explain to the jury this X-ray photograph? A. Part of it.

20 Q. Did you hear any questions asked him to elucidate in any way the X-ray photograph under cross-examination by the counsel on the other side? A. I don't remember the testimony.

Q. And you say, doctor, that that gentleman, a member of the profession of physicians, came here with an X-ray photograph and explained it to this jury and that he has entirely falsified to the jury?

MR. DAWSON: I object. He doesn't say that at all. He can't ask one witness to characterize another.

30 THE COURT: I will sustain the objection.

Q. Doctor, do you say that this X-ray falsifies the conditions as shown by the X-ray of this woman? A. I say it casts a false shadow, it is not in keeping with the normal condition or conformation of that head.

40 Q. Well, you have told us where the nasal bone is and all the different bones of the head, but the only thing we are interested in is the shadows that show a fracture, and you say there are none of

Dr. Joseph M. Rector—Cross.

that kind? A. I found none; that is, on either one, and the one that I enlarged on was the antero-posterior, or the shadow which is caused by an instrument placed in front of the body and casts its shadows through the body; that is, in front of the head and casts it through.

Q. You are not a specialist in X-rays, are you? **10**

A. No, sir.

Q. And you heard this gentleman qualify as an X-ray specialist, did you not? A. I did not. He was on the stand when I came in here.

Q. Did you hear his testimony as to the fractures that this X-ray photograph showed? A. I did.

Q. All of it? A. No. I don't know what he said when I was not here. **20**

Q. But you say that that testimony that there were fractures there and it is shown upon this X-ray picture is not so?

(Objected to.)

A. I did not.

Q. Doctor, who was present when you examined this woman? A. I don't know that gentleman's name—he was on the stand here a few minutes ago—a physician and yourself. **30**

Q. You were introduced to him, were you not?

A. Yes, but I don't remember his name.

Q. Dr. Moffatt? A. The gentleman who wears glasses and who was here a short time ago, who qualified as an orthopedist.

Q. And both of us observed the examination of this woman by you, did we? A. Well, I wasn't paying much attention to you or to the doctor. I was making my own examination. **40**

Q. And you say that you put her through all

Dr. Joseph M. Rector—Cross.

of the motions and all those kinds of things, do you? A. I did.

Q. And had her raise her hands over her head?
A. I did.

10 Q. And you say that both of them were raised over her head, do you? A. I explained that. I said first when I asked her to do it, when I asked her to follow me they went up in equal directions.

Q. Didn't she explain to you that they didn't go up, one of them? A. Yes, when I asked her to make the examination—I mean movements—she said it pained her.

Q. Didn't you notice that when her arm went up that it trembled as it went up too? A. Yes, sir.

20 Q. You observed that, did you? A. Yes, sir.

Q. And you say that this stoop in her shoulder that she has here has developed since your time three weeks ago? A. I don't know that she has any droop to her shoulder. I haven't seen her droop it.

Q. Now, you saw her stripped that day, didn't you? A. Yes.

Q. Mr. Dawson asked you if it was in evidence at that time, did he not? A. Yes.

30 Q. Did you know at that time that Dr. Moffatt was an orthopedic specialist? A. I did not.

Q. Do you say now that both of her shoulders were on a level and that the line was level across them? A. I do not. I haven't seen her today to examine her.

Q. I say do you say that when you examined her in my office, when I was there? A. I do.

40 Q. That there was a straight line and that there was no difference in her shoulders? A. None whatever, when she stood straight and erect,

Dr. Joseph M. Rector—Cross.

with both limbs direct upon the trunk of the body.

Q. What is the effect of an injury on the shoulder to a person when they stand? A. It depends on what the injury is.

Q. Well, you take a bruise on the shoulder that would tear all the muscles away, tear the shoulder blade or one of the bones of the shoulder away. 10

A. Which do you wish, the muscles or the bone?

Q. Well, we will take first the muscles.

MR. DAWSON: I object. I don't think it is cross-examination. There is nothing in the case to indicate that there was any tearing away of the shoulder blade or anything of that kind. I think we ought to confine it to the issue. 20

THE COURT: I assume that is what Mr. Fay was endeavoring to do.

MR. FAY: Yes, I am quite sure it is.

Q. Doctor, what would be the effect on her standing, from an orthopedic point of view? A. The effect upon the shoulder or the body?

Q. Upon the body. A. That would depend upon which muscle is torn. Every muscle has a different function. 30

Q. Well, will you take the muscle—how about the ligaments across, the acromio-clavicular ligaments? A. The acromio-clavicular ligaments are ligaments which bind together the extremities of the two bones of the shoulder, that is, the scapula and the clavicle, or shoulder blade—collar bone, so known. But these ligaments have nothing whatever to do with the shoulder joint. The shoulder joint is composed of two bones. 40

Q. I am asking you now what the effect would

Dr. Joseph M. Rector—Cross.

be upon a person standing up having pain in those joints, usually? A. That question is so broad that I can't understand it. The acromioclavicular ligament simply holds together the extremities of the two bones. These ligaments are furthermore bound together by the muscles which pass over them. Now the muscles are in a constant state of contraction. The ligaments simply bind together the muscles, which are in a constant state of contraction, which we call tone, are the agents which support and control the extremity, except when the bone itself is fractured. If the bone is fractured then the support to that portion of the body is gone as far as the bone is concerned; but still the constant contraction and tone of the muscles which pass over that portion is not gone, and prevents a change in condition to the extent that the support number one by a fracture of the bone is gone, but the support from the constant contraction of the muscles remains. Therefore we get a small amount of deformity at the seat of the fracture and beyond the seat of the fracture, unless the fulcrumage part, the proximate side, that is, the nearest side, of the body is also gone. When that is gone then we have loss of normal position on that extremity.

30 Q. Now, you say there is no loss of the regular position of this woman, do you? A. At the time I examined her I said no.

Q. How long ago was that? A. October 25th.

Q. Take a look at her now.

(Plaintiff produced before witness.)

A. Yes.

40 Q. Her back. A. I can't see her back, no. I can see the back of her dress.

Dr. Joseph M. Rector—Cross.

Q. Well, from what you can see, doctor, would you say that everything is regular and even there?

A. I see she is holding the right shoulder lower than she is holding the left.

Q. You say she is holding it? A. She is holding it. She is holding it lower than the left. When I strip this woman there is nothing in the spinal column, it is perfectly straight—which would cause a tilting of the spine. A tilting of the spine will cause a change in the direction on either the right or left side. I am standing now with a tilted spine and one shoulder is higher than the other. And from my examination on October 25th there was no tilting in that spinal column, there was no fracture of the shoulder blade or collar bone or was there any laceration or tear of the muscle structure. 10

Q. You say now there is not a fracture of the shoulder blade or any other muscle? A. I don't know what there is now. 20

Q. Do you say there isn't any tilting of the spinal cord? A. I will only say that on taking the gown off to see the position which the spinal column assumes.

Q. Will you examine, with the permission of the court, with the doctor here, the orthopedic surgeon, examine her back now and see if there is? A. I will. 30

MR. FAY: May we do it, if the court please?

THE COURT: You may.

(The plaintiff and the physicians retire to the anteroom for examination.) 40

Dr. Joseph M. Rector—Re-Direct.

RE-DIRECT EXAMINATION BY MR. DAWSON:

Q. Doctor, you just made an examination of the plaintiff. Did you find anything there to indicate a cause for the drooping of her shoulder, if you found any drooping? A. Drooping is caused
 10 by a curve of the spinal column when she stands leaning on the left or right foot.

Q. And is that in any way due to injury to the shoulder by a trauma on the 21st of August? A. That is not. That is when her posture—I mean if she stands on one side the shoulder droops. If she would do the same on the other side the left shoulder would droop, the same as I am going. To prove it, the wing of the scapula, the shoulder
 20 blade, shows it is drooping because as she stands upon one side, the side opposite the shoulder droops, the back of the shoulder blade also goes out. It also shows it is the spinal column. In all conditions where we have a lateral curvature

MR. FAY: That question was not asked.

Q. Go ahead, doctor. A. In cases where there is a lateral curvature of the spine the shoulder
 30 blade on the opposite side to the compensatory curve projects itself out exactly the same as this woman when she stands bearing her weight on one side and not bearing weight on the other.

RE-CROSS EXAMINATION BY MR. FAY:

Q. Any curvature at the region of the shoulder blade? A. No, sir.

Q. Any curvature down in the tenth rib? A.
 40 It begins just about the tenth, the ninth and tenth ribs.

Dr. Joseph M. Rector—Re-Cross.

Q. She took her clothes off while you were there and stood first on one foot and then on the other, didn't she? A. Yes, sir.

Q. And that tilting continued all the time, didn't it? A. When she was dividing the weight of the body through the center line of the body or spinal column, the shoulders were the same height. When she bears the weight on one side and twists, then the shoulder droops on that side. 10

Q. She took her clothes off? A. Yes.

Q. You insisted that she take them down to show her back all the way down? A. Yes, I marked out the curvature in the position below the tenth rib, of which the counsel has just spoken, with that pencil on the line of curvature. 20

Q. You mean you ran a pencil down the center of the back? A. Yes, down the center of the back, and showed that there was a curve on that side and an opposite curve on the other side. In other words, the drooping side shows also in the operating of the spinal column, and you noticed when you stood in front of her too, that this shoulder was considerably forward in advance of the other. 30

Q. And very considerably forward? A. Yes, I noticed that her one knee was straight and one was bent.

Q. You did? A. Yes, I looked for it.

Q. I didn't call your attention to it. A. You called my attention to it now.

Q. Yes. A. That is my testimony.

Q. Wasn't she stepping from one side to the other, doctor? A. That is my testimony.

Q. Did you hear my question? A. Yes. 40

Dr. Joseph M. Rector—Re-Cross.

Q. Wasn't she stepping from one side to the other? A. Yes.

Q. Doing that constantly? A. Yes, sir.

Q. And still that shoulder was drooping forward more than the other, wasn't it? A. Not when she was erect.

10 Q. Not when you straightened out one side and held up the other? A. Not when she was erect and I called counsel's attention to it, both shoulders were the same length and level, so it was no lower.

Q. You saw Dr. Moffatt measure, didn't you? A. Yes.

Q. Were they the same lengths then when he measured it? A. No, sir; not his measurements.

20 Q. And you got her to assume a correct position, did you not, when the measurement was made? A. Stand with her heels together and stand erect.

Q. No, when the measurements were made I thought you put her in the position yourself.

A. When the measurements were made it only showed a difference between the central part of the spinal column and the two extremities at the shoulder.

30 Q. That is at the shoulder? A. Yes.

Q. Were you here when Dr. Moffatt testified? A. Yes, sir.

Q. What was the place that he said this stretching or tearing was made? A. If I remember it was between the shoulder blade and the collar bone.

40 Q. Do you know just where? Do you know what they call it? A. There are several ligaments there. I think the positive name was called the acromio-clavicula ligaments.

Dr. Joseph M. Rector—Re-Re-Direct.

Q. And that is what he called it, wasn't it?
A. Yes, that is what I said.

Q. Where are they located? A. Between the end of the shoulder blade and the end of the collar bone, connecting with the ligaments which come down from the caput to the shoulder on both sides. However, those are not distinct ligaments, they are only parts of some ligaments which surround the shoulder joint and they are simply given that name because they are in that region. 10

Q. Now, if they are torn or stretched what is the remedy for that, doctor? A. The ligaments?

Q. Yes. A. Sew them together.

Q. And how do you do that? A. By cutting the skin and putting the needle through just under the skin, not going into the shoulder bone at all. 20

Q. And that would be sufficient? A. Well, sometimes the ligaments don't heal. We have trouble with them sometimes.

Q. What do you do in case they don't heal?
A. Let them alone after we have tried to heal them.

Q. Don't do anything more? A. If they have failed to unite there is nothing more to be done. 30

Q. And you consider the operation which you have told us as sufficient, do you? A. Yes, as far as the ligaments are concerned. We try to sew them together and if they don't heal then they stay apart and we have that distance between the two.

RE-DIRECT EXAMINATION BY MR. DAWSON:

Q. Doctor, did you hear Dr. Moffatt describe 40

Dr. Joseph M. Rector—Re-Re-Direct.

some sort of operation he thought might be performed on the shoulder? A. Yes, I understood him to say that he was going to open the joint, and in opening the joint, refreshing or scraping the bones or putting them in position to hold them up. The result of entering that shoulder joint and taking in the opposing surfaces of those bones means an absolute ankylosis; in other words, the arm stays exactly where you put it. It stays there fixed and fixed. If you want to do it you can do it better to put it in a plaster cast and it will stay here, as far as the shoulders are concerned, if you want it here. Those raw surfaces of the bones unite together and it will stay there. I can't see how an operation of bringing together the small ligaments here, half an inch in length, would necessitate the opening up of the joints and working together the surfaces of the joints. I surely would not have the surfaces of the joints touched for the sake of a ligament that is about a half an inch in length and a quarter of an inch wide.

BY MR. FAY:

Q. Have you ever performed one of those operations? A. Not that operation, no, sir.

BY MR. DAWSON:

Q. Is there anything in the condition of the shoulder which in your opinion would require an operation of that kind? A. None whatever.

Dr. Barclay W. Moffatt—Direct.

DR. BARCLAY W. MOFFATT, recalled for plaintiff:

DIRECT EXAMINATION BY MR. FAY:

Q. Dr. Moffatt, you were at an examination in the other room of Mrs. Paiewonsky? A. Yes, sir. 10

Q. Did you make the measurements? A. I did.

Q. What was the difference between her two shoulder blades? A. It varied from a quarter of an inch to three-quarters of an inch.

Q. And was Dr. Rector present when you made the measurements? A. Yes.

Q. How was she standing? A. She was standing as near erect as she could, with all her muscles relaxed, that is, her feet together and knees together. 20

Q. At the time you made the measurements? A. Yes, sir.

Q. Just explain to the jury exactly what the condition was.

(Objected to.)

A. The condition right then?

MR. DAWSON: I object. I don't think it is vital and I don't think it ought to come in as new matter. The witness has testified as to what the condition of the patient was when he saw her. 30

(Objection sustained.)

Q. When she was standing erect was one shoulder lower than the other? A. When she was standing as erect as she could, yes. 40

Barclay W. Moffat—Cross—Re-Direct.

CROSS EXAMINATION BY MR. DAWSON:

Q. You did see her with both shoulders straightened out though at times, Doctor, didn't you? A. When she——

10 Q. I say you did see her; just answer that question, didn't you? A. Did see her with both shoulders even?

Q. Yes. A. Yes.

Q. And at times you saw her with the right shoulder higher than the left, didn't you? A. No, I don't remember seeing that.

RE-DIRECT EXAMINATION BY MR. FAY:

20 Q. What were you going to say about when you saw her with both shoulders even? A. That was when she contracted her muscles and forcibly drew her shoulders together. So that the normal alignment of those two bones was restored, but when she was relaxed, both shoulders equally relaxed, so that she was dependent on this joint here between the collar bone and the shoulder blade, which I spoke of, and which I found torn, when she depended on that joint for support, one shoulder fell forward and down.

30 Q. And in performing an operation of this kind, you heard Dr. Rector describe the operation? A. Yes. I think he must have misunderstood what I said. I didn't mention going into the shoulder joint. I was speaking of this joint between the collar bone and the shoulder blade, the one that is stretched or torn, that we have been discussing all along. I didn't at any time mention going into the shoulder joint.

40 Q. And have you performed that operation? A. Ten or twelve—eleven cases.

Louis Mandelberg—Direct.

Q. Eleven cases? A. Yes, sir.

Q. You have actually performed it yourself?

A. Yes, sir.

Adjourned till December 2, 1924, at 10

A. M.

Freehold, N. J. December 2, 1924.

Trial of the cause resumed at 10 A. M.

LOUIS MANDELBERG, sworn for defendant: 20

DIRECT EXAMINATION BY MR. DAWSON:

Q. Mr. Mandelberg, were you employed by Mr. Joffe in August, 1923? A. Yes, sir.

Q. Were you driving a car, for a delivery car?

A. Yes, sir.

Q. Did you say it was a delivery car? A. Yes, sir.

Q. Your car? A. Yes, sir. 30

Q. How long had you been driving the car?

A. Who, for Mr. Joffe?

Q. Anybody. A. Three years.

Q. Were you licensed at the time of this accident? A. Yes, sir.

Q. Did the car have a glass windshield in it?

A. Yes, sir.

Q. What was your business with Mr. Joffe?

A. Just delivery. 40

Louis Mandelberg—Direct.

Q. And you drove that car all the time? A. Yes, sir.

Q. On the day of the accident did you see the plaintiff, Mrs. Paiewonsky? A. Just before the accident I did.

10 Q. Where did you first see her? A. In the store.

Q. Who was she with? A. Mrs. Manne.

Q. Do you know whether or not she made any purchases there? A. Yes, she did make a purchase.

Q. Who made the purchases? A. Mrs. Manne.

Q. Did you have any conversation with Mrs. Manne? A. No, sir.

Q. Or with Mrs. Paiewonsky? A. No, sir.

20 Q. Did you talk to them at all about your delivery? A. No, sir.

Q. Did you get Mrs. Manne's order, I mean for delivery? A. Yes, sir.

Q. Where did you get it? A. In the store.

Q. Well, whereabouts in the store? A. Right on the window, a whole load of orders.

Q. How did you know to whom it was to be delivered? A. Well, it is marked on the back.

30 Q. Oh, it is marked on the back? A. Yes, sir.

Q. What did you do then? A. I loaded up my car with the orders.

Q. Were there other orders besides this one? A. There was about fifteen or twenty.

Q. Where was Mrs. Manne when you picked up the order and put it in the car? A. Standing about three feet away from me.

40 Q. And did you hear any conversation between Mrs. Manne and Mrs. Paiewonsky? A. Yes.

Louis Mandelberg—Direct.

Q. What did they say? A. Mrs. Manne said to Mrs. Paiewonsky—

MR. FAY: I object to any conversation between Mrs. Manne and Mrs. Paiewonsky.

MR. DAWSON: It is your plaintiff.

MR. FAY: True.

10

(Objection overruled.)

Q. What was said? A. Mrs. Manne said to Mrs. Paiewonsky, "You look tired. You ought to go home."

Q. "You look tired"? A. Yes, "You ought to go home." And she says, "Well, I will walk home." Mrs. Manne says, "Well, the boy will take you home." And Mrs. Paiewonsky didn't want to.

Mrs. Manne kept on coaxing her and by the way she was coaxing her I thought maybe she wanted to get rid of her, so I says, "All right. I will take you home." She gave me a tip and I walked out and she followed me out. Well, she didn't want to go in the car.

20

Q. Who followed you out? A. Mrs. Paiewonsky.

Q. She came out alone? A. Yes, came out right after me.

30

Q. Who got in the car first? A. I did.

Q. Did she get in after you? A. Yes.

Q. Where was your car at that time? A. Right in front of the store, against the curb.

Q. And what is the number of the store? A. I don't know. It must be around 89.

Q. You don't know the number? A. No, I don't know the number.

Q. Was it close to the curb? A. Yes.

Q. Backed up or parallel with the curb? A. No, just parallel with the curb.

40

Louis Mandelberg—Direct.

Q. When you got in what next did you do?

A. I started off the motor.

Q. Was it a self-starter? A. Yes, sir.

Q. Started from the seat? A. Yes, sir.

10 Q. And what did you do then? A. I just pulled away from the curb and about fifteen feet in front of me was another car, a Packard car, and when I pulled out, went out towards the middle of the street, there was a car coming right towards me. To avoid hitting that car in a head-on collision I pulled over to the right, and when I pulled to the right the wheel just naturally locked on me, which does happen on a Ford.

Q. What do you mean locked, you couldn't turn it? A. No.

20 Q. Did you strike this other car? A. Struck the other car, just glanced, and my car bent the mudguard, so it broke the windshield.

Q. On your car? A. Yes, when it struck the windshield on my car.

Q. Did anything happen to Mrs. Paiewonsky then? A. Mrs. Paiewonsky went right into the windshield.

Q. Was she cut? A. She was cut.

30 Q. How far was that car ahead of you in feet that you struck? A. About fifteen feet away.

Q. About fifteen feet away? A. Yes.

Q. Were you going to turn around in the road? A. No, sir; I couldn't turn around in the middle of the street.

Q. You were just going straight ahead? A. Just going straight ahead.

Q. How many speeds has your car got on it? A. One.

40 Q. Well, you have more than one speed, haven't you? A. Well, I have the first and then high.

Louis Mandelberg—Cross.

Q. Which speed were you in at the time? A. First.

Q. How fast will that car go in first speed? A. About four or five miles an hour.

Q. How fast were you going, would you say? A. I was in first speed, which naturally is about four miles an hour. **10**

Q. How soon did you stop? A. As soon as I struck the other car.

Q. Stopped immediately, did you? A. Yes.

Q. Did you get out of the car then? A. Mrs. Paiewonsky walked out ahead of me.

Q. You got out after Mrs. Paiewonsky? A. Yes.

Q. Where did Mrs. Paiewonsky go then? A. She walked up there with Miss Dora Joffe, right out to the doctor. **20**

Q. Which way was that from you? A. Right straight ahead of me; I would say about twenty-five feet away.

Q. The next building was? A. Yes.

Q. Had you ever had Mrs. Paiewonsky in your car before? A. No, sir; never seen her before.

Q. Did you have any instructions about carrying passengers in the car? A. I got instructions from Mr. Joffe not to take nobody in the car without his authority. **30**

Q. When did you get those instructions, do you remember? A. When I started to work for him.

Q. Did you ever violate those instructions except on this day? A. No, that was the first time.

CROSS EXAMINATION BY MR. FAY:

Q. Do you know Mr. Manne? A. Yes, sir. **40**

Louis Mandelberg—Cross.

Q. You know him well, don't you? A. Certainly do.

Q. Did you ever take him home? A. Once.

Q. I thought you just said that you never violated instructions? A. Well, that was only once.

10 Q. Then you did violate it at that time? A. Yes.

Q. Did you ever take Mrs. Manne home? A. No, sir.

Q. You know Mrs. Manne, do you? A. I certainly do.

Q. And you never took her home? A. No, sir.

Q. Did you ever take Mr. and Mrs. Manne home together? A. No, sir.

Q. At no time? A. No, sir.

20 Q. Did you ever take Mrs. Paiewonsky's little boy home? A. I never seen him in my life.

Q. You saw him here yesterday? A. That is the only time I ever did see him.

Q. You saw him on the witness stand? A. Yes, sir.

Q. Heard his testimony? A. Yes, sir.

Q. You say you never took him home? A. Never seen him in my life before.

30 Q. And never took anybody except Mrs. Paiewonsky? A. The only one that I ever took was Mr. Manne, the only one I ever took in that car.

Q. Was Mrs. Manne with Mrs. Paiewonsky? A. Yes, sir.

Q. Why did you ask Mrs. Paiewonsky to get in the car? A. I never did ask her anything of the kind.

Q. Didn't you just say a little while ago you told her you would take her home and to get in?

40

Louis Mandelberg—Cross.

A. I told that to Mrs. Manne, not Mrs. Paiewonsky.

Q. You never told her to get in the car and she followed you in? A. I never told her to get in the car. She followed me in.

Q. I thought you told her that she might get in. A. I didn't tell her that she might get in. Mrs. Manne forced her in. **10**

Q. So was Mrs. Manne there at that time? A. Yes.

Q. You say she forced her in? A. Certainly.

Q. Did Mrs. Paiewonsky have a bundle in her arm? A. She had a few bundles.

Q. Under her arm? A. I don't know whether she had them under her arm. I know she had them in her hands when she came outside. **20**

Q. Didn't you get some bundles? A. I got my own orders to take out.

Q. Didn't you get some bundles from Mrs. Manne? A. No, sir.

Q. Didn't Mrs. Joffe give you some bundles? A. Mrs. Joffe gave me some bundles, yes.

Q. From Mrs. Manne? A. I don't know whose they were.

Q. Didn't you take them down and deliver them? A. I didn't deliver nothing of the kind. I had them in the car. **30**

Q. Didn't you deliver them though? A. Not then. Afterwards I delivered them.

Q. You did deliver them? A. After the accident.

Q. And Mrs. Paiewonsky had some bundles under her arm, didn't she? A. Certainly.

Q. And Miss Joffe also gave Mrs. Paiewonsky some bundles, didn't she? A. I didn't see it. **40**

Louis Mandelberg—Cross.

Q. Now, you say this was a Ford? A. Yes, sir.

Q. Which way were you headed when you got in the car, which way was the car headed? A. Toward the west, towards Second Avenue.

Q. Towards Second Avenue? A. Yes, sir.

10 Q. You were not headed towards Ocean Avenue? A. No, sir.

Q. And how far ahead was the place where you struck the car from the place where you started? A. Fifteen feet.

Q. Fifteen feet? A. Yes, sir.

Q. The doctor's office is fifteen feet ahead of Mr. Joffe's store, is it? A. The doctor's office is twenty-five feet away from where I struck the other car.

20 Q. You heard the doctor's testimony yesterday, didn't you? A. Yes, sir.

Q. You heard him say where the car was that was struck, didn't you? A. No, I didn't hear him say nothing.

Q. What part of the other car did you hit ahead of you? A. The mudguard.

Q. And your steering gear was locked, did you say? A. Was locked.

30 Q. Was it locked when you started? A. No, sir.

Q. It locked after you had started? A. Locked after I had started.

Q. You say Mrs. Paiewonsky got out of the car ahead of you? A. Yes, sir.

Q. And walked with who, did you say? A. Miss Dora Joffe.

Q. Where was Miss Dora Joffe when you hit the other car? A. In the store.

40 Q. In the store? A. Yes, sir.

Louis Mandelberg—Cross.

Q. And how long after you hit the other car did you get out? A. As soon as Mrs. Paiewonsky got out I got right out after her.

Q. She got right out and she and Miss Joffe then walked right into the doctor's office? A. Yes, sir.

Q. Mrs. Paiewonsky got out herself and walked in, didn't she? A. She didn't fall or nothing, she got out of the car. **10**

Q. And walked right into the doctor's office, didn't she? A. Yes.

Q. Who helped her in? A. Miss Dora Joffe.

Q. Miss Dora Joffe helped her in? A. Yes.

Q. How long after the collision was it that they got into the doctor's office? A. Oh, I should judge about two minutes. **20**

Q. Who else was there besides Miss Joffe and Mrs. Paiewonsky and you? A. I don't know. I wasn't up there.

Q. What? A. I didn't go up there with them.

Q. You didn't go up into the doctor's office? A. No, sir.

BY MR. DAWSON:

Q. What was the condition of the car before that in the morning, had you been driving it before that? A. I had driven it all the morning, up till around two o'clock. **30**

Q. Was it all right up to that time? A. Certainly.

Dora Joffe--Direct.

DORA JOFFE, sworn for defendant.

DIRECT EXAMINATION BY MR. DAWSON:

Q. Dora, you are the daughter of the defendant in this case? A. Yes.

10 Q. And you are attending school now, are you? A. Yes.

Q. In June of 1923 were you in your father's store? A. Yes.

Q. What were you doing there? A. I am book-keeper for him.

Q. And do you remember the time that Mrs. Paiewonsky was injured? A. Yes, sir; I do.

Q. Did you see the collision? A. No.

20 Q. How did you hear of it? A. Well, I heard the glass break and I supposed—

Q. You heard the glass break, then what did you do? A. Then I came right out of the store.

Q. When you got out did you see Mrs. Paiewonsky? A. Yes.

Q. Was she in the car or out of the car at that time? A. She was out of the car.

Q. And did you speak to her then? A. No, I didn't.

30 Q. What did you do? A. Well, I took her right up to the doctor's office.

Q. And that was Dr. Filic's office? A. Yes.

Q. And how long did you stay there with her? A. About five minutes.

Q. Did you have any conversation with Mrs. Paiewonsky before the accident while she was in the store? Were you talking to her? A. I don't believe so.

Dora Joffe—Cross.
Alexander Joffe—Direct.

CROSS EXAMINATION BY MR. FAY:

Q. You don't know whether you had any conversation with her or not, do you? A. No.

Q. Did you give her any bundle? A. I don't remember the time, but I didn't usually give the bundles. 10

Q. I say you don't remember whether you did or not? A. No.

Q. And you took Mrs. Paiewonsky up into the doctor's office? A. Yes.

Q. How old are you, Miss Joffe? A. Nineteen.

Q. It is a large glass window in front of your shop, is it not? A. Yes.

Q. And you can see out and down the street from where you stood, can you not? A. No. 20

Q. Can't see outside? A. No, I can see outside but I sit in the back of the store.

k

ALEXANDER JOFFE, sworn for defendant:

DIRECT EXAMINATION BY MR. DAWSON:

Q. Mr. Joffe, you were in the butcher business in Long Branch in June or August of 1923? A. Yes, sir. 30

Q. Are you still conducting that store? A. Yes, sir.

Q. How long have you been in Long Branch? A. Nineteen years.

Q. Did you have a Ford delivery truck used in your business? A. Yes, sir. 40

Q. And did you employ Mr. Mandelberg as the driver of that truck? A. Yes.

Alexander Joffe—Cross.

Q. Did he do anything except deliver merchandise? A. That is all.

Q. You didn't see this accident, did you? A. No, I didn't.

Q. You were away at the time? A. I was away, yes.

10 Q. Did you have any conversation with Mrs. Paiewonsky on that day? A. Well, she came in, yes.

Q. What? A. Yes, I was there about an hour before.

Q. You saw her about an hour before? A. Before I left, yes.

Q. Did she say anything to you about getting in the car?

20 (Objected to as irrelevant and immaterial.)
(Objection overruled.)

A. No, sir.

Q. Did you give her any permission to get in the car? A. No.

Q. Did you ever give any instructions to Mandelberg about people being in your car? A. I don't get you.

30 Q. Did you ever give him any instructions about taking people in your car? A. Yes, I did.

Q. What were they? A. The instructions were he couldn't take anybody.

Q. Did you make any practice of delivering customers with your orders in your business? A. No, sir.

CROSS EXAMINATION BY MR. FAY:

40 Q. Do you know Mr. Manne? A. Yes, sir.

Alexander Joffe—Cross.

Q. Did he ever go home in your delivery car?

A. Yes, sir.

Q. He did? A. Yes, sir.

Q. And you knew of it? A. Yes, sir.

Q. Did Mrs. Manne ever go home in your delivery car? A. Well, I couldn't remember; probably, yes. **10**

Q. Do you remember Mrs. Paiewonsky's boy?
A. No, I don't.

Q. You don't remember him at all? A. No.

Q. Did you ever take him home yourself? A.
No.

Q. Did you ever take Mrs. Manne home? A.
Yes, I did.

Q. And did you ever take Mr. Manne home?
A. Mr. Manne, yes. **20**

Q. And it was a general practice when Mr.
and Mrs. Manne came to your store and made an
order to take them home in the car, wasn't it?

A. No, sir.

Q. Frequently didn't it happen? A. No, sir.

Q. Well, many a time did you know of it when
the boy took them home? A. I don't remember
any.

Q. You just said that the boy took them home? **30**

MR. DAWSON: He didn't say that at all.
He asked him if anybody took them home.

A. I took them up myself.

Q. You took them up yourself? A. Yes.

Q. Didn't your boy take them home in your
presence? A. I don't remember that.

Q. You don't remember? A. I don't remem-
ber.

Q. I guess that is all. **40**

DEFENDANT RESTS.

Max Manne—Direct.

PLAINTIFF'S TESTIMONY IN REBUTTAL.

MAX MANNE, recalled for plaintiff:

DIRECT EXAMINATION BY MR. FAY:

10 Q. Mr. Manne, did you ever drive home in the car with Mr. Joffe's chauffeur?

MR. DAWSON: I object to that, if your Honor please, as not rebuttal.

MR. FAY: I specifically called his attention to the fact while he was on the witness stand and asked him the question did he ever take Mr. Manne home.

20 MR. DAWSON: You asked Mr. Manne that yesterday.

THE COURT: Well, I think he did ask Mandelberg.

MR. FAY: Yes, I asked Mandelberg whether this boy ever took him and then I asked this witness if he didn't take him home.

THE COURT: It is admitted.

(Objection noted for defendant as ground of appeal.)

30 A. Certainly he took me home, of course he did.

Q. How many times? A. Lots of times.

Q. Did he ever take Mrs. Manne home with you? A. Absolutely did.

Q. And did you see him take other people home? A. Yes, sir.

Q. Now, Mr. Manne, did you pay Dr. Filic's bill?

40 MR. FAY: An omitted question.

Emma Manne—Direct.

A. Yes, I did.

Q. How much was it? A. It was \$13, like he testified to yesterday.

Q. You paid it, did you? A. I did, sir.

Q. And you paid it for whom? A. I paid it for Mrs. Paiewonsky.

Q. And did you make a mistake in telling her what you paid? **10**

(Objected to.)

A. I did not, sir.

MRS. EMMA MANNE, recalled for plaintiff:

20

DIRECT EXAMINATION BY MR. FAY:

Q. Mrs. Manne, did Mr. Joffe's chauffeur ever take you home?

MR. DAWSON: I object to that, if your Honor please, on the same ground.

(Objection overruled.)

A. Yes.

Q. How many times? A. So many times I couldn't say. **30**

Q. Did he ever take you home while Mr. Joffe was there? A. Oh, yes.

Q. And did he ever take you home under his direction? A. He did.

BOTH SIDES REST.

40

*Motion for Direction of Verdict.***MOTION FOR DIRECTION.**

10 MR. DAWSON: If your Honor please, I move for the direction of a verdict at this time on the same grounds upon which I moved for a non-suit, and upon the further ground that it appears by the uncontradicted evidence in the case that this boy was acting in violation of orders of his master and that when he did that the agency was destroyed and the wrongful act, if there was a wrongful act, was the act of the driver and not the act of the master.

20 THE COURT: The motion is denied.
(Objection noted for defendant as ground of appeal.)

30

40

Charge.

Gentlemen of the jury: There is no question in this case that there was an accident in which the plaintiff was injured; but the happening of the accident does not of itself fix liability upon the defendant. You cannot hold the defendant answerable for the plaintiff's injuries unless you find from a fair preponderance of the evidence that her injuries were received as the natural and proximate result of negligence on the part of the defendant or his servants or agents. 10

It appears from the evidence that Mrs. Paiewonsky was injured while riding in a motor delivery car owned by the defendant and used in the conduct of his business. It appears also that this motor car at the time of the accident was driven by an employee or servant of the defendant. The accident was caused by the defendant's car coming into collision with another car standing at the curb near the defendant's place of business. 20

The first question for you to decide is whether the defendant's car was operated negligently; that is, whether it was run at a rate of speed at which a reasonably prudent driver, exercising due care, would not have run it; or whether it was otherwise operated in a manner which showed a lack of reasonable care. Unless you find such negligence in operation and that that was the proximate cause of the accident you need go no further in your inquiry, since in that event the defendant would not be liable and you would be obliged to say so by your verdict. 30

If you should find that the accident was the result of negligence then it would be your duty to determine from all the evidence whether such 40

Charge

negligence was the negligence of the defendant. Admittedly the car in which the plaintiff was riding at the time she was injured was not driven by the defendant. There is nothing in the evidence that I recall which indicates that the defendant had expressly invited the plaintiff to ride in his car on this occasion or that he had any knowledge of the fact that she was riding in the car. But that circumstance is not necessarily decisive of the question as to his liability. The plaintiff's theory on which she seeks to hold the defendant is that the plaintiff was a guest in the defendant's car at the invitation of the defendant's servant, and that in extending this invitation, the servant was acting within the scope of his employment. The law is that the master is responsible for any wrong done by a servant with the master's authority, either express or implied, for the purpose of executing the master's orders and doing the master's work. The master's liability ceases whenever his agent pursues any line of conduct outside of the scope of his employment and not prompted by any benefit or accommodation to the master or the master's interests.

Now, did the defendant's servant invite the plaintiff to ride in the defendant's car? If he did was he acting under the authority of the defendant or within the scope of his employment? If the plaintiff was not an invitee she cannot recover under the facts in this case. If the plaintiff procured at her own request or through the request of her friend Mrs. Manne the privilege of riding in the defendant's car she occupied the status of a mere licensee, to whom the driver or owner owed only the duty of refraining from

Charge

acts of wanton or willful injury, and the plaintiff assumed the ordinary risk of injury from dangers of accident incident to travel in the operation of a motor car.

If she was an invitee of the defendant's driver, and if in inviting her to ride the defendant's driver acted either expressly or by necessary implication within the line of his duty under his employment, then the master would be liable to the plaintiff for any injury resulting proximately from the servant's negligence. One who invites another to ride with him as a guest in a private conveyance is laid under the duty of reasonable care toward his guest. Was Mandelberg acting within the scope of his employment in carrying Mrs. Piaewonsky in his employer's car? That you must decide from the evidence. Did Mandelberg sometimes carry the patrons of his employer to their homes? Was this done by the direction or with the knowledge of his employer or was it done so frequently that the employer must have been presumed to know that his servant was doing it?

Joffe would not be answerable in this case if what his servant did was not in the line of his duty or was done in violation of his master's instructions. He would be answerable if what his servant did was in the course of his duty or was done as a part of a common practice in the conduct of the master's business, of which practice the master knew or ought to have known.

If you find the plaintiff has met the burden of showing by the greater weight of evidence that the accident in this case was due to the negligence of the defendant's servant and that the plaintiff at the time of the accident was riding as a guest in the defendant's car by the invitation

10

20

30

40

Charge

of the defendant, either express or implied, then you would come to the question of damages. If the plaintiff is entitled to recover at all in this case the measure of damages would be compensation for the injuries which she sustained, her pain and suffering, and whatever monetary outlay she was obliged to make in her efforts to be cured; that is, for medical care and attention.

Except as I have included them in my instructions I decline to submit the requests to charge of the defendant.

 DEFENDANT'S EXCEPTIONS.

20 MR. DAWSON: The defendant prays an exception to the refusal of the court to charge requests 3, 5, and 6 as requested.

Defendant's Requests to Charge.

1. That there was no wanton or willful negligence of the chauffeur, and if you find that the plaintiff was in the car as licensee, then your verdict must be in favor of the defendant.

30 2. If you find the plaintiff was in the Joffe car at the invitation of Joffe, then Joffe owed her the duty of reasonable care; that is, the care that a reasonably prudent person would use under the circumstances as then existing.

40 3. If the plaintiff was in the car because she asked the driver to take her home, or because Mrs. Manne asked the driver to take her home, she would then be what the law terms a licensee, and Joffe would not owe her the duty of reasona-

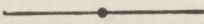
Defendant's Requests to Charge.

ble care. His only obligation to her under these circumstances is to refrain from willful injury to her.

4. There is no claim of willful injury in this case, so if you find that plaintiff was in the car as a licensee, then it is your duty to return a verdict in favor of the defendant. **10**

5. Before you can find a verdict in favor of the plaintiff in this case you must find that plaintiff was in the car at the request or invitation of Mr. Joffe.

6. If the driver was acting in violation of orders in taking passengers in the car, then he was not the agent of Joffe and Joffe would not be liable. **20**



Statement of Facts.

Statement of Facts. **30**

Statement of Facts. **40**

Defendant's Requests to Charge.

10
 20
 30
 40

...the only obligation to her under these circumstances is to remain from within safety...
 ...There is no claim of willful injury in this case, so if you find that plaintiff was in the car as a passenger, then it is your duty to return a verdict in favor of the defendant, or perhaps you may find in favor of the plaintiff in this case you must find that plaintiff was in the car at the request or invitation of Mr. Joffe.
 6. If the driver was acting in violation of orders in taking passengers in the car, then he was not the agent of Joffe and Joffe would not be liable.

Defendant's Requests to Charge.

10
 20
 30
 40

...the only obligation to her under these circumstances is to remain from within safety...
 ...There is no claim of willful injury in this case, so if you find that plaintiff was in the car as a passenger, then it is your duty to return a verdict in favor of the defendant, or perhaps you may find in favor of the plaintiff in this case you must find that plaintiff was in the car at the request or invitation of Mr. Joffe.
 6. If the driver was acting in violation of orders in taking passengers in the car, then he was not the agent of Joffe and Joffe would not be liable.

30 MAR.T.1925

New Jersey Court of Errors and Appeals.

ANNA PAIEWONSKY,

Plaintiff-Appellee,

vs.

ALEXANDER JOFFE,

Defendant-Appellant.

Action at
Law.
On Appeal.

10

BRIEF FOR APPELLANT.

20

This appeal brings up for review a judgment in the Monmouth County Circuit of the Supreme Court entered in favor of the plaintiff against the defendant for the sum of \$2,000.00.

Statement of Facts.

30

Anna Paiewonsky, the plaintiff in this case, was spending a few weeks during the month of August, 1923 with her friend, Mrs. Manne, at the latter's residence in Long Branch, New Jersey. On the 14th of August, 1923, Mrs. Manne entered the meat market of the defendant to make some purchases. She and the plaintiff stepped into the store and left her order, and then went downtown to attend to some other business. On the way back, they stopped in the store to see if Mrs. Manne's purchases had been delivered. Joffe,

40

the defendant, was leaving the store as they entered (there is no contention that he was in the store at the time plaintiff and Mrs. Manne were in there). Mrs. Manne remarked to the plaintiff "You look tired", and the delivery boy, who was standing close by, turned around and said "I will take you home". Mrs. Manne said "I am going on some other errands"; she gave the boy

10 ten cents and said "You take Mrs. Paiewonsky (the plaintiff) and the packages". Whereupon, Mrs. Manne left the store and the plaintiff entered the Ford automobile which the delivery boy was using for the purpose of delivering packages from Mr. Joffe's store. As the boy was starting the automobile, he pulled out from the curb, but for some reason, failed to allow sufficient clear-

20 ance for another automobile which was standing at the curb and a part of the standing automobile struck the windshield of Joffe's car, and the plaintiff received injuries which consisted of a small cut on her chin which required two stitches to close and a cut on the left side of her face near the hair line which required three stitches to close. She immediately got out of the car and went into the office of Dr. Filic, whose office adjoins the store of the defendant. After her wounds were treated she went back to Mrs.

30 Manne's home. She left Mrs. Manne's about Labor Day and returned to her home in New York. Later she started action which resulted in the judgment here under review.

40

Grounds of Appeal.

1. Because the Court refused to non-suit the plaintiff when requested so to do by the defendant.

2. Because the Court refused to direct a verdict for the defendant when requested so to do.

10

3. Because the Court admitted illegal evidence on behalf of the plaintiff.

4. Because the Trial Court refused the following requests to charge:

(a) Before you can find a verdict in favor of the plaintiff in this case, you must find that the plaintiff was in the car at the request or invitation of Mr. Joffe.

(b) If the driver was acting in violation of orders in taking passengers in the car, then he would not be the agent of Joffe, and Joffe would not be liable.

20

30

40

POINT I.**The Court should have granted the defendant's motion to non-suit.**

10 The complaint in this cause alleges that on August 14, 1923, the plaintiff was lawfully in said automobile by the invitation of the defendant, but when plaintiff's attorney opened the case to the jury, he stated that he was going to prove that the plaintiff was a passenger in the car of the defendant as an invitee, which relationship arises out of an implied invitation arising out of the custom of the defendant to take customers home in his automobile. The attorney of the defendant stated that he would object to the introduction of any evidence on the question of custom, and moved for a non-suit on the opening, based on the fact that the complaint was silent as to any implied invitation arising out of custom. The Trial Court, however, took the view that an invitation might arise from a custom, and that the simple allegation of "invitation of the defendant," was sufficient to allow evidence of a custom to show an implied invitation extended through the chauffeur.

30 Plaintiff testified as follows:

"Q. Had you ever ridden home in the car before? A. No." (P. 14.)

She was then asked if she had seen Mrs. Manne ride home in the car, and whether she had seen other people ride in the car. To these questions the Court sustained defendant's objection.

Counsel for the plaintiff then said:

40 "MR. FAY: I think to establish a prac-

tice, if the Court please, I would have to show——

“THE COURT: Well, I don’t think you can show that, so as to charge this defendant with the fact that this woman had seen other people in the car. You will have to show more than that.

“MR. FAY: Other customers.

“THE COURT: How does she know they were other customers? **10**

“Q. Have you seen other customers there?
A. Yes, sir.

“Q. Have you ever seen any other customers driven home in the car?” (P. 15.)

Defendants’ objection was overruled and the plaintiff permitted to answer.

“A. Yes, sir.

“Q. Did you ever see Mrs. Manne driven home? A. Many times.” (P. 16.) **20**

Mrs. Manne also testified that she had been driven home by Mr. Joffe. She testified as follows:

“Q. Did Mr. Joffe himself take customers home? A. He has taken me home many times.

“Q. Anyone else? A. Yes; I have seen others going.

“Q. With Mr. Joffe? A. Yes. **30**

“Q. And have you been there when Mr. Joffe gave directions to the chauffeur to take other customers home? A. Well, I have seen him take them home, I didn’t pay any attention.

“Q. You have seen him take them home? A. Oh, yes.” (P. 43.)

If the above testimony was properly admitted to show a custom of the defendant to take his customers home in his automobile, then the question arises as to whether the plaintiff, who ad- **40**

mitted that it was not a custom, could attain a status of an invitee of the defendant, or, in other words, if a custom was established as to customers, did it exist as to a guest of a customer? The plaintiff said she had only been in the defendant's store once or twice and that she had never ridden home in the defendant's car (p. 14). She also testified:

10

"Q. You never made a purchase in there in your life, did you? A. Well, usually on the way——

"Q. Just answer the question. You never made a purchase of him in your life, did you? A. No; I was Mrs. Manne's guest." (P. 25.)

20

We do not concede that the few isolated instances when Mr. and Mrs. Manne had been driven home by Mr. Joffe, the defendant, or by the chauffeur, create a custom which would so enlarge the scope of the duty of the chauffeur as to permit him to invite customers into the automobile and thereby create a duty on behalf of the defendant. But even assuming that there was a custom out of which plaintiff could spell an implied invitation of the defendant to invite customers into the defendant's car, yet it must be remembered that this custom was as to customers, and the plaintiff herein was not a customer; she had never made a purchase in the store and said that she was there merely as a guest of Mrs. Manne, who was a customer. That such a custom did not extend to a guest seems to be settled by the law of this State.

30

Fleckenstein, a plaintiff, 12 years of age, accompanied his friend, Young, into the defendant's store. Young intended to make purchases, and did so, but Fleckenstein did not intend to buy anything. He merely accompanied his friend on the latter's business. While they were in

40

the store the manager thereof was prying open a box of groceries by inserting a hatchet into the cover and striking it with a hammer. While this was being done a fragment of metal flew into Fleckenstein's eye and destroyed his sight. Action was brought against the storekeeper. At the close of the case, the Court granted a motion for non-suit. The question then went to the Court of Appeals on plaintiff's appeal. **10**

That Court, in deciding the case, said:

"The question arises, was the infant plaintiff lawfully upon the defendant's premises, and, if so, was he an invitee or licensee? In our judgment, he was lawfully in the store of the defendant, not as an invitee, however, but only as a licensee.

"Merchants invite the public to enter their stores to buy wares. It cannot be said that they invite the entrance of those who accompany them, but who have no intention of purchasing; such persons are mere licensees. While it may be that they invite those to enter, who, after inspecting their wares may become purchasers, such an invitation did not extend to young Fleckenstein, when he accompanied his friend Young into the store, as he, Fleckenstein, admittedly, had no intention of purchasing anything. * * * The judgment of non-suit was right and must be affirmed." **20** **30**

Fleckenstein v. Great A. & P., 91 N. J. L. 145.

If Joffe, the defendant, owed a duty to his customers, arising out of implied authority of the chauffeur to invite them into defendant's automobile, this duty did not extend to a guest of the customer. **40**

Plaintiff was a licensee.

10 If it be held that it was within the scope of the employment of the chauffeur to carry customers of the defendant in the defendant's automobile, and, if it be held that a custom, which exists as to customers, exists as to guests and friends of the customer, still the plaintiff cannot recover because she was at most a licensee in the defendant's car at the time of the accident.

The plaintiff described her entrance into Joffe's store as follows:

20 "Coming back to Mr. Joffe's store, we stepped in, Mrs. Manne went first in the place, I followed her and the chauffeur followed us. Mrs. Manne remarked that I looked tired. So the chauffeur was standing near my side and he says, 'I will take you home.' The chauffeur told us he would take us home and Mrs. Manne says, 'I wouldn't go now.' (p. 12.) The chauffeur said, 'Come on, I will have you home in two minutes.'" (P. 13.)

30 She had only been in Joffe's store once or twice before; that she had never returned home before in the car (p. 14), and she had never made a purchase in the store (p. 25).

40 Mrs. Manne, a witness called by the plaintiff, said that she had left an order in Joffe's earlier that day and on the way back stopped to see if the order had been delivered. She says they went into the store, the chauffeur, or the delivery boy, followed them and that she remarked (to plaintiff) "Anna, you look tired." So the boy volunteered "'I will take you.' I says, 'Never mind me, I am going on some other er-

rands, you take Mrs. Paiewonsky and the packages.'” (p. 42.)

It seems to us that fair interpretation of this testimony is that the chauffeur, when he made the remark, “I will take you home,” was talking to Mrs. Manne, and Mrs. Manne’s testimony seems to prove that she was the party doing the talking when she said:

10

“We stepped in and the chauffeur followed us, and I remarked, ‘Anna, you look tired,’ and the boy said, ‘I will take you home.’ I said, ‘Never mind me, I am going on some other errands, you take Mrs. Paiewonsky and the packages.’”

She further testified:

“Q. And did you ask him to take her home at that time? A. I didn’t need to; he volunteered to.

20

“Q. He volunteered? A. Yes.

“Q. He says, ‘I will take her home’? A. He says he will take us home, and I said all right, he might take my friend and the packages.

“Q. Was that all the conversation you had? You just said, ‘You look very tired’? A. That is all I did at that time, yes.

“Q. Then the chauffeur said, ‘I will take you home’? A. ‘I will take you home.’

30

“Q. Didn’t you say you were not going home, or something of that kind? A. I said, ‘I am not going home,’ but he might take my friend home.

“Q. You said that, that he might take your friend home? A. Yes.

“Q. Did you give him a tip at that time? A. Yes, I always do.

“Q. What did you give him? A. Usually give him ten cents.

“Q. Did you give him ten cents at that time? A. Yes. And I always do when they take my things home.

40

“Q. And he said, ‘I will take her home’?
A. Yes.” (Pp. 47-48.)

By this testimony, it appears that the chauffeur, speaking to Mrs. Manne, said that he would take her home and the plaintiff got in the car, because Mrs. Manne said to the chauffeur, “You take my friend home,” and gave him ten cents for
10 so doing. It doesn’t appear that up to this point the plaintiff had any part in the conversation. She was clearly in the car as a licensee.

At the close of plaintiff’s case, there was no custom shown which could be construed as an implied authority of the chauffeur to transport customers, or guests of customers, in the defendant’s automobile, and if a custom was shown, there was no evidence to show the plaintiff, a guest of a customer, came within the
20 implied authority of the chauffeur to carry customers of the defendant in his automobile, and a non-suit should have been granted.

POINT II.

The Court should have granted defendant’s motion for a direction of a verdict in favor of the defendant.
30

The defendant’s chauffeur was called to the stand and he explained the circumstances of the plaintiff getting into the automobile. He stated that he had nothing to do with the purchases made by Mrs. Manne and he had not talked to them about the delivery. He loaded his wagon with parcels, and Mrs. Manne’s package was marked so that he knew it belonged to her. He
40 loaded on the orders. There were about 15 or

20, besides the one which was to go to Mrs. Manne. When he picked up Mrs. Manne's package she was standing about three feet from him.

His testimony continued as follows:

"Q. Did you hear any conversation between Mrs. Manne and Mrs. Paiewonsky? A. Yes.

"Q. What did they say? A. Mrs. Manne said to Mrs. Paiewonsky— **10**

"Q. What was said? A. Mrs. Manne said to Mrs. Paiewonsky, 'You look tired. You ought to go home.'

"Q. 'You look tired'? A. Yes, 'You ought to go home.' And she says, 'Well, I will walk home.' Mrs. Manne says, 'Well, the boy will take you home.' And Mrs. Paiewonsky didn't want to. Mrs. Manne kept on coaxing her and by the way she was coaxing her I thought maybe she wanted to get rid of her, so I says, 'All right. I will take you home.' She gave me a tip and I walked out and she followed me out. Well, she didn't want to go in the car. **20**

"Q. Who followed you out? A. Mrs. Paiewonsky.

"Q. She came out alone? A. Yes; came out right after me.

"Q. Who got in the car first? A. I did.

"Q. Did she get in after you? A. Yes." **30**

(P. 105.)

He said Mrs. Paiewonsky had never been in his car before (p. 107).

This testimony of the driver closely coincides with that of the plaintiff's witness, Mrs. Manne, and seems to prove conclusively that the plaintiff was a licensee in the defendants' car at the time of the accident. **40**

POINT III.

The driver, in permitting plaintiff to enter the automobile, was acting without the scope of his employment.

Joffe, the defendant, was called and he stated
 10 that Mandelberg was employed as a driver of the Ford delivery truck and his only business was to deliver merchandise (p. 113).

He testified as follows:

“Q. Did you ever give him any instructions about taking people in your car? A. Yes, I did.

“Q. What were they? A. The instructions were he couldn't take anybody.

20 “Q. Did you make any practice of delivering customers with your orders in your business? A. No, sir.

On cross examination he stated:

“Q. Do you know Mr. Manne? A. Yes, sir.

“Q. Did he ever go home in your delivery car? A. Yes, sir.

“Q. He did? A. Yes, sir.

“Q. And you knew of it? A. Yes, sir.

30 “Q. Did Mrs. Manne ever go home in your delivery car? A. Well, I couldn't remember; probably, yes.

“Q. Do you remember Mrs. Paiewonsky's boy? A. No; I don't.

“Q. You don't remember him at all? A. No.

“Q. Did you ever take him home yourself? A. No.

“Q. Did you ever take Mrs. Manne home? A. Yes; I did.

40 “Q. And did you take Mr. Manne home? A. Mr. Manne, yes.

"Q. And it was a general practice when Mr. and Mrs. Manne came to your store and made an order to take them home in the car, wasn't it? A. No, sir.

"Q. Frequently, didn't it happen? A. No, sir.

"Q. Well, many a time did you know of it when the boy took them home? A. I don't remember any.

"Q. You just said that the boy took them home? **10**

"MR. DAWSON: He didn't say that at all. He asked him if anybody took them home.

"A. I took them up myself.

"Q. You took them up yourself? A. Yes.

"Q. Didn't your boy take them home in your presence? A. I don't remember that.

"Q. You don't remember? A. I don't remember." **20**

Mandelberg, the driver, testified:

"Q. Did you have any instructions about carrying passengers in the car? A. I got instructions from Mr. Joffe not to take anybody in the car without his authority.

"Q. When did you get those instructions, do you remember? A. When I started to work for him.

"Q. Did you ever violate those instructions except on this day? A. No, that was the first time." (P. 107.) **30**

He also stated that he had never taken Mrs. Manne home in the car (p. 108).

On cross examination he was asked:

"Q. Was Mrs. Manne with Mrs. Paiewonsky? A. Yes, sir.

"Q. Why did you ask Mrs. Paiewonsky to get in the car? A. I never did ask her anything of the kind. **40**

"Q. Didn't you just say a little while ago you told her you would take her home and

to get in? A. I told that to Mrs. Manne, not Mrs. Paiewonsky.

"Q. You never told her to get in the car and she followed you in? A. I never told her to get in the car. She followed me in.

"Q. I thought you told her that she might get in? A. I didn't tell her that she might get in, Mrs. Manne forced her in." (Pp. 108-109.)

10

From the above testimony it would appear that Mandelberg, the driver, in carrying passengers in the delivery car was acting in violation of expressed orders. Of course, the fact that the owner himself had, on a few occasions, taken Mr. and Mrs. Manne home, could not be construed as an authority to his employee to extend a like service.

20

"The mere fact that the automobile belonged to the defendant did not make him liable. The fact that the chauffeur caused injuries during the period of his employment does not make the defendant liable. If the employee in doing an act breaks the connection of himself and employer, the act done under those circumstances is not that of the employer."

O'Brien vs. Stern Bros., 223 N. Y. 292.

30

"Where the driver of a milk wagon had been instructed not to allow children to ride in the wagon and notice to that effect had been posted in the office of the company; held that the driver had no right to allow children to ride with him, and in so doing, acted without the scope of his employment."

Goldberg vs. Bordens, 227 N. Y. 465.

40

"A boy, 15 years of age, was invited by the driver of an automobile, who was in the employ of the defendant, to board the truck

for a ride. The boy was thrown from the truck and injured. Held that the invitation of the driver of the truck to the boy to ride with him was unauthorized by the owner, and was not within the scope of the driver's implied authority as a servant of the master, and no liability was, therefore, imposed upon the owner of the truck."

Zampella vs. Fritzhenry, 97 L. 597.

10

"Where an employee disobeyed his instructions and deviated from the business which he was directed to pursue, and his use of the car was his own use, the relation of master and servant was terminated."

Cronecker vs. Hall, 92 Law 450.

There should have been a verdict either on the grounds that the chauffeur was acting in violation of instructions, or secondly, because Mrs. Paiewonsky was a licensee while in the automobile. The question of illegal evidence is not argued further than to say that objection was made to that testimony of the plaintiff which intended to show that she had seen Mrs. Manne or others ride in the defendant's automobile. Of course, if the Court finds that the allegation of the complaint, to wit, "on or about said date, the plaintiff was lawfully in said automobile by the invitation of said defendant" was sufficient to allow proof of custom, then, of course, the evidence offered in proof of custom was lawfully admitted. The defendant contended, however, that the allegation that she was in the automobile at the invitation of the defendant without the customary words of, "by his servant or agent," was insufficient to allow proof of an implied invitation arising out of a custom.

20

30

40

**For the above reasons, we respectfully
urge that the judgment should be set
aside.**

Respectfully submitted,

**EDWARDS & SMITH,
Attorneys of Defendant-Appellant.**

10

**EDWIN F. SMITH,
RAYMOND DAWSON,
Of Counsel.**

20

30

40

New Jersey Court of Errors and Appeals

10

ANNA PAIEWONSKY,
Plaintiff-Appellee
vs.
ALEXANDER JOFFE,
Defendant-Appellant

*On Appeal
from
Supreme Court*

20

STATEMENT OF FACTS.

The plaintiff, Anna Paiewonsky, recovered judgment in a Supreme Court issue in the Monmouth County Circuit, for the sum of Two Thousand Dollars (\$2,000.00).

The plaintiff, Anna Paiewonsky, was residing with her friend, Mrs. Emma Manne, on Ocean Avenue, Long Branch, New Jersey.

30

She went out with Mrs. Manne to do her marketing on the 14th day of August, 1923, and went to the meat market of the defendant to make some purchases, a place where she had frequently been before. After Mrs. Manne had given her order, they went out in the shopping district, and returned later. Mr. Joffe was in the store at the time, and Mrs. Manne gave some instructions about having her purchases sent home and delivered. Mr. Joffe, both himself, and through his chauffeur, had been in the

40

habit of taking Mr. and Mrs. Manne and other persons home at the time of the delivering of their purchases, and the plaintiff had seen other people taken home in the car.

10 The chauffeur who had taken other persons doing business at the Joffe store home, offered in the presence of Mr. Joffe's daughter, at the time she was handing Mrs. Manne's purchases to him, to take Mrs. Paiewonsky home. The chauffeur insisted upon Mrs. Paiewonsky getting into the car for the purpose of being taken home, and through the negligence of the driver the car struck another car, and Mrs. Paiewonsky was severely injured; she had a severe blow over the temple which has left a scar; has a scar on her chin, and a scar on her arm, and has suffered permanent injuries described in the testimony, and these wounds appear to have been
20 permanent wounds from which she suffers headaches, and pains in her shoulder, which, according to an eminent orthopaedic surgeon is caused by the bones being separated and the ligaments pulled apart.

POINTS ONE; TWO, AND THREE.

The defendant claims that motion for non-suit should have been granted or that direction of verdict in favor of defendant should have been granted, and denies that there was any invitation to the
30 plaintiff.

It appears by the testimony of Max Manne that Mr. Joffe had taken him home many times prior to the accident, and driven the car himself, and that the chauffeur had also taken him home many times, and on page 58, by the testimony of Gussie Lipkowitz, page 58 and 59, that she had been taken home by Mr. Joffe, and that the chauffeur had helped put the purchases in the car. And by Morris Paiewonsky, page 56, that he had been taken home by the
40 chauffeur at the direction of Mr. Joffe, and that he

had seen his mother when he came home in the car, and at one time Mrs. Manne was with him. And Mrs. Manne testified that they had been invited by the chauffeur to be taken home and that she frequently was taken home by the driver in Mr. Joffe's presence, and that Mr. Joffe himself had taken her home, and she further testified that she had been taken home by Mr. Joffe many times, and that he had directed the boy to take her home on p. 42 and 43. 10

Mrs. Anna Paiewonsky testified on pages 12, 13, 14, 15 and 16 that she had seen Mrs. Manne driven home many times; that she had seen other customers driven home; that the chauffeur had invited her to ride home; that Miss Joffe handed her a bundle, and passed another bundle to the chauffeur. All of this testimony was sufficient to justify the verdict of the jury that Mrs. Paiewonsky was an invitee. 20

If there is any question about the declaration or complaint not containing sufficient statement, it may be amended by this Court adding such allegation as may be sustained by the evidence.

There is no doubt that the course of practice pursued by Mr. Joffe and the chauffeur with the persons in the store in taking them home and also by permitting the chauffeur to invite persons and customers to ride home with him with the knowledge of Mr. Joffe when he was delivering parcels, has been established. 30

In this case, however, Mrs. Paiewonsky knew Mr. Joffe and had frequently seen and talked with him.

And Mr. Joffe saw Mrs. Paiewonsky when she entered the store, and there is no positive evidence that he was not in the doorway at the time she was invited to ride home.

Under all the circumstances, the determination of whether Mrs. Paiewonsky was an invitee or a licensee was a question for the jury. 40

It is an entirely different question where a person enters a store and is injured by the act of some person therein, and where a person is invited to ride in an automobile and is injured by the negligence of a servant while driving, and particularly where there has been a custom for the driver of the car which is known to the plaintiff, as appears in this case, to take home both customers and their companions, who have made purchases at the store, and particularly where the daughter or the wife have handed some of the parcels to the plaintiff at the time she was invited to ride in the car.

Under the circumstances, the jury had a right to determine that the plaintiff was an invitee, and find the verdict accordingly.

The plaintiff, Anna Paiewonsky, had seen others taken home in the car, had seen her own son brought home, and knew that it was a custom for the driver of the car to take home from the store, with Mr. Joffe's knowledge, the customers of the store and their guests.

The whole question was properly submitted to the jury.

30

40

All three points in this case are covered in the cases hereinafter cited.

The driver of the car was acting within the scope of his employment when he took Mrs. Paiewonsky home, as had been the custom to take the customers and their guests home, having taken Mr. Manne home, Gussie Lipkowitz, Mrs. Paiewonsky's son, Morris Paiewonsky, with the knowledge of Mr. Joffe. 10

Mr. Joffe himself, on page 115, admits taking Mr. and Mrs. Manne home; said he did not remember when the boy took them home, although they both testified that the boy had taken them home; said he did remember Mrs. Paiewonsky's son although the boy testified on page 56 that Mr. Joffe had directed the chauffeur to take him home.

Mr. Joffe testified that he did not remember when the boy had taken Mr. and Mrs. Manne home. 20

All of which was properly submitted to the jury, and was a question of fact all properly decided under the charges of the Court.

The questions hereinafter cited generally deal with all of the three questions argued.

The plaintiff in this case comes within the rule laid down in MacKensie vs. Oakley, 94 N. J. L., p. 66:

“Where the legal status of the plaintiff was that of an invitee to whom the duty of due care was owing by the defendant, and the situation in regard to the accident was within the legal rule applicable to an accident, which suddenly and for no apparent cause happens, and yet from the very fact of its occurrence an abnormal situation is presented which bespeaks negligence, under the rule of *res ipsa loquitur*, the defendant is called upon for an explanation to 30

exculpate herself from the legal inference or presumption of negligence, and the question whether the explanation was sufficient or not is one of fact for the jury."

MacKensie vs. Oakley, 94 N. J. L., p. 66;
 Phillips vs. Library Company, 55 N. J. L., p.
 307; Sheridan vs. Foley, 58 N. J. L., p. 230;
 10 Higgins vs. Goerke-Krich Co., 91 Id., 464.

The case of Depue vs. Salmon Company, 92 N. J. L., p. 550, and Chirgotis vs. Counes, 115 Atl. p. 211, 95 L. 170-112 Atl. 130, 118 Atl. 774-33 A. L. R. 1422 Note.

The case of Ferris vs. McArdle, 92 N. J. L., p. 580, cited in Donaldson vs. Ludlow and Squier, 94 N. J. L., p. 306, and also was followed and opinion controlled in the case of Tuttle vs. Dodge, 116 At. Rep.,
 20 p. 627, cited on page 631.

In the case of Donaldson vs. Ludlow and Squier, was a case where the defendant had hired from the plaintiff an automobile and placed it in charge of the driver, who went to a place to purchase tickets for a fight, intending to return the car to a garage, and left it in charge of a boy on a frequented street in Newark, unlocked, and he returned in ten minutes and found it stolen. The controversy was whether negligence in its loss was a jury question.
 30 The Court submitted the question of master and servant as to the servant's negligence in view of his deviation from the route to the garage, to the jury. The Court, under the circumstances, held that where a person puts it in the power of his servant to make an unauthorized use of an automobile that the employer is liable not only for the servant's negligence in an action of tort under the doctrine of respondent superior but is also liable in an action upon his contract of bailment. Donaldson vs. Ludlow, et als, 94
 40 N. J. L., p. 306.

In the case of Chirgotis vs. Counes, the car had been taken out without the knowledge of the defendant, according to their testimony; the Court permitted testimony of admission to be made, showing that the defendant had knowledge that the car was taken out. The Court refused a non-suit and directed a verdict, which submitted the case to the jury.

The opinion of the Supreme Court was sustained in the Court of Appeals, and the judgment affirmed. 10

In the case of Ferris vs. McArdle, 92 N. J. L., p. 580, it had been the practice of the servant to stop at home for his supper, on the way home after driving his master, and after supper to take the car to the garage.

The practice was known to the master, the servant deviated from the direct course in order to go home to his supper, and the Court refused to non-suit or direct a verdict, and the Court said that if there is any acquiescence in the practice, it constituted the driver the servant of the master while driving home to supper, the defendant was entitled to a verdict even if he permitted it to be done or acquiesced in the practice, and the Court of Errors and Appeals under the circumstances held that the refusal to non-suit or direct a verdict was proper. In the McArdle case, it was a mere acquiescence in the practice or a permission to do the act. Ferris vs. McArdle, 92 N. J. L., p. 580. 20 30

The Court seems to be so familiar with the Depue vs. Salmon case, that it is unnecessary to make any quotation.

The most recent case is a New Hampshire case, above referred to in 116 Atl., Rep. p. 627.

I quote the statement of the case made by the Court, as I think it will be helpful in this case, it is found on page 629 of the case:

10 “The defendants denied that the driver was acting as their employee at the time of the accident. Upon this question the evidence tended to prove the following facts: The driver was employed on a weekly salary. His duties were to deliver goods to the retail trade and different retail establishments in the City of Manchester, about 50 in number, scattered throughout the City, to be visited whenever business required it. For this purpose the defendants had furnished a Dodge commercial car. During the period between June, 1918, when the truck was purchased, and the driver became the operator thereof, and the day of the accident, the driver had used the truck to go home to dinner, and practically as he wanted to, or saw fit to do, with the knowledge and consent of, and without objection from the defendants, or either of them. There were no stated hours of employment, except that he was supposed to be at the store at seven o'clock. The hour when he ceased work at noon and the time when he returned to work after the noon meal were not fixed, but were regulated and governed by his convenience and the amount of work to be done. The driver's work was to deliver the goods, and so long as that was done, how he did it, when he did it, and the manner in which he did it were left to his own calculation and discretion, all of which was entirely satisfactory to his employers. He delivered orders on his way home to dinner, as convenience might demand. during the entire period of the ownership of the truck, the purpose being to deliver the goods which the firm sold as expediently and as conveniently as he might be able to plan and devise, and in doing that the defendants left it to the driver's discretion and judgment how he should

20

30

40

do it. On the day of the accident he left the store about 11:30, which was about his usual time, took the car and went to his residence. After dinner he left home about a quarter past 12, planning to get back to the store about 1 o'clock, to deliver goods which would not be ready before 1:30, but which he was to deliver when it was convenient or the proper time had come to do so, using his truck. 10

"On his way back to the store he went to and stopped at the office of the Greer Piano Company which took him four blocks away from the most direct route from his house to the store. While going to and from dinner he generally went the most direct route, but not invariably. He could choose whichever route suited his convenience and taste when he went and came. His stop at the Greer Piano Store was for the purpose of inquiring about a player-piano which he was contemplating purchasing for his wife. He had been conferring with the Greer Piano Company with reference to buying a piano for two or three weeks, during which time he called at the piano store six times during working hours. The nature of his employment at the store was such that he was at liberty to do about as he pleased so long as the work was accomplished. The negotiations concerning the piano were begun by Mr. Greer calling at the defendant's store, and while negotiations continued the defendants' servant used the truck in question to call at the piano store at least once during business hours. The accident occurred after he left the piano store while he was on his way to the defendant's place of business and before he had reached the direct route thereto from his house. The defendant's 20 30 40

motions for a non-suit and for a directed verdict were denied, subject to exception."

And I also quote at length from page 630 and 631.

10 "The test by which this point in the case is to be determined here is to inquire whether there was any evidence from which it could be found that the defendants' servant was doing any act which in any way was a part of their business, either directly or indirectly, at the time of the accident. If there was not such evidence, the defendants are not liable, and their motions for a non-suit and for a directed verdict were well grounded. But if the evidence warrants a finding that he was so engaged, the issue was properly submitted to the jury.

20 "Whatever the relations of the parties were as to the use of the truck, it was not one created by an express contract, but one to be inferred from the driver's course of conduct, and the defendants' acquiescence therein. From the driver's testimony it could be found that he made no distinction between using the truck for his own errands and those of his employers. He did work for them on his trips to his dinner and he did errands for himself when out of his usual business trips. It could be found that the implied contract was that the truck should be used for all these purposes indiscriminately and that if there was occasion to make delivery or take orders in connection with the dinner trip it was the driver's duty to perform such service in connection with that trip.

30
40 "While he testified that he never transacted any business for the defendants upon the return trip from his dinner, it could be found that this merely happened to be so, and that his duty

to do the business as convenience required might at any time call for such service. It could be found that if he had been called upon by the defendants for any such service during his so-called free time, it would have been his duty under the contract established by usage to perform the demanded service. The work to be thus done with the truck would be of a mixed character and the arrangement for the mutual benefit of the parties concerned. It would enable the defendants to make use of the driver's trips for his dinner, and the driver to make those trips more expeditiously and conveniently. 10

"In determining in the first instance how the work should be done, what routes should be taken, and what deviations made, the driver appears to have had complete authority. These matters were left entirely for him to arrange. 20
The case is not one where a servant had a defined route to go over, but where the choice of time, route, deviation for incidental errands of his own, including trips for his dinner, were entirely in his hands. In effect, his employers said to him: Here is this work to be done, and you will also have to go to your dinner and do your personal errands. Take the truck and use it for all these purposes and to the best advantage for everybody. 30

"While the driver's mere act of going to his dinner or on the errand about the piano, would be solely his own business, yet facilitating the doing of either, so that by a combination of effort and resources the business of both parties could be more readily transacted, might well make the transportation of the driver in the automobile an act which was being done, in part at least, for the benefit of the master. *Depue vs. George D. Salmon Co.*, 92 N. J. Law, 550, 40

106 Atl. 379; *Carrier vs. Donovan*, 88 Conn. 37, 89 Atl., 894.

10 "The case has been argued by the defendants upon the theory that the contract between them and the driver must be found to be one granting to him, as an independent party, the right to use the truck. As before stated, the contract rests in the inferences to be drawn from the conduct of the parties. According to the testimony, there was no express agreement about the driver's having any time off in the middle of the day that was his own, or about the way in which the truck should be used; and it could be found that by tacit understanding and for their mutual benefit the business of the defendants and that of their driver was conducted as though it were all one enterprise. Strength is added to the probability of this view by the fact that this was a family affair. The driver was the son of the senior partner in the defendant firm.

20 "Cases like *Danforth vs. Fisher*, 75 N. H. 111, 71 Atl. 535, 21 L. R. A. (N. S.) 93, 139, 79 N. H. 335, 109 Atl. 45, are not in point here. Those cases involve questions of departure from the expected line of conduct and the doing of unauthorized acts. Here the acts were fully authorized, or could be found to be so, and the only question is whether there is any evidence that doing them was in any way a part of the defendant's business.

30 "Upon all the evidence it could be found that the driver's use of the car was much more than merely a permissive one. The conclusion that the defendants wished the whole affair to be conducted as it was, that in effect it was a part of their business program that the car should be used in this way to facilitate the interests of

40

every one concerned, is within the probabilities of the case. *Ferris vs. McArdle*, 92 N. J. Law, 580, 106, Atl. 460. It could be found that it was the driver's duty to take the car for this purpose, just as it would have been had there been a practice for him to use it to convey another employee who was bound upon similar errands. The fact that in this case the driver and the passenger were the same person does not determine the question of the defendants' responsibility. *Depue vs. George D. Salmon Co.*, 92 N. J. Law, 550, 106 Atl. 379; *Cox's Case*, 225 Mass., 114 N. E. 281. 10

"A finding that the driver's transportation of himself to his dinner and upon incidental errands was in pursuance of his contract of service was warranted, since the evidence tended to show that: 20

"It was one of the incidents of his employment, that it was an accessory, collateral or subsidiary part of his contract of employment, something added to the principal part of that contract as a minor, but none the less a real feature or detail of the contract. Whatever has been uniformly done in the execution of such a contract by both of the parties to it well may be regarded as having been adopted by them as one of its terms. Especially is this so where none of the provisions of the contract has been shown by either party, but everything is left to be inferred from their conduct. In *re Donovan*, 217 Mass. 76, 78, 104, N. E. 431. (Ann. Cas. 1915, C. 788.) 30

"Transportation to and from his work was incidental to his employment; hence the employment continued during the transportation in the same way as during the work. *Swanson vs. Latham*, 92 Conn. 87, 101 Atl. 492; *Harrison* 40

vs. Central Construction Co., 135 Md. 170, 108 Atl., 874; Fisher vs. Tidewater Building Company (N. J. Sup.) 114 Atl., 150; Littler vs. George A. Fuller Company, 223 N. Y., 369, 119 N. E. 554.

10

In short, it could be found that the whole course adopted in the use of the truck was in pursuance of the contract to be implied from the conduct of the parties, was designed to promote the defendants' business, and did promote it in some degree. If the jury so found, the defendants' would be liable for the driver's conduct at the time of the accident.

20

"It is true that on the face of the driver's testimony a different state of facts, and one freeing the defendants from responsibility, might appear or be found. But the driver was shown to be an interested witness. He was the son of one of the defendants, and it was for the jury to determine whether his statements favorable to them were to be accepted as true or not. Jenson vs. Fischer, 132 Minn. 475, 157 N. W. 498. Moreover, the driver's assertions that his trip was something which in no way concerned the defendants or their business involved his conclusion as to the law applicable to the case. Because he went to get his own dinner, and because the piano errand was his own affair, he concluded that he could not be considered as acting as the defendants' employee. His testimony to that effect was 'merely a denial of the law. It is not evidence which varies or contradicts the facts to which he also testifies.' Tilton vs. Daniels, 79 N. H. 368, 370, 109 Atl. 145, 156. The issue whether the driver was acting within the scope of his employment at the time of the accident, was properly submitted to the jury.

30

40

“The position that there was no evidence that the accident was caused by the driver’s fault, while the plaintiff was free from fault, is sought to be supported upon the theory that in the attempts of each to avoid the other the plaintiff was in each instance the first and careless actor, and that the driver merely tried to avoid the effects of the plaintiff’s successive careless acts. But there is also evidence that the situation is just the reverse of that. It could be found that the plaintiff was taking a safe course, which was, or should have been, manifest to the driver; that the driver carelessly turned his course thereby endangering the plaintiff; that the plaintiff sought to avoid the collision by changing his course; that the driver again turned; and so on in like sequence until the accident occurred. Which version of the transaction was the true one, and the question of fault upon the part of either actor, were plainly matters to be submitted to the jury. There was no error in the denial of the motions for a non-suit and for a directed verdict. *Chatel vs. Schonland*, 75 N. H. 543, 78 Atl., 128, 139 Am. St. Rep. 739.”

10

20

I also quote a paragraph from page 634 of the case:

30

“The defendants did not testify, and excepted to an instruction that the jury might consider that fact in determining the scope of the driver’s employment. One question for the jury to pass upon was whether they would believe the driver’s statements of his relations with the defendants. Their failure to testify was the ordinary failure to call available witnesses, (*Lee vs. Hustis*, 79 N. H. 434, 111 Atl. 627)

40

accentuated by the fact of their interest. Such failure could properly be considered when the jury took up the question of the extent to which they would believe the driver."

10 The Court, in summing up its conclusions as to the findings, states that "it was one of the incidents of his employment that it was accessory, collateral or subsidiary part of his contract of employment. Something added to the principal part of that contract as a minor, but none the less a real feature or detail of the contract. Whatever has been uniformly done in the execution of such a contract by both of the parties to it well may be regarded as having been adopted by them as one of its terms. Especially is this so where none of the provisions of the contract has been shown by either party, but everything
20 is left to be inferred from their conduct."

It will be seen in this case, from the testimony of Max Manne, p. 74, and in the testimony of Gussie Lipkowitz, p. 58 and 59, and in the testimony of Morris Paiewonsky, p. 56, and Emma Manne, p. 42 and 43, as far as 1—15, and p. 47, commencing 1—15, and Anna Paiewonsky, p. 13, 14, 15 and 16, p. 22, 1—28 and p. 23 to 1—10, p. 26, 1—10 to 20, that all of this testimony goes to prove the practice of Mr. Joffe himself taking or permitting his chauffeur to
30 take home persons from his store.

Mr. Joffe admitted that they had taken Mr. and Mrs. Manne home, but did not remember how often, and did not deny that the driver had taken people home with his knowledge, and only made a general statement that he had never given any instructions to Mandelberg about people being in his car.

And in the last part of his testimony, p. 115, bottom of the page, stated that he could not remember whether the boy had taken people home in his
40 presence.

The driver's testimony was rather weak; he stated that he got instructions in the beginning not to carry anyone without authority, and that he had not violated them. Mr. Joffe did not corroborate him in this statement, and he frequently took people home in Mr. Joffe's presence. His testimony is very much weakened by direct contradiction of the witness heretofore mentioned, and it quite clearly appears as a jury question that the incidents of the driver's employment of taking customers home was an accessory, collateral and subsidiary part of his employment, but none the less a real feature of his contract. 10

Mr. Joffe had knowledge that he took the customers home, and that he did it regularly.

The present case has every incident of the cases that have been sustained. The jury decided that the servant did not violate his instructions, and that he acted in accordance with the usual practice as between employer and employee, and that the relation of master and servant existed and can be implied as well as expressed. 20

All of this was taken into consideration by the jury, and it was a jury question properly submitted to the jury.

The driver of this car was acting generally for his master, which view was taken by the jury upon the testimony.

It was to the master's interest in building up a summer trade in a City like Long Branch to carry on as a custom in his business a practice of sending his customers and their companions home when delivering merchandise, and the relation of master and servant continued while in the pursuit of that custom. 30

DePue vs. Salmon Company, 92 N. J. L., p. 550.

This case was followed in an unreported case in the Supreme Court of Mary Sullivan vs. Rose Cohen, 40

et als, in which a verdict of \$20,000 was sustained after being reduced to \$14,000.

The opinion was filed June 26th, 1922.

Iannicelli vs. Benvenga, 123 Atlantic, p. 882.

10 We respectfully submit that the case was submitted to the jury by the Judge of the Court, and that the judgment entered on the verdict of the jury should be sustained.

Respectfully submitted,

THOMAS P. FAY

Attorney for Plaintiff-Appellee.

20

30

40

10

20

30

40

10

20

30

40

1. Court of Errors & Appeals

THE COURT OF ERRORS AND APPEALS
OF THE STATE OF NEW YORK

IN SENATE, JANUARY TERM, 1880.
REPORT OF THE COURT, WITH
OPINIONS OF THE JUSTICES
AND OF THE ATTORNEY GENERAL
IN THE CASES REPORTED.

BY
JAMES C. CLARKE,
CLERK OF THE COURT.

STATE OF THE CASE

IN SENATE, JANUARY TERM, 1880.
REPORT OF THE COURT, WITH
OPINIONS OF THE JUSTICES
AND OF THE ATTORNEY GENERAL
IN THE CASES REPORTED.

BY
JAMES C. CLARKE,
CLERK OF THE COURT.

10

20

30

40

