

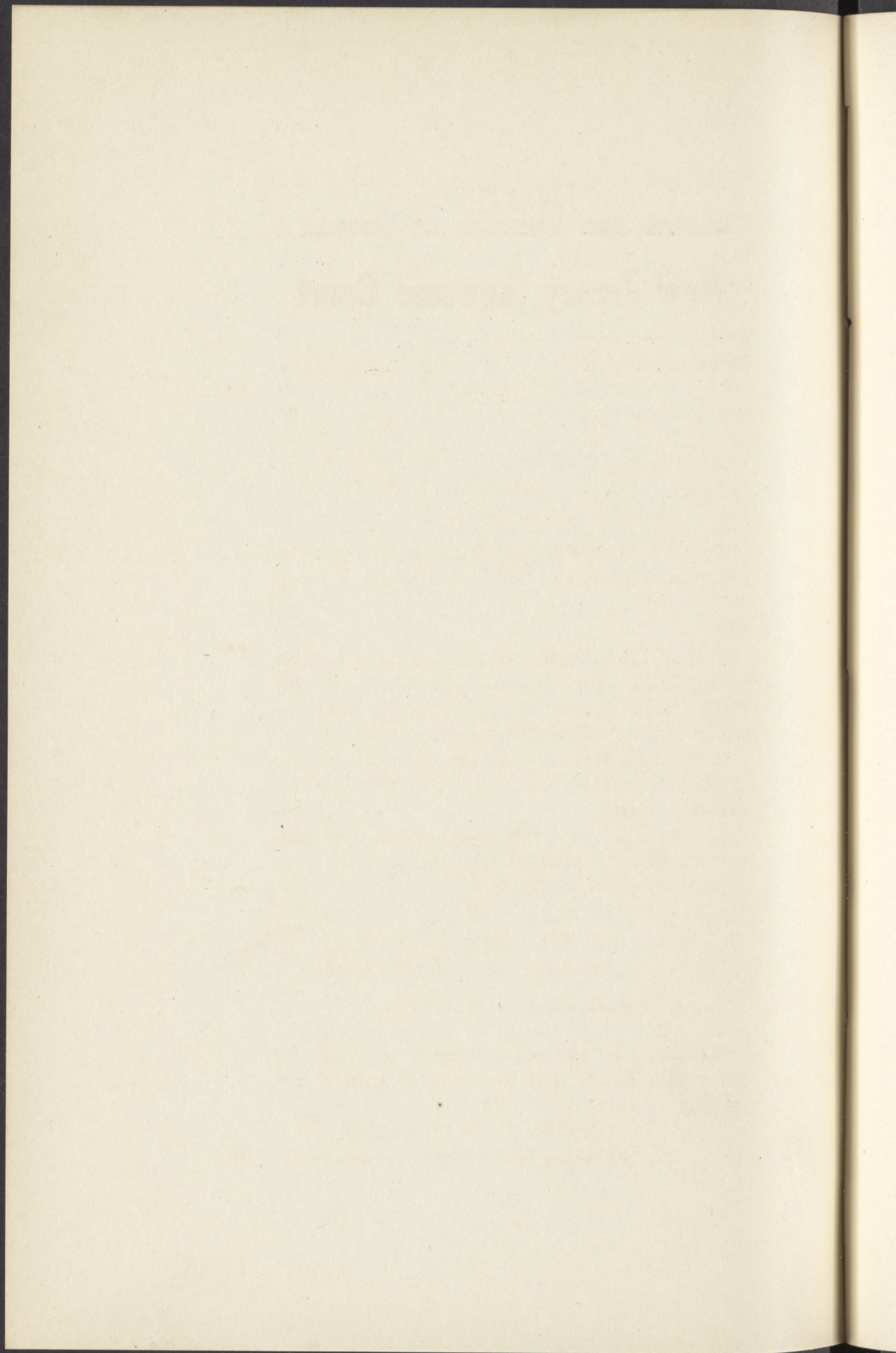
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## TESTIMONY.

### *For Plaintiff.*

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*Notice and Grounds of Appeal.*

**NOTICE AND GROUNDS OF APPEAL.**

**New Jersey Supreme Court**

FREDERICK KERNER,	}	<i>Plaintiff,</i>	<i>Action at</i>	10
ERNEST ZERR,		<i>Defendant.</i>	<i>Law.</i>	
<i>vs.</i>			<i>Notice and</i>	
			<i>Grounds of</i>	
			<i>Appeal.</i>	

To John W. McGeehan, Jr., Esq., attorney for defendant-respondent, 790 Broad street, Newark, N. J.

Sir:

PLEASE TAKE NOTICE that the plaintiff appeals to the Court of Errors and Appeals in the last resort in all causes in New Jersey, from the whole of the judgment entered in this cause. 20

AND TAKE NOTICE that the following is the ground of appeal which the plaintiff-appellant will rely upon:

1. Because the Trial Court granted a non-suit against the plaintiff-appellant and in favor of the defendant-respondent. 30

Respectfully,

PALMER & COOPER,  
Attorneys of plaintiff-appellant.

Dated, Newark, N. J., July 1, 1926.

Service is hereby acknowledged of a copy of the within Notice and Grounds of Appeal, this 1st day of July, A. D. 1926.

JOHN W. MCGEEHAN, JR.,  
Attorney of defendant-respondent. 40

*Complaint.*

**TRANSCRIPT OF PLEADINGS.**

NEW JERSEY SUPREME COURT.

ESSEX COUNTY.

10	FREDERICK KERNER, <div style="text-align: right;"><i>Plaintiff,</i></div> <div style="text-align: center;"><i>vs.</i></div> ERNEST ZERR, <div style="text-align: right;"><i>Defendant.</i></div>	}
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Palmer & Cooper, attorneys for plaintiff.  
 John W. McGeehan, Jr., attorney for defendant.

20 Summons issued August 11, 1925.

**COMPLAINT.**

Filed August 20, 1925.

The plaintiff, residing at 57 Gotthardt street, Newark, New Jersey, says that:

30 1. On Saturday April 11, 1925, the defendant Ernest Zerr was the owner of a certain Dodge sedan automobile.

2. On or about said date the defendant invited the plaintiff Frederick Kerner for a ride in his said automobile which invitation the plaintiff accepted.

40 3. In the course of said ride the defendant drove his automobile off of Bernard avenue in the Town of Hilton, New Jersey, into a driveway of a certain floral nursery there situated.

*Complaint.*

4. After conducting certain business there the defendant again got into his automobile and asked the plaintiff to walk out to the sidewalk of Bernard avenue to direct the defendant in backing his automobile again into Bernard avenue through whatever traffic might be there, which the plaintiff did.

10

5. While the plaintiff was standing on the sidewalk of Bernard avenue about ten feet to the right of the path of the backing automobile, with his back to the automobile, watching for traffic on Bernard avenue, the defendant, negligently and carelessly, and wilfully, wantonly and maliciously, and without regard for the safety of the plaintiff, backed his automobile with great speed, off the roadway, out of the course it had been going, onto the sidewalk, against the plaintiff, throwing him forcibly into the middle of Bernard avenue, without making reasonable observation of the path his automobile was taking, or the whereabouts of the plaintiff, and without making proper use of his brakes with which the automobile was equipped, but stepped on the accellerator instead of the brake as he should have done under the circumstances in which he found himself, and lost control of the automobile.

20

30

6. As a result of the aforesaid negligence and carelessness, and the wilfulness, wantonness, and maliciousness of the defendant, the plaintiff was severely injured in and about his head, arms, legs, hands, feet, and body and he received severe lacerations of the scalp, concussion of the brain, fracture of the skull, deep abrasions of the left leg, two compound fractures of the right leg, abrasions of the right leg and thigh, and

40

*Complaint.*

10 abrasions of the right elbow; all of which caused the plaintiff pain and suffering and will in the future, and the plaintiff was obliged to expend large sums of money for medicines, hospital expenses, and medical services and will in the future, in order to try to effect a cure of his said injuries, and he will be permanently injured, and the plaintiff sustained loss of considerable clothing, and has been and will in the future be deprived of wages and profits which he otherwise would have received, and he was confined to a hospital for a long period of time, and thereafter to his bed, and in his home, and cannot now and may not for a long time in the future use his right leg, and will be permanently injured therein, and elsewhere, and he sustained internal  
20 injuries.

Wherefore the plaintiff demands of the defendant the sum of \$10,000.00 and costs of this suit.

PALMER & COOPER,  
Attorneys for Plaintiff.

30

40

*Answer.*

**ANSWER.**

Filed September 16, 1925.

The answer of the defendant, Ernest Zerr.

The defendant, answering the complaint filed by the plaintiff in the above-entitled cause, says: 10

1. Paragraph 1 is admitted.
2. Paragraph 2 is admitted.
3. Paragraph 3 is admitted.
4. Paragraph 4 is admitted.
5. Paragraph 5 is denied.
6. Paragraph 6 is denied.

**FIRST SEPARATE DEFENSE. 20**

Plaintiff was guilty of contributory negligence in that he so carelessly, negligently and improperly acted and conducted himself at the time and place mentioned in the complaint, that he thereby by his said negligence caused and contributed to the cause of any injuries sustained by him.

JOHN W. MCGEEHAN, JR.,  
Attorney of Defendant. 30

*Reply.*

**REPLY.**

Filed September 15, 1925.

The plaintiff by way of reply says that:

- 10 1. He denies the allegations contained in the first separate defense of the defendant's Answer.

PALMER & COOPER,  
Attorneys for Plaintiff.

20 I, Edward J. Kelleher, Clerk of the Supreme Court of the State of New Jersey, do certify that the foregoing is a true transcript of the pleadings in the above-stated cause as the same remain on file in my office.

(SEAL) In testimony whereof I have set my hand and the seal of said Court at Trenton, this twenty-eighth day of April, A. D. nineteen hundred and twenty-six.

EDWARD J. KELLEHER,  
Clerk.

30

40

*Postea.***POSTEA.**

NEW JERSEY SUPREME COURT.

ESSEX COUNTY.

FREDERICK KERNER,	}	<i>Plaintiff,</i>	<i>Action at</i>	10	
<i>vs.</i>					<i>Law.</i>
ERNEST ZERR,					<i>Defendant.</i>

This case was tried before the Hon. William A. Smith, Judge, to whom the same was referred for trial, with a jury on June 23, 1926.

The Court granted a motion for non-suit against the plaintiff, Frederick Kerner, and in favor of the defendant, Ernest Zerr.

(Signed) WILLIAM A. SMITH,  
Circuit Court Judge.

June 24, 1926.

30

40

*Stipulation.*

**STIPULATION.**

NEW JERSEY COURT OF ERRORS AND  
APPEALS.

10	FREDERICK KERNER,  <div style="text-align: right; padding-right: 20px;"><i>Plaintiff,</i></div>	}	<i>Action at Law.</i>
	<i>vs.</i>		<i>On Appeal.</i>
	ERNEST ZERR,  <div style="text-align: right; padding-right: 20px;"><i>Defendant.</i></div>	}	<i>Stipulation.</i>

20 It is hereby stipulated by and between the attorneys for the respective parties hereto that the State of the Case to be prepared in the above appeal need not contain any of the medical testimony taken at said trial.

Dated, July 1, 1926.

PALMER & COOPER,  
Attorneys for plaintiff-appellant.

JOHN W. MCGEEHAN, JR.,  
Attorney for Defendant-Respondent.

30

40

*Frederick Kerner, direct.*

NEW JERSEY SUPREME COURT,  
ESSEX COUNTY.

Wednesday, June 22, 1926.

Before Hon. William A. Smith, *J.*, and a jury.

For the plaintiff appear Palmer & Cooper (by John W. Palmer). 10

For the defendant appears John W. McGeehan, Jr.

(A jury is called and sworn.)

Mr. Palmer opens in behalf of plaintiff.

Mr. McGeehan opens in behalf of defendant.

FREDERICK KERNER, plaintiff, sworn in his own behalf. 20

*Direct examination* by Mr. Palmer.

Q Before this accident what was your business? A Automobile decorator.

Q And what was your business before that? A Interior decorator.

Q Whom were you employed by? A Mr. Williams, on Sussex avenue.

Q Automobile painting? A Yes, sir. 30

Q What were your wages? A \$40 a week.

Q What was your relation with Mr. Zerr? A My brother-in-law. When I came home from work he invited me.

Q What did he say and what did you say? A The two of us happened to run accidentally together and he asked me to go and take a ride with him.

Q Did he say anything where to go? A He asked me whether I would go with him and buy 40

*Frederick Kerner, direct.*

some flowers, as the following day was Easter Sunday.

Q Did you go with him? A Yes, sir.

Q Who drove the car? A Ernest Zerr, my brother-in-law.

10 Q Who else was in it? A A man by the name of William Kaiser.

Q The three of you went for a drive? A Yes, sir.

Q Where did you finally wind up? A Up at Hilton.

Q Where did you go? A Right by the nursery. I don't know the name of the lane, but the main highway was Bernard avenue.

Q What did Mr. Zerr do? A We drove into Bernard avenue and we drove to the nursery.

20 Q Did you finally get some flowers? A No, sir, we were disappointed, we couldn't get what we were after.

Q What did you say to him? A We were both making a break to get back into the car and he said I should walk along and guide him, and as I was walking along I got hit in the back.

30 Q What do you mean by guide? A He wanted me to guide him until he got out on the main highway.

Q Did you guide him at all before you were hit? A No, sir, I was on my way, walking.

Q Where were you walking to? A Towards Bernard avenue.

Q When were you to give him any signals? A As I was going on Bernard avenue, on the main road.

40 Q As a matter of fact, did you get to Bernard avenue at the time you were struck? A I must have been close to it because I wasn't far away from it, as far as I remember.

*Frederick Kerner, direct.*

Q What is the next thing? A The next I know was when I got picked up from underneath the car.

Q Where were you? A I was underneath the hind wheel; I was on Bernard avenue.

Q Whose car was that? A Mr. Zerr's.

Q Can you describe where you were? Were you near any wheels or how was it? A The wheels wasn't on me, but I was in the center of the car, underneath the center of the car. 10

Q From there where were you taken? A To the Irvington Hospital.

Q How long did you remain there? A Twenty-two days.

Q Who treated you? A Dr. English.

Q And who else? A Dr. Lovell.

Q After remaining twenty-two days where were you taken? A Home. 20

Q How was your leg at that time? A It was put in a cast.

Q How long did you have to remain at the house? A Six and a half months after that.

Q You were confined to the house; I mean to the house, that you couldn't get out. A Two and a half months.

Q After those two months were you able to get around? A Just able to hop around on crutches. 30

Q You say your leg was in a cast? A Yes, sir.

Q How long did it remain in that particular cast? A I had two casts put on. The first one was on, I should judge, pretty near two months, as near as I can remember.

Q Who took that off? A Dr. English.

Q Who put on the new one? A Dr. English.

Q How long did the second one remain? A Two months. 40

*Frederick Kerner, direct.*

Q Who finally took that off? A Dr. English.

Q As you were walking along that lane did Mr. Zerr give you any warning that he was driving towards you? A No, sir.

10 Q Did he give you any warning? A No, sir.

Q Where was it, in back of you or the side of you? A No, it was on my right side.

Q Was it even with you or above you or where was it? A It was a little bit behind me.

Q Had you seen him move up at all until the time he struck you? A No, sir.

Q Do you know how far it was from the point where you were hit and where you were when you were picked up? A Well, I should judge fifteen or twenty feet.

20 Q During the time that you remained in the hospital were you operated on there? A No, sir.

Q Just these casts, and so forth? A Yes, sir.

Q Have you received any bill from the hospital for the services rendered you? A Yes, sir.

Q Has that been paid? A No, sir.

Q What is the amount of that bill? A \$104.

30 Q That is for services in the hospital? A That is hospital services.

Q Have you received a bill from Dr. English? A Yes, sir.

Q Dr. English is here in court? A Yes, sir.

Q Has that been paid? A No, sir.

Q What do you owe Dr. English? A \$241.

40 Q From the time you were hurt until the time you were able to return to work how many weeks or months passed? A Thirty-one, thirty-two weeks.

*Frederick Kerner, direct.*

Q When you did return to work were you able to do the same kind of work? A No, sir.

Q What kind of work did you have to do?

A I went back to the same place I was working. I was placed in charge, I had lighter work to do.

Q Were you paid the same wages? A No, sir.

Q How much difference was there? A \$5 less. 10

Q How long did you remain at \$35? A Three months.

Q And then were you able to do the same kind of work at \$40 a week that you were able to do before the accident? A No, sir, on interior painting no man wants to work with you.

Q Why? A Because I have a limp and a scaffold is always jarring.

Q What have you done with regard to shoes to overcome that? A I had an extension put on; I had the shoemaker make it higher. 20

Q Has that overcome the length? A Not all of it.

Q What, if anything, do you find was wrong with your scalp after this accident? A I have headaches.

Q After you got in the hospital what was wrong with your scalp? A I was torn to the back here (indicating). 30

Q Can you tell us in inches? A About six or seven inches.

Q What, if anything, did you find was wrong with your left leg after this accident? What was wrong with your left leg, not the one that was broken—the left leg? A I had a gash from the ankle up to the knee.

Q Did that leave a scar? A Yes, sir.

Q Has that healed up? A No, sir. The center scar has remained. 40

*Frederick Kerner, direct.*

Q How much is remaining? A Four inches.

Q Was that from these injuries? Was there any other part of your body injured? A My left lip was torn.

Q What was wrong with it? A It has been painful for a week or two.

10 Q Tell us about this right leg, that is, the one that was broken. A Yes, sir.

Q Where was it broken? A Above the ankle and below the knee.

Q It was not broken above and below the knees? A No, sir.

Q So that the breaks are below your knee? A Yes, sir.

Q And are there any disfigurements on your leg now? A Yes, sir.

20 Q What does the disfigurement consist of? A Why, the bone is naturally sticking out.

Q You mean it is lumpy? A Yes, it is disfigured.

Q At the point where it was broken there is a lump now? A Yes, sir.

Q Did those injuries give you much pain? A Yes, sir; change of the weather.

Q I am not speaking of now. The day after you received them? A Yes, sir.

30 Q For what period of time did you suffer a great deal of pain? A Until it started to knit together, until about two months; I felt pain for the first two months.

Q Was your leg put in any kind of apparatus to straighten it out or just in a cast? A Just in the cast.

Q Was it suspended in the air or just lying in bed? A Just in bed.

40 Q What changes do you notice, if any, with regard to the way you feel and act now, with

*Frederick Kerner, direct.*

the way you were before you were hurt? A I don't feel the way I did. The feeling being like pressure, that I sometimes have pains across the side here from walking and overstraining, that the muscles in the leg stretch and hurt my stomach.

Q Do you notice anything about getting tired quicker than you used to? A Yes, sir. 10

Q How were you tired? A The leg didn't seem to hold up the same as it used to.

Q Were you conscious or unconscious when they picked you up? A Just about half; I was just about ready to go off; I remember my brother-in-law picking me up and putting me in the car.

Q You told us about the hospital bill and Dr. English's bill and twenty-two days that you were unable to work. Did you have any other expenses caused to you besides the hospital, the operations and casts? A Just two prescriptions from Dr. English. 20

Q At any time, from the time you left Mr. Zerr, until the time you were struck you had given him no kind of a signal at all to come on? A No, sir.

Q Had you turned around to see if he was standing still? A No, I kept walking around towards the avenue. 30

Q Where was this third man at the time of the accident, was he in the automobile? A He was in the nursery, as far as I believe.

Q Was he going to stay in the nursery? A As far as I know, he was going to meet us when we got out to the highway.

Q When you walked down the roadway towards Bernard avenue, as you walked towards Bernard avenue, were you in the middle or the 40

*Frederick Kerner, cross.*

right or the left-hand side of that lane? A On the left-hand side.

Q And what drive car was this car of your brother-in-law's, right or left-hand drive? A Left-hand.

10 Q But the front of it you say was pointed in towards the green house? A Yes, sir.

Q As you walked out toward Bernard avenue you were on the left-hand side? A Yes, sir.

Q If you were on the left-hand side as you walked toward Bernard avenue I suppose your brother-in-law, as he sat in his car with his back towards you, he was not only in back of you, but on your right-hand side, wasn't he? A Yes, sir.

20 *Cross examination by Mr. McGeehan.*

Q This was a Dodge sedan that your brother-in-law was driving? A Yes, sir.

Q The other man that was with you was another brother-in-law? A He is related somehow, but I don't know how.

Q Mr. Kaiser? A Mr. Kaiser is the man.

30 Q The concern that you worked for, is that also known on Sussex avenue as the New Jersey Finishing Company? A Yes, sir.

Q Do you remember a Mr. Lanbardy calling on you, and you told him that it was the New Jersey Finishing Company? A Yes, sir.

Q Do you remember telling him how this accident happened while you were in the hospital? A I never told anybody.

Q You had a talk with Mr. Lanbardy? A Only just where I was working.

40 Q Did you also tell him that you were earning \$40 a week? A Yes, sir.

*Frederick Kerner, cross.*

Q Didn't you tell him that you were employed by the above concern for the past year? A Yes, sir.

Q Painting automobiles? A Yes, sir.

Q Did you also tell him that you had a wife and baby at 57 Hart street? A Yes, sir.

Q So you did tell him more than merely where you worked? A Yes, sir. 10

Q You told him about this place? A Yes, but not in regard to the accident.

Q He questioned you about it? A I never gave him any information about the accident.

Q Will you answer the question? He questioned you about it? A Yes, sir.

Q Didn't you tell him in these words, or substantially to this effect the following—

Objected to. 20

The Court: Give him the statement as you understand it and then you can qualify it afterwards.

Q Did you tell Mr. Lanbardy at the hospital, when you told him these other things, the following: That you were invited by your brother-in-law to take a ride and that you proceeded to Becker's Nursery, Hilton, New Jersey, and that you could not find the particular flowers you wanted, and suggested to Mr. Zerr you would guide him out in the street, motioning to him to back up, that the road was clear, and when he reached the main road the car dropped into a gully; that your brother-in-law accelerated the car getting out of the gully and that you were unable to get out of the way and was knocked down by the right rear wheel; that you didn't know how your leg came to be injured, the one that was hurt, and that you were taken to the 30 40

*Frederick Kerner, cross.*

Irvington General Hospital. Did you tell him that is the way the accident happened? A No, not all the way you have it there.

Q Tell us what of what I have said to you you didn't tell him? A I didn't tell him I was out on the main road and waving to him to come out.  
10 I haven't told him that.

Q Did you tell him about a rut? A No, sir; I never told nothing of it.

Q Didn't say anything about the rut there? A No, sir.

Q You did tell him that, that you did beckon him and advised him whether the road was clear, "I walked out and wanted to see whether the road was clear." Did you tell him that? A Yes, sir.

20 Q Did you tell him that the driveway leading out was small? A Yes, sir.

Q Did you tell him that? A Yes, sir.

Q Did you tell him that you suggested to Mr. Zerr that you would go ahead and guide him out? A I didn't tell him that, he told me that.

Q You talked about that subject, but you didn't say that? A Mr. Zerr, he told me to do that.

30 Q But you told Mr. Lanbardy that Mr. Zerr told you to go and guide him out? A Yes, sir.

Q So you did talk to Mr. Lanbardy about how the accident happened? A Yes, sir.

Q Why did you say a moment ago that you didn't tell him about the accident, but only as to where you worked and lived? A I didn't get your question.

Q Why did you a moment ago say that you didn't know anything about how it happened, but only told him where you worked and lived?

40 A I told him just how the accident happened.

*Frederick Kerner, cross.*

Q Why did you say you didn't tell him? A Because I didn't understand the way you asked me.

Q There was a rut there, wasn't there? A As far as that I couldn't even swear that there was a rut there.

Q Was there a rut there in the getting out of the automobile? A I couldn't tell you. 10

Q Was there a rut there, as you saw, as the automobile was coming out of that lane? A No, I couldn't tell you; I couldn't say.

Q Then the auto was standing about twenty-five feet in the street when you got out? A Yes, sir.

Q And your brother-in-law was at the wheel? A Yes, sir.

Q Did you first get in and then get out? A After we went into the nursery? 20

Q Yes. A We went out in the machine and he couldn't get what we wanted.

Q You didn't go in the machine? A No, sir.

Q He got in behind the wheel? A Yes, sir.

Q You all this time remained outside of the car? A Yes, sir.

Q And was Mr. Kaiser there all the time? A No, he wasn't there; he was at the florist's, as far as I know. 30

Q How wide was this road that your automobile stood upon? A It was fifteen feet.

Q Was it twice as wide as the automobile? A A little bit wider than this (indicating).

Q Was his automobile in the center of it? A Mostly to the right.

Q It is right as it faces inside of the property there? A It is right.

*Frederick Kerner, cross.*

Q A little right to the center of the road as it stood there? A Yes, sir.

Q Partly away from the main road? A Yes, sir.

10 Q And that left how many feet, about, to the right of the right side of the car, and between the right side of the car and the edge of the driveway, from the right of the driveway and the right of the automobile, how far was it as it stood there? A Ten feet or more—I didn't quite get you.

Q You say the driveway was about fifteen feet wide? A Yes, sir.

Q But the automobile stood a little bit to the right of the center of it? A Yes, sir.

20 Q And I am asking you how many feet there was to the right-hand side of the driveway there and the right-hand side of the automobile facing in there? A About ten feet.

Q Was it higher or lower than the driveway? A I don't know; it looked pretty even to me.

Q Was it higher or lower than the other one or did it look alike? A It was a little lower.

Q So you could walk off of the road going down the street? A I was off the road.

30 Q Were you off the road when you were there? A Yes, sir.

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

Q How much off? A If there had been a sidewalk there I would have used them; I was on the path that was meant for sidewalks.

Q Were you on that fifteen-foot drive when you were hit? A I was on my way out.

Q Were you on that driveway when you were hurt? A I was on the drive.

40 Q You understand that question? A Yes, sir.

*Frederick Kerner, cross.*

Q There was room for you to walk? A Yes, sir.

Q There was room enough for you to walk on the outside of that driveway? A Yes, sir.

Q You could have walked out there? A Yes, sir.

Q Did you hear it put into gear? A No, sir. 10

Q Did you hear and see the emergency brake taken off? A I didn't hear nothing.

Q The car wasn't running at the time it was in the nursery? A No, sir.

Q Do you mean to say that the distance was only twenty feet from you to the street, that you were on that driveway when you were hurt, and that you didn't hear the motor start at all? A I couldn't hear it until I got on the machine. There was quite a few cars. 20

Q Do you mean to say he turned the motor over and you couldn't hear it? A I didn't hear it, no, sir.

Q How far out did you get? A About twenty feet.

Q Almost to the street? A Yes, sir.

Q Came down straight until you reached the street? A No, sir.

Q As a matter of fact, didn't you beckon to him to come on before you started out and while he was moving and before you were hurt? A No, sir. 30

Q Do you know anybody else who was there? A Only the man that picked me up.

Q What is his name? A Mr. Becker.

Q You saw him? A I saw him when he picked me up.

Q Have you subpoenaed him? A Yes.

Q But you know Becker was there? A Yes, sir. 40

*Frederick Kerner, cross.*

Q As a matter of fact, were you not beckoning and assisting when the right wheel was resting on the boulevard there? A Wasn't I directing him?

Q Yes. A No, sir.

10 Q Why didn't you turn around and watch him if you knew he was in there? A I was going to ask him to back in; I didn't see him because my back was turned to him.

Q You didn't see the car coming toward you at all? A No, sir.

Q You didn't hear the "Pugh! Pugh! Pugh!" of the exhaust? A No, sir.

Q Never knew a thing afterwards, did you? A Never knew a thing until they picked me up.

20 Q You say you were about ten feet from where you were picked up from the automobile? A Yes, sir.

Q Can you tell us how far you were from the gulley there? A No, I couldn't.

Q How long is it since you have done interior decorating before this? A Three or four years.

30 Q You haven't been doing work that required you to go on scaffolds? A At the time of the accident I was automobile painting and since that time I have done interior decorating.

Q My question is, how long before the accident was the last time that you did any interior decorating? A About ten or fifteen months before.

Q Did you ever talk to your brother-in-law, the defendant in this case? A No, sir, never thought I had a case.

40 Q Neither before nor since you brought the suit? A No, sir.

*Frederick Kerner, re-direct.*

Q You were going to get some kind of flowers? A Yes, sir.

Q You see your brother-in-law quite often? A Once in a while.

*Re-direct examination by Mr. Palmer.*

Q You say some X-rays were taken of you by Dr. Lovell? A Yes, sir. 10

Q Have you ever received a bill from him? A No, sir.

Q I understood you to say to Mr. McGeehan that if there had been a sidewalk there that you would have been on the sidewalk. What did you mean to say?

Objected to.

The Court: You can ask him more particularly as to the roadway. 20

Q Was there a sidewalk along this driveway? A No, sir.

Q Then what part of the driveway or whereabouts was it you were walking; were you walking on the part where the automobiles ride on? A No, sir, not on the grass, not on the automobile part. 30

Q What do you mean when you say you were going out in the road where the automobiles pass? A I was out on the walk, where the people walk.

Q Did you walk straight behind that automobile? A No, sir, the automobile was on one side when I was walking straight.

Q Did this road go in straight from where it was fifteen feet wide? A Yes, sir. 40

*Frederick Kerner, re-direct.*

Q Was it dirt or grass or what? A Dirt road.

Q Were the edges fairly defined or marked so that you could see how wide it was? A Yes.

Q Was there a path alongside of it? A No, sir.

10 Q Did you walk down that strip you just spoke of now? A No, sir, I walked where anybody would walk to get out of the street; that is where I was walking.

Q Then you walked down that automobile road? A I didn't; I was on the separate path.

Q Did you go over to your left in walking out to the street then? A Yes, sir.

20 Q How far off that automobile path did you go in walking out to that street—you didn't walk out straight on that fifteen-foot path? A I walked straight out, yes, sir. If you will give me a pencil I will mark it.

Adjourned until tomorrow, Wednesday,  
June 23, 1926, A. M.

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*Frederick Kerner, re-cross.*

SECOND DAY.

Wednesday, June 23, 1926.

Continued pursuant to adjournment.  
Present, counsel as before stated.

FREDERICK KERNER, plaintiff, resumes the stand. 10

*Re-cross examination* by Mr. McGeehan.

Q Mr. Kerner, at the close of the day we were trying to determine whether you walked down what we call the automobile path or whether you walked down some lane alongside of it, which? A I have this picture and I drew this picture because I couldn't explain it the right way, if you want to look at it. 20

Q You have drawn a sketch of the locality, is that right? A Yes, sir.

Q Will you point on this sketch what is the automobile pathway or road. A (Indicating on sketch.) This is the automobile pathway where the machines run.

Q Between the two right-hand lines? A Yes, sir. 30

Q That is about fifteen feet wide there? A Yes, sir.

Q Were you walking down that or somewhere near that when you were hurt? A (Indicating.) Here.

Q Indicating a point to the left of the wide part. So that you were walking as you went to the street to the left of the automobile park? A Yes, sir. 40

*Frederick Kerner, re-cross.*

Q And how far off is the automobile road, how far off of the fifteen-foot pathway, or whatever it is there? A This is about two feet and I was about here (indicating).

Q How many feet were you from the edge of the automobile driveway? A About five feet.

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

Q Were you out in the street or not yet to the street at the time you say you were struck by the automobile? A I wasn't out to the street.

Q How far were you from the street? A I should judge about eight feet from Bernard avenue.

Q (By the Court.) That is, when you were hit? A Yes, sir.

20 Q (By Mr. McGeehan.) Where were you when you found yourself under the automobile? A On Bernard avenue.

Q How far out in the middle of the street?

A In the middle of the street.

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

*By the Court.*

30 Q I thought you said on direct examination that the hind wheels were in Bernard avenue? A The car was still at the back and the hind wheels was still facing over Bernard avenue when I was facing up the street, in the center of Bernard avenue.

Q How wide is Bernard avenue? A I couldn't tell you just exactly.

40 Q You mean that the front and rear wheels were in Bernard avenue? A Yes, sir, the whole car was in Bernard avenue when I was picked up.

*Frederick Kerner, re-cross.*

*By Mr. McGeehan.*

Q How many steps did you go from the time you left the rear part of the car, how many steps did you go before you say you were struck?

A All the way out, about eight feet out to Bernard avenue.

Q How many steps was that? A About 10  
eighty or sixty steps.

Q Don't you remember testifying yesterday on your direct examination that the car stood twenty to twenty-five feet from Bernard avenue in that driveway so that if you were struck eight feet from Bernard avenue you only moved twelve feet? A That is about the way I get it.

Q Do you mean to say that you walked fifty 20  
or sixty steps and that the car overtook you after you walked that far and came in contact with you? A Yes, sir, the car hit me as I was going along there.

Q And you never heard or knew it was moving that distance? A No, sir.

Q Was your testimony incorrect yesterday when you said the car stood twenty to twenty-five feet from the street? A That is the way I judge it; I couldn't remember the exact number 30  
of steps.

Q You take a step of about two or three feet, don't you? A I couldn't tell you.

Q You know that fifty or sixty steps would be more than twenty feet? A Yes, sir.

Q Or more than 150 or 180 feet. Have you any idea at all where this car stood before this thing occurred? A Where it stood?

Q Yes. A In the middle of the lane, opposite the florist, the nursery. 40

*Frederick Kerner, further re-direct.*

Q You don't remember very many of the details of his accident? A No, sir.

Q You think you may have forgotten how far it was from the street—you might have forgotten how far it was from the street? A I didn't tell you the exact; I couldn't tell you.

10 Q You are certain it was out in the middle of the street? A When I was being picked up I was in the middle of the street.

Q Do you remember testifying yesterday that you were picked up fifteen or twenty feet from where you were hit? A From where I was hit?

Q Yes. Do you remember testifying yesterday, in answer to Mr. Palmer's questions, that you were picked up fifteen or twenty feet from where you were hit? A I judge it that way.

20 Q Do you judge it to be any more? A No, sir.

Q How wide was that street? A The lane, do you mean?

Q No, the middle of the street you say you were picked up. A I don't know the exact, but I should judge it is as wide as this room here.

Q What kind of a street is it, a smooth pavement? A An asphalt pavement.

30 Q Do you know whether there is a gully there? A I couldn't tell you.

Q Is there a gutter or curb there? A Not as I remember.

*Further re-direct by Mr. Palmer.*

Q You drew this last night as being your idea of the situation out there? A Yes, sir.

40 Mr. Palmer: I offer this in evidence.

*Frederick Kerner, further re-direct.*

Mr. McGeehan: I have no real objection to it. I don't think it helps at all.

The Court: I will sustain the objection.

Q I will use it in this respect. What is the automobile part of this lane that runs alongside of the florist, what is that paved with or what is that composed of? A It is a dirt road. 10

Q And as a person walks out toward the greenhouses from Bernard avenue, what do you walk on? A A cinder road, a path.

Q When you left Mr. Zerr at his automobile and went toward Bernard avenue, did you go on the dirt road or on the cinder path? A On the cinder path.

Q And that is how far to the left of the automobile road? A Between two and three feet between the road. 20

Q Between the automobile road and the cinder path that you were walking on is two or three feet wide and all grass for that two or three feet? A There is a lot of grass and weeds.

Q What were you on when you hit the roadway, or the cinder path? A The cinder path.

Q When you left Mr. Zerr at the automobile, and walked, as you were walking out towards Bernard avenue, did you walk along the dirt road or did you go along the cinder path? A I walked out towards the cinder road. 30

Q When you left Mr. Zerr at the automobile and you were going to go out to Bernard avenue to watch him or guide him, did you do any walking at all on the automobile roadway or did you go directly to the cinder path and walk directly along that? A I walked directly towards the cinder path. 40

*Frederick Kerner, further cross.*

Q Do you know whether or not the engine on the automobile was running when you left Mr. Zerr or whether he started it afterwards? A No, sir, I don't think it was running.

Q When you left it? A No, sir.

10 Q When you told us yesterday that the automobile was twenty to twenty-five feet up that roadway, do you think that that is correct as to the number of feet, or could you show us in this room how far up on Bernard avenue his automobile was when you left it? A As far as I can judge, practically would be up there and the automobile was moving, anyway, the length of this room, if not a little bit further.

20 The Court: That would be approximately fifty feet.

Q And the fifty or sixty steps which you testified, does that include your going along the cinder path? A Yes, sir.

Q You didn't know there was going to be an accident? A No, sir.

*Further cross examination by Mr. McGeehan.*

30 Q When did you decide that the automobile was about the distance of this room, yesterday, or did you speak to anybody over night? A No, sir.

Q Not as to the way the accident happened? A No, sir.

Q You are a painter by occupation? A Yes, sir.

Q And interior decorator? A Yes, sir.

40 Q And you are used to measurements, you know whether it is fifteen or twenty feet? A

*Frederick Kerner, further cross.*

No, sir, you don't do that; somebody does that for you.

Q In your work of interior decorating you do have to estimate the area of the surface and the size of the walls? A Yes, sir, the boss does that.

Q But you are with him and you help him? A 10  
Very seldom.

Q How many feet do you think I am from you? A Twelve feet.

Q When you said twenty or twenty-five feet you mean that based on— A As far as I could lay it out.

Q If that car was that far from the road what was your purpose in guiding it? A I was told to go to Bernard avenue and when I got out there to guide him out to the main road, being 20  
as the traffic was very heavy.

Q Your purpose was simply to tell him if any car was coming to Bernard avenue? A Yes, sir.

Q You thought he would back up to Bernard avenue? A Yes, sir.

Q You knew you were not going to guide him from the driveway to Bernard avenue? A I knew I wasn't going to do that.

Q You knew that he was driving to the rear 30  
to get to a point five to ten or fifteen feet from the street without your assistance? A I didn't know he was started at all.

Q You expected him to start? A Not until I got out there.

Q Why didn't you expect him to start until you got out? A I tried to play him safe.

Q You just said, did you not, that your only purpose in guiding him was to protect him from automobiles on Bernard avenue? A Yes, sir. 40

*Frederick Kerner, further cross.*

Q You didn't expect him not to move the car until you went out in the street? A That is what I thought his intentions were.

Q He didn't say what his intentions were? A No.

10 Q He didn't say, "I won't move until you get out in the street"? A No, sir.

Q Didn't you see him start his motor? A No, sir.

Q Didn't you see him start? A No, sir.

Q And where were you standing, on the edge of the street when you were hurt? A No, sir.

Q Your right leg was hurt? A My right leg.

Q Your left leg wasn't hurt? A Only bruised and badly scraped and scratched.

20 *By the Court.*

Q Are there any buildings or fences on either side of that driveway? A No, sir.

Q So that observation in both directions is clear? A Yes, sir.

Q Is that driveway inclined, or do you know where that incline started there, and whether a car would have to go down under its own power? A It is practically an even road.

30 Q Where is the mirror on that automobile, is it in the automobile or on the front mudguard?

A I can't tell you. There is a mirror on the inside of the car, I know.

Q You mean the mirror to look to the rear? A Yes, sir.

*By a Juror.*

40 Q Where does this street line begin, ten feet from the curb or was there a curb? A Where does the street line begin?

*Frederick Kerner, further cross.*

The Court: In other words, when you referred to where the street was, where did it begin, and that separates the street, and I believe the lane adjoining, is there a side wall or curb?

Witness: There is no curb, as far as I know; there is just a low spot there where grass and weeds grow. 10

Q What were you referring to, where the street was; where was the travelled part? A The cinder path is naturally where people would walk.

Q We are talking about Bernard avenue.

*By a Juror.*

Q Is there a curb or a sidewalk there? A No, sir. 20

*By the Court.*

Q What do you mean when you say you came to the place where Bernard avenue began? How would you describe it if you were referring to the locus of the place? A How would I describe it?

Q What was the point where you picked out where Bernard avenue began? A I don't know where Bernard avenue began. 30

Q You have already said it was so many feet on Bernard avenue, what is the point that you determine it Bernard avenue—you know that street is made up of a travelled roadway? A It might be.

Q Made up of a gutter or a curb or a sidewalk, we don't know what is there. What is the point that you took that you thought Bernard avenue began at? A The hard travelled road. 40

*Motion for a Non-suit.*

*By a Juror.*

Q Known as the curb?

The Court: I wouldn't say that.

10 Mr. McGeehan: I move for a non-suit on the ground that the evidence shows that there was no negligence on the part of the defendant and that there was contributory negligence on the part of the plaintiff. The proofs do not conform to the complaint. The complaint says that while he was standing ten feet on Bernard avenue with his back to the automobile watching for traffic on Bernard avenue.

20 The Court: The plaintiff testified yesterday that he was asked to walk along and guide the defendant to the main street, then he said he went to Bernard avenue to give the signal. It is true that he has changed that claim somewhat today, but no matter if that is so, the point of the case is that he knew that he left his car, that he was going out, and that he didn't make any observation, either by his eyes or his ears, to protect him from the backing of the car. It seems to me that that is contributory negligence. If you take his broader view that he was to guide it two or three feet, then I do not think the defendant should be charged with negligence, that he was entitled to rely upon that guiding.

30

I will grant the motion for non-suit.

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

40 Exception noted as ground of appeal.

## New Jersey Court of Errors and Appeals

FREDERICK KERNER,  
*Plaintiff-Appellant,*

*vs.*

ERNEST ZERR,  
*Defendant-Respondent.*

*Action  
at Law.  
On Appeal  
from  
Supreme  
Court, Essex  
Circuit.*

### BRIEF OF DEFENDANT-RESPONDENT.

#### Statement of Facts.

This is an appeal from a non-suit granted at the Essex Circuit of the Supreme Court upon the trial of an action brought by the plaintiff to recover damages for personal injuries sustained by him as the result of his being struck and run over by the automobile of the defendant, his brother-in-law, while the same was being backed out of a driveway where it had been parked.

The undisputed evidence showed the plaintiff and the defendant had entered the driveway in the car together, and both alighted therefrom and went to a greenhouse on the premises, from which they returned to the car. Thereupon the defendant got into the car for the purpose of backing it out of the driveway and into the street, while the plaintiff walked toward the street for the purpose of guiding the defendant in his course from the driveway into the street. The plaintiff himself was the sole witness called for the purpose of testifying to the occurrence of the accident, when he rested his case. As some of his testimony is in contradiction of other parts of his testimony, the precise circumstances under which he was injured are left somewhat

in doubt, but the salient facts are covered in the testimony quoted hereinbelow.

### EVIDENCE.

The witness testified that when the defendant got into the car he, the plaintiff, undertook to guide him *until* he got out on the main highway. On page 10 he testified:

“Q What did you say to him? A We were both making a break to get back into the car, and he said I should walk along and guide him, and as I was walking along I got hit in the back.

Q What do you mean by guide? A He wanted me to guide him until he got out on the main highway.”

He further testified that at that time the car was on the driveway with its rear toward the street, and that he walked toward Bernard avenue and was struck from behind when he was close to the street (bottom, p. 10).

As to the undertaking of the plaintiff, further light is thrown upon the situation by his testimony (top of p. 32).

“Q You didn't expect him not to move the car until you went out in the street? A That is what I thought his intentions were.

Q He didn't say what his intentions were? A No.

Q He didn't say, 'I won't move until you get out in the street'? A No, sir.”

It will be observed from the foregoing testimony that although the plaintiff saw the defendant get into the car and go behind the wheel, and knew that he intended to back the car out into the street, and although the defendant did not say he would not start the car or move it until signaled, or until the plaintiff got into the street, yet the plaintiff assumed that he would not do so, and in this assumption, coupled as it

is with his failure to watch the car or listen to its motor being started and running, he was negligent.

It is respectfully submitted that under the circumstances he knew and should have known that the car would be driven backward to and into the street, and it was his duty to exercise care, to observe its course as it moved out of the driveway backward, and if he were injured because he did not look toward it and did not listen for it, he merely assumed that it would not start, without any basis for such assumption, and under such circumstances it is respectfully submitted that the Court did not err in granting a non-suit upon the grounds that the plaintiff's injuries were the result of his own contributory negligence.

The brief of the plaintiff-appellant submits the proposition that the plaintiff walked off of the automobile driveway and was not upon the driveway when he was struck, but the plaintiff testified (bottom, p. 15):

“Q When you walked down the roadway towards Bernard avenue, as you walked towards Bernard avenue, were you in the middle or the right or the left-hand side of that lane? A On the left-hand side.”

A careful reading of the question, including as it does the phrase, “When you walked down the roadway, etc., ‘were you in the middle or the right or the left-hand side of that lane’ ”? makes his answer clear that he meant that he was walking down the lane, and on the left-hand side of it. Any doubt that may arise from this question and answer is settled when the witness testified as follows (p. 20, ll. 35 to 38):

“Q Were you on that fifteen-foot drive when you were hit? A I was on my way out.

Q Were you on that driveway when you were hurt? A I was on the drive."

He also testified (top of p. 21) that there was room for him to walk outside of the driveway, and that he could have walked out there.

In view of these definite statements by the plaintiff, the portions of his testimony which are quoted by the brief of the plaintiff-respondent to show an opposite position on his part when struck are probably misinterpreted in the brief, for they do not make his position as clear and definite as the foregoing quoted portions of his own testimony do.

As he walked out, knowing, as he should have known, that the car was to be backed out into the street, it was his duty to watch its course to protect himself. Instead of this, he kept his back turned towards it, and, therefore, did not see it coming towards him. Neither did he use his ears to listen for its approach, although he only walked twenty feet from it when he was hurt. On page 21, line 23, he testified that he didn't hear the motor started nor hear it put into gear, nor hear the emergency brake taken off, nor hear the motor running. Under these circumstances, it is respectfully submitted that the plaintiff was guilty of contributory negligence. It is also submitted that the defendant was not guilty of negligence, if he had a right to assume that his brother-in-law, who undertook to guide him out, would watch his course in backing and would warn him if he himself or any other person got into the path of the automobile. There is no evidence that he backed out fast or suddenly, or in any negligent manner.

Upon the foregoing state of facts the Trial Court granted a non-suit upon the ground that

the plaintiff was guilty of contributory negligence and the defendant was not guilty of negligence. It is respectfully submitted that in doing so the Court did not err, and that the judgment of non-suit should be affirmed.

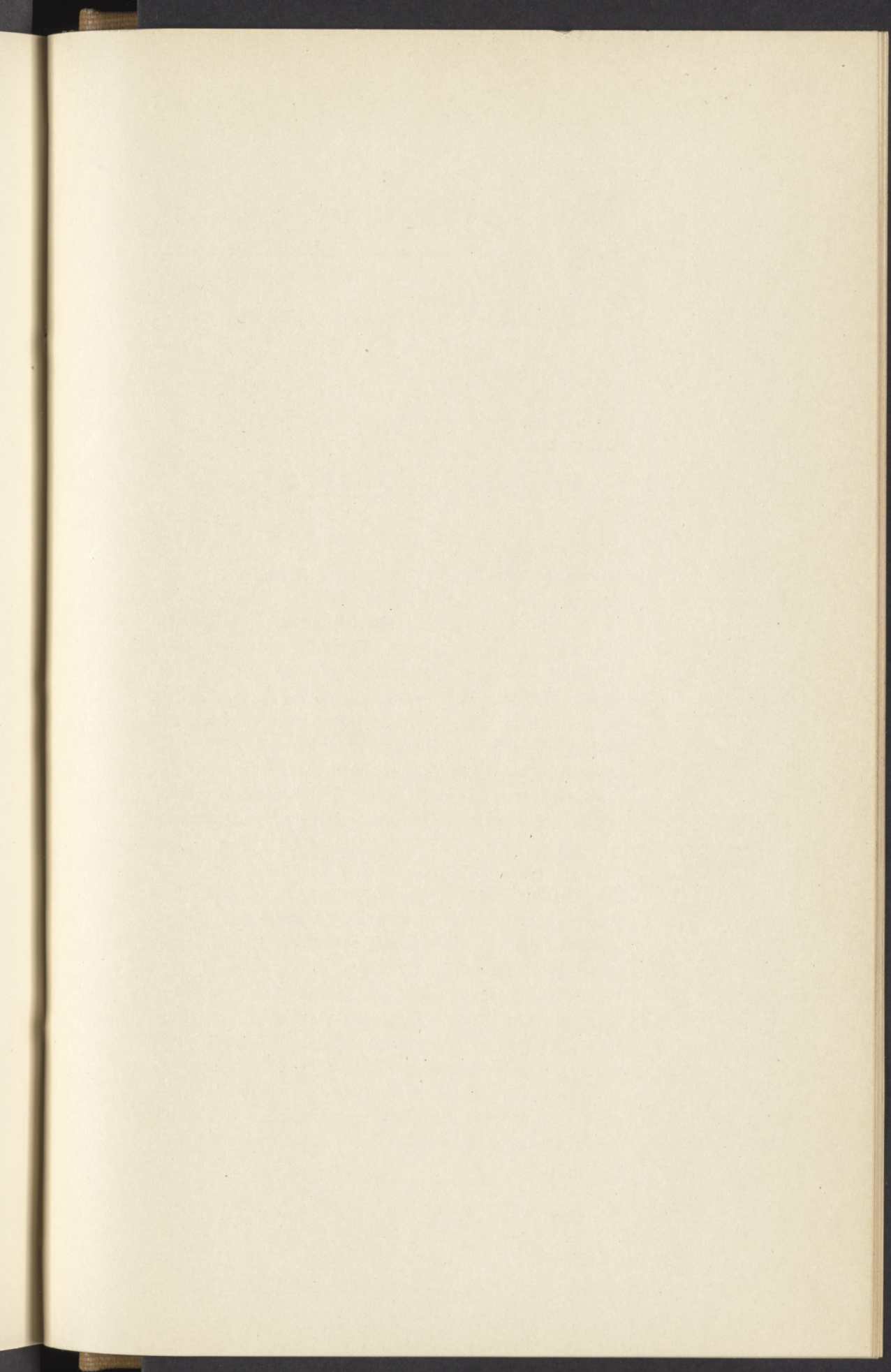
Respectfully submitted,

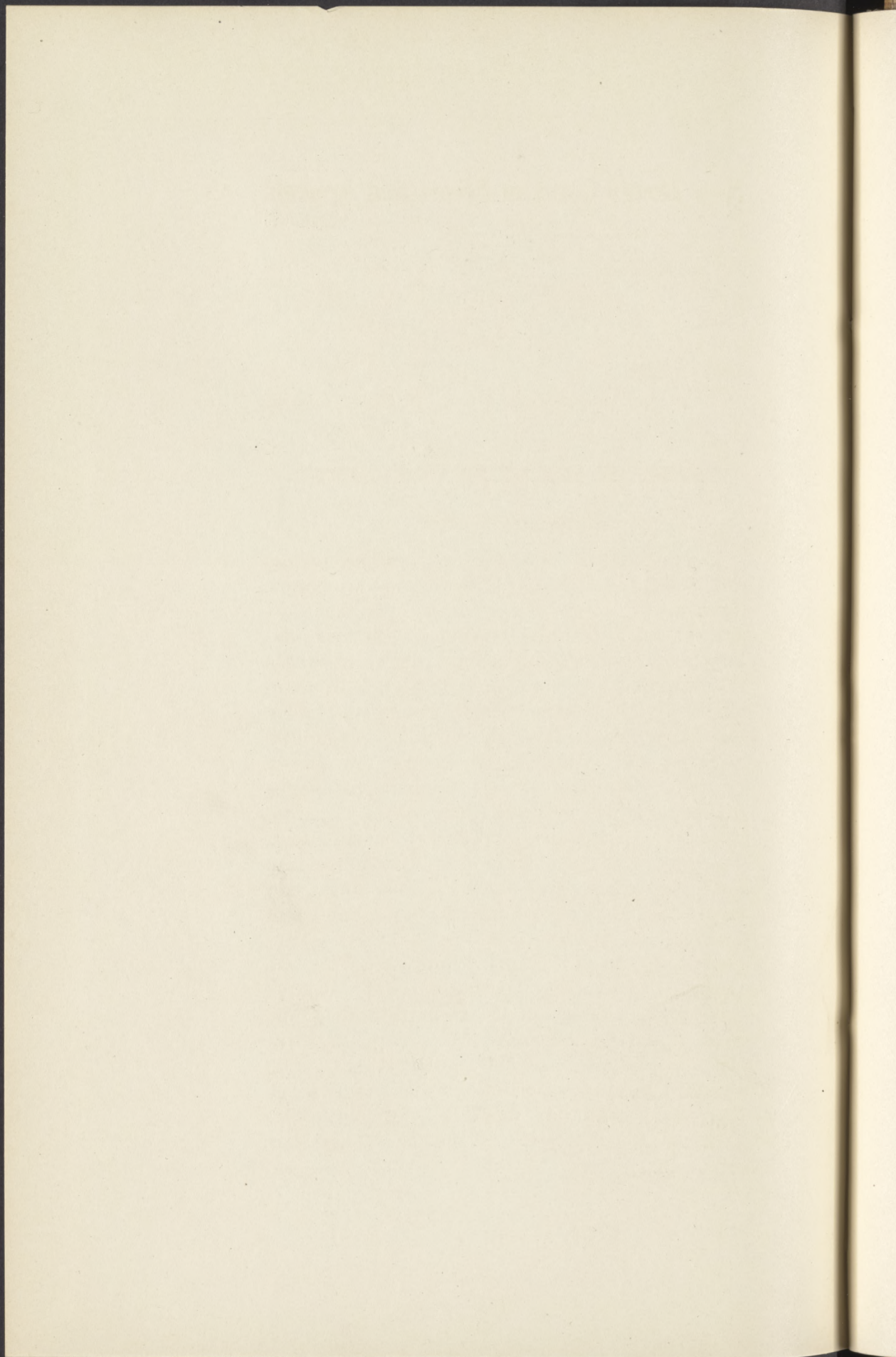
JOHN W. MCGEEHAN, JR.,  
Attorney for and of Counsel with  
Defendant-Respondent.

The first of these is the fact that the  
country was not a united kingdom at that time  
and that the various states were not  
in a position to unite in a common  
policy.

### THE HISTORY OF THE

REIGN OF THE KING OF GREAT BRITAIN  
FROM THE DEATH OF THE KING OF GREAT BRITAIN  
TO THE DEATH OF THE KING OF GREAT BRITAIN





## New Jersey Court of Errors and Appeals

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FRANK KERNER,

*Plaintiff-Appellant,*

*vs.*

ERNEST ZERR,

*Defendant-Respondent.*

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*Action at  
Law.*

*On Appeal  
from  
Supreme  
Court,  
Essex  
Circuit.*

### BRIEF OF PLAINTIFF-APPELLANT.

#### Statement of Facts.

The parties to this suit are brothers-in-law, and on April 11, 1925 (which was the day before Easter), happened to meet in the city of Newark, and the plaintiff was invited by the defendant to go on an automobile ride to a florist's in Irvington, as it appeared that each of them intended to buy some flowers for use at their respective homes the next day. The plaintiff accepted the invitation and the car was driven by the defendant to a florist on Bernard avenue in Irvington, and the defendant drove his automobile for a distance of 25 feet or so into a driveway which ran from Bernard avenue into the yard of the greenhouses. The florist not having the kind of flowers which the defendant wanted, the parties came out of the greenhouses, and as the plaintiff approached the defendant's automobile he was asked by the defendant to go out on to Bernard avenue and there signal the defendant when it was safe for the defendant to back his automobile out into Bernard avenue, which is a street along which there was considerable traffic at that time. This driveway into the yard of the florist was com-

posed of a dirt roadway wide enough for a vehicle to use, and along the northerly side of it there was a strip of grass about two or three feet wide, and then to the north of this grass there was a footpath, made of cinder. The plaintiff endeavored to comply with the defendant's request and walked around the back of the automobile across the roadway, across the strip of grass and got onto the footpath, at which time he was easily three or four feet away from the edge of the roadway which is intended for the use of vehicles. Having gotten onto the footpath he turned and walked in an easterly direction along that footpath and intended to continue walking along it until he came to Bernard avenue, at which time it was his intention to observe what the traffic conditions were and to signal to the defendant when it was safe for the defendant to back his automobile along the driveway and out into Bernard avenue. While the plaintiff was in the act of walking along this footpath and before he had quite gotten to Bernard avenue, and before he had ever given any signal to the defendant, or been in any position to give any signal to the defendant, the latter started his automobile and drove it backwards at a time when the plaintiff's back was turned, and with no warning of his approach to the plaintiff drove the automobile violently against the plaintiff, throwing him out into the roadway of Bernard avenue and there running over him, and in addition to breaking his leg, his scalp was torn for a distance of six or seven inches and the leg that was not broken had a gash extending from the ankle to the knee. The plaintiff was in a hospital for twenty-two days and his leg was in a cast for about four months, and a period of thirty-one weeks elapsed before the

plaintiff was able to resume his work, at which he had previously earned \$40.00 a week.

The trial court granted a non-suit in this case, and it is from that decision of the court that this appeal is taken.

**The trial court erred in granting a non-suit against the plaintiff and in favor of the defendant.**

There can be no question but that the testimony adduced at the trial verifies in every particular the circumstances as outlined in the foregoing statement of facts. There is no dispute whatsoever over the fact that the defendant met the plaintiff and invited him to go on this ride to the florist, and the following quotations from the testimony of the plaintiff show what he was asked to do by the defendant. On p. 10, l. 30, there appears the following:

“Q Did you guide him at all before you were hit? A No, sir, I was on my way, walking.

“Q Where were you walking to? A Towards Bernard avenue.

“Q When were you to give him any signals? A As I was going on Bernard avenue, on the main road.”

At the top of p. 12, he proves that no warning was given to him by the following:

“Q As you were walking along that lane, did Mr. Zerr give you any warning that he was driving towards you? A No, sir.”

That the plaintiff had never signalled to the defendant to back the car out is shown by the following, l. 25, p. 15:

“Q At any time from the time you left Mr. Zerr until the time you were struck, you had given him no kind of signal at all to come on? A No, sir.”

That the plaintiff was not walking in the roadway which is used by vehicles, but was off on the footpath is shown by the following, bottom p. 15:

“Q When you walked down the roadway towards Bernard avenue, as you walked towards Bernard avenue, were you in the middle or the right or left-hand side of that lane? A On the left-hand side.”

On cross examination he was asked particularly whether in walking towards Bernard avenue he walked in the roadway or used the footpath, and on p. 20, l. 25, there appears the following:

“Q So you could walk off of the road going down the street? A I was off the road.

“Q Were you off the road when you were there? A Yes, sir.

“Q Are you sure of that? A Yes, sir.

“Q How much off? A If there had been a sidewalk there I would have used that; I was on the path that was meant for sidewalks.”

An endeavor was made on cross examination to show that the plaintiff had signalled for the defendant to come on before the plaintiff ever started to walk towards Bernard avenue, but the plaintiff expressly denied that he had done so (p. 21, l. 30).

On re-direct he was asked:

“Q. Then, what part of the driveway or whereabouts was it you were walking; were you walking on the part where the automobiles ride on? A No, sir, not on the grass, not on the automobile part.

“Q What do you mean when you say you were going out in the road where the automobiles pass? A I was out on the walk, where the people walk.

“Q Did you walk straight behind that automobile? A No, sir, the automobile was

on one side when I was walking straight”  
(p. 23, l. 25).

He was again asked (p. 24, l. 15):

“Q Then you walked down that automobile path? A I didn’t; I was on a separate path.”

On his re-cross examination, at the bottom of page 25, the plaintiff had drawn a map and pointed out where he was when he was struck, and in order to have it appear on the record he was asked by Mr. McGeehan:

“Q Indicating a point to the left of the wide part. So that you were walking as you went to the street to the left of the automobile part? A Yes, sir.

“Q And how far off is the automobile road, how far off of the fifteen-foot pathway, or whatever it is there? A This is about two feet and I was about here (indicating).

“Q How many feet were you from the edge of the automobile driveway? A About five feet” (top p. 26).

On his re-direct examination, the court having sustained an objection to the use of the drawing which the plaintiff had made, he was, however, allowed to testify from it, and at that time proved conclusively that he was several feet away from the roadway used by automobiles, and that when he was struck the defendant not only had started his automobile backwards without any warning to the plaintiff, but that he also ran it off the roadway and across a strip of grass and onto the cinder path where the plaintiff was walking, with his back to the defendant at that time, for on p. 29, l. 10, he was asked:

“Q What is the automobile part of this lane that runs alongside of the florist, what is that paved with or what is that composed of? A It is a dirt road.

“Q And as a person walks out towards the greenhouses from Bernard avenue, what do you walk on? A Cinder path, a path.

“Q When you left Mr. Zerr at his automobile and went towards Bernard avenue, did you go on the dirt road or on the cinder path? A On the cinder path.

“Q And that is how far to the left of the automobile road? A Between two and three feet between the road.

“Q Between the automobile road and the cinder path that you were walking on is two or three feet wide and all grass for that two or three feet? A There is a lot of grass and weeds.

“Q What were you on when you were hit, the roadway or the cinder path? A The cinder path.”

At l. 35, on p. 29, he was asked:

“Q When you left Mr. Zerr at the automobile and you were going to go out to Bernard avenue to watch him or guide him, did you do any walking at all on the automobile roadway or did you go directly to the cinder path and walk directly along that? A I walked directly towards the cinder path.”

On his re-cross examination he had stated that he thought the automobile was about twenty or twenty-five feet from Bernard avenue as it stood there outside the florists in the driveway, and he was asked (p. 31, l. 15):

“Q If that car was that far from the road what was your purpose in guiding it? A I was told to go to Bernard avenue and when I got out there to guide him out to the main road, being as the traffic was very heavy.”

On p. 31, l. 35, he was asked:

“Q You expected him to start? A Not until I got out there.

“Q Why didn't you expect him to start until you got out? A I tried to play him safe.”

At the top of p. 32 he was again asked on re-cross:

“Q You didn't expect him not to move the car until you went out in the street? A That is what I thought his intentions were.”

It is respectfully submitted that in this case the plaintiff has not been guilty of such contributory negligence as would warrant a non-suit, because it is not at all difficult to visualize the situation of the parties at the time they came out of the greenhouses and the defendant wanted to get his automobile back again into Bernard avenue. The dirt driveway on which his automobile was then standing was undoubtedly too narrow to permit of his automobile being turned around, so he asks the person riding with him to walk out to Bernard avenue and let the driver know when it is safe to back the car out onto that street. With this being the situation there was nothing at all unreasonable or careless in the plaintiff assuming that the defendant meant what he said, and the plaintiff thereupon crosses over the dirt roadway and over the grass strip and gets onto the cinder footpath and heads towards Bernard avenue, fully intending when he got there to make observations of the traffic and to signal to the driver when it was safe to drive the car backwards and get onto the main highway, and this is just what the plaintiff was in the act of doing. If subsequently the driver of the automobile changed his mind and concluded to undertake to get out onto Bernard avenue without the aid of any signals, it would be most unreasonable to charge the plaintiff with knowledge of this change of mind, particularly when the defendant did not even take the trouble to blow the horn and thus warn the plaintiff that the defendant did not intend to remain in the driveway, but would either go all the way out

unaided or would wait until he reached the very edge of Bernard avenue and the little roadway before he would need the assistance of the plaintiff. It is always to be borne in mind that Mr. Kerner, in getting off the roadway and across the strip of grass, had placed himself four or five feet away from any point where this automobile could have touched him if the automobile had kept to the roadway, and this is entirely beside the fact that he understood, and I believe any ordinarily careful person would have understood from the foregoing testimony and circumstances, that the automobile would not be moved until he had gotten down to Bernard avenue, where the defendant had asked him to go, and there made his observations and given his signals.

To hold that Mr. Kerner should anticipate that an automobile which he understood was going to remain where it was until he should signal otherwise, would, without warning to him, be suddenly started backwards, driven off the roadway on which it was supposed to go in any event, be driven across the strip of grass separating the roadway from the cinder path and strike him with the violence with which the defendant struck him, with absolutely no warning of any kind, is to place a burden on the plaintiff which the law does not sanction.

The case of *Consolidated Traction Co. v. Scott*, 68 N. J. L. 682, decided by this Honorable Court, deals to a very large extent with the province of court and jury in actions which are based on negligence and on the question of granting a non-suit holds, speaking of a trial court:

“It is not for him to say whether there are any facts proven in a given case from which the jury would be justified in finding

negligence on the part of the defendant, but, rather, whether any facts have been established by evidence from which negligence might be reasonably inferred by a jury \* \* \* and must bear in mind that the question is not whether he would infer negligence from the established facts, but whether negligence can be reasonably and legitimately inferred therefrom by the jury. \* \* \* It must be remembered that negligence is not a fact which is the subject of direct proof, but an inference from facts put in evidence. \* \* \* Whether the facts are disputed or undisputed, if different minds might honestly draw different conclusions from them, the case should properly be left to the jury.”

It is respectfully submitted that it is certainly open to a group of twelve different minds to honestly draw different conclusions from the foregoing state of facts; that is, there may be some out of the twelve who would feel that in the face of the conversation which took place between these parties and the circumstances surrounding them at the time they came out of the greenhouse Mr. Kerner should have known that this automobile would be backed up without any warning to him, whereas, certainly an equal number would feel that in view of the same conversation and circumstances the automobile would either remain where it was until Kerner got to a place where he could signal to it or, if Mr. Zerr subsequently changed his mind and concluded that he could get out of the driveway without Kerner's assistance, that he would signal to Kerner that the machine was being backed up in Kerner's direction, at a time when the latter's back was turned, and in any event, that the machine would not be run off the driveway and across a three-foot strip of grass onto a path reserved for pedestrians without some

kind of a warning being given to a man whose back the defendant knew was turned to him at the time. As I understand the opinion in *Consolidated Traction Company v. Scott*, if among honest minds such different conclusions might honestly be drawn from the facts in this case, then the court erred in withdrawing it from the jury.

Another leading case on the same subject and to the same effect is *Sutton v. Bell*, 79 N. J. L. 507, also decided by this court.

It has frequently been held by this court that:

“In passing upon a motion to non-suit, the court cannot weigh the evidence, but must take as true all evidence which supports the view of the party against whom the motion is made, and must give him the benefit of all legitimate inferences which are to be drawn therefrom in his favor.” *Andre v. Mertens*, 88 N. J. L. 626; *Thornton v. Cater*, 94 N. J. L. 435; *Mulroney v. O’Keefe*, 98 N. J. L. 853.

Respectfully submitted,

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