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Summons.

(Tested September 12, 1932.)

THE STATE OF NEW JERSEY to

[L. S.]

RUDOLPH EBERSTADT

10

YOU ARE SUMMONED to answer the annexed complaint of

MARY BUTLER

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 said 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

WITNESS, Hon. William S. Gummere of the said Court, at Trenton this twelfth day of September nineteen hundred and Thirty-two.

FRED BLOODGOOD,
Clerk.

30

THOMAS P. MCKENNA,
Attorney.

40

Complaint.

(Filed September 29, 1932.)

NEW JERSEY SUPREME COURT,
MONMOUTH COUNTY.

10

MARY BUTLER,
Plaintiff,

vs.

RUDOLPH EBERSTADT,
Defendant.

Action at Law.

20

The plaintiff, Mary Butler, residing at 71 Third Avenue, in the City of Long Branch, County of Monmouth and State of New Jersey, complaining, says that:

30

1. On or about May 31st, 1931, plaintiff, Mary Butler, was riding in a certain Packard Touring car, owned by the defendant, and which was then being driven and operated by Charles A. Lauter, the servant or agent of the defendant, in a westerly direction on the Harrison-Kearny Turnpike, in or near the town of Harrison, in the County of Hudson, in the State of New Jersey.

2. On or about said time and place one Nicholas L. Rizzolo was driving and operating a certain Oakland automobile in an easterly direction on the said Harrison-Kearny Turnpike.

3. It then and there became the duty of the said Charles A. Lauter, the servant or agent of the defendant, to so carefully, lawfully, prudently, and cautiously drive and operate the said motor-

40

Complaint

vehicle of the defendant that it should refrain from running into persons and motor-vehicles lawfully on the said Harrison-Kearny Turnpike.

4. On or about said time and place the said Charles A. Lauter, the servant and agent of the defendant, so carelessly, negligently, and reck- 10
lessly drove and operated the defendant's said motor-vehicle as to cause it to run into and strike with great force and violence the said automobile driven and operated by the said Nicholas L. Riz- zoli aforesaid.

5. The said Charles A. Lauter, servant or agent of the defendant, was negligent, careless and reck- 20
less in this that: (a) he drove and operated the motor-vehicle of the said defendant at a high, excessive, and illegal rate of speed; (b) he drove and operated the said motor-vehicle without regard for the rights and safety of others upon the said highway; (c) he maintained no control of said motor-vehicle; (d) no lookout was maintained upon the said highway for other motor-vehicles lawfully upon the same; (e) he operated said au- 30
tomobile without making reasonable and proper observation on the highway for the approach of vehicles lawfully on said highway; (f) he operated said motor-vehicle without proper brakes (g) the motor-vehicle of said defendant was not equipped with proper brakes or stopping appliances; (h) he operated said motor-vehicle in such a careless and negligent manner as to lose control thereof and to drive said motor-vehicle on the wrong side of the said highway; (i) he drove said motor- 40
vehicle of the defendant on the wrong or left side of the said highway; (j) he did not give the said Rizzoli the right of way on the said highway; (k)

Complaint

he was in diverse others respects careless and negligent in the operation of the motor-vehicle of the said defendant.

10 6. As a direct and approximate result of the negligence, carelessness, and recklessness of the defendant, by his servant or agent as aforesaid, and of the said Charles A. Lauter, as the servant and agent of the defendant, plaintiff, Mary Butler, was thrown out of the motor-vehicle of the defendant and rendered unconscious, and suffered concussions of the brain, shock to her nervous system, cerebral hemorrhages, laceration of the right leg at the middle third, with a large hematoma beneath it, full loss of the sight of left eye and partial loss of sight of right eye, and the plaintiff, 20 also suffered grave bodily injuries to wit: lacerations of the forehead, bodily bruises, cuts and contusions in and about the face, head, arms, and legs, which have left permanent scars which will forever disfigure her, the exact nature of which are as yet unknown to the plaintiff, all of which caused and still cause her great pain and suffering, and deprive and will continue to deprive her of the normal uses of her body and its members, and hampers and will continue to hamper her normal bodily movements, and the plaintiff is 30 informed and verily believes will permanently cause her pain and deprive her and hamper her of the normal uses of her body and its members.

7. By reason of the injuries caused as aforesaid, by the negligence, recklessness, and carelessness of the defendant, by his servant or agent as aforesaid, and by the said Charles A. Lauter, as the agent and servant of the defendant as aforesaid, the plaintiff was confined in the West 40 Hudson Hospital at or near the town of Harrison

Complaint

aforesaid for a long period of time, and was and is totally disabled from following her usual occupation, and has spent large sums of money for nursing, medical and surgical attentions and aid, devices, and medicines and other necessary expenditures so occasioned.

10

8. Wherefore, the plaintiff demands as damages against the defendant the sum of \$50,000 and costs of this suit.

THOS. P. MCKENNA,
Attorney for Plaintiff.

Answer.

(Filed October 18, 1932.)

20

NEW JERSEY SUPREME COURT,
MONMOUTH COUNTY.

MARY BUTLER,
Plaintiff,

vs.

RUDOLPH EBERSTADT,
Defendant.

Action at Law.

30

Defendant, residing at West Orange, New Jersey, says that—

FIRST DEFENCE.

1.—Paragraphs 1 and 2 of the Complaint are admitted.

2.—Paragraphs 3, 4, 5, 6, 7, and 8 of the Complaint are denied.

40

Answer

SECOND DEFENCE.

The alleged injuries complained of were caused by the sole negligence of Nicholas L. Rizzoli, who so operated and drove the Oakland automobile mentioned in the Complaint, as to cause it to col-
 10 lide with the automobile of defendant, and not by any act or default of defendant or by or through the act or default of any one for whose acts defendant is in any way responsible.

THIRD DEFENCE.

Plaintiff was a fellow-servant of Charles A. Lauter, the driver of defendant's automobile, and defendant is not liable to plaintiff for any injury which may have been sustained by her by or
 20 through any act or default of said Charles A. Lauter. Defendant avers, however, that no act or default of said Charles A. Lauter caused the alleged injuries of which plaintiff complains.

WALL, HAIGHT, CAREY & HARTPENCE,
 Attorneys for Defendant.

OBJECTION IN POINT OF LAW.

Before, at or upon the trial of this action defen-
 30 dant will object in point of law to the jurisdiction of the Court on the ground that at the time of the alleged injuries complained of plaintiff was a servant or employee of defendant, and that the respective rights and liabilities of the parties are governed by the Workmen's Compensation Act of the State of New Jersey, and not by the common law.

WALL, HAIGHT, CAREY & HARTPENCE,
 40 Attorneys for Defendant.

Reply.

(Filed October 27, 1932.)

NEW JERSEY SUPREME COURT,
MONMOUTH COUNTY.

<p>MARY BUTLER, <i>Plaintiff,</i> <i>vs.</i> RUDOLPH EBERSTADT, <i>Defendant.</i></p>	}	<p>10</p> <p>Action at Law.</p>
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Plaintiff, Mary Butler, replying to the Answer of the Defendant, says that: 20

1. She joins issue with the defendant on the Answer to paragraphs 3, 4, 5, 6, 7 and 8 of the first defense to the complaint.

2. She denies the allegations contained in the second defense of the said Answer.

3. She denies the allegations contained in the third defense of the said Answer.

THOS. P. MCKENNA,
Attorney of Plaintiff. 30

Demand for Bill of Particulars.

(Filed January 28, 1933.)

NEW JERSEY SUPREME COURT,
MONMOUTH COUNTY.

10

MARY BUTLER,
*Plaintiff,**vs.*RUDOLPH EBERSTADT,
Defendant.

Action at Law.

20

To Wall, Haight, Carey & Hartpence,
Attorneys of Defendant,
15 Exchange Place,
Jersey City, N. J.

Sirs:

Please take notice that the defendant, Mary Butler demands that the defendant serve upon the attorney for the plaintiff, within ten days after the service of this demand a verified Bill of Particulars, showing the following details:

30

1. What are the particulars of negligence of Nicholas L. Rizzoli, which caused his automobile to collide with the automobile of the defendant, causing the injuries complained of?

2. What are the particulars of the injuries thus caused by the collision of the automobile of the said Nicholas L. Rizzoli with the automobile of the defendant?

40

3. What are the particulars establishing that the plaintiff was a fellow servant of Charles A. Lauter, and why the defendant is not liable to the plaintiff for her injuries?

Demand for Bill of Particulars

4. Give the particular act or acts of the plaintiff or of the said Rizzoli, or his omissions, upon which plaintiff's cause of action is based.

5. And generally, but in detail, all matters that will give the plaintiff information as to the scope of the defendant's defence as claimed under his answer herein. 10

THOMAS P. MCKENNA,
Attorney of Plaintiff,
Long Branch, N. J.

Service acknowledged December 20, 1932.

WALL, HAIGHT, CAREY & HARTPENCE,
Attorneys for Defendant.

Notice to Strike Out Demand. 20

(Filed April 6, 1934.)

NEW JERSEY SUPREME COURT,
MONMOUTH COUNTY.

MARY BUTLER,
Plaintiff,

vs.

RUDOLPH EBERSTADT,
Defendant.

Action at Law. 30

To Thomas P. McKenna, Esq.,
Attorney for Plaintiff.

Sir:

PLEASE TAKE NOTICE, That on Saturday, January 14, 1933, at ten o'clock in the forenoon, or as 40

Notice to Strike Out Demand

10 soon thereafter as counsel may be heard, we will move before Hon. Rulif V. Lawrence, Circuit Court Judge, and Supreme Court Commissioner, at the Monmouth County Court House, in Freehold, New Jersey, to strike out the Demand for Bill of Particulars in above case served upon us by you on December 20, 1932, on the grounds that said Demand is untimely, improper and illegal and seeks to elicit from defendant information pertaining to defendant's defence, not material or relevant to plaintiff's case, and which does not constitute a proper subject of a Bill of Particulars.

Yours, &c.,

WALL, HAIGHT, CAREY & HARTPENCE,
Attorneys for Defendant.

20 Dated December 27, 1932.

Service acknowledged this 3 day of January,
A D., 1933.

THOS. P. McKENNA,
Attorney for Plaintiff.

30

40

Bill of Particulars.

(Filed March 12, 1934.)

NEW JERSEY SUPREME COURT,
MONMOUTH COUNTY.

<p>MARY BUTLER, <i>Plaintiff,</i> <i>vs.</i> RUDOLPH EBERSTADT, <i>Defendant.</i></p>	}	<p>10 Action at Law.</p>
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To Thomas P. McKenna, Esq.,
Attorney for Plaintiff,
Long Branch, New Jersey. 20

Sir:

The following are answers to the Demand for Bill of Particulars heretofore requested by you.

1. The negligence of Nicholas L. Rizzoli consisted of the following:

Said Nicholas L. Rizzoli operated his automobile carelessly, recklessly and negligently, at a high, excessive and unlawful rate of speed, on the wrong side of the highway, without giving any warning, without making proper observation for the approach of other vehicles on said highway, without regard for the rights and safety of the defendant and the plaintiff on said highway, without having his automobile under control and otherwise contrary to the statute in such case made and provided so as to collide with the automobile of the defendant causing whatever injuries were sustained by the plaintiff. 30
40

Bill of Particulars

2. Whatever injuries were sustained by the plaintiff were caused solely by the aforesaid negligence of Nicholas L. Rizzoli, in causing his automobile to collide with the automobile of the defendant.

10 3. Plaintiff was employed by defendant as a cook in his household on May 27th, 1931, for the period of one month at a monthly salary of \$80.00 per month plus her board and lodging, she to reside in defendant's home and plaintiff entered upon her course of employment on said date and continued in such employment in pursuance to the terms thereof. She was injured by an accident arising out of and during the course of her said employment on May 31st, 1931, in the performance
20 of her duties while riding in defendant's automobile, which was driven by defendant's chauffeur, Charles A. Lauter, who was a fellow-servant with plaintiff at the time of the occurrence of the accident.

30 On May 28th, 1931, defendant directed the plaintiff and said chauffeur, Charles A. Lauter, and one other fellow-servant, Mary Cassidy, a nurse, to proceed by defendant's automobile, driven by said Charles A. Lauter, with defendant's three children, Otis Davey, age 12, Rudolph, Jr., age 7, and Andrew, age 5, from defendant's residence at Merrywood Drive, West Orange, to defendant's summer home, located at Ramsenburg, Long Island, for the purpose of spending the holiday weekend there. While there, the plaintiff performed her duties as a cook and the other servants performed their respective duties as nurse and chauffeur.

40 On May 31st, 1931, in accordance with the defendant's directions, the plaintiff and said Mary

Bill of Particulars

Cassidy, the nurse, and Charles A. Lauter, the chauffeur, and defendant's three children left Ramsenburg, Long Island, in defendant's said automobile, driven by defendant's said chauffeur Charles A. Lauter, to return to defendant's said residence in West Orange, New Jersey. While in the course of that journey on a direct route from Ramsenburg, Long Island, to defendant's said residence at Merrywood Drive, West Orange, New Jersey, and while at or near the Harrison Kearney Turnpike, in and near the Town of Harrison and at or near the overhead bridge of the Lackawanna Railroad, an automobile of Nicholas L. Rizzoli and driven by him collided with defendant's said automobile in which defendant's said children and said plaintiff, and said nurse were riding and which was being driven by said chauffeur, Charles A. Lauter.

Whatever compensation plaintiff may be entitled to receive for her alleged injuries therefore is to be determined by the provisions of an Act, commonly known as the Workmen's Compensation Act of the State of New Jersey (P. L. 1911, Chapter 95) and the several amendments thereof and supplements thereto and not at common law.

4. Withdrawn. 30

5. See paragraphs 1, 2 and 3.

WALL, HAIGHT, CAREY & HARTPENCE,
Attorneys for Defendant.

(Indorsed)

Service of the within Bill of Particulars is hereby acknowledged this day of March, 1933.

THOS. P. MCKENNA, 40
Attorney for Plaintiff.

**Notice for Hearing of Objection in Point of
Law.**

(Filed April 6, 1934.)

NEW JERSEY SUPREME COURT,
MONMOUTH COUNTY.

10

MARY BUTLER,
Plaintiff,

vs.

RUDOLPH EBERSTADT,
Defendant.

Action at Law.

20 To:

THOMAS P. MCKENNA, Esq.,
Attorney for plaintiff,

Sir:

30

PLEASE TAKE NOTICE, That on Thursday, December 21, 1933, at 9:30 o'clock in the forenoon, or as soon thereafter as the Court may hear the same, we will move before Hon. Rulif V. Lawrence, Circuit Judge and Supreme Court Commissioner, at the Court House in Freehold, New Jersey, to fix a time and place for the hearing of the objection in point of law stated in the answer of the above-named defendant filed in the above-stated cause, before the trial of the action, and for the taking of the evidence necessary to determine the same, by depositions, or as the Court may direct, in accordance with law and the rules and practice

40

Notice for Hearing of Objection in Point of Law
of the Court. Upon said motion we will rely on
the record and the law applicable thereto.

Dated: December 15, 1933.

Yours, etc.,

WALL, HAIGHT, CAREY & HARTPENCE, 10
Attorneys for Defendant.

STATE OF NEW JERSEY, }
COUNTY OF HUDSON, } ss.:

JAMES R. LAIRD, JR., being duly sworn, accord-
ing to law, on his oath, says that he is associated
in the practice of law with Wall, Haight, Carey
& Hartpence, Attorneys for Defendant in this
cause, and that on December 16, 1933, he served 20
within Notice on Thomas P. McKenna, Attorney
for Plaintiff, by leaving a true copy thereof at
his office on Broadway in Long Branch, New Jer-
sey, with a person in charge thereof.

JAMES R. LAIRD, JR.

Sworn to and subscribed before me this }
18th day of December, A. D., 1933. }

GROVER J. CAREY, 30
Notary Public of New Jersey.
Commission expires May 11, 1937.

Amended Answer.

(Filed December 28, 1933.)

NEW JERSEY SUPREME COURT,
MONMOUTH COUNTY.

10

MARY BUTLER,
*Plaintiff,**vs.*RUDOLPH EBERSTADT,
Defendant.

} Action at Law.

20

Defendant, residing at West Orange, New Jersey, says that—

FIRST DEFENCE.

1.—Paragraphs 1 and 2 of the Complaint are admitted.

2.—Paragraphs 3, 4, 5, 6, 7 and 8 of the Complaint are denied.

SECOND DEFENCE.

30

The alleged injuries complained of were caused by the sole negligence of Nicholas L. Rizzolo, who so operated and drove the Oakland automobile mentioned in the Complaint, as to cause it to collide with the automobile of defendant, and not by any act or default of defendant or by or through the act or default of any one for whose acts defendant is in any way responsible.

THIRD DEFENCE.

40

Plaintiff was a fellow-servant of Charles A. Lauter, the driver of defendant's automobile, and

Amended Answer

defendant is not liable to plaintiff for any injury which may have been sustained by her by or through any act or default of said Charles A. Lauter. Defendant avers, however, that no act or default of said Charles A. Lauter caused the alleged injuries of which plaintiff complains.

10

FOURTH DEFENCE.

Plaintiff was employed by defendant as a cook in his household on May 27th, 1931, for the period of one month at a monthly salary of \$80.00 per month plus her board and lodging, she to reside in defendant's home; and plaintiff entered upon her course of employment on said date and continued in such employment in pursuance to the terms thereof. She was injured by an accident arising out of and during the course of her said employment on May 31st, 1931, in the performance of her duties while riding in defendant's automobile, which was driven by defendant's Chauffeur, Charles A. Lauter, who was a fellow-servant with plaintiff at the time of the occurrence of the accident.

20

On May 28th, 1931, defendant directed the plaintiff and said Chauffeur, Charles A. Lauter, and one other fellow-servant, Mary Cassidy, a nurse, to proceed by defendant's automobile driven by said Charles A. Lauter with defendant's three children, Otis Davey, age 12, Rudolph Jr., age 7, and Andrew, age 5, from defendant's residence at Merrywood Drive, West Orange, to defendant's Summer home located at Ramsenburg, Long Island, for the purpose of spending the holiday weekend there. While there, the plaintiff performed her duties as a cook and the other servants performed their respective duties as nurse and chauffeur.

30

40

Amended Answer

On May 31st, 1931, in accordance with the defendant's directions, the plaintiff and said Mary Cassidy, the nurse, and Charles A. Lauter, the chauffeur and defendant's three children left Ramsenburg, Long Island, in defendant's said automobile driven by defendant's said chauffeur, Charles A. Lauter, to return to defendant's said residence in West Orange, New Jersey. While in the course of that journey on a direct route from Ramsenburg, Long Island, to defendant's said residence at Merrywood Drive, West Orange, New Jersey, and while at or near the Harrison Kearny Turnpike, in and near the Town of Harrison and at/or near the overhead bridge of the Lackawanna Railroad, an automobile of Nicholas L. Rizzolo and driven by him collided with defendant's said automobile in which defendant's said children and said plaintiff, and said nurse were riding and which was being driven by said chauffeur, Charles A. Lauter.

On or about May 27th, 1933, plaintiff elected to submit to the jurisdiction of the New Jersey Department of Labor, Workmen's Compensation Bureau, in that she filed in that department in Trenton, a petition for compensation in which Rudolph Eberstadt, the above-named defendant, was named as the respondent and which petition set forth the same accident and injuries as are set forth in the within Complaint and alleges that the petitioner was in the employ of said defendant, when these injuries were sustained and that they resulted from an accident which arose in the course and out of said employment, and which said petition was sworn to by said Mary M. Butler under oath, on the 24th day of May, 1933, and in which she claims that she is entitled to have

Amended Answer

her compensation for said injuries fixed and determined, under the provisions of the act entitled "An Act prescribing the liability of an employer to make compensation for injuries received by an employee in the course of the employment, establishing an elective schedule of compensation and regulating procedure for the determination of liability and compensation thereunder", approved April 4th, 1911, and the Acts supplemental thereto and amendatory thereof, and that your petitioner may be awarded her costs in this proceeding, and such other or further relief as may be proper. 10

An answer was filed by the said Rudolph Eberstadt in said compensation case, in which he admitted that said Mary Butler was his employee and was injured on May 31st, 1931, in an accident which arose out of and during the course of her employment and did not contest her right to receive compensation for said injuries under the Act aforesaid but merely put in issue the extent of these alleged injuries and the amount of the compensation to which said plaintiff would be entitled under the said statute. 20

Annexed hereto and made a part hereof are copies of said petition and answer. 30

Whatever compensation plaintiff may be entitled to receive for her alleged injuries, therefore, is to be determined by the provisions of the Act aforesaid, and not at common law.

OBJECTION IN POINT OF LAW.

Before, at or upon the trial of this action defendant will object in point of law to the jurisdiction of the Court on the ground that at the time of the alleged injuries complained of, plain- 40

Amended Answer

tiff was a servant or employee of defendant, and that the respective rights and liabilities of the parties are governed by the Workmen's Compensation Act of the State of New Jersey, and not by common law.

10 WALL, HAIGHT, CAREY & HARTPENCE,
Attorneys for Defendant.

Form No. 20.

NEW JERSEY DEPARTMENT OF LABOR
WORKMEN'S COMPENSATION BUREAU
Trenton, N. J.

EMPLOYEE'S CLAIM PETITION FOR COMPENSATION

20

MARY BUTLER,
Petitioner,

vs.

RUDOLPH EBERSTADT,
Respondent.

30 Received at Trenton May 27, 1933.
Claim Petition No.—
Date of accident—May 31, 1931.
Attorney for Petitioner—Thomas P. McKenna,
Long Branch, N. J.

*To the Workmen's Compensation Bureau of New
Jersey:*

The claimant respectfully alleges the following
facts:

40

Amended Answer

1. What is your name?—Mary Butler.
2. Where do you live?—71 Third Avenue, Long Branch, New Jersey.
3. Sex—Female.
4. Age—44. 10
5. Married—Widow.
6. By whom were you employed at the time of the accident? (Give name and business address)—Rudolph Eberstadt, Merrywood Drive, West Orange, New Jersey.
7. What was the business of your employer?—Don't know.
8. Did you give written notice to your employer at the time you were hired, or later, that the Compensation Law should not apply to you?—No. 20
9. Did you receive such notice from your employer?—No.
10. Did your employer have knowledge of your accident?—Yes.
11. Did you notify your employer of your accident?—Yes.
12. If so, on what date?—May 31st, 1931. 30
13. Have you made claim to your employer for compensation?—No.
14. What was your regular occupation, and what kind of work were you doing at the time of the accident?—Keeping rooming house. Temporarily helping.
15. When did the accident happen?—May 31, 1931. 40

Amended Answer

16. Where did the accident happen?—On Harrison-Kearny Turnpike.

17. What was the nature of the accident, and how did it happen?—Automobile accident, cars collided.

10 18. On what date were you compelled to stop work because of the injury?—May 31, 1931.

19. On what date were you well enough to work again?—Not since.

20. If still disabled, on what date do you think you will be able to work?—Unable to estimate.

21. Give nature of any injury from which you will recover—From the bruises.

20 22. If any permanent injury has resulted, either amputation or loss of usefulness of any member, or impairment of any physical organ, explain fully—Sight, head and nervous system and other injuries which require explanation from physician.

23. Were you wages fixed by piece-work?—No.

24. If so, what was your average weekly wage?—

30 25. If wages were fixed by the hour, state rate per hour—

26. Give number of hours in an ordinary working day—

27. Give number of days in an ordinary working week—

28. State the amount of weekly wages—None agreed upon.

Amended Answer

29. How much money have you received from your employer as compensation (not medical aid) since your accident?—None.

30. Has your employer promised to pay you any compensation?—No.

31. If so, how much?— 10

32. Was medical aid required?—Yes.

33. Did you receive medical, surgical or hospital service?—Yes.

34. Did you request your employer to furnish these services?—No.

35. Were they furnished?—Yes.

36. If so, between what dates?—Since May 31, 1931, to date. 20

37. If not what sum did you expend for medical, surgical or hospital services?—About \$750.00.

38. Give name and address of physician and hospital—Physicians at Hospital, West Hudson Hospital.

39. What other facts are there which you believe important?—Instituted an action against Rudolph Eberstadt in the New Jersey Supreme Court for \$50,000.00. 30

40. Are you willing that the Compensation Bureau endeavor to secure compensation for you, by agreement, before calling for an official hearing?—

41. If you are unwilling state reasons—

Your Petitioner therefore prays that your Honorable Bureau will determine the amount of com- 40

Amended Answer

TO THE RESPONDENT.

The foregoing claim petition has been presented by the petitioner to the Workmen's Compensation Bureau for hearing and determination in accordance with the provisions of the Workmen's Compensation Act. 10

We hereby notify you that unless an answer shall within ten days after the service of this notice, be filed in duplicate with the Secretary of the Bureau, in the State House at Trenton, the facts alleged in the petition will be deemed to be admitted and no testimony will be required from the petitioner to prove such facts.

WORKMEN'S COMPENSATION BUREAU
W. E. STUBBS,
Secretary. 20

Form No. 23.

NEW JERSEY DEPARTMENT OF LABOR
WORKMEN'S COMPENSATION BUREAU
Trenton, N. J.

RESPONDENT'S ANSWER TO EMPLOYEE'S CLAIM
PETITION.

MARY BUTLER,
Petitioner,

vs.

RUDOLPH EBERSTADT,
Respondent.

30

Claim Petition No. 25913.

Sept. 11, 1933.

Attorney for Respondent—Edwards, Smith &
Dawson, 1 Exchange Pl., Jersey City, N. J. 40

Amended Answer

In answer to Claim Petition filed in this cause:

1. What is the petitioner's name?—Mary Butler.
2. Where does he reside?—71 Third Avenue, Long Branch, N. J.
- 10 6. Was the petitioner in your employ at the time of the accident?—Yes.
7. State your business.—Broker.
8. Did you receive written notice from the Petitioner at the time of hiring, or later, that the Compensation Law was not to apply to him?—No.
9. Did you give such notice to him?—No.
- 20 10. When did you first have knowledge of this accident?—
11. Did you receive notice of this accident from the Petitioner?—
12. Is so, on what date?—
13. Has any claim for compensation been made?—Yes, by this petition.
- 30 14. What was the Petitioner's regular occupation, and what kind of work was he doing at the time of the accident?—Petitioner was engaged as a cook. At the time of the accident, petitioner was riding from Respondent's summer home at Ramsenburg, Long Island, to Respondent's residence in West Orange, and at the time of the accident, was engaged in her employment.
15. When did the accident happen?—May 31, 1931.

Amended Answer

16. Where did the accident happen?—On a public highway in Kearny, N. J.
17. What was the nature of the accident, and how did it happen?—Respondent's car collided with an automobile negligently operated by Nicholas L. Rizzolo. 10
18. On what date was the petitioner compelled to stop work because of injury?—At once.
19. On what day was the injured well enough to work again?—Shortly thereafter.
20. If still disabled, on what date do you estimate he will be able to work?—
21. Give your understanding of the nature of any injury from which he should recover— 20
22. Give your understanding of any permanent injury which has resulted, either amputation or loss of usefulness of any member or impairment of any physical organ. Explain fully.—
23. Were the wages fixed by piece-work?—
24. If so, what was the average weekly wage of the injured?—
25. If wages were fixed by the hour, state rate per hour— 30
26. Give number of hours in an ordinary working day—
27. Give number of days in an ordinary working week—
28. State the amount of weekly wages—Wages were \$80. per month plus board and lodging.
29. How much money have you paid the injured as compensation (not including medical aid) 40

Amended Answer

since the accident?—Respondent has tendered compensation payments and mailed drafts therefor to petitioner, but petitioner has failed to use said drafts.

10 30. Have you promised to pay compensation?
—Respondent has offered to pay compensation.

31. If so, how much?—

32. Was medical aid required?—Yes.

34. Were you requested to supply the necessary medical service required by law?—No.

35. Did you furnish this service?—Yes.

36. If so, between what dates?—

20 37. If not, give reason for failure to do so.

38. Give name of physician and hospital rendering service at your direction—Respondent has paid for treatment rendered petitioner at West Hudson Hospital; has paid Dr. Dukes and Dr. J. F. Coughlin.

30 39. What other facts are there which you believe important? If you deny that compensation is payable in this case explain fully your reasons for this conclusion—Respondent does not deny that compensation is payable in this case. Respondent has paid all medical expenses; Respondent has tendered compensation payments and is and always has been ready and willing to pay petitioner in accordance with the Workmen's Compensation Laws of the State of New Jersey.

RUDOLPH EBERSTADT,
Respondent.

40 By EDWARDS, SMITH & DAWSON,
Attorneys.

Amended Answer

STATE OF NEW JERSEY, }
 COUNTY OF HUDSON, } ss.:

GEORGE ECHELMAN, of full age, being duly sworn according to law, on his oath deposes and says: That he is associated with the firm of Edwards, Smith & Dawson, attorneys for respondent named in the foregoing answer to claim petition; that he has read the same and is familiar with the contents thereof; and that the matters and things therein set forth are true according to the best of his knowledge and belief. 10

GEORGE ECHELMAN,
 Respondent.

Subscribed and sworn to before me, this 11th day of September, 1933, at Jersey City, N. J. 20

ALLEN C. MATHIAS,
 An Attorney at Law of New Jersey.

(This affidavit may be sworn to before a Deputy Commissioner or a Compensation Referee, or any other person authorized to administer an oath.)

Service of the within Amended Answer is hereby acknowledged this 28 day of December, 1933; Notice and Order waived. 30

THOMAS P. MCKENNA,
 Attorney of Plaintiff.

Reply to Amended Answer.

(Filed January 8, 1934.)

NEW JERSEY SUPREME COURT,
MONMOUTH COUNTY.

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<p>MARY BUTLER, <i>Plaintiff,</i></p> <p style="text-align: center;"><i>vs.</i></p> <p>RUDOLPH EBERSTADT, <i>Defendant.</i></p>	}	Action at Law.
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The plaintiff, Mary Butler, replying to the amended answer of the defendant, says that:

1. She joins issue with the defendant as to paragraph 2 of the first defense contained in the amended answer.

2. She denies the allegations contained in the second, third and four defenses of the said amended answer.

THOMAS P. MCKENNA,
Attorney of Plaintiff.

30

Verdict.

(Rendered January 11, 1934.)

We, the jury find that Mary Butler's employment was casual and find in favor of plaintiff and against the defendant and award damages to the amount of \$20,000.

40

Postea.

(Filed January 16, 1934.)

NEW JERSEY SUPREME COURT,
MONMOUTH COUNTY.

<p style="text-align: center;">MARY BUTLER, <i>Plaintiff,</i></p> <p style="text-align: center;"><i>vs.</i></p> <p style="text-align: center;">RUDOLPH EBERSTADT, <i>Defendant.</i></p>	}	<p>10</p> <p>Action at Law.</p>
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This action was tried before Hon. Rulif V. Lawrence, Judge of the Circuit Court with a jury at the Monmouth Circuit, on January 11th, 1934. 20

The jury rendered a special verdict against the defendant and in favor of the plaintiff that plaintiff's employment referred to in the said action was "casual" employment, and a general verdict against the defendant and in favor of the plaintiff for the sum of \$20,000, with costs to be taxed in favor of the plaintiff.

RULIF V. LAWRENCE,
Judge. 30

Entered January 13, 1934.

Rule for Judgment.

(Entered January 16, 1934.)

NEW JERSEY SUPREME COURT,

10

MARY BUTLER,
*Plaintiff,**vs.*RUDOLPH EBERSTADT,
Defendant.

Action at Law.

On Postea.

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It is ordered that judgment be, and hereby is,
entered in favor of plaintiff and against the de-
fendant for the sum of twenty thousand dollars,
besides costs to be taxed nisi.

Entered January 16, 1934.

On motion of

THOMAS P. McKENNA,
Atty.

\$20,000.00

90.18

30

\$20,090.18

R. to S. C.

Above R. to S. C. dischgd and verdict reduced to

\$14,000.00

90.18

\$14,090.18

See Min. Jan. Term, 1934, under date of Mar.
19, 1934, costs on R. to S. C. \$18.25.

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Judgments Vol. 49, pg. 522.

Rule to Show Cause and Stay.

(Entered January 20, 1934.)

NEW JERSEY SUPREME COURT,

MONMOUTH COUNTY.

<p>MARY BUTLER, <i>Plaintiff,</i> <i>vs.</i> RUDOLPH EBERSTADT, <i>Defendant.</i></p>	}	<p>10</p> <p>Action at Law.</p>
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Application for this rule having been made to me, the Judge before whom the above-stated cause was tried, on January 16th, 1934, being within six days after the rendering of the verdict therein,—

It is ordered that the above-named plaintiff Mary Butler show cause before me, at the Court House, in Freehold, New Jersey, on Saturday, the Tenth day of February, A. D. 1934, at ten o'clock in the forenoon, or as soon thereafter as the Court may hear the same, why the verdict rendered in her favor and against the above-named defendant Rudolph Eberstadt in said cause on January 11th, 1934, should not be set aside and a new trial granted, upon the sole ground that said verdict is excessive, all exceptions and objections noted by defendant upon the trial of the cause

Rule to Show Cause and Stay

being hereby expressly reserved, and execution to be stayed until the further order of the Court.

Dated, January 19, 1934.

RULIF V. LAWRENCE
Circuit Court Judge.

10

Entered January 20, 1934,
On motion of,

WALL, HAIGHT, CAREY & HARTPENCE
Attorneys for Defendant.

A true copy

FRED L. BLOODGOOD
Clerk.

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Continuance.

(Entered February 3, 1934.)

NEW JERSEY SUPREME COURT,

MONMOUTH COUNTY.

<p style="text-align: center;">MARY BUTLER, <i>Plaintiff,</i></p> <p style="text-align: center;"><i>vs.</i></p> <p style="text-align: center;">RUDOLPH EBERSTADT, <i>Defendant.</i></p>	}	<p>10</p> <p>Action at Law. On Rule to Show Cause.</p>
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Upon good cause shown,—IT IS ORDERED that the rule to show cause why the verdict in above-stated cause should not be set aside and a new trial granted, dated January 19, 1934, returnable February 10, 1934, be and the same hereby is continued to the 24th day of February, A. D., 1934, at the same hour and place and with like effect in all respects as in said rule contained.

Dated, February 3, 1934.

RULIF V. LAWRENCE
Circuit Court Judge.

Entered February 3, 1934,
On motion of,

WALL, HAIGHT, CAREY & HARTPENCE
Attorneys for Defendant.

(Indorsed)

Service of a copy of within Continuance acknowledged.

Feby. 5, 1934.

THOS. P. MCKENNA,
Atty. for Pltff.

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Conclusions.

(Filed March 1, 1934.)

NEW JERSEY SUPREME COURT,
MONMOUTH COUNTY.

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MARY BUTLER,	}
<i>Plaintiff,</i>	
vs.	
RUDOLPH EBERSTADT,	}
<i>Defendant.</i>	

20 Action at Law. On defendant's rule to show cause.

For the rule, Wall, Haight, Carey & Hartpence.

Opposed, Thomas P. McKenna and Theodore D. Parsons.

LAWRENCE, C. C. J.:

30 This was an accident case, tried before the court and a jury at the Monmouth Circuit. A verdict was returned in favor of plaintiff for \$20,000. Under the rule to show cause taken out in behalf of defendant, it was argued that this award is excessive and should be reduced. The suit involved a collision between an automobile of defendant, driven at the time by his chauffeur, and in which plaintiff was riding as a passenger, and another car. It appeared that she was a cook in the household of defendant and was returning with the family from Southampton—where they had spent the week-end to their home in Orange.

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Conclusions

The accident occurred under the Lackawanna Railroad bridge, on the Harrison Turnpike, in Essex County.

The collision was of sufficient force to throw her from the automobile to the pavement. When picked up, she was semi-conscious, bleeding from the nose and forehead, and at the hospital to which she was taken, she was also found to have cuts on her legs and bruises and lacerations about her body. She remained in the hospital two months under treatment, complaining of headaches and dizzy spells, inability to see clearly out of the left eye, some difficulty in hearing on that side and a ringing in the ear. After leaving the hospital, she moved to Long Branch and later, because of continued dizziness, went to another hospital where she remained for four weeks. At the trial, she appeared rather sluggish, although entirely coherent and responsive, and it was claimed that she had lost considerable weight. The physician who first attended her and an eye and ear specialist who had treated her expressed the opinion that she had suffered an intercranial injury and that her sight and hearing had been permanently affected to a considerable degree. Specialists, who had been called by defendant to examine her, were not inclined to go as far, but apparently entertained the view that she had suffered a nervous shock in addition to the physical injuries, discounted the theory of an intercranial injury, and suggested that she would in all likelihood recover a fairly normal state of health after the present litigation had been concluded. Plaintiff appeared to be between forty-five and fifty years of age. The medical and hospital bills stated to have been incurred amounted to approximately \$165. No

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Conclusions

X-ray pictures were produced and it was not claimed that there had been a fracture of the skull.

10 As indicated, the sole question argued under the rule was whether or not the sum awarded plaintiff is excessive. Considering the evidence offered at the trial, and the cases cited below, the conclusion is that it is. See *Dwyer v. N. Y. Telephone Co.*, 4 N. J. Misc., 986; *Crawford v. American Stores Co.*, 5 N. J. Misc., 413; *Clarkson v. Ley*, 7 N. J. Misc., 332; *Hehle v. Marathon Bus Line*, *Ibid.* 629; *Dolgin v. McDonald*, 8 N. J. Misc., 572; *Mendez v. Gurtner*, *Ibid.*, 917; *Alisaukas v. Itro*, 9 N. J. Misc., 1057; *Kalogerakas v. Public Service Co-ordinated Transport*, 10 N. J. Misc., 175; *Schoenfelder v. Pope*, *Ibid.*, 247; and *Riebel v. Liddle*, *Ibid.*, 437.

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If plaintiff consents to a reduction of the verdict to \$14,000, the rule to show cause will be discharged, otherwise it will be made absolute as to damages only.

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Order to Elect, &c.

(Entered March 12, 1934.)

NEW JERSEY SUPREME COURT,

MONMOUTH COUNTY.

MARY BUTLER,
Plaintiff,

vs.

RUDOLPH EBERSTADT,
Defendant.

Action at Law.

On Rule to
Show Cause.

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A rule to show cause why the verdict in above-stated action should not be set aside upon the ground only that the same was excessive, having been allowed, and the same having been duly argued, and the Court having filed conclusions directing that said verdict should be set aside and a new trial granted as to damages only unless the plaintiff should elect to accept the sum of fourteen thousand dollars (\$14,000.) in lieu of said verdict, which was for the sum of twenty thousand dollars (\$20,000.),—

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It is thereupon ordered that said plaintiff file her election to accept said reduction of said verdict to fourteen thousand dollars (\$14,000.) with the Clerk of this Court, at Trenton, within ten days from and after the service of a copy of this order (which may be uncertified) upon her attorney of record, Thomas P. McKenna, Esq., either personally or by leaving the same at his law office in Long Branch, New Jersey, or that, in default of the filing of said election as above directed, said rule to show cause be made absolute and said ver-

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Order to Elect, &c.

dict be set aside, and a new trial ordered, as to damages only, without further order.

Dated March 10, 1934.

RULIF V. LAWRENCE,
Circuit Court Judge.

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Entered March 12, 1934,
On motion of

WALL, HAIGHT, CAREY & HARTPENCE,
Attorneys for Defendant.

(Indorsed)

Service acknowledged March 14, 1934.

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THOS. P. MCKENNA,
Atty. of Plff.

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Consent to Accept Reduction of Verdict.

(Filed March 19, 1934.)

NEW JERSEY SUPREME COURT,
MONMOUTH COUNTY.

<p>MARY BUTLER, <i>Plaintiff,</i></p> <p style="text-align: center;"><i>vs.</i></p> <p>RUDOLPH EBERSTADT, <i>Defendant.</i></p>	}	<p>10</p> <p>Action at Law.</p>
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I hereby consent to the reduction of the verdict rendered in the above action from \$20,000 to \$14,000, and that judgment may be entered accordingly.

Dated March 13, 1934.

THOMAS P. McKENNA,
Attorney of Plaintiff.

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**Rule Discharging Rule to Show Cause and
Reducing Verdict.**

(Entered March 19, 1934.)

NEW JERSEY SUPREME COURT.

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MARY BUTLER,
Plaintiff,

vs.

RUDOLPH EBERSTADT,
Defendant.

Action at Law.

On Rule to
Show Cause.

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A rule to show cause why the verdict in the above cause should not be set aside and a new trial granted, having been heretofore allowed and entered, and said rule coming on to be heard before the court, and the court having heard the argument of counsel, and duly considered the reasons filed, and being of opinion that unless the plaintiff, Mary Butler, elect to accept the sum of Fourteen Thousand (\$14,000) Dollars in lieu of the verdict rendered in the case, said rule to show cause should be made absolute, and said plaintiff consented to accept said sum of Fourteen Thousand (\$14,000) Dollars in lieu of said verdict,

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It is ordered that said rule to show cause be discharged, with costs.

Dated March 13, 1934.

Entered Mar. 19, 1934,
On motion of Thomas P. McKenna,
Attorney of Plaintiff.

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Judgment.

(Entered January 16, 1934.)

This action was tried before Hon. Rulif V. Lawrence, Judge of the Circuit Court with a jury at the Monmouth Circuit, on January 11th, 1934.

The jury rendered a special verdict against the defendant and in favor of the plaintiff that plaintiff's employment referred to in the said action was "casual" employment, and a general verdict against the defendant and in favor of the plaintiff for the sum of \$20,000, with costs to be taxed in favor of the plaintiff.

10

Subsequently to the rendition of said verdict a rule to show cause why the verdict should not be set aside and a new trial granted was allowed to said defendant which said rule was argued before Rulif V. Lawrence, Circuit Court Judge, and said Judge having ordered that if the plaintiff Mary Butler would consent to reduce her verdict as against the defendant to \$14,000.00 said rule to show cause would be discharged otherwise it would be made absolute, and the said plaintiff having consented to accept said reduced verdict and said rule to show cause having been discharged,

20

Whereupon it is adjudged that the plaintiff Mary Butler do recover of the said defendant Rudolph Eberstadt the sum of Fourteen Thousand dollars damages together with her costs which have been taxed at \$14,000.00 the sum of One Hundred eight dollars and forty-three cents, making in the whole the sum of Fourteen Thousand one hundred eight dollars and forty-three cents.

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Judgment signed and entered January 16, 1934.

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THOMAS J. BROGAN,
Chief Justice.

Notice of Appeal.

(Filed March 23, 1934.)

NEW JERSEY SUPREME COURT,

MONMOUTH COUNTY.

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<p>MARY BUTLER, <i>Plaintiff,</i></p> <p style="text-align: center;"><i>vs.</i></p> <p>RUDOLPH EBERSTADT, <i>Defendant.</i></p>	}	Action at Law.
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To the plaintiff, Mary Butler, and/or her Attorney, Thomas P. McKenna, Esq.

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PLEASE TAKE NOTICE that Rudolph Eberstadt, the defendant in the above entitled action, appeals from the whole of the judgment entered in this cause in the above entitled Court to the Court of Errors and Appeals of New Jersey in the last resort in all causes.

WALL, HAIGHT, CAREY & HARTPENCE,
Attorneys of Defendant-Appellant.

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Dated: March 21st, 1934.

Service of the within Notice of Appeal is hereby acknowledged this 21st day of March, 1934.

THOMAS P. MCKENNA,
Attorney for Plaintiff.

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Judgment signed and entered January 10, 1934.
Thomas J. Brown,
Chief Justice.

Recognizance on Appeal.

(Filed March 23, 1934.)

SUPREME COURT,
STATE OF NEW JERSEY
MONMOUTH COUNTY CIRCUIT

10

MARY BUTLER,
Plaintiff-Respondent,

against

RUDOLPH EBERSTADT,
Defendant-Appellant.

KNOW ALL MEN BY THESE PRESENTS, That we, 20
RUDOLPH EBERSTADT, as PRINCIPAL, and COLUMBIA
CASUALTY COMPANY, a corporation organized and
existing under the laws of the State of New York,
and authorized to transact business in the State
of New Jersey, as SURETY, are held and firmly
bound unto MARY BUTLER in the sum of TWENTY-
EIGHT THOUSAND TWO HUNDRED SIXTEEN AND
86/100 (\$28,216.86) DOLLARS, for the payment of
which sum well and truly to be made, we bind our- 30
selves, our successors and assigns, jointly and
severally, each in the whole sum, firmly by these
presents.

SEALED with our SEALS and DATED this 22nd day
of March, Nineteen Hundred and Thirty-four.

WHEREAS, a verdict was rendered in the New
Jersey Supreme Court, Monmouth County Circuit,
in a suit therein pending wherein Mary Butler is
plaintiff and Rudolph Eberstadt is defendant, for

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Recognizance on Appeal

10 the sum of Twenty Thousand Dollars (\$20,000.00), which verdict was later reduced by the Court to Fourteen Thousand Dollars (\$14,000.00) and a judgment entered thereon for Fourteen Thousand One Hundred Eight and 43/100 Dollars (\$14,108.43) damages and costs; and the defendant, Rudolph Eberstadt, is about to appeal from said judgment of the New Jersey Supreme Court, Monmouth County Circuit, to the New Jersey Court of Errors and Appeals.

20 Now, THEREFORE, the condition of this recognizance is such, that if the said Rudolph Eberstadt, defendant-appellant, shall prosecute his appeal with effect, and also pay and satisfy said judgment, together with all costs and damages adjudged in the former court, and all costs and damages to be awarded for delay of execution, should said judgment be affirmed, then this recognizance to be void; otherwise to remain in full force and virtue.

Witness:

DONALD R. BALDWIN

ANNA FOX

RUDOLPH EBERSTAT (L. S.)

(RUDOLPH EBERSTADT)

30 COLUMBIA CASUALTY COMPANY

By: ARTHUR W. DILLEY (L. S.)

Attorney-in-Fact

Recognizance on Appeal

[SEAL] COLUMBIA CASUALTY COMPANY
One Park Avenue, New York, N. Y.

FINANCIAL STATEMENT
as of December 31, 1933

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* This item shows valuations for Bonds and Stocks in accordance with rules of New York Insurance Department.

ASSETS		
Real Estate	\$	25,000.00
*Bonds and Stocks		4,757,090.33
Cash in Bank and Office		366,093.23
Interest due and accrued		64,085.86
Premiums in course of collection (not overdue)		235,444.70
Other Assets	135,328.08	\$5,583,042.20
LIABILITIES		
<i>Reserves:</i>		
Unearned Premiums	\$1,040,441.22	
Claims in process of adjustment....	1,455,989.00	
Commission on premiums in course of collection	65,491.23	
Taxes and Sundries.....	92,420.58	
<i>Contingency Reserve:</i> representing difference between value carried in assets and actual December 31, 1933 market quotations on all Bonds and Stocks owned.....	641,372.83	
Capital, paid up.....	\$1,000,000.00	
Surplus over all liabilities	1,287,327.34	
Surplus to Policyholders	2,287,327.34	\$5,583,042.20

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STATE OF NEW YORK, }
COUNTY OF NEW YORK, }SS.:

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FRANK P. CASEY being duly sworn, says: that he is Attorney-in-Fact of the COLUMBIA CASUALTY COMPANY, and that, to the best of his knowledge and belief, the foregoing is a true and correct statement of the financial condition of said Company as of December 31, 1933.

FRANK P. CASEY [SEAL]
Attorney-in-Fact

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Recognizance on Appeal

Subscribed and sworn to before me this 22nd
day of March, 1934.

MARGARET GILLIGAN

Notary Public Kings County
Kings County Clerk No. 556
Kings County Register's No. 5188
New York County Clerk No. 405
New York County Register's No. 5-G-226
Commission expires March 30, 1935

10

[SEAL] COLUMBIA CASUALTY COMPANY
One Park Avenue, New York, N. Y.

Fidelity and Surety Department

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POWER OF ATTORNEY-GENERAL

KNOW ALL MEN BY THESE PRESENTS:

THAT the COLUMBIA CASUALTY COMPANY, a corporation of the State of New York, has made, constituted and appointed, and by these presents does make, constitute and appoint ARTHUR W. DILLEY, of Jersey City, N. J., its true and lawful attorney-in-fact for it and in its name, place and
stead to execute on behalf of the said Company,
as surety, any bond, undertaking or contract of
suretyship, except undertakings guaranteeing the
payment of principal of loans or the interest
thereon, not to exceed the sum of Fifty thousand
dollars (\$50,000.00);

30

The authority hereby conveyed shall expire and terminate one year from the date hereof.

THIS Power of Attorney is made and executed pursuant to and by authority of the following By-Laws and Resolutions:

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Recognizance on Appeal

At a regular meeting of the Board of Directors of the COLUMBIA CASUALTY COMPANY, held at its office in the City of New York, on the 4th day of February, 1920, a quorum being present, the following By-Laws were unanimously adopted:

“ARTICLE III. OFFICERS.

10

“Section 1. The president or a vice-president shall have power and authority to appoint assistant secretaries, resident vice-presidents, resident secretaries, resident assistant secretaries, and attorneys-in-fact and to give such appointees full power and authority to sign and to seal with the company’s seal, where required, all policies, bonds, recognizances, stipulations and all underwriting undertakings, and may at any time remove any such appointees and revoke the authority given them.”

20

“ARTICLE V. SIGNING OF POLICIES, ETC.

“Section 1. All policies, bonds, recognizances, stipulations and all underwriting undertakings shall be valid: (a) when signed by the president or a vice-president or a resident vice-president or a departmental manager, as one representative of the company, and the secretary or assistant secretary or a resident assistant secretary or other duly authorized official or agent of the company, as the other representative of the company, and when sealed with the seal of the company where required by law; or (b) when executed by an attorney-in-fact.”

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AND at a regular meeting of the Board of Directors of the COLUMBIA CASUALTY COMPANY, held at its office in the City of New York on the 20th day of April, 1920, a quorum being present, the following Resolution was unanimously adopted:

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Recognizance on Appeal

10 “Resolved, that attorneys-in-fact are hereby authorized to verify any affidavit required to be attached to bonds, recognizances, or contracts of indemnity, and all other writings obligatory in the nature thereof, and are also authorized and empowered to certify to a copy of any of the By-Laws of the Company and to any Resolution adopted by its Board of Directors.”

AND at a regular meeting of the Board of Directors of the COLUMBIA CASUALTY COMPANY, held at its office in the City of New York on the 11th day of February, 1930, a quorum being present, the following Resolution was unanimously adopted:

20 “Resolved, that any two assistant secretaries, appointed by the president or a vice-president, shall have power and authority to appoint attorneys-in-fact and to give such appointees full power and authority to sign and to seal with the Company’s seal, where required, all policies, bonds, recognizances, stipulations and all underwriting undertakings, and may at any time remove any such appointees and revoke the authority given them.”

30 IN WITNESS WHEREOF, the COLUMBIA CASUALTY COMPANY has caused its official seal to be hereunto affixed and these presents to be signed by its Assistant Secretary and attested by its Assistant Secretary this 15th day of November, 1933.

[SEAL]

COLUMBIA CASUALTY COMPANY
By GEO L. LARKIN
Assistant Secretary

Recognizance on Appeal

Attest:

D. P. SPOTTS
Assistant Secretary

STATE OF NEW YORK, COUNTY OF NEW YORK, SS.:

On the 13th day of November, 1933, before me 10
personally came GEO. L. LARKIN, to me known,
who, being by me duly sworn, did depose and say:
that he is the Assistant Secretary of the COLUMBIA
CASUALTY COMPANY, the corporation described in
and which executed the above instrument; that he
knows the seal of the said corporation; that the
seal affixed to said instrument is such corporate
seal; that it was so affixed by order of the Board
of Directors of said corporation and that he signed
his name thereto by like order. 20

MARGARET GILLIGAN
Notary Public, Kings County
Kings County Clerk No. 556
Kings County Register's No. 5188
New York County Clerk No. 405
New York County Register's No. 5-G-226
Commission expires March 30, 1935

I, A. H. NELSON, an Attorney-in-Fact of the 30
COLUMBIA CASUALTY COMPANY, do hereby certify
that I have compared the foregoing copy of the
power of attorney and affidavit with the originals
now on file in the home office of the said Company,
and that the same are correct transcripts thereof,
and of the whole of the said originals, and that the
said power of attorney has not been revoked and
is now in full force and effect.

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Recognizance on Appeal

In testimony whereof, I have hereunto set my hand and affixed the seal of the said company, this 22nd day of March, 1934.

A. H. NELSON [SEAL]
Attorney-in-Fact

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Sworn to before me this }
22nd day of March, 1934. }

MARGARET GILLIGAN

Notary Public, Kings County
Kings County Clerk No. 556
Kings County Register's No. 5188
New York County Clerk No. 405
New York County Register's No. 5-G-226
Commission expires March 30, 1935

20

Approved as to form and sufficiency this 22nd day of March, 1934.

HARRY A. STILES,
Supreme Court Commissioner
of New Jersey.

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Grounds of Appeal.

(Filed April 20, 1934.)

NEW JERSEY COURT OF ERRORS AND
APPEALS.

MARY BUTLER,
Plaintiff-Respondent,

vs.

RUDOLPH EBERSTADT,
Defendant-Appellant.

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Action at Law.

On Appeal from
New Jersey
Supreme Court.

Rudolph Eberstadt, the above named defendant-appellant, hereby states the following Grounds of Appeal from the judgment of the New Jersey Supreme Court in the above-entitled cause:

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1. The Court refused to dismiss the cause for lack of jurisdiction to hear and determine the same, when thereunto moved by defendant.

2. The Court refused to stay the trial of the cause when thereunto moved by defendant, until the New Jersey Department of Labor, Workmen's Compensation Bureau, had determined the facts and nature of plaintiff's employment by defendant; whether the rights and obligations of the respective parties were governed by the Workmen's Compensation Act of said State; and whether that Bureau had jurisdiction to first determine the same, subject to ultimate review by the New Jersey Supreme Court on certiorari.

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3. The Court refused to direct a verdict in favor of the defendant and against the plaintiff, when thereunto moved by defendant.

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4. The Court submitted to the jury for determination the question whether or not said Court had jurisdiction to hear and determine the cause.

10 5. The Court submitted to the jury for determination the question whether plaintiff's employment by defendant was casual or regular within the provisions and meaning of the Workmen's Compensation Act.

6. The Court submitted to the jury for determination questions of law which should have been determined by the Court.

20 7. The Court should have determined as a matter of law that plaintiff's employment by defendant was not casual but regular within the provisions and meaning of the Workmen's Compensation Act.

8. The Court should have determined as a matter of law that plaintiff and the chauffeur Charles A. Lauter were fellow-servants of defendant, and that therefore plaintiff could not recover against defendants in this cause.

30 9. The Court erred in determining as a matter of law that plaintiff and the chauffeur Charles A. Lauter were not fellow-servants of defendant.

10. The Court erred in excluding from evidence the answer of the defendant Rudolph Eberstadt which was filed in the proceeding instituted by plaintiff in the New Jersey Department of Labor, Workmen's Compensation Bureau, to obtain compensation from defendant pursuant to the provisions of the Workmen's Compensation Act.

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The following questions were admitted:

11. Of the witness Charles A. Lauter:

“Q. In your judgment, as long as you don’t want to get down to feet and inches, in your judgment driving the car at 20 or 25 miles an hour and applying the four wheel brakes, assuming you are sitting behind the wheel in that chair, will you indicate an object in this room the distance at which you could stop?” 10

12. Of the witness Charles A. Lauter:

“Q. So you were driving a car that day without knowing how far you could stop the car?”

13. Of the witness Otis Eberstadt:

“Q. May I ask you, on the Harrison Pike don’t you remember passing cars?” 20

The Court charged the jury as follows:

14.—

“The defendant, Mr. Eberstadt, cannot be required to pay compensation in this litigation unless it appear that she was hurt as the result of the negligence of Mr. Eberstadt’s employee, namely, the chauffeur, at the time.” 30

15.—

“She, moreover, cannot in this suit recover if the evidence shows that her employment in the Eberstadt family as a domestic was of a regular character and nature. I say that because the suit has gotten into a legal phase, as it were, and if the facts are found, under the greater weight of the credible evidence, to be such that her proper place is in another court, namely, the Compensation Bureau, and not 40

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10 here, under what we know as the common law, then, obviously, there could be no verdict in her favor in this present suit. Therefore, you have the first question for consideration, and that is whether she has satisfactorily shown her relation to the Eberstadt household at the time of the accident. If she was there under a casual employment, one of an accidental nature, but filling an emergency and not under regular employment, then you would have a right to pass to the other questions involved in the case.

20 "There is, as you must know, a law providing for the compensation of employees who are injured in the course of and arising out of employment. That law sets up a special court, as it were, whereby the injured employee may have the right determined as to what compensation for a given injury should be made by the employer.

30 "Counsel for the plaintiff here has very candidly said to you that the compensation there provided by law is less than could be recovered in a common law action for the negligent act of the master, express or implied, whereby an injury occurs to the employee. You, however, are not to be influenced by such a statement, because the Legislature has defined the policy with reference to compensation between employers and employees, between masters and servants, and you and I are not concerned with that policy; we have got nothing to do with it. The Legislature determined that, and so you could not permit a prejudicial view to enter your minds in determining this case on the theory that because

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the plaintiff, if a case of negligence has been proven, would get more in this suit than she would through the medium of the Employers' Liability Act, for the very obvious reason that if that is the way you decided the case then you would not be determining it in accordance with the evidence and the rules of law as the Court indicates them to you. You cannot decide the case from that standpoint at all. You cannot give this woman compensation because you think she is seriously hurt from that fact alone. 10

"She cannot recover if there was not any negligence on the part of the chauffeur of the defendant Eberstadt. If the cause of the accident was the negligence of the driver of the other car she cannot recover if her employment in the Eberstadt household was regular and not casual. 20

"Now, that brings me to say this: The law has attempted to define what casual employment means. So far as the language is concerned, it is perfectly understandable, but its application to a given case is not easy, as indicated by the courts in all of the decisions with which the books are filled. The language of the statute is this: 'All natural persons who perform service for another for financial consideration, exclusive of casual employments, which shall be defined, if in connection with the employer's business, as employment the occasion for which arises by chance, or is purely accidental, or, if not in connection with any business of the employer, as employment not regular, periodic or recurring, such nat- 30

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ural persons, therefore, being within the provisions of the Employers' Liability Act.'

10 "The phrase which would appear to be applicable to this case, therefore, is this: 'or, if not in connection with any business of the employer, as employment not regular, periodic or recurring.'

"You have here the case of a domestic servant, and a sharp issue is drawn as to whether or not the plaintiff was merely casually employed for an emergency or regularly employed for a definite period.

20 "There is a very sharp contradiction in this case between Mrs. Butler and Mrs. Eberstadt and Mrs. Sullivan. Who is telling the truth becomes a question for you.

"If you believe Mrs. Eberstadt and Mrs. Sullivan in their statements as to how it came about that Mrs. Butler was employed as a cook, then it would indicate that she was employed for one month at \$80, and if you so find I charge you that that would be a regular employment and not a casual one.

30 "We do find cases where an employment for days instead of a month has been held to be regular and not casual, but each case, it appears, must be determined by its own set of facts, and so you will first determine whether Mrs. Butler was employed regularly for one month at a stipulated wage, as testified to by Mrs. Sullivan and Mrs. Eberstadt, or whether she merely was employed, as she claims, to provide a given meal, and then after she had so served was asked to go upon

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a journey to the summer home of the Eberstadts on Long Island for the week-end, and so went unexpectedly, through an accidental situation involving the absence of the regular cook, to fill an emergency because of the latter situation.

“If you find in the case, under the fair preponderance of the proof, that she was merely employed to fill an emergency and not for a month at \$80, then you may say that the employment was casual. 10

“If that be so, then you would take up the other phase of the case, namely, whether the negligence of the chauffeur was the cause of the accident, and as the proximate cause thereof gives rise to a right on the part of the plaintiff to recover.” 20

16.—

“If you should find that the negligence of the defendant’s driver has been established under the greater weight of the credible legal evidence, or if you find that the collision was due to the joint negligence of both drivers of the cars involved, and should further find, under a fair preponderance of the proof, that Mrs. Butler’s employment was only casual 30 within the definition of the law, you determining the fact, of course, then you would be justified in awarding her a sum which would compensate her for the injury or injuries which she received, you ascertaining the nature of her injuries, the extent of them, the pain and suffering that in all reasonable probability accompanied them; the length of time she was incapacitated, if any, and whether 40

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there is any permanent phase to the injury or injuries which prevents her from resuming her accustomed nature and character of work, and, having so ascertained, then what sum would compensate her is left to your sound judgment and discretion.”

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17.—

“I ought to say that while I have discussed the negligence phase of the case under the question of damages, that if Mrs. Butler’s employment was regular and not casual that is the end of the case, and she will be required to pursue her remedy in the Labor Bureau under the Employers’ Liability Act.”

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18.—

“There was some suggestion that she, the plaintiff, and the chauffeur were involved in a common employment. I am not submitting that question to you, because it is not before you, and I have held as a matter of law that her right to recover, if you so find under the other phases of the law and the evidence, would not be prevented because she was employed by Mr. Eberstadt in his household and the chauffeur likewise was in his employ.”

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19.—

“The case is left with you, members of the jury, for your consideration. Take it and endeavor to do justice between these litigants, bearing in mind that there is that jurisdictional question as to whether employment was regular or casual. If it was regular, then Mrs. Butler must be relegated to the Compensation Court. Incidentally, she has filed a

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petition there under advice of counsel, so that her right to pursue any remedy there has been protected. Whether she has a right to remain in this court depends upon how you find the state of the evidence as to the nature of her employment at the time of the accident." 10

WALL, HAIGHT, CAREY & HARTPENCE,
Attorneys for Defendant-Appellant.

(Endorsed,)

Service acknowledged April 19, 1934.

THOS. P. MCKENNA,
Attorney for Plaintiff-Respondent.

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Testimony.

NEW JERSEY SUPREME COURT,
MONMOUTH COUNTY.

MARY BUTLER,
Plaintiff,

vs.

RUDOLPH EBERSTADT,
Defendant.

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Transcript of testimony taken in the above stated cause, before Hon. Rulif V. Lawrence, Judge, and a jury, on Tuesday, January 9th, 1934, at one o'clock in the afternoon, at the Court House, Freehold, New Jersey.

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Testimony

Appearances:

THEODORE PARSONS, Esquire, appearing for
THOMAS P. MCKENNA, attorney of record,
for the plaintiff.

10 JOHN A. HARTPENCE, appearing for the de-
fendant.

Mr. Hartpence: If your Honor please, prior to
the drawing of a jury, I would like to make a
motion to dismiss this case for lack of jurisdic-
tion on the ground that the pleadings show that
the plaintiff in this case has filed a petition for
compensation with the New Jersey State Work-
men's Compensation Bureau for the very same
20 accident involved in this suit, against the same
defendant as in this suit, alleging him to be her
employer.

The Court: Involving the same injury?

Mr. Hartpence: The same injury, the same
accident; the same occurrence. Our point in mak-
ing this motion in the beginning is that we feel
that she has elected here in her claim for compen-
sation, to submit herself to the jurisdiction of the
Compensation Court, and that it is the clear in-
30 tention of the Legislature, and the policy of the
law, that these controversies between employer
and employee should be brought in the Compensa-
tion Court, and not tried by common law and a
jury.

Just by way of illustration, let us suppose, as
in this case, that a controversy arises as to
whether or not the plaintiff was a regular em-
ployee of the defendant. That is not for a jury
to decide in a common law court. The Legislature

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Testimony

has taken it out of the common law court, and vested in a special tribunal, and it is before this tribunal that this case should come.

The Court: You say that the plaintiff herself has conceded that the jurisdiction is in the Labor Department, under the Employers' Liability Law? 10

Mr. Hartpence: And filed a petition there.

The Court: How are you prepared to show that?

Mr. Hartpence: The pleadings show it.

The Court: It always has been the rule that the common law never takes jurisdiction in cases involving employer and employee where the provisions of the Employers' Liability Act applied. We don't try cases if we have no jurisdiction. 20

Mr. Hartpence: That's my point now.

The Court: Your motion is addressed to the jurisdiction of this Court?

Mr. Hartpence: Yes, sir.

The Court: I will hear what you have to say, Mr. Parsons.

Mr. Parsons: The pleadings speak for themselves. This suit was instituted some time in September, 1932. The accident happened in May, 1931. The original election of the plaintiff in this suit was in the Common Law Court. She came into this Court and asked for compensation. Now, your Honor, of course, is acquainted with the statute as to the two year period of limitation. Just before the two year period expired in the Common Pleas, the plaintiff filed a petition in the Compensation Court to preserve her rights there, and in that petition, she set forth the very facts that appear in the petition here. Casual employment. The only object in filing it in that way was 30 40

Testimony

to preserve or protect her rights. The first suit was brought in this Court.

The Court: She could have no remedy in the Workmen's Compensation Court,—or under the Employers' Liability Act,—for casual employment.

10 Mr. Parsons: We concede that to be the law.

The Court: Why did she file the petition—

Mr. Parsons: For the very good reason, to protect herself—

The Court: Yes, but if it should appear here that her employment was not casual, then the jurisdiction would be preserved, if it appeared that her employment was other than casual,—

Mr. Parsons: —then she would not lose her rights under the Statute of Limitations.

20 The Court: But suppose it appeared that her employment was not casual, then the jurisdiction under the Employers' Liability Act would apply.

Mr. Hartpence: It is not for this Court to decide; it is for the Compensation Bureau.

The Court: That is my difficulty. Whether I should hold this trial in abeyance upon the determination by the Labor Bureau as to her employment.

30 Mr. Parsons: No, I think Mr. Hartpence is in error there. In 4 Miscellaneous, 951, the Appellate Court has held that the question of casual employment is a jury question.

Mr. Hartpence: I don't remember a case holding that.

The Court: What does it hold?

Mr. Hartpence: This case differs from that. What happened there was the Court below directed a verdict because the Court found that the

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employment was not casual, and on the appeal, Chief Justice Gummere said that he felt the Court below should not have directed a verdict because he says that the facts as they stood would seem to indicate, or do indicate, that the employment was casual, and it was contended in the court below that the employment was regular. So he says in that event, that it was a question for the jury to decide. That is the way the case held. We respectfully beg leave to differ from the dictum of the Court. 10

(After argument.)

The Court: In cases where a recovery is sought for any injuries received due to negligence we always recognize common law courts have jurisdiction. The statutes came along in 1911, as I remember it, and provided a new method for compensation as between employer and employee, based upon two elements,—the nature of the contract, and the provisions, whether it was regular employment or casual. That resulted in lodging such controversies in the Labor Bureau under an act. And I remember that some of the lawyers were up in arms; they thought that their business would disappear; they had forgotten about some other things. The result was that the jurisdiction was changed by the Legislature to the Bureau, but the common law jurisdiction in all other cases remained. In this case, if you can show that the plaintiff's employment was regular and not casual, then I would either take the evidence here,—if the evidence was undisputed, uncontradicted, I would meet the question of law and hold the question in abeyance, and I would let the jury determine whether the employment was casual or not, and I would say to the jury that if they found it 20 30 40

Rudolph Eberstadt—Direct

was casual, then they would proceed to consider the merits of the case, and if they found it was regular, they would have no further jurisdiction.

(After discussion.)

10 The Court: Well, in view of the fact that the suit was brought here first, and she filed a petition with the Bureau later, I am inclined to think that I will retain jurisdiction, to the point of inquiry, anyway, as to whether her employment was casual or whether it was not. If the jury should say she was only casually employed, then she is entitled to the common law remedy, and would stay here. If they found she was regularly employed, then no verdict can be rendered here. Now, I don't know what effect that is going to have. When did the accident happen?

20 Mr. Parsons: May 31st, 1931.

(After discussion.)

The Court: You may proceed with the case. Exception allowed Mr. Hartpence.

Jury sworn.

RUDOLPH EBERSTADT, being duly sworn, according to law, on his oath testifies as follows:

30 *Direct examination by Mr. Parsons.*

Q. Mr. Eberstadt, where do you live? A. West Orange, New Jersey.

Q. Your place of business is where? A. 25 Broadway, New York.

Q. And have you a summer home in Long Branch? A. West End.

Q. May I ask you in reference to the place in West End, New Jersey, did you run that place, or did your wife run it? A. I paid the bills for it.

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Rudolph Eberstadt—Direct

Q. That's what I mean. May I ask you with reference to the servants of the house—who hires them? A. My wife.

Q. You have given her authority to hire the servants, have you? A. I don't know, I assume you mean—well, the usual relations between a husband and wife—she runs the house. 10

Q. You have granted her that authority? A. Yes.

Q. You gave her authority to make arrangements with the servants? A. Yes.

Q. You gave her authority to hire and discharge servants? A. Yes.

Q. Did you give her authority to make arrangements about the employing of servants? A. I did, yes. 20

Q. May I ask you generally, Mr. Eberstadt, if your wife is your agent so far as refers to the servants in the house—the hiring and discharging and so on—so far as that is concerned? A. Yes.

Q. May I ask you—do you remember May of last—May of 1931? A. Yes.

Q. May I ask you, the regular cook that you had at your home at that time—do you know her name? A. Why, Mrs. Butler was employed at that time as a regular cook. 30

Q. Were you present when she was employed? A. I was not.

Q. Before the employment of Mrs. Butler, who was the usual cook? A. We had a cook, Martha Irkatak.

Q. Did Mrs. Irkatak come back to your employment later? A. She did not. She was physically unable; she had some sort of sickness.

Q. She never has come back? A. She never has come back. 40

Leo Moore, Jr.—Direct

LEO MOORE, Jr., being duly sworn, according to law, on his oath testifies as follows:

Direct examination by Mr. Parsons.

10 Mr. Parsons: By consent of Mr. Hartpence, I offer in evidence three photographs of the scene of the accident.

Received in evidence and marked Exhibits P-1, P-2 and P-3 respectively.

Q. Where do you live? A. Newark, New Jersey.

Q. Did you live there on May 31st, 1931? A. I did.

Q. What was your occupation at that time? A. Bus operator.

20 Q. What has been your occupation since that time? A. Bus operator until June of this year.

Q. How many times have you been over the Harrison Turnpike between Newark and Jersey City? A. Over—Oh, I have in the summer time on an average of three times a day.

Q. I mean, you are well acquainted with the Harrison Turnpike? A. Yes.

30 Q. May I show you three photographs, marked Exhibits P-1, P-2 and P-3, and I will ask you to examine these photographs, and then I will ask you if the condition on the highway has changed since May 31, 1931—the condition as shown in these photographs? In other words, do the photographs show the same condition as existed in May of 1931? A. They do.

Mr. Hartpence: At that point?

Mr. Parsons: Yes.

40 Q. At that point? A. Yes.

Leo Moore, Jr.—Direct

Mr. Parsons: I suggest, Mr. Hartpence, that you show the jury just what the photographs are.

Mr. Hartpence: All right.

Mr. Parsons: Exhibit P-1, ladies and gentlemen of the Jury, is the Harrison Turnpike, just so you can get some sort of an idea of this photograph, just right down at the end of the street, you can see the high buildings of Newark. So that if you are looking into this photograph, you are looking toward Newark; you are over on the Jersey City side looking toward Newark. And these two other photographs are taken in the opposite direction. As you look at these two other photographs, of the Harrison Turnpike, you are looking toward Jersey City. The other two photographs I refer to are Exhibits P-2 and P-3. Exhibit P-1 is the view looking toward Newark.

Q. Mr. Moore, on May 31st, 1931, by whom were you employed? A. Newark Sight Seeing Bus Company.

Q. In what capacity were you employed by the Bus Company? A. As a driver. Chauffeur.

Q. And on that day, where had you been? A. Columbia Park, Jersey City, on the bus.

Q. What kind of bus were you driving? A. Pierce Arrow coach.

Q. Was there any other driver driving on the bus that day? A. Peter Curcio.

Q. Who was operating the bus? A. I was.

Q. Where was Mr. Curcio? A. Sitting in the first seat behind me. The second seat in the bus.

Q. The second seat in the bus? A. The first one behind me.

Leo Moore, Jr.—Direct

Q. These buses, Mr. Moore, or this particular bus in question, had which hand drive, right or left? A. Left hand drive.

Q. The first seat in the bus over where Mr. Curcio sat was on the right or left hand side of the bus? A. The left hand side of the bus.

10 Q. Can you tell us approximately about what time you had left Columbia Park in Jersey City? A. About six o'clock at night.

Q. Did you have any passengers on the bus? A. I did.

Q. Will you tell us the road you took from Columbia Park toward Newark? A. We left Columbia Park, came down Hudson Boulevard, and came down the Boulevard as far as the ramp off the Boulevard—it leads down into the new high-
20 way where the Turnpike meets it. Then we kept right along the Harrison Turnpike.

Q. That is where the Harrison Turnpike starts? A. The Harrison Turnpike near where highway is elevated—

Q. The Pulaski Skyline? A. Yes.

Q. Going along the Harrison Turnpike, you were going toward what city? A. Toward Newark.

30 Q. Toward Newark? A. Yes.

Q. Can you describe the surface of the road there—what kind of a road is there? A. Cobble stone.

Q. Can you tell us what sort of car tracks are there, and how many car tracks in the road? A. One set toward Newark and one set toward Jersey City.

Q. And can you tell us where these car tracks are in the road? A. Right in the center.

40 Q. Right in the center? A. Yes.

Leo Moore, Jr.—Direct

Q. Now, on this day in question, may I ask you—May 31st, 1931, can you tell us what day of the week that was, Mr. Moore? A. It was Sunday.

Q. Was there much traffic—will you describe the conditions of traffic on the road going toward Newark, in the direction in which you were going? 10

A. I would say heavy.

Q. Heavy traffic? A. Heavy traffic.

Q. Do you remember any particular vehicle in front of your vehicle? A. There was a Greyhound bus.

Q. Can you tell us how many lanes of traffic there were on the road going toward Newark?

A. Two lanes.

Q. And will you tell us which lane of traffic your bus was in? A. My bus was in the center lane; second lane. 20

Q. And is the center lane the second lane? A. Second lane.

Q. Can you tell us where your bus was in relation to the line of car tracks going toward Newark?

A. I was approximately on the car track—the Newark bound car.

Q. So the other line of traffic going toward Newark was on your right hand side? A. That's right. 30

Q. Did you observe an accident that day? A. I did.

Q. May I ask you with reference to the line of traffic over by the car tracks on your right hand side—the other line of traffic—may I ask you in what line of traffic the Greyhound bus was? A. The same line I was in, in front of me.

Q. The Greyhound bus was immediately in front of you? A. I think there was another car between him and I. 40

Leo Moore, Jr.—Direct

Q. And the three of you were in the center lane of traffic? A. Yes.

Q. Was your attention called to anything? A. It was.

10 Q. Who called your attention to it? A. The other driver who was sitting in the bus; he called my attention to it.

Q. When he called your attention, you looked? A. I glanced one side where I saw a car stepping by me—past me.

Q. In which direction was that car going? A. The car was going toward Newark.

Q. Toward Newark? A. Yes.

Q. Now, when the car was abreast of you—I understand there was a lane of traffic at your right? A. That's right.

20 Q. Then there was your car along the car track—your bus? A. Yes.

Q. And this car was abreast of you, on your right hand side? A. In the right lane.

Q. And that made three cars abreast, going toward Newark? A. That is right.

Q. Can you tell us approximately how fast your bus was traveling at that time? A. Between thirty-five and forty.

30 Q. Was that car which came up to the left, passing you, going faster or slower than your bus? A. She would have to go faster than me to pass me.

Q. He was passing your bus? A. Yes.

Q. Can you tell us what you saw happen? A. The other driver called my attention to them: "Look at that fellow going by," or some—words to that effect, and I glanced out of the window, and I saw, and I said, "It ain't going to last long".

Leo Moore, Jr.—Direct

Q. Did you see what happened? A. I kept looking forward through the window, to the left of the greyhound bus, I saw the collision.

By the Court.

Q. Was there a collision? A. There was a collision. 10

Q. Between— A. Between the car that passed me and another car coming in the opposite direction.

By Mr. Parsons.

Q. The car coming in the opposite direction, Mr. Moore—can you locate that for us on the highway? Can you locate the approximate position of the car coming in the opposite direction? A. In the road? 20

Q. Yes. A. He was in the center lane, coming toward Jersey City.

Q. He was in the center lane coming toward Jersey City? A. Yes.

Q. With reference to the car tracks running toward Jersey City, where was he? A. On the car tracks.

Q. On the car tracks running toward Jersey City? A. Yes.

Q. Can you tell us approximately—may I ask you with reference to that car coming in the opposite direction, that collided with the car that passed your bus—can you tell us with reference to the car tracks approximately where the collision took place? A. On the car track going toward Jersey City. 30

Q. On the car track going toward Jersey City? A. Yes; that's right.

Leo Moore, Jr.—Direct

Q. May I ask you, Mr. Moore, directing your attention particularly to the bridge—the Lackawanna bridge over the highway—did the collision take place on the Newark side of the bridge, or on the Jersey City side of the bridge? A. Just about underneath it, I guess.

10 Q. Just about underneath the bridge? A. Yes.

Q. May I ask you—on Exhibit P-1—if you can identify that photograph—can you tell us what view that is? A. Yes, sir.

Q. What is it? A. That is the Harrison Turnpike going toward Newark.

Q. And as you look into the picture, is that the same view that you had traveling upon the highway? A. That is exactly it.

Q. You sat in the driver's seat— A. Yes.

20 Q. Assuming this is the driver's seat—and as you sat in the driver's seat, you would be looking right down toward Newark? A. Approximately the same position, yes.

Q. Will you take this pen and on Exhibit P-1 will you put your initial "M", indicating on Exhibit P-1 the point of the collision—where the collision took place? Just mark the letter "M" there. A. (Witness does as requested.)

30 Q. Now, Mr. Moore, the letter that you have marked, "M", is placed between the two rails of a car track. Will you tell us which car track that is? Is that the car track going toward Jersey City or toward Newark? A. That is the car track going toward Jersey City.

Q. That is the car track going toward Jersey City? A. Yes, sir.

40 Q. And in the direction in which you were going, and in the direction in which the car that passed you also was going, was that the right or

Leo Moore, Jr.—Cross

left-hand side of the highway? A. It was the left-hand side of the highway.

Cross examination by Mr. Hartpence.

Q. Where did you say Mr. Curcio was located in the bus with you, driving along there near the scene of the accident? A. In the first seat behind me. 10

Q. Well, there was a partition, wasn't there— A. No, sir.

Q. —between you and the first seat? A. No, sir.

Q. Are you sure, Mr. Curcio was not driving your bus? A. Yes, sir.

Q. "Yes, sir" what? A. He was not driving my bus.

Q. He was not driving your bus? A. No. 20

Q. —at the time of the accident? A. At the time of the accident.

Q. He was not driving your bus? A. No, sir.

Q. Had he been driving your bus at all on the highway after you left Columbia Park? A. No, sir.

Q. What company did you say you were employed by? A. At that time, the Newark Sight-seeing Bus Company.

Q. Was Mr. Curcio also employed by that same company? A. He was. 30

Q. What was his business? A. The same as mine; driver.

Q. Driver of— A. —a bus.

Q. Had he ridden out with you from Newark to Columbia Park on the way over? A. He did.

Q. He didn't drive the bus at all? A. No, sir.

Q. Then he came back with you? A. He did.

Leo Moore, Jr.—Cross

Q. How many lines of traffic was there just before you got to the bridge where the accident occurred going toward Jersey City? A. Toward Jersey City?

10 Q. Yes? A. The traffic was light. I wouldn't say whether there was one or more lanes. The traffic was light; they were going the other way.

Q. Were they driving in a single car lane toward Jersey City, or were some of them driving abreast? A. I could see some abreast; they were passing—

Q. When they were passing? A. When they were passing.

Q. How far back from the bridge were you when you say the car involved in the accident passed at your left? A. I would say approximately 150 feet.

20 Q. How far? A. Approximately a hundred and fifty feet.

Q. From the bridge? A. From the bridge.

Q. And the car, as I understand you, had gotten underneath the bridge? A. About underneath the bridge.

Q. At the time the collision occurred? A. Yes, sir.

30 Q. At the time the collision occurred, there was more than one car in the lane going toward Jersey City? A. There were.

Q. Two cars in the lane? A. That's right. Two abreast, that is.

Q. Two abreast, yes. Are you sure there were not three abreast? A. Positive.

Q. Where was the car that collided with the one that passed you when you first saw it? A. He was coming against—he was going toward Jersey City in the center lane of traffic.

Leo Moore, Jr.—Cross

Q. When you speak of the center lane of traffic, what do you refer to? A. The second line.

Q. The second line? A. Yes.

Q. Did you say he was to the right of the center of the road? A. I did not. I said he was right in the center lane of traffic toward Jersey City.

Q. Where was he with regard to the center of the highway? A. In the Jersey City car track going toward Jersey City. 10

Q. Are you quite sure that he was not further to the left? A. I am.

Q. Was the left wheel in the Jersey City car track? A. Yes, sir.

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

Q. What I am trying to find out is, where his car was located with respect to the bridge when you first saw it. Had it reached the bridge yet, or was it underneath the bridge, or where was it? A. Not quite to the bridge yet. 20

Q. On the Newark side of the bridge? A. That's it. Just was coming under the bridge.

Q. And at the time you were about 150 feet back from the bridge? A. Yes, sir.

Q. On the Jersey City side? A. That's right.

Q. And was it at that point that the other car passed you on the left? A. That's right. 30

Q. Do you happen to know how wide this bridge is that is shown on the photograph? I mean by that, how wide the railroad tracks are that cross on that bridge, as shown by the abutment there? A. Well—

Q. Do you know? A. I do not.

Q. Never measured that? A. No, sir.

Q. And according to your testimony, the collision took place right underneath the bridge? A. Right about where my initial is. 40

Leo Moore, Jr.—Cross

Q. That is actually underneath the bridge? A. No, it is not.

Q. Is that toward the Jersey City end of the bridge, or toward the Newark end of the bridge? You said it was not underneath the bridge; on which side was it? A. Not exactly underneath the full bridge.

10

Q. Was it on the Jersey City— A. More to the Jersey City side.

Q. More to the Jersey City side? A. Yes.

Q. Do you know how many railroad tracks there are crossing the bridge,—how many steam railroad car tracks that cross the bridge? A. That cross the bridge?

Q. Yes? A. I don't recall whether that was electric or steam.

20

Q. It is the old line of the Lackawanna to Newark? A. Yes.

Q. I understand you have gone under there several times. Did you ever look at it closely enough to determine how many tracks are there? A. I have not.

Q. On this overhead bridge? A. I have not.

Q. After the collision, did you stop your bus, and did you get out? A. Traffic was stopped; could not pass.

30

Q. Could not pass? A. No.

Q. Did you get out of your bus and look at the scene of the accident at all? A. I did.

Q. And you observed the two cars, did you, that were in collision? A. I did.

Q. Any other cars besides these two cars involved in the collision? A. No.

Q. The automobile headed toward Newark that you say passed your car,—to the left,—what sort

40

Leo Moore, Jr.—Cross

of car was that? A. I don't remember. I think it was a Packard; I am not sure.

Q. What was its appearance, a closed car? A. A closed car; sedan.

Q. The one that had been going toward Newark? A. Closed.

Q. The one that was going toward Jersey City in this collision,—what kind of a car was that? A. I don't know. 10

Q. If you don't know the name of it, what was its appearance? A. Closed car.

Q. Just the back closed, or— A. Closed car.

Q. Two seats in the car, or single? A. Sedan. Five passenger.

Q. Five passenger? A. I think so.

Q. And the one that was going toward Newark, was that also a two-seated car? A. Sedan. 20

Q. Did you see the position of these two cars after the accident occurred? A. Yes, I did.

Q. Where was your bus stopped when you said traffic was stopped—where was your bus standing? A. About fifty feet from the bridge.

Q. It had not yet reached the bridge? A. When the accident happened?

Q. No, when the traffic stopped and your bus stopped, had your bus yet reached the bridge? A. It had not. 30

Q. You were about fifty feet back at that time? A. Yes.

Q. Where were the two cars that figured in the collision when you got out and looked, at the scene of the accident? Take first the Newark car—headed toward Newark. Where was that? A. That was to the left.

Q. I am asking now where it was with relation to the right hand curb; you were going past the 40

Leo Moore, Jr.—Cross

car—or rather, the car passed you on your left, you were facing—going toward Newark? A. That's right.

Q. The car passed you to your left, going toward Newark? A. Yes.

10 Q. After the collision—I understand you to say before the collision, there were two lanes of cars going toward Newark? A. That's right.

Q. Where was this car that passed you to the left, that figured in the collision with relation to the right-hand curb, after the accident happened and the cars were at rest? A. He was about in the center.

Q. About in the center of the highway? A. About in the center of the road.

20 Q. Where was the car when they came to rest after the accident—where was the car that had been proceeding toward Jersey City? A. That was in the right-hand side of my road.

Q. On the right-hand side of your road? A. Yes.

Q. Was it still heading toward Jersey City or was it heading in some other direction? A. It had been turned around on the highway. Instead of heading toward Jersey City, it was turned around, heading the other way.

30 Q. And heading which way? A. Toward Newark.

Q. Then may I understand that the car—the automobile which figured in the collision and which had been heading toward Jersey City, after the accident was over, and the cars were at rest, was then turned around and headed toward Newark? A. Yes.

Q. That's right? A. Yes—wait a minute. I don't know which cars were headed toward New-

Leo Moore, Jr.—Cross

ark. I won't say which car it was; I remember the position of the car, but I won't say which car it was after they got tangled up.

Q. You didn't pay much attention to that? A. No.

Q. Were they both right together? A. No, they were not. 10

Q. Locked together? A. No, they were not.

Q. How much space was there between them? A. Why, so you could get a car between.

Q. And they were out there, you said, toward the middle of the highway? A. That's right.

Q. How long was it before traffic moved after the accident? A. Oh, I don't know. It seemed about fifteen minutes to me.

Q. Some police officers were in charge at the time, weren't there? A. After the accident happened, they were, yes. After the accident, there were some Hudson County police there. 20

Q. And for about fifteen minutes after the accident, the lines did not move? A. They started to move; yes; pleasure cars.

Q. But not until about fifteen minutes after the accident? A. That's right. It seemed that long to me, whether it was actually or not.

Q. There must have been quite a good many cars blocked up there, weren't there? A. There was. 30

Q. Did you see any people who had been in the—in either of the two cars which were in the collision? A. I did.

Q. Where were they? A. The one that I first had my attention on—one woman who was under the wheel of one car, and it attracted—

Q. Of which car? A. I don't know which car.

Leo Moore, Jr.—Cross

Q. You don't know which woman that was? A. Do I remember which woman?

Q. Yes; not her name— A. I do not.

Q. Was there anyone else out of the cars? A. Yes. There was a woman; another woman, and there were two fellows lying in the road; they didn't lie there; they picked themselves up, but they were there.

Q. They were thrown out? A. Yes; that's right.

Q. Were the two women thrown out? A. They were.

Q. Any children? A. I didn't notice the children; I noticed one small lad—very small.

Q. Did the women walk around? A. One woman walked around; the other had her foot caught.

20 Q. Had her foot caught? A. Yes.

Q. The two fellows got up and walked around? A. Yes.

Q. Weren't they all occupants of the two cars, or don't you know? A. One was an occupant from one car; the two that were lying down there, they were both riding in one car.

Q. Both riding in one car? A. Yes.

Q. Do you know which car that was? A. The one coming toward Jersey City.

30 Q. What time of day was it that the accident happened? A. About—about quarter to seven.

Q. Was the day a clear day or a stormy day? A. It was raining.

Q. It was raining? A. Yes.

Q. It was raining about the time of the accident, wasn't it? A. That's right.

Q. Did you have your headlights on? A. No, sir.

Leo Moore, Jr.—Cross

Q. Did you notice whether either of the other cars had their headlights on? A. There was no need for headlights. They didn't have them on.

Q. You mean it had not gotten dark enough for headlights? A. Yes, sir.

Q. You have said it was a very cloudy, rainy day? A. I wouldn't say cloudy; it was raining; clear vision. 10

Q. Had it been raining all that day? A. No, it had not.

Q. When did it start raining? A. It started about five o'clock, I guess. Started late in the afternoon.

Q. Had it been raining until—up until the time of the accident? A. And after.

Q. Did you talk with any of the people who had been in these two cars that were in the collision, after the collision was over? A. I did not. 20

Q. Did you talk with any of the policemen who came there? A. I did not.

Q. You made no statement that is on record, of how the accident occurred? A. I made a statement to my company.

Q. You made a statement to your company? A. Yes.

Q. That's the only one you made a statement to? A. Yes. 30

Q. Do you know how wide that highway is where the accident occurred? A. I do; forty-five feet five inches.

Q. You mean the street car track? A. Yes.

Q. I suppose—you said the car track? A. Yes.

Q. You said the two automobiles that figured in this accident, after it was over, were partly on the car tracks? A. That's right.

Nicholas Rizzolo—Direct

Q. What was there to prevent the traffic from going each side—what was there to hinder it?

A. There was an officer, and you could not go. He held up lots of traffic.

Q. Going which way? A. Toward Newark.

10 Q. What about the Jersey City side? A. That was clear.

Q. What? A. That was clear.

Q. But no traffic went through for fifteen minutes after the accident? On that side? A. No, I am talking about going toward Newark.

Q. Jersey City was clear? A. It was not clear, but a fellow could squeeze through.

Q. And the traffic kept right on going through there? A. I didn't notice.

Q. You didn't notice? A. No, I didn't notice.

20 Q. You were referring to the fact that traffic was blocked up on your side of the road? A. Yes.

Q. That was because there was a bus ahead of you, and you couldn't get through? A. Yes.

Q. Was that the greyhound bus you referred to? A. That's right.

Q. There would have been room enough for an ordinary pleasure car to have gone through, if the bus had not blocked the way? A. That's right.

30 Q. That's correct, is it? A. That's right.

NICHOLAS RIZZOLO, being duly sworn, according to law, on his oath testifies as follows:

Direct examination by Mr. Parsons.

Q. Mr. Rizzolo, you live where? A. Newark.

Q. And did you live there on May 31st, 1931? A. Yes.

40 Q. Were you the owner of an automobile on that day? A. Yes.

Nicholas Rizzolo—Direct

Q. What kind of automobile did you own? A. Oakland sedan.

Q. Can you tell us what year model that was? A. 1927 sedan.

Q. 1927 sedan? A. Yes.

Q. Were you traveling on the Harrison Turnpike that day, Mr. Rizzolo? A. I was. 10

Q. And in which direction were you going on the Harrison Pike? A. Headed toward Jersey City.

Q. And was anybody riding with you? A. Friend of mine, yes.

Q. And what is his name? A. John Tobia.

Q. Can you describe the kind of day it was? A. It was raining late in the afternoon.

Q. How much traffic was there, Mr. Rizzolo, coming from Jersey City toward you; can you tell us whether the traffic was heavy or light? A. From Jersey City to Newark? 20

Q. Yes? A. Traffic was heavy.

Q. Traffic was heavy? Can you tell us how many lines of traffic there were going from Jersey City to Newark? A. Two lanes.

Q. Are you acquainted with that Harrison Pike? A. Well, I have been over there quite often.

Q. Have you heard Mr. Moore on the stand here say that there were two lanes of car track down the road right there? A. Yes, sir. 30

Q. Directing your attention to the traffic on the highway coming from Jersey City to Newark, can you tell us where the first line, or the center lane of traffic was traveling? A. On the car tracks.

Q. And which one of the car tracks? A. Well, on the left.

Q. The car track on your left? A. On the left; the car track on my left the way I was going. 40

Nicholas Rizzolo—Direct

Q. In which direction were the cars in the first car track traveling, by the first line of traffic from Jersey City to Newark, in which lane were they traveling? A. There was one lane near the curb, and the other lane closer up to the car tracks.

10 Q. There was another lane on the car track?
A. Yes, sir.

Q. As you were traveling along, in what lane were you traveling? A. Into my second car track.

Q. You were inside the second car track; were there any cars to your right? A. Yes, sir, there was.

20 Q. So that on the right hand side of the road going toward Jersey City, there was a car to your right, and then you were in the center lane on that side; is that right? A. Yes, sir.

Q. As you were approaching this bridge of the Lackawanna Railroad over to the Harrison Pike, did you observe anything particularly in the traffic coming toward you? A. I saw one car pull out of the second lane.

Q. And when you refer to the second lane—the car pulling out of the second lane, can you tell us whether you mean the lane at the curb, or the lane at the center of the road? A. Center of the road.

30 Q. Did you notice any vehicles in front of that car? A. Do you mean—

Q. Any vehicle between that, or in front of that car on the highway? A. The car that pulled out?

Q. Was there any vehicle in front of that car that pulled out? A. There was two buses.

Q. And these buses were going in what direction? A. They were coming toward Newark.

Q. In your lane, were they? A. The inside lane, inside the car track.

40

Nicholas Rizzolo—Direct

Q. Inside of the car track? A. Yes.

Q. May I ask you to examine Exhibit P-3? I ask you if you are acquainted with that photograph, Mr. Rizzolo? A. The highway facing toward Jersey City.

Q. May I ask you if that direction in which you are looking into the picture is the direction in which you were traveling? A. Yes, sir. 10

Q. May I ask you if you will step up and indicate to the jury where you were traveling on the highway before the accident? A. Before the accident, I was right here; this here was about the center of my car (indicating on photograph).

Q. So the center of your car was traveling on its right-hand—with its right-hand wheels on the traveled road toward Jersey City? A. That's right. 20

Q. And the left-hand wheels of your car were—would be approximately where? A. On this side, here; right about here (indicating).

Q. About to the center of the car track? A. Yes, sir.

Q. Is that right? A. Yes.

Q. Now, may I ask you if you will just take the stand. Now, as you were traveling along, you said you saw a car pull out from behind this bus? A. Yes. 30

Q. As that car was coming back over, could you tell me in what portion of the highway that car was traveling? A. You mean what part of the road he was on?

Q. Yes. A. Why, he was way over on my side.

Q. He was over on your side? A. Yes, sir.

Q. With reference to the car track, where was he? A. Well, he was way over on that side of the car track—on my side. 40

Nicholas Rizzolo—Direct

Q. So that he was in the second car track, was he? A. Yes, sir. The car track on my side.

Q. May I ask you if you can locate approximately, Mr. Rizzolo, just where the accident happened? Will you put an "R", that being your initial, where the two cars came together? A.

10 Where the two cars came together?

Q. Yes, at what place? A. (Witness indicates on photograph.)

Q. Before you place the "R", will you tell us on which side of the bridge—the Jersey City or the Newark side of the bridge, they came together? A. We were just going under the bridge when I saw them come there, down here, and after that, that is when they hit. Everything went black when they hit.

20 Q. Everything went black with they hit? A. Yes.

Q. Were you under the bridge on the Newark side or the Jersey City side? A. Mostly under the bridge.

Q. Mostly under the bridge? A. Yes.

Q. Will you place an "X" just where the contact was, please? A. Before or after?

Q. Place an "R"—just at the time of impact. A. (Witness places letter "R" on photograph.)

30 Q. And that "R" for your name indicates where the impact was, Mr. Rizzolo? A. Yes, sir.

Q. Now, on account of the perspective, may I ask you if the "R" is intended to be just under the bridge? It looks as if it was way this side. A. It looks as if it was here, on this side (indicating).

Q. Do you intend to put it just under the bridge? A. Yes.

Nicholas Rizzolo—Cross

Q. Then on Exhibit P-3, the letter "R" is supposed to be just under the bridge? A. Yes.

Q. Can you tell us what kind of weather it was? A. It was raining at that time.

Q. And can you tell us approximately how fast you were traveling? A. I was going at about twenty-five miles an hour. 10

Q. And did you have a windshield wiper on your car? A. Yes.

Q. On this night in May—May 31st, 1931, it was daylight saving? A. Daylight saving.

Q. Approximately at what time did the accident happen? A. Around 6:40.

Q. Around 6:40? A. Yes, sir.

Q. Was it dark or daylight then? A. It was daylight, but a little misty. 20

Q. What happened to you in the accident, Mr. Rizzolo? A. I was thrown out of the car.

Cross examination by Mr. Hartpence.

Q. You say there was a car to your right, going in the same direction you were going at the time the collision occurred? A. Yes, sir.

Q. And you had pulled out to pass the car which was before you as you were going to Newark—that car which was on your right, at the time the collision occurred? A. Not at that time. 30

Q. What? A. Not at that time.

Q. When did you pull out? A. Why, down the road further.

Q. And then you stayed out, is that it, in passing this car? A. There were cars in that one lane to the curb.

Q. One lane to the curb? A. There was one lane, and then I was in the second lane. I was in the second lane. 40

Nicholas Rizzolo—Cross

Q. Going toward Jersey City? A. Yes, sir.

By the Court.

Q. Was there a lane between you and the curb at the right? A. Yes, sir.

10 *By Mr. Hartpence.*

Q. And you were in the second lane, is that right? A. Yes, sir.

Q. You were not there at that point with your own car, alone— A. Sir?

Q. You were not on the second lane with your own car, alone, but there were other cars in that particular lane, weren't there? A. Not in front of me.

Q. Not in front of you? A. No.

20 Q. How about in back of you? A. There was traffic in back.

Q. Now, let me understand this. You were driving, going toward Jersey City, the way you were going, there were two lanes of cars going in that direction, one nearer the curb, and one out on the car track; is that correct? A. Yes, sir.

Q. Weren't you passing the car that was to your right at the time the collision occurred? A. I was past it; I didn't pull out—

30 Q. You were going faster than the car that was at your right, intending to pass it, weren't you? A. He was slowing up; I had to pass him.

Q. Why did you have to pass him? A. He was stopping his car.

Q. Why didn't you slow yours down? A. I was alongside of him.

Q. Did that prevent you from slowing yours down? A. I was going slow enough.

Nicholas Rizzolo—Cross

Q. So you made up your mind to pass him when he slowed down? A. He was not stopping me; he was on the right, on my right. I had a clear road ahead of me.

Q. Were there any cars ahead of him in that same lane? A. Yes, sir.

Q. And you say you saw this car that came toward you pull out from the lane that was going toward Newark? A. That's right. 10

Q. And there were two buses ahead of him at that time? A. Yes, sir.

Q. Had you actually reached the overhead railroad bridge when you saw the other car pull out of the Newark lane? A. Had I reached the bridge, did you say?

Q. Yes? A. No.

Q. How far away from the bridge were you at that time? A. At— 20

Q. At the time when you saw the other car pull out? A. Just before I got under the bridge.

Q. Just before you got under the bridge? A. Yes.

Q. You had no trouble in seeing him? A. No.

Q. It was light, was it? A. Yes, sir.

Q. And you saw him coming toward you? A. Yes, sir.

Q. Well, wasn't there room enough for both of you to pass? A. No, sir. 30

Q. How far back from the other side of the bridge was that car when you saw it pull out from behind the two buses? A. You mean the distance from the bridge to where he was?

Q. Yes, going to Jersey City? A. I couldn't say exactly.

Nicholas Rizzolo—Cross

Q. Had either of two buses yet reached the bridge when you saw the other car pull out from behind them? A. No, sir.

Q. They had not? A. No.

10 Q. When you saw him coming toward you down the road, did you make any effort to turn your car and get out of the way? A. Yes, sir.

Q. What did you do? A. I pulled over as far to the right as I could. I couldn't pull over on account of the other cars that were there on the side.

Q. And he kept right on coming? A. Yes, sir.

Q. Did you notice whether or not he made any effort to pull off to the right and go by that way? A. He couldn't.

20 Q. Why not?

The Court: Did he?

Witness: Did he?

The Court: Yes; not what he could do. What did he do?

Witness: He kept on coming ahead; of course, I guess he thought he could squeeze through.

The Court: Was there room?

Witness: No, sir.

30 Q. I understood you to say on your direct examination that you saw this other car coming toward you, and then everything became black, and that's all you knew about it. A. That's the time it hit.

Q. Did that happen as quickly as that? You saw him pull out from behind the bus—you think it happened so quickly? A. All I knew after that, was when I picked myself up on the side of the road.

40

*Nicholas Rizzolo—Cross**By the Court.*

Q. Did you know how near he was? A. I couldn't say—

Q. When you saw this car coming from behind this bus? A. No, sir, I couldn't say.

By Mr. Hartpence.

10

Q. You had not yet quite reached the railroad bridge, had you when you saw him coming toward you, or coming at you from behind these buses? A. I had not quite reached it.

Q. What was the width of the Lackawanna tracks on the bridge? There were tracks on the bridge, weren't there? A. Just the width of the bridge.

Q. And neither of the two buses he had pulled out from behind had yet reached the bridge from the other side? A. No, sir.

20

Q. There was that much distance, at least, between you when you saw him pull out from behind the bus? A. You mean the distance from my car to his car?

Q. Yes; the width of the Lackawanna tracks plus the length of the two buses—at least that much distance between you, wasn't there? A. Might have been a little more or a little less. I don't know.

30

Q. Now, you brought suit against Mr. Rudolph Eberstadt, the defendant in this case, in the East Orange District Court growing out of this accident, didn't you?

Mr. Parsons: Objected to as immaterial.

The Court: I don't know.

(After discussion.) Question withdrawn.

40

Nicholas Rizzolo—Cross

Q. You testified in the East Orange District Court with regard to the circumstances of this accident in some suits that were brought there, didn't you? A. He brought suit against me.

Q. And you counterclaimed against him, didn't you? A. I was the defendant in the case.

10

The Court: You testified in the case, anyway?

Witness: Yes, sir.

Q. Don't you remember this question being asked you at the trial, and your answer—this way: "Q. How fast were you going? A. About 20 miles an hour; something like that. Q. When was it you tried to pass that car? A. When I tried to pass him? Q. This car in front of you? A. I saw
20 I had a lot of room and I tried to pass him right under the bridge. Q. That is where you tried to pass him? A. Yes. Q. And it was just before this accident, wasn't it? A. Just before this accident." Were not these questions put to you, and didn't you give these answers to them? A. I don't remember.

The Court: He doesn't remember.

By the Court.

30

Q. Well, if you did so testify, would that have been a correct statement? A. What is that, sir?

Q. If you did so testify, would that have been a correct statement of fact? A. That has been a couple of years ago. I just cannot remember.

By Mr. Hartpence.

Q. Don't you remember this question being put to you at the trial: "Q. When you first started

40

Nicholas Rizzolo—Cross

to pull out, did you see the Eberstadt car? A. I did not see him." Do you remember that question being put to you, and your answering that way?

The Court: When he first—

Mr. Hartpence: "When you first started to pull out, did you see the Eberstadt car? A. I did not see him." 10

The Court: When you pulled out—

Witness: He said when I first started to pull out—

The Court: Yes.

Witness: Why, I must have been way down the road.

By the Court.

Q. You say you did not see him then? He had not yet pulled out? A. I didn't see him because I was further back down the road. 20

By Mr. Hartpence.

Q. You said the first time you saw him was when you were at a point behind the other car on the left side of it. "A. When I first saw it? Q. When you first saw the Eberstadt car. A. He was just coming from the New York end of the bridge." Were those questions put to you, and did you answer them that way? A. I don't recall. 30

Q. After the collision occurred between your car and the other car and the cars had come to a rest, where was your car? A. You mean the position on the road?

Q. Yes; what position they were in. A. I was facing toward Newark—

Q. On which side of the highway? A. On my side.

Nicholas Rizzolo—Cross

Q. That would be on the right-hand side looking toward Jersey City? The left-hand side looking toward Newark? A. I was on my right.

Q. What? A. I was on the right side going toward Newark.

10 Q. Was it turned completely around? A. I wouldn't say directly facing it; at a little angle.

Q. On a little angle? A. I was still out on the Jersey City street railroad tracks, still on my side—my right-hand side.

Q. Was it still out on the tracks, or was it in toward the curb? A. Partly on the tracks, partly on the street.

Q. Partly on the street? A. Yes.

20 Q. Where was the other car that came into collision with you when it was all through? A. He was facing Newark up ahead of where I was.

Q. Facing Newark, up ahead of where you were? A. Yes, sir.

Q. How much space was there between the two cars? A. I don't know how much space there was between his car and my car.

Q. You said he was ahead of you; how far away from you was he? A. I would say about fifteen feet.

30 Q. After the accident was over, and your cars had come to a rest, there was fifteen feet between his car and your car? A. About that distance, my car in back and his car in front.

Q. And where was his car standing with relation to his right-hand curb? How far away from you? A. He was way over into the first track.

Q. Well, what do you call the first track? A. He was more in the—he was way over to his left.

Q. You refer to the track leading to Jersey City as the first track? A. The first track—there was

Nicholas Rizzolo—Cross

two tracks; he was more over from the first track, on his side.

Q. You mean he was more over on the track leading toward Jersey City? A. More over to the side than that.

Q. Where did you go after the accident was over? A. The police took me to the hospital to get me fixed up, and then I went back to headquarters. 10

Q. How long did you stay there at the scene of the accident before you left it? A. At the scene of the accident?

Q. Yes? After the accident occurred, how long was it before you went away? A. I stayed there until the cops came down with the patrol wagon, and they had to help take a woman out, she was under the front wheel of the Packard, the other car, and they also got a police ambulance and went to the Hudson Hospital. 20

Q. The Hudson Hospital car? A. Yes.

Q. How long were they there? A. He had a couple of stretchers in the ambulance, and after that, they took me to police headquarters.

Q. Where is that? A. Right at Harrison Turnpike. In Harrison Turnpike.

Q. And when you were there, you made a statement to one of the police officers there, did you not? Lieutenant Hoppe? A. The officer there asked for it, yes. 30

Q. I show you this paper, Mr. Rizzolo, and ask you to look at it carefully, and see whether or not that is your signature—"Nicholas L. Rizzolo", at the bottom of the first page, and "Nicholas L. Rizzolo" at the bottom of the writing on the second page. That's a statement you made and

Nicholas Rizzolo—Cross

signed, isn't it? A. I just signed my name on it; I didn't make the writing on it.

Q. You signed your name at these two places, didn't you? A. Yes, sir.

By the Court.

10 Q. Was it read to you? A. What?

Q. Did the Captain read it to you after it was written? A. Yes, sir.

By Mr. Hartpence.

Q. Did you read it yourself? A. No, sir; he read it.

Q. And you signed it? A. Yes.

Q. As a matter of fact—

20 The Court: You may mark it for identification.

Paper is marked D-1 for Identification.

Q. As a matter of fact, he asked you the questions and then you gave him the answers; isn't that correct? A. He asked me questions and waited and I answered them.

30 Q. Don't you remember stating in this statement, before Lieutenant Hoppe—this statement, D-1, for Identification—"I was driving my car an Oakland sedan, registry E-42142 N. J. toward Jersey City from Newark, on the Harrison Turnpike, and got under the D. L. and W. Railroad bridge, and pulled out to pass a car riding close to my right-hand curb, and as I was passing this car on my right, my car was struck head on by a Packard touring car that was coming toward Newark."

40

*Nicholas Rizzolo—Cross**By the Court.*

Q. Did you so say? A. Beg pardon?

Q. Did you so say? A. I said I got hit head on.

By Mr. Hartpence.

Q. Yes; that was the answer you gave to the officer, wasn't it? A. That's what I did. 10

Q. Notwithstanding, Mr. Rizzolo, you said nothing at all, did you, about seeing that Packard pull out from behind the bus? A. Which statement is that?

Q. This statement made to Lieutenant Hoppe?

Mr. Parsons: I don't think the witness could answer that until he is shown the statement. 20

Mr. Hartpence: He can have the statement. Let him see it.

By the Court.

Q. The question is, did you say anything in that statement to Lieutenant Hoppe about a car pulling out from behind the bus. Look at the statement and see if there is anything about that.

Mr. Parsons: The question is improper. There is a question upon the statement as stated here, which includes that question asked; there is no question to elicit that answer at all. 30

The Court: That is your reaction. Nevertheless, the witness may say that; the witness may say that he only answered the questions asked; if he was not asked anything about the other matter, that is his answer. He may

Nicholas Rizzolo—Redirect

look at the statement and see whether he did say anything about it or not.

By the Court.

10 Q. Did you say anything in the statement about seeing the car pull out from behind a bus? A. No, sir; he didn't ask me that question.

Redirect examination by Mr. Parsons.

Q. Mr. Rizzolo, referring to Exhibit D-1 for Identification, I am going to ask you one more question with reference to this. How many questions with reference to the accident are written down there? Just count them. Just the questions with reference to the accident? A. Four.

20 Q. Just four. And is one of these questions: "What part of the road was your car on at the time of the accident?" A. Yes, sir.

Q. And did you answer that? A. Yes, sir.

Q. Was another one of the questions: "How fast were you going at the time of the accident?" A. That's right.

Q. Did you or did you not answer that? A. Yes, sir.

30 Mr. Parsons: I would like to offer this in evidence as part of our case.

Mr. Hartpence: I have no objections.

Received in evidence and marked Exhibit P-4.

Q. Now, Mr. Rizzolo, may I ask you—did you make measurements yesterday as to the width of the Harrison Turnpike? A. Yes, sir.

Q. Have you those measurements with you? A. Yes, sir.

Nicholas Rizzolo—Redirect

Q. Will you tell us the width from curb to curb of the Harrison Turnpike? A. The width of the Harrison Turnpike from curb to curb is forty feet five inches.

Q. Will you tell us the width from the right-hand curb going toward Newark to the outside trolley track on the right going toward Newark? From the right-hand curb going toward Newark to the outside rail of the right-hand trolley track— A. Coming from Jersey City? 10

Q. Coming from Jersey City, going toward Newark? A. Thirteen feet four inches.

Q. From the right-hand curb to the outside trolley track, the width is how much—or the distance is how much? A. Thirteen feet four inches.

Q. From the trolley track across—I mean from the first track, on the outside lane of tracks going toward Jersey City—what is the distance across all of the tracks from the outside rail—all of them? A. Fourteen feet five inches. 20

Q. The distance between the outside rail across these rails is fourteen feet— A. —five inches.

Q. And what is the distance from the curb on the right-hand side as you go toward Jersey City, in the direction you would go to go to Jersey City, to the right-hand track—outside track going to Jersey City? A. Twelve feet eight inches. 30

By Mr. Hartpence.

Q. On what part of the highway were these measurements made? A. Directly under the bridge.

Q. Directly under the bridge of the D. L. and W., before this accident happened? A. Yes, sir.

Q. When did you make them, Mr. Rizzolo? A. Yesterday. 40

John Tobia—Direct

JOHN TOBIA, being duly sworn, according to law, on his oath testifies as follows:

Direct examination by Mr. Parsons.

Q. Mr. Tobia, where do you live? A. Newark, New Jersey.

10 Q. Are you a friend of Mr. Rizzolo, the last witness? A. Yes, sir.

Q. Did you know him on May 31st, 1931? A. Knew him all my life.

The Court: You were in his car on the day of the accident?

Witness: Yes, sir.

Q. Coming down Harrison Turnpike, Mr. Tobia, can you tell us where you were sitting in the car?

20 A. The front seat, right-hand side.

Q. Who was driving the car? A. Mr. Rizzolo.

Q. The car has a left-hand drive? A. Yes, sir.

Q. Will you describe the condition of traffic on the Harrison Turnpike that day? A. It was light going toward Jersey City, and it was heavy coming towards Newark.

Q. And as you approached the bridge—the D. L. and W bridge—can you tell us how many lanes of traffic were coming from Jersey City and going to Newark? A. There were two already, coming.

30 Q. Two lanes? A. —toward Newark, and two going toward Jersey City.

Q. And in what lane of traffic were you going toward Jersey City? A. We were in the second.

Q. And by "second" do you refer to the one near the curb, or the one near the center of the road? A. On the right-hand side, straddling the first rail.

John Tobia—Direct

Q. You were on the first rail of the tracks. Directing your attention to traffic coming from Jersey City and going toward Newark— A. Yes.

Q. Do you remember the buses going— A. I remember two or three—I can't tell you just—I remember the buses.

Q. Can you tell the condition of the weather at that time? A. It was raining. 10

Q. Will you tell us just what you saw—what happened, in your own words? A. We were passing a car along on my right-hand side. There was two cars in on our left. There was a bus behind the car, and the first car shooting out and hit us and spun us around and went past us, and we were backed up on the opposite side of the street.

Q. You ended up on the opposite side of the street? A. Yes. 20

Q. Directing your attention, Mr. Tobia, to Exhibit P-2, may I ask you if you will indicate on Exhibit P-2 the rail which you said you were straddling when you were going toward Jersey City? A. (Witness indicates as requested.)

Q. Can you indicate to the Jury, you looking into Exhibit P-2, on the right-hand side, the four wheels there, where you were riding? A. We were riding on this—the right-hand side. There was a car here (indicating the right rail). 30

Q. Will you indicate on Exhibit P-2, according to your recollection, where the collision took place, placing the letter "T" for your name; will you put the letter "T" here on Exhibit P-2? A. (Witness places letter "T" as requested.)

Q. Can you tell us approximately, Mr. Tobia, how fast—do you drive a car yourself? A. No, sir.

John Tobia—Cross

Q. You don't? A. No, sir.

Q. Can you describe, with relation to the general traffic, the speed of your car before this accident, whether it was going fast or slow? A. I don't know; I never rode in a car that speeds—

10 Q. Were you going fast or slow? A. No, sir—

Mr. Hartpence: I object.

Question withdrawn.

Q. Directing your attention, Mr. Tobia, to the bus—can you tell us what lane of traffic the bus was riding in? A. Second, because they were over the track.

Q. They were riding on the car track? A. They did.

20 Q. They were coming in the opposite direction toward you? A. Yes, sir.

Cross examination by Mr. Hartpence.

Q. Mr. Tobia, you also testified in the suit in the East Orange District Court, didn't you? A. Yes, sir.

Q. Do you remember this question being asked you, and you making this answer? "Q. Will you please tell the Court just what happened as you approached the bridge? A. As we approached—

30 Q. Yes. A. As we approached the bridge, there

was a car— Q. Tell us what Rizzolo did? A. The car on our right, we had caught up to him; there were two cars together coming down on our left, and this Packard pulled out and hit us on the left side, and turned us completely around. We were both thrown out." You remember so testifying? A. Yes, sir.

40 Q. Do you remember also testifying: "You were riding behind the car in front of you? A.

John Tobia—Cross

On our right-hand side. Q. You were right at the car track? A. Yes. Q. When you pulled out to go past this car, did you pull over to the car track? A. Not as I remember. Q. When was it you pulled out to pass this car? A. Just underneath the bridge." You so testified, didn't you? A. What was the last?

10

Q. "When was it you pulled out to pass this car? A. Just underneath the bridge." A. Yes. Just approaching it. I couldn't tell whether we were right on this end of it, or right about at the bridge.

Q. In that trial, did you testify that there were two buses there, and the Packard car pulled out from behind the bus? A. I wasn't asked that, I don't think.

Q. You did not testify about that, did you? A. No, I was not asked. I couldn't think of everything.

20

Q. What had you and Mr. Rizzolo been talking about as you drove along there just before the accident happened? A. What were we talking about?

Q. Yes? A. Nothing. Same thing anybody else would.

Q. What? A. Nothing.

Q. Just sat there talking about nothing? A. Yes.

30

Q. You both had your attention centered on going around to the left and passing that car ahead you; is that right? A. I didn't get that.

Q. You both had your attention centered on going around to the left and passing that car ahead of you, is that right? A. No, we were riding—

Q. You were riding in the third lane, weren't you? A. No, sir; the second.

40

John Tobia—Cross

Q. In the second? A. Yes, sir.

Q. Which car were you trying to pass then?

A. The car that was stopped; evidently they decided to stop, or something, but they were pulling over to stop, and we were passing them.

10 Q. And where was that, just where you were passing them? A. Just as we got under the bridge.

Q. Just as you got under the bridge? A. Just before the bridge, I couldn't exactly say.

Q. And in which lane of traffic going toward Jersey City, was that car? A. The first on our right.

Q. The first on your right? A. Yes.

20 Q. Well, there were two lanes of traffic going toward Jersey City? A. We were in the second.

Q. You were in the second? A. Yes.

Q. Well, if the car you just referred to was in the right-hand lane, did you have to turn out to pass it? A. How could we help but pass it? He was stopping; we had to.

Q. When he was in the first lane? A. Yes.

Q. If he was riding in the first lane— A. Yes.

30 Q. —and you were driving in the second lane, why was it necessary for your car to turn out to pass him if he slowed up to stop? A. He was slowing up; we pulled out; we were riding in the second lane, and we couldn't pass beyond him. We had to pull out to pass him. We were riding beside him.

Peter Curcio—Direct

PETER CURCIO, being duly sworn, according to law, on his oath testifies as follows:

Direct examination by Mr. Parsons.

Q. Mr. Curcio, where do you live? A. Camden Street, Newark, New Jersey.

Q. Did you live in Newark, New Jersey, on May 31st, 1931? A. I did. 10

Q. Where are you employed? A. Newark Sight Seeing Bus Company.

Q. And on this day in question, were you on a Newark Sight Seeing Bus? A. I was.

Q. And who was driving the bus? A. Leo Moore.

Q. The first witness who was on the stand in this case? A. That's right.

Q. Where were you sitting in the bus? A. The first seat back of the driver. 20

Q. And on what side of the bus were you sitting? A. The left-hand side.

Q. What kind of bus was that bus? A. Pierce Arrow coach.

Q. And as Mr. Moore said, you had been where? A. Pardon?

Q. You had been taking a ride on the bus that day? A. I did.

Q. You were riding from Jersey City to Newark? A. Right. 30

Q. With reference to the Harrison Turnpike, how many lanes of traffic that day were going toward Newark? A. Two.

Q. Can you tell us in which lane of traffic your bus was? A. The first lane. The second lane, in other words.

Q. Was there a lane of traffic on your right going toward Newark? A. Right. 40

Peter Curcio—Direct

Q. Can you tell us if there was anything that you remember as to the traffic in the lane in front of you—any particular car in front of you? A. Well, there was a bus—a greyhound bus.

Q. A Greyhound bus? A. Yes.

10 Q. As you rode there, Mr. Curcio, did you observe any car upon the highway? A. Coming toward us or past us?

Q. Passing you—well, any car in particular that you observed? A. The car that passed us on our left.

Q. And at the time that that car passed you on your left, as you say, will you tell us just where you were on the highway? A. I would say about 150 feet away from the bridge.

20 Q. About 150 feet away from the bridge, on the Jersey City side of the bridge? A. Right.

Q. Coming toward the bridge? A. Right.

Q. And will you tell us what part of the road you were on when this car passed? A. We were riding between the first and second tracks.

Q. Between the first and second tracks? A. Between the first and second tracks.

Q. Where was this car that passed you—which side did it pass you on? A. Left-hand side.

Q. The left-hand side? A. Right.

30 Q. Can you tell us in what particular portion of the road or highway that went by you? A. Between the second and third rail.

Q. Between the second and third rail? A. Yes.

Q. Was there any break in the line of traffic ahead of you so that car could turn back into his right? A. None.

Q. Did you make any observation out the side to see—or did you make any observation to Mr.

Peter Curcio—Cross

Moore, the driver who was in front of you? A. I did.

Q. You make an observation; what happened?

A. We were stopped; there was an accident ahead of us.

Q. You didn't actually yourself see the accident? A. I did not.

10

Q. You have been driving a bus how long? A. Five years.

Q. Can you tell us the approximate speed that your bus was going immediately before the accident? A. Between thirty-five and forty.

Q. How far from you, approximately, did this accident happen? A. About a hundred feet.

Q. And may I ask you in what position you were sitting in the bus—were you facing the front, or were you facing sideways? A. Sitting sideways.

20

Cross examination by Mr. Hartpence.

Q. Where had you been, just on this trip on the bus, Mr. Curcio? A. To Columbia Park.

Q. That is located where? A. In Jersey City.

Q. Up the Boulevard? A. Right.

Q. Did you ride over with Mr. Moore? A. I did.

Q. On his trip from Newark to Columbia Park? A. I did.

Q. What time did you go out? A. Oh, we went out in the afternoon; we were out at Columbia Park about two hours.

30

Q. Took a lot of passengers over? A. We did.

Q. Then you were coming back from Columbia Park when the accident happened? A. Right.

Q. What time of night was that? A. About 6:45.

Q. What kind of day was it when the accident happened? A. Raining—rainy.

40

Peter Curcio—Cross

Q. What were you and Moore talking about when you sat there on the side, right back of him?

A. Not a thing.

Q. Just before the approach to that railroad bridge, and you say this accident happened, you had not been saying anything to each other at all?

10 A. Not a thing.

Q. What was the last stop that your bus had made before you got there at the railroad bridge?

A. The last stop?

Q. Yes? A. At the light at the top of the viaduct.

Q. How far away were you then from the railroad bridge? A. I didn't measure it.

Q. How far away; a half mile? A. I haven't the least idea.

20 Q. What? A. I haven't the least idea.

Q. You have been over that road a good many times? A. I have, but I never stopped and measured it.

Q. Is it a mile away, or a half a mile away? A. I wouldn't say.

Q. Is your business that of driving a bus? A. Yes.

Q. Work for the same company that Mr. Moore did? A. I did.

30 Q. Weren't you driving the bus? A. I was not.

Q. Weren't you driving that bus at the time the accident happened? A. No, sir.

Q. You are sure of that, are you? A. Positively.

Q. You testified in the trial also, didn't you, in the East Orange District Court? A. I did.

Q. I call your attention to these questions and answers. Were you asked this question, and did you or not make the answers. "Q. Were you driv-

Peter Curcio—Cross

ing the bus that day? A. Yes. Q. About 6:45 P. M., where were you driving a bus? A. On Harrison Turnpike coming to Newark. Q. Do you remember seeing an accident after it happened? A. After it happened, I did.” A. I answered that question, who was the driver of the bus?

10

Q. Yes? A. I said, no, he was.

Q. You said, “No, he was?” A. Right.

Mr. Hartpence: I will ask that pages 41 and 42 of this transcript of testimony be marked for identification.

Pages are marked D-2-a and D-2-b respectively.

“Q. Were you driving a bus on that day? A. Yes. Q. About 6:45 P. M., where were you driving the bus? A. On the Harrison Turnpike, coming to Newark. Q. Do you remember seeing this accident? After it happened? That is, the position of the cars? A. After it happened, I do.”

20

Q. Do you remember those questions and answers? A. I answered some questions. I was asked if I was driving a bus that day, which in the early part of the morning, I did. I drove a bus; I was supposed to drive—

30

Q. At 6:45? A. I was sitting in the front seat in back of the driver, at 6:45, on the Harrison Turnpike.

Q. Do you remember being asked this question at the trial? “Q. You say the first time you saw this Packard it was about two hundred feet from where? A. Two hundred feet from the scene of the accident.” A. From the bridge. That’s when it first passed us.

40

Peter Curcio—Cross

Q. Where did you go after the accident happened? A. I went to Loew's Theatre, Newark.

Q. How long was it before you left the scene of the accident, after it happened? A. About ten minutes.

10 Q. Did you get off the bus at the time the accident happened? A. I did.

Q. And then when you went over to Newark, did you go back on this bus and go into Newark? A. Yes, I did.

Q. Did you see a police officer there? A. I did.

Q. Make any statement then? A. None.

Q. Did you make any statement to an officer at all, how the accident occurred? A. None.

20 Q. Where was the Packard touring car when you saw it stopped after the collision? A. Facing Newark the other side of the bridge.

Q. Toward Newark? A. Right.

Q. Where was it with relation to the right-hand curb? A. To the first and second tracks.

Q. When you say "first and second tracks", you mean the first and second rails of the first and second tracks, is that right? A. Yes, certainly.

Q. There were only two trolley tracks there? A. Between the first and second tracks.

30 Q. Between the first and second track? A. Right.

Q. And that was headed toward Jersey City or Newark? A. Newark.

Q. Where was the other car that was headed—had been headed toward Jersey City? A. He was on the right of the road facing Newark.

Q. Facing Newark? A. Right.

Q. How far out from his right-hand curb was he? A. I didn't stop to see.

40 Q. What? A. I didn't see that.

Peter Curcio—Cross

Q. You didn't see that? A. No.

Q. Wasn't he way out on the tracks on the other side of the road toward the right-hand curb going toward Newark? A. He was over the first track.

Q. He was over the first track, wasn't he? A. Yes.

Q. Wasn't he over the second track also? A. I don't know. 10

Q. How much space was there between the two cars that you say you saw there after the accident? A. There was enough for a bus to go through, but you would have to go through very carefully.

Q. That is between the curb and— A. Between both cars.

Q. Oh, between both cars? A. Yes. 20

Q. So a bus could have gone between the two cars that were in the collision after it was over? A. He would have to go very carefully.

Q. He would have to go through very carefully? A. Yes.

Q. You do recall that positively? A. I do.

Q. Well, before the traffic to Newark started up again, did they move the two cars that were in the collision? A. I don't remember.

Q. You don't know what they did. Did they permit traffic to resume its movements toward Newark? A. When I next returned to the scene of the accident, they directed traffic to come through. What happened after our bus went through, I do not remember. 30

Q. Did your bus go through toward Newark right between the two cars that were in the collision? A. It did.

Q. They had not been moved from the place— A. I don't know if they had or not.

Q. What? A. I don't know if they had or not. 40

Mrs. Delia Curran—Direct

MRS. DELIA CURRAN, being duly sworn, according to law, on her oath testifies as follows:

Direct examination by Mr. Parsons.

- Q. Mrs. Curran, where do you live? A. I live in Newark.
- 10 Q. Pardon me? A. I live in Newark.
- Q. You live in Newark? A. Yes, sir.
- Q. How long have you known Mrs. Butler? A. I knew her all my lifetime.
- Q. I didn't hear you. A. I have known her all my lifetime.
- Q. You have known her your entire life, have you? A. Yes.
- Q. And more particularly, Mrs. Curran, will you tell us if you had known her since you were both of age, and so on? A. Yes.
- 20 Q. Did you know her after she was married? A. Yes.
- Q. And did you know her after her accident happened? A. Yes, sir.
- Q. Did you know her from the time that she was in this accident? A. Yes.
- Q. Did you visit her since the accident? A. Yes, I have.
- 30 Q. Can you, generally, describe Mrs. Butler's condition before the accident, first with reference to her ability to work. Do you know what she did? A. Yes.

Mr. Hartpence: I object to that as incompetent and immaterial.

The Court: It is laying the foundation for the general physical condition of Mrs. Butler. I will allow it. You need not be too remote.

Mr. Hartpence: I further object because it calls for a conclusion.

40

Mrs. Delia Curran—Direct

Mr. Parsons: I withdraw the question.

Q. Can you tell us how much Mrs. Butler worked before the time of this accident, Mrs. Curran? A. She always worked in around the home, of course, at different homes.

Q. What kind of work did you see her do? A. 10
She was working all day—

By the Court.

Q. What kind of work did she do? A. She did housework.

Q. Housework? A. Yes.

By Mr. Parsons.

Q. She worked for other people all day? A. 20
Yes.

Q. Had you seen her before the accident—that is, before May 31st, 1931, had you seen Mrs. Butler in company with friends? A. Yes, I did.

Q. Will you tell us with reference to the neighbors and friends of hers—did she avoid people, or did she mix with them?

Mr. Hartpence: I object.

The Court: No, that is not the way to get at it. Let her describe what she observed, her physical appearance— 30

Q. Will you describe the physical appearance of Mrs. Butler? A. Mrs. Butler was a strong, healthy, normal woman. Entirely different person than she is now. I know from her photograph, you can tell—

Q. I show you a photograph, Mrs. Curran, and ask you if you recognize this photograph? A. 40
Yes, I do. That's a photograph just exactly like Mrs. Butler was before the accident.

Mrs. Delia Curran—Direct

Q. Before the accident? A. Yes.

Mr. Parsons: I offer it in evidence.

By Mr. Hartpence.

10 Q. How long before the accident was this photograph taken, do you know, Mrs. Curran? A. Well—1929.

The Court: 1929.

Mr. Hartpence: All right.

By Mr. Parsons.

Q. The accident happened in 1931? A. 1931.

Photograph is received in evidence and marked Exhibit P-5.

20 Q. Was there any apparent change you noticed, in the appearance of Mrs. Butler after the picture was taken in 1929 from her appearance before the accident in 1931? A. No, I don't think there was.

Q. Mrs. Curran, may I ask you if you will describe Mrs. Butler before the time of this accident—how she carried on conversations, and so on? A. Well, she was like a normal being, pleasant and sociable in that way—

30 Q. How did she meet people before the accident? A. Very sociably.

Q. Have you known her since then? A. Yes.

Q. Have you seen her—been in her presence and company since the accident? A. Yes, I have.

Q. Directing your attention first to her appearance; will you describe that?

Mr. Hartpence: Objected to as irrelevant and immaterial.

40 The Court: No, you had better describe her physical condition, what in the past her conduct has been—her physical condition.

Mrs. Delia Curran—Direct

Q. Will you describe her physical condition since the accident? A. She is an entirely different woman. She seems to be mentally defective, as far as her actions are concerned.

Mr. Hartpence: I move to strike that out.

The Court: Strike it.

10

Q. Will you describe her actions? Not what you think about her actions, but tell us how she acts.

Mr. Hartpence: I don't think it is her acts that are material, but what is her condition.

By the Court.

Q. What do you say as to her physical appearance? A. Her physical appearance has changed greatly.

20

Q. How has it changed? A. She has gotten thin; she acts different. Her disposition has entirely changed.

By Mr. Parsons.

Q. Will you tell us, what we particularly want to know—will you tell us how her disposition has changed?

Mr. Hartpence: Objected to as immaterial and irrelevant.

30

Q. —in an outward way? A. She acts—

The Court: Objection sustained.

By the Court.

Q. Describe her appearance. What does she look like? A. Well—

40

Mrs. Delia Curran—Cross

Q. She is thin? A. She has gotten thin. She acts different towards people. She doesn't talk to them when they come to the house.

Q. She is not as talkative as she used to be? A. She doesn't talk—

10 Q. Sits by herself? A. She goes out of the room and sits in a room by herself. She cries—

Q. Have you seen her cry? A. Oh, yes.

Cross examination by Mr. Hartpence.

Q. Did you live with her, Mrs. Curran? A. No, I don't.

Q. Where do you live? A. I live in Newark.

Q. How often have you seen Mrs. Butler during this past year, say? A. The last year?

20 Q. Yes? A. I have seen her—well, every two weeks or once a month, maybe; sometimes oftener than that.

Q. You would go down—where was it that you saw her? A. At her sister's home, and when she would go down to the shore in the summer.

Q. Long Branch? A. Yes.

Q. You would go down there and see her? A. Yes.

Q. How long would you stay when you went down? A. Just a visit; that's all.

30 Q. What? A. Just for the day.

Q. Did Mrs. Butler talk with you on these occasions when you went there? A. Not very—

Q. When you visited her? A. Not very much, no.

Q. Not very much? A. No.

Q. Well, when did you learn that she had met with an accident? A. I knew it right after she had the accident.

Jean O'Connor—Direct

Q. How soon after that did you see her? A. Well, I don't think I saw her, not while she was in the hospital—about three or four months after that.

Q. And then where did you see her? A. I saw her at her sister's home in Orange.

Q. Where? A. In Orange. 10

Q. How often did you see her out there? A. I saw her I guess about four or five different times.

Q. Then she went to Long Branch? A. Yes.

Q. You talked with her on these occasions when you saw her? A. Yes, I have.

Q. Did she talk about her accident? A. No, she didn't seem to talk about her accident. Talked about how she felt.

Q. About how she felt? A. Yes.

Q. Did she talk about that a great deal? A. Yes. 20

Q. That was her chief topic of conversation, wasn't it, as to how she felt? A. Well, no. Not always.

Q. What else did she talk about? A. Sometimes she wouldn't talk about anything at all.

JEAN O'CONNOR, being duly sworn, according to law, on her oath testifies as follows: 30

Direct examination by Mr. Parsons.

Q. Mrs. O'Connor, where do you live? A. West Orange.

Q. And with reference to where Mrs. Butler lives, where do you live? A. On the same street.

Q. How long have you known Mrs. Butler? A. Five years.

Q. And did you know her before the accident? A. Yes. 40

Jean O'Connor—Direct

Q. Before May 27th— A. Yes.

Q. —1931? A. Yes.

Q. Or May 31st, 1931? A. Yes.

Q. How often did you see her before that date?

A. Well, daily; I would go in and out of her house—her home.

10 Q. And since that time have you seen her? A. The same.

Q. The same? A. Yes.

Q. Will you describe her physical condition and appearance before the accident? A. Well, before the accident she was an entirely different woman. We had parties together, and we would go out together—and now she just leaves—she just wants to go upstairs, and leaves you when you go into the house. She imagines we are going to hurt her.

20 Q. Directing your attention—

Mr. Hartpence: I move that that be stricken.

The Court: Strike it out. Imaginations don't mean anything.

30 Q. Directing your attention to her physical appearance before the accident, and since, will you describe that, Mrs. O'Connor? A. Well, her appearance before the accident, she was much tidier—much more careful of herself. Now she is very careless of herself, mostly. She doesn't mind. She doesn't care if she has two or three dresses on.

Q. Directing your attention to Exhibit P-5—you said you have known her for five years? A. Yes.

Q. Have you? A. Yes.

Q. I call your attention to this photograph, and ask you if that photograph represents her condition, or her physical appearance before the acci-

40

Jean O'Connor—Direct

dent? A. Yes; she has lost considerable weight since the accident.

Q. Directing your attention also, Mrs. O'Connor—do you know if before the accident, Mrs. Butler worked? A. Yes.

Q. Can you tell us what kind of work she did? A. Cooking and housework. 10

Q. Do you know if she did any other kind of work? A. No, I do not.

Q. For some time before the accident, was she in any business that you know of? A. She kept a rooming house.

Q. She had a rooming house some time before the accident? A. Yes.

Q. Do you know if she has done that kind of business since the accident? A. Not since the accident, no. 20

Q. She has done nothing since? A. No.

Q. Have you talked with her—have you visited her since the accident? A. Yes.

Q. May I ask you with reference to her mental alertness, quickness in answering and so on—will you describe what it is now? A. She is not interested in talking; she has lost her interest in anything at all. No conversation at all. She doesn't talk.

Q. How was she before? A. Very good company. She was an entirely different woman. She took an interest in what you said, in conversations—what you said to her, but now, she is entirely different. 30

Q. May I ask you if, in your conversations with her, before, in your talks with her before, Mrs. O'Connor, if she ever experienced any trouble in hearing? A. No, no. 40

Jean O'Connor—Cross

Q. Did you go to the movies with her before the accident? Do you remember going to the movies with her before the accident? A. Yes.

Q. Did she experience any trouble with her eyesight before the accident?

10 Mr. Hartpence: Objected to as immaterial and irrelevant.

The Court: Yes; strike it out.

Question withdrawn.

Cross examination by Mr. Hartpence.

Q. Where did you live before the accident, Mrs. O'Connor? A. On Essex Avenue in West Orange.

Q. What sort of house did you live in? A. It was a two family house.

20 Q. A two-family house? A. Yes.

Q. Where did she—what part of the house did she live in? A. Upstairs.

Q. She lived upstairs? A. Yes.

Q. Do you know how many rooms she had in her part of the house? A. I couldn't say; I never was in the third floor, I don't know how many she had on the second and third floors.

Q. What? A. I couldn't say how many rooms there were on the third floor.

30 Q. Three floors? A. First, second and third.

Q. Which did she have? A. Both; the whole back part of the house.

Q. You visited her daily, you said? A. Not so much in Orange; only when she came to West Orange.

Q. West Orange? A. Yes.

Q. Where did she live in West Orange? A. On the same street—the same street—

Q. —as you? A. That's right.

Patrick Hudson—Direct

Q. What kind of a house did she live in there?

A. One-family house.

Q. How many rooms in that house? A. I couldn't say. About eight.

Q. Was that before she was hurt? A. Yes.

Q. Do you know how many rooms she had in her rooming house? A. No; I was never interested. 10

Q. What? A. No; I don't know.

PATRICK HUDSON, being duly sworn, according to law, on his oath testifies as follows:

Direct examination by Mr. Parsons.

Q. Mr. Hudson, where do you live? A. New York. 20

Q. And you live here in Monmouth County in the summer? A. Yes.

Q. And you have been employed here in Monmouth County for some period of time? A. Yes.

Q. By whom? A. Mr. H. J. Sullivan.

Q. In what capacity? A. Chauffeur.

Q. Are you related to Mary Butler? A. Brother.

Q. May I ask you if you know if, since the death of Mrs. Butler's husband, if she has been self-supporting or not? 30

Mr. Hartpence: I object.

A. She has been self-supporting.

Mr. Parsons: I want to show her ability to work.

Mr. Hartpence: I think that calls for a conclusion.

The Court: Yes, it does.

Patrick Hudson—Direct

Q. Will you tell us what your sister did, or what she has done since the death of her husband?

A. She had been cooking most of the time. She ran a boarding house in Essex Avenue—

10 Q. Where has she cooked—can you tell us where she has worked? Do you know some of the places where she has worked? A. She was working in New York as well as she worked in Jersey, for a while.

Q. And can you tell us the condition of her health down to the date of the accident? A. She has worked all the time. It was good.

Q. And since the accident, can you tell us how it was? A. Not good. She has not been able—

20 The Court: The expression “She has not been able” will be stricken.

Q. May I ask you if at any time since the accident, she has lived with you? A. Yes, most of the time.

By the Court.

Q. Describe her appearance as you observed it before the accident. A. She has fallen off in weight—

30 Q. What else? A. And she sometimes loses her recollection of things; she can't seem to remember. She is careless about the way she looks. She don't dress up the same as she used to.

Q. What about her doing work? Does she work as she used to? A. No, she does no work at all.

Q. She doesn't work at all? A. No.

Q. Was she in the hospital after the accident? A. Yes, your Honor. She was.

Q. How long was she there? A. I think she was there two months and several days.

40

Mary Butler—Direct

Q. What kind of injury did she have? Do you know? A. Head injury.

Q. Head injury? A. And leg and spine. I think it is on the records of the hopsital.

No cross examination.

Mr. Parsons: That is all, except we have Mrs. Butler; that is all I have at this time. 10

Adjourned to Wednesday, January 10th, 1934, at ten o'clock in the forenoon.

Freehold, N. J., January 9 and 10, 1934.

SECOND DAY.

Appearances:

For Plaintiff: THOMAS P. MCKENNA, Esq., by THEODORE D. PARSONS, Esq. 20

For Defendant: WALL, HAIGHT, CAREY & HARTPENCE, by JOHN A. HARTPENCE, Esq.

MARY BUTLER, plaintiff herein, being first duly sworn, was examined and testified as follows:

Direct examination by Mr. Parsons.

Q. Mrs. Butler, you are the plaintiff in this case, are you? A. Yes, sir. 30

Q. Where do you live at the present time? A. West Orange.

Q. With whom do you live? A. My sister.

Q. May I ask you where you lived in 1931? A. In Orange.

Q. You are a widow, are you? A. Yes, sir.

Q. When did your husband die? A. 1913.

Mary Butler—Direct

Q. Since your husband's death, Mrs. Butler, will you tell us what has been your occupation?

A. I have done housekeeping for a private family, cooking with private families, and housework.

Q. How long did you do that? A. All these years up to three years ago.

10 Q. Three years ago what did you do? A. About five years ago I lived in my own flat.

Q. What did you do? A. I rented out rooms to boarders, boarding.

Q. May I ask you when you went out working, Mrs. Butler, how much did you receive? A. Well, first when I went out working I think it was about \$35 a month, but in the late years it was \$100 a month, in the last five years.

20 Q. In addition to that \$100 a month, Mrs. Butler, where did you live? A. I lived with the family.

Q. Did the family furnish you room and board? A. Yes, sir.

Q. Now, coming down to 1931, what had happened to your rooming house? A. Well, the boys lost work, couldn't get work, and they moved away. They couldn't stay with me.

30 Q. As a result of the boys moving away what did you do for a living? A. Well, I thought I would get work.

Q. Did you get some work? A. I looked for some. I got two weeks in Montclair.

Q. Do you remember how much you got for those two weeks? A. \$25 a week.

Q. Now, coming down to just before Decoration Day, 1931, you were living at that time where? A. In my own home.

40 Q. Did you go to an employment agency? A. Yes, I did.

Mary Butler—Direct

Q. As a result of going to the employment agency where did you go? A. To Mrs. Eberstadt's.

Q. Will you tell us when you went to Mrs. Eberstadt's whether you took your clothes with you or not? A. No.

Q. Can you tell us for what purpose you went there? A. I went to get lunch. 10

Q. Did you get lunch? A. Yes, sir.

Q. Did you see Mrs. Eberstadt when you first went there? A. Not right away; I had lunch almost prepared when she came in the kitchen.

Q. After you had prepared lunch and Mrs. Eberstadt came into the kitchen, did you have a conversation with her? A. After lunch was over, yes. She came back in the kitchen.

Q. Tell us just what the conversation was between you and Mrs. Eberstadt? A. Mrs. Eberstadt asked me if I would go over Decoration Day to a country home in Long Island to help her out, and I only came to get lunch and said I could not go, I had no clothes. She said that would be all right, she would send the chauffeur to my home after lunch and get whatever I wanted. 20

Q. At that time when the chauffeur went and got what you wanted will you describe just what clothes were brought? A. In the meantime, I called up my sister and asked her to get some things ready for me. She had the things put in a paper box, I think, not a suitcase, not many, just a few articles. 30

Q. Did you go to Long Island? A. Yes, sir.

Q. Now, at that time, Mrs. Butler, even at the preparing of lunch and after the preparing of lunch and going to Long Island was anything said

Mary Butler—Direct

to you about wages? A. No, Mrs. Eberstadt never mentioned it, and neither did I.

Q. Did Mrs. Eberstadt tell you how long she wanted you? A. Over Sunday.

10 Q. Did she tell you why she wanted you? A. Yes. She said something about her permanent girl having a ringworm in her leg.

Q. Did you tell us where you went in Long Island? Do you know the name of the town? A. It was in Southampton; I don't just know the name of the village.

Q. How many went out to Long Island, Mrs. Butler? A. Mrs. Eberstadt and the nurse and the children and I, and Mrs. Eberstadt and I and two children and the nurse went in one car and the chauffeur had the oldest boy in the other car.

20 *By the Court.*

Q. Who drove the car? A. Mrs. Eberstadt.

By Mr. Parsons.

Q. You stayed in Long Island how many days? A. We went on Thursday afternoon, and Sunday afternoon they decided to send us home about 3 o'clock, after dinner.

30 Q. Was Mr. Eberstadt out in Long Island? A. Yes, he came down Friday.

Q. Have you ever talked to Mr. Eberstadt? A. No.

Q. What time did you leave Long Island? A. We left Long Island, I think—I am not sure—around 3 o'clock. We were in a little bit of a rush.

Q. In what car did you leave? A. I left with the nurse and three children, and the chauffeur drove.

40

Mary Butler—Direct

Q. Do you know what kind of a car it was?

A. I don't know. It was an open car; I can't give you the name of it.

Q. Where did you sit? A. In the back seat.

Q. Where did the rest of the people sit? A. The nurse and the youngest boy were in the back seat and two children in the front seat. 10

Q. On the way home did you change your positions in the car at all? A. Not me, but it was very cold and the children had no coats, and the nurse asked the chauffeur to put the young children in the seat with the chauffeur and the oldest boy came back in the seat with the nurse and I, and we drove quite a distance, but the young boy was annoying the chauffeur with questions, and I asked her to take him so that the chauffeur would pay more attention to driving. So, the oldest boy went back in the front seat. 20

Q. Do you remember anything about this accident? A. I don't remember about the accident.

Q. What is the next thing you remember after the accident? A. I remember some man picking me off the street and wiping blood off my face.

Q. Where were you taken after that? A. We went to the hospital, the West Hudson Hospital.

Q. Where is the West Hudson Hospital? A. In Kearny. 30

Q. What doctor took care of you there? A. Dr. Dukes.

Q. When you were taken to the hospital do you remember what they did to you? A. We were sitting on a bench, and then they put me upstairs in bed.

Q. After you were in bed can you tell us what treatment they gave you? A. The first day they

Mary Butler—Direct

didn't seem to think I was—they just put cold water on my head and left me in bed, but on the second day when the nurse came in the room I had a bad headache, and after two days my head got very bad, and everybody appeared double to me. I seen people coming double right in the room.

10

By the Court.

Q. Where were you hurt? A. My head, both legs, my side and my ear. Both of my legs were cut open.

By Mr. Parsons.

Q. In the hospital what did they do to you after the first or second day? A. Well, they put icebags on my head and they had an X-ray taken.

20

Q. How long did you have icebags on your head? A. Two weeks, off and on.

Q. Did you have any open wound on your head? A. I had a cut here and big bruises on my eye, and a cut here.

Q. What had happened to your eyes in the accident, Mrs. Butler? A. Bad bruises on both eyes; both eyes almost closed.

30

Q. When you were in the hospital the first two days you were there with both eyes bruised; did you do anything with relation to your eyes? A. When Dr. Dukes discovered it they had a specialist examine my eyes.

Q. Did you yourself, the first couple of days, when your eyes were black and blue, did you yourself try to do anything? A. Mrs. Eberstadt came in the second day and looked at my eyes, and I told her I could see.

Q. Did you try both eyes? A. I did; I could see.

40

Mary Butler—Direct

Q. Will you tell us just how you tried both eyes? A. I put a towel over one and a towel over the other, and they were all right for two days and after I seen the doctor I couldn't see out of this eye.

Q. Out of the left eye? A. It started as if there was sand thrown in my eye. 10

Q. Now, can you today see out of your left eye? A. Sometimes I think I can see some light.

Q. If you put your hand over your right eye can you see people with your left eye? A. I can't distinguish persons, but I can distinguish light.

Q. They kept icebags on your head two weeks? A. Yes, sir.

Q. Then what treatment did they give you? A. They had a specialist come in, and he said to put hot water compresses on as hot as I could stand. 20

Q. How long did you continue to do that? A. Two weeks, I think.

Q. How long, all told, did you remain in the West Hudson Hospital? A. Two months and a few days.

Q. In addition to the blow on your head, you were hurt where else? A. Both my legs were cut open, and I was bruised in my body and back.

Q. Directing your attention to your head, did you receive any other injuries or any breaks around the head? A. No breaks. 30

Q. Nothing happened to your teeth? A. Yes, two teeth got knocked out. I had bridgework, and a tooth got broken.

Q. How long before the accident had you had the bridgework put in? A. Just a little while; I hadn't finished paying for it. I still owe \$50.

Q. You owe that yet? A. Yes, sir.

Mary Butler—Direct

Q. What happened to the bridgework? A. It wasn't any use to me; it wouldn't fit without the tooth.

Q. The tooth was broken? A. Yes, sir.

Q. May I ask you, when you got out of bed in the hospital how did you feel? A. I couldn't walk.
10 I took dizzy spells; I would fall over.

Q. Directing your attention to the period of time you were in the hospital with reference to your head, outside of not being able to see out of your left eye, did you suffer anything else? A. Yes, I suffered with the back of my neck and my head, and I suffer yet. It seems as if I was caught in a wall and trying to creep out, and something bruising down on me.

Q. You feel that yet? A. Yes, sir.

20 Q. How often? A. It is a little better sometimes, but it is there all the time, continuously.

Q. Directing your attention, Mrs. Butler, after you left the West Hudson Hospital where did you go? A. I spent two weeks with my sister in West Orange.

Q. Then where did you go? A. I went to my brother. She had eight children, and I couldn't stand the children, so I went to my brother's in West End, Long Branch.

30 Q. While you were staying with your brother what happened to you? A. I never could go downstairs, and my head kept bothering me. I wasn't able to do anything. I could walk, but I had to stay in one room, one floor. There was ringing in my left ear all the time.

Q. Did you suffer any dizzy spells while you were with your brother at West End? A. Yes, sir.

Mary Butler—Direct

Q. How long did you stay with your brother there? A. I think it was in October; he had to go back to the city.

Q. Where did you go then? A. My brother found a lady, Mrs. Herbert, and I went there and stayed there for a time. I took a dizzy spell, and she said I shouldn't stay there, so I went to the Hazard Hospital. 10

Q. How long were you in the Hazard Hospital? A. Four weeks.

Q. From the Hazard Hospital where did you go? A. Back to Mrs. Herbert's.

Q. How long did you remain with Mrs. Herbert? A. Over two years, until last May.

Q. Since last May where have you been living? A. With my sister in West Orange, and down in Baltimore in the summer time. 20

Q. Mrs. Herbert died? A. Yes, sir.

Q. During that period of time, Mrs. Butler, may I ask you with reference to your head and these dizzy spells, after you left the Hazard Hospital how did you feel? A. Well, I felt I could keep on my feet better; but I wasn't any better otherwise. My head bothered me all the time.

Q. Did you go to any doctor after you left the Hazard Hospital? A. Yes. Christmas time when I went to West Orange I tried a few doctors in Newark, Dr. Hagerty and Dr. Quimby. I got their addresses from patients in the West Jersey Hospital. 30

Q. Did you go to any other doctor in Orange? A. Dr. Lyons. I have seen him several times.

Q. Did you go to any other doctor in Monmouth County? A. Yes, I went to a doctor on Third Avenue.

Mary Butler—Direct

Q. Do you remember his name? A. I think it is Dr. Marr.

Q. Dr. John Marr? A. Yes, sir. I had a puffed out eye.

10 Q. You say you had a puffed out eye; how long had that been? A. The first winter I went down there.

Q. Describe what happened? A. My face got all swollen on this side, and it got to going up in my eye; my right eye got kind of closed, so I went to the doctor.

Q. Was there any change in the color of your face? A. Yes, it got dark; the blood was coming down through the inside.

20 Q. Has that been since that time? A. A few days, yes.

Q. Now, Mrs. Butler, before this accident what did you do for recreation? Did you go to the movies at all? A. Yes, I was at the movies a lot.

Q. Did you do any reading? A. Yes, I like reading.

Q. What have you done by way of recreation? A. I used to go to card parties a good bit. I like them best of all.

30 Q. Directing your attention to taking care of your clothes, and so forth, did you take care of your own clothes before the accident? A. Yes, always.

Q. Did you do any sewing? A. I did some sewing, not much.

Q. Since the accident may I ask you if you attempt to read what happens? A. I can't stay at it; my head bothers me if I keep steady at it, at any one thing for a little while; I get dizzy spells.

Mary Butler—Direct

Q. What happens to your good eye? A. It gets blurred, as if something was squeezing inside, sewing them together.

Q. If you go to the moving pictures what happens? A. I only went a few times, and the picture mixes on the screen. I mean it moves around and I don't enjoy it. 10

Q. Have you been able to do any sewing since the accident? A. No, sir.

Q. Since May 31, 1931, have you been able to do any work at all? A. Well, I tried a little bit at my sister's, but I can't finish anything.

Q. Have you worked for anybody else? A. No.

Q. You have described this pain in your head; can you tell us where that pain extends to? A. It went down my back, and sometimes I get it in this leg, and can't keep my legs together for only a few hours. 20

Q. Now, before the accident, with reference to your hearing, did you have any trouble with your hearing at all? A. No, sir.

Q. Has there been any change in your hearing since the accident? A. There is a ringing in this ear; I can't hear so good with this ear.

Q. You are referring to which ear? A. My left ear.

Q. Will you tell us where on your head you suffered the blow or bruise? A. I think my head was hurt all over. It was cut here (indicating) and black and blue. 30

Mr. Hartpence: I think it should be designated on the record that she is pointing to a point over her left eye.

*Mary Butler—Cross**By Mr. Parsons.*

Q. Have you received a bill from the Hazard Hospital? A. I did, but I mislaid it; I couldn't find it.

10 Q. This is a bill which Mr. McKenna obtained recently; will you look at that bill, Mrs. Butler, and see if that is a copy of the original bill, if that is the amount of the original bill from the Hazard Hospital? A. That is it; I remember what it was.

Q. What was the original bill? A. About \$165.

Q. Have you paid this bill? A. No.

Q. It is still due and owing? A. Yes, sir.

20 Mr. Hartpence: The only objection to it is we think that under the theory of our defense the bill is not properly chargeable to us, but chargeable to the employer under the Compensation Act.

(Bill referred to marked in evidence Exhibit P-6.)

By Mr. Parsons.

30 Q. I show you P-5, which was identified by some of your friends and acquaintances that testified yesterday; may I ask you when this picture was taken? A. That was taken in 1929, in the fall.

Mr. Parsons: That is all.

Cross examination by Mr. Hartpence.

Q. Where were you living in 1929, Mrs. Butler, at the time this photograph was taken? A. I was in Asbury Park at the time I had that picture taken.

40 Q. Where were you living at that time? A. I was living in my own home.

Mary Butler—Cross

Q. Where is that? A. 98 North Essex Avenue, Orange.

Q. How long had you lived there? A. Well, three years.

Q. Where had you lived before that? A. In different places in the Oranges.

Q. Always in the Oranges? A. Yes, sir. 10

Q. You lived all of your life there? A. With the exception of two years in New York.

Q. And it was not until after you were injured in this accident that we have been talking about that you came down to Long Branch, was it? A. I came to Long Branch after I left the Hudson Hospital.

Q. About two weeks after that you went to live with your sister in West Orange, didn't you? A. No, I came direct from the West Hudson Hospital to my sister's in West Orange, and I was upstairs, and there was a big family, and I couldn't stand the noise, so I came down to my brother's in West End. 20

Q. That is right in Long Branch, part of Long Branch, isn't it? A. Yes, sir.

Q. How long did you stay there? A. He went to the city the last week in October.

Q. Oh, he only stayed in Long Branch during the summer? A. Yes, sir. 30

Q. Where was his regular residence? A. In New York in the winter and Long Branch in the summer.

Q. When your brother went back to New York after the summer where did you go? A. 71 Third Avenue, Long Branch.

Q. With whom? A. Mrs. Herbert.

Q. How long did you stay with Mrs. Herbert? A. I stayed one day. 40

Mary Butler—Cross

Q. Then you went to the Hazard Hospital? A. Yes, sir.

Q. Where is that located? A. It is in Long Branch.

10 Q. You stayed there how long? A. I am sure it was three or four weeks. I came out and had to go back again.

Q. Where did you go after you left the Hazard Hospital? A. Mrs. Herbert's.

Q. How long did you stay with her? A. Until last May.

Q. You lived with her? A. I lived in the house with Mrs. Herbert until January.

Q. Did you board with her? A. I boarded with her, yes; we boarded together. She was an elderly lady and very quiet, and I liked her.

20 Q. After she died where did you go? A. I had a girl come in and stay with me, and I stayed in the house, and the family used to come weekends, her daughters.

Q. How long did you stay there? A. She rented the house in May, and I didn't like the other party, so I couldn't stay.

Q. Where did you go then? A. West Orange.

Q. And you have been there ever since? A. Yes, sir.

30 Q. How long has your husband been dead? A. Since 1913.

Q. When was it that you began to take in roomers at your apartment? A. It was about three years before the accident I had my own flat.

Q. Where did you have your own house and take in those boarders? A. 98 North Essex Avenue, Orange.

40 Q. What kind of a house did you have, how many rooms? A. A two-family house, seven rooms on the second floor and five on the first.

Mary Butler—Cross

Q. How many roomers did you have on the average? A. Five boys.

Q. When did they stop rooming with you, did you say? A. The fall of 1931 their work stopped and they moved; they couldn't stay.

Q. 1931? A. 1930.

Q. It was the fall before you were hurt when work stopped and the boys moved away? A. Yes, sir. 10

Q. You did not have roomers from the fall of 1930 until you were hurt? A. No, sir.

Q. What sort of work did you do during that period? A. I didn't do much of anything; I stayed home.

Q. There wasn't much work to be had, was there? (No answer.) 20

By the Court.

Q. Did you have any work that you could have done? A. I think I got a few weeks or a few months somewhere.

By Mr. Hartpence.

Q. You did work a couple of weeks in Montclair, didn't you? A. Yes, sir.

By the Court.

Q. Did you apply for work anywhere? A. Yes, sir. 30

Q. Where? A. In Mrs. Sullivan's.

Q. An employment agency? A. Yes, sir.

Q. Did you get any work through Mrs. Sullivan? A. No, I never got any position.

Q. What kind of work did you do, housework, as a rule? A. Housework and cooking, and help through the house. 40

*Mary Butler—Cross**By Mr. Hartpence.*

Q. But you never got any work through Mrs. Sullivan? A. No, sir.

Q. That is right? A. Yes, sir.

Q. What kind of work did you tell Mrs. Sullivan you could do if she could get work for you?
10 A. Cooking is the only work.

Q. Is that what you told Mrs. Sullivan? (No answer.)

By the Court.

Q. How did you register with Mrs. Sullivan, as a cook? A. As a cook. I never did anything else.

By Mr. Hartpence.

Q. Your arrangement with her was you wanted
20 her to get you work as a cook if she could; is that right? A. Yes, sir.

Q. Did Mrs. Sullivan call you up or get in touch with you about the work for Mrs. Eberstadt? A. No. I dropped in to the office in the morning to see if there would be anything, and I was about 10 minutes in the office when Mrs. Sullivan came out of the waiting room and asked if some girl would go to Long Island to get a lunch. Nobody answered, so I spoke up but said I had no clothes
30 and didn't know how to get there. She said the chauffeur was coming down, so the chauffeur came down and took me.

Q. Is that all Mrs. Sullivan said to you? A. Yes, sir.

Q. Did you go back to see Mrs. Sullivan again after that? A. I have never seen her since.

Q. Didn't you go back to Mrs. Sullivan's after you had been up to Mrs. Eberstadt's? A. I couldn't, because I got hurt.
40

Mary Butler—Cross

Q. Didn't you go back after you saw Mrs. Eberstadt and tell Mrs. Sullivan you had made an arrangement with Mrs. Eberstadt to stay there as cook for a month at \$80 a month? A. I never spoke to Mrs. Sullivan since.

By the Court.

10

Q. Didn't you tell Mrs. Sullivan that you had arranged with Mrs. Eberstadt to stay with her a month at \$80? A. No, sir.

Q. Did you make any such arrangement with Mrs. Eberstadt? A. Never. There was no money mentioned.

Q. Or time? A. Or time.

By Mr. Hartpence.

Q. Now, you said you never have seen Mrs. Sullivan since that morning when you left her office? A. No, sir. 20

Q. Have you talked with her since over the telephone? A. No, sir.

Q. Have you written any letters to her? A. No, sir.

Q. Have you communicated with her in any way? A. No, sir.

Q. Now, when you went to Mrs. Eberstadt's that morning you went right in the kitchen, did you? A. Yes, sir. 30

Q. Who told you to go to the kitchen? A. The chauffeur brought me in.

Q. How did you get from Mrs. Sullivan's office up to Mrs. Eberstadt's? A. Mrs. Eberstadt's chauffeur came to Sullivan's office and took me up.

Q. And he took you right in the kitchen? A. Yes, sir.

Q. Was there anyone else there? A. Yes, a waitress was in the kitchen. 40

Mary Butler—Cross

Q. Who told you what to do? A. Well, I wouldn't say for positive, but I think there was a slip of paper to prepare lunch, and the waitress told me what to get.

Q. There was a note telling you to get lunch?
A. Yes, sir.

10 Q. So, you went ahead and did what that said?

A. Yes, sir.

Q. The waitress helped you? A. She told me a few things.

Q. How did you know where to find things? A. That is easy; I got them.

Q. You had no trouble about that? A. No, sir.

Q. What sort of a lunch did you prepare? A. I think it was chops; I couldn't remember.

20 *By the Court.*

Q. Did it start with a salad? A. I think we had a hot lunch, anyhow. I couldn't say what it was.

By Mr. Hartpence.

30 Q. When did Mrs. Eberstadt first come to see you? A. Mrs. Eberstadt came to the kitchen when she came in with the children at lunch time, and I think she said "How do", or something to that effect. After lunch she came out in the kitchen and she had her hat on, and she asked me if I would go to Long Island over Decoration Day. I said, "I only came to get lunch; I haven't got my clothes". She said, "That is all right, Mary, the chauffeur will take you right down after lunch".

Q. Did she tell you what she wanted you to go to Long Island for? A. To help her out at the cooking for Sunday.

40

Mary Butler—Cross

Q. What day was this? A. I went to her on Wednesday, and then it was the next day, on Thursday.

Q. You went to Long Island? A. Yes, sir.

Q. How long did you stay there at Mrs. Eberstadt's on Wednesday after you got through with lunch? Did you stay all night? (No answer.) 10

By the Court.

Q. Did you spend the night at Eberstadt's after getting the lunch? A. After I got the lunch I remained in the house until the chauffeur was ready to take me.

Q. So then you went to your sister's and got your clothes and came back to the Eberstadt's and spent the night there, and the next morning you went to Southampton? A. Yes, sir. 20

By Mr. Hartpence.

Q. Did you cook there each day, Thursday, Friday, Saturday and Sunday? A. Yes, sir.

Q. All three meals, breakfast, lunch and dinner at night? A. Yes, sir.

Q. And then you started back home Sunday afternoon? A. Yes, sir.

Q. Had not Mrs. Eberstadt or Mr. Eberstadt during all that period said anything to you at all about how much pay you were to get for your work? A. Mr. Eberstadt did not speak at all to me, and Mrs. Eberstadt never mentioned it, nor neither did I. 30

By the Court.

Q. Didn't you know how much you were to get? A. I didn't know how long I would be needed.

*Mary Butler—Cross**By Mr. Hartpence.*

10 Q. You were going to stay as long as you were needed? A. No. First I went to get lunch and I thought that was all I was required for. Then Mrs. Eberstadt asked me for Sunday and I thought all I would be needed was for Sunday. She had her permanent girl, which I understood would be in West Orange when I got back.

Q. Is that the reason you did not ask her about how much money you were to get? A. It just wasn't discussed.

By the Court.

Q. It did not occur to you to ask her? A. No, sir.

20 Q. You never thought of asking? A. That is right; I knew I would get paid.

Q. How did you know that? A. I was pretty sure of it.

Q. How did you know you would be paid? A. I did.

Q. You were taking a chance on it, anyway, were you? A. Yes, sir.

By Mr. Hartpence.

30 Q. Did you see the other girl at all, the permanent girl? A. No, I didn't.

Q. Well, now, after you were hurt and you went to the West Hudson Hospital, you said that Dr. Dukes took care of you there? A. Yes, sir.

Q. Did Dr. Dukes ask you where you lived? A. I think he did.

Q. Did he ask your age, where you lived, what your business was, and all that sort of thing? A. I don't remember him asking me.

Mary Butler—Cross

By the Court.

Q. Did he ask you where you were working? A. I don't think he did; I don't remember.

By Mr. Hartpence.

Q. Didn't you have some other doctor at the hospital besides Dr. Dukes? A. Yes, sir, several doctors. 10

Q. Dr. Cottman? A. I don't know his name.

Q. Several doctors treated you at the hospital? A. They came in and out. There was an eye specialist.

Q. Wasn't that Dr. Cottman? A. It could have been.

Q. Now, Mrs. Butler, the bills of those doctors who took care of you, they have all been paid, haven't they? A. Well, I paid the doctors myself in their offices. 20

Q. How often did you go to see them? A. Really not so often, because Dr. Dukes and Dr. Lyons both said it was not a matter of medical attention, it was more time and rest. Dr. Lyons told me that, and told my sister.

Q. Mr. Eberstadt has paid most of your doctor bills and hospital bills? A. The hospital bills in West Hudson I didn't pay, nor any doctors, either. I think I paid a specialist that was called in. I forget his name, too. 30

Q. I show you this paper, Mrs. Butler, purporting to be a Claim Petition, and ask you if that is your signature there, "Mary M. Butler"? A. That is my signature.

Q. And this one also is your signature, isn't it? A. Yes, sir.

*Mary Butler—Cross**By the Court.*

Q. Who prepared the paper for you? A. Mr. McKenna, as far as I know.

By Mr. Hartpence.

10 Q. In that petition I notice that you state, in answer to the question: "What sum did you expend for medical, surgical or hospital services?", and your answer was: "About \$750". Did you spend that yourself? A. No, I didn't.

Q. What does that mean? A. Well, I spent it in having people come around. I meant that way. I used to have some one come with me to go places.

20 Q. How much money actually did you spend for medical and surgical services, doctors' bills and medicine? A. Well, I can't just say the amount, because I had some money in the bank and I just took it out and spent it until it was gone.

Q. You did not keep track of it? A. No, sir.

By the Court.

Q. How much did you have in the bank? A. \$700.

30 Q. Did you spend it all? A. Pretty near. I didn't spend it all in doctors. I couldn't go in the street car, and somebody would have to take me and I would have to pay them.

By Mr. Hartpence.

Q. That included your board? A. My board wasn't included; that was only for people taking me places.

(Petition referred to marked D-3 for Identification.)

*Mary Butler—Cross**By Mr. Hartpence.*

Q. Some checks were sent you by Mr. Eberstadt, were they not, from time to time? A. I didn't get any checks.

Q. You didn't get any? A. I don't understand.

By the Court.

10

Q. Was any compensation paid you? A. Checks came to the house.

Q. How many did you receive and how much were they, each check? A. I couldn't say.

Q. Don't you remember? A. I think it was some of them \$12 and some \$14, different weeks.

Q. How long did you receive those? A. They came steady while I was in the hospital.

Q. And you were in the hospital how long? A. Almost two months. 20

Q. During that period each week you would get a check from \$12 to \$14 from Mr. Eberstadt? A. As far as I remember.

By Mr. Hartpence.

Q. What did you do with those checks? A. I wasn't able to go out; I didn't do anything until I came out of the hospital.

Q. Did you cash them? A. No. 30

By the Court.

Q. Have you ever cashed them? A. No.

Q. Have you still got them? A. I think my brother took charge of them.

Q. Did he cash them for you? A. I don't know; I got no money, anyway.

Q. What do they amount to, do you know, all told? A. I couldn't say.

40

Mary Butler—Cross

Q. You never did anything with them yourself?

A. No, sir. I had my own money, and I spent it.

Q. You took the advice of your lawyer; is that it? (No answer.)

By Mr. Hartpence.

10 Q. Did you speak to your lawyer about the checks? A. My brother gave them to him.

Q. Did you endorse them? A. I didn't do anything with them.

Q. You don't know what became of the checks?

A. As far as I know, Mr. McKenna and my brother took them.

Q. He still has them? A. I don't know.

Q. Were you advised by your counsel not to cash them? A. He didn't say anything to me.

20 *By the Court.*

Q. You live with your brother? A. Yes, sir.

By Mr. Hartpence.

Q. Did your brother say anything to you about not cashing them? A. No, he said nothing to me about anything.

30 Q. After you turned the checks over to your brother did you ever ask him why it was you did not get your money? A. No.

Q. You did not by any chance tell your brother and your attorney that they might keep them themselves, or anything like that? A. I don't think I cared much at that time. I didn't care anything about them then.

Q. After you had filed this petition which I showed to you, and which you said you signed, did you get a paper, an answer to it by Mr. Eberstadt? Was that served on you personally, his

40

Mary Butler—Cross

answer, in which he set up his side of the case?

A. I didn't see that, either.

Q. Did your attorney bring that to your attention, that such a paper had been filed? A. I think my brother may have spoken about it.

Q. But you did not know about it yourself? A. No, I never seen it. 10

Q. Didn't you know that he had filed an answer in that case, in which he stated that he did not deny that you were entitled to compensation, and tendered himself ready and willing to pay it to you?

Mr. Parsons: I think the answer speaks for itself.

Mr. Hartpence: I am asking her whether she did not know. 20

By the Court.

Q. Were you told by anyone that he had admitted that you should receive compensation? A. Yes. Somebody called up Mrs. Sullivan and told her just two weeks ago.

By Mr. Hartpence.

Q. From whom did you get the information? A. Mrs. Sullivan. 30

Q. Was that the same Mrs. Sullivan where you went to get the position? A. Yes, sir.

Q. Aside from that, didn't you know that Mr. Eberstadt had said that he was perfectly willing to pay you \$12 or \$14 a week compensation, and offered to do it? A. I didn't know anything outside of I was in the hospital and checks started to come. That is all the information I had.

Mr. Hartpence: That is all.

Mr. Parsons: That is all. 40

Dr. Howard R. Dukes—Direct

Dr. HOWARD R. DUKES, a witness called by and on behalf of the plaintiff, being first duly sworn, was examined and testified as follows:

Direct examination by Mr. Parsons.

- 10 Q. You live where? A. Kearny, New Jersey.
 Q. You are a licensed physician and surgeon in the State of New Jersey.
 Q. How long have you been practicing? A. Since 1912.
 Q. Are you connected with any institution? A. The West Hudson Hospital.
 Q. You are a graduate of what institution? A. Bellevue.
 Q. In what capacity are you connected with the West Hudson Hospital? A. Visiting surgeon.
 20 Q. Now, doctor, directing your attention to May 31, 1931, did you see Mrs. Mary Butler, the witness who was just on the stand? A. I did.
 Q. Directing your attention to your first examination of her, will you describe at that time her condition? A. I first saw Mary Butler in the receiving ward of the West Hudson Hospital. She had a laceration of the forehead; she was in extreme shock; she had symptoms of compression of the brain; a laceration of the middle one-third of
 30 her left leg.
 Q. What did you do with her? A. I treated her for her shock, put her to bed, kept her warm, the usual treatment for shock, and kept her under observation.
 Q. That was in the hospital? A. Yes, sir.
 Q. As the result of your observation will you describe the various symptoms and conditions that appeared while you kept her under observation?

Dr. Howard R. Dukes—Direct

A. I noticed she could not see with her left eye. If you would approach the bed from that side she couldn't see, and if you held a finger up and closed the other eye she couldn't tell how many fingers you had up.

By the Court.

10

Q. You made those tests? A. Yes, sir.

By Mr. Parsons.

Q. Doctor, you say you found symptoms indicating compression or pressure on the brain; did you continue to observe her as to that point, also?

A. Yes, sir.

Q. Will you describe her condition with relation to that? A. Her pulse was full and slow, her left pupil slightly dilated, and it did not react as good as the right one did, and her general mentality was very much dulled.

20

Q. Did you continue to observe her in that condition? A. I did.

Q. What treatment did you give during that period of time, Doctor? A. I kept her in bed, kept her free from excitement, and gave her potassium iodide to promote absorption of any tissue that might form as a result of an injury of that description.

30

Q. The injury was at what point? A. The brain.

Q. Mrs. Butler testified that ice bags were placed on her head? A. Yes, sir.

Q. What was the purpose of that? A. She had a severe headache.

Q. Doctor, the severe headache you say she had, for which the ice bags were given, is that indicative of any condition? A. Probably due to some irritation of the brain.

40

Dr. Howard R. Dukes—Direct

10 Q. Now, you have described it as compression or pressure on the brain; the testimony is that this lady was thrown out of a car, landed upon the pavement, and you have described the injuries to her head; may I ask you if from the condition which you found in the hospital that indicated pressure upon the brain, that condition? A. Yes, sir.

Q. May I ask you if that condition, bearing in mind the accident in which this lady was, being thrown from a car upon the pavement, if that condition, in your opinion, was the proximate and natural result of being thrown out of the car and upon the pavement of the highway?

Mr. Hartpence: Objected to.

20 The Witness: It was due to some trauma.

Mr. Hartpence: I object, as too general. All she recalled was that she came to and found blood on her face.

The Court: I will allow you to ask this, whether the condition the doctor found was traumatic.

Mr. Parsons: Witnesses yesterday said that the woman was thrown out of the car onto the pavement.

30 The Court: You have put in "on her head".

Mr. Parsons: Strike out "on her head."

The Court: You will have to leave that out, that she fell on her head.

By Mr. Parsons.

Q. Doctor, in your opinion, with a history of this woman having been in an automobile accident, were those injuries traumatic? A. Yes, sir.

40

Dr. Howard R. Dukes—Direct

By the Court.

Q. The result of an injury? A. Yes, sir.

Q. A recent injury? A. Yes, sir.

Q. You saw her immediately? A. Within half an hour or an hour after her injury.

By Mr. Parsons.

10

Q. Directing your attention to the condition of the left eye and the loss of vision therein, what did you ascribe that condition to? A. It was probably due to some condition whereby there was pressure on the optic nerve, or a hemorrhage in the optic nerve.

Q. As a result of finding that condition, did you call a specialist in? A. Yes, sir, Dr. Coghlan.

Q. Was Dr. Coghlan ready to come to this trial yesterday? A. Yes, sir, but he had a severe hemorrhage and was taken to the hospital. 20

Q. Did Dr. Coghlan, in conjunction with you, examine Mrs. Butler with reference to the eye? A. He did.

Q. Was any examination made, Doctor, with reference to the condition around Mrs. Butler's nose? Was there any condition existing there at the time of your examination while she was at the hospital? A. I don't recall any condition of the nose. 30

Q. When she was brought in the hospital, may I ask you whether she was bleeding from the nose? A. Yes, bleeding from the nose and a laceration on her forehead.

Q. Now, doctor, during the time she was in the hospital under your care was there any condition with reference to her ear or her hearing? A. Well, she didn't seem to respond so good when

40

Dr. Howard R. Dukes—Direct

you approached her on the left side. If I asked a question on the left side she would automatically turn her head around so she could probably get better hearing.

10 Q. What did you ascribe that condition to, doctor, the cause of that condition? A. Probably due to some internal injury, that is, some injury within the skull.

Q. Doctor, may I ask you, generally, during that period of time while she was under your treatment she was in the hospital how long? A. From May 31st to July 22d.

Q. Two months lacking nine days? A. Yes, sir.

20 Q. During the period of time when she was in the hospital was there any complaint by her about noises in her head, and so on? A. That was her trouble; that is the reason I kept her in bed so long.

By the Court.

Q. What did she say about that? A. She complained of severe headaches and ringing in her ears.

By Mr. Parsons.

30 Q. What is the cause of that, doctor? A. Due to some injury within the brain.

By the Court.

Q. A ringing in the ear due to some injury to the brain? A. Due to some irritation of the nerves there.

Q. Is that always so? A. It depends upon where the injury might be. It shows there is some stimulation of the auditory nerve.

Dr. Howard R. Dukes—Direct

Q. Are there causes for that? A. Yes, sir.

Q. For example? A. A brain tumor.

Q. What else? A. A fractured skull.

Q. What else? A. Diseases of the mastoid bone.

Q. Can one have a ringing in the ear without having any of those injuries? A. I don't believe so; I don't think it would come on without cause. 10

Q. Suppose a person caught cold? A. It would be due to some irritation.

By Mr. Parsons.

Q. You saw Mrs. Butler while she was on the stand, did you? A. Yes, sir.

Q. I am going to ask you generally, doctor, comparing her appearance on the stand today and when she was first under your observation in the hospital, will you compare her physical appearance between the two times? 20

By the Court.

Q. How does she look now as compared to when she was in the hospital? A. She looks as if she lost 30 or 40 pounds weight, and probably aged about 10 years.

By Mr. Parsons.

Q. Will you describe her condition when she left the hospital? A. She was very nervous. 30

Q. Was she complaining at the time she left the hospital of any condition in her head? A. She still complained of headaches, and could not see in her left eye. She still had the ringing in her ear.

Mr. Parsons: That is all.

*Dr. Howard R. Dukes—Cross**Cross examination by Mr. Hartpence.*

Q. Have you seen Mrs. Butler since she left the hospital until you saw her here today? A. Yes, sir.

10 Q. When and where? A. The last time I saw her was in Dr. Lever's office last June.

Q. That was the time there was a physical examination made of Mrs. Butler by Dr. Dias and Dr. Dowd, at which you were present? A. Yes, sir.

Q. Was there any other occasion? A. Previous to that I had probably seen her three or four times.

Q. Where? A. At my office.

20 Q. She had come to your office, had she? A. Yes, sir. She was living out of town, and some friend had brought her there in an automobile.

Q. Do you have the record before you? A. No, I have no record here of the exact days on which she came to the office.

Q. But you do have a record there, haven't you, pertaining to Mrs. Butler's case? A. Yes, sir.

Q. You have been referring to that as you have testified? A. Yes. This happened two years ago.

30 Q. Can you recall and can you state about when it was that she came to your office to see you with relation to the time she left the hospital? Was it soon after she left? A. About a month after, the first time.

Q. Does that aid you in any way in fixing the other days she came to see you? A. I would say three or four times. She came at very irregular intervals. If I had the records here I could tell you the exact days.

Dr. Howard R. Dukes—Cross

Q. Were those other four times comparatively soon after she left the hospital? A. Over a period of a year.

Q. Did you ever come to Long Branch to see her? A. No, sir.

Q. Or did you ever go out to visit her anywhere? After she left the hospital? A. No. 10

Q. Did you take from her at the time she was in the hospital a history, medical history? A. Yes, sir.

Q. You asked her questions about her general health, how she came to be in the condition she was, and all that sort of thing? A. Why, certainly; we always do that.

Q. Did you make a record of that? A. Yes, sir.

Q. Have you got it there with you? A. Yes, sir.

Q. Did you ask her her name? A. That record always comes up with the chart. It is taken in the office, and as soon as the patient is admitted they get the name of the patient and it is put on the chart and card, the address where they live, next of kin and telephone number. 20

Q. By whom employed, and all that? A. By whom employed and the name of the insurance company, if they can possibly get it, and all those details are taken care of.

Q. The name of undertaker, if needed, and all that? A. If necessary. 30

Q. Does your record show all those things? A. It shows the name and address.

Q. Will you give us the name and address that appears on your record there that you got from her?

Mr. Parsons: I assume Mr. Hartpence is making the Doctor his own witness for that purpose. 40

Dr. Howard R. Dukes—Cross

The Court: It is not proper cross examination, but I will allow you to make him your witness. All he has testified was about the physical condition of the woman.

Mr. Hartpence: And part of the history.

10 The Court: That has nothing to do with the injury. You may make him your own witness for that purpose, if you desire.

Mr. Hartpence: I am perfectly willing to ask the question and stand or fall on it.

By Mr. Hartpence.

Q. What name did she give you? A. Mary Butler.

20 Mr. Parsons: As I understand it, the Doctor has testified these records were not taken by him.

By the Court.

Q. You recognize it as her record, in accordance with the usual custom and practice in the hospital? A. Yes, sir.

By Mr. Hartpence.

Q. What address is given? A. I haven't got any address on this one.

30 Q. You have the address there somewhere, haven't you? A. No, there is no address on here.

Q. Does it show by whom she was employed? A. Not on this form here. We have a card system up there. I haven't the card. That is taken care of through the office force.

Q. Don't your notes at all show where she resided? A. Here is the address: "Mary Butler, 33 Kirke Street, May 31, 1931; domestic, Irish, age, 42."

40

*Dr. Howard R. Dukes—Cross**By the Court.*

Q. Does it indicate by whom she was employed?

A. It doesn't say here. That is on another card system.

Q. Did you make a report to the Department of Labor of the State of New Jersey of this injury to Mary Butler? A. I filled out a form; I don't know whether it went to the Department of Labor or to the insurance company. 10

By Mr. Hartpence.

Q. Is that the paper which I show you, a report rendered by you respecting the injuries of Mary Butler?

By the Court.

Q. Did you make a report to the Department of Labor of this case? A. I signed that report. 20

By Mr. Hartpence.

Q. In this report you state the present address of Mary Butler as 1 Merrywood Drive, West Orange, New Jersey; name of employer, Rudolph Eberstadt, and address, 1 Merrywood Drive, West Orange? A. I wrote that.

Q. That report is dated June 12? A. Yes, sir. 30

By the Court.

Q. Where did you get that information to make that report? A. This was confirmed—

Q. Where did you get the information to fill in? A. From Mary Butler.

Q. You asked her? A. Yes. It contains the name of person, address, name of employer, address of employer and date of accident.

Dr. Howard R. Dukes—Cross

Q. You got that in the hospital from Mrs. Butler? A. Part of it, and part of it from my own observation.

By Mr. Hartpence.

10 Q. The date June 12 is 1931? A. Yes, sir.

The Court: He merely uses that to refresh his memory as to whether she told him by whom she had been employed. That is the purpose of that.

(Paper referred to marked D-4 for Identification.)

By Mr. Hartpence.

20 Q. Do you know Dr. Coghlan, the eye specialist?
A. I called him to look Mary Butler over.

Q. Do you know his signature? A. I wouldn't swear to his signature.

Q. Do you know when you called him in? Can you state the date when you called him in, from your records there, or otherwise refresh your recollection? A. It was sometime during her stay in the hospital; I cannot tell you what date it was.

By the Court.

30 Q. Was she there two months? A. From May 31st to July 22nd.

By Mr. Parsons.

Q. I note in Exhibit D-4 for Identification an accurate and complete description of the nature and extent of the injury you have given concussion of the brain and cerebral hemorrhage? A. Yes, sir; you always have hemorrhage of the brain with concussion.

Dr. Jack Bloomburg—Direct

Q. Also hemetoma on the left side of the head?

A. Yes, sir.

Q. What is a hemetoma? A. A black and blue mark, swelling.

Q. In other words, that is an indication of trauma? A. Yes, sir.

Q. Also you have here: "No vision of left eye; vision of right eye impaired". A. She didn't seem to see as well as she should with her right eye. 10

Q. And no vision in her left eye? A. That is right.

Mr. Hartpence: Just an omitted question.

By Mr. Hartpence.

Q. You have practiced how long? A. Since 1912. 20

Q. Do you specialize in any particular branch of surgery? Have you specialized in the matter of the brain or of the eye or ear? A. General surgery.

Mr. Hartpence: That is all.

Mr. Parsons: That is all.

DR. JACK BLOOMBURG, a witness called by and on behalf of the plaintiff, being first duly sworn, was examined and testified as follows: 30

Direct examination by Mr. Parsons.

Q. You live where, Doctor? A. Elizabeth, New Jersey.

Q. You are a practicing physician of the State of New Jersey? A. Yes, sir.

Q. With what institutions are you connected? A. I am attending surgeon at the Elizabeth Gen- 40

Dr. Jack Bloomburg—Direct

eral Hospital, Chief of the clinic at St. Elizabeth's Hospital.

The Court: The Doctor has qualified in the circuit frequently.

10 Mr. Hartpence: I will admit the Doctor's qualifications unqualifiedly.

By Mr. Parsons.

Q. Doctor, at my request, did you last Sunday make an examination of Mrs. Mary Butler? A. Yes, sir.

Q. Will you describe the examination, the different things that you did in examining Mrs. Butler? A. I examined her scalp, her eyes, the interior of her eyes and eye muscles.

20 Q. In examining the interior of the eyes did you do that without instruments, or did you have instruments to aid you? A. There are instruments which make examination of the interior of the eye possible. Without them you cannot see the interior of the eye. Naturally, I used those instruments. They allow you to see the interior of the eye and blood-vessels within the eye, that being the only place in the body where blood-vessels can be directly seen in action. I examined the ears, the tracks that connect the organ of hearing with the brain proper, and examined her reflexes.

30 Q. And by "reflexes" you mean what? A. The various nerve connections as shown by testing out the response of muscles and joints by tapping or stroking or pinching. I examined her sensory system, examined her co-ordination.

40 Q. Will you describe generally as a result of that examination what condition you found? A. The condition in the left eye was impaired to the extent of 20/70.

Dr. Jack Bloomburg—Direct

Q. What does that mean? A. The vision of the individual is taken at a distance of 20 feet. The individual is tested 20 feet from the reading chart. The letters are so blocked out according to the system that the average normal individual can see a certain letter at 20 feet, and the vision is marked in fractions as of 20ths, so normal would be 20/20. This woman sees at 20 feet what the average normal individual should see at 70 feet. In other words, what I or you or anyone else could see at 70 feet she has to see at 20 feet. The condition of the right eye was 20/30; in other words, what I should see at 30 feet she can see at 20 feet. 10

Q. While on that point, may I ask you instead of using the 20/70, may I ask you if you can in percentage state the percentage normal vision she has in her left eye? A. I would say that she has a 35 per cent. normal vision in her left eye, between 30 and 35 per cent. normal. 20

Q. So that her eye is between 65 and 70 per cent. disabled? A. Yes, sir.

By the Court.

Q. What is the matter with her eye? A. She cannot see. There has been some affection of the optic nerve in some form, shape or manner. The nerve head itself, which you can see, is slightly blurred, that is, instead of it being clean cut and sharp edged it is fuzzy, and there is a little congestion of the retinal vein, the vein that can be seen in the interior of the eye. The hearing in her left ear is 40 per cent. of normal. The hearing in her right ear is 90 per cent. normal. In testing the woman out the turning test was used, that is, putting the woman in a revolving chair and turning her around 10 times in 20 seconds. She has 30

40

Dr. Jack Bloomburg—Direct

marked reduction in the eye movements which are caused by the turning. If you take a normal individual and put him in the chair and turn him to the right 10 times in 20 seconds you will see a jumping movement of the eyes to the left lasting 35 or 45 seconds. In this woman the response lasted 14 seconds.

10

By the Court.

Q. Which indicates what? A. Definite disturbance of the central brain track.

By Mr. Parsons.

20

Q. While on that point, the rotating in the chair is the test that is given for the aviators? A. That is the test, and when we are turned around and stopped and there are things moving in front of us, instead of the body moving it is the eyeball moving.

30

Q. You take any individual after they are turned around several times you will see the eyes dancing. If turned to the right the eyes will dance to the left; if turned to the left the eyes dance to the right? A. That is simply due to stimulating that nerve. You can get the same effect by hot water or cold water sprayed into the ear, or by irritating that particular nerve with a mild electric current.

Q. In a normal person the vibration or movement of the eyes stop in what time? A. If a normal individual is turned 10 times in 20 seconds to the right the eyes will dance to the left from 35 to 45 seconds.

Q. In Mrs. Butler's case how long did that continue? A. 14 seconds.

40

Dr. Jack Bloomburg—Direct

Q. That indicates disturbance of the central nervous track? A. I think it is unwise to pick out that and say that that indicates anything. It is the whole picture that indicates something. Any one symptom would not show anything; you have to take the picture as a whole.

Q. Now, proceed, please. A. As to her nose, she has her nasal septum definitely turned to the left, and the left air space of the jaw shows slight congestion. 10

Q. Can you tell us about her reflexes, and so on? A. The woman presents a general sluggishness; all her reflexes were sluggish. There wasn't anything very pronounced about her reflexes. There were no areas of anesthesia.

Q. Can you tell us just from what condition Mrs. Butler is suffering? A. Just from my examination? 20

Q. From your examination and the testimony which you have heard, and the history? A. I can tell you that this woman has certain conditions, and unless I assume certain things have happened previously I couldn't do it.

Q. If Mrs. Butler, on May 31, 1931, was in an automobile accident whereby she was thrown from the car onto the street, thereafter taken to the hospital, where it was found that she was bleeding from the nose, suffering from severe shock; thereafter began to lose vision in her left eye, suffered severe headaches, pounding in the head, loss of hearing in her left ear, that, in conjunction with a period of two months treatment in the hospital, with continuing loss of vision, continued hearing of pounding noises and headaches, in conjunction with your examination, may I ask you what her 30

Dr. Jack Bloomburg—Direct

condition is? A. It is the result of a severe intracranial injury.

10 Q. What is intracranial injury? A. An injury within the skull to the brain. If this woman did not have these things previous to the accident—now, she meets with an accident, and bleeds at the nose—

Mr. Hartpence: There is no evidence yet to show that she did not have these things previous to the accident.

The Court: Her brother testified she had no such condition, as I remember.

Mr. Hartpence: He did not testify as to medical and surgical conditions.

20 The Court: I think you are mistaken about that. Both she and he testified to the physical condition, as I understand.

Mr. Parsons: I put on three witnesses yesterday who told about her being able to see, hear, and work steadily.

The Court: The Doctor says the conditions he found would in all reasonable probability be traumatic, as the result of intracranial injury. I think the witness has gone as far as he may.

30 *By Mr. Parsons.*

Q. Directing your attention generally first to the eyes, bearing in mind that this accident happened on May 31, 1931, and your examination took place last Sunday, may I ask you if that condition of the eye is permanent? A. Yes, sir.

Q. And what have you to say with reference to her ear? A. That is permanent.

Dr. Jack Bloomburg—Cross

Q. Are the conditions in the head and the sluggish responses permanent? A. Yes, sir.

Q. Doctor, in an injury to the brain may I ask you if brain tissue regenerates? A. Brain tissue never regenerates.

Q. Generally, Doctor, with such injury as Dr. Dukes has described, of intracranial pressure and cerebral hemorrhage, it has been testified that Mrs. Butler, before this injury, was energetic, worked, was congenial, enjoyed society, and since the accident it has been testified that she desires to avoid people, she is subject to crying spells, has been unable to work, does not like to go to the movies or read; may I ask you if, in your opinion, this change in Mrs. Butler is a reasonably permanent result of an injury to the brain? 10

Mr. Hartpence: I object. 20

By the Court.

Q. Is it a reasonably probable result of a traumatic condition? A. It is psychic. It is one of these psychic injuries that often follow a cerebral injury.

By Mr. Parsons.

Q. Is that a permanent injury or not? A. I wouldn't want to say. 30

Q. Nobody can tell? A. No.

Mr. Parsons: That is all.

Cross examination by Mr. Hartpence.

Q. That may be due to what you term psychoneurosis? A. That is what I would term that.

Q. Will you tell us what psychoneurosis is? A. Psychoneurosis is the inability of the individual to 40

Dr. Jack Bloomburg—Cross

harmonize with his circumstances and his surroundings. Now, in very plain language, it means the inability of the individual to get along decently in circumstances in which he finds himself.

Q. And inability to concentrate? A. Yes, sir.

10 Q. And they allow injuries to prey upon their minds? A. Yes, sir.

Q. And that makes them nervous? A. I would change that phraseology. You say they allow injuries to prey upon their minds; the correct terminology should be the injuries prey upon their minds.

Q. By reasonable exercise of will and change of scene, change of surroundings, they can overcome it? A. If they can overcome it they wouldn't be psychoneurotic.

20 *By the Court.*

Q. People can overcome neurosthenia? A. Yes, sir.

By Mr. Hartpence.

Q. That, to a great extent, is in the mind of the person who suffers from it? A. Entirely.

30 Q. Doctor, you never examined Mrs. Butler prior to this occasion you testified about? A. No, sir.

Q. You don't know what her previous condition was, do you? A. No, sir.

Q. As to whether there was difficulty with her eyes, ears, previous to the accident, you don't know? A. I don't know.

Q. Speaking about this test of the revolving chair, and the reaction of the normal individual to that test, does the age of the individual have any bearing on that? A. It might.

40

Dr. Jack Bloomburg—Cross

Q. Would there be a difference as to the reaction you have given as to a normal individual if the person subjected to the test were 20 years old or 25 years old or 47 years old? A. No. The age would come in in this respect: If you took an elderly individual who was arteriosclerotic you would get a different response. You should get the same response from 20 to 45. 10

Q. But not at 60? A. 60 is just on the upper border.

By Mr. Hartpence.

Q. At what age is this normal standard fixed that you refer to? A. 16, 17 or 18.

Q. Assuming that Mrs. Butler was about 44 years of age when she was injured, and that was in May of 1931, so that she is pretty nearly three years older now, would you expect to find the same reaction to that test in her case as in a person 16, 17 or 18 years old? A. Yes, sir. 20

Q. Nothing else would enter into it? A. Oh, yes, a lot of things could enter into it.

Q. What? A. If this woman had a previous ear disease, if she had an infection that affected the eighth cranial nerve.

Q. Assuming that she had a catarrhal condition of the left ear, wouldn't that make a difference? A. If the catarrh was very severe it might. 30

Q. Would catarrh of the ear produce the ringing of the ear? A. It could, yes, sir.

Q. And catarrh is simply another name for a cold? A. What I understand by catarrh is a definite condition characterized by mild inflammation of the ear due to cold.

Q. Didn't you test Mrs. Butler's eyes for near-sightedness or farsightedness? A. Yes, sir.

Dr. Jack Bloomburg—Cross

Q. What did you find about the nearsighted and farsighted features? A. The vision in the left eye is what I characterized as 20/70, and in the right eye 20/30.

10 Q. What is the bearing of that upon nearsightedness or farsightedness? May not a person be nearsighted and the vision affected, the way you have expressed it, without injury to the eye?

By the Court.

Q. Due to disease, for example? A. Certain diseases can cause that condition.

Q. Sometimes measles cause it? A. Yes, sir, but this eye has the characteristics of a traumatic condition, as this woman can only see at 20 feet what I can see at 70 feet.

20 Q. And you say that is due to injury of the optic nerve? A. Yes, sir.

By Mr. Hartpence.

Q. Can it not occur from myopia? A. Certainly, a thousand conditions.

Q. And as her age grown upward the vision, without injury or disease at all, tends to dim? A. Our near vision, but you have here a 20/30 in one eye and 20/70 in the other. If you took one
30 thousand cases of myopia the patient is myopic in each eye.

By the Court.

Q. What is myopic? A. Nearsightedness. Here you have one eye with one condition and another eye radically different.

By Mr. Hartpence.

40 Q. Do you always find both eyes the same? A. No.

Dr. Jack Bloomburg—Cross

Q. One eye may be affected and the other eye not, even in a normal individual without injury or trauma? A. There is no question about it.

By the Court.

Q. How about glasses for her? A. I wouldn't recommend them, for this reason, that the difference between the two eyes is so great that it would be annoying to her. To correct one eye, the disproportion is too great. 10

By Mr. Hartpence.

Q. In your test of the eyes did you test with lenses to find out whether she was nearsighted or farsighted? A. Yes.

Q. What did you find? A. I found that the vision in one eye was 20/30, and in the other eye 20/70, and that was the very best I could get for that eye. 20

By the Court.

Q. Did that indicate near-sightedness or far-sightedness? A. A slight near-sightedness, but that doesn't explain this condition.

By Mr. Hartpence.

Q. Now, the ear, Doctor, the ear condition that you find in Mrs. Butler could very probably be caused by a catarrhal condition? A. Mrs. Butler's condition, in all probability, is not caused by the catarrhal condition. 30

Q. Why not? A. In the first place, the difference in hearing between one ear and the other is great; in the second place, a very careful examination of the back of her nose, also using instruments which showed the condition directly where 40

Dr. Jack Bloomburg—Cross

you can see the mouth of the tube that leads from the nose to the ear—

By the Court.

Q. Did you find catarrh? A. No, sir.

10 *By Mr. Hartpence.*

Q. Don't you often find that the so-called normal person without injury or trauma will have difficulty in hearing with one ear and no difficulty with the other? A. I do find it, yes, sir.

Q. Attributable to what causes? A. Probably some previous disease. Many diseases affect the hearing, scarlet fever, measles, typhoid, meningitis.

20 Q. Then that condition would exist even though you found no then existing catarrhal condition? A. Oh, yes, that condition can go right through life without any evidence of catarrh.

Q. Doctor, how long have you practiced? A. Seventeen years.

30 Q. Have you specialized in any particular branch? A. Injuries and affections to the head. I am examining surgeon, Department of Labor; consultant surgeon, Second Corps Area, Head Injuries; Central Railroad Company of New Jersey, Simmons Beds, and about six insurance companies.

Mr. Hartpence: That is all.

By Mr. Parsons.

Q. Mr. Hartpence has picked out each question, the conditions of the eyes, the conditions of hearing; may I ask you, as a general picture, taking in the condition of the hearing and taking in the

Michael H. Potter—Direct

condition of the eyesight and the general picture you have, may I ask you if in your opinion the condition of Mrs. Butler is the result of trauma or physical shock?

Mr. Hartpence: Objected to.

The Court: He says it is traumatic; how many times do you want him to say it? 10

Mr. Parsons: That is all.

Mr. Hartpence: That is all.

MICHAEL H. POTTER, a witness called by and on behalf of the plaintiff, being first duly sworn, was examined and testified as follows:

Direct examination by Mr. Parsons.

Q. Where do you live? A. 905 Scattergood Street, Philadelphia. 20

Q. By whom are you employed? A. Pennsylvania Greyhound Lines.

Q. In what capacity are you employed by the Pennsylvania Greyhound Lines? A. Bus operator.

Q. At the present time where are you operating buses? A. Philadelphia to Gettysburg and return. 30

Q. You were in Gettysburg yesterday? A. Yes, sir.

Q. On May 31, 1931, were you operating between Jersey City and Newark? A. That was the run between New York and Philadelphia.

Q. Were you operating a bus at that time? A. Yes, sir.

Q. What kind of a bus were you operating? A. A Z-250 Yellow Coach.

Michael H. Potter—Direct

Q. Directing your attention to May 31, in the afternoon, or sometime in the evening, were you traveling from Jersey City towards Newark and Philadelphia? A. I left New York at 5:20, headed towards Newark.

10 Q. Do you know the Harrison Pike? A. Yes, sir.

Q. I show you P-1 and ask you if you recognize this picture? A. This is the Harrison Turnpike going towards Newark. This is the Public Service Bus Terminal up here (indicating).

Q. Directing your attention to May 31, Mr. Potter, may I ask you to describe the condition of the traffic on the Harrison Pike? A. It was very heavy at that time.

20 Q. How many lanes of traffic were there going towards Newark? A. Two.

Q. May I ask you with reference to the two lanes of traffic where your bus was traveling, in which lane of traffic? A. The second lane going towards Newark.

Q. You mean the lane in the center, the center lane? A. I was practically in the car track.

Q. On Exhibit P-1 will you indicate the car track on which you were traveling? A. This one here (indicating).

30 Q. So as we look at the picture, you were traveling towards Newark on the right hand car track? A. That is right.

Q. Did you notice any car pass you in the vicinity of that bridge? A. Well, on my left there was a car coming up.

Q. How did you notice that, Mr. Potter? A. Well, we have a side mirror on the side of the bus.

Michael H. Potter—Direct

Q. Tell us in what direction that car was going?

A. The same way I was, but way out in the middle of the road, like over in the other lane of traffic, practically, at that time.

Q. Did that car pass you? A. Well, as he got even with me there was a terrible crash, and I wanted to swing my bus. I thought I was going to get the benefit of it. 10

Q. Could you swing to the right? A. No, there was a line of traffic.

Q. At the time you wanted to swing your bus with the line of traffic on your right you were riding in the car tracks? A. Yes, sir.

Q. How fast were you going as this car came past you? A. 30 or 35.

Q. Did you stop your bus? A. I had to. 20

Q. Did you get out? A. Yes, sir. I got out and walked around to the left—things was happening pretty fast—I could hear brakes and people hollering, and I picked up a very short stout lady. She was laying like this (indicating). Blood was running, and I put her in somebody's car.

Q. Where was this lady lying? A. In front of my bus.

Q. In the road? A. Yes, sir.

Q. Bleeding where? A. It seems it was coming out of her head. I put my handkerchief on it and some gentleman helped me pick her up, and I noticed a car. He said, "I will take her to the hospital." He said, "Get your bus out of here; everything is tied up". 30

Q. Did you take your bus and get out? A. I did.

Mr. Parsons: That is all.

*Michael H. Potter—Cross**Cross examination by Mr. Hartpence.*

Q. You did not say what it was that caused this crash that you heard, did you? A. Well, two cars head on.

10 Q. Did you see them come together head on? A. Yes, sir. This car coming alongside of me, I thought he was going to swing into me to avoid a head on. An accident means an awful lot to a Greyhound bus driver, Mister. I stopped, and that is when things happened as quick as they did.

Q. I understood you to say on your direct examination that you saw a car come up in back of you in the mirror, come in back of you on the left side? A. That is right.

20 Q. And while it was still opposite your bus you heard a crash? A. Well, it was practically right along in front of me when the crash happened, in front of my bus, on the side.

Q. Had it completely gotten clear beyond your bus? A. Oh, no.

Q. Just at the front of your bus? A. Practically right alongside of it. Here is the bus and here is his car (indicating), and these cars came together.

30 Q. I didn't understand you to say on your direct examination that the two cars came together; you simply said you heard a crash? A. I wasn't asked about two cars coming together.

Q. I ask you whether you saw what made the crash? A. Another car.

Q. Did you actually see them come together? A. Yes, sir.

Q. Had you seen the car coming towards you before the crash? A. There was plenty cars com-

Michael H. Potter—Cross

ing along there in the open spaces along the Harrison Turnpike.

Q. Did you see the car coming towards you which you say crashed head on? A. Yes, sir, I did.

Q. Where was it when you first saw it, Mr. Potter? A. When I first saw it it was in one of them openings that happened along in that traffic, the way that road was crowded in them days, possibly 100 feet ahead of me. 10

Q. Coming towards you? A. No, he was on his own side of the road.

Q. Coming in the opposite direction? A. Yes, sir.

Q. Coming towards your car? A. Going towards Jersey City. 20

Q. Now, which did you see first, the car coming towards you or the car in back of you? A. The car in back of me.

Q. Where was your bus with respect to the overhead bridge that shows in this photograph P-1? Where was your bus with respect to that bridge when you first saw, in your mirror, the car coming in back of you? A. Well, with my bus standing, you mean?

Q. Your bus was moving, wasn't it? A. That is right. 30

Q. Had it reached the bridge yet when you first saw the car coming back of you on the left side? A. I couldn't say that, to be exact; it wasn't far from the bridge.

Q. Approximately how far was it? A. I wouldn't say.

Q. Well, can't you approximate it? A. I wouldn't say, for this reason: I don't really 40

Michael H. Potter—Cross

know. I was really right under the bridge at that time.

Q. Where was your bus with relation to the bridge when you stopped it after the crash? A. Practically under it.

10 Q. You say "Practically under it"; what part of it was under it? A. The front.

Q. The front part of your bus had gone underneath the bridge? A. It was just entering it.

Q. But the whole bus had not gone clear under the bridge? A. Oh, no.

Q. In how many feet would you say you stopped your bus after the crash? A. I dare say 10 feet.

20 Q. So that when you first saw this car coming up in back of you on your left by looking into the mirror, how far back of your car did you first observe it? A. That is a very hard question to answer. The type of side mirror we used at that time were very reflecting. They magnified things a whole lot more than they are, but along there that is one thing we always had to watch, because there was an awful lot of crazy driving, and if there was an inch everybody took it, and I always watched that, because I got in one jam there and got accused of causing it.

30 Q. How long had you driven the bus you were driving that day? A. I got that bus brand new and drove it four years.

Q. You must have been able to determine how far back your reflecting mirror could carry? A. I don't think there is a man living that can judge distance from a rear view mirror.

Q. Well, would you say that you could see the approaching car in that mirror before it came opposite the rear of your bus? A. Positively.

Michael H. Potter—Cross

Q. Further back than that? A. Oh, yes.

Q. Did you notice whether the car that was approaching you slowed down at all or not after you first saw it? A. No, I couldn't.

Q. You didn't notice that? A. No, sir.

Q. Did you notice whether the car coming up alongside of you slowed down after you first saw it? I am asking you now about the car that came up from your rear; did you notice whether that slowed down after you saw it? A. What was the first question? 10

Q. The first question was whether you saw the car coming in the opposite direction, whether you saw it slow down after you first saw it? A. I couldn't answer that.

Q. Now, my next question is about the car coming in back of you; did you notice after you first saw it whether it slowed down any or not? A. I couldn't answer that. 20

Q. Did you see both cars coming towards each other? A. I seen them both come together. I was glad I did not get mixed up in it.

Q. At the time of the crash did you see the cars with your eyesight or through your mirror? A. Direct with my eyesight, right at the driver's window. 30

Q. Had you started to slow your car down before the crash came? A. Oh, yes, I had already knocked it into third gear.

Q. Did you notice what part of the cars came together? A. Apparently head on.

Q. Did you notice what kind of cars they were, whether they were open cars, closed cars, or what? A. I didn't take no exact notice to that.

Q. This is the first time you have testified, isn't it, about this case in court? A. Yes, sir. 40

Michael H. Potter—Cross

Q. What time of day was it? A. About 6:30.

Q. What time did you leave New York? A. 5:20.

10 Q. It took you from 5:20 until about 6:30 to get to the place where this happened? A. Yes, sir; it has often been longer than that. It is all according to the draw-bridges.

Q. What kind of a day was it? A. Very rainy, misty.

20 Q. Did you observe where the two automobiles that collided were after the accident? What was their positions on the highway after everything had come to a stop? A. Both came just like that (indicating), to my left. When I walked out this lady was laying between the left front fender and this Packard, whatever it was she fell out of. Three little children were with her, and another lady.

Q. Do you recollect whether that Packard was an open car or a closed car? A. I couldn't say.

Q. When you say they were right together were they head on, or left side of each car, or what?

A. From what I recall of it they were plumb head on.

30 Q. And locked together? A. I don't know about being locked. They can come together without being locked, you know.

Q. This car that was coming in the opposite direction to which you were going, the one going towards Jersey City, I understood you to say, was 100 feet away when you first saw it? A. Yes, sir.

Q. Did it change its course in any way from the time you first saw it until the accident? A. He couldn't until it got hit. Anything will change its course if you knock it out of line.

Michael H. Potter—Cross

Q. Why couldn't it? A. If you are coming down the same road I am, on the same side of the road, if you don't pull over you are going to get hit, ain't you?

Q. Was it because the place was so narrow there was no room to turn one way or the other?

A. If he had turned to his right he would have went in the line of traffic; if he had turned to his left I would probably have got hit.

Q. You are speaking about the car going towards Jersey City? A. Yes, sir.

Q. So, his course did not change from the time you first saw him until the crash? A. Certainly not, from the way he got hit.

Mr. Hartpence: That is all.

Mr. Parsons: That is all. That is the plaintiff's case.

Mr. Hartpence: We renew our motion to dismiss, on the ground urged at the opening of the case, that the case is not within the jurisdiction of this Court. The employment was not casual. On the plaintiff's own testimony, she was engaged for a specific purpose, first, to prepare lunch, but, after she had done that she then was engaged for regular employment and did not know how long it was going to last, to act as cook in the family.

(Argument by counsel.)

The Court: I will concede that if the employment here was regular and not casual the suit should be in the Labor Bureau. That is conceded, but if the employment was casual, then the case is properly here.

Mr. Hartpence: I agree with that.

Charles A. Lauder—Direct

The Court: Now, I will not hold as a matter of law that the employment of the plaintiff was regular. I am going to let the jury pass upon that. The motion will be denied.

10 Mr. Hartpence: Exception.
(Exception noted as ground for appeal.)

Mr. Hartpence: We would like to reserve right at the close of the case to renew our motion.

The Court: Certainly. I will allow you to have a record made, here, under proper exceptions, naturally.

EVIDENCE ON BEHALF OF DEFENDANT.

20 CHARLES A. LAUDER, a witness called by and on behalf of the defendant, being first duly sworn, was examined and testified as follows:

Direct examination by Mr. Hartpence.

Q. Where do you reside? A. 19 North Jefferson Street, Orange, New Jersey.

Q. What is your occupation? A. Chauffeur.

30 Q. How long have you carried on that occupation? A. I am presently employed two years in the same place.

Q. How long altogether have you driven automobiles? A. Approximately about 10 years.

Q. By whom were you employed and where did you work in May, 1931, at the time of this accident? A. For Mrs. Rudolph Eberstadt, in West Orange.

Q. Were you employed there as chauffeur? A. Yes, sir.

40 Q. In the family? A. Yes, sir.

Charles A. Lauder—Direct

Q. How long had you been so employed? A. About two months.

Q. About two months prior to the accident? A. Yes, sir.

Q. Where did the accident take place? A. On the Harrison Turnpike, in Kearny.

Q. Where had you been and where were you going to? A. From Remsenburg, Long Island, to West Orange. 10

Q. When had you gone to Remsenburg? A. The Thursday previous to the accident.

Q. On what day did the accident happen? A. Sunday.

Q. Had you driven an automobile out to Remsenburg? A. Yes, sir, a Packard touring car.

Q. Was that the same car you were driving at the time of the accident? A. That is right. 20

Q. What kind of a car was that? A. It was a Packard straight eight touring car.

Q. Was it a closed or open car? A. Open.

Q. Was there a cover over it? A. It had a top on it.

Q. Had you driven the same car on Thursday? A. Yes, sir.

Q. Who were in the car with you on the way back Sunday afternoon? A. The nurse, Mary Cassidy, Mary Butler, three children and myself. 30

Q. Had you been out to the house in Remsenburg during that whole period? A. Yes, sir.

Q. Did you observe what Mrs. Butler, the plaintiff here, did while she was out there? A. Yes, sir.

Q. What did she do? A. Her duties were cooking.

Q. How often did you see her working? A. Well, she cooked three meals a day out there. 40

Charles A. Lauder—Direct

Q. Each day that she was there? A. Yes, sir.

10 Q. Will you describe just how the accident occurred? A. Yes, sir. I was driving towards Newark on the Harrison Turnpike, and it was raining that day, and as I was approaching the bridge I was following a line of traffic going towards Newark, and there were cars coming in the opposite direction towards Jersey City, and I was between the first car track and the curb.

20 Q. What bridge are you referring to? A. The Lackawanna Railroad bridge. As I approached the bridge a car coming in the opposite direction turned out of line to pass a car in front of him, presumably, and I just noticed the nose of the car coming out, and I swung as hard as I could to the right to get away, and all I remember was the crash, and when I woke up I was alongside of the car.

Q. You say you had been traveling in the line of traffic towards Newark? A. That is right.

Q. How many lines of traffic were there on the way to Newark? A. There was one line in front of me and none beside me or back of me. I was the last car following the line—there was a red roadster, Hudson County police officers were following my car, that is, a ways back.

30 Q. Was there one line or two lines going towards Jersey City? A. Two lines.

Q. Did you notice what car was directly in front of you? A. I didn't notice until the nose of the car turned out; I didn't take notice what kind of a car it was at the time.

Q. I mean, as you drove along and approached the bridge what kind of a car was directly in front of you? A. I don't remember; it is quite awhile ago.

40

Charles A. Lauder—Direct

Q. Had you pulled out to the left from behind the car that was in front of you to go by it at the time this other car came out and struck you? A. No, sir.

Q. How far away from you was the other car when you first saw it turn out? A. I couldn't tell you that; all I saw was the nose come out, and I heard the crash and felt myself tumbling. 10

Q. It all happened quickly? A. Yes, sir.

By the Court.

Q. How fast were you driving? A. 25 to 28 miles an hour, something of that sort. It was raining and I couldn't go fast.

Q. After the accident was over where did you find yourself? A. Right alongside of the car on the left-hand side; I had been thrown out. 20

Q. What did you observe as you found yourself there? A. I observed Mary Cassidy, the nurse, in front of the car. Her foot was pinned between the tie-rod and the wheel, and Otis and Junior Eberstadt were still in the car, and Mary Butler was in back of me on the street.

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

By Mr. Hartpence.

Q. Was your car then at a standstill? A. Yes, sir. 30

Q. How about the car that collided with you; was that at a standstill? A. Yes, sir.

Q. What was the position of your car with respect to the right-hand curb looking towards Newark in the direction you were going? A. The front of the car was approximately two feet from the right-hand curb, and the rear about four feet, on a slight angle, facing towards Newark. 40

Charles A. Lauder—Direct

Q. Which part of your car had been struck?

A. The front left, and it came along and damaged the whole left side of the car.

Q. Where was the other car that collided with you? A. Approximately 15 feet in back of me, diagonally across the road.

10 Q. On which side? A. On his right side.

Q. Where was it with respect to the car tracks? A. The front was in the middle of the road—or, rather, the rear was in the middle of the road and the front was facing towards Newark, against the curb, kind of diagonally across this way (indicating), between the track and the curb.

Q. It was turned around in the opposite direction from which it had been going; is that it? A. Yes, sir.

20 Q. But with the front of the car pointing towards the curb? A. That is right.

Q. That would be the left-hand curb as it stood that way? A. That is right.

Q. The rear of the car was out towards the car tracks? A. Yes, sir.

Q. Was any part of that car on the car tracks? A. I believe it was around the first rail or so, or in between; I didn't notice exactly. My intentions were getting the injured to the hospital.

30 Q. Did you help take them to the hospital? A. I had to take the disc wheel off of the car in order to release the nurse's foot.

Q. Did you help put them in the car? A. I helped put Mary Cassidy in the police car, and I believe Mary Butler was assisted into the police car, also, and taken to the West Hudson Hospital.

Q. I show you a photograph and ask you if you recognize the automobile shown in that photograph? A. I do.

40

Charles A. Lauder—Cross

Q. What automobile is that? A. That is the car I was driving.

Q. Does that show its condition after the accident took place? A. That is right.

Mr. Hartpence: I offer the picture in evidence. 10

(Picture referred to marked in evidence Exhibit D-5.)

By Mr. Hartpence.

Q. Now, I show you a side view and ask you if that is a side view of the same car right after the accident? A. Yes, sir.

Mr. Hartpence: I offer this photograph in evidence. 20

(Photograph referred to marked in evidence Exhibit D-6.)

By Mr. Hartpence.

Q. I show you still another photograph and ask you if you can identify that car? A. That is the other car that struck mine.

Q. Is that its condition right after the accident? A. Yes, sir.

Mr. Hartpence: I offer this photograph in evidence. 30

(Photograph referred to marked in evidence Exhibit D-7.)

Mr. Hartpence: That is all.

Cross examination by Mr. Parsons.

Q. When you got to the hospital did you phone anybody? A. Yes, sir.

40

Charles A. Lauder—Cross

Q. You had a date that night, didn't you? A. No.

Q. Didn't you phone a girl and say you couldn't get there in time? A. No, I did not; I phoned a girl and told her I was in the hospital. I phoned a girl, but she had not expected me.

10 Q. What did you phone her for if she did not expect you? You did phone a girl, didn't you? A. Absolutely.

Q. And you phoned her to let her know you wouldn't be there? A. No, sir.

Q. To let her know you would be late? A. No, sir.

Q. What for? A. To let her know that I was coming home.

20 Q. So, she did expect you? A. After I told her I was coming.

Q. What time did you leave Long Island? A. Shortly before 3 o'clock.

Q. How far is Southampton from New York City? A. I haven't any idea.

The Court: Counsel may agree it is 50 miles, at least.

By Mr. Parsons.

30 Q. You had to go through Long Island City? A. I don't know.

Q. Brooklyn? A. Yes, sir.

Q. It was Sunday afternoon? A. Yes, sir.

Q. You went through Brooklyn and went through New York City and to the scene of the accident? A. Yes, sir.

Q. And you left there around 3 o'clock? A. Yes, sir.

40 Q. Isn't it true that before the accident for some time you had been passing cars on the highway?

Charles A. Lauder—Cross

Mr. Hartpence: I object; that is immaterial.

The Court: You would not be permitted to go back to Southampton; keep in Hudson County.

By Mr. Parsons.

Q. Had not you been passing cars along the Harrison Pike? 10

Mr. Hartpence: I object, as being incompetent, immaterial and irrelevant.

The Court: I will allow it.

Mr. Parsons: I will withdraw the question.

By Mr. Parsons.

Q. Did you see any buses along the Harrison Pike as you approached the scene of the accident? 20
A. No, sir.

Q. You did not see a bus? A. Not that I remember.

Q. You did not see any Greyhound bus? A. No, sir.

By the Court.

Q. Did you pass any Greyhound bus at or about the time of the accident? A. Long before I might have, but I know around the scene of the accident I did not. 30

Q. You did not pass a Greyhound bus from the rear? A. No, sir, I didn't.

By Mr. Parsons.

Q. And you did not pass a Pierce Arrow bus near the scene of the accident? A. No, sir.

Q. May I ask you, on this Sunday afternoon there was very heavy traffic on the Harrison Pike, was there not? A. There was ahead of me. 40

Charles A. Lauder—Cross

Q. And that traffic was traveling in a double line towards Newark? A. Yes, sir.

Q. So that there was a lane of traffic along the curb, wasn't there? A. Yes, sir.

Q. And a lane of traffic along the car tracks? A. Possibly.

10 Q. Is it or isn't it so? A. Well, yes.

Q. It is so? A. Yes, sir.

Q. Now, you stated that you swung to your right? A. Yes, sir.

Q. There was traffic to your right? A. No, sir.

Q. So that this double lane of traffic did not exist where you were? A. No, sir.

Q. For how long a period of time had there been no double lane of traffic? A. Half a mile.

20 Q. And constantly, as you got up to this place, there was a double line of traffic? A. They were ahead of me all the time. I thought you meant alongside of me. I had not been in a double line before the accident. I was following the lines of traffic, but I wasn't in the lines of traffic, as far as any cars alongside of me or back of me is concerned.

Q. There wasn't any double line there? A. Positively.

30 Q. And for half a mile back from the scene of the accident there was no double line? A. No, sir.

Q. Was there anything that had happened along the highway that would cause a break in that line? A. Possibly. There is bridges along there which might hold up traffic.

Q. Do you know whether the bridges had? A. That I don't know.

40 Q. And you know from driving along the Harrison Pike that if those bridges open on a Sunday afternoon it jams the whole pike up? A. Yes, sir.

Charles A. Lauder—Cross

Mr. Hartpence: I object; that is incompetent, irrelevant and immaterial.

By Mr. Parsons.

Q. It did not happen this afternoon? A. Not that I remember.

Q. And you say that on a Sunday afternoon for half a mile before the scene of the accident there was an open road? 10

Mr. Hartpence: He did not say that.

By Mr. Parsons.

Q. Didn't you say that there was half a mile of open road where there was no double lane before the accident? A. In back of me.

Q. Well, you had covered that half mile, hadn't you? A. Approaching the scene of the accident, yes. 20

Q. So, you had gone through half a mile of what you call open road, had you not? A. No, I followed this line of traffic along from the beginning of the Harrison Turnpike to the point of the accident.

Q. Didn't you just state that for half a mile before the accident you traveled over an open road? A. No, I did not. 30

Q. Did you notice any kind of vehicles in front of you? A. There were a lot of cars in front of me.

Q. When this accident happened did you see Mrs. Butler lying in the street? A. No, sir. When I came to I saw Mary Cassidy first, and Mrs. Butler was standing alongside of the back of the car.

Q. Was the Greyhound bus man in uniform near her? A. I didn't see any. 40

Charles A. Lauder—Cross

Q. Did you see any other bus man near there?

A. No.

Q. Did any bus man help get Mary Cassidy out from your car? A. I didn't notice.

10 Q. When Mary Cassidy was lying near your car did you see a bus man there? A. All I was thinking about was helping Mary Cassidy; there were a lot of men around there trying to lift the car.

Q. Did you notice any of those men in bus uniforms? A. I didn't observe.

Q. So far as you know from your observation there were no bus men there? A. That is right.

Q. Where do you say the point of impact took place? A. Directly under the bridge.

20 Q. In what portion of the highway? A. On my right-hand side.

Q. And at that point on your right-hand side of the street was there any car to your right at all? A. No, sir.

Q. How far was the nearest car that was in front of you? A. He probably proceeded ahead quite a ways, 100 feet or so.

Q. At the time of the impact the nearest car in front of you was 100 feet away? A. 100 or 120 or 125 at the time of the impact.

30 Q. How far in front of you did you see this car pull out? A. All I saw was the nose pull out of line; that is all I remember.

Q. Was there a double line on the other side of the street? A. That is right.

Q. You said that this car pulled out of line? A. He pulled out of line; that is all I remember. I saw it as I was proceeding along. I was commencing to start to pull out of the line, and it had come out so close to in front of me I didn't

Charles A. Lauder—Cross

have a chance to get away. That is all I remember.

Q. Sitting where you are, will you indicate in this courtroom how far you say that car was? A. I couldn't say; I saw its nose come out and that is all I remember.

10

By the Court.

Q. How near was the car to you when you pulled your car to the right? A. I don't remember that, because all I remember is seeing the nose come out, and my first thought was to get out of the way.

Q. You don't know how far that nose was away from you? A. No, sir.

Q. But it was coming in the opposite direction? A. It came out of the line.

20

Q. Out of line on the other side? A. Yes, sir, and I turned away to get out of the way, and as I did, I heard a crash, and that is all I remember until I woke up.

Q. You don't mean you pulled your car to the right? A. Yes, sir.

Q. I thought you were coming towards West Orange? A. I was, but I swung to the right to get away from him coming in the opposite direction.

30

By Mr. Parsons.

Q. Irrespective of what you remember about specific distances, I will ask you if you saw that car come out of line the distance from where you are sitting to me?

Mr. Hartpence: Objected to.

The Witness: I don't know.

40

*Charles A. Lauder—Cross**By Mr. Parsons.*

Q. Is there any reason that you cannot remember?

10 Mr. Hartpence: Objected to as incompetent. This witness has stated that all he knows about the accident is as he was driving along he saw a car nose out and he turned to the right and tried to get away, and he lost consciousness. All the rest of this is incompetent; he doesn't know.

Mr. Parsons: That is a common refuge for witnesses to shield themselves behind "I don't know".

By the Court.

20 Q. You say you don't know how far it was? A. That is right.

Q. Why don't you know? A. Because I put my brakes on and everything went blank.

Q. And that is all you know? A. That is all I remember.

Q. Therefore, you don't know because you don't know? A. Yes, sir.

By Mr. Parsons.

30 Q. Did you put the brakes on your car? A. Yes, sir.

Q. Four wheel brakes? A. Yes, sir.

Q. You were going how fast? A. Between 25 and 30.

Q. Applying your four wheel brakes with your going at 20 to 25 miles an hour, in good condition, in what distance could you stop your car?

40 Mr. Hartpence: I object; that is incompetent, irrelevant and immaterial.

Charles A. Lauder—Cross

The Witness: I never tested them.

By Mr. Parsons.

Q. How long have you been a chauffeur? A. About three years altogether.

Q. Being a chauffeur and driving cars don't you make it your business to know in what distance you can stop your car at different speeds? 10

Mr. Hartpence: I object; that is irrelevant. What has that got to do with this case?

By the Court.

Q. Do you know in what distance you can stop your car?

Mr. Parsons: That is a different question. I am asking him if, as a chauffeur, he doesn't make it his business to know within what distance he can stop his car. 20

The Court: He says he doesn't know; that is a comprehensive answer.

By Mr. Parsons.

Q. Don't you make it your business to know? A. I do, according to my own judgment, but when it comes down to feet I couldn't tell you how long it takes to stop the car. 30

Q. In your judgment, as long as you don't want to get down to feet and inches, in your judgment, driving that car at 20 or 25 miles an hour and applying the four wheel brakes, assuming you are sitting behind the wheel in that chair, will you indicate an object in this room the distance at which you could stop?

Mr. Hartpence: I object. 40

Charles A. Lauder—Cross

The Court: Objection overruled.

Mr. Hartpence: Exception.

(Exception noted as ground for appeal.)

The Witness: I don't know; it depends on the condition of the brakes.

10 *By Mr. Parsons.*

Q. In the condition the brakes were that day in what distance could you stop? A. I don't know.

Q. So, you were driving a car that day without knowing how far you could stop the car?

Mr. Hartpence: I object; incompetent, immaterial and irrelevant.

The Court: I will allow him to answer.

Mr. Hartpence: Exception.

20

(Exception noted as ground for appeal.)

(Question read, as follows:)

“Q. So you were driving a car that day without knowing how far you could stop the car?”

The Witness: So far as scientific points, I was, but when it comes to judgment, by seeing a car in front of me, I usually start stopping long before—I don't wait until an emergency presents itself in order to stop the car.

30 *By Mr. Parsons.*

Q. Did you see Mr. Potter when he was on the stand? A. I did.

Mr. Parsons: Will Mr. Potter please stand up?

(A man arose in the court-room.)

By Mr. Parsons.

40 Q. Did you see that gentleman at the scene of the accident? A. No, I didn't.

Charles A. Lauder—Cross

Q. You did not see him near Mrs. Butler at all?

A. No, I didn't.

Q. Were you here in court yesterday? A. I was.

Q. Did you see Mr. Moore on the stand?

Mr. Hartpence: Objected to as immaterial; 10
it is not proper cross examination.

The Court: He is effecting his credibility.
Mr. Parsons is making a point of the fact that
these people were around there, that they
helped Mrs. Butler, they were there, and he is
trying to show that the man was not con-
scious of his surroundings, I suppose. Of
course, what happened afterwards would
make no difference.

Mr. Hartpence: What difference would it 20
make whether this witness saw the other wit-
nesses?

The Court: It may have some bearing on
the subject.

By Mr. Parsons.

Q. May I ask you where in the highway Mrs.
Butler was lying? A. She was standing at the left
side of the car.

Q. Was she holding onto the car? A. No, she 30
was standing by herself, and Junior Eberstadt
was alongside of her.

Q. Was she bleeding at that time? A. Yes, sir.

A. And Junior Eberstadt was beside her? A.
Yes, sir.

Q. How long after the accident was that? A.
That was just immediately after the accident.

Q. Immediately after the accident? A. Yes,
sir.

Charles A. Lauder—Cross

Q. You appeared and testified, as did Mr. Rizzolo in court, did you not? A. Yes, sir.

Q. Do you remember this question being asked you, and your answer as follows, referring to Mr. Rizzolo's car: "Q. Was he on his right side of the street?" Your answer: "A. Approximately right on the edge of his half, I suppose." A. Coming towards me, that was what you mean?

Q. He was on his right coming towards you? Was that your answer? A. If it is in the book, yes, sir.

By Mr. Hartpence.

Q. When you said that that was where Mr. Rizzolo's car was, at what point of the occurrence was that? A. That was previous to the accident.

Q. Was that just as you saw the nose turn out?

Mr. Parsons: I object; that is leading.

By the Court.

Q. Was it Rizzolo's car that collided with yours? A. Yes, sir.

Q. Then you did see the nose of the car that collided with yours? A. Yes, sir.

Q. How far away was that car when you first saw it? A. I don't remember. All I remember is the nose coming out, and I heard the crash.

Q. But you did see it? A. Yes, sir.

Q. How do you know where it was? A. It was in the line of traffic, I suppose.

Otis Eberstadt—Direct

OTIS EBERSTADT, a witness called by and on behalf of the defendant, being first duly sworn, was examined and testified as follows:

Direct examination by Mr. Hartpence.

Q. How old are you? A. 14.

Q. Where do you live? A. West Orange, New Jersey. 10

Q. What is your father's name? A. Rudolph Eberstadt.

Q. What is your mother's name? A. Alberta Eberstadt.

Q. Do you remember the accident to your car on that Sunday afternoon in May, 1931? A. Yes, sir.

Q. Where were you at the time of the accident? A. On the outside of the front seat.

Q. What kind of a car were you riding in? A. 20
A Packard touring car, open.

Q. Where had you come from? A. Remsenburg, Long Island.

Q. Who was driving your car? A. Charles Lauder, the chauffeur.

Q. Is he the witness that just testified before you? A. Yes, sir.

Q. Will you tell what you saw happen as you drove along there? A. We were driving along, and just as we got under the bridge I saw the nose of that car pull out, and then our brakes went on and my head hit the windshield, and that is all I know. 30

Q. Which car did you see pull out? A. The car that hit us.

Q. What did it pull out from? A. From the lane of traffic coming towards us.

Q. Which way were you going? A. Towards Newark.

Otis Eberstadt—Direct

Q. Which way was the other car going? A. Jersey City.

Q. It all happened quickly? A. Yes, sir.

Q. That is all you know about it? A. Yes, sir.

10 Q. Just before you saw that car pull out and you were struck, had your car pulled out around another car that was ahead of you to your left? A. No, sir.

Q. Were you following another car? A. Yes, sir, we were following the line of traffic.

Q. Do you recall where your car was in the highway as you were following the line of traffic just at the time of the accident? A. We were straddling the first line of car tracks on our right-hand side of the road.

Q. The first rail? A. Yes, sir.

20 Q. Did you lose consciousness at the time of the accident? A. I don't know. The first thing I remember everybody was walking around. I don't know whether I did for a while or not.

Q. Where was your car? A. Our car was facing Newark on a slight angle. Its front wheel was about two feet from the curb, and the back wheel about four or five feet.

30 Q. Did you see where the other car that struck you was? A. Well, it was about 15 feet in a diagonal line, and it was facing towards Newark, turned around, and the front was in towards the curb and the back was out on the tracks.

Q. In towards which curb? A. Towards our left-hand curb.

Q. The curb opposite the one where your car was? A. Yes, sir.

Mr. Hartpence: That is all.

*Otis Eberstadt—Cross**Cross examination by Mr. Parsons.*

Q. Otis, you remember passing a bus, don't you?

A. I do quite a ways back, about four minutes before the accident.

Q. What kind of a bus was that? A. I don't remember; I just know it was a bus. 10

Q. You take interest in the Greyhound Coast to Coast buses, don't you? A. I know what they look like.

Q. Do you remember passing a Greyhound bus?

A. If it was a Greyhound bus it wasn't the regular color.

Q. Do you know the Jersey Coast sight seeing buses, Pierce Arrows? A. Yes, sir.

Q. Did you pass one? A. Yes, sir.

Q. You even passed a police car before the accident? A. Yes, because it was slowing down. 20

Q. You passed several other cars before the accident, didn't you? A. I don't remember; we were pretty clear.

Q. Don't you remember passing other cars before the accident? A. We did, of course, before we got to New York.

Q. Don't you remember passing cars in the last half hour before the accident?

Mr. Hartpence: Objected to as immaterial. 30

The Court: Objection sustained; it is too remote.

By Mr. Parsons.

Q. May I ask you, on the Harrison Pike don't you remember passing cars?

Mr. Hartpence: I object.

The Court: Objection overruled.

Mr. Hartpence: Exception. 40

Otis Eberstadt—Cross

(Exception noted as ground for appeal.)

By Mr. Parsons.

Q. Don't you remember passing cars on the Harrison Pike? A. No, I don't, except the police car.

10 Q. How long did it take you from New York to the scene of the accident? A. I don't remember.

Q. Well, about how long?

The Court: If you don't know, say so.

The Witness: I don't know.

By Mr. Parsons.

Q. Was it longer than a half hour? A. I have no idea.

20 Q. Do you remember being asked this question: "Did you pass any cars at all going along there in the last half hour?" And your answer was, "Yes, sir"?

Mr. Hartpence: I object.

By the Court.

Q. Do you remember being in the East Orange District Court after the accident? A. Yes, sir.

Q. And Mr. Rizzolo was examined? A. Yes, sir.

30 Q. Were you examined? A. Yes, sir.

Q. At that examination were you asked this question and did you make this reply: "Did you pass any cars at all going along there in the last half hour", and your answer was, "Yes, sir"? A. Yes, that was the police car.

By Mr. Parsons.

Q. That is the only car you passed? A. That is the only car I know of.

Mrs. Alberta Eberstadt—Direct

Q. Do you remember this question being asked you: "Did you pass a bus?" And your answer was, "Yes"? A. I said I passed a bus.

Mr. Parsons: That is all.

Mr. Hartpence: That is all.

10

MRS. ALBERTA EBERSTADT, a witness called by and on behalf of the Defendant, being first duly sworn, was examined and testified as follows:

Direct examination by Mr. Hartpence.

Q. What is your full name? A. Alberta Eberstadt.

Q. Your husband's name is Rudolph? A. Yes, sir.

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

20

Q. Who are they? A. Otis, Rudolph, Junior, and Andrew.

Q. How old are the two younger children? A. Andrew will be eight in April and Rudolph is ten now.

Q. How old is Otis? A. 14.

Q. Where did you and Mr. Eberstadt and your family reside in May, 1931? A. In West Orange, New Jersey.

Q. And you had a summer home somewhere? A. Remsenburg, Long Island.

30

Q. Do you recall Mrs. Mary Butler, the plaintiff, in this case? A. Yes, sir.

Q. Where did you first come in contact with her? A. I called Mrs. Sullivan's agency to get a temporary cook, my cook being ill.

Q. As a result of that call what happened? A. Mrs. Sullivan recommended that I take Mary But-

40

Mrs. Alberta Eberstadt—Direct

ler for a period of one month, or, rather, I suggested I take her for one month, giving my cook who was ill a month's vacation.

Q. Mrs. Butler came to your place? A. Yes. Mrs. Sullivan called me—

10 Mr. Parsons: I object to any conversation.

By the Court.

Q. As a result of your call did anything happen?

A. I took Mary Butler for a period of one month.

Q. When did Mary Butler come to your house?

A. She came to my house Wednesday, May 27th.

Q. Following this call you made to Mrs. Sullivan? A. Yes, sir.

20 Q. Did you employ Mary Butler as cook when she came there? A. I did not interview her; I simply took Mrs. Sullivan's word and agreed with her on the salary I was to pay her, and she notified Mary Butler—

Mr. Parsons: I move to strike it out.

The Court: Strike it out. You don't know whether she did or not. She says she had no knowledge of the length of her employment.

The Witness: I engaged her for one month.

30 *By the Court.*

Q. Did you fix a price? A. \$80.

Q. And you did that through Mrs. Sullivan?

A. Yes, sir.

By Mr. Hartpence.

Q. What was the trouble with the other cook?

A. Athlete's foot, and I was afraid the children

Mrs. Alberta Eberstadt—Direct

might contract the disease, so I told her to stay away one month.

By the Court.

Q. Did you say to Mary that she was employed for one month? A. Yes, sir.

Q. You told her so after she came? A. Yes, sir. 10

Q. Did you tell her what her wages would be? A. Certainly. I never said a word about lunch. The first I heard of it was in court.

Q. Do you mean to say you did not have her sent up for lunch? A. I had five servants; one of the five could have gotten lunch. I wouldn't have called anyone else in for lunch.

Q. How did Mrs. Mary Butler come to get over to the Long Island home? A. Because we were going there for the week-end, Decoration Day, the whole family, with the exception of the waitress, who stayed home and ironed. 20

Q. At the time Mrs. Butler came to you as cook what was her work? A. Only cooking and taking care of the kitchen.

Q. Did she start right in when she got there? A. Right away. I left word what she should do. I told Helen to tell her she was to do the cooking. she knew she was to do the cooking; it was understood. 30

Mr. Parsons: I move to strike out the last part.

The Court: Yes, strike out the last part.

By Mr. Hartpence.

Q. Was anything arranged about Mrs. Butler, in addition to doing the cooking and being paid,

Mrs. Alberta Eberstadt—Direct

as you have said, about where she was to stay?
A. She was to stay at my home.

Q. And receive board and lodging with you, in addition to the money? A. Yes, sir.

By the Court.

10 Q. You told her that? A. It was all understood through Mrs. Sullivan.

Q. I am asking you whether you personally told Mary that she was employed for a month? A. Oh, yes, after she came.

Q. And that she was to receive \$80? A. Yes, sir.

By Mr. Hartpence.

20 Q. And she was to stay one month? A. Yes, sir, and Mrs. Sullivan told her before she came there.

Mr. Parsons: I move to strike it out.

The Court: Strike it out.

By Mr. Hartpence.

Q. Had you directed Mrs. Sullivan to make any specific arrangements with Mrs. Butler about it?

Mr. Parsons: I object.

30 The Court: Objection sustained; Mrs. Sullivan is the best evidence.

Mr. Hartpence: I am only asking her whether she had directed Mrs. Sullivan to do anything about arranging for the employment of the cook.

The Court: She has already testified to that. She said she went to Mrs. Sullivan and employed a cook for a month, and Mrs. Sullivan recommended Mrs. Butler.

40

*Mrs. Alberta Eberstadt—Direct**By the Court.*

Q. Did you see her when she came? A. No.

Q. You found her when you returned? A. Yes, sir.

Q. When did you get home? A. For lunch, but I didn't see her until after lunch. 10

Q. And Mary had prepared lunch? A. Certainly. I had done the ordering and she had done the cooking.

By Mr. Hartpence.

Q. Did you have anything to do with sending for Mrs. Butler's clothing? A. The chauffeur went for her and brought Mary and her clothes with her.

Q. Did you have anything to do with the directing of Mrs. Butler to go over to the Long Island home? A. I just said that we were all going. I don't usually consult servants as to whether they want to go; I just say "We are going", and they go. 20

Q. What time did you leave? A. Thursday, the 28th.

Q. That was the day after Mrs. Butler had come to you? A. Yes, sir.

Q. Who went over? A. Mary Butler, the cook, Mary Cassidy, Charles Lauder, the three children and myself. 30

Q. And Mr. Eberstadt came later? A. He came later.

Q. You had one or two cars? A. Two.

Q. Going over to Long Island did you ride in the same car with Mrs. Butler? A. Yes, sir.

Q. Going back did you ride in the same car with Mrs. Butler? A. No, sir.

*Mrs. Alberta Eberstadt—Cross**By the Court.*

Q. Do you know anything about the accident?

A. Just what I found out the night of the accident.

Q. You were not at the scene? A. No, sir.

By Mr. Hartpence.

10

Q. What was the other cook's name? A. Yer-
katoch.Q. How long was she away? A. As a matter of
fact, she never came back.Q. Did you see her foot before she left? A.
Yes, sir.Q. What was its condition? A. It was very
seriously infected; I don't know how she stood it
as long as she did.

20

Mr. Hartpence: That is all.

*Cross examination by Mr. Parsons.*Q. Mrs. Eberstadt, let me ask you if you can
remember when you first saw Mrs. Butler? A.
On Wednesday, the day she came, after lunch,
Wednesday, the 27th.

Q. After lunch? A. Yes, sir.

Q. You did not see her when she entered the
house? A. No.

30

Q. You did not see her before lunch? A. No,
sir.Q. Did you give her any orders as to what was
to be had for lunch? A. Yes, sir; everything is
written down in my house.Q. So, when Mrs. Butler came there, there was
in writing what was to be had for lunch? A. Yes,
sir.

40

Q. After you had lunch did you see Mrs. But-
ler? A. Yes, and I told her that she was to be
with me one month at \$80 a month.

Mrs. Alberta Eberstadt—Cross

Q. At that time had Mrs. Butler brought her clothes? A. Yes, sir.

Q. How do you know? A. Because the chauffeur brought a bag or box; I don't know what she had in it. I know he brought a suitcase.

Q. Did you see the suitcase? A. No, but he said he did. 10

Q. You did not see it? A. Yes, sir. The only reason I know they were there she did not go back for any clothes, and we went to Long Island the next day with her suitcase with her.

Q. After you came out and talked to her after lunch what kind of clothes did she have on? A. Just a plain house dress.

Q. May I ask you if she had on any uniform or regular attire used by cooks? A. Yes, a bungalow apron, a loose dress with light color. 20

By the Court.

Q. You would call that an apron? A. I think they call them bungalow dresses, don't they?

By Mr. Parsons.

Q. May I ask you if you remember, Mrs. Eberstadt, the color of the dress? A. No, I don't.

Q. Can you remember anything about her attire when you went out and saw her? A. Except that she was very untidy. 30

Q. Did you at that time reprimand her for being untidy? A. No, but I noticed it.

Q. And with your idea about people in the house you don't keep untidy servants, do you? A. Sometimes I am forced to.

Q. Was it your feeling at that time that you were forced to keep Mary Butler? A. I had engaged her for a month; I had to. 40

Mrs. Alberta Eberstadt—Cross

Q. And when you talked to her you had already seen that she was untidy? A. Yes, sir.

Q. Notwithstanding that, you tell us here that you engaged her for one month? A. Yes, sir.

Q. What room did the cook have in the house?
A. I had four rooms in a wing. I don't think she took my old cook's room, because I had that all fumigated.

10

Q. At that time Mrs. Butler came there had your cook moved out her clothes? A. No.

Q. Her clothes were in the room, weren't they?
A. Yes, sir.

Q. You did not give her the cook's room, but you gave her a different room? A. I had to have the rugs fumigated.

20

Q. The cook's clothes were still there? A. Yes, sir.

Q. At what time did you first tell Mrs. Butler about this trip to Long Island? A. Wednesday afternoon.

Q. About what time? A. I should judge it was immediately after lunch.

Q. Do you recall any conversation with Mrs. Butler, and Mrs. Butler saying to you she would have to get her clothes? A. No, sir.

30

Q. Do you recall any conversation of Mrs. Butler about using the phone to her sister to get her clothes ready? A. No, sir.

Q. Do you recall sending the chauffeur down with Mrs. Butler to her home to get her clothes?
A. No. I sent the chauffeur down in the morning to bring her up there.

Q. Do you know where you sent him? A. To Creek Street.

40

Mrs. Alberta Eberstadt—Cross

Q. What time in the morning did that take place? A. Around 10:30 in the morning.

Q. How soon after 10:30, to your knowledge, did Mrs. Butler arrive at your house? A. I was out.

Q. When did you next see Mrs. Butler after you talked with her? A. I don't remember that, either. 10

Q. May I ask you if it is not unusual for you to take servants and hire them in the middle of the month for a month? A. No.

Q. When had your permanent cook left? A. She left the Saturday before.

Q. At the time she left she was to stay away for a month? A. No, she moved without my knowing, because she was ill. I saw her.

Q. I thought you said you requested her to take a month's vacation? A. She called me later and said she had to leave because her foot hurt. I said, "You had better stay away a month". 20

Q. I will ask you if you did not testify on direct examination that you had asked this cook to take off one month because you did not want the children to catch the infection? A. She had already gone when I returned home.

Q. You did not ask her to leave? A. I did not ask her to leave; I asked her to stay away for one month. 30

Q. Did you know at the time before she had left that she had this infected foot? A. I knew she had it, but I didn't know how bad it was.

Q. I thought you said on direct examination it was very bad and you wondered how she could work on it? A. I might have seen her before.

Mrs. Alberta Eberstadt—Cross

Q. But she left and you did not know she was going? A. Yes, sir.

Q. Had you asked her when you saw her foot to leave? A. I saw the foot after she left. She came back to see me.

10 Q. You did not see it before she left? A. No, sir.

Q. Had she spoken about it? A. Not much; she never complained.

Q. You say she did not speak to you much about it? A. No, she wore a slipper.

Q. Directing your attention, Mrs. Eberstadt, to the people in the house, all the servants were laid off shortly after the accident, weren't they? A. Yes, sir.

20 Q. How soon afterwards? A. About the middle of June.

Q. The maid? A. Yes, sir.

Q. The waitress? A. Yes, sir.

Q. The chauffeur? A. Yes, sir.

Q. So, the month after Mary Butler came there you did not have any employes at all? A. I started all over again.

By Mr. Hartpence.

30 Q. Why did you do that?

The Witness: Must I answer that?

The Court: If you care to.

The Witness: Because I found them reading my mail, and I couldn't trust them, so I discharged the whole lot.

By the Court.

Q. Then did you take on a new lot? A. A new lot.

40

Martha Bahr—Direct

Mr. Parsons: That is all.

Mr. Hartpence: That is all.

MARTHA BAHK, a witness called by and on behalf of the defendant, being first duly sworn, was examined and testified as follows: 10

Direct examination by Mr. Hartpence.

Q. Where do you live? A. New York.

Q. Did you ever work for Mrs. Eberstadt? A. Yes, sir.

Q. Where? A. South Orange.

Q. Before your marriage? A. Yes, sir.

Q. What was your name before you were married? A. Martha Yerkatock.

Q. Do you remember when you left Mrs. Eberstadt's house? A. Yes, I left in 1931, the last part of May. 20

Q. Why was it you went away? A. I had a sore foot.

Q. Had you had it treated by a doctor? A. Yes, sir.

Q. Were you to stay away any given length of time when you went away? A. Yes, sir, for a month.

Q. What was your work when you worked there? A. As a cook. 30

Q. How long did you stay away? Did you go back at all to Mrs. Eberstadt's? A. No. She told me I should come back, but she had to go to the country, and my foot wasn't well and I couldn't come back.

Q. So you never did actually go back to work for her? A. No.

Mr. Hartpence: That is all. 40

*Martha Bahr—Cross**Cross examination by Mr. Parsons.*

Q. When you left you did not take your clothes with you, did you? A. No, I didn't.

Q. At the time you left, when you first left you expected to be back very shortly, didn't you? A. Not shortly, because I had to stay away. First
10 Mrs. Eberstadt said I should take off three or four weeks.

Q. At the time you first went you did not speak to Mrs. Eberstadt about going, did you? A. What?

By the Court.

Q. Did you leave without notifying Mrs. Eberstadt? A. It came all of a sudden. Mrs. Eberstadt told me she was going to give me a month
20 off, and Mrs. Eberstadt went to New York on Friday night, and Saturday morning my foot was so bad I couldn't walk, and I left, and when Mrs. Eberstadt came back I wasn't there, but I called her Saturday afternoon.

By Mr. Parsons.

Q. Mrs. Eberstadt didn't know that you were going to leave the day you left, did she? A. No.

Q. And she did not know the day you left how long you were going to be away, did she? A. She
30 meant to give me a month off.

Q. The day you left Mrs. Eberstadt did not know how long you were going to be away? A. I called her up Saturday night and she said she was going to give me a month off.

Q. When you left Mrs. Eberstadt didn't know how long you were going for? A. No.

Mrs. Theresa Sullivan—Direct

Q. And you didn't know how long you were going for? A. No, sir.

Q. And you left your clothes there? A. Yes, sir.

By Mr. Hartpence.

Q. The Saturday evening you called her up, was it the same Saturday you had gone away? A. Yes, sir. 10

By Mr. Parsons.

Q. You did come back for your clothes? A. I came back later, not right away.

Mr. Parsons: That is all.

Mr. Hartpence: That is all.

20

Mrs. THERESA SULLIVAN, a witness called by and on behalf of the defendant, being first duly sworn, was examined and testified as follows:

Direct examination by Mr. Hartpence.

Q. What is your full name? A. Mrs. Theresa Sullivan.

Q. Where do you live? A. 155 Ward Place, South Orange.

Q. What is your business? A. Employment agency. 30

Q. How long have you been in that business? A. Going on 12 years.

Q. When you speak of an employment agency you mean employment of whom? A. Domestic help.

Q. Do you recall any transaction with Mrs. Eberstadt and Mrs. Mary Butler? A. Yes, sir.

40

Mrs. Theresa Sullivan—Direct

10 Q. What was the transaction? A. Mrs. Butler came to the office to put in her name for a cook's position, and I took her name and address and references, and I told her the first one that came in for a cook I would give it to her, and she was sitting in the other room and a call came in from Mrs. Eberstadt, asking me if I had good cooks on my list, that her cook took the month off, she wasn't well, and she had to have somebody to fill her place. I told her I just had a girl that worked in nice homes and I thought probably she could fill the place. I asked her what wage, and she said \$80 a month, and I told Mary about the position and to see Mrs. Eberstadt and talk to her about it.

20 Q. Didn't you tell Mrs. Butler at that time the position was to pay \$80? A. Yes, sir.

Q. What did Mrs. Butler say? A. She said she would go and see Mrs. Eberstadt.

Q. Did she come back to see you after that? A. No, she had to go right away to the position, as the lady needed someone to do her cooking, and the references were all right, and Mrs. Eberstadt depends on me to investigate.

30 Q. Did Mrs. Butler come back and report? A. Yes, I got a report from Mrs. Eberstadt's house, and I called a number she gave me in West Orange and she said she had accepted the position.

Q. Mrs. Butler? A. Yes, sir.

Q. Do you keep records? A. Yes, I keep records for the Department of Labor.

Q. What does the Department of Labor do with that record? A. They look over my books and see if they are correct, and then they okay them.

Mrs. Theresa Sullivan—Direct

Q. Have you got your record here pertaining to this employment? A. Yes. We never have any trouble.

Q. Will you produce it, please? A. Yes, sir.

By the Court.

Q. What is your first entry? A. "Mary Butler to Mrs. Eberstadt." 10

Q. What is the date? A. May 27, 1931. The same day she had been to the office she went in the afternoon to Mrs. Eberstadt's home.

By Mr. Hartpence.

Q. What else does it say? A. It says, "To Mrs. Eberstadt for a month".

By the Court.

20

Q. You made that entry? A. Yes, sir.

Q. When? A. On the same day I got the information that she was engaged.

By Mr. Hartpence.

Q. What is the date of the page? A. The 16th.

Mr. Hartpence: I ask that that page be marked.

Mr. Parsons: I object.

30

The Court: I will allow the book to be marked.

Mr. Parsons: Her own evidence is the best evidence.

The Court: That would be competent. She has explained that her system was to make entries.

Mr. Hartpence: She was obliged to make them for the Department of Labor.

40

Mrs. Theresa Sullivan—Direct

Mr. Parsons: May I state my objection on the record? My objection is that this witness's own testimony is the best testimony, and any notations or records of her own would be immaterial.

10 *By the Court.*

Q. You remember the circumstances of Mrs. Butler coming in and registering? A. Yes, sir, I take full charge of the office myself.

Q. That is the record you keep? A. Yes, sir.

The Court: I will allow page 16 to be marked.

(Page referred to marked in evidence Exhibit D-10.)

20

Mr. Parsons: Exception.

(Exception noted as ground for appeal.)

The Witness: This is the books they have for the Department of Labor inspector. They go through every name and address. I have one for the ladies and one for the men. You have to have things correct for the Department.

By Mr. Hartpence.

30

Q. Referring to this book which you have just presented, which is marked "Inspected 10/7/32, R. J. Aldrich, Department of Labor," what does that mean? A. That means the book is correct.

Q. Who put that on there? A. Mr. Aldrich.

Q. So that the records you keep are subject to inspection and approval by the Department of Labor? A. Yes, sir. They can come in at any hour of the day and look at my books.

40

Mrs. Theresa Sullivan—Cross

Mr. Hartpence: I suppose we might mark that page of the book just to show what the course of procedure is.

The Court: I don't see that that is material. Of course, what Mrs. Sullivan is telling us is that the State, through the Labor Department, under the Workmen's Compensation Act, so far as the requirement is concerned, keeps tab on those employed. 10

Mr. Parsons: There is a special act governing employment agencies.

The Court: I don't think it is material to put it in. The presumption of law would be that the officials do their duty.

Mr. Hartpence: That is all.

Cross examination by Mr. Parsons. 20

Q. Mrs. Sullivan, this day book which you have here, as I understand it— A. It is only just for putting down the names.

Q. Just listen to my questions and answer my questions. This day book, where you have placed the names down on the extreme right-hand column, is that the wages they are to get? A. Yes, sir.

Q. You have right opposite Mary Butler's name, "Mary Butler to Mrs. Eberstadt", you have the figures "65"? A. 80. You can see it right here (indicating). 30

By the Court.

Q. Have you 65 opposite there? A. No, the other party's name was ahead of that, and there wasn't room for the 80. I just put 65 in the first space, and I couldn't get the 80 in.

*Mrs. Theresa Sullivan—Cross**By Mr. Parsons.*

Q. On the line, the very line where there is Mary Butler, right along the line follows 27, and then in that line are the figures 65; isn't that so? Answer yes or no? A. It is partly on the same line.

10

Q. May I also ask you if it doesn't show that in that space there has been an erasure? A. No, sir. Here is the 80 here (indicating).

Q. Will you please look at it and see if you can not see that there have been erasures and figures underneath? A. I didn't erase anything.

Q. I am going to ask you to look at your own book and ask you if on that book there have not been figures erased? A. Never. I never erased anything. I put down who she went to. I never erase anything.

20

Q. Now, after the time that Mrs. Butler was there, Mrs. Sullivan, after the time that Mrs. Butler was there and left did you see her again? A. No.

Q. Did you talk to Mrs. Butler personally again? A. On the telephone.

Q. Mrs. Butler? A. Up at Mrs. Eberstadt's house. That afternoon she got the position I asked her if she had taken the position—

30

Q. You asked Mrs. Butler? A. Mrs. Butler and the waitress both answered, and Mrs. Eberstadt was out, and when she came home I called up and she said everything was all right.

Q. May I ask you if since Mrs. Butler has been hurt you talked to Mrs. Butler's sister over the phone? A. Mrs. Butler's sister called me up just about a week ago.

William E. Davenport—Direct

Q. And didn't she call you approximately a year and a half ago? A. I never heard from her.

Q. Her sister called you two weeks ago? A. This man came to my office to get the record of Mary Butler, when I sent her and the date and all about it—

Q. Her sister called about two weeks ago; do you remember her name? A. She said she was a friend of Mary's, from her home, and I said, "Is this her sister?" She says, "No, this is a friend." 10

Q. She did not leave her name or anything? A. No name; she said she was a friend.

Mr. Parsons: That is all.

Mr. Hartpence: That is all.

20

WILLIAM E. DAVENPORT, a witness called by and on behalf of the defendant, being first duly sworn, was examined and testified as follows:

Direct examination by Mr. Hartpence.

Q. What is your occupation? A. Court Stenographer.

Q. I show you a transcript of testimony taken in the East Orange District Court, and ask you if you reported that case and made that transcript of testimony? A. Yes, sir. 30

Q. Did you take down stenographically the testimony of the witnesses? A. I did.

Q. And reproduced it in typewriting? A. I did.

Q. Accurately? A. Yes, sir.

Mr. Hartpence: I ask that this transcript be marked for Identification.

(Transcript referred to marked D-11, for Identification.) 40

William E. Davenport—Cross

By Mr. Hartpence.

Q. Does this book contain the entire testimony in the proceedings in the case, including the names of the witnesses who testified? A. Yes, sir.

Mr. Hartpence: That is all.

10 *Cross examination by Mr. Parsons.*

Q. Have you your original minutes here? A. Yes, sir.

The Court: It doesn't appear what use he intends to make of it.

Mr. Hartpence: I only want to know whether he wants to cross examine on the proof of the book.

20 Mr. Parsons: I have no questions.

By Mr. Hartpence.

Q. Are these original notes of what transpired at the trial represented by this transcript? A. They are.

Q. Complete? A. Yes, sir.

Q. And is this transcript, D-11 for identification, a correct and complete transcript of your original notes as you have them there? A. Yes, sir, Thursday, December 4, 1931.

30 Mr. Hartpence: I offer the original notes for identification.

(Notes referred to marked D-12, for Identification.)

Mr. Hartpence: We want to offer pages 32, 33, 34, 35, 38 and 41, which has been previously marked D-2 for Identification; page 42, which has been previously marked D-2-B,

40

William E. Davenport—Direct

for Identification; 41, marked D-2-A for Identification; pages 43 and 44, and specifically on those pages the parts which I interrogated upon and which I will read into the record at this time.

Mr. Parsons: I submit it is improper to read from this record that is now being offered. 10

The Court: You examined what witnesses in it?

Mr. Hartpence: I also want to offer specifically the cover, which contains a list of witnesses, and the first page of the transcript.

The Court: The proper way to go about that is to ask the stenographer to read his notes on the particular testimony, questions and answers given by witnesses whom you want to contradict. You will lay a foundation by asking them whether they did not so testify in Police Court. The answer may have been doubtful or contradictory; in that situation you would have a right to ask the stenographer to refer to his notes taken at the time of the testimony of the particular witnesses, and then ask him whether this question was asked and did he so answer. 20

Mr. Hartpence: I thought I could simplify it by offering the pages and letting the pages speak for themselves. 30

The Court: Interrogate the stenographer whether the witness was examined, and if so, whether he was asked certain questions and gave certain answers, from his original notes. That is the way that should be done.

William E. Davenport—Direct

By Mr. Hartpence.

10 Q. Take your original notes, D-12 for identification, and, referring to the testimony of Nicholas Rizzolo, in cross examination by Mr. Stevens, was he asked these questions and did he make these answers:

“Q. When was it you tried to pass this car?”

“A. Yes, sir.” (Reading from original notes.)

“I saw I had a lot of room, and I tried to pass him right under the bridge.”

Q. (Reading from transcript.) “That was just before the accident, wasn’t it?” A. (Reading.) “Just before the accident.”

20 Q. (Reading.) “When you pulled out to pass him, did you go out on the car tracks?” A. (Reading.) “No, sir.”

Q. (Reading.) “You were still to the right of the car tracks?” A. (Reading.) “Yes, sir.”

Q. (Reading.) “Did you pull out to the right of the other car?” A. (Reading.) “I did.”

Q. (Reading.) “When you first started to pull out did you see the Eberstadt car?”

Mr. Parsons: My recollection is none of these questions were asked Mr. Rizzolo.

30 The Court: I think he was interrogated as to whether he had passed the bridge, and so on, and whether he testified in police court, and he said he did not remember, and in the circumstances they have a right to show it.

Mr. Parsons: But only the questions they directly asked Mr. Rizzolo.

Mr. Hartpence: That is what I am confining myself to.

William E. Davenport—Direct

By Mr. Hartpence.

Q. (Reading.) "When you first started to pull out did you see the Eberstadt car?" A. (Reading.) "No, sir, I didn't see it."

Q. (Reading.) "You say the first time you saw it you were about alongside of the other car?" 10
A. "When I first saw it he was just coming from New York under the bridge."

Q. "Where were you at that instant?" A. "Where was I? Under the bridge there."

Q. In the testimony of John Tobia, the next witness, right near the beginning: "Tell us what Rizzolo did?" A. "The car on our right— (hesitating)

Q. Will this help you if you look at the transcript? 20

Mr. Parsons: I object.

The Court: He will work it out; leave him alone.

The Witness: "We about caught up to him when there were two cars already coming down our left, and this Packard pulled out and hit us on the left side, turning us completely around, and we were both thrown out." 30

By Mr. Hartpence.

Q. Now, over in the cross examination, the last question: "When was it you pulled out to pass this car?" A. "Just underneath the bridge."

Q. Now, the testimony of Peter Kircheo: "Were you driving a bus on that day?" A. "Yes, sir."

Q. "About 6:45 P. M. where were you driving your bus?" A. "Harrison Turnpike, coming to Newark." 40

William E. Davenport—Cross

Q. "Do you remember seeing this accident after it happened, the position of the cars?" A. "After it happened I did."

Mr. Hartpence: That is all.

Cross examination by Mr. Parsons.

10

Q. Of course, in taking these notes you take them down on shorthand, do you? A. I do.

Q. And that depends upon your hearing the witnesses correctly? A. That is true.

Q. And sometimes you make mistakes in what the witness says? A. There may be a mishearing.

Q. For instance, in one of the answers you were reading to Mr. Hartpence you read it first "Got" and then "Caught", didn't you? (No answer.)

20 Q. May I ask you if it is not possible that Mr. Kircheo said, "I was riding in a bus" instead of "Driving"? A. That is possible.

By Mr. Hartpence.

Q. But it is not probable you would have taken it down differently than what he said? A. Hardly.

Q. I want to ask you, referring to this transcript, and also to your original notes, if your original notes show the title of the Court? A. Yes, sir.

30

Q. What was it?

Mr. Parsons: I don't know that that is material.

The Court: It is admitted; the West Orange Police Court.

The Witness: "District Court, East Orange, New Jersey, December 4, 1931." It was on a property damage.

40

*William E. Davenport—Cross**By Mr. Hartpence.*

Q. Who were the parties to the suit?

Mr. Parsons: That is immaterial.

The Court: It is not material who they were. This plaintiff wasn't. In any event, there was litigation, and these witnesses were examined and testified in the manner indicated. 10

By Mr. Hartpence.

Q. Does the list of witnesses show the name of Leo Moore? A. No.

By Mr. Parsons.

Q. Nor does it show the name of Mr. Potter? A. Potter and Kelly for the plaintiff Eberstadt. 20

Q. Does it show him as a witness? A. I would have to go through it.

Q. Never mind. I am going to ask you to make the characters on this sheet of paper that you use for "I was riding" and the characters you use for "I was driving".

(Witness made shorthand characters as directed.)

Mr. Parsons: That is all. 30

By Mr. Hartpence.

Q. Will you write out opposite these in English which one is "I was riding" and which one is "I was driving"?

(Witness marked paper as directed.)

Mr. Hartpence: I ask to have this marked for identification.

Dr. Ambrose F. Dowd—Direct

(Paper referred to marked D-13 for Identification.)

Mr. Hartpence: That is all.

10 DR. AMBROSE F. DOWD, a witness called by and on behalf of the defendant, being first duly sworn, was examined and testified as follows:

Direct examination by Mr. Hartpence.

Q. Your profession is what? A. Physician.

Q. How long have you practiced? A. 23 years.

Q. You are a graduate of what institution? A. Fordham University.

Q. Do you specialize in any particular branch?

20 A. Nerves, mental diseases and conditions.

Q. Are you connected with any hospitals or other institutions? A. Yes. I am connected with the Saint James Hospital, Irvington General Hospital, Crippled Children, and some others.

Q. Have you had occasion to examine the plaintiff in this case, Mrs. Mary Butler? A. Yes, sir.

Q. When did you examine her? A. June 15, 1933.

30 Q. And where? A. In the office of Dr. Lever, Newark.

Q. Who else was present? A. Dr. Lever and Dr. Dias.

Q. What was the nature of your examination?

A. It was a physical examination, paying particular attention, so far as I was concerned, to her nervous system.

Q. What did you find her condition to be? A. She was suffering at that time from psychoneurosis.

Dr. Ambrose F. Dowd—Direct.

Q. What do you mean by that? A. She was suffering from a functional nervous disorder, characterized objectively by sensory disturbances in the left leg and the left side of her face, spasm of her lids, and disturbance of vision, particularly the left eye, and some loss of hearing.

Q. Why do you characterize that as psychoneurosis? A. Because I found no structural basis for it; it was mental rather than physical. 10

By the Court.

Q. Don't you think there was anything the matter with her eye? A. Structurally I saw nothing wrong with her eye; I thought the loss of vision was mental loss of vision.

Q. How about the optic nerve? A. In my judgment it appeared to be normal. 20

Q. In other words, the woman imagines? A. Oh, no, it is not a question of imagination; this is a real nervous illness.

Q. There is nothing the matter with the structure of the eye? A. There is nothing the matter with the structure of the eye.

Q. It is a case of nerves? A. It is a case of a mental condition in which the patient does not see because of the mental condition. 30

Q. It is a mental difficulty? A. Yes, sir.

Q. In other words, if it were not for her mental condition her eye would be perfectly normal? A. Yes, sir.

By Mr. Hartpence.

Q. What about her hearing? A. I think that is the same.

Q. What about the permanency or temporary nature of these conditions, and what can be done 40

Dr. Ambrose F. Dowd—Direct

to overcome them? A. I think she can get well; she can by treatment and removal of everything pertaining to litigation and other things.

Q. You think this is a case of litigation neurosis? A. No.

10 Q. You think after the law suit is over she will get better? A. She will improve and eventually get better.

Q. Under treatment? A. Under treatment.

Q. Are you able to state with reasonable certainty about how long it will be? A. I cannot say; it depends upon the treatment and the woman herself.

Q. Did you find evidence of near-sightedness or far-sightedness? A. I did not go into that; Dr. Dias went into that.

20 Q. Did you find any evidence of injury to the brain? A. No.

Q. Did you find any evidence of injury to the optic nerve or other nerves that might affect the eyes? A. No.

By the Court.

30 Q. Did you find any evidence of any traumatic condition other than nervousness? A. Psychoneurosis is evidence of a traumatic condition; she is a psychoneurotic.

Q. But there is no physical manifestation otherwise? A. There are objective signs of psychoneurosis, her reflexes, spasm of the lids and sensory disturbance.

Q. Was there evidence of a bruise or scar? A. Yes, sir, she has a scar on her hip.

Q. You found this, did you? A. Yes, sir.

Q. Were the scars healed? A. Healed.

40 Mr. Hartpence: That is all.

Dr. Ambrose F. Dowd—Cross

Cross examination by Mr. Parsons.

Q. Doctor, psychoneurosis is a real disease? A. Yes, sir, it is.

By the Court.

Q. If it was not you would not be specializing, would you? A. Certainly not. There are many other manifestations. 10

By Mr. Parsons.

Q. Doctor, may I ask you whether or not shell shock, what the men suffered during the war, is a form of psychoneurosis? A. It is a form of it.

Q. And shell shock is a form of psychoneurosis, and you couldn't tell whether you could cure a man or not, could you? A. A majority of them got well; a certain percentage did not. 20

Q. And they can be permanently disabled and crippled from it? A. Yes, sir, a minority.

Q. You did find, you say, a real psychoneurosis here? A. Yes, sir.

Q. Now, in addition to that, did you take into consideration the fact that the doctor that treated this woman in the hospital found concussion of the brain and cerebral hemorrhage? A. I took into consideration that there was history of unconsciousness, and that the condition had been diagnosed as concussion. There was no structural evidence of any cerebral concussion; those evidences had disappeared. 30

Q. Is there any difference between a cerebral concussion and a cerebral hemorrhage? A. Yes, sir.

Q. Which is the more severe? A. Cerebral hemorrhage.

Dr. Joseph L. Dias—Direct

Q. And bearing in mind that Dr. Dukes, who had this woman in charge for two months in the West Hudson Hospital, and diagnosed her condition as concussion and cerebral hemorrhage, may I ask you if that would affect your opinion?

10 A. No, sir. If she had cerebral hemorrhage it would have been evident when I saw her by paralysis or something.

Q. Isn't it possible to see a cerebral hemorrhage collected at a point over the optic nerve as evidence of the result of a cerebral hemorrhage? A. Cerebral hemorrhage might produce blindness.

By Mr. Hartpence.

Q. Did you find any evidence of that present?

A. No.

20 Q. If it had been present would it have shown itself? A. Yes, sir.

Mr. Hartpence: That is all.

Mr. Parsons: That is all.

Dr. JOSEPH L. DIAS, a witness called by and on behalf of the defendant, being first duly sworn, was examined and testified as follows:

30 *Direct examination by Mr. Hartpence.*

Q. Your profession is what? A. Eye, ear, nose and throat surgeon.

Q. How long have you been practicing your profession, doctor? A. I have been practicing in New Jersey thirty years.

Q. You are a graduate of what institution, doctor? A. College of Physicians and Surgeons, Medical Department, Columbia University, and

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Dr. Joseph L. Dias—Direct

eight years New York Eye and Ear, and four years Cornell Medical College.

The Court: The doctor is qualified.

By Mr. Hartpence.

Q. You examined also Mrs. Mary Butler, the plaintiff? A. I did, on the same day that Dr. Dowd did at Dr. Lever's office. 10

Q. Was Dr. Dukes present? A. Yes, sir.

Q. That is the same doctor that testified here? A. Yes, sir.

Q. Now, what did you examine Mrs. Butler particularly for? A. I examined her eyes, ears, nose and throat.

Q. What did you find her condition to be, and her nervous condition? A. She had no pathological changes in her eyes, nothing wrong with either eye. The interior of each eye was normal. She is somewhat near-sighted in both eyes, a little more in the left than the right. At that time she told me that she could see absolutely nothing with her left eye, but I could find absolutely nothing wrong with it, and I examined her hearing and found a catarrhal process in her ears. There was only a slight difference between the hearing in her left ear and that in the right. I examined her nose and found she had a chronic catarrhal process of the nose. She has a thickening of the linear membrane of the nose, brought about by a cracked partition of the nose, which was caused by the hard palate being high and narrow. That brought about that condition. 20 30

Q. Was that a congenital condition? A. Yes, sir.

Q. Not caused by trauma? A. No, sir.

Dr. Joseph L. Dias—Direct

10 Q. What was the effect of the catarrhal condition which you found? A. That catarrhal condition produced a catarrhal condition in her ears. We have tubes that lead from the back part of the nose to the middle ear, the purpose of which are to replenish air in the middle ear, and the catarrhal process had extended from the nose through tubes into the middle ear.

By the Court.

Q. What is the effect? A. It diminishes hearing. It begins to first cut down the low notes of the scale, and if it continues finally all of the notes of the scale are cut out.

Q. She complains of a ringing? A. That is tinnitus aurium.

20 *By Mr. Hartpence.*

Q. Now, the near-sightedness that you referred to, did you determine what the cause of that was? A. The eyeball is too long; she was simply born with the eyeball too long. A near-sighted eyeball is too long. She has an eyeball that is longer than normal.

By the Court.

30 Q. Born that way? A. Yes, sir.

By Mr. Hartpence.

Q. Was there any evidence in her case of injury, or trauma? A. Oh, no, trauma or injury never causes either near-sightedness or far-sightedness any more than it causes one finger to be shorter than another in individuals. The nerve head in each eye is absolutely normal.

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Dr. Joseph L. Dias—Direct

Q. What about the presence or absence of pressure on the auditory nerve? A. She hears the fork as soon on one side as she does on the other. We timed it with a stop watch to determine if there is shortening of the bone conduction.

By the Court.

10

Q. What is the difficulty with Mrs. Butler, purely nerves? A. Yes, plus a catarrhal condition, which brings about noises and some diminished hearing, and at times she hears better than others. In stormy weather she hears worse than on a dry day. It is the pressure that affects her hearing.

By Mr. Hartpence.

Q. Did you find evidences of injury to the head or brain? A. Not to the eyes or ears, no. 20

Q. Did you find any evidence of trauma or injury that would produce either the eye or ear conditions you referred to? A. No.

Q. What, in your opinion, is the trouble with her eye, her left eye, when she says she cannot see? A. Well, she thinks she cannot see.

By the Court.

Q. But it is her eye? A. Yes, but there is nothing pathologically wrong. 30

Q. What makes her think she cannot see? A. She says she cannot.

Q. Do you think she can see? A. Yes, sir.

Q. You do? A. Why, certainly. Here is an eye specialist who admitted to her ability to use the eye to the extent of 20/70 with that eye, and that is a tremendous improvement over when I saw her. When I saw her she stated that she

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Dr. Joseph L. Dias—Direct

could see absolutely nothing with that eye. That is a tremendous improvement.

By Mr. Hartpence.

10 Q. How about the 35 per cent? A. 20/70 is equivalent to about a 35 per cent. loss of sight. She has 65 to 70 per cent. loss of sight in that eye. 20/70 means about 35 per cent. loss of sight.

Q. Assuming that what she says is so? A. Yes, sir.

Q. And assuming that Dr. Bloomberg's figures are so she would still have 65 per cent. good sight?

A. Yes, sir. With proper near-sighted glasses she should see normally.

By the Court.

20 Q. Why does she need glasses if she is simply imagining that she cannot see? A. You cannot bring her vision down to standard unless she has a near-sighted glass.

Q. You did find a structural condition? A. I found her near-sighted, yes.

By Mr. Hartpence.

Q. She needs near-sighted glasses? A. Yes, to get 20/20.

30 Q. What is your opinion, Doctor, of her probable recovery from this hysterical condition? A. I think she will get well and have normal vision. If she will get a proper pair of glasses she will see 20/20 with each eye.

Q. How about her hearing, Doctor? A. She will continue having poor hearing, and it is going to become worse until her nasal condition is treated, because that is a progressive process.

Dr. Joseph L. Dias—Cross

Q. Suppose she were treated properly, what would be the probable result, Doctor? A. There may be a slight improvement in hearing, and it may remain stationary. Operating is to prevent progress.

By the Court.

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Q. In any event, Doctor, you have no doubt in your mind that that condition is not traumatic?

A. It is not traumatic.

Q. Not the result of injury? A. No, sir.

Q. You also have no hesitancy in expressing the opinion that she will entirely recover except to the extent you have indicated? A. Yes, sir.

Mr. Hartpence: That is all.

Cross examination by Mr. Parsons.

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Q. As I understand your testimony, this woman hasn't a thing, so far as hearing and eyesight are concerned, that is due in any way to trauma? A. Except her nervous condition; that is, no doubt, due to trauma.

Q. In other words, your whole idea about this lady's condition is purely that? A. Yes, sir.

Q. Do you say that concussion of the brain and cerebral hemorrhage have nothing to do with her present condition? A. They have nothing to do with the condition of her eye and ear.

30

Q. You very often find very different things at different times in the same case, don't you, about the same person? A. Yes, sir.

Q. And you can make the statement that a person is 100 percent. disabled, and appear in court and testify that the person has recovered fully, can you not? A. I don't quite understand that. I would say that a person has 100 percent. dis-

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Dr. Joseph L. Dias—Cross

ability, and say afterwards they have fully recovered?

Q. Yes. A. It all depends. If a person has an imaginary condition they will recover, but if they have any pathological condition they would not recover.

10 Q. May I ask you this: Is there any reason why, before this accident, Mrs. Butler suffered nothing in her ears and after the accident she does suffer? A. Yes. After a person has had an accident a person begins to note every one of her or his bodily functions, and will make observations of things that passed unnoticed before.

Q. Do I understand your statement to be that Mrs. Butler must have had, before the accident, ringing in her ears? A. It might have come after
20 the accident, because a catarrhal process does not cause ringing in the ears right away.

Q. When this woman was cast out of this car onto the street, taken to the hospital, and lay in the hospital about two months, and complained of pounding, as Dr. Dukes testified, and ringing in her head and ears, do you say that this accident had no connection with that condition? A. I don't think so. She describes it as all patients do who have chronic catarrh of the ear.

30 Q. Directing your attention to this woman's landing in the street, suffering a concussion of the brain, being diagnosed as having a cerebral hemorrhage, lying there in the hospital and finding one eye losing vision, and the other eye being all right, do you say that this accident had nothing to do with that condition? A. Yes, because I have examined the eye and I have seen there is nothing wrong with it. If she had atrophy of the optic nerve it could have been seen.

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Dr. Joseph L. Dias—Cross

Q. You say there is no blurring of the nerve in the left eye? A. There is not.

Q. And that was true at the time that you examined— A. On June 15, 1933.

Q. Was Dr. Lever present at that examination? A. He was in the room, yes.

Q. And did you and Dr. Lever at that time have a consultation and state that it was possible that this blindness may be now existing because of intracranial hemorrhages? A. Absolutely not.

Q. Did Dr. Lever state that to you? A. No.

Q. Did he also state that the intracranial hemorrhages may press upon the optic nerve intracranially or intraoptically? A. No, sir.

Mr. Hartpence: I object.

By Mr. Parsons.

Q. Did you state it to him?

Mr. Hartpence: I object.

The Witness: No, sir.

Mr. Hartpence: I object.

The Court: It is proper cross examination.

Mr. Hartpence: My objection is that it is being read from some report of Dr. Lever's. He was not her physician. If Dr. Lever's views of this case are to be brought into the case in this indirect way I say that is improper.

The Court: The complete answer to it is this: Unless he produces Dr. Lever he is bound by Dr. Dias's answer.

Mr. Hartpence: He is asking about consultation; that reads into the record practically Dr. Lever's views.

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Dr. Joseph L. Dias—Cross

Mr. Parsons: I will withdraw the question.

By Mr. Parsons.

10 Q. Did you know at the time of your examination that Mrs. Butler had a nose bleed? A. I didn't see any.

Q. At the time of your examination did you know that she suffered a nose bleed in this accident? A. I got the history; I will read it and find out. I have a note in the history that she did not bleed from the nose.

Q. You have that note? A. That was the history given me by Dr. Dukes.

20 Q. Do you know that on the hospital records and in Dr. Dukes' own testimony here this morning, this woman was bleeding at the nose when she was taken to the hospital? A. I know nothing about that.

Q. May I ask you if it is a fact that this woman was bleeding from the nose when taken to the hospital and when Dr. Dukes first treated her, would that change your opinion? A. No.

Q. What does bleeding from the nose indicate? A. It may indicate any number of things.

30 *By the Court.*

Q. Well, for example? A. It might indicate that she had a broken nose.

Q. Well, in this case? A. Simply a congestion of the head at the time.

Q. Might it indicate just that condition you found from her nose, in being thrown from a car and suffering injury to her nose? A. No, because I would have seen evidences of fracture there, and there are no evidences of fracture.

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Dr. Joseph L. Dias—Cross

Q. When was your examination? A. On June 15, 1933, a little over two years after the date of the accident.

Q. And in the mucus membrane of the nose, do you mean to say as a medical man that two years after the accident in the mucus membrane you can see a fracture? A. Yes, because there would be a sharp deflection of the bone. 10

Q. Might there not have been such a slight fracture with the injury there that it would not show at all? A. Theoretically that is feasible; I have never seen one.

Q. Now, coming down to the condition of the ear, you say the only thing that can cause the condition you found in Mrs. Butler's ear was a catarrhal condition? A. Yes, sir, that is a catarrhal condition that she has. 20

Q. That is the only thing that could cause it? A. Yes.

Q. So, that should have existed before the accident, that deafness? A. Yes, sir.

Q. You actually did find deafness in the ear? A. Not deafness as the layman calls it deafness.

Q. You found impairment? A. Very slight.

Q. In which ear? A. Left.

Q. Do you know what side of the head Mrs. Butler was struck on? A. I am looking to find out whether I have that here. Yes, she had a laceration behind the left ear. 30

Q. Did she have anything else on the left side of her head? A. She had a laceration over her left eye and one under it.

Q. Was there anything else on the left side of the head? A. Not that I have any note of here.

Q. I am directing your attention to the fact that Dr. Dukes testified that she had a large hematoma 40

Walter Bucholz—Direct

indicating extensive concussion on the left side of the head; would that have any effect on hearing?

A. It might. If it had I would have found it in my tests.

Q. Your tests happened two years afterwards; the hematoma would have passed, would it not?

10

A. The hematoma would have disappeared.

Q. But the existence of that condition at the time of the accident indicated trauma or force applied at that part of the head? A. Certainly.

Q. And trauma or force applied at that part of the head can cause difficulty in hearing? A. It can if it affects the auditory nerve, but it did not in this case.

Mr. Parsons: That is all.

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Mr. Hartpence: That is all.

WALTER BUCHOLZ, a witness called by and on behalf of the defendant, being first duly sworn, was examined and testified as follows:

Direct examination by Mr. Hartpence.

Q. What is your occupation? A. At the present time?

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Q. Yes. A. I am a poultry raiser at the present time. At the time of the accident I was on the Police Department.

Q. The Police Department of what? A. I was connected with the Hudson County Police Department at the time of the accident.

Q. You know about this accident? A. I do.

Q. On May 31, 1931? A. Yes, sir.

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Q. What brought it to your attention? A. Why, I was patrolling that particular post at the time and I was notified by a brother officer that

Walter Bucholz—Direct

there was an accident. I had just finished handling another accident and the officer directed my attention to this other accident.

Q. On the same highway? A. The same highway.

Q. You went to the scene of the accident? A. I did. 10

Q. Where did you find the scene of the accident to be? A. Under the Lackawanna bridge on the Harrison Turnpike.

Q. When you got there what did you see? A. Of course, there was a lot of confusion. I saw one car crossways of the road at an angle, and another car at the right.

Q. Did the cars appear to be damaged? A. The Oakland sedan was very badly damaged and the Packard was damaged around the left front end. 20

Q. What kind of a Packard was it? A. An open touring car.

Q. Where was that when you got there? A. That was under the bridge on the north side of the road about 2 or 3 foot from the curb, the north curb.

Q. Is the north side of the road the right-hand side of the road looking towards Newark? A. Yes, sir. 30

Q. Where was the Oakland car? A. Slanting in the road, almost touching both sides of the car track.

Q. Headed towards Newark? A. Partly.

Q. Where was that with respect to the south curb? A. From my previous testimony, I believe I said it straddled both car tracks.

Q. What is your recollection now? A. I don't think I could change it. 40

Walter Bucholz—Direct

Q. I show you this photograph, Exhibit P-1; do you recognize that? A. I do.

Q. Is that the scene of the accident that you refer to? A. Yes, sir.

10 Q. Now, looking towards Newark can you point out on that photograph about where the Oakland car was with regard to the street railway tracks? A. Why, this was just lapping over this rail, and the other end came around here, as I can recall (indicating). That would be the third lane going north, the third track going north.

Q. Will you come over to this table and with this lead pencil mark where the rear end of the Oakland car was with respect to the tracks and where the front end was? A. I couldn't just get it down to the inch.

20 Q. Never mind the inch. A. I would put the rear end about here (indicating).

Q. Mark an R there for the rear, and put a ring around it. A. This is supposed to be under the bridge (indicating).

Q. Where was the rear end of the car? A. That would be the rear end here (indicating).

Q. Of the Oakland? A. Of the Oakland.

Q. Where was the front end? A. Over here (indicating).

30 Q. Make an F there for the front and put a ring around it. (Witness marked photograph as directed.)

Q. It was under the bridge? A. Oh, yes.

Q. Right underneath the bridge? A. Yes, sir.

Q. Was it nearer to the north side or the other side? A. I couldn't recall; I know it was under the bridge.

40 Q. Show me where the Packard car was? A. The nose of the Packard car would be just about

Walter Bucholz—Direct

if you dropped a line off of the westerly end of the bridge. Here is the car as it rested. The radiator was nearer to the curb than the rear end would be.

Q. And the front of the car was about how far from the right-hand curb? A. About two or three foot from the curb. 10

Q. Put an F there. A. I would say this was just about clearing the bridge; in other words, if you dropped a line down it would just about hit the radiator.

Q. On the side of the bridge towards Newark? A. Yes, sir.

Q. Where was the rear? A. Four foot from the curb.

Q. Put an R back there. (Witness marked photograph as directed.) 20

Q. Was anybody hurt there, did you see when you got there? A. Yes, sir.

Q. Whom? A. Well, now, some of the parties had been taken to the hospital already.

Q. Whom did you see? A. I don't recall the names.

Q. Did you see a man, woman, children, or whom? A. I took two children and the other two women went in another vehicle, and I met them at the hospital. 30

Q. I am still asking you for an answer as to whom you saw of these people when you got to the scene of the accident? A. Merely the two children.

Q. Did you see Mr. Rizzolo there, the driver of one of the cars? A. I couldn't swear if I did or not. I saw him at sometime during the proceedings. 40

Walter Bucholz—Cross

William Lamont—Direct

Q. Did you see Mr. Lauder, the other driver of the other car? A. Yes, sir.

Q. Was he there when you got there? A. Yes, sir.

10 Q. Who went with you down to the scene of the accident, anybody? A. No, sir; I was patrolling alone.

Q. And another officer came along? A. Yes, sir, Officer William Lamont and Officer Bloom.

Q. Anybody else? A. A little later on Lieutenant Hoppe.

Mr. Hartpence: That is all.

Cross examination by Mr. Parsons.

20 Q. You were the first one there, were you? A. I was the first officer there, yes, sir.

Mr. Parsons: That is all.

WILLIAM LAMONT, a witness called by and on behalf of the defendant, being first duly sworn, was examined and testified as follows:

Direct examination by Mr. Hartpence.

30 Q. You were a member of the Hudson County Police force also? A. Yes, sir.

Q. Did you see this accident on May 31, 1931? A. I didn't see the accident.

Q. Did you have anything to do with it? A. I came there after the accident happened.

Q. Did you go down with Mr. Bucholz? A. He was there before I was.

Q. What did you observe when you got there? A. Just that the traffic was tied up. That is what

William Lamont—Direct

attracted my attention to it; the traffic wasn't moving. I drove down that way, and the traffic was all tied up. I got out of the car and walked ahead to find out what it was.

Q. Did you see the damaged cars? A. Yes, sir.

Q. Where were they? A. The Packard was on the north side of the road, heading west on the Harrison Turnpike, and the other car was on the other side of the road, the south side of the road, facing in just which direction I am not quite clear. 10

By the Court.

Q. Does the highway run east and west? A. Yes, sir.

By Mr. Hartpence.

Q. The north side of the road is the right-hand side as you go towards Newark? A. Yes, sir. 20

Q. The south side is the right-hand side as you go towards Jersey City? A. Yes, sir.

Q. Can you state about what the position of the Packard was with relation to the right-hand curb? A. Well, the Packard was almost parallel with the curb; I think the rear was out a little bit more.

Q. How far away from the curb? A. Three or four feet.

Q. Where was the other car? A. Near the other curb, but part of it, if it is clear to my mind now, was on the rail heading east. 30

Q. That is, the rear part? A. I am not quite sure; I know the car was on an angle.

Q. The car was turned around on an angle? A. Yes, sir.

Mr. Hartpence: That is all.

Mr. Parsons: No questions.

William B. Bloom—Direct—Cross

WILLIAM B. BLOOM, a witness called by and on behalf of the defendant, being first duly sworn, was examined and testified as follows:

Direct examination by Mr. Hartpence.

10 Q. You were a member of the Hudson County Police force also? A. Yes, sir.

Q. Did you see the accident happen? A. No, sir, but I was there afterwards.

Q. What did you see the positions of the two damaged cars to be? A. The Packard car was two or three foot away from the curb facing north, and the Oakland car was on an angle facing north, with the back facing Jersey City.

Q. About how close to the curb was the Packard car? A. Oh, about three foot from the curb.

20 Q. What about the other car on the other side? A. The other car, the Oakland, was near the center of the road, with the rear end facing Jersey City.

Q. Were you present in the Police Court when Mr. Rizzolo and Mr. Lauder were there? A. No, sir.

Mr. Hartpence: That is all.

Cross examination by Mr. Parsons.

30 Q. You were the third one there? A. Yes, sir.

Mr. Parsons: That is all.

August F. Hoppe—Direct

AUGUST F. HOPPE, a witness called by and on behalf of the defendant, being first duly sworn, was examined and testified as follows:

Direct examination by Mr. Hartpence.

Q. You are also a member of the Hudson County Police Force? A. Yes, sir. 10

Q. Were you there at the time of the accident? A. I was there after the accident occurred.

Q. You were Lieutenant of Police at that time? A. Yes, sir.

Q. Did you see the scene of the accident after it occurred? A. Yes, 10 or 15 minutes after it occurred.

Q. Did you make an investigation of it? A. I did.

Q. Where were the two damaged cars when you saw them? A. Why, the Packard car was on the right-hand side of the road; the rear end was probably out a foot further than the front end. 20

Q. How far out from the curb, the front and rear? A. About three or four foot.

Q. What about the other car? A. The sedan was in the center of the road, facing half way towards Kearny and half way towards Newark, in about the center of the road, I would say.

Q. Did you examine anybody or take any statements with regard to the accident? A. I did. 30

Q. Did you take a statement from Mr. Rizzolo? A. Yes, sir.

Q. This statement, showing you P-4 for Identification? A. Yes, sir; I took it.

Q. How did you come to take a statement from Mr. Rizzolo?

August F. Hoppe—Direct

Mr. Parsons: I object.

The Court: He will say that it is in accordance with the usual custom.

The Witness: That is it.

By the Court.

10 Q. You were there to investigate and get statements, and so forth? A. Yes, sir.

By Mr. Hartpence.

Q. Did you ask Mr. Rizzolo the usual questions?

A. Yes, sir.

Mr. Hartpence: That is all.

Mr. Parsons: No cross examination.

Mr. Hartpence: We offer in evidence D-4 for Identification.

20

Mr. Parsons: I object.

The Court: Only that part of it that relates to his report. You have got other matters there, haven't you?

Mr. Parsons: It is entirely irrelevant.

The Court: So far as the report of Dukes is concerned.

Mr. Hartpence: He said that he obtained that information from Mary Butler, and then the other side interrogated him about the nature of his diagnosis. It seems to me to that extent it is entitled to go in.

30

The Court: I think you had better content yourself with the affirmative statement of Dr. Dukes at the time. He testified to it.

Mr. Hartpence: I take it that on the offer of the testimony taken in the East Orange District Court your Honor feels that is entirely unnecessary?

40

Testimony

The Court: The stenographer has testified from his original notes; that is the best evidence always as to testimony taken at other times and occasions.

Mr. Hartpence: We desire to offer in evidence the original Claim Petition, New Jersey Department of Labor, D-3 for Identification, and also the original answer, which I have here under the certificate. 10

The Court: This may be evidential under the Workmen's Compensation Act.

Mr. Parsons: I am perfectly willing to let the petition go in, but the answer is signed by the attorney of record, and I object.

The Court: In other words, you say that unless Eberstadt signed that Mrs. Butler could not be bound by it? 20

Mr. Parsons: Yes, sir.

The Court: You are probably correct about that. You cannot get Eberstadt's testimony in here without producing him. In that answer he makes certain statements. I will allow the petition but not the answer.

Mr. Hartpence: I ask that the answer be marked for identification, and pray an exception to your Honor's ruling. 30

(Exception noted as ground for appeal.)

(Petition referred to marked in evidence Exhibit D-15; Answer referred to marked D-14 for Identification.)

Mr. Hartpence: I should like to reserve the right to produce Mr. Eberstadt.

Mr. Parsons: I hope to produce Dr. Coghlan. He was the eye doctor that examined Mrs. Butler in the hospital shortly after the accident. 40

Testimony

Wednesday, January 11, 1934.

10 Mr. Hartpence: We desire to renew our offer of the answer of the New Jersey Department of Labor in the case of Mary Butler against Rudolph Eberstadt, which is verified by George Echleman, of the firm of Edwards, Smith and Dawson, who are attorneys for the respondent, Rudolph Eberstadt, in that case, to the extent of showing not all the facts and circumstances set forth in the answer, but simply to the extent that the respondent does not contest compensation, and is perfectly willing to pay it and has paid all medical expenses under the New Jersey Compensation Act.

20 Now, it seems to us, your Honor, that this is a pleading in a cause which is binding upon the respondent. It would not make any difference who represented the respondent in filing. He is represented by his attorneys, and they come into court and plead and say, "We admit liability". To that extent we offer the answer.

30 The Court: My view of that is that you cannot bind the plaintiff by any such admission. Of course, she does file a petition in which she apparently alleges that her employment came within the provisions of the Employers Liability Act. That is as far as you need go, I should say. It is in the record now that you admit liability under the Workmen's Compensation Act, but you deny liability at common law.

40 Mr. Hartpence: In support of that we offer the answer which we have filed in the com-

Mrs. Katherine Farrell—Direct

pensation suit, which is a pleading in that proceeding.

(Argument by counsel.)

The Court: I will allow a certified copy of the petition to be marked.

Mr. Hartpence: We renew our offer of the answer, and pray an exception to your Honor's refusal to admit it. 10

(Petition referred to previously marked in evidence Exhibit D-15.)

MRS. KATHERINE FARRELL, a witness called by and on behalf of the plaintiff in rebuttal, being first duly sworn, was examined and testified as follows: 20

Direct examination by Mr. Parsons.

Q. You are a sister of Mrs. Butler, are you?

A. Yes, sir.

Q. And you live in West Orange? A. Yes, sir.

Q. Do you remember the day that Mary went to work for the Eberstadts? A. Yes, I do.

Q. May I ask you if you received a telephone call from Mary? A. Yes, I did; she called me to have her things ready for her. 30

Q. As a result of that telephone call—

Mr. Hartpence: I move to strike out the answer.

Mr. Parsons: I will consent.

By Mr. Parsons.

Q. As a result of that telephone call, tell us what you did? A. I went down to Essex Avenue and got a few house dresses and house shoes and put them in a box. 40

Mrs. Katherine Farrell—Direct

Q. What happened with reference to the box?

A. The chauffeur and her came and got them, and they went away, and she said she was going over Decoration Day.

10 Mr. Hartpence: I move to strike that out.
Mr. Parsons: I consent that it be stricken out.

The Court: Yes, strike it out.

By Mr. Parsons.

Q. Now, may I ask you what time of day the chauffeur and Mary came down to get the box?

A. I really couldn't tell you what time it was, but it was after lunch, maybe 3, maybe 4.

20 Q. Sometime in the afternoon? A. Yes, sir; I couldn't tell you the time.

Mr. Parsons: That is all.

Mr. Hartpence: No cross examination.

Mr. Parsons: That is our case.

30 Mr. Hartpence: We desire to renew our motion to dismiss on the ground of lack of jurisdiction in this court as already urged on the previous motion and for reasons stated in the previous motion. I presume it is hardly necessary for me to repeat what I had to say in that respect.

The Court: In other words, you base it on reasons heretofore stated?

Mr. Hartpence: Yes, sir.

The Court: I incline to the view that it becomes an issue of fact, in view of the testimony of the plaintiff and the contradictory testimony of the defendant, especially that of Mrs. Eberstadt, together with that of Mrs.

40

Motion for Directed Verdict

Sullivan. I will leave it to the jury to determine.

Mr. Hartpence: We also desire, if your Honor please, to make an alternative motion for a directed verdict in favor of the defendant on the same grounds urged for our motion for dismissal. The evidence is conclusive that the employment of the plaintiff by the defendant was not casual, but was a regular employment, and therefore the rights of the parties are to be determined by the New Jersey Compensation Act, and not here.

(Argument by counsel.)

The Court: You need not argue it; I have already disposed of the same question. I am going to let that go to the jury as a question of fact, and you may have an exception. I may say that that question would more properly rise under a Rule to Show Cause in the case of an adverse verdict, as to the weight of the evidence. The difficulty is that the trial judge cannot presuppose what the jury will do where an issue of fact is involved. If the jury should determine that the weight of the credible evidence justifies a finding of casual employment, if that should be subsequently considered by the Court to have been contrary to the weight of the evidence, then the trial court, under a rule, would have control of the subject matter. As the issue now is, it becomes one of fact for the jury. You are asking me to do that as a matter of law.

Mr. Hartpence: No, sir. I am asking your Honor to take Mrs. Butler's testimony with full force, just as she gives it. I say that that

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Motion for Directed Verdict

testimony as she gave it and as it stands does not show, as a matter of law, casual employment under the statute and under the decisions. It shows regular, recurring, periodic service.

10

The Court: I will control that on a rule in the event it is necessary.

Mr. Hartpence: We also move for a directed verdict in favor of the defendant, again giving the plaintiff's testimony full force and effect, with no conflict of evidence, and it seems to me that it appears that Mrs. Butler was a fellow servant of Lauder, the chauffeur, at the time the accident occurred.

20

The Court: I have been considering that subject as this trial has been going on, and I am not at all clear that this particular case would come within the rule of fellow servant.

30

Mr. Hartpence: I don't think the facts in that respect are disputed. There is one case specifically and absolutely on the point. I am sorry that I have not the New York reports with me. There is a case in the Court of Appeals of New York which is exactly in point, both on the facts and the law. I will give your Honor the citation, which is *Fay v. DeCamp*, 257 N. Y. 407.

(Argument by counsel.)

The Court: Motion denied; you may have an exception.

Mr. Hartpence: Exception.

(Exception noted as ground for appeal.)

(Charge of the Court, previously transcribed, follows.)

40

Charge of the Court.

LAWRENCE, *J.* Members of the jury, you are to understand that the mere fact that the plaintiff in this case was injured in the accident involved, even though it may appear in the evidence that she received an injury or injuries which still persist in some form, that you would not be justified in awarding damages merely because of that fact. 10

Apparently the plaintiff was hurt in the accident, but the defendant, Mr. Eberstadt, cannot be required to pay compensation in this litigation unless it appear that she was hurt as the result of the negligence of Mr. Eberstadt's employee, namely, the chauffeur, at the time. She, moreover, cannot in this suit recover if the evidence shows that her employment in the Eberstadt family as a domestic was of a regular character and nature. I say that because the suit has gotten into a legal phase, as it were, and if the facts are found, under the greater weight of the credible evidence, to be such that her proper place is in another court, namely, the Compensation Bureau, and not here, under what we know as the common law, then, obviously, there could be no verdict in her favor in this present suit. Therefore, you have the first question for consideration, and that is whether she has satisfactorily shown her relation to the Eberstadt household at the time of the accident. If she was there under a casual employment, one of an accidental nature, but filling an emergency and not under regular employment, then you would have a right to pass to the other questions involved in the case. 20 30

There is, as you must know, a law providing for the compensation of employees who are injured in the course of and arising out of employ-

Charge of the Court

ment. That law sets up a special court, as it were, whereby the injured employee may have the right determined as to what compensation for a given injury should be made by the employer.

10 Counsel for the plaintiff here has very candidly said to you that the compensation there provided by law is less than could be recovered in a common law action for the negligent act of the master, express or implied, whereby an injury occurs to the employee. You, however, are not to be influenced by such a statement, because the Legisla-
20 ture has defined the policy with reference to compensation between employers and employees, between masters and servants, and you and I are not concerned with that policy; we have got nothing to do with it. The Legislature determined that, and so you could not permit a prejudicial view to enter your minds in determining this case on the theory that because the plaintiff, if a case of negligence has been proven, would get more in this suit than she would through the medium of the Employers Liability Act, for the very obvious reason that if that is the way you decided the case then you would not be determining it in accordance with the evidence and the rules of law as the Court indicates them to you. You cannot
30 decide the case from that standpoint at all. You cannot give this woman compensation because you think she is seriously hurt from that fact alone.

She cannot recover if there was not any negligence on the part of the chauffeur of the defendant Eberstadt. If the cause of the accident was the negligence of the driver of the other car she cannot recover if her employment in the Eberstadt household was regular and not casual.

Charge of the Court

Now, that brings me to say this: The law has attempted to define what casual employment means. So far as the language is concerned, it is perfectly understandable, but its application to a given case is not easy, as indicated by the courts in all of the decisions with which the books are filled. The language of the statute is this: "All natural persons who perform service for another for financial consideration, exclusive of casual employments, which shall be defined, if in connection with the employer's business, as employment the occasion for which arises by chance, or is purely accidental, or, if not in connection with any business of the employer, as employment not regular, periodic or recurring; such natural persons, therefore, being within the provision of the Employers Liability Act."

The phrase which would appear to be applicable to this case, therefore, is this: "or, if not in connection with any business of the employer, as employment not regular, periodic or recurring."

You have here the case of a domestic servant, and a sharp issue is drawn as to whether or not the plaintiff was merely casually employed for an emergency or regularly employed for a definite period.

There is a very sharp contradiction in this case between Mrs. Butler and Mrs. Eberstadt and Mrs. Sullivan. Who is telling the truth becomes a question for you.

If you believe Mrs. Eberstadt and Mrs. Sullivan in their statements as to how it came about that Mrs. Butler was employed as a cook, then it would indicate that she was employed for one month at \$80, and if you so find I charge you that that would be a regular employment and not a casual one.

Charge of the Court

We do find cases where an employment for days instead of a month has been held to be regular and not casual, but each case, it appears, must be determined by its own set of facts, and so you will first determine whether Mrs. Butler was employed regularly for one month at a stipulated wage, as testified to by Mrs. Sullivan and Mrs. Eberstadt, or whether she merely was employed, as she claims, to provide a given meal, and then after she had so served was asked to go upon a journey to the summer home of the Eberstadts on Long Island for the week-end, and so went unexpectedly, through an accidental situation involving the absence of the regular cook, to fill an emergency because of the latter situation.

If you find in the case, under the fair preponderance of the proof, that she was merely employed to fill an emergency and not for a month at \$80, then you may say that the employment was casual.

If that be so, then you would take up the other phase of the case, namely, whether the negligence of the chauffeur was the cause of the accident, and as the proximate cause thereof gives rise to a right on the part of the plaintiff to recover. In that respect the case assumes the usual aspects of an automobile accident case.

The plaintiff is here claiming that the accident was due to the negligence of the chauffeur in the manner in which he drove the defendant's car on the highway at the time of the accident. There is the usual variation in the testimony of a contradictory nature, the weight and credit of which is for the jury. Whether it was the fault solely of the driver of defendant's car, or whether it was

Charge of the Court

the fault, in the negligent sense, of the driver of the other car involved in the collision, or whether it was the fault of both drivers, becomes a question for your determination.

If you should find that the negligence of the defendant's driver has been established under the greater weight of the credible legal evidence, or if you find that the collision was due to the joint negligence of both drivers of the cars involved, and should further find, under a fair preponderance of the proof, that Mrs. Butler's employment was only casual within the definition of the law, you determining the fact, of course, then you would be justified in awarding her a sum which would compensate her for the injury or injuries which she received, you ascertaining the nature of her injuries, the extent of them, the pain and suffering that in all reasonable probability accompanied them; the length of time she was incapacitated, if any, and whether there is any permanent phase to the injury or injuries which prevents her from resuming her accustomed nature and character of work, and, having so ascertained, then what sum would compensate her is left to your sound judgment and discretion.

In addition to that, she is claiming for medical and hospital expenses involved. What those bills were I am not at the moment advised; your recollection will have to prevail. Counsel may state whether any medical bills are claimed.

Mr. Parsons: Only one, the Hazard Hospital.

The Court: Some of them are not involved, as I recall. It may be there is some evidence as to a bill, the nature of which you will recall. If you find, therefore, that that bill was necessarily in-

Charge of the Court

curred in attempts to cure Mrs. Butler of her injuries, and is reasonable in amount, then, you would be justified in adding it to her compensation.

10 I ought to say that while I have discussed the negligence phase of the case under the question of damages, that if Mrs. Butler's employment was regular and not casual, that is the end of the case, and she will be required to pursue her remedy in the Labor Bureau under the Employers Liability Act.

20 There was some suggestion that she, the plaintiff, and the chauffeur were involved in a common employment. I am not submitting that question to you, because it is not before you, and I have held as a matter of law that her right to recover, if you so find under the other phases of the law and the evidence, would not be prevented because she was employed by Mr. Eberstadt in his household and the chauffeur likewise was in his employ.

30 The case is left with you, members of the jury, for your consideration. Take it and endeavor to do justice between these litigants. Bear in mind that there is that jurisdictional question as to whether employment was regular or casual. If it was regular, then Mrs. Butler must be relegated to the Compensation Court. Incidentally, she has filed a petition there under advice of counsel, so that her right to pursue any remedy there has been protected. Whether she has a right to remain in this court depends upon how you find the state of the evidence as to the nature of her employment at the time of the accident.

EXCEPTIONS TO CHARGE.

Mr. Hartpence: We pray exceptions to your Honor's charge in the following respects:

First, in submitting to the jury the determination of the question of the nature of the employment, whether casual or regular, and the determination of the liability of the defendant with respect to the nature of the employment, where the Court charged the jury, in substance, as follows: "That is the first question you have to determine, has the plaintiff satisfied you of the nature of the employment"'. 10

Next, where the Court charged the jury that "If the plaintiff was there by accidental or chance employment, and not of regular nature, then you have the right to pass on the further questions involved in the case"'. 20

Next, where the Court charged the jury that "Plaintiff's counsel has said that compensation under the statute is less than at common law"'. 20

Also, to where the Court said: "The law has attempted to define casual employment, and while the language is understandable its application is not easy", that that is a question that ought not be submitted to the jury at all.

Next, to where the Court quoted the statute defining casual employment. 30

Next, where the Court stated "There is a sharp issue of fact between Mrs. Butler and Mrs. Eberstadt as to the terms of employment, and you are to determine who was telling the truth"'. 30

Also, the Court charged the jury: "You must first determine if Mrs. Butler was employed regularly or merely for the occasion to cook"'. 40

Exceptions to Charge

Next, where the Court charged the jury: "If you find that the plaintiff was employed merely to fill an emergency and not for one month at \$80, then that would be casual and you could then take up the question of the negligence of the chauffeur".

10 Next, where the Court charged the jury: "If you find the employment was casual, then you would be justified in awarding such sum as she is reasonably entitled to receive in your sound judgment and discretion".

In submitting to the jury the determination, as a matter of fact, the question of the jurisdiction, and leaving it to them to find and determine the nature of the employment.

20 Also to the Court's charging the jury with regard to the fellow-servant rule, that he had ruled as a matter of law that plaintiff's right to recover against the defendant would not be prevented because of her employment by the same employer.

Next, where the Court charged "If her employment was in an emergency it was casual", and the jury could consider the other questions involved.

30

40



Looking towards Newark.

Exhibit P-1.

265

187097-A

002

LACKAWANNA FIDDIES TO NEW YORK

LACKAWANNA FERRIES TO NEW YORK
BARCLAY ST. CHRISTOPHER ST. 23RD ST.
CLEARANCE 15 FT.



Looking towards Jersey City.

Exhibit P-2.

266

No 2090-9

505



Looking towards Jersey City.

Exhibit P-3.

267

WINSLOW
PHOTOGRAPHY

447099-A

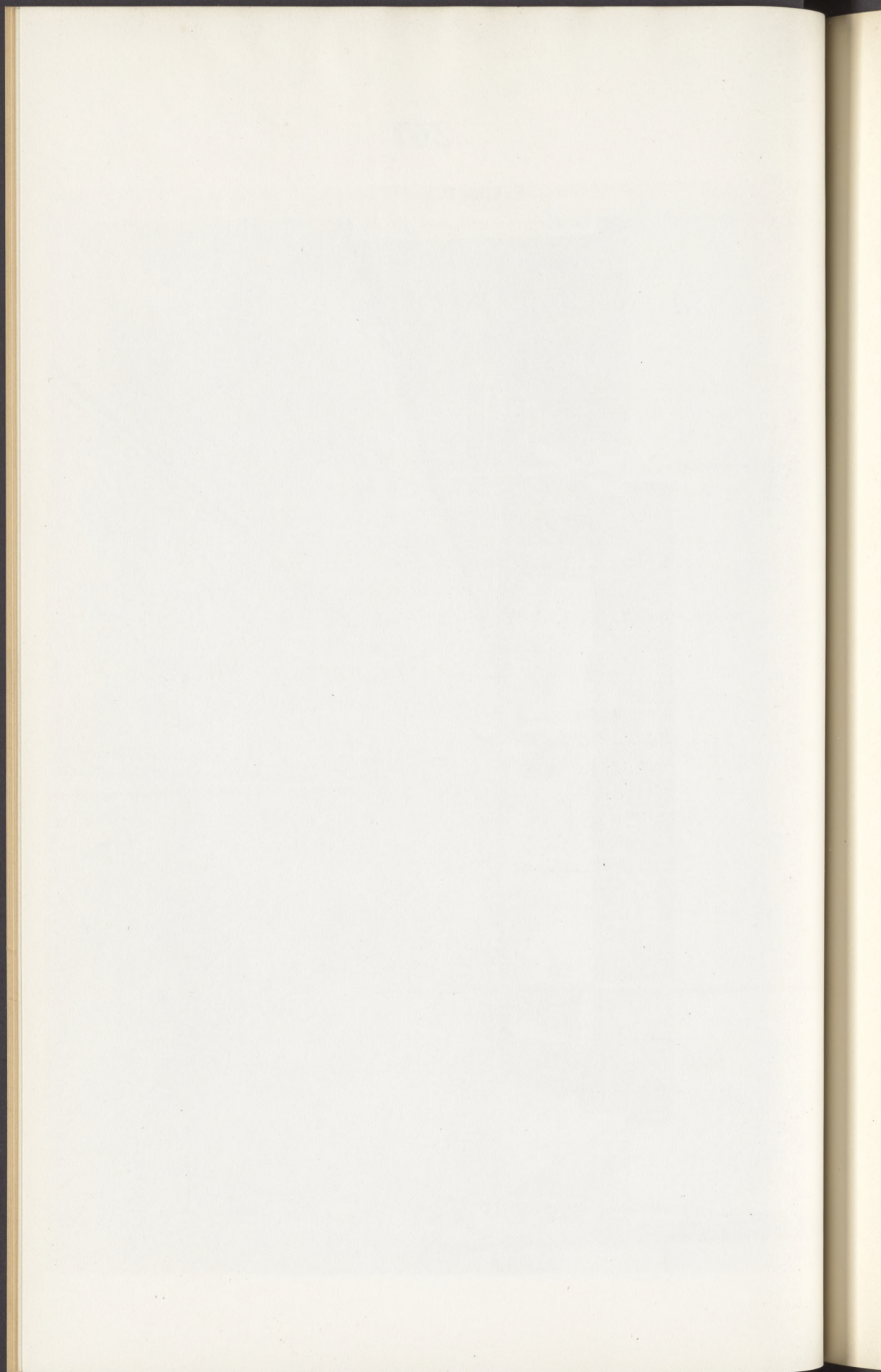


Exhibit P-4.DEPARTMENT OF POLICE
County of Hudson

May 31st, 1931

Statement of—Nicholas L. Rizzolo.

Residence—535 North 11th St., Newark, N. J. 10

Made to—Lieutenant Hoppe.

I am a Lieutenant of the Hudson County Police Department. I am going to ask you some questions in reference to the crime for which you are arrested. You may answer them or not just as you wish; but what you do say must be of your own free will—a voluntary statement—as it will be taken down in writing and used at your trial.

Drivers Lic. 1146873 N. J. 20
Registration 1E42142 N. J.

Q. What is your name?

A. Nicholas L. Rizzolo.

Q. Where do you live?

A. 535 North 11th St., Newark, N. J.

Q. How old are you?

A. 21.

Q. What is your occupation?

A. Unemployed.

Q. How long have you worked there? 30

A.

Q. You are charged with Reckless driving and Atrocious Assault and Battery in that you did operate a Oakland Sedan Registration 1E42142 N. J. on Newark Turnpike May 31st 1931, about 6:40 P. M. and did collide with a Packard Touring Car Registration 1E16837 N. J. and did injure

Exhibit P-4

Miss Mary Cassidy, Mrs. Mary Butler and Andrew Eberstadt. What have you to say to above charge?

10 Answer. I was driving my car a Oakland Sedan Registration 1E42142 N. J. towards Jersey City on the Newark Turnpike when I got under D. L. & W. R. R. Bridge I pulled out to pass a car that was riding close to my right hand curb and as I was passing this car on my right my car was struck head on by a Packard Touring Car that was going towards Newark. I was thrown out of my car to ground.

Question. What part of road was your car on at time of accident?

Answer. I was on my right side of road. My car was stradling right hand car track.

20 Question. How fast were you going at time of accident?

Answer. About 20 miles per hour.

Question. Do you want to make any complaint against driver of Packard Car?

Answer. Yes. Reckless driving.

Question. Is your car insured for liability?

Answer. No.

NICHOLAS L. RIZZOLO.

Witness

30 Patrolman WM. B. BLOOMER.

Chas. Lauter

Nicholas Rizzolo

A A & B.

Received

Prosecutor's Office

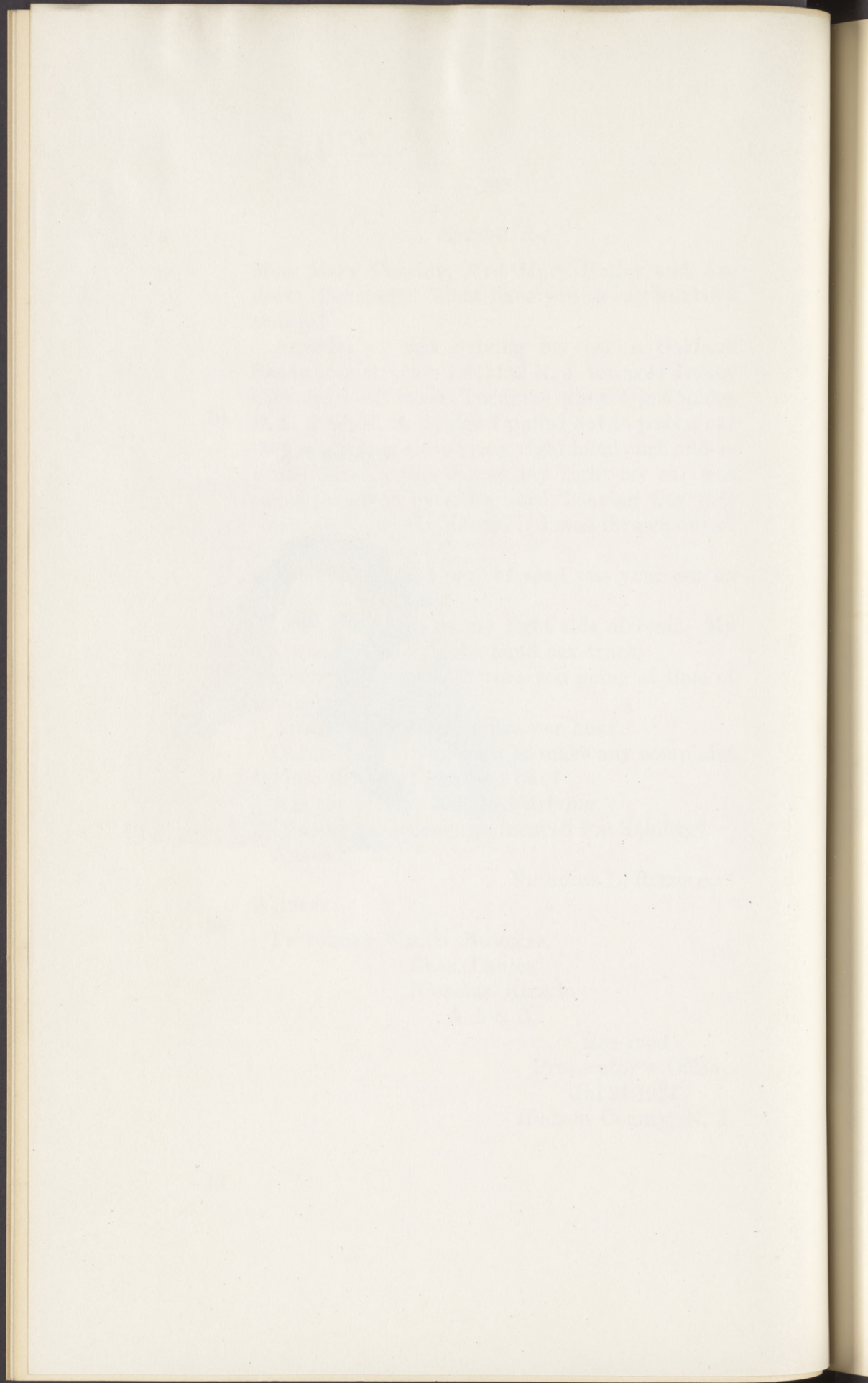
Jul 21 1931

Hudson County, N. J.

270

Exhibit P-5.





Long Branch, N. J. Jan. 6, 1934.

Mrs. Mary Miller
71 Third Avenue, Long Branch, N. J.
The Dr. W. O. Hanson Hospital
Washington and Dewey Sts.

10

To Hospital Room and Care
from 8-31-31 to 9-26-31

8.00

3 days @ \$3.00 per day

Remitted from 10-5-31 to 10-28-31

7.50

Remitted from 10-28-31 to 10-28-31

4.50

1.00

1.00

1.00

1.00

1.00

Laboratory for Blood & Urine
Microscopical

10

10

Exhibit P-6.

Long Branch, N. J. Jan. 6, 1934.

Mrs. Mary Butler
71 Third Avenue, Long Branch, N. J.

10	THE DR. E. C. HAZARD HOSPITAL Washington and Dewey Sts.	
	To Hospital Room and Care from 9-24-31 to 9-26-31	
	2 days C at \$3.00 per day	6.00
	Readmitted from 10-5-31 to 10-28-31	
	24 days at \$3.00	72.00
	X-rays	72.00
	Laboratory fee Blood & Urine	5.00
	Medical Attention	10.00
20		<hr/>
		165.00

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Exhibit D-5.



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Exhibit D-6.

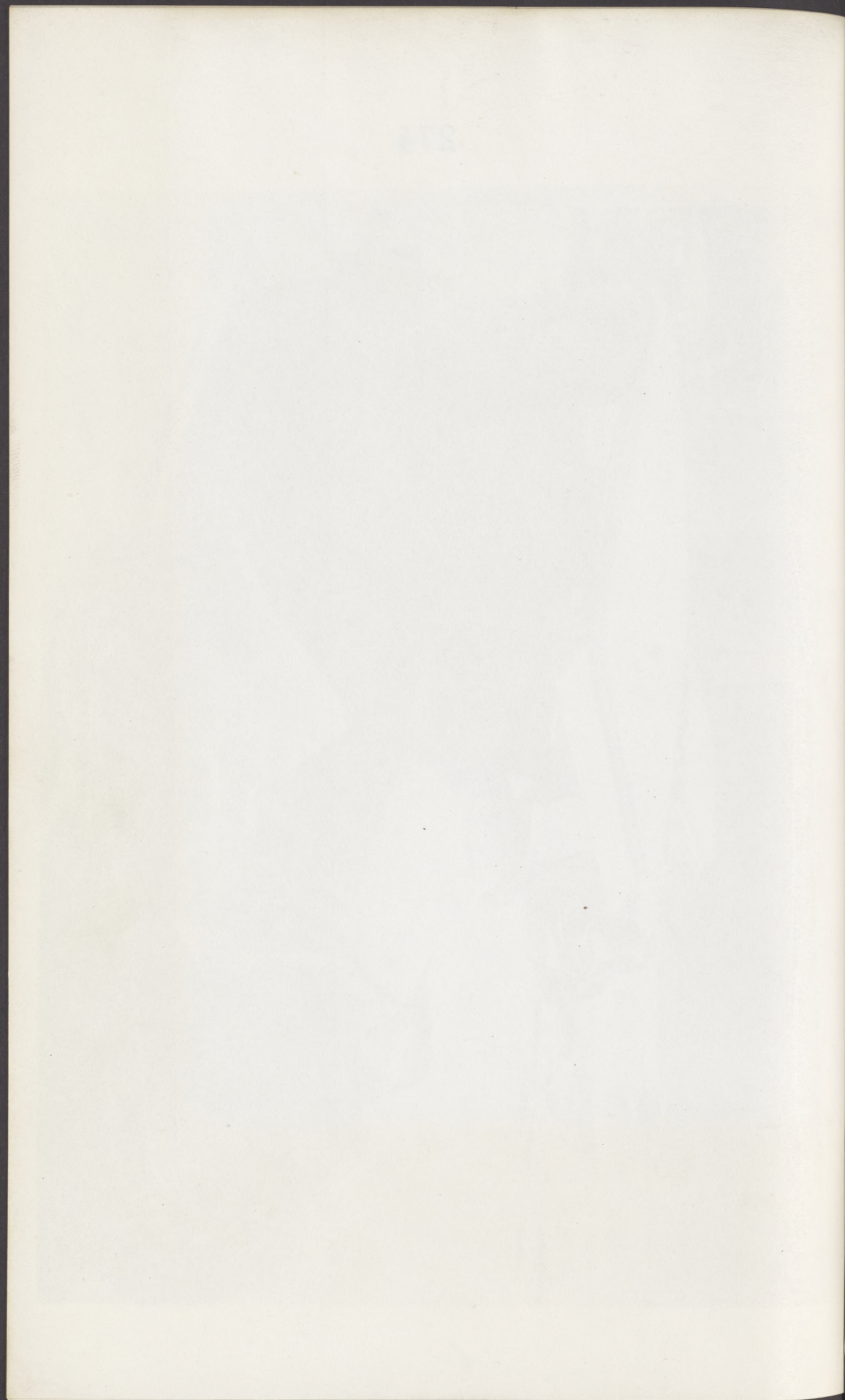
273

272



Exhibit D-7.

274



May 22nd 1931

John Emma Radich to Mrs Hall - 150
~~Freda Johnson to Mrs Butler 80~~
 Margaret Hetherington to Mrs E.A. Paul 75
 Rosaline to Mrs Reynolds - 50
 Margaret Murdoch to Mrs Baker 65
 Anna Kuhn to Mrs H.H. Hart 22nd 75
 Nora Glavey to Mrs Scaulon - 65
 Ellen Dearty to Mrs Scaulon May 26th 65
 James & Couple to Mrs de Vecchia 150
 Lily Rogers to Mrs Allen May 27th 50
 Kathleen Boyce to Mrs Peterson May 27th 45
 Adelle Lindby to Mrs Butler 28th 81
 Julia Bennet to Mrs Scaulon 28 65
 Mary Butler to Mrs Ehrstadt 27 65
 Mary & Niece to Mrs Howard Mon - 1st 12th 80
 Jenny Ashbury to Mrs Scaulon 65
 Marie Stein to Mrs Denny ^{Evening 29} May 28th 75
 Gertrude Glancy to Mrs ^{Drury June 1st} 60
 Mary Houston to Mrs Euler 65
 Anne Engel to Mrs Setton June 5th 70
 Elizabeth Schaeffer to Mrs ^{June 3rd} 70
 June & Nichols to Mrs 65
 Elizabeth Fisher to Mrs Oedenhausen 55
 Miss Allman to Mrs Dixon 8th 5th June 60
 Frances Snowden to Mrs Cranney 75
 Louise Gordon to Mrs Orgood ^{June 8th 257 Beechwood} 50
 Anna Kunn to Mrs Hart June 9th 80
 Bridget Dearty to Mrs Adams 75
 Margaret Harvey to Mrs Hart 55
 C. Landers June 8th 60

Lalma

04-3896 17

Mrs King Days
works

~~Mrs A. A. Brill~~
 15 N York St. N.Y.C.
~~Bridget Dearty to Mrs Adams 75~~
~~Cardine Tallon to Mrs Rowley 373 Grove Rd 60~~
 Wilma Miller to Mrs Setton 70
 Germaupil to Mrs 70
 Bridie O'Connor to Mrs Peoffitt 17 60
 Catherine Garris to St. Byrne 16th 65
 Anna Viskup to Mrs Reynolds 17 60
 Kate Kuhn to Mrs ~~Rowley~~ 18 75
 Catharine Tallon to Mrs ~~Rowley~~ 18th 60
 May Quinn to Mrs Barkhorn
 Mary Carlton to Mrs Mackin 25th Mrs. Wright
 Lucy Bueler to Mrs ~~Rowley~~ 32 45 0 5
 Mary Fury to Mrs Kipp 65 30 40
 Martha Mucukat 80 June 29th
 Helen Radloff to Mrs Steinbaeck 70
 Anna Schneeberger to Mrs Augenblie 24
 May Mulvey to Mrs Stewart 55
 Elizabeth Deffley to Mrs Leach 70
 Johnny Bennett to Mrs ^{Wed 8th} 70
 Mrs H.H. Hart 70
 Girl to Mrs Lowell 45
 Martha ~~Gaska~~ to Mrs Schultz ^{July 1st} 60
 Elizabeth Deffley to Mrs ~~Leach~~ 70
 Anna Lisa to Mrs Augenblie 55
 Girl to Mrs Powell
 Elsie Schlegel to Mrs Huff. ^{July 8th 1931}
 Tell Mrs Kelgus
 Bezelovs

275

Exhibit D-14 for Identification.

Form No. 23

NEW JERSEY DEPARTMENT OF LABOR
 WORKMEN'S COMPENSATION BUREAU
 Trenton, N. J.

RESPONDENT'S ANSWER TO EMPLOYEE'S CLAIM 10
 PETITION

MARY BUTLER,
Petitioner,

vs.

RUDOLPH EBERSTADT,
Respondent.

Claim Petition No. 25913
 Sept. 11, 1933.

20

Attorney for Respondent Edwards, Smith &
 Dawson, (Address) 1 Exchange Place, Jersey
 City, N. J.

In answer to Claim Petition filed in this cause:

1. What is the petitioner's name? Mary But-
 ler
2. Where does he reside? (Street Address) 71
 Third Avenue (City or Town) Long Branch, N. 30
 J.
6. Was the petitioner in your employ at the
 time of the accident? Yes
7. State your business Broker
8. Did you receive written notice from the Peti-
 tioner at the time of hiring, or later, that the Com-
 pensation Law was not to apply to him? No
9. Did you give such notice to him? No. 40

Exhibit D-14 for Identification

10. When did you first have knowledge of this accident?

11. Did you receive notice of this accident from the Petitioner?

12. If so, on what date?

10

13. Has any claim for compensation been made? Yes—by this petition

14. What was the Petitioner's regular occupation, and what kind of work was he doing at the time of the accident? Petitioner was engaged as a cook. At the time of the accident petitioner was riding from Respondent's summer home at Ram-senburg, Long Island to Respondent's residence in West Orange and at the time of the accident, was engaged in her employment

20

15. When did the accident happen? (State month, day, year and hour) May 31, 1931.

16. Where did the accident happen? In a public highway in Kearny, N. J.

17. What was the nature of the accident, and how did it happen? Respondent's car collided with an automobile negligently operated by Nicholas L. Rizzolo.

30

18. On what date was the petitioner compelled to stop work because of injury? At once.

19. On what day was the injured well enough to work again? Shortly thereafter.

20. If still disabled, on what date do you estimate he will be able to work?

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Exhibit D-14 for Identification

21. Give your understanding of the nature of any injury from which he should recover?.....
22. Give your understanding of any permanent injury which has resulted, either amputation or loss of usefulness of any member or impairment of any physical organ. Explain fully..... 10
23. Were the wages fixed by piece-work?.....
24. If so, what was the average weekly wage of the injured?.....
25. If wages were fixed by the hour, state rate per hour.....
26. Give number of hours in an ordinary working day.....
27. Give number of days in an ordinary working week..... 20
28. State the amount of weekly wages Wages were \$80. per month plus board and lodging.
29. How much money have you paid the injured as compensation (not including medical aid) since the accident? Respondent has tendered compensation payments and mailed drafts therefor to petitioner but petitioner has failed to use said drafts. 30
30. Have you promised to pay compensation? —Respondent has offered to pay compensation.
31. If so, how much?.....
32. Was medical aid required? Yes
34. Were you requested to supply the necessary medical service required by law? No.

Exhibit D-14 for Identification

35. Did you furnish this service? Yes

36. If so, between what dates?.....

37. If not, give reason for failure to do so.....

10 38. Give name of physician and hospital rendering service at your direction Respondent has paid for treatment rendered petitioner at West Hudson Hospital; has paid Dr. Dukes and Dr. J. F. Coughlin.

20 39. What other facts are there which you believe important? If you deny that compensation is payable in this case explain fully your reasons for this conclusion Respondent does not deny that compensation is payable in this case. Respondent has paid all medical expenses; Respondent has tendered compensation payments and is and always has been ready and willing to pay petitioner in accordance with the Workmen's Compensation Laws of the State of New Jersey.

RUDOLPH EBERSTADT
(Respondent)

By EDWARDS, SMITH & DAWSON,
Attorneys.

30

STATE OF NEW JERSEY }
COUNTY OF HUDSON } ss.:

GEORGE ECKELMAN of full age, being duly sworn according to law, on his oath deposes and says. That he is associated with the firm of Edwards, Smith & Lawson, attorneys for the respondent named in the foregoing answer to claim petition;

40

Exhibit D-14 for Identification

that he has read the same and is familiar with the contents thereof; and that the matters and things therein set forth are true according to the best of his knowledge and belief.

GEORGE ECKELMAN

(Respondent) 10

Subscribed and sworn to before me, this 11th. day of September, 1933 at Jersey City, N. J.

ALLEN C. MATHIAS

An Attorney at Law of New Jersey.

(This affidavit may be sworn to before a Deputy Commissioner or a Compensation Referee, or any other person authorized to administer an oath.)

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30

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Exhibit D-15.

Form No. 20

NEW JERSEY DEPARTMENT OF LABOR
WORKMEN'S COMPENSATION BUREAU
Trenton, N. J.

10 EMPLOYEE'S CLAIM PETITION FOR COMPENSATION

MARY BUTLER,
Petitioner,

vs.

RUDOLPH EBERSTADT,
Respondent.

Received at Trenton May 27 1933
Claim Petition No.
Date of Accident May 31, 1931

20

If known, state name of insurance company
Phoenix Indemnity Company

Attorney for Petitioner Thomas P. McKenna,
(Address) Long Branch, N. J.

*To the Workmen's Compensation Bureau of New
Jersey:*

The claimant respectfully alleges the following
facts:

30

1. What is your name? Mary Butler

2. Where do you live? (Street Address) 71
Third Avenue (City or Town) Long Branch,
New Jersey.

3. Sex Female 4. Age 44 5. Married Widow

6. By whom were you employed at the time
of the accident? (Give name and business ad-
dress) (Name) Rudolph Eberstadt (Street ad-

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Exhibit D-15

dress) Merrywood Drive (City or Town) West Orange, New Jersey.

7. What was the business of your employer?
Don't know

8. Did you give written notice to your employer at the time you were hired, or later, that the Compensation Law should not apply to you? No 10

9. Did you receive such notice from your employer? No

10. Did your employer have knowledge of your accident? Yes

11. Did you notify your employer of your accident? Yes

12. If so, on what date? May 31, 1931. 20

13. Have you made claim to your employer for compensation? No

14. What was your regular occupation, and what kind of work were you doing at the time of the accident? Keeping rooming house Temporarily helping

15. When did the accident happen? (State month, day, year and hour) May 31, 1931 30

16. Where did the accident happen? On Harrison-Kearny Turnpike

17. What was the nature of the accident, and how did it happen? Automobile accident, cars collided.

18. On what date were you compelled to stop work because of the injury? May 31, 1931.

Exhibit D-15

19. On what date were you well enough to work again? Not since _____
20. If still disabled, on what date do you think you will be able to work? Unable to estimate _____
- 10 21. Give nature of any injury from which you will recover. From the bruises _____
22. If any permanent injury has resulted, either amputation or loss of usefulness of any member, or impairment of any physical organ, explain fully Sight, head and nervous system and other injuries which require explanation from physicians.
23. Were your wages fixed by piece-work? No
- 20 24. If so, what was your average weekly wage?

25. If wages were fixed by the hour, state rate per hour _____
26. Give number of hours in an ordinary working day. _____
27. Give number of days in an ordinary working week _____
- 30 28. State the amount of weekly wages. None agreed upon
29. How much money have you received from your employer as compensation (not medical aid) since your accident? None
30. Has your employer promised to pay you any compensation? No
31. If so, how much?
- 40 32. Was medical aid required? Yes

Exhibit D-15

33. Did you receive any medical, surgical or hospital service? Yes
34. Did you request your employer to furnish these services? No
35. Were they furnished? Yes 10
36. If so, between what dates? Since May 31, 1931 to date
37. If not, what sum did you expend for medical, surgical or hospital services? About \$750.
38. Give name and address of physician and hospital. Physicians at hospital West Hudson Hospital
39. What other facts are there which you believe important? Instituted an action against Rudolph Eberstadt in the New Jersey Supreme Court for \$50,000. 20
40. Are you willing that the Compensation Bureau endeavor to secure compensation for you, by agreement, before calling for an official hearing?
-
41. If you are unwilling, state reasons -----
-

Your Petitioner therefore prays that your Honorable Bureau will determine the amount of compensation due to your Petitioner from the said defendant, under the act entitled "An Act prescribing the liability of an employer to make compensation for injuries received by an employee in the course of the employment, establishing an elective schedule of compensation and regulating pro-

Exhibit D-15

cedure for the determination of liability and compensation thereunder," approved April 4th, 1911, and the Acts supplemental thereto and amendatory thereof, and that your petitioner may be awarded his costs in this proceeding, and such other or further relief as may be proper.

10

And your petitioner will pray, etc.

(Petitioner) MARY M BUTLER

(Address) -----

STATE OF NEW JERSEY }
COUNTY OF MONMOUTH } ss.:

MARY M. BUTLER of full age, being duly sworn according to law, on his oath deposes and says:

20

That he is the petitioner named in the foregoing petition; and that he has read the same and is familiar with the contents thereof; and that the matter and things therein set forth are true according to the best of his knowledge and belief.

(Petitioner) MARY M BUTLER

Subscribed and sworn to before me, this 24th day of May, 1933, at Long Branch

30

ESTHER A. HELEKER
Notary Public of N. J.

(This affidavit may be sworn to before a Deputy Commissioner or a Compensation Referee, or any other person authorized to administer an oath.)

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Exhibit D-15

TO THE RESPONDENT

The foregoing claim petition has been presented by the petitioner to the Workmen's Compensation Bureau for hearing and determination in accordance with the provisions of the Workmen's Compensation Act. 10

We hereby notify you that unless an answer shall, within ten days after the service of this notice, be filed in duplicate with the Secretary of the Bureau, in the State House, at Trenton, the facts alleged in the petition will be deemed to be admitted and no testimony will be required from the petitioner to prove such facts.

WORKMEN'S COMPENSATION BUREAU

W. E. STUBBS, 20
Secretary.

30

40

EXHIBIT C-107

The petitioners claim position has been...
by the petitioners to the Women's Commission...
intention for hearing and deliberation to occur...
in accordance with the provisions of the Women's Com-
mission Act.

10

We hereby notify you that unless an answer
shall be filed within ten days after the service of this
notice, the petitioners shall be deemed to have
admitted and no testimony will be required from
the petitioners to prove such facts.

20

WOMEN'S COMMISSION BUREAU
1111 North Dearborn Street, Chicago, Illinois
Attention: Secretary
Enclosed herewith are the following documents:
1. A copy of the petition filed by the petitioners.
2. A copy of the answer filed by the respondents.
3. A copy of the order of the Commission.

30

Very truly yours,
Secretary

40

Witness my hand and seal of the Commission
this 10th day of May, 1954.

Stipulation.

(Filed April 30, 1934.)

NEW JERSEY COURT OF ERRORS
AND APPEALS.MARY BUTLER,
*Plaintiff-Respondent,**vs.*RUDOLPH EBERSTADT,
Defendant-Appellant.

10

Action at Law.

It is hereby stipulated and agreed by and between the attorneys for the respective parties that upon the trial of this action before Hon. Rulif V. Lawrence, Circuit Court Judge, at the Monmouth Circuit, on January 9th, 1934, defendant made a motion before the Court to stay the trial of the action until and pending a determination by the Workmen's Compensation Bureau, Department of Labor, in the State of New Jersey, of the nature and character of the employment of plaintiff by defendant, whether casual or regular, and whether or not the Workmen's Compensation Bureau had jurisdiction to hear and determine the rights and liabilities of the respective parties; and that said motion for a stay was denied by the Court and an exception to the Court's ruling was duly allowed the defendant.

20

30

Dated—April 19, 1934.

THOS. P. MCKENNA,
Attorney for Plaintiff.WALL, HAIGHT, CAREY & HARTPENCE,
Attorneys for Defendant. 40

(Indorsed)

Filed April 30, 1934.

110 MAY. 7 1934

New Jersey Court of Errors and Appeals

MARY BUTLER,
Plaintiff-Respondent,

vs.

RUDOLPH EBERSTADT,
Defendant-Appellant.

Action at Law
On Appeal
from New
Jersey Su-
preme Court

BRIEF OF DEFENDANT-APPELLANT.

1.

Statement of Facts.

This is an appeal by the defendant from the judgment of the Supreme Court in favor of the plaintiff in above stated cause entered upon a verdict rendered by the jury at the Monmouth Circuit.

On May 31st, 1931, plaintiff was injured in an automobile accident by being thrown from defendant's car in which she was riding on a public highway at or near Harrison, New Jersey. Defendant's car was being driven by his chauffeur, and in the car besides plaintiff and the chauffeur also were the nurse and three children.

According to the story of the plaintiff she had been hired by defendant as a cook in his home on the preceding Wednesday, May 27th. She testified that she had been seeking employment and had registered her name with an employment

agency conducted by a Mrs. Sullivan, but had received no assignment. On Wednesday morning, May 27th, she called at the office of Mrs. Sullivan to see if she had been able to place her, and while there a telephone call came in for a cook. Mrs. Sullivan thereupon sent her to the home of defendant, who resided in West Orange, New Jersey, for the purpose of preparing lunch that day. Mrs. Eberstadt's regular cook was ill. Plaintiff received some instructions from a maid and prepared the lunch. Mrs. Eberstadt came in later, and after lunch arranged with plaintiff to stay on over Sunday and go down with the family to their summer home on Long Island to cook for them. Plaintiff at first objected and said she had brought no extra clothing with her, expecting to stay only to prepare lunch. Mrs. Eberstadt said she would send the chauffeur to plaintiff's home for the necessary clothing, and this was done. Plaintiff's sister testified that the chauffeur came for the clothing that same afternoon. Plaintiff remained at the Eberstadt home accordingly, and on Thursday went with the family to the Long Island home and cooked for them each day until they returned to West Orange on the following Sunday afternoon. Nothing was said at any time about the remuneration plaintiff was to receive. It was while on the way back from the Long Island home to West Orange that the accident occurred, which resulted in the injury to plaintiff. Plaintiff contended that the accident was due to the negligence of the driver of the defendant's car, and brought the present suit against defendant in a common law action.

On the other hand, defendant contended that the accident was caused by the negligence of one Rizzoli, who negligently operated *his* car and

collided with defendant's car, without any fault or negligence on the part of defendant's chauffeur. Mrs. Eberstadt testified with regard to the employment of plaintiff, that she had given her regular cook a month's vacation for medical treatment, she being afflicted with an infected foot, and had employed plaintiff as a cook for a month at \$80.00 per month. Board and lodging were included. Mrs. Sullivan also testified that that was the arrangement made with plaintiff, and she produced her day book to substantiate that testimony. That book had to be correctly kept for inspection by and approval of the State Department of Labor. Mr. Eberstadt, the defendant, who was called as a witness by plaintiff, testified that Mrs. Butler was employed as a regular cook, and that the former cook, Martha Irkatak, never came back. Martha Bahr, nee Irkatak, testified that she was to stay away for a month when Mrs. Eberstadt gave her the vacation, but that her infected foot did not get well, and that she did not go back to work for Mrs. Eberstadt. Dr. Dukes, who treated plaintiff for her injury, and who testified for her, made a report of the accident in which he stated that the then present address of plaintiff was 1 Merrywood Drive, West Orange, New Jersey, that the name of her employer was Rudolph Eberstadt, whose address was 1 Merrywood Drive, West Orange. That report was dated June 12th, 1931, and Dr. Dukes said that the information contained therein had been given him by the plaintiff. This clearly showed that plaintiff regarded herself as still being in the employment of the defendant at least twelve days after the accident. Following the accident, defendant tendered plaintiff checks in payment of compensation under the schedule provided by the Work-

men's Compensation Act, but although plaintiff retained the checks she did not cash them. Defendant also paid her initial medical and hospital expenses. Plaintiff also incurred expense amounting to \$750. On May 27, 1933, plaintiff filed a sworn petition in the Workmen's Compensation Bureau stating that she had been injured while employed by defendant, in an accident arising out of and in the course of her employment, and praying that that tribunal proceed to determine her right to receive compensation under the provisions of the Workmen's Compensation Act. An answer was filed by defendant in that compensation proceeding, admitting the accident to and the employment of plaintiff and stating defendant's willingness to pay compensation, and the prior tender thereof, and asking the Bureau to fix and determine the amount thereof. The Trial Court admitted the petition of plaintiff in evidence when the records of the Workmen's Compensation Bureau were offered by defendant upon the trial of the present case, but refused to admit the answer.

2.

The Pleadings.

Defendant in his answer denied that plaintiff's injury was caused by the negligence of defendant's chauffeur and set up as special defenses that—

1. Her injuries resulted from the negligence of Rizzoli, the operator of the car that collided with defendant's car;

2. But if the injuries did result from the negligence of defendant's chauffeur, then he and plaintiff were fellow-servants, and plaintiff could not recover against defendant.

3. Plaintiff was an employee of defendant and was injured in an accident arising out of and in the course of her employment, and the respective rights and liabilities of the parties were governed by the Workmen's Compensation Act and should be determined by the Workmen's Compensation Bureau. The objection to the jurisdiction of the Court and motion to dismiss for lack of jurisdiction was set up in point of law.

Plaintiff joined issue in her reply, and thereafter, upon demand by plaintiff defendant set forth fully the facts pertaining to the employment in a bill of particulars.

The motion to dismiss came on before trial, but was continued over to the trial by the judge who heard the motion. The defendant in the interim amended his answer and set forth in detail the defense pertaining to the Workmen's Compensation feature.

3.

The Course of the Trial.

At the opening of the trial, at the close of the plaintiff's case, and at the close of the whole case, defendant renewed his motion to dismiss for lack of jurisdiction. These motions were denied. Upon the denial of the motion to dismiss, at the opening of the trial, defendant then moved for a stay of the proceedings of this Court until the question of jurisdiction had been determined by the Workmen's Compensation Bureau. This motion was also denied.

At the close of the whole case defendant also moved for the direction of the verdict in his favor on the grounds that:

1. Plaintiff's employment was regular, not casual;

2. That therefore this Court had no jurisdiction to determine the controversy between the parties; and

3. That if jurisdiction was retained by this Court of this cause as a common law action (which was plaintiff's contention), then the fellow-servant rule barred a recovery by plaintiff against defendant in this action.

That motion was also denied, the Court ruling as a matter of law that plaintiff and defendant were not fellow-servants and that the fellow-servant rule was not applicable. During the course of the trial the Court admitted certain evidence over the objection of the defendant and excluded certain other evidence offered by defendant. This will be considered later.

The Court submitted the case to the jury for determination upon the questions of:

1. The liability of defendant to plaintiff for the injuries complained of;
2. The negligence of defendant;
3. The jurisdiction of the Court;
4. Whether the employment of plaintiff by defendant was casual or regular.

Objections were made by the defendant to these and other features of the Court's charge, which will also be considered later.

The jury rendered a verdict that the employment was casual and found in favor of plaintiff a verdict for Twenty Thousand (\$20,000) Dollars.

On rule to show cause addressed to the damages only, with all exceptions reserved, the verdict was reduced to Fourteen Thousand (\$14,000) Dollars, for which amount, with costs, judgment final was entered. From that judgment the present appeal is taken.

4.

Grounds of Appeal Relied On.

Appellant relies on all grounds of appeal, as set forth on pages 53-61 of the State of the Case.

5.

Questions Involved.

1. Should not the Trial Court have dismissed for lack of jurisdiction, or stayed the trial pending the determination of the controversy by the Workmen's Compensation Bureau, and the finding of that tribunal as to the nature of the employment, whether regular or casual?

2. Should not the Trial Court, have ruled as a matter of law that the employment of plaintiff was regular, and not casual, and dismissed the action or directed a verdict for defendant?

3. Did not the Trial Court err in ruling as a matter of law that the fellow-servant rule did not apply and was not a bar to plaintiff's action?

4. Did not the Court err in submitting to the jury the questions of (1) jurisdiction, (2) the nature of plaintiff's employment, whether regular or casual, (3) the liability of defendant?

5. Did not the Court err in admitting the evidence of the witnesses, Charles A. Lauter and

Otis Eberstadt, set forth in detail later herein, and in excluding the answer of the defendant filed in the Workmen's Compensation proceeding?

6. Did not the Court err in charging the jury in the manner set forth in the grounds of appeal 14-19 inclusive which are considered in detail later herein?

6.

Argument.

(a)

While the admission of the questions submitted to the witnesses Lauter and Otis Eberstadt, set forth in the grounds of appeal 11, 12, and 13, may of themselves appear to be devoid of harm to the defendant, it is respectfully submitted that they tended to create a false impression in the minds of the jury regarding the conduct of the chauffeur who was driving defendant's car at the time the accident occurred. It could make no difference so far as the accident is concerned what the chauffeur had been doing previously. The question at issue was what did he do or fail to do at the time of the occurrence complained of. From these questions the jury might well have been led to believe or feel that the chauffeur drove in a careless or indifferent manner generally, and that therefore he must have been careless and indifferent at the time the collision of the automobiles actually occurred. That was tantamount to convicting him of negligence at large, and was seriously harmful to the defendant. It is respectfully submitted that it was error on the part of

the Trial Court to permit the questions to be answered.

“There is no such thing as negligence at large.”

Bien v. Unger, 64 N. J. Law 596;
Wyckoff v. Birch, 76 N. J. Law 646.

(b)

The refusal to permit the answer in the Workmen's Compensation proceeding to go in evidence was erroneous. It was part of the record of the Compensation Bureau. Plaintiff's petition was admitted as part of that record, and showed that plaintiff had sought the jurisdiction of the Bureau in determining her rights. The answer was also competent to show defendant's submission to the jurisdiction of that tribunal and the tender of compensation by him. Those facts, of course, appear by positive evidence otherwise in the course of the trial. Nevertheless, we respectfully submit that the answer itself should have gone in evidence so as to show completely the situation as it existed in the Compensation Bureau, and that its exclusion was error. Under the statute either party has the right to invoke the jurisdiction of the Bureau (P. L. 1911, p. 134, 763, Sec. 18; amd. P. L. 1921, p. 736. *Sexton v. Newark Dist. Tel. Co.*, 84 N. J. Law 85, 89; aff. 86 N. J. Law 701).

(c)

It is clear that there was a dispute as to the terms of the employment of plaintiff by defendant, and also conflicting contentions regarding the nature of that employment, whether regular or casual. We respectfully submit that the determination of that dispute should have been left to

the tribunal specially created by law to determine controversies between employers and employees, viz.: The Workmen's Compensation Bureau, and not submitted to a common law jury for determination. The statute itself provides that the Bureau shall have "exclusive original jurisdiction" (P. L. 1918, p. 430, Sec. 3; P. L. 1911, p. 134, 763, Sec. 18; *Sexton v. Newark Dist. Tel. Co.*, *supra*). This is the unquestionable policy of the law, and the legislation creating that special tribunal, and fixing its jurisdiction and prescribing its functions, has been sustained and acquiesced in by both this Court and the Supreme Court in numerous cases that have arisen and have been adjudicated since the enactment of the Workmen's Compensation legislation. Among them are

Sexton v. Newark Dist. Tel. Co., *supra*;
O'Connell v. Simms & Co., 85 N. J. Law 64;
Parro v. R. R. Co., 85 N. J. Law 155;
Gregutis v. Wacklark Wire Works, 86 N. J. Law 610;
Scalise v. Uvalde Asphalt Paving Co., 98 N. J. Law 696;
Friese v. Nagle Packg. Co., 110 N. J. Law 588;
Jersey City v. Borst, 90 N. J. Law 454;
Moore v. Defrees, 97 N. J. Law 378;
O'Mara v. Kirch, 106 N. J. Law 151;
Smith Mfg. Co., 107 N. J. Law 38; *v. Common*
Holzapfel v. Hoboken & Co. R. Co., 92 N. J. Law 193.

It is in line with like legislation respecting certain tribunals having jurisdiction, in the first instance, over matters pertaining to taxation, schools, public utilities, inheritance tax, motor vehicles, real estate boards, etc. All these various

special agencies have been created and function as the result of a definite policy of the law to build up and sustain tribunals carrying on their multitudinous activities as specialists in their respective subjects and fields, and to relieve the common law courts of a great mass of litigation respecting matters which in the very nature of things can best be handled by such special tribunals rather than through the more cumbersome machinery of a common law court.

History and Purpose of the Legislation.

- Schneider, Workmen's Comp. Law*, Vol. I, p. 1, sec. 1;
Honnold, Workmen's Comp., Vol. I, pp. 3-13, secs. 1, 2;

School Tribunals.

- Stockton, Board of Education*, 72 N. J. Law 80;
Bd. Edcn. of Flemington v. State Board, 81 N. J. Law 211; aff. 85 N. J. Law 384;

Public Utilities.

- C. R. R. Co. v. Pub. Util. Com.*, 112 N. J. Law 215; 12 N. J. Adv. Ops. 215, Feb. 17, 1934;
Harrison v. U. N. J. R. R., Etc., Co., 101 N. J. Eq. 427; aff. 103 N. J. Eq. 372;

Tax.

- In re Roebing's Estate*, 91 N. J. Eq. 72;
Town of Union v. Hudson Co. Tax Bd., 77 N. J. Law, 178;

Real Estate.

- P. L. 1921*, p. 370; *P. L. 1925*, p. 672;

Zoning.

Steinberg v. Bd. Adjustment of Nutley, 6 N. J. Misc. Rep. 597, aff. 106 N. J. Law, 603;

Motor Vehicles.

3 *Comp. Stat.*, p. 3426; 1911 *Supp.*, p. 1976;

Medical.

State, Elder, v. Medical Society, 35 N. J. Law 200;

Law.

P. L. 1917, Ch. 193, p. 564;

Miscellaneous.

Dubelbeiss v. W. Hoboken, 81 N. J. Law, 98; aff. 82 N. J. Law 683;

P. L. 1903, p. 554, Sec. 65;

Commonwealth Roofing Co. v. Riccio, 81 N. J. Eq. 486.

If a common law jury is to be permitted to determine whether the Workmen's Compensation Bureau has or has not jurisdiction to hear and settle controversies arising between employer and employee, before that special tribunal can pass upon the rights of the respective parties, it will readily be seen that the whole purpose and fabric of this special tribunal ultimately will fall. Either the subject matter should be vested completely in the special tribunal, subject only to review by the Supreme Court on certiorari and thereafter by this Court, or else it should be thrown back to the common law court *in toto*. The two cannot work satisfactorily together. And if this be true as to the Workmen's Compensation Bureau, it will follow inevitably with the tax, school, public utility, real estate, and other special tribunals created by the Legislature as above indicated.

(d)

It will be observed that the Trial Court did not simply leave it to the jury to determine questions of fact which may have been in conflict, but in terms left it to the jury to determine legal issues, *i. e.*, jurisdiction, and the legal conclusions of regular or casual employment. If the Court rightly held jurisdiction of the cause, then, when the facts were all in, the Court should have decided as a matter of law whether or not it had jurisdiction and whether or not the employment in question was regular or casual. The jury might, under proper instruction, determine disputed facts, but the legal conclusions to be drawn after those facts had been so determined by the jury, were for the Court. A perusal of the Court's charge, we respectfully submit, demonstrates that throughout, legal rather than factual issues were submitted to the jury for determination. (Case p. 257, line 20.)

Laying aside defendant's version of the employment, on plaintiff's own version the employment was *regular*, not *casual*, and the Court should have so ruled as a matter of law.

The Statute defines *casual employment* to be

"If in connection with the employer's business, as employment the occasion for which arises by chance or is purely accidental; or if not in connection with any business of the employer, as employment not regular, periodic or recurring."

P. L. 1919, p. 211, Sec. 23(c).

It should be noted that it is the *occasion* for the employment which must arise by chance or be

purely accidental, not the *employment* itself, in order to make the employment casual.

“The words as used in this act, connote that employment is *regular* when it is steady and permanent for more than a single piece of work; *recurring*, when the work is to be performed at some future time by the same party, without further engagement; and *periodic*, when the work is to be performed at stated intervals, without further engagement.”

Forrester v. Eckerson, 107 N. J. Law 156.

See also:

Sabella v. Brasileiro, 86 N. J. Law 505, aff. 87 Law 710;

Schaeffer v. DeGrottola, 85 N. J. Law 444;

Scott v. Payne Bros., 85 N. J. Law 446;

Stillman v. Essex Common Pleas, 139 Atl. Rep. 705;

Mullen v. Walker, 105 N. J. Law 199;

Cantwell v. Delaney, 10 N. J. Misc. Rep. 783, aff. 110 N. J. Law 554;

Price v. Price, 154 Atl. Rep. 323; aff. 109 N. J. Law 349;

Hanna v. Erie R. R. Co., 8 N. J. Misc. Rep. 829;

Cicalese v. Lehigh Valley R. Co., 75 N. J. Law 897;

Depue v. Salmon Co., 92 N. J. Law 550;

Dunbaden v. Castles Ice Cream Co., 103 N. J. Law 427;

Bolos v. Trenton Fire Clay Co., 102 N. J. Law 479;

O'Mara v. Kirch, 106 N. J. Law 151, *supra*.

The Trial Court (Case pp. 259-260) outlined to the jury to some extent the statute pertaining to casual employment, and stated (p. 259, l. 21) as follows:

“The phrase which would appear to be applicable to this case, therefore, is this: ‘or, if not in connection with any business of the employer, as employment not regular, periodic or recurring.’

“You have here the case of a domestic servant, and a sharp issue is drawn as to whether or not the plaintiff was merely casually employed for an emergency or regularly employed for a definite period.” * * *

The Court further charged the jury, in this respect (p. 260, l. 1) as follows:

“We do find cases where an employment for days instead of a month has been held to be regular and not casual, but each case, it appears, must be determined by its own set of facts, and so you will first determine whether Mrs. Butler was employed regularly for one month at a stipulated wage, as testified to by Mrs. Sullivan and Mrs. Eberstadt, or whether she merely was employed, as she claims, to provide a given meal, and then after she had so served was asked to go upon a journey to the summer home of the Eberstadts on Long Island for the week-end, and so went unexpectedly, through an accidental situation involving the absence of the regular cook, to fill an emergency because of the latter situation.

“If you find in the case, under the fair preponderance of the proof, that she was merely employed to fill an emergency and not for a month at \$80, then you may say that the employment was casual.”

The Court thereby confused the test of casual employment *in the employer's business*, with the test of casual employment *not in the employer's business*. It is only in the former that the question of the employment being by *chance* or *accidental* is involved. In the latter the test is whether or not it was *regular, periodic* or *recurring*. And the test of what is regular is stated by the Court in *Forrester v. Eckerson, supra*.

This discussion has been predicated upon the facts of employment asserted by plaintiff. Even upon her own version, there was no issue to submit to the jury. The Court should have determined, as a matter of law, as upon uncontradicted testimony adduced by plaintiff and with every intendment in her favor, that the employment was *regular* within the provisions of the statute, and the controversy therefore not cognizable by the common law tribunal, or directed a verdict in favor of defendant.

A fortiori would this be so if defendant's version were so accepted, and the Court so charged the jury (Case p. 259, l. 36).

(e)

In the charge the Court, among other things, said (Case p. 258, line 8) that it had been candidly stated by plaintiff's counsel that the amount awarded by the Bureau would be less than the amount recoverable at common law, in this action. The Court further stated that in the event that a verdict was rendered in favor of the plaintiff, "then what sum would compensate her is left to your sound judgment and discretion." (Case p. 261, l. 26.) This was highly prejudicial to the defendant, and it is clear that the jury was influenced thereby to give the plaintiff the benefit of

what they thought was the more advantageous result; and the amount of the verdict rendered also indicates clearly that they were thus influenced in reaching their determination, which even the Court felt was unjustifiable, as shown by its action in reducing the verdict almost one-third.

(f)

Plaintiff, having invoked the jurisdiction of the Compensation Bureau, should now be confined to that tribunal for the determination of her rights. Her counsel stated on the trial that the object of filing the compensation petition was merely to preserve plaintiff's rights to compensation in the Bureau, in the event that she should fail in the common law court. This does not seem to us to be a legally justifiable position. Either she was an employee, governed by the Workmen's Compensation Act, or she was not such an employee, and thus subject to the common law.

(g)

The theory of plaintiff's case, as stated by her counsel, and as is apparent from the pleadings and the procedure, is that the present action is strictly an action at common law, not governed by the Workmen's Compensation Act, because the nature of plaintiff's employment was casual and not regular. Here again plaintiff should not be permitted to equivocate. Either her rights are determinable at common law or under the statute. If at common law, then all common law defenses remain to the defendant. Among them is the fellow-servant rule. Under that rule if the injuries to plaintiff resulted from the negligence of a fellow-servant, plaintiff cannot recover therefor against the master. The first section of the

Workmen's Compensation Act (P. L. 1911, p. 134, 763) does not affect the fellow-servant rule except in actions brought under Section 1 of that act. The fellow-servant rule has not been abolished where the act does not apply, and where the action is at common law strictly, as here.

Imbesi v. American Ice Co., 101 N. J. Law 182;

Ducjack v. N. J. Zinc Co., 104 N. J. Law 575;

Smith v. Int'l High Speed Steel Co., 98 N. J. Law 574;

Downing v. Oxweld Acetylene Co., 112 N. J. Law 25; N. J. Adv. Rep., Vol. XII, No. 3, Jan. 20, 1934;

Szalkowski v. C. S. Osborne & Co., 9 N. J. Misc. Rep. 538, 154 Atl. Rep. 611.

That the plaintiff and the chauffeur were fellow-servants seems clear.

Fay v. DeCamp, 257 N. Y. 407;

Olsen v. Nixon, 61 N. J. Law 671;

Pfeiffer v. Dialogue, 64 N. J. Law 707.

The Trial Court erred in ruling that the fellow-servant rule did not apply under the circumstances of this case, and in charging the jury that the right of plaintiff to recover against the defendant "would not be prevented because she was employed by Mr. Eberstadt in his household and the chauffeur likewise was in his employ" (Case pp. 256, 262).

It is respectfully submitted therefore that the judgment of the Supreme Court under review should be reversed and the record remitted with direction to enter judgment in favor of the defendant or to dismiss the action for lack of jurisdiction.

Respectfully submitted,

WALL, HAIGHT, CAREY & HARTPENCE,
*Of Counsel with Defendant-
Appellant.*

JOHN A. HARTPENCE,
of Counsel.

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PHYSICS DEPARTMENT

REPORT OF THE

COMMISSIONERS OF THE

STATE OF CHICAGO

FOR THE YEAR

1891

CHICAGO

1892

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PHYSICS DEPARTMENT

REPORT OF THE

COMMISSIONERS OF THE

New Jersey Court of Errors and Appeals

MARY BUTLER,

Plaintiff-Respondent,

vs.

RUDOLPH EBERSTADT,

Defendant-Appellant.

Action at Law

On Appeal
from Su-
preme Court.

BRIEF OF PLAINTIFF-RESPONDENT.

INTRODUCTORY STATEMENT.

Mary Butler, a widow of forty-four years of age, received injuries on May 31st, 1931, in an automobile accident when the car in which she was riding collided with another automobile upon the Harrison Turnpike. As the result of these injuries, she was in the hospital for three months, lost the sight of one eye, lost most of the hearing of one ear and sustained an injury to the brain. She was awarded a verdict of \$20,000.00 at the Monmouth Circuit by a jury which, upon a rule to show cause, was afterwards reduced to \$14,000.00.

For some years after the death of her husband, Mrs. Butler had supported herself by running a rooming house. When the years of economic distress arrived, she lost most of her boarders and thereafter supported herself by working as a cook at various homes. She was out of work on May 27th but her name was listed at an employment

agency. By circumstances, she chanced in at this employment agency at the very time that the operator received a request for a cook to prepare lunch for the appellant's wife, Mrs. Eberstadt. Mrs. Butler agreed to prepare this lunch and went to the Eberstadt home. She did not see Mrs. Eberstadt when she arrived there, but proceeded to prepare the lunch.

After lunch Mrs. Eberstadt came out and asked her if she were able to go to Long Island over the holiday. Decoration Day was on a weekend and the Eberstadts had a summer home on Long Island. Mrs. Butler was further informed that her services were needed because the regular cook was ill but was expected to return shortly. Mrs. Butler informed Mrs. Eberstadt that she would act as cook over the weekend if Mrs. Eberstadt would give her time to procure her clothing. Mrs. Eberstadt then gave orders for the chauffeur to take Mrs. Butler down to her home to procure an outfit. Mrs. Butler telephoned her sister to have the outfit ready and the chauffeur thereafter drove Mrs. Butler to her sister's home, where she obtained her clothing.

The trip to Long Island followed. Mrs. Butler acted as cook over the weekend. The return to the home of the Eberstadts in West Orange took place on Sunday, May 31st. Mrs. Butler was a passenger in the defendant's Packard car.

In crossing the Newark meadows, the chauffeur found two lanes of traffic moving towards Newark. He attempted to pass these two lanes, thereby becoming the third car abreast traveling towards Newark. Traveling in the opposite direction towards Jersey City was another car which the chauffeur struck with the Packard. Mrs.

Butler was thrown out of the car onto the pavement, landing on her head. Suit was instituted by Mrs. Butler against Rudolph Eberstadt. The appellant at the trial below offered evidence by Mrs. Eberstadt and the operator of the employment agency that Mrs. Butler was hired for one month.

This brief is written without knowledge of the contents of the brief of the appellant. The appellant writes down nineteen grounds of appeal. These nineteen grounds, however, comprise actually only three. The appellant urges the judgment is erroneous in that Mrs. Butler was not a casual employee but as a matter of law was a regular employee whose rights were within the jurisdiction of the Compensation Bureau and that the Supreme Court had no jurisdiction of the dispute. The second reason urged by the appellant is that there should have been a direction of a verdict inasmuch as the negligence of the chauffeur was that of a fellow servant. Finally, the appellant writes down exceptions to the admission and exclusion of evidence. There appears to be no substance to this ground.

The learned Trial Court held that a question of fact under the evidence arose whereby it became the peculiar province of the jury to determine whether Mrs. Butler was a casual employee or a regular servant. The Trial Court also held that the fellow servant rule was not applicable.

REVIEW OF TESTIMONY.

Mrs. Butler, in 1931, lived at her own home (p. 126, l. 35). She had enrolled at an employment agency. As a result of this enrollment she received a call to go to Mrs. Eberstadt. When she received this call, she took no clothes with her.

“Q. Can you tell us for what purpose you were there? A. I went to get lunch” (p. 127, l. 10).

After lunch was over, Mrs. Eberstadt came to the kitchen (p. 127).

“Q. Tell us just what the conversation was between you and Mrs. Eberstadt? A. Mrs. Eberstadt asked me if I would go over Decoration Day to a country home in Long Island to help her out, and I only came to get lunch and said I could not go, I had no clothes. She said that would be all right, she would send the chauffeur to my home after lunch and get whatever I wanted” (p. 127, ll. 20-27).

Mrs. Butler called up her sister to prepare a parcel with clothes. The Eberstadt chauffeur called for these clothes and Mrs. Butler went to Long Island (p. 127, ll. 29-35). Mrs. Eberstadt never mentioned wages (p. 128, l. 6).

“Q. Did Mrs. Eberstadt tell you how long she wanted you? A. Over Sunday.

Q. Did she tell you why she wanted you
A. Yes. She said something about her permanent girl having a ringworm in her leg” (p. 128, ll. 6-11).

On cross-examination Mrs. Butler described the circumstances of her going to the Eberstadts' as follows:

“Q. Did Mrs. Sullivan call you up or get in touch with you about the work for Mrs. Eberstadt? A. No. I dropped in to the office in the morning to see if there would be anything and I was about ten minutes in the office when Mrs. Sullivan came out of the waiting room and asked if some girl would go to Long Island to (West Orange) get a lunch. Nobody answered, so I spoke up but said I had no clothes and didn't know how to get there. She said the chauffeur was coming down, so the chauffeur came down and took me” (p. 140, ll. 22-32). * * *

“Q. When did Mrs. Eberstadt first come to see you? A. Mrs. Eberstadt came to the kitchen when she came in with the children at lunch time, and I think she said, ‘How do?’ or something to that effect. After lunch she came out in the kitchen and she had her hat on and she asked me if I would go to Long Island over Decoration Day. I said, ‘I only came to get lunch; I haven't got my clothes.’ She said, ‘That is all right, Mary, the chauffeur will take you right down after lunch’ ” (p. 142, ll. 25-36).

The Court then asked her:

“By the Court:

Q. Didn't you know how much you were to get? A. I didn't know how long I would be needed” (p. 143, ll. 36-37).

Trial counsel then asked:

“Q. You were going to stay as long as you were needed? A. No. First I went to get lunch and I thought that was all I was required for. Then Mrs. Eberstadt asked me for Sunday and I thought all I would be needed was for Sunday. She had her permanent girl, which I understood would be in West Orange when I got back” (p. 144, ll. 1-12).

Mrs. Eberstadt, on cross-examination, stated that:

“A. I called Mrs. Sullivan’s agency to get a temporary cook, my cook being ill” (p. 203, l. 36) * * *

“A. I did not interview her. I simply took Mrs. Sullivan’s word and agreed with her on the salary I was to pay her and she notified Mary Butler” (p. 204, ll. 19-23).

Mrs. Eberstadt said that she hired Mrs. Butler for one month (p. 204, l. 5). However, this was done through Mrs. Sullivan (p. 204, l. 20; p. 206, l. 10). She then stated that she also talked to Mrs. Butler after she came to the house. When Mrs. Butler arrived, Mrs. Eberstadt sent the chauffeur to get her clothes.

On cross-examination Mrs. Eberstadt said she first saw Mrs. Butler after lunch on the day she came. When Mrs. Butler came to her new place of employment, the permanent cook had not moved out her clothes (p. 210, l. 15). Mrs. Butler was first told about the trip to Long Island after lunch (p. 210, l. 22):

“Q. When had your permanent cook left? A. She left the Saturday before.

Q. At the time she left, she was to stay away for a month? A. No, she moved without my knowing, because she was ill. I saw her” (p. 211, ll. 17-23).

Martha Bahr, the permanent cook, testified that she left in the last part of May (p. 213, l. 20). When she left she did not take her clothes with her (p. 214, l. 7). Mrs. Eberstadt did not know that she was going to leave (p. 214, l. 27). She did not know how long she was going when she left and left her clothes there. Later she came back for her clothes (p. 215).

Mrs. Sullivan, the employment agency woman, stated that Mrs. Butler had left her name for a cook's position. A call came from Mrs. Eberstadt asking for a cook to take the place of the permanent cook, who wasn't there and had taken a month off. Mrs. Butler had to leave at once for the position (p. 216).

Mrs. Farrell corroborated Mrs. Butler and said that after Mrs. Butler started to work for the Eberstadts, she received a 'phone call from her sister and procured a few house dresses and shoes and put them in a box. The chauffeur and Mrs. Butler came down for them after lunch, between three and four o'clock in the afternoon (p. 254).

The defendant did not call as a witness the chauffeur, the waitress or any other employee. The sole evidence pertaining to the circumstances of the employment was given by the plaintiff, Mrs. Butler, the defendant's wife, Mrs. Eberstadt, and Mrs. Sullivan, of the employment agency. The testimony of these witnesses was in sharp conflict.

Corroboration of Mrs. Butler is found in statements made by Mrs. Eberstadt on cross-examination and the statements of her cook, the only witness of all the servants in the house who appeared for the defendant.

At the close of the case plaintiff had proven that she was employed to prepare a lunch at the defendant's home, due to the illness of the permanent cook. Upon arriving there and preparing this lunch, she was then asked if she would not fill in over the holiday at Long Island. This she agreed to do.

The defendant, on the contrary, offered proof to show that the employment was for a term of one month.

These two sentences present the factual case which was submitted to the jury for its determination. If Mary Butler was a casual employee, her suit was well founded. If she was a regular employee, she should then have proceeded in the Compensation Bureau. This issue was submitted to the jury.

ARGUMENT.

I.

UNDER THE EVIDENCE THE QUESTION OF CASUAL EMPLOYMENT OF THE PLAINTIFF WAS PROPERLY SUBMITTED TO THE JURY.

The review of the testimony discloses that Mrs. Butler was employed initially only to prepare lunch. After this task had been performed, she was then requested to continue her services as cook over the weekend. Her injury was suffered on the return trip from Long Island. Her story is corroborated by her sister, who packed a few clothes for her which were obtained by the plaintiff and the chauffeur in the middle of the afternoon.

Mrs. Sullivan, of the employment agency, and Mrs. Eberstadt, contradict this story and state that Mrs. Butler was employed by the month. Contradictions appear, however, in the testimony of the latter two witnesses. Mrs. Eberstadt did not see Mrs. Butler until after lunch, when she first mentioned to her about the Long Island trip. Her permanent cook had left because of illness

without advising Mrs. Eberstadt how long she would be away. At the time that Mrs. Butler went to render the services to Mrs. Eberstadt, the clothes of the permanent cook were still in her room and Mrs. Butler did not even occupy the cook's room. The time and the circumstances of employment, an engagement in the middle of the day, suddenly, without forewarning, also corroborate the evidence of Mrs. Butler.

There was thus presented two different descriptions of the circumstances of the employment. If Mrs. Butler was employed simply to prepare lunch, and after lunch was then engaged to simply act as cook over a weekend, her employment was casual. On the other hand, if she was engaged by the month, her employment under the decisions apparently was permanent.

The definition of casual employment is contained in *Chap. 93 of the Laws of 1919*, page 211. Under Subdivision C, the Legislature defines casual employment as follows:

“* * * employe is synonymous with servant, and includes all natural persons who perform service for another for financial consideration, exclusive of casual employments, which shall be defined, if in connection with the employer's business, as employment the occasion for which arises by chance or is purely accidental; or if not in connection with any business of the employer, as employment not regular, periodic or recurring.”

The essentials, therefore, of casual employment are:

1. Occasioned by chance;
2. Purely accidental;
3. Not regular, periodic or recurring.

Applying these tests to the evidence given by Mrs. Butler, her employment was casual. By chance the permanent cook was ill. As a result of this illness and her departure from her position by chance, without notifying Mrs. Eberstadt, the occasion for the employment of Mrs. Butler arose. She was employed only to prepare lunch and thereafter for the weekend. Certainly this employment was not regular, periodic or recurring.

This question has been before the Courts for adjudication repeatedly. In *Forrester v. Eckerson*, 107 N. J. L. 156, the plaintiff, who was regularly employed by a company of which the defendant was president, on occasions painted the homes of the executives. During this time the company stopped payment of his wages. On one such occasion, while painting the home of the president, he was injured by a ladder breaking. As in the instant case, an appeal was taken from the refusal of the Trial Judge to non-suit and to direct a verdict for the defendant upon the ground that the plaintiff's employment was not casual. It is significant that the same firm of attorneys represented the defendants-appellants in that case as in the case at bar. The words of Justice Donges, who spoke for this court, in affirming the judgment for the employee, may well be applied verbatim to the instant case:

“It will be noted that employment covered by this section has been divided into two classes: (1) that which is in connection with the employer's business; and (2) that which is not in connection with the employer's business. Appellants concede that the employment in the instant case falls within the second classification.

“The question is, then, was plaintiff-respondent’s work for the defendants-appellants regular, periodic or recurring?”

“The words, as used in this act, connote that employment is regular when it is steady and permanent for more than a single piece of work; recurring, when the work is to be performed at some future time by the same party without further engagement; and periodic when the work is to be performed at stated intervals, without further engagement.

“In the case under consideration there is nothing to suggest regularity of employment, because upon completion of the particular job, plaintiff would return to his usual and regular employment with the Butterine Company, nor is there any testimony that it was in contemplation that he should return to defendant’s home at any time, either fixed or indefinite, to do any work. If other work was ever to be done, a new employment would be entered into. The employment, therefore, was casual.

“In our opinion, the Trial Court correctly disposed of the motion to non-suit and to direct a verdict for defendants. The judgment is affirmed.”

In the case under review, likewise, the employment falls within the second classification, *i. e.*, not in connection with the employer’s business. The question is, then, was the plaintiff-respondent’s work for the defendant-appellant regular, periodic or recurring? Under the evidence given by the plaintiff, there was nothing to suggest regularity of employment, nor any testimony that the plaintiff should return to the defendant’s home at any time, either fixed or indefinite, to do any work.

In *Thompson v. Wagner*, 103 N. J. L. 230, Thompson was hired to remove snow from railroad tracks. Such an employment was held casual. This decision may not be strictly applicable to the present case because Thompson was working within the usual course of defendant's business. However, it is an example of casual employment arising by chance, just as in the present case the illness of the permanent cook arising by chance caused the employment of the plaintiff. This last case was affirmed by this Court in 104 N. J. L. 198.

In *Adams v. Quackenbush*, 7 N. J. Misc. 444, the Compensation Bureau dismissed a petition. Petitioner was employed by the respondent to clean an apartment. The Compensation Bureau held that such services were casual and that the petitioner was not entitled to compensation.

In *Martin v. Belais*, 5 N. J. Misc. 68, the Compensation Bureau again denied a domestic servant compensation. The petitioner was employed to clean rooms in the respondent's summer home and while doing so was injured. Commissioner Stubbs said:

“It is obvious that the employment was not regular, as the petitioner was engaged not for any definite period, but merely to do certain specified acts which required only a few hours for their accomplishment. Furthermore, petitioner and respondent never met, or agreed upon the compensation to be paid for the services, and there is no suggestion that the petitioner's services were anything more than temporary, or to be continued in any capacity.”

Taking the testimony of Mrs. Butler in the case *sub judice* as correct, in view of the jury's

decision, it cannot be said that she was employed for any regular period or was to do recurrent or periodic work.

In *Bosco v. Segal*, 4 N. J. Misc. 951, the Supreme Court held that the duty to determine the nature of the employment where contrary proofs are submitted by the employee and the employer, rests upon the jury. *Bosco* had submitted proof that he was a casual employee. The defendant submitted proof that he was not. The Trial Court directed a verdict in favor of the defendant upon the ground that his only remedy was provided by the Employer's Liability Act. The Supreme Court reversed this judgment.

“It may be conceded that the testimony of witnesses called by the defense supports the conclusion that the employment was not casual; but, in this situation of the proofs, it was plainly for the jury, and not for the Court, to determine the question of the nature of the employment, and there was error in directing a verdict for the defendant.”

Likewise, under the situation presented by the proofs in the case at bar, Mrs. Butler, under the plaintiff's testimony, was clearly a casual employee. Under the defendant's testimony, she was not. This situation clearly presented a question for the jury and the Trial Court correctly submitted this question to the jury for its determination.

Under this point of the argument, logically falls the grounds of appeal written down by the defendant, charging that the Trial Court erred in failing to dismiss the suit for lack of jurisdiction.

The defendant argued that the Workmen's Compensation Bureau had exclusive jurisdiction of all actions which involved the relation of master and servant and that until the matters in difference had been submitted to the Workmen's Compensation Bureau, the law Court had no jurisdiction.

The defendant further urged that the action of the plaintiff in filing a petition with the Compensation Department a few months before the trial also deprived the law Court of jurisdiction.

Various of the grounds of the appeal written down by the defendant charge, also, that the Trial Court erred in permitting the jury to pass upon the jurisdiction of the law Court and of the relation of master and servant. This is an evident misconstruction of the charge of the Trial Court. The Trial Court stated to the jury that it was their function to determine the relationship between the plaintiff and defendant. If the decision held that the plaintiff was a permanent and regular employee of the defendant, the case was then at an end because the law Court had no jurisdiction of the litigation.

This specific point raised by the defendant has never been passed upon in this jurisdiction. However, the Courts of this jurisdiction have enunciated broad principles of law which dispose of the appellant's proposition adversely to his contention.

The plaintiff instituted her present action in September, 1932. In May, 1933, eight months before the trial of this cause, the petitioner filed a petition for compensation with the Department of Labor (p. 20). The defendant contends that the

filing of this petition deprived the law Court of its jurisdiction of the action instituted previously, and also contends that in all matters of litigation between master and servant, the Department of Labor has exclusive jurisdiction. This last statement is obviously erroneous.

In *Downing v. Oxweld Acetylene Company*, 112 N. J. L. 25, this Court passed upon this identical argument. In answer to the contention that the Workmen's Compensation Law provides exclusive remedies, Justice Heher said:

“* * * It is not to be presumed that the legislature intended to deprive the injured workman of his common law remedy, in the event that he suffered, as a result of the negligence of his employer, an occupational disease not specified in the Compensation Act.”

In *Smith v. International High Speed Steel Company*, 98 N. J. L. 547, the Court of Errors and Appeals approved Justice Bergen's opinion that the Compensation Act is not exclusive:

“* * * The injury not falling within the Compensation Act, the common law remedy is not affected by it.”

The relationship between the plaintiff and defendant involved a determination of conflicting evidence. If the evidence offered by the plaintiff presented the correct version, then the plaintiff could recover no compensation under the elective provisions of the act and was relegated to her common law remedy. The law Courts have sole jurisdiction of this remedy and have not been deprived of this jurisdiction. The fact that Mrs. Butler after the institution of her action in the law suit based upon her right to this common law

remedy, thereafter filed a petition with the Department of Labor to protect any rights which she might have under the act, does not affect the present case.

In *Shoemaker v. Maloney*, 102 N. J. L. 363, the plaintiff brought suit in an action of debt and also suit under the Mechanics' Lien Law. The Court of Errors and Appeals, by Justice Kalisch, held that the two actions, one common law and the other statutory, could be maintained and that there was no election or waiver in so doing.

In *Barton v. Silver*, 107 N. J. Eq. 314, a bill had been filed in the Court of Chancery and a replevin suit in a Court at law. Vice-Chancellor Leaming said:

“* * * The general rule is that the Court first obtaining jurisdiction of a cause has a right to decide every issue properly arising in the cause and may prevent a party withdrawing to another court the decision of such issues in a manner which will prevent the proper administration of remedies incident to the primary cause.”

The primary cause in the present case was brought in the law Court. This cause has been prosecuted to judgment. The later filing of a petition in the Compensation Court cannot deprive the law Court of the jurisdiction first obtained by it.

In other jurisdictions the filing of either a prior or subsequent petition for compensation has been held not to foreclose the right to proceed with a common law action.

In *Neumann v. Morris Dry Dock & Repair Co.*, 255 Fed. 97, a stevedore, who had filed a peti-

tion under the state compensation law, was not precluded from instituting an action in admiralty for personal injuries.

In *Waters v. Guile*, 234 Fed. 532, a railroad employee filed a petition under the state act and also brought a common law action under the Federal Employers' Liability Act. The filing of the petition did not deprive the law Court of its jurisdiction.

In *Plastino v. Seattle*, 119 Wash. 195, 205 Pac. 404, the employee filed a claim for workmen's compensation. He also brought a common law action upon the ground that he was engaged in extra hazardous employment which gave him a right to such an action. The defendant contended that the filing of the petition for compensation deprived the plaintiff of his right of suit at law. The Court held that the mere filing of the petition did not constitute an election on the part of the plaintiff so as to preclude him from maintaining the common law action.

In 28 *R. C. L.* 833, paragraph 120, it is said:

“In order that an employee shall be precluded from invoking a common law or general statutory remedy, it must appear that he has accepted the provisions of the Compensation Act.”

The existence of the petition filed by the plaintiff in the Labor Department being subsequent to the present action, cannot be pleaded in abatement of it (1 *C. J.* 59). Nor can the filing of the latter petition be deemed an election of remedies.

20 C. J. 34:

“* * * the commencement of a subsequent action cannot operate as an election of remedies so as to preclude the prosecution of the prior action * * *”

Since the relationship of plaintiff and defendant was purely a question of fact for the jury, and since the jurisdiction of the law court has been first invoked, it is submitted that this Court retains jurisdiction until final judgment and that the Trial Court did not err in refusing to direct a verdict or stay the action until the determination by the Labor Department of the petition later filed.

II.

THE FELLOW SERVANT RULE IS NOT APPLICABLE.

The Workmen's Compensation Law, *P. L. 1911*, Chap. 95, page 134, of this State, is generally considered to pertain solely to payment according to schedules and percentages to employees who have been injured in the course of their employment. It is noteworthy, however, that the law contains two separate sections.

Section two of the law is that generally considered and most frequently in litigation. Section one of this act, however, applies to the pre-existing common law action of a servant who may bring suit for injuries against his master.

Paragraph one of Section one provides that the employee shall receive compensation from his employer when injured through the *actual or lawful imputed negligence of the employer*, providing the employee is not wilfully negligent.

Paragraph two reads as follows:

“The right to compensation as provided by Section one of this act shall not be defeated upon the ground that the injury was caused in any degree by the negligence of a fellow employee or that the injured employee assumed the risks inherent in or incidental to or arising out of his employment or arising from the failure of the employed to provide and maintain safe premises and suitable appliances; *which grounds of defense are hereby abolished.*”

Paragraph three relates to the effect of sub-contracts. Paragraph four makes the provisions of the preceding paragraphs applicable to the death act. Paragraph five provides that the burden of proof to establish wilful negligence shall be upon the defendant in all actions at law.

Section one, therefore, of the Workmen's Compensation Law applies solely to injuries resulting from negligence actually or lawfully imputed to the employer and in such actions abolishes the defenses of assumption of risk and fellow servant rule. In other words, under Section one of the Compensation Act, the common law action of servant against master is considered with the result that the foregoing defenses are abolished. Section two of this act applies to all injuries irrespective of negligence.

This Court, in 86 N. J. L. 701, affirmed *Sexton Newark District Telegraph Company*, 84 N. J. L. 85, in which the Supreme Court, speaking through Justice Trenchard, held that the provisions of the Workmen's Compensation Law which abolished the defenses of assumption of risk and the fellow servant rule were constitutional. In this

opinion Justice Trenchard points out the two different remedies provided in the act. He says:

“Sections one and two providing two entirely different schemes—one regulative of the common law, and the other purely the creature of statute—* * * Section one allows a recovery only in cases where the employe can show that his injuries were caused by an accident ‘arising out of and in the course of his employment, of which the actual or lawfully imputed negligence of the employer is the natural and proximate cause,’ and ‘provided the employe was himself not wilfully negligent.’ The section does, however, abolish the common law defenses of assumption of risk and the fellow servant rule.”

Justice Trenchard then discusses the constitutionality of such a provision and decides that the act is constitutional though it regulates an existing common law action and at the same time provides a new remedy and further expressly holds that the abolition of the defenses of assumption of risk and fellow servant does not render the act unconstitutional.

In *Brost v. Whitall-Tatum Company*, 89 N. J. L. 531, this Court again held that the provisions of the act abolishing the defenses of assumption of risk and the fellow servant were constitutional. Brost sued at law because the employer had given notice that the Workmen's Compensation Act should not apply. Among the motions for nonsuit, the employer urged that the risk was obvious and assumed by the plaintiff. Chancellor Walker said:

“As to assumption of risk: The provision in Section 1 of the act on this score is that the right to compensation shall not

be defeated upon the ground that the injured employe assumed the risks inherent in, and incidental to, or arising out of his employment, or arising from the failure of the employer to provide and maintain safe premises and suitable appliances, which ground of defense is, by the act, abolished. This enactment is constitutional according to our decisions."

The action brought by Mrs. Butler is a common law action. Assuming for the purposes of this argument that her injuries were received while she was performing the duties of her employment, since the passage of the Employers' Liability Act in such common law actions the defense of assumption of risk and of fellow servant has been abolished.

In the instant case even had this act not been passed, the fellow servant rule would not have been applicable. The foundation of the fellow servant rule rests upon engagement by a common master in a common employment of such kind that in the exercise of ordinary sagacity all engaged in it were able to foresee when accepting it that the negligence of a fellow servant would probably expose them to injury.

In the instant case Mrs. Butler was employed as a cook. Her engagement was to perform duties in the kitchen preparing food. She was purely a household servant. The chauffeur, Lauder, was not engaged in the home nor performed any duties therein. Prior to the passage of the Employers' Liability Act of this state, this jurisdiction would not have held that the chauffeur and the cook were in a common employment. A butler, a waitress, a kitchen helper and the cook may all have been in a common employment be-

cause they all worked together to the same ends and the same purpose. A cook with common sagacity in entering employment could well realize that in entering that she was subjecting herself to the carelessness of a waitress, a butler or a housemaid or kitchen helper. No cook, however, could expect in entering an employment that she were assuming the risk of the negligence of a chauffeur whose duties were entirely separate and apart from the kitchen. The case is absolutely bereft of proof that the chauffeur and Mrs. Butler were fellow servants. No proof was offered that they were employed by the same master or subject to the orders of the same master. A careful reading of the case does not disclose this. It is to be noted that the chauffeur testified that he was employed by Mrs. Eberstadt while the suit is against Rudolph Eberstadt.

At the time of the accident Mrs. Butler was a passenger in a car. She was performing no duties. She was not engaged in work but was returning from Long Island where she had gone to serve as cook. There was no proof that at the time of her injury she was in the service of the defendant or of Mrs. Eberstadt. There is no proof anywhere in the case that Lauder was an employee of the defendant, Eberstadt. There was no proof that Lauder received orders from either Mr. or Mrs. Eberstadt. There is no proof showing that in any way the cook and the chauffeur were engaged in joint or common tasks or that one, in the ordinary performance of her duties, cooperated or worked towards the accomplishment of the same task or same similar scheme of work with the chauffeur, the driver of the automobile.

The absolute absence of law in this state since the passage of the Employers' Liability Act would seem dispositive of the issue. However, a few citations from the reports of cases which arose before the passage of the act abolishing the defenses of the fellow servant rule and assumption of risk furnishes clear rulings that the relation which existed between Mary Butler, the plaintiff, and the chauffeur was not that of fellow servants.

In *Ondis' Adm'x. v. Great Atlantic and Pacific Tea Company*, 82 N. J. L. 511, a workman bailing water out of a pit was held not to be a fellow servant of a superintendent who started machinery.

“These other servants were not fellow servants engaged in a common employment with him, the intestate, but are to be regarded as acting in this respect as the representatives of the master, and the only question is whether they, in fact, exercised due care.”

In *Pakusewski v. Ringwood Company*, 81 N. J. L. 552, the plaintiff was shoveling ore into cars from an iron mine when he was crushed by a rock falling upon him which had been loosened by blasting. This Court held that between the plaintiff shoveling ore and the blaster, the foremen in charge, no relation of fellow servant existed and affirmed a verdict for the injured workman.

In *Harris v. United Steamship Company*, 75 N. J. L. 861, the requisite of a fellow servant is described:

“* * * They were all serving and controlled by the same master in a common

employment of such kind that in the exercise of ordinary sagacity, all engaged in it were able to foresee, when accepting it, that the negligence of a fellow servant would probably expose them to injury."

In *Polo v. Palisade Construction Company*, 75 N. J. L. 873, a foreman in charge of dynamite was held not to be a fellow servant of a laborer in an excavation who was killed through explosion of dynamite.

In *Ricker v. Central Railroad Company*, 73 N. J. L. 751, this Court held that a train dispatcher was not a fellow servant of a fireman.

"The liability of the master depends on whether he has entrusted the servant with such control as is properly the business of the master."

In *O'Brien v. American Dredging Co.*, 53 N. J. L. 292, Justice Magie, speaking for the Supreme Court, said that to be fellow servants, persons must be employed under the control of the same master in a *common* employment obviously exposing them to injury from the negligence of others so employed or controlled.

In *McAndrews v. Burns*, 39 N. J. L. 118, this Court said:

"* * * A fellow servant I take to be anyone who serves and is controlled by the same master. Common employment is service of such kind that, in the exercise of ordinary sagacity, all who engage in it may be able to foresee, when accepting it, that through the negligence of fellow servants, it may probably expose them to injury. The ground on which rests the exemption of the master from liability to the servant for negligence of a fellow servant,

engaged in a common employment is that the servant is presumed to contract in reference to the risk incurred."

The application of the rules laid down by these cases to the employment of Mrs. Butler is conclusive that she was not a fellow servant of the chauffeur. The two were not engaged in a common employment. The two did not have common masters. The two were not engaged in a common business. Mrs. Butler, with common sagacity, could not have foreseen, when she began her work as a cook, that she was undergoing the risk of negligence on the part of the chauffeur.

No further argument, however, will be made on this point, in view of the statutory declaration which is dispositive of the appellant's contention.

III.

THE COURT MADE NO ERRORS IN THE ADMISSION OR REJECTION OF EVIDENCE.

The eleventh and thirteenth grounds of appeal relate to the following questions:

"Q. In your judgment, as long as you don't want to get down to feet and inches, in your judgment driving the car at 20 or 25 miles an hour and applying the four-wheel brakes, assuming you are sitting behind the wheel in that chair, will you indicate an object in this room the distance at which you could stop?

"Mr. Hartpence: I object.

"The Court: Objection overruled.

"Mr. Hartpence: Exception" (p. 55, ll. 4-13; p. 195, ll. 31-37).

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“Q. May I ask you, on the Harrison Pike don’t you remember passing cars?”

“Mr. Hartpence: I object.

“The Court: Objection overruled.

“Mr. Hartpence: Exception” (p. 201, ll. 36-40).

These two grounds of appeal upon the admission of these two questions are of no avail to the appellant. It will be noted that defendant’s counsel simply objected and upon the Court’s overruling the objections, prayed exceptions. It is an established rule, laid down by this Court, that an objection to evidence which is overruled and to which an exception is taken, to furnish a ground of appeal, must recite the basis of the objection.

In *Semkin v. Hollander*, 82 N. J. L. 485, Justice Bergen, speaking for this Court, said:

“* * * Nor are the exceptions upon which the plaintiffs-in-error base their argument under this assignment, entitled to any consideration, because they do not point out the particular ground of objection. * * * The ground of objection was indefinite and ambiguous. * * * It is difficult to conceive of a more indefinite objection or a greater violation of the rule relating to this subject. The Trial Court and opposing counsel are entitled to have pointed out by counsel the precise point of his objection to the testimony tendered.”

In *Garrison v. Newark Call Printing and Publishing Company*, 87 N. J. L. 217, Justice Parker, for the Court of Errors and Appeals, says in the syllabus:

“A general objection to evidence is no ground of reversal.”

The twelfth ground of appeal challenges the propriety of a question asked to the chauffeur:

“Q. So you were driving a car that day without knowing how far you could stop the car” (p. 196)?

The basis of the objection was “incompetent, immaterial and irrelevant.” This exception, it is submitted, is subject to the same vice as existed in the two previous questions. However, the condition of brakes and the distance in which a car can be stopped was material and pertinent to the issues involved.

In *Siegeler v. Neuweiler*, 91 N. J. L. 273, this Court approved the admission of testimony concerning the condition of brakes. The question assuredly was pertinent and the objection properly overruled.

In the tenth ground of appeal, exception is taken to the action of the Trial Court in excluding from evidence the answer of the defendant, Rudolph Eberstadt, in the Workmen's Compensation proceedings. This answer was offered by the defendant and was, patently, a self-serving declaration. It was not offered by the plaintiff as an admission against interest but was offered by the defendant himself. Furthermore, this answer was not signed or sworn to by Eberstadt but simply by his attorneys. The Trial Court excluded the answer in that it would be putting in evidence on the part of Eberstadt without producing him (p. 251). The offer was made by defendant's counsel on the ground that the answer was a pleading which was binding upon the respondent. This answer, as has been stated, was but hearsay in that Eberstadt did not sign it and is a self-serving declaration. It was clearly not admissible.

In *Wood v. Price*, 79 N. J. Eq., 14, Chancellor Pitney held that pleadings in another suit could not be admitted to prove the truth of the averments in the pleadings but only for the purpose of showing the pendency of such proceedings, the nature and object of it.

It is further a general rule that pleadings in other suits are admissible when they are admission against interest. In the present case the answer was a self-serving declaration.

In *Johnson v. Crane*, 1 N. J. Misc. 501, the Supreme Court held that it was not error for the Trial Court:

“to refuse to admit in evidence the record and proceedings between the above named parties and the Workmen’s Compensation Bureau.”

No error was made by the Trial Judge in the admission or exclusion of evidence.

IV.

CONCLUSION.

Because the character of the employment of the plaintiff, whether casual or permanent, was a disputed question of fact within the peculiar province of the jury which determined this adversely to the defendant; because the fellow servant defense is abolished, and because the Trial Court made no errors in the admission of testimony, it is respectfully submitted that the judgment should be affirmed.

Respectfully submitted,

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110MAY.T.1934

New Jersey Court of Errors and Appeals

No. 110, May Term, 1934

MARY BUTLER,
Plaintiff-Respondent,

vs.

RUDOLPH EBERSTADT,
Defendant-Appellant.

Action at Law.
On Appeal from
Supreme Court.

SUPPLEMENTAL BRIEF OF DEFENDANT- APPELLANT.

Appellant's main brief was prepared with the idea of amplification upon oral argument. It was also the intention at that time to reply to respondent's brief and to discuss certain features to which it was the desire of counsel to direct the Court's attention.

The Court will recall that when the case was called for oral argument, counsel for respondent was actually engaged in a long trial in the United States District Court, from which he was not at liberty to withdraw, and that counsel for appellant stated that he did not feel that he should argue the case orally in the absence of his opponent. Both sides being averse to a continuance until the next term, it was agreed that the case should be submitted on briefs at the present term, provided leave were given to file supplemental

briefs in lieu of the oral argument. The Court accorded counsel that privilege.

On page 2 of respondent's brief it is stated that:

"Mrs. Butler was further informed that her services were needed because the regular cook was ill but was expected to return shortly."

We think that the testimony does not substantiate the statement that *she was expected to return shortly*.

Mr. Eberstadt, the defendant, who was called as a witness by plaintiff, stated (Case, p. 67, lines 32-40):

"By Mr. Parsons.

Q. Before the employment of Mrs. Butler, who was the usual cook? A. We had a cook, Martha Irkatak.

Q. Did Mrs. Irkatak come back to your employment later? A. She did not. She was physically unable; she had some sort of sickness.

Q. She never has come back? A. She never has come back."

Mrs. Butler, the plaintiff, herself testified in this respect, as follows:

"By Mr. Parsons.

Q. Did Mrs. Eberstadt tell you how long she wanted you? A. Over Sunday.

Q. Did she tell you why she wanted you? A. Yes. She said something about her permanent girl having a ringworm in her leg" (Case, p. 128, lines 6-10).

“Q. Did she tell you what she wanted you to go to Long Island for? A. To help her out at the cooking for Sunday.

Q. What day was this? A. I went to her on Wednesday, and then it was the next day, on Thursday.

Q. You went to Long Island? A. Yes, sir.

Q. How long did you stay there at Mrs. Eberstadt's on Wednesday after your got through with lunch? Did you stay all night? (No answer.)

By the Court.

Q. Did you spend the night at Eberstadt's after getting the lunch? A. After I got the lunch I remained in the house until the chauffeur was ready to take me.

Q. So then you went to your sister's and got your clothes and came back to the Eberstadt's and spent the night there, and the next morning you went to Southampton? A. Yes, sir.

By Mr. Hartpence.

Q. Did you cook there each day, Thursday, Friday, Saturday and Sunday? A. Yes, sir.

Q. All three meals, breakfast, lunch and dinner at night? A. Yes, sir.

Q. And then you started back home Sunday afternoon? A. Yes, sir.

Q. Had not Mrs. Eberstadt or Mr. Eberstadt during all that period said anything to you at all about how much pay you were to get for your work? A. Mr. Eberstadt did not speak at all to me, and Mrs. Eberstadt never mentioned it, nor neither did I.

By the Court.

Q. Didn't you know how much you were to get? A. I didn't know how long I would be needed.

By Mr. Hartpence.

Q. You were going to stay as long as you were needed? A. No. First I went to get lunch and I thought that was all I was required for. Then Mrs. Eberstadt asked me for Sunday and I thought all I would be needed for was Sunday. She had her permanent girl, which I understood would be in West Orange when I got back.

Q. Is that the reason you did not ask her about how much money you were to get? A. It just wasn't discussed.

By the Court.

Q. It did not occur to you to ask her? A. No, sir.

Q. You never thought of asking? A. That is right; I knew I would get paid.

Q. How did you know that? A. I was pretty sure of it.

Q. How did you know you would be paid? A. I did.

Q. You were taking a chance on it, anyway, were you? A. Yes, sir.

By Mr. Hartpence.

Q. Did you see the other girl at all, the permanent girl? A. No, I didn't" (Case, pp. 142, line 37, to 144, line 31).

Mrs. Eberstadt testified:

"By the Court.

Q. As a result of your call did anything happen? A. I took Mary Butler for a period of one month.

Q. When did Mary Butler come to your house? A. She came to my house Wednesday, May 27th.

Q. Following this call you made to Mrs. Sullivan? A. Yes, sir.

Q. Did you employ Mary Butler as cook when she came there? * * *

The Witness: I engaged her for one month.

By the Court.

Q. Did you fix a price. A. \$80.

Q. And you did that through Mrs. Sullivan? A. Yes, sir.

By Mr. Hartpence.

Q. What was the trouble with the other cook? A. Athlete's foot, and I was afraid the children might contract the disease, so I told her to stay away one month" (Case, p. 204, line 11, to p. 205, line 2).

"By Mr. Hartpence.

Q. What was the other cook's name? A. Yerkatock.

Q. How long was she away? A. As a matter of fact, she never came back.

Q. Did you see her foot before she left? A. Yes, sir.

Q. What was its condition? A. It was very seriously infected; I don't see how she stood it as long as she did." (Case, p. 208, lines 9-19.)

"Cross examination by Mr. Parsons.

Q. After you had lunch did you see Mrs. Butler? A. Yes, and I told her that she was to be with me one month at \$80. a month. * * * " (Case, p. 208, line 38.)

"Q. Was it your feeling at that time that you were forced to keep Mary Butler? A. I had engaged her for a month; I had to. * * * " (Case, p. 209, line 37.)

“Q. May I ask you if it is not unusual for you to take servants and hire them in the middle of the month for a month? A. No.

Q. When had your permanent cook left? A. She left the Saturday before. * * *”
(Case, p. 211, line 12.)

Martha Bahr testified:

“*Direct examination by Mr. Hartpence.*

Q. What was your name before you were married? A. Martha Yerkatock.

Q. Do you remember when you left Mrs. Eberstadt's house? A. Yes, I left in 1931, the last part of May.

Q. Why was it you went away? A. I had a sore foot.

Q. Had you had it treated by a doctor? A. Yes, sir.

Q. Were you to stay away any given length of time when you went away? A. Yes, sir, for a month.

Q. What was your work when you worked there? A. As a cook.

Q. How long did you stay away? Did you go back at all to Mrs. Eberstadt's? A. No. She told me I should come back, but she had to go to the country, and my foot wasn't well and I couldn't come back.

Q. So you never did actually go back to work for her? A. No.” (Case, p. 213, lines 18-38.)

On page 7 of respondent's brief it is stated:

“Upon arriving there and preparing this lunch, she was then asked if she would not fill in over the holiday at Long Island.”

We think that the testimony above quoted does not sustain this statement. Plaintiff's own testi-

mony was that she was to stay "over Sunday"; and that she did not know how long she would be needed. There is nothing to indicate that she was to "fill in" over the holiday.

On page 10 of respondent's brief it is stated that:

"By chance the permanent cook was ill. As a result of this illness and her departure from her position by chance, without notifying Mrs. Eberstadt, the occasion for the employment of Mrs. Butler arose. She was employed only to prepare lunch and thereafter for the weekend. Certainly this employment was not regular, periodic or recurring."

The testimony quoted shows that it was not by chance that the permanent cook was ill. She had been ill some time before she left, and Mrs. Eberstadt said that she did not see how the cook has stood it as long as she did. (Case, p. 208, line 19.) She did not depart from her position by chance, but because Mrs. Eberstadt told her to go away for a month's vacation. She did not go without notifying Mrs. Eberstadt. (Case, pp. 211, 212.) She went away on Saturday, and it was not until the following Wednesday that Mrs. Butler was employed. That fully negatives the idea of a sudden emergency or chance leading to the hiring of the plaintiff. And on the testimony of Mrs. Butler herself, it was regular employment,—Wednesday, Thursday, Friday, Saturday and Sunday. What could be more periodic or recurring? It is not the length of time for which the employment is to continue that makes it *regular* as distinguished from *casual*; it is the *nature* of the employment.

On page 9 of respondent's brief, it is stated that:

"The time and the circumstances of employment, an engagement in the middle of the day, suddenly, without forewarning, also corroborate the evidence of Mrs. Butler."

But giving plaintiff the benefit of her own testimony as to the circumstances surrounding her engagement, the employment for the lunch had passed by, and then a new contract of employment was entered into, whereby she was to become an employee in the household for the rest of that day, and for the following day, Thursday, and for Friday, and for Saturday, and for Sunday, and for "over Sunday". And she knew, from her own testimony, that she was to be transported down to Long Island and back as part of her contract of employment. There can be no doubt of her own understanding in this respect, and it is clinched by the testimony of her own physician, Dr. Dukes, who testified in her behalf on the trial. (Case, p. 159, at lines 8, *et seq.*)

"By the Court.

Q. Does it indicate by whom she was employed? A. It doesn't say here. That is on another card system.

Q. Did you make a report to the Department of Labor of the State of New Jersey of this injury to Mary Butler? A. I filled out a form; I don't know whether it went to the Department of Labor or to the insurance company.

By Mr. Hartpence.

Q. Is that the paper which I show you, a report rendered by you respecting the injuries of Mary Butler?

By the Court.

Q. Did you make a report to the Department of Labor of this case? A. I signed that report.

By Mr. Hartpence.

Q. In this report you state the present address of Mary Butler as 1 Merrywood Drive, West Orange, New Jersey; name of employer, Rudolph Eberstadt, and address, 1 Merrywood Drive, West Orange? A. I wrote that.

Q. That report is dated June 12? A. Yes, sir.

By the Court.

Q. Where did you get that information to make that report? A. This was confirmed—

Q. Where did you get the information to fill in? A. From Mary Butler.

Q. You asked her? A. Yes. It contains the name of person, address, name of employer, address of employer and date of accident.”

This information was given by plaintiff on June 12th, nearly two weeks after she was injured, and she then stated that her employer was Rudolph Eberstadt, the defendant, and that her address was 1 Merrywood Drive, West Orange, which is the address of her employer, Rudolph Eberstadt. That she considered herself still in the employ of defendant at that time seems irrefutable.

Cooking and housework was the regular work of plaintiff. (Case, p. 139, line 38; p. 140, lines 11, 16.) That was also the regular work in the household where she was employed by defendant.

Upon plaintiff's own version, the employment was *regular*, not *casual*; and *a fortiori* that is so upon the whole evidence in the case.

On Page 17 of respondent's brief, it is stated that "the existence of the petition filed by the plaintiff in the Labor Department being subsequent to the present action, cannot be pleaded in abatement of it (1 C. J. 59)".

The Practice Act of 1912 (P. L. 1912, p. 389, Rule 30) provides that:

"30. Matters arising after suit begun.

Supplemental pleadings, showing matters arising since the original pleadings or suit begun may be filed by either party, by leave of court, and upon terms."

Reference to the record (Case, p. 29, line 30) will show that Notice and Order for the Amended Answer was waived and that service thereof was acknowledged by the Attorney of Plaintiff.

And in *Matthison v. Payne*, 98 N. J. Law 383, it was held that the common-law plea *puis darrein continuance* is not abrogated by the Practice Act of 1912, although it is not now used in that form and by that terminology. Its effect remains, however, and any matter arising after answer or issue joined may be set forth in a supplemental pleading.

On page 17 of respondent's brief, it is also stated that, quoting from 28 R. C. L. 833, paragraph 120:

"'In order that an employe shall be precluded from invoking a common law or general statutory remedy, it must appear that he has accepted the provisions of the Compensation Act.'"

That is just what the plaintiff in the present case did. She filed her petition in the Workmen's Compensation Bureau, verified by her oath, in

which she stated (Exhibit D-15, Case, pp. 281-285) that:

“6. By whom were you employed at the time of the accident? (Give name and business address)

(Name) Rudolph Eberstadt

(Street Address) Merrywood Drive

(City or Town) West Orange, New Jersey.”

That petition was verified on May 24th, 1933, nearly two years after the accident and was filed in the Workmen's Compensation Bureau on May 27th, 1933. In addition to the statement of employment above quoted, the petition prayed that the Bureau would determine the amount of compensation due to the petitioner from the said defendant under the Workmen's Compensation Act.

As late, therefore, as the date above stated, plaintiff still claimed that she was employed by the defendant at the time of the accident, and yet, on page 22 of respondent's brief, it is contended that:

“At the time of the accident Mrs. Butler was a passenger in a car. She was performing no duties. She was not engaged in work but was returning from Long Island where she had gone to serve as cook. There was no proof that at the time of her injury she was in the service of the defendant or of Mrs. Eberstadt.”

Clearly there is no justification for that statement. Not only the proofs, but Mrs. Butler's own admissions, above referred to, show clearly that she was, and that she considered herself, in the performance of her duties as a servant of the ~~plaintiff~~ at the time she met with her accident.

defendant

In any event, the case below was tried from beginning to end on the theory that plaintiff was an employe of defendant at the time she was injured, but the controversy arose between the parties with regard to the nature of that employment, whether *regular* or *casual* (Case, pp. 257-262). It is well settled that a case will not be considered on an appeal on a theory different than that upon which the case was tried.

Hyman v. Atlantic City R. R. Co., 101 N. J. Law 124, 126;

Donohue v. Campbell, 98 N. J. Law 755, 758;

Garibaldi v. Rubenstein, 99 N. J. Law 223;

Gordon v. Rollo Trans. Co., 11 N. J. Misc. Rep. 689.

In *Berkowitz v. Lyons*, 98 N. J. Law 198, 204, this Court, speaking through Mr. Justice MINTURN, said:

“This ruling, therefore, on defendant’s motion became the law of the case, and defendant now, regardless of the abstract legal correctness of the ruling, is concluded by it.” (Cases cited.)

Nowhere during the course of the trial was it even suggested that the status of the plaintiff was that of a “passenger” in the car. If that had been the contention of plaintiff, an entirely different issue would have been raised with regard to the respective rights and duties of the parties, which defendant would have had the right to meet in an entirely different way from the issue of *regular* or *casual* employment. It is also well settled that on appeal the Court will not consider

a question which was not raised or argued in the Court below, unless it may involve a question of jurisdiction or of public policy.

Allen v. City of Paterson, 99 N. J. Law
489;

Musto v. Mitchell, 105 N. J. Law 575;

Punk v. Botany &c. Mills, 105 N. J. Law
647.

It is also to be noted, as set forth in our main brief, at page 9, at the close of paragraph (b), that either employer or employe has the right to invoke the jurisdiction of the Compensation Bureau. This the defendant did by filing his answer in the proceeding in the Compensation Bureau, instituted by the plaintiff, as shown by Exhibit D-14 for Identification (Case, pp. 276-280; see reference to Statute and decision cited at page 9 of main brief).

Section 18 of the Workmen's Compensation Act (see Pamphlet Copy of the Law submitted herewith, p. 14) provides that:

“18. In case of a dispute over or failure to agree upon a claim for compensation between employer and employe, or the dependents of the employe, either party may submit the claim, both as to the questions of fact, the nature and effect of the injuries, and the amount of compensation therefor according to the schedule herein provided, to the Workmen's Compensation Bureau, as prescribed in paragraph five of the supplement to this act, approved February twenty-eighth, one thousand nine hundred and eighteen, as chapter 149.”

And Section 3 of the Act of 1918 (P. L. 1918, Chapter 149, p. 28 of the Pamphlet) provides as follows:

“3. The Commissioner of Labor, the deputy commissioners and the referees appointed under this act, either sitting individually or together, *shall have exclusive original jurisdiction* of all claims for compensation arising under the act to which this act is a supplement, and the acts amendatory thereof and supplemental thereto.”

It should also be noted that by Section 9 of the Act (p. 4 of Pamphlet) the law placed the parties under Section II of the Act automatically, unless one or the other gave notice in the manner prescribed by the Act that they would not be so bound, and Section 15 (p. 13 of the Pamphlet) exacts the giving of a notice of the accident by the employe to the employer if the employe is to claim compensation under the Act.

In the petition of plaintiff above referred to (Case, p. 282, lines 9 to 20) she states as follows:

“8. Did you give written notice to your employer at the time you were hired, or later, that the Compensation Act should not apply to you? No.

9. Did you receive such notice from your employer? No.

10. Did your employer have knowledge of your accident? Yes.

11. Did you notify your employer of your accident? Yes.

12. If so, on what date? May 31st, 1931.”

Not only therefore did the law place the parties under Section II of the Act, but the plaintiff placed herself there by her own acts and statements and by formally invoking the jurisdiction of the Com-

pensation Bureau. Defendant also voluntarily submitted to the jurisdiction of that Bureau, tendered compensation (which was refused) and paid plaintiff's medical and hospital expenses, as required by the Act (which plaintiff accepted). See Case, p. 145, lines 23-32; pp. 147-148; p. 284, lines 1 to 12; p. 279, lines 10-26.

Defendant, however, has no power to compel a hearing of the Compensation proceeding. His only remedy, in the event that petitioner will not proceed, is to move to dismiss the petition. But in the present case that would be to no purpose, for defendant desired to pay compensation and besought the Bureau to fix and determine it.

There can be no doubt but that plaintiff was still within the course of her employment on the way back from Long Island to West Orange, at the time the accident occurred. The cases cited at page 14 of our main brief demonstrate that proposition.

In *Hanna v. Erie R. R. Co.*, 8 N. J. Misc. 829, 831, the Supreme Court held that:

“The mere circumstance that the employe was eating his lunch does not seem to alter the case,” citing, *Zabriskie v. Erie*, 86 N. J. Law 266 (at toilet); *Terlecki v. Strauss*, 85 Law 454; 86 Law 708 (adjusting hair).

In *Cicalese v. L. V. R. R. Co.*, 75 N. J. Law 897, 900, the plaintiff was a laborer. His work was done. On his way home on hand car an appliance broke and he was injured. This Court held that the relation of Master and Servant continued, and said:

“The relation of master and servant continues during the carriage of the servant to and from his work, when done by the master,

or with his consent, where from the character of the service such transportation is beneficial both to the master and the servant.”

In *Depue v. Salmon Co.*, 92 N. J. Law 550, this Court held that the relation of master and servant continued while the servant was on his way home after his work was completed, it being the arrangement that he was entitled to use the employer's automobile to go to and from his home and his place of business.

Dunbaden v. Castles Ice Cream Co., 103 N. J. Law 427, was an action at law by a third party injured by collision with car of defendant, being driven by its employe Grundman, who drove defendant's Ford car from Newark to Perth Amboy in the morning, and there picked up a truck loaded to cover his route. After serving his route he returned the truck to Perth Amboy, and then drove the Ford car from Perth Amboy back to Newark. On his way home from Perth Amboy to Newark the accident to plaintiff occurred.

This Court held—Master and servant relation between Grundman and Ice Cream Company still continued while Grundman was driving the Ford car from Perth Amboy home to Newark after leaving the truck at Perth Amboy at the conclusion of the day's work on the truck.

At pages 432, 433, this Court said:

“The trial Court left it to the jury to determine from the evidence whether Grundman was at the time of the accident the servant or agent of the appellant. We think this is the course which the trial Court should have taken.” * * *

“It was beneficial to the appellant to have Grundman get to its Perth Amboy plant

promptly for the service of his route." * * *
 This he could better accomplish by means of
 an automobile than railway. No difference
 between this case and *Depue v. Salmon Co.*,
 92 N. J. L. 550. * * *

"We also observe that the appellant's
 answer admitted that Grundman was driving
 the automobile as its agent when the collision
 occurred."

In *Bolos v. Trenton Fire Clay Co.*, 102 N. J.
 Law 479, the Supreme Court held that the em-
 ploye was still in the course of his employment
 while riding from the garage where he ate his
 lunch to the brick-shed, where he actually per-
 formed his work, even though that took him out
 on the public highway.

In *O'Mara v. Kirch*, 106 N. J. Law 151, this
 Court held that the employe was injured in
 the course of his employment, as the result of an
 automobile accident while he was being driven to
 church on a Sunday by the employer's chauffeur,
 it having been part of the arrangement of hiring
 that he was to be thus taken to and from church
 on Sundays.

In *Laverty v. Ludington & Co.*, 110 N. J. Law
 410, it was held by this Court, speaking through
 Mr. Justice DONGES, that—

(Syl.) "Where employer instructed em-
 ployes to report for work at his place of busi-
 ness, transported them in his truck to the job,
 which was some miles distant from his place
 of business, and brought them back from the
 job to his yard after the end of the day's
 work, *held*, injuries sustained in an accident,
 while being so transported, arose out of and
 in the course of the employment."

Mr. Justice DONGES, at page 412, said:

“In the instant case, the employes, though not actually working at the time of injury at the job for which they were employed, were injured in doing something which the employer expressly directed, or consented, they should do as an incident of their employment, and were, in our opinion, within the scope of their employment while on the employer’s truck being by him transported from his job. * * *

(Cases cited.)

“Applying the rule to the undisputed facts in the cases under review, there was no error in the finding that the relation of master and servant continued during the period of the transportation of the employe by the employer, and that the injuries sustained arose out of and in the course of employment of the decedent and the respondent, Laverty, Jr.”

In the present case, according to Mrs. Butler’s own version of the hiring, she was to go down to Long Island to perform some of her services, which of necessity involved the transportation there and returning.

On page 28 of respondent’s brief, it is argued that the Answer in the Compensation proceeding was inadmissible, except “for the purpose of showing the pendency of such proceedings, the nature and object of it.” That was defendant’s purpose in offering the record from the Compensation Bureau—to show that there was such a proceeding pending, the nature and object of it, that there was a dispute between the employer and employe touching the very subject matter of the present suit, and that both parties had invoked the

jurisdiction of the Bureau. It would seem that the offer of the complete record in evidence by the defendant for the purposes mentioned was proper and that it was error to exclude it, as already urged *supra* (Case, p. 252).

In *Watson v. Stagg*, 108 N. J. Law 444, at 446, Mr. Justice PARKER, speaking for the Supreme Court, said:

“It will thus be seen that in a situation such as that presented by the present case, the injured party has the right of proceeding under the Workmen’s Compensation Act and recovering double compensation because of having been employed without the certificate mentioned, or in the alternative, of resorting to an ordinary suit for damages based on negligence in cases where the accident was due to negligence. *We are clear that he cannot do both*; and this was the view of the Court of Errors and Appeals in the case of *Boyle v. VanSplinter*, 101 N. J. L. 89. That case rested on a different statute, but there can be no distinction in principle. The court distinctly held that if the Workmen’s Compensation Bureau had jurisdiction (which was a disputed point in the case) and exercising that jurisdiction, had made its finding, the common law action would be barred.

“In the case now before us there seems to be no question with regard to the jurisdiction of the Workmen’s Compensation Bureau. The case is clearly within the language of the amendment of 1924 above quoted, and consequently in a case where the employment is not in violation of any provision of the Factory act (*Terlingo v. Belz-Parr*, 106 N. J. L. 221), *and the injured party has elected to resort to the Workmen’s Compensation Act for his remedy and there has been an adjudi-*

cation in his favor in that proceeding, it operates as a bar to a further resort to the alternative provision of the statute permitting an action for damages.

“Applying these principles to the case before us, it follows that when the defendant offered to prove, and attempted to prove, that there had been a workmen’s compensation proceeding and there had been an award, this proof should have been admitted, and, if admitted, should have resulted in a direction of a verdict for the defendant. The offers of such proof were overruled and exceptions duly entered. The case is before us on proper grounds of appeal and the judgment is accordingly reversed, to the end that a *venire de novo* issue, and that at the second trial the defendant be permitted to make the proof which was excluded at the first.”

Cited with approval by this Court in *Damato v. DeLucia*, 110 N. J. Law 380.

See also :

Osborne v. Consolidated Stone Co., 109 N. J. Law 590, 593, 594, quoted *infra*.

On pages 25-27 of respondent’s brief the action of the Trial Court in excluding the evidence of the witnesses Lauter and Otis Eberstadt is reviewed. It is to be noted that respondent does not present any cogent argument on the merits of the principle involved, but goes to some length in discussing the technical objection to the consideration of the questions because of the form of the objections below. Where the merits pinch, it is usual to emphasize the technicality!

The Practice Act of 1912 (P. L. 1912, p. 382, sec. 25) abolishes exceptions in civil cases. It is true, however, that notwithstanding that provi-

sion our Courts have held that it is still necessary to note an objection in some form to the proceeding to which an objection is made, and also to register an objection to the ruling of the Court thereon.

In *Leifrant v. Progressive Agency*, 98 N. J. Law 526, at 527, this Court cited with approval *Kargman v. Carlo*, 85 N. J. Law 635, and held that "I desire to note an exception" is an appropriate form of expression, and cites numerous cases.

No fixed form, however, is required. Upon the trial of cases at Circuit, the official stenographers almost invariably merely note the "objection", the "overruling" or "sustaining" of the objection by the Court, and the "exception" of counsel, as the record clearly indicates was done in this case (Case, pp. 195, 201). The specific ground of the objection is lost in the argument and colloquy ensuing. This the stenographer does not report, and even if it were reported, this Court does not permit such colloquy to form any part of the record.

Supreme Court Rule 107(a);

Ippolito v. Ridgefield, 94 N. J. Law 97,
99;

State v. Catania, 102 N. J. Law 569, 576.

That this is the common practice is borne out by the record in the earlier stages of the case, where again and again what was said in argument of the initial motions is covered by the stenographer by the parenthetical statement ("After argument", and "After discussion"). See Case, pp. 65, 66; also, pp. 255, 256. Counsel are in the hands of the stenographers. Whatever is reported, and the form that it takes, is in the control of the reporter. Counsel do not write it down. The

stenographer should state the grounds made by counsel, but they do not always do so. And in the present case, the abbreviated form has been used by the stenographer. This was carried to such an extent that the alternative motion to stay the cause pending determination by the Workmen's Compensation Bureau of the jurisdictional feature and the nature of the employment involved, was omitted entirely, and it became necessary to apply to the Court to rectify it, resulting in the stipulation to that effect (directed to be made by the Court) appearing on page 287 of the State of the Case. We think it very unwarranted for respondent to argue against the regularity of the procedure in this respect, and feel that it should not be seriously considered.

On page 3 of respondent's brief, reference is made to the Grounds of Appeal, stating that there are nineteen grounds, but that they, however, "comprise actually only three". The Grounds of Appeal are so extensive (covering nine pages of the State of the Case, pp. 53-61), that counsel felt that it would unwarrantedly expand the limits of the brief if they were reprinted therein in full, and hence in the main brief, at page 7, merely referred the Court to the pages where they were printed in the Case. In view of the oft-repeated rule of this Court, respecting the necessity of setting forth in full the questions or answers and the parts of the charge of the Court objected to, *totidem verbis*, in this present case the verbosity of the Grounds seems unavoidable.

State Highway Commission v. Zyk, 105
N. J. Law 156;

*Form of Grounds of Appeal appended to
Practice Act of 1912* (P. L. 1912, p.
416), as follows:

“The following questions were admitted:

6. To the witness G. H. (Copy the questions.)

7. The Court charged the jury. (Copy the parts of the charge claimed to be erroneous.)”

On page 8 of the brief, respondent confuses the test of *regular* and *casual* employment. It is respectfully submitted that the Trial Court fell into the same error. It was apparently conceded upon the trial that plaintiff's employment by defendant was *not in connection with the employer's business* (Case, p. 259, lines 21-24; p. 260, lines 1-24).

And, as the Court stated to the jury (Case, p. 259, line 21) the determination of the question whether or not the employment was *casual* depended upon whether the employment was *regular, periodic or recurring*. That is the language of the statute. (Quoted on page 9 of respondent's brief, and on page 13 of our main brief.)

Yet, in the charge to the jury, the Court departs from the test laid down by the statute, and refers in several parts of the charge to the *chance or accidental* features of the employment (Case, p. 257, lines 32-35; p. 259, lines 27-30; p. 260, lines 1-24). The *chance or purely accidental* features of the employment, however, apply only when the employment is *in connection with the employer's business*. That explains the decision in *Thompson v. Wagner*, 103 N. J. Law 230, cited at the top of page 12 of respondent's brief. Counsel for the respondent, however, again falls into the fallacy of arguing that it is the same in the present case, and begs the question by asserting that “it is an example of casual employment arising by chance, just as in the present case the

illness of the permanent cook arising by chance caused the employment of the plaintiff". The illness of the permanent cook did not arise by chance, as pointed out by the testimony quoted *supra*. She had been ill for some time, working under difficulties, and finally Mrs. Eberstadt told her she should take a month's vacation. That was on a Saturday. It was not until the following Wednesday that the plaintiff was employed. Meantime, the household ran right on. Where is the element of *chance* or *purely accidental* occurrence here? But that, after all, is not the test where the employment occurs *not in connection with any business of the employer*, as here. There the test is, as pointed out *supra*: Was the employment *regular, periodic or recurring*? Here it was all three. It was *regular* in that it pertained to the regular duties of the household, in which the employment was made. This is the meaning of *regular* as stated by the Court in the case of *Stillman v. Common Pleas*, 139 Atl. Rep. 705, where plaintiff was engaged as a nurse and for housework for two weeks and further uncertain time. Petitioner had been accustomed to this sort of service, sometimes engaging for domestic work generally, and sometimes as seamstress.

The Supreme Court, at page 706, held that:

"It was for a definite period of two weeks, with an uncertain and indefinite period added thereto. The petitioner was bound to continue in that work for such a period, *and would have been liable in damages if she had quit. The work to be done was of a regular character, being ordinary housework. The*

work was of a kind usually done by petitioner, although not with strict regularity. For the period for which she was engaged, however, she was in every sense a regular servant in the household of the prosecutor, within the requirements of the Workmen's Compensation Act, as amended in 1919, p. 211."

In *Cantwell v. Delaney*, 10 N. J. Misc. Rep. 783, aff. 110 Law 554, the petitioner was employed as a nurse for "three weeks" and such indefinite time as needed. Her employment was Held—Regular. Work was of such a character as to constitute her a regular employe in the household of prosecutor (citing *Stillman v. Common Pleas, supra*).

In *Schaeffer v. DeGrottola*, 85 N. J. Law 444, Schaeffer, the employer, said to petitioner: "Come Monday morning, I will give you some work to shave the skins". He had twenty odd dozen skins of a certain kind, and was trying out a new line of goods. He had no expectation of having any more of the same kind. His regular business was a different kind. The twenty odd dozen was not a full day's work. He was injured at 11 a. m. the first day he worked for Schaeffer. Schaeffer had also said the price would be "fifteen cents a dozen, and that if the petitioner did better work, the price would be sixteen cents".

The Supreme Court held:

"If the trial judge believed this testimony, as he had the right to do, it was at least a fair inference that the intent was not to limit the work to the twenty dozen skins of the special kind, but to give the petitioner employment at piece work in Schaeffer's regular business without limit as to time. Such employment, we think, would not be casual."

In *Price v. Price*, 154 Atl. Rep. 323, aff. 109, Law 349, petitioner had been employed in his brother's business prior to February 1, 1928. The business was then closed out, and petitioner ceased to work for him. But on this occasion the defendant needed help and called upon his brother.

Petitioner was injured while on respondent's truck, while returning home after finishing the job on hand of moving furniture.

Held:—The employment was *regular*, not *casual*.

Mullen v. Walker, 105 N. J. Law 199, 200, was an action at law for personal injuries. Plaintiff contended employment was casual.

Mr. Justice (now Chancellor) CAMPBELL, speaking for this Court, said:

“On May 4th, because of the advertisement of respondents, he applied to them for work, and was informed that such work as they then had to offer him was not permanent, but consisted in unloading one car-load of flour from the car to their warehouse.

“This employment he accepted and worked that day from one p. m. to four-ten p. m., and was paid \$3.

“He was informed by respondents that they expected another car within two or three days and was asked by them if he liked the work, and if he would care to work in unloading such other car. He replied that he would if he then had no regular employment, and gave to respondents his home address.

“On May 6th respondents left word at his home for him to report to their place of business the next day at eight a. m. Being still out of employment he did so, and found that they had another car for unloading, accepted the employment, and was directed to remove

the bags of flour from the car and pile them at a certain place in the warehouse, making piles as high as the ceiling if possible. He was directed to this work in connection with a foreman or other employe of respondents.”

He was injured while piling the bags.

This Court held:—The employment was not casual. Non-suit affirmed.

In *Scott v. Payne Bros., Inc.*, 85 N. J. Law 446, petitioner was employed for an indefinite period at \$5. per day to work on a contract for the erection of a steel building. He had been working a week when the accident happened. Award affirmed.

The Supreme Court, per SWAYZE, J., said:

“This was not a case of casual employment. The petitioner was employed in the regular business of the defendant, and likely to be retained for some time, and as long as the work remained unfinished. It was not a mere temporary, accidental employment. * * *

“The man does not cease to be an employe because at certain instants of time he is not actually engaged in his work. Employment within the meaning of the statute refers rather to the contract than to the labor done in pursuance of the contract. * * *

“The Workmen’s Compensation Act provides, in section 2, an elective scheme to which neither employer nor employe are obligated to assent. If they do assent, whether expressly or by the implication of the statute, *they assent to the whole scheme*; a part of that scheme is that the decision of the trial judge as to all questions of fact shall be conclusive and binding; in effect the agreement is that the compensation shall be such as the trial judge shall determine, subject to

the review by this court of questions of law. The evidence permitted the finding that the injury would last for one hundred and four weeks. We find no legal error in this."

Plaintiff's work in the present case was also *periodic*, from day to day for a period starting on Wednesday and continuing "over Sunday", according to plaintiff's own version of it. It was also *recurring* day by day during that same period.

It is the *work* for which the employe is employed that must be *regular*, not the *act* of employment. That is clearly pointed out in the cases quoted next *supra*.

There is no adjudicated case that makes the test of *regular* or *casual* employment to depend upon the factors *permanent* or *temporary*, as indicated by the Trial Court and argued by counsel for respondent. Nor is the length of time for which the employment is made, the test.

Bosco v. Segal, 4 N. J. Misc. 951, is cited at page 13 of respondent's brief, as authority for the proposition that where the nature of the employment of plaintiff was in dispute, *i. e.*, whether *regular* or *casual*, it was for the jury to determine the issue.

It is to be noted, however, that in that case the question of jurisdiction of the common law court to determine that question was not raised nor adjudicated. Neither does it appear in that case that the Court countenanced the proposition that it was for the jury to determine, as a question of law, the nature of the employment when it was not in dispute. It was the *facts* that were in dispute there, not the *law*. In the present case, we are arguing that, on the case presented by plaintiff, the employment was regular. The Trial

Court submitted to the jury the determination of an issue of law, *i. e.*, whether the employment was *regular* or *casual*, assuming, and charging, that if plaintiff's version were true, it was *casual*, and if defendant's were true, it was *regular*. Therein lies the error. It was *regular* in either event, and was so urged by defendant upon the motion to dismiss or to direct (Case, pp. 181, 255).

It is the jury's function ordinarily to determine the facts, but from those facts, as so determined, it is the Court's function to determine the law.

The mere circumstance that the Court made no point of the jurisdictional question in *Bosco v. Segal*, *Watson v. Stagg*, *Boyle v. Van Splinter*, and *Damato v. De Lucia*, cited *supra*, does not warrant the conclusion that the decisions determine that the common law court is to exercise jurisdiction through the medium of a jury, as distinguished from the Workmen's Compensation Bureau, as argued by respondent. It does not appear that the question of jurisdiction was either raised, considered or determined. It was doubtless as expressed by Mr. Chief Justice GUMMERE (who also sat in the *Bosco* case), in speaking for this Court in *In re Roebbling's Estate*, 91 N. J. Eq. 72, at page 75:

“It seems clear to us from what has been said that the question of jurisdiction was neither mooted on the argument nor considered later by the court; for, it can hardly be conceived that a matter so vital as the power of the legislature to strip the supreme court of one of its most important functions would have been passed over without a word indicative of the view of this court on the subject. The only explanation is, that none of the astute counsel who argued these cases, and none of the members of the court as it was

constituted at the time of the various arguments, perceived that the question of our jurisdiction was involved in the decisions, and that the court proceeded to the consideration of the causes without giving thought to so important a matter. In this situation we have no hesitation in declaring that our prior action provides no precedent which should be considered as controlling by us in the present case."

Page 8 of respondent's brief states that:

"If Mary Butler was a casual employee, her suit was well founded. If she was a regular employee, she should then have proceeded in the Compensation Bureau. This issue was submitted to the jury."

Therein, we respectfully contend, lies the basic error in this case. It should not have been left to the uncertainty of a technically unlearned jury to determine this fundamental legal issue. Either the Court should have decided that issue itself, as a matter of law, on the facts before it, or it should have dismissed or stayed the action, so that that issue could be first determined by the Workmen's Compensation Bureau, the tribunal created by the Legislature to deal with and administer the legal rights of employers and employes, as a part of a great nation-wide, if not world-wide, social movement and philosophy, subject to review ultimately by the Supreme Court on certiorari, where the whole case could be reviewed and determined, rather than on appeal in a common law action, where only errors of law of the lower court are reviewable.

On page 21 of respondent's brief, it is stated that "the chauffeur, Lauder, was not engaged in the home nor performed any duties therein".

And on page 22, it is stated that "there is no proof anywhere in the case that Lauder was an employe of the defendant, Eberstadt. There was no proof that Lauder received orders from either Mr. or Mrs. Eberstadt".

In paragraph 1 of the Complaint, plaintiff alleges that she was riding in a certain Packard touring car, owned by the defendant, and which was then being driven and operated by Charles A. Lauder, the servant or agent of the defendant, at the time of the accident (Case, p. 2). This was admitted by the defendant in both the Answer and the Amended Answer (Case, pp. 5 and 6). What the pleadings admit it is not necessary to prove (P. L. 1912, p. 388, Rule 20).

“20 statements not denied are admitted.

Every material allegation of fact in a pleading, which is not denied by the adverse party, is deemed to be admitted, unless the latter avers that he has no knowledge or information thereof sufficient to form a belief.”

In *Osborne v. Consolidated Stone &c. Co.*, 109 N. J. Law 590, Mr. Justice CASE, speaking for the Supreme Court, at pages 593, 594, said:

“The petition and answer form the method, and the only method, by which a triable issue, under the statute, may be framed. They are, in a measure, comparable to the pleadings in an action at law. They constitute a part of the record of the cause. * * *

At the close of the case the situation was, therefore, that knowledge of the accident was admitted by the employer; the employe had, under oath, asserted the giving of notice; the employer had not made denial thereof though it was under the statutory duty to do so if the notice had not been given; and the employer had solemnly averred a distinctly different

proposition as its reason for denying liability. Then, without theretofore intimating any change of position, the employer moved a dismissal of the case, naming as a ground that the accident had not been reported within ninety days.

"It was held by the Court of Errors and Appeals in *State v. Scott*, 104 N. J. L. 544, an action at law, that where the pleadings contained an admission from which the party had not sought to be relieved the trial judge was quite justified in dealing with the case conformably to such concession. Without attempting to apply the rules of law pleading to proceedings under the Workmen's Compensation act, we nevertheless think that the common sense of the principle stated in the Scott case serves equally to dispose of the question before us. We consider that the contents of the answer, viewed in the light of the statutory requirements, were tantamount to an admission of actual and timely knowledge by the employer and also of the giving of due notice by the employe, and that the commissioner was thereby justified in his factual finding and in his denial of the employer's motion to dismiss."

Upon the trial, plaintiff called the defendant, Rudolph Eberstadt, as a witness and established affirmatively that although Mrs. Eberstadt, his wife, may have in fact hired and discharged the household servants, and looked after the running of the home in general, nevertheless she did so on his authority and as his agent. This was essential to plaintiff's case, if she was to hold the defendant liable, for manifestly Mrs. Eberstadt had attended to the actual hiring of plaintiff (Case, pp. 66-67).

It was also essential to plaintiff's case if she were to hold defendant liable, to establish the fact that Lauder, who was driving the automobile at the time of the accident and whose negligence she alleged was the cause of her injuries, was defendant's employe, and for whose acts defendant would be liable *respondeat superior*.

If, therefore, those two propositions have not been established by the evidence, then there is no basis of law upon which to found and sustain the judgment in favor of the plaintiff now under review and if it be true, as stated in respondent's brief at page 22, that "there is no proof anywhere in the case that Lauder was an employe of the defendant, Eberstadt", then, upon the face of the record, the judgment in favor of the plaintiff under review is erroneous, cannot be sustained in law, and should be reversed and set aside.

On the other hand, however, in addition to the allegations and admissions in the pleadings and the testimony of Mr. Eberstadt above referred to, Lauder himself testified (Case, pp. 182, 183) as follows:

"Direct examination by Mr. Hartpence.

Q. Where do you reside? A. 19 North Jefferson Street, Orange, New Jersey.

Q. What is your occupation? A. Chauffeur.

Q. How long have you carried on that occupation? A. I am presently employed two years in the same place.

Q. How long altogether have you driven automobiles? A. Approximately about 10 years.

Q. By whom were you employed and where did you work in May, 1931, at the time of this accident? A. For Mrs. Rudolph Eberstadt, in West Orange.

Q. Were you employed there as chauffeur?
A. Yes, sir.

Q. In the family? A. Yes, sir.

Q. How long had you been so employed?
A. About two months.

Q. About two months prior to the accident? A. Yes, sir.

Q. Where did the accident take place? A. On the Harrison Turnpike, in Kearny.

Q. Where had you been and where were you going to? A. From Remsenburg, Long Island, to West Orange.

Q. When had you gone to Remsenburg? A. The Thursday previous to the accident.

Q. On what day did the accident happen?
A. Sunday.

Q. Had you driven an automobile out to Remsenburg? A. Yes, sir, a Packard touring car.

Q. Was that the same car you were driving at the time of the accident? A. That is right."

And in the testimony of Mr. Eberstadt (Case, p. 67) who was plaintiff's own witness, it is stated that:

"By Mr. Parsons.

Q. That's what I mean. May I ask you with reference to the servants of the house—who hires them? A. My wife.

Q. You have given her authority to hire the servants, have you? A. I don't know, I assume you mean—well, the usual relations between a husband and wife—she runs the house.

Q. You have granted her that authority?
A. Yes.

Q. You gave her authority to make arrangements with the servants? A. Yes.

Q. You gave her authority to hire and discharge servants? A. Yes.

Q. Did you give her authority to make arrangements about the employing of servants?

A. I did, yes.

Q. May I ask you generally, Mr. Eberstadt, if your wife is your agent so far as refers to the servants in the house—the hiring and discharging and so on—so far as that is concerned? A. Yes.”

It seems clear, therefore, that the plaintiff and the chauffeur were fellow-servants of the defendant. The cases cited in our main brief at page 18 would seem to admit of no doubt on this point. See also *Curley v. Hoff*, 62 N. J. Law 758, where Mr. Justice COLLINS, speaking for this Court, reviews the subject and the authorities.

On this subject, the Court of Appeals of New York has recently decided a case which is so strikingly similar to the case at bar that an outline of the facts and conclusions of the Court are here given.

Fay v. DeCamp, 257 N. Y. 407 (1931) Ct. Ap. CRANE, J.

DeCamp lived at 952 Fifth Avenue, New York City. He had establishments at Rye and Old Forge, N. Y. He had numerous servants and employes.

Margaret Fay was the upstairs chambermaid to take care of rooms. Other servants did cooking and waited on the table. “The defendant also had an automobile and a chauffeur used for domestic service, as distinguished from business employment.”

On August 6, 1926, the help left Rye for Old Forge, and were being driven in defendant’s car,

operated by his chauffeur, when the injury to plaintiff occurred.

There was workmen's compensation insurance, but for some reason it was not enforceable, and

“Miss Fay therefore elected to bring this action to recover at common law against her employer for the negligence of his chauffeur, and the question is whether she was at the time a fellow-servant with that employee.”

Much has been written since *Priestly v. Fowler*, 3 M. & W. 1, and *Farwell v. B. & W. R. R. Co.*, 4 Metc. 49.

“The underlying principle is that the plaintiff is precluded from recovery wherever the functions which he and the negligent co-employee were discharging, although not identical or even similar in character, were yet such that the two servants were contributing directly to the common object of their common employer in that enterprise for which their services were engaged, or, to employ a terminology which is frequently found in the books, the injured servant's right to recover does not depend upon the fact that he may have been in a different department of the service from the delinquent. * * *

“Both the chauffeur and the maid were engaged by the employer in maintaining the home and place of abode, the maid in attending to her department in keeping the house in order, and the chauffeur in transporting the occupants to and from the house or from one home to the other. Both were performing work reasonably connected with the running and maintenance of the defendant's summer places in accordance with his tastes. Had the employer been carrying on a business in

which he employed the chauffeur, and while so engaged in that business the chauffeur had run over or injured a domestic servant, we can see clearly that they would not be fellow-servants.

“The plaintiff had not ceased her employment or terminated her duties. She was the upstairs maid at Rye and was to be the maid at Old Forge. To get there she was being transported in her employer’s car by another employee of his. The risks connected with such transportation in order to perform her duties and to continue her daily tasks were reasonably to be anticipated and considered when entering his employ.

“Such we find to be the ruling in *Erjauschek v. Kramer* (141 App. Div. 545), where the maid was injured while riding with her employer and his wife in an automobile driven negligently by the chauffeur. The relationship, we have held in numerous cases, remains unbroken while the servant is in the course of transportation to and from his place of employment where the parties by their contract of hiring inferentially so stipulated. Seldom do we find an express stipulation for transportation; rather, it is gathered by implication from the duties and surrounding circumstances. (Cases cited) * * * Neither is it necessary that the servant be under compulsion to use the afforded transportation. (Cases cited) * * * What is usually or customarily done by persons shifting from city to summer residence in connection with transporting the household is a matter which must be considered.” * * *

(Cases cited showing where fellow-servant rule has been held to apply.)

<i>Housekeeper</i>	fellow-servant with	<i>Son of employer</i> carrying coal. (86 Neb. 180.)
<i>Scrub woman</i>	“	<i>Night watchman</i> (146 App. Div. 642.)
<i>Chambermaid</i>	“	<i>Housekeeper</i> (183 Mass. 296.)
<i>Laundress</i>	“	<i>Chauffeur</i> (160 Mass. 45.)

But a *servant on the way to church* NOT a fellow-servant with *chauffeur*; on the theory that that was her own affair. (87 Conn. 354.)

(Cf. *O'Mara v. Kirch*, *supra*, where it was part of the contract of hiring.)

“The facts vary in every case, but within the principle to which the decisions have attempted to adhere, we think the maid in this case and the chauffeur were fellow-servants at the time of the accident, and that the plaintiff, under this common law rule, now firmly established in the law, cannot recover.”

Verdict in favor of plaintiff reversed, and Complaint dismissed.

Unanimous. Cardozo, Ch.J., and Pound, Lehman, Kellogg, O'Brien and Hughes J. J., concur.

(Full Court.)

But respondent at pages 18, *et seq.*, argues that the fellow-servant rule is not applicable, and that it has been abolished in this State. That argument, however, runs counter to the decisions of this Court, cited on page 18 of our main brief, rendered subsequent to the enactment of the Workmen's Compensation Act, where it was held

in the several instances there referred to that the defences of fellow-servant and assumed risk still exist in actions at common law not covered by the Workmen's Compensation Act.

In *Imbesi v. American Ice Co.*, 101 N. J. Law 182, plaintiff was injured while helping in the ice-cutting room. Stood on cakes. Foreman turned hose on them. Caused plaintiff to slip. Action at law. Non suit: affirmed. This Court *held*—

(1)—Workmen's Comp. Act applied;

(2) —

“The answer to the second ground is that the undisputed facts show that appellant's injury was caused by the act of a fellow-servant, and that the non-suit might also have rested upon that reason.”

In *Ducjack v. N. J. Zinc Co.*, 104 N. J. Law 575, plaintiff contracted rheumatism in mine. Not a compensable disease. Suit at common law. This Court *held*.—Assumed risk. Non suit affirmed.

In *Downing v. Oxweld Acetylene Co.*, 112 N. J. Law 25, xii Adv. Repts. No. 3, Jan. 20, 1934, Mr. Justice HEHER, speaking for the Supreme Court, said, at page 30:

“It is not to be presumed that the legislature intended to deprive the injured workman of his common law remedy, in the event that he suffered, as a result of the negligence of his employer, an occupational disease not specified in the Compensation Act. Such an intention must be expressed in clear and unequivocal language. The term ‘compensation’ should not be construed to embrace damages recoverable for breach of a common law duty, unless that legislative purpose is indubitably expressed.”

The provisions of Section 1 of the Act referred to by respondent, only apply to proceedings for *compensation* instituted under that section. The Statute can have no broader application. This Court has so held in the cases cited *supra*. The Statute automatically places employer and employe under Section 2 of the Act, where the Act itself covers the relation, and it is only by one party or the other giving notice that he will not be bound by that Section, that Section 1 becomes operative.

Where, however, as here contended by plaintiff, the Workmen's Compensation Act does not apply at all, and the rights of the parties are to be determined at common law, in a common law action (which plaintiff asserts this action to be (Respondent's brief, pp. 15, 19, 21)), the common law defences are still open to the employer.

What plaintiff is seeking to do is to assert the right to maintain this action at common law, because the alleged casual nature of her employment takes here outside the Statute, and at the same time she is endeavoring to claim the benefit of Section 1 of the Statute by asserting that by that Section the defence of fellow-servant has been abolished. In other words, she is attempting to claim some benefit under the Statute, while disavowing any burden under the Statute. Either her rights are at common law or they are under the Statute. If at common law, then defendant's common law defences remain. If under the Statute, then she automatically comes under Section 2, because neither party has disavowed Section 2 in a way that places the parties under Section 1. Under Section 2, plaintiff is entitled to the compensation provided by that schedule, in accordance with the nature and extent of her injuries, to be fixed

by the Workmen's Compensation Bureau in the first instance, subject to review ultimately by the Supreme Court and this Court. Defendant has been willing to accord her this right from the beginning.

As was said in the case of *Smith v. International High Speed Steel Co.*, 98 N. J. Law 574, which was an action for death of employe of defendant company, resulting from inhaling steel particles thrown off in the process of boring steel tubing:

“The appeal is rested solely upon the proposition that the Workmen's Compensation law of this state provides the exclusive remedy for a death resulting from the cause we have indicated.” * * *

This Court quoted from the opinion of Mr. Justice BERGEN, in the Supreme Court, as follows:

“ ‘The defendant says the complaint is bad because under the Workmen's Compensation act all injuries are to be recovered under it, unless service under section two is protested. This is true, *but the injury must refer to such cases as are subject to the statute.* I think a disease, such as is described in the complaint, is not the result of an accident, and that a recovery for injuries therefrom is not confined to the Workmen's Compensation act. Where no specific time can be fixed when an accident is claimed to have occurred there is no accident within the meaning of the compensation act. *Liondale Bleach Works v. Riker*, 85 N. J. L. 426. *The injury not falling within the Compensation act the common law remedy is not affected by it.* The motion to strike out will be denied with costs.’ ”

“We concur in the views expressed in that opinion, and affirm the judgment appealed from for the reason stated therein.”

That the Workmen's Compensation Bureau should have jurisdiction in the first instance to determine the question of the nature of the employment of plaintiff and the rights of the respective parties, employer and employe, has been argued at some length in our main brief. It does not seem to be appropriate or necessary to repeat the argument here. We are, however, referring to several recent decisions of this Court, which we desire to note here in addition to those referred to at page 10 of the main brief.

Textileather Corp. v. Gt. Am. Indem. Co.,
108 N. J. Law 121;

Sigley v. Marathon Razor Blade Co., 111
N. J. Law 25;

Helminsky v. Ford Motor Co., 111 N. J.
Law 369;

Tutino v. Ford Motor Co., 111 N. J. Law
435.

Many other adjudications of our Courts might be cited and reviewed, but those herein referred to may be sufficient to illustrate and demonstrate the position of appellant in this case. While it is not claimed that the Legislature has the power to deprive the Supreme Court of its common law powers and prerogatives, still it is asserted that in many instances the Courts have acquiesced in the legislative regulation of those powers, and particularly where, as in the creation of special tribunals, the power of the Court ultimately to review the proceedings of such inferior tribunals is not interfered with. A number of such instances are referred to at pages 10 and 11 of our main brief. Others have come to our attention since that brief was written, but those mentioned will suffice to illustrate our argument in this respect.

Still others may occur to the Court in the consideration of this case.

What we urge is, that this Court, in harmony with the many judicial expressions respecting the creation of the special tribunal in which the Legislature has vested the administration and adjustment of differences arising between employe and employer, its history and purpose, its functions and the methods of exercising them, so sharply contrasted with the procedure of the common law tribunals, and the far-reaching economic and social, as well as legislative and judicial, principles that are vitally involved,—will take the position and establish the rule that that special tribunal—the Workmen's Compensation Bureau—shall in the first instance be the tribunal to hear and determine the jurisdictional features of such controversies, where there is a dispute involving such jurisdiction, and that the determination thereof shall not be left to the uncertainties and vagaries of juries in common law actions, who ordinarily have had no training in the philosophy or the law involved and have no intellectual concept of the system being administered.

Is it too much to say and to prophesy that if this rule be not adopted, the whole fabric of that system is in danger of being torn down and its machinery eventually wrecked? And with the wrecking of it, back upon the common law courts will come the whole enormous mass of controversies now being adjusted through the administration of that special tribunal. All that has to be done is for employe or employer to raise a jury question respecting the jurisdiction of the Bureau or the applicability of the Compensation act, by some conflict of evidence or otherwise (and nothing is easier), and then the question of whether

or not the Workmen's Compensation tribunal is to function is to be determined by the jury, composed of twelve people who technically know nothing about it. All that they see is, that a plaintiff in a suit claims to have been injured, that for some reason the defendant does not want them to pass upon the rights of the parties but the Court has said they may, and then they proceed, as in this case, to demonstrate to an employer what they can do for an injured employe, and they do it. And particularly will they do it when, as in this case, it is made plain to them that the plaintiff may receive a larger amount at their hands than he or she could receive in the Compensation tribunal. Therein lies the danger and the unwisdom of submitting what are in their nature *legal issues* to a jury for determination.

Either the Compensation Bureau should be left untrammelled in the administration of the Compensation act, or the whole movement should come back to the common law courts. In the light of the history, purpose and experience of this great social and economic movement, the latter alternative seems *unthinkable*, as was expressed by Mr. Justice BODINE, speaking for this Court, in *Textileather Corp. v. Gt. Am. Indem. Co.*, 108 N. J. Law 121, *supra*, where, at page 123 of the report, he said:

“The legislature in setting up a plan for compensation for occupational diseases intended to provide a complete and workable arrangement for the compensation of those disabled by occupational diseases, and also for suitable provisions for their dependents in the event of death. * * *

It is unthinkable that the legislature should have contemplated that in such instances the

recovery of compensation should be defeated. The legislature has properly assumed a benevolent care for workmen. The Compensation act has proved of inestimable benefit not only to employer and employe, but also to the state generally. The legislature must have intended that compensation should be determined, subject to procedural limitations, when the disability or death occurred, and at no other time. Otherwise, the whole plan would prove ineffective.”

And that is not all. With the fall of this legislative plan will also come inevitably the collapse of the whole system of special tribunals to which reference has been made. As they now stand, recourse must be first had to them in their respective spheres before the Supreme Court and this Court will entertain jurisdiction of them, and it is the expressed judicial policy to then only disturb their findings in case of palpable misjudgment. Shall the common law courts be again overwhelmed with the flood of litigation now handled by those various special tribunals in the first instance? The great mass of those controversies never get beyond the special tribunals, and the disputes end there; so that while they still are subject to ultimate review in the Supreme Court and this Court, but comparatively few are ever carried to the dockets and calendars of those appellate courts.

It seems to us that what we ask harmonizes best with the other machinery of our judicial system, and we respectfully urge the adoption of the rule which we have here suggested and advocated.

The clear purport of our argument is that our Courts have recognized the legislative policy—the public policy—set up by the legislation pertaining

to Workmen's Compensation, as being a branch of our jurisprudence to be vested in the special tribunal avowedly created for the purpose of administering it, and that this public policy cannot be varied or set aside by the acts of the parties and should not be brought into conflict with the common law courts.

Moore v. Derees, 97 N. J. Law 378, 385,
supra;

Osborn v. New Amsterdam Casualty Company, 111 N. J. Law 358, 361.

The grounds of appeal are all covered by appellant's argument. For convenience they may be grouped as follows:

- (1) Grounds 1, 3, and 4;
- (2) " 2, 6 and 7;
- (3) " 3, 5, 6, and 7;
- (4) " 4, 15, 16, 17, and 19;
- (5) " 5, 7, 17, and 19;
- (6) " 6, 5, 14, 15, 16, 17, and 19;
- (7) " 7, 5, 6, 15, 16, 17, and 19;
- (8) " 8, 3, 9, 14, 15, 16, and 18;
- (9) " 10, 1, 2, and 4;
- (10) " 11, 12, and 13;
- (11) " 18, 8, and 9.

Respectfully submitted,

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[6326]

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