

ligent by men of ordinary care and prudence, and contributing as it did to his injury, under principles well established in this state he is debarred from a recovery. If he had not been negligent he would not have received any injury from negligence arising from any other source."

*Smith v. Van Sumer, 58 N. J. 190.*

It is submitted, therefore, that the trial court was not only justified, but indeed required under all the evidence to hold that as a matter of law the plaintiff was guilty of contributory negligence.

POINT III

The trial court properly directed a verdict for the defendant and the judgment should be affirmed.

Respectfully submitted,

DeVos Tomlinson,  
Wm. A. Barkalow,  
Of Counsel with  
Defendant-Respondent.

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*Thomas vs. Devine, et al.—Summons.*

**SUMMONS.**

STATE OF NEW JERSEY: ss.

To Charles P. Devine and William  
Bartlett, GREETING:

(L. s.) You are hereby summoned to answer the annexed Complaint of George Thomas, by his next friend Harold J. Thomas, and Harold J. Thomas, individually, in an action at law in the Supreme Court, and TAKE NOTICE that unless you file an Answer to said Complaint with the Clerk of the Supreme Court at Trenton, within twenty days after service upon you of this Writ and the annexed Complaint the Plaintiffs may proceed in this suit, and Judgment may be entered against you.

10

20

Witness, WILLIAM S. GUMMERE, Chief Justice  
of the Supreme Court at Trenton, this 31st day  
of July, 1926.

EDWARD J. KELLEHER,  
Clerk.

JOHN W. LYNES,  
Attorney for Plaintiffs.

30

40

COMPLAINT.

New Jersey Supreme Court

UNION COUNTY.

10

GEORGE THOMAS, by his next friend, HAROLD J. THOMAS, and HAROLD J. THOMAS, individually,

Plaintiffs,

vs.

CHARLES P. DEVINE and WILLIAM BARTLETT,

Defendants.

Action at Law.

Complaint.

20

The plaintiffs residing in the City of Elizabeth, County of Union, State of New Jersey, say that:

1. At all the times hereinafter named the defendant, Charles P. Devine, was the owner of an automobile displaying the license #U5777-1926 New Jersey.

30

2. At all the times hereinafter mentioned the defendant, Charles P. Devine, through his servant, agent or employee, William Bartlett, managed, operated and controlled said automobile displaying license #U5777-1926 New Jersey.

40

3. That on or about the 5th day of April, 1926, the plaintiff, George Thomas, was lawfully crossing Caldwell Place at the intersection of South Union street, both of which are public highways in the City of Elizabeth, County of Union, and State of New Jersey.

4. That at the said time and place as aforesaid and while the said George Thomas, one of the plaintiffs, was in the act of crossing said highway, the defendant, Charles P. Devine, through his servant, agent or employee, William Bartlett, without notice or warning, drove his said automobile into, against and upon the plaintiff, George Thomas.

10

5. That as a result of the driving the said automobile into and against the plaintiff, George Thomas, the plaintiff, George Thomas, was thrown to the ground and run over by the said automobile and received a fracture of the left leg, and was bruised, contused, wounded and injured in other parts of the body, and was as a result thereof confined to the hospital for a long period of time and will in the future continue to suffer from the said injuries.

20

6. The plaintiff, George Thomas, as a result of the said driving of the said automobile into and against him and of the injuries resulting therefrom, has received a permanent injury and a shortening of the left leg.

7. The plaintiff, George Thomas, has since continually suffered and will in the future continue to suffer from said injuries.

30

8. The plaintiff, George Thomas, was in the exercise of due care at the time said collision occurred.

9. It was the duty of the defendants to so control, manage and operate their automobile so as not to have driven into, against and upon the plaintiff, George Thomas.

10. The plaintiff, George Thomas, at the time of said collision was under the age of fourteen years, to wit: nine years of age.

40

*Thomas vs. Devine, et al.—Complaint.*

11. Said injuries to the plaintiff, George Thomas, were due to the carelessness, negligence and recklessness of the defendants. The carelessness, negligence and recklessness of the defendant, William Bartlett, consisted in (a) driving the automobile without being licensed to do so; (b) driving the automobile while in an intoxicated condition; (c) in not observing the rights of the plaintiff, George Thomas, in and to said highway; (d) in not giving any notice or warning as he approached said intersection; (e) in driving said automobile without the brakes being in a proper condition; (f) in approaching said street intersection at an unsafe rate of speed; (g) in approaching said street intersection without having the brakes properly set; (h) in not using due care for the safety of others using the said highway at the said time and place. The carelessness, negligence and recklessness of the defendant, Charles P. Devine, consisted in (a) allowing the defendant, William Bartlett, to operate said automobile without a license; (b) allowing the defendant, William Bartlett, to operate said automobile when in an intoxicated condition; (c) permitting the said William Bartlett to operate said automobile when the brakes were not in a proper condition; (d) allowing the said William Bartlett to operate said automobile at an unsafe rate of speed; in not giving a warning of the approach of said automobile and in not observing the rules of the road.

12. The plaintiff, Harold J. Thomas, the next friend and father of the plaintiff, George Thomas, as a result of the negligence of the defendants, and the injuries resulting to George Thomas, as aforesaid, was put to great expense in procuring hospital services, medical attendance and

*Thomas vs. Devine, et al.—Complaint.*

medicine and in the loss of time in caring for the said George Thomas and will in the future be put to other and further expense as a result thereof.

13. The plaintiff, Harold J. Thomas, demands of the defendants the sum of \$3,000.00.

14. The plaintiff, George Thomas, demands of the defendants the sum of \$15,000.00.

JOHN W. LYNESS,  
Attorney for Plaintiffs.

*Thomas vs. Devine, et al.—Answer.*

**ANSWER.**

**NEW JERSEY SUPREME COURT.**

UNION COUNTY.

10	GEORGE THOMAS, by his next friend, HAROLD J. THOMAS, and HAROLD J. THOMAS, indi- vidually,	Plaintiffs,	Action at Law.
	<i>vs.</i>		Answer.
	CHARLES P. DEVINE and WILLIAM BARTLETT,	Defendants.	

20 The defendant, Charles Devine, residing in the City of Elizabeth, County of Union and State of New Jersey, by way of answer says:

1. He admits paragraph 1 of the complaint.
2. He denies the allegations in paragraphs 2-3-4-5-6-7-8 and 9 of the complaint.
3. The defendant has not sufficient knowledge of the allegations in paragraph 10 and leaves the
- 30 plaintiff to his proof.
4. He denies the allegations in paragraphs 11 and 12 of the complaint.

**FIRST SEPARATE DEFENSE.**

The carelessness and negligence of the plaintiff, George Thomas, was the proximate cause of the alleged accident.

*Thomas vs. Devine, et al.—Answer.*

**SECOND SEPARATE DEFENSE.**

The carelessness and negligence of the plaintiff, George Thomas, contributed to the happening of the alleged accident.

**THIRD SEPARATE DEFENSE.**

10

The carelessness and negligence of the plaintiff, Harold J. Thomas, was the proximate cause of the alleged accident.

**FOURTH SEPARATE DEFENSE.**

The plaintiff, George Thomas, was at the time of the happening of the accident the agent and servant of Harold J. Thomas, and the carelessness and negligence of George Thomas, which negligence caused the accident, is imputed to the plaintiff, Harold J. Thomas.

20

**FIFTH SEPARATE DEFENSE.**

The defendant, William Bartlett, was at the time of the happening of the accident engaged in and about his own business, and was not engaged in or about the business of the defendant, Charles P. Devine.

JNO A. MATTHEWS,  
Attorney for Defendants.

30

*Thomas vs. Devine, et al.—Reply.*

**REPLY.**

NEW JERSEY SUPREME COURT.

UNION COUNTY.

10	GEORGE THOMAS, by his next friend, HAROLD J. THOMAS, and HAROLD J. THOMAS, indi- vidually,  <div style="text-align: right; padding-right: 5px;"><i>Plaintiffs,</i></div>	}	<i>Action at          Law.</i>
	<i>vs.</i>		<i>Reply.</i>
	CHARLES P. DEVINE and WILLIAM BARTLETT,  <div style="text-align: right; padding-right: 5px;"><i>Defendants.</i></div>		

20 Plaintiffs deny every allegation in the First, Second, Third, Fourth and Fifth Defense of the answer and join issue on the remainder of the answer.

JOHN W. LYNNESS,  
 Attorney for Plaintiffs.

30

40

*Thomas vs. Devine, et al.—Postea.*

**POSTEA.**

NEW JERSEY SUPREME COURT.

UNION COUNTY.

10	GEORGE THOMAS, by his next friend, HAROLD J. THOMAS, and HAROLD J. THOMAS, indi- vidually,  <div style="text-align: right; padding-right: 5px;"><i>Plaintiffs,</i></div>	}	<i>Action at          Law.</i>
	<i>vs.</i>		<i>Postea.</i>
	CHARLES P. DEVINE and WILLIAM BARCLAY,		

This case was tried before Judge Peter F. 20  
 Daly, and a jury at the Union County Circuit  
 on February 14th and February 15th, 1927. The  
 jury returned a general verdict against the de-  
 fendants and in favor of the plaintiff George  
 Thomas, in the amount of Four Thousand Five  
 Hundred and 00/100 (\$4,500.00) Dollars, and in  
 favor of the plaintiff Harold J. Thomas in the  
 amount of Five Hundred and 00/100 (\$500.00)  
 Dollars.

PETER F. DALY, 30  
 Judge.

Filed February 17, 1927.

40

*Thomas vs. Devine, et al.—Notice of Appeal.*

**NOTICE OF APPEAL**

NEW JERSEY SUPREME COURT.

UNION COUNTY.

10	GEORGE THOMAS, by his next friend, HAROLD J. THOMAS, and HAROLD J. THOMAS, indi- vidually,    CHARLES P. DEVINE and WILLIAM BARTLETT,  	}	<i>Plaintiffs,</i>  <i>vs.</i>  <i>Defendants.</i>	<i>Action at          Law.</i>  <i>Notice of          Appeal.</i>
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20 To John W. Lyness, Esq., attorney of the above-named plaintiffs:

TAKE NOTICE that Charles P. Devine, one of the above-named defendants, appeals to the Court of Errors and Appeals in the last resort in all causes in New Jersey, from the whole of the judgment in the above-entitled cause in the New Jersey Supreme Court, Union County.

30 JNO A. MATTHEWS,  
Attorney of Defendant-Appellant,  
Charles P. Devine.

Dated July 2, 1927.

*Dilbatis vs. Devine, et al.—Summons.*

**SUMMONS.**

STATE OF NEW JERSEY: ss.

To Charles P. Devine and William Bartlett. GREETING:

(L. s.) You are hereby summoned to answer the annexed complaint of Anthony Dilbatis, by his next friend, Joseph Dilbatis, and Joseph Dilbatis, individually, in an action at law in the Supreme Court, and TAKE NOTICE that unless you file an answer to said complaint, with the Clerk of the Supreme Court at Trenton, within twenty days after service upon you of this writ and the annexed complaint the plaintiffs may proceed in the suit, and judgment may be entered against you.

20 WITNESS, WILLIAM S. GUMMERE, Chief Justice  
of the Supreme Court at Trenton, this 31st day  
of July, 1926.

EDWARD J. KELLEHER,  
Clerk.

JOHN W. LYNES,  
Attorney for Plaintiffs.

*Dilbatis vs. Devine, et al.—Complaint.*

**COMPLAINT.**

NEW JERSEY SUPREME COURT.

UNION COUNTY.

10	ANTHONY DILBATIS, by his next friend, JOSEPH DILBATIS, and JOSEPH DILBATIS, individually,	}	<i>Plaintiffs,</i>
	<i>vs.</i>		
	CHARLES P. DEVINE and WILLIAM BARTLETT,	}	<i>Defendants.</i>

*Action at Law.*  
*Complaint.*

20 The plaintiffs residing in the City of Elizabeth, County of Union, State of New Jersey say that:

1. At all the times hereinafter mentioned the defendant, Charles P. Devine, was the owner of an automobile displaying the License No. U5777-1926 New Jersey.

30 2. At all the times hereinafter mentioned the defendant, Charles P. Devine, through his servant, agent or employee, William Bartlett, managed, operated and controlled said automobile displaying License No. U5777-1926 New Jersey.

3. That on or about the 5th day of April, 1926, the plaintiff, Anthony Dilbatis, was lawfully crossing Caldwell Place at the intersection of South Union street, both of which are public highways in the City of Elizabeth, County of Union, and State of New Jersey.

40 4. That at the said time and place as aforesaid and while the said Anthony Dilbatis, one of

*Dilbatis vs. Devine, et al.—Complaint.*

the plaintiffs, was in the act of crossing said highway, the defendant, Charles P. Devine, through his servant, agent or employee, William Bartlett, without notice or warning, drove said car into, against and upon the said plaintiff, Anthony Dilbatis.

10 5. That as a result of the said driving the said automobile into and against the plaintiff, Anthony Dilbatis, the plaintiff, Anthony Dilbatis, was thrown to the ground and run over by the said automobile and received a fracture of the left leg, and was bruised, contused and wounded and injured in other parts of his body, and was as a result thereof confined to the hospital for a long period of time and will in the future continue to suffer from the said injuries.

20 6. The plaintiff, Anthony Dilbatis, as a result of the said driving the said automobile into and against him and of the injuries resulting therefrom, has received a permanent injury and a shortening of the left leg.

7. The plaintiff, Anthony Dilbatis, has since continually suffered and will in the future continue to suffer from said injuries.

30 8. The plaintiff, Anthony Dilbatis, was exercising due care at the time said collision occurred.

9. It was the duty of the defendants to so control, manage and operate their automobile so as not to have driven into and upon the plaintiff, Anthony Dilbatis.

40 10. The plaintiff, Anthony Dilbatis, at the time of said collision was under the age of fourteen years, to wit: thirteen years of age.

*Dilbatis vs. Devine, et al.—Complaint.*

11. Said injuries to the plaintiff, Anthony Dilbatis, were due to the carelessness, negligence and recklessness of the defendants. The carelessness, negligence and recklessness of the defendant, William Bartlett, consisted in (a) driving the car without being licensed to do so; (b) driving the car while he was in an intoxicated condition; (c) in not observing the rights of the plaintiff, Anthony Dilbatis, in and to said highway; (d) in not giving any notice or warning as he approached said intersection; (e) in driving said car without the brakes being in a proper condition; (f) in approaching said street intersection at an unsafe rate of speed; (g) in approaching said street intersection without having the brakes properly set; (h) in not using due care for the safety of others using the said highway at the said time and place. The carelessness, negligence and recklessness of the defendant, Charles P. Devine, consisted in (a) allowing the defendant, William Bartlett, to operate said car without a license; (b) allowing the defendant, William Bartlett, to operate said car when in an intoxicated condition; (c) permitting the said William Bartlett to operate said car when the brakes were not in a proper condition; (d) allowing the said William Bartlett to operate said car at an unsafe rate of speed; in not giving a warning of the approach of said car and in not observing the rules of the road.

12. The plaintiff, Joseph Dilbatis, the next friend and father of the plaintiff, Anthony Dilbatis, as a result of the negligence of the defendants, and the injuries resulting to Anthony Dilbatis, as aforesaid, was put to great expense in procuring hospital services, medical attendance and medicines and in the loss of time in caring

*Dilbatis vs. Devine, et al.—Complaint.*

for the said Anthony Dilbatis and will in the future be put to other and further expense as a result thereof.

13. The plaintiff, Joseph Dilbatis, demands of the defendants the sum of \$3,000.00.

14. The plaintiff, Anthony Dilbatis, demands of the defendants the sum of \$15,000.00.

JOHN W. LYNESS,  
Attorney for Plaintiffs.

20

30

40

*Dilbatis vs. Devine, et al.—Answer.*

**ANSWER.**

NEW JERSEY SUPREME COURT.

UNION COUNTY.

10	ANTHONY DILBATIS, by his next friend, JOSEPH DILBATIS, and JOSEPH DILBATIS, individually,	}	<i>Plaintiffs,</i>	<i>Action at Law.</i>
	<i>vs.</i>			
	CHARLES P. DEVINE and WILLIAM BARTLETT,	}	<i>Defendants.</i>	<i>Answer.</i>

20 The defendant, Charles Devine, residing in the City of Elizabeth, County of Union, and State of New Jersey, by way of answer says:

1. He admits paragraph 1 of the complaint.
2. He denies the allegations in paragraphs 2-3-4-5-6-7-8 and 9 of the complaint.
3. The defendant has not sufficient knowledge of the allegations in paragraph 10 and leaves the plaintiff to his proof.
- 30 4. He denies the allegations in paragraphs 11 and 12 of the complaint.

FIRST SEPARATE DEFENSE.

The carelessness and negligence of the plaintiff, Anthony Dilbatis, was the proximate cause of the alleged accident.

*Dilbatis vs. Devine, et al.—Answer.*

SECOND SEPARATE DEFENSE.

The carelessness and negligence of the plaintiff, Anthony Dilbatis, contributed to the happening of the alleged accident.

THIRD SEPARATE DEFENSE.

10

The carelessness and negligence of the plaintiff, Joseph Dilbatis, was the proximate cause of the alleged accident.

FOURTH SEPARATE DEFENSE.

The plaintiff, Anthony Dilbatis, was at the time of the happening of the accident the agent and servant of Joseph Dilbatis, and the carelessness and negligence of Anthony Dilbatis, which negligence caused the accident, is imputed to the plaintiff, Joseph Dilbatis. 20

FIFTH SEPARATE DEFENSE.

The defendant, William Bartlett, was at the time of the happening of the accident, engaged in and about his own business, and was not engaged in or about the business of the defendant, Charles P. Devine.

JNO A. MATTHEWS, 30  
Attorney for Defendants.

*Dilbatis vs. Devine, et al.—Reply.*

**REPLY.**

NEW JERSEY SUPREME COURT.

UNION COUNTY.

10	ANTHONY DILBATIS, by his next friend, JOSEPH DILBATIS, and JOSEPH DILBATIS, individually, <div style="text-align: right;"><i>Plaintiffs,</i></div>	}	<i>Action at Law.</i>
	<i>vs.</i>		<i>Reply.</i>
	CHARLES P. DEVINE and WILLIAM BARTLETT, <div style="text-align: right;"><i>Defendants.</i></div>		

20 Plaintiffs deny every allegation in the First, Second, Third, Fourth and Fifth Defense of the answer and join issue on the remainder of the answer.

JOHN W. LYNES,  
Attorney for Plaintiffs.

30

40

*Dilbatis vs. Devine, et al.—Postea.*

**POSTEA.**

NEW JERSEY SUPREME COURT.

UNION COUNTY.

10	ANTHONY DILBATIS, by his next friend, JOSEPH DILBATIS, and JOSEPH DILBATIS, individually, <div style="text-align: right;"><i>Plaintiffs,</i></div>	}	<i>Action at Law.</i>
	<i>vs.</i>		<i>Postea.</i>
	CHARLES P. DEVINE and WILLIAM BARCLAY,		

This case was tried before Judge Peter F. Daly and a jury at the Union County Circuit on February 14 and February 15, 1927. The jury returned a general verdict against the defendants and in favor of the plaintiff Anthony Dilbatis, in the amount of Three Thousand Three Hundred and 00/100 (\$3,300.00) Dollars, and in the favor of the plaintiff Joseph Dilbatis, in the amount of Five Hundred and 00/100 (\$500.00) Dollars.

PETER F. DALY,  
Judge. 30

Filed February 17, 1927.

40

*Dilbatis vs. Devine, et al.—Notice of Appeal.*

**NOTICE OF APPEAL.**

NEW JERSEY SUPREME COURT.

UNION COUNTY.

10	ANTHONY DILBATIS, by his next friend, JOSEPH DILBATIS, and JOSEPH DILBATIS, individually, <i>Plaintiffs,</i>	}	<i>Action at Law.</i>
	<i>vs.</i>		<i>Notice of Appeal.</i>
	CHARLES P. DEVINE and WILLIAM BARTLETT, <i>Defendants.</i>		

20 To John W. Lyness, Esq., attorney of the above-named plaintiffs:

TAKE NOTICE that Charles P. Devine, one of the above-named defendants, appeals to the Court of Errors and Appeals in the last resort in all causes in New Jersey, from the whole of the judgment in the above-entitled cause in the New Jersey Supreme Court, Union County.

JNO. A. MATTHEWS,  
Attorney of Defendant-Appellant,  
Charles P. Devine.

30

Dated: July 2, 1927.

40

*Stipulation.*

**STIPULATION.**

NEW JERSEY COURT OF ERRORS AND APPEALS.

10	GEORGE THOMAS, by his next friend, HAROLD J. THOMAS, and HAROLD J. THOMAS, individually, <i>Plaintiffs,</i>	}	
	<i>vs.</i>		
	CHARLES P. DEVINE and WILLIAM BARTLETT, <i>Defendants.</i>		<i>Action at Law.</i>

20	ANTHONY DILBATIS, by his next friend, JOSEPH DILBATIS, and JOSEPH DILBATIS, individually, <i>Plaintiffs,</i>	}	
	<i>vs.</i>		
	CHARLES P. DEVINE and WILLIAM BARTLETT, <i>Defendants.</i>		<i>Stipulation.</i>

30

It is hereby stipulated and agreed by and between the parties hereto, through their respective attorneys, that the above-entitled appeals shall be argued together.

JOHN W. LYNESS,  
Attorney of Plaintiffs-Appellees.

JNO. A. MATTHEWS,  
Attorney of Defendant-Appellant,  
Charles P. Devine.

40

Dated: July 2nd, 1927.

*Grounds of Appeal.*

**GROUND OF APPEAL.**

**NEW JERSEY COURT OF ERRORS  
AND APPEALS.**

10	GEORGE THOMAS, by Harold J. Thomas, his next friend, and HAROLD J. THOMAS, <i>Plaintiffs,</i> <i>vs.</i> CHARLES P. DEVINE and WILLIAM BARCLAY, <i>Defendants.</i>	<i>Action at Law.</i> <i>On Appeal from Supreme Court, Union County.</i>
20	ANTHONY DILBATIS, by Joseph Dilbatis, his next friend, and JOSEPH DILBATIS, <i>Plaintiffs,</i> <i>vs.</i> CHARLES P. DEVINE and WILLIAM BARCLAY, <i>Defendants.</i>	<i>Grounds of Appeal.</i>

30 The above-entitled causes were tried together in the New Jersey Supreme Court, Union County, before the Honorable Peter F. Daly, Judge of the said Court, and a jury.

The defendant, Charles P. Devine, writes down the grounds of appeal upon which he rests his appeal to set aside the verdicts rendered in favor of the plaintiffs and against the defendants and to grant a new trial of said causes:

40 1. Because the trial court erred in refusing to direct a verdict to be rendered in favor of the

*Grounds of Appeal.*

defendant and against the plaintiffs when requested to do so by the defendant.

2. Because the trial court erred in refusing to permit an answer to the following question, during the cross examination of William Barclay:

Q Have you been convicted of driving an automobile on the fifth of April while under the influence of intoxicating liquor? 10

JNO. A. MATTHEWS,  
Attorney for Defendants-Appellants.

Service of a copy of the within grounds of appeal is hereby acknowledged this 20th day of July, 1927.

JOHN W. LYNESS,  
Attorney for Plaintiffs-Appellees. 20

30

40

*Testimony.*

NEW JERSEY SUPREME COURT.

UNION COUNTY CIRCUIT.

January Term, 1927.

10 GEORGE THOMAS, by Harold J.  
Thomas, his next friend, and  
HAROLD J. THOMAS,

*vs.*

CHARLES P. DEVINE and WILLIAM  
BARTLETT.

20 ANTHONY DILBATIS, by Joseph  
Dilbatis, his next friend, and  
JOSEPH DILBATIS,

*vs.*

CHARLES P. DEVINE and WILLIAM  
BARTLETT.

30 Transcript of stenographer's notes of evidence  
in the above-entitled cause, taken before Hon.  
Peter F. Daly, Circuit Court Judge, and a jury,  
at the Union County Court House, in the City of  
Elizabeth, New Jersey, on the 14th day of Feb-  
ruary, A. D. 1927, at 3:15 P. M.

Appearances:

John W. Lyness, Esq., George R. Walsh, Esq.,  
attorneys for the plaintiffs.

John A. Matthews, Esq., Thomas M. Kane,  
Esq., (present), attorneys for the defendants.

A jury being empaneled and found satisfactory,  
they were sworn.

40 Adjourned until tomorrow, February 15, 1927,  
at 9:30 A. M.

*Anthony Dilbatis, direct.*

SECOND DAY.

Transcript of stenographer's notes of evidence  
in the above-entitled cause, taken before Hon.  
Peter F. Daly, Circuit Court Judge, and a jury,  
at the Union County Court House, in the City  
of Elizabeth, New Jersey, on the 15th day of 10  
February, A. D. 1927, at 9:30 A. M.

Appearances:

John W. Lyness, Esq., George R. Walsh, Esq.,  
attorneys for the plaintiffs.

John A. Matthews, Esq., Thomas M. Kane,  
Esq., (present), attorneys for the defendants.

Mr. Lyness opens the case for the plaintiffs.

Mr. Kane opens the case for the defendants. 20

ANTHONY DILBATIS, one of the plaintiffs,  
being duly sworn according to law, on his oath  
saith:

*Direct examination* by Mr. Lyness.

Q How old are you, Anthony? A Fourteen.

Q How old were you on April 5, 1926? A  
Thirteen.

Q Do you know what it is to take an oath? A 30  
Yes, sir.

Q Do you know what happens to you if you  
tell a lie?

The Court: If there is any examination  
along that line it is done exclusively by the  
Court. Go on.

Q Anthony, do you remember the fifth day of  
April, 1926? A Yes. 40

*Anthony Dilbatis, direct.*

Q Where were you at about 7 o'clock that night, or 7:30? A We were playing on the lawn there.

Q Do you remember what happened to you at that time or just a little later? A Yes.

10 Q Will you speak loud and tell his Honor and gentlemen of the jury just what did happen? A We was going down the street and we got down pretty near the corner and we was going to go across and then the car come down and when we was getting about two foot away from the—

Q Speak louder, Anthony. A When we was getting two feet away from the curb, about, then that car come down and hit us.

Q The car came down and hit you? A Yes.

20 Q Do you know what direction this car came from? A From Broad street down to South Union street.

Q Did you see this car before it struck you? A No. Just seen it when I got hit.

Q Just saw the car as it struck you? A Yes.

Q Did you notice what part of the car struck you? A Why, the light.

Q Which light was it, Anthony? A The left, on that side.

Q The left-hand light? A On this side.

30 Q As the car was moving this way it was the left-hand side? A Yes.

Q Had you crossed in front of the car before it struck you? A We was going across and then the car come and struck us.

Q Did you notice how fast the car was coming? A No, we didn't see it.

Q You just saw it as it struck you? A Yes.

40 Q What happened to you after you were hit by the automobile? A We was taken to the hospital.

*Anthony Dilbatis, direct.*

Q Well, before that what happened? A Some men took us, picked us up.

Q The juror can't hear you. A Some men picked us up.

Q Some man picked you up? A Yes.

Q Before that were you thrown any distance as the result of being struck by the car? A I 10 don't know but they told me I was.

Q What is that? A I don't know but they told me I was.

Q You don't know? A No.

Q After you were knocked to the ground some man took you to the hospital? A Yes.

Q Then what happened? A They took me in the hospital and they laid me out on the thing and they bandaged the leg all up and then they took me up in the ward. 20

Q What else did they do? A Then they gave me an operation the next day.

Q They did what? A Gave me an operation the next day.

Q The next day they gave you an operation? A Yes.

Q Did you then remain in the hospital? A Yes, sir.

Q Do you remember how long you were in the hospital? A About more than three weeks. 30 About a month, two months, and then I went home.

Q About a month? A Yes, or two.

Q Why did you go home? A I had the measles.

Q You were sent home from the hospital on account of having the measles? A Yes.

Q Did you thereafter return to the hospital? A Yes, I went back and got an operation.

Q They took you back for another operation? 40 A Yes.

*Anthony Dilbatis, direct.*

Q How long did you stay there the second time? A I stood there about a month.

Q About a month the second time? A Yes.

Q And then what happened? A Then I had to go there every Tuesday and have my leg bandaged.

10 Q Had to go there every Tuesday to have your leg bandaged? A Yes.

Q How is your leg now, Anthony? A It ain't quite good yet.

Q Not quite good? A No.

Q Well, what is the matter with it? A It hurts.

Q It hurts you? A When it ain't nice out, it hurts.

20 Q It hurts all the time? A Yes, when it ain't nice out.

Q You mean when the weather is bad your leg hurts you? A Yes.

Q Will you just show the jurors where you were hurt on that leg, Anthony? A (Witness exhibits injury to the jury.)

Q When the automobile hit you, Anthony, did it strike you with great force? A Sure.

30 Q Do you know whether you were thrown away from the automobile? A I was hit over this side more.

Q Do you know how far you were thrown away from it? A No.

Q Did you hear the driver of the automobile give you any signal that he was approaching? A No.

Q No signal at all? A No.

Q Did you see any lights on the car? A No.

Q Now, after you were hit, Anthony, were you conscious? A Yes, just a little while.

40 Q Just a little while? A Yes, sir.

*Anthony Dilbatis, cross.*

*Cross examination by Mr. Kane.*

Q You didn't see the car, you say, until you were hit? A Yes, sir.

Q Therefore, you don't know whether there were any lights on it or not, do you? A I don't think there was because I didn't see them.

10 Q You didn't see any because you didn't see the car until it hit you? A Yes, sir.

Q Now, do you remember just which side of the car it was that hit you? A Left over here.

Q Use this book as an automobile, the automobile came along this way, show us which side of the car hit you. A Right here (indicating).

Q What part of the street were you crossing? A The right.

Q I know, but what part of the street, was it in the middle of the street or at the corner, or where? A It wasn't on the corner. It was up by a hydrant.

Q How far away from the cross-walk is that hydrant? A I don't know.

Q Well, can't you give us an idea? Is it one or two houses away from the corner, or is it more than that? A No houses.

Q No houses away from the corner. A few feet away from the corner? A I don't know how many feet.

30 Q Well, a few feet. All right. The Thomas boy was with you at the time? A Yes.

Q Where were you going? A Home.

Q Where had you been? A Up on the lawn playing.

Q Did you have to be home at any particular time? A No. We was going home. I didn't eat yet. I was going home.

Q Were you in a hurry going home? A No. 40

*Anthony Dilbatis, cross.*

Q When you crossed the street just what manner did you cross? You say that you crossed at the fire hydrant just a little above the corner. Did you go straight across the street or did you go on an angle? A Straight across.

Q Were you running? A No.

10 Q Walking fast? A No. We was walking kind of slow.

Q Walking slowly? A Just the way I always walk.

Q The usual gait. Were you talking to the little Thomas boy as you were going along there? A No, not going across, I wasn't.

Q Were you talking to him before you went across? A When we was coming the street we was talking.

20 Q You just came down the street talking, you stopped talking and then walked across the street without looking? A No, we stopped there and then looked up and down and nothing was coming so we walked across.

Q You looked up and down and didn't see this automobile? A No.

Q Was it light or dark? A It was getting dark.

Q It was kind of dusk. About 7 o'clock at night, was it? A Yes.

30 Q The 5th of April, is that the date? A Yes.

Q How far across the street had you gone before the accident happened? A About two feet.

Q About two feet? A Or more.

Mr. Kane: That is all.

Mr. Lyness: That is all.

*George Thomas, direct.*

GEORGE THOMAS, one of the plaintiffs, being duly sworn according to law, on his oath saith:

*Direct examination by Mr. Lyness.*

Q How old are you, George? A Ten.

Q Ten years of age? A Yes, sir. 10

Q On April 5, 1926, how old were you? A Nine.

Q George, do you remember the fifth day of April, 1926? A Yes.

Q Where were you on that evening? A We were on the lawn there and we got tired of playing and we was coming home and we went down to the curb and we looked both ways, we didn't see no lights coming and we didn't hear any horn, so we just started to cross and we got about in the middle there, and before we could see the car was on top of us and we got hit. 20

Q You got hit by an automobile? A Yes, sir.

Q Did you see the automobile before it struck you? A No, sir. Just when it went, it was right on top of us. We didn't have any time to get out of the way.

Q You just saw the automobile as it was right on top of you? A Yes.

Q Did you hear this automobilist give you a signal? A No, sir. 30

Q Before you started to cross the street you looked to see if there were any vehicles approaching? A Yes, sir.

Q What part of the car struck you, George? A I got hit by the mudguard. He was just a little bit behind me.

Q By the mudguard? A Yes, sir.

Q Which one was it? A Left-hand side.

Q On the left-hand side? A Front mud-guard on the left-hand side. 40

*George Thomas, direct.*

Q What happened to you after you were struck by the car? A Well, when we got struck and threw us in the air a couple of men picked us up and brought us to the hospital, and I was unconscious and I didn't wake up until we was in the ward in the hospital.

10 Q You say you were thrown in the air? A Yes, sir.

Q How far were you thrown in the air? A I don't know just how far we was thrown in the air.

Q Were you run over by the car or thrown away from the car? A Well, we got hit, we was thrown, and we got hit when they threw us we got run over again.

Q The car ran over you? A Yes.

20 Q Were you injured as the result of being struck by this car? A Yes.

Q Where were you hurt, George? A On the thigh.

Q On the thigh? A Yes, sir.

Q Will you show us just where you were hurt? (Witness exhibits injury to the jury.)

Q After you were taken to the hospital, George, what happened to you? A Well, the first time we was there they stretched our leg and put us in some kind of—put something on our legs and then the next day they operated on us.

30 Q Put something on your leg and then the next day they operated? A Yes, sir.

Q How long did you remain in the hospital? A Six weeks.

Q You were there six weeks? A Yes, sir.

40 Q And then what happened? A Then we was there six weeks and then I got brought home and I had to stay in a cast home a little while and then I went back and got the cast taken

*George Thomas, cross.*

off and I had to come back and then I stayed in the house with the cast off my leg for two weeks and then every Tuesday we had to get massages and so on and then we got a little bit so we could walk.

Q How does your leg feel now, George? A Well, it hurts. 10

Q Does it hurt you now? A Well, not only when it is real damp weather it hurts a little, but when it is damp it hurts.

Q Just come down and show the jurymen how you walk. (Witness illustrates to the jury.)

*Cross examination by Mr. Kane.*

Q Where was this lawn that you were playing on? A Shepard's lawn right alongside of a vacant house. 20

Q How near to the corner of the street is that? A Well, it is about say three feet.

Q Is it the first house on the corner, the lawn? A Yes, sir.

Q It was still bright, wasn't it, when you started across the street, still daylight? A It was just about getting dusk.

Q About what time was it? A About seven or half-past seven. 30

Q When you came down off the lawn did you run down to the curb or walk down? A Walk.

Q Were you and the other boy talking as you walked down there? A No, we weren't talking.

Q Did you walk from the lawn right down on the sidewalk and then right out into the street?

A We went down to the sidewalk and then we stopped and walked out then slowly and then we looked both ways and didn't see nothing, no 40

*George Thomas, cross.*

lights or horn or nothing, so we started to cross and we was about in the middle and the car was right on top of us and we got hit.

Q You walked down and you stopped. Where were you when you stopped? A We was about right on the lawn by the curb.

10 Q Do you mean near the curb? A They have a lawn right near the curb.

Q Between the sidewalk and the curb there is a little grass? A Yes, sir.

Q So you stood there. How close to the curb were you when you stood there? A Well, I don't know. We was only a little ways from the curb and then we walked slowly out to the thing, out to the curb, and we looked both ways and we didn't see any signal of any car coming, we didn't hear any signal, so we started across and we was about halfway across there and we got hit.

20 Q Were you both standing on the curbstone side by side? A Yes, sir.

Q How far down the street to your left could you see? A Well, we could see all the way down to the corner.

30 Q How far is all the way down to the corner? Is that the next block below? A Yes. See right up to Broad street.

Q Do you know how far that is from where you were? A No.

Q You didn't see any car? A No, sir.

Q Are you sure about that now? A Yes, sir.

Q Are you sure that you looked that way? A Yes, sir.

40 Q And you looked the other way, too? A Yes, sir.

*Howard Goldy, direct.*

Q How far out into the street did you walk? A Well, from the curb we was about three feet and about right in the middle of the street.

Q You say the mudguard hit you? A Yes, sir.

Q Were you walking beside the other boy when you were hit, or were you walking behind him or in front of him? A Well, I was just a little in front of him. 10

Q How far in front of him? A About a foot. The mudguard hit me and the light hit him.

Q You say you didn't see this car until it hit you? A No, sir.

Q Do you know how far away from the cross-walk you were when you were hit? A No, sir. 20

Q You were not on the cross-walk? A From the corner we was just a little ways up.

Q Did you see any other automobiles? A No, sir.

Q No automobiles at all? A No, sir. The road was clear.

HOWARD GOLDY, a witness produced on behalf of the plaintiffs, being duly sworn according to law, on his oath saith: 30

*Direct examination by Mr. Lyness.*

Q Mr. Goldy, where do you live? A 109 Camden street, Roselle Park.

Q Do you remember the fifth day of April, 1926? A Yes, sir.

Q Where were you on that day? A I was in my car. 40

*Howard Goldy, direct.*

Q Where was that? A On Caldwell Place.

Q How does Caldwell Place run, north and south or east and west? A I couldn't tell you exactly.

10 Q That is the street right beyond here? A I know the street.

Q What were you doing there, Mr. Goldy? A I was getting ready to park.

Q In which direction was your car facing? A Broad street.

Q Towards Broad street? A Yes, sir.

20 Q While you were parking there just what happened? A I was facing Broad street, I was coming up from South Union, had turned in from West Grand in the direction of Rahway avenue on South Union and came up from South Union to Broad getting ready to park, I seen a car coming down Caldwell Place, coming so fast that I was afraid—

Mr. Kane: Don't tell us what you were afraid of.

A Coming so fast that it probably would hit me until I turned in, there is a space there, room for me to turn in. I was still facing Broad street.

30 Q Can't you tell us, Mr. Goldy, how fast this Ford car was coming? A I cannot tell you, I don't exactly know how fast it was coming.

Q Well, how would you describe the speed of the car? A Too fast for Caldwell Place.

Q Well, could you tell us if it was going fifteen or twenty miles an hour? A More probably.

Q More than that. Did this Ford car strike you, or strike your car? A No.

40 Q Did you see this accident? A I did not.

*Howard Goldy, direct.*

Q Did you see the boys after? A I did.

Q Where did you see them? A Laying on the ground.

Q And where was that with reference to your car? A In back of my car.

Q How far? A At least fifty feet.

Q About fifty feet? A Yes, sir. 10

Q What caused you to turn around to see these boys lying in the road? A I thought this car hit my right rear—left fender.

Q Did it? A No.

Q What did it strike, if anything? A Well, it must have struck the boys—

Mr. Kane: I object and move it be stricken out.

The Court: It is stricken out. 20

Q What caused you to turn around, Mr. Goldy? You heard a crash? A I heard a crash.

Q And you turned around? A I got out of the car.

Q You got out of the car? A Yes, sir.

Q And then you saw the two boys lying in the road? A I did.

Q What did you do then? A I went to see what I could do for the boys. 30

Q Well, what did you do for the boys? A I picked one of the boys up.

Q Then what did you do? A Placed him in a car.

Q In your car? A No, sir.

Q In whose car was it? A I don't know.

Q Did you notice any lights on this Ford car? A I cannot remember.

Q Did you hear any signal? A No, sir.

Q Was there any given, so far as you know? A As far as I know I can't say. 40

*Howard Goldy, cross.*

Q Did you notice where this car was driving with reference to the center of the road? A Yes, sir.

Q Where was it? A Driving on this side alongside of the cars that were parked at the front end of the cars that were parked on this side of Caldwell Place. 10

Q On the Ford car's left or right? A Ford car's left.

Q Did you notice what happened to the Ford car after this accident occurred? A It disappeared.

Q Did you see which way it went? A Towards Rahway avenue on South Union street.

Q Did you see it turn? A I did.

Q Did you follow the car at that time? A I did not. 20

*Cross examination by Mr. Kane.*

Q How wide is that street, Mr. Goldy? A I don't know.

Q Have you any idea? A No, I have not.

Q Were the cars parked along both sides of the street? A Cars parked on both sides of the street.

Q What part of the street were you driving on as you turned out of Union Place, or Union street? A I was driving on this side. I just passed a few cars that were already parked with their rear to the curb, and there was a space. 30

Q Were the cars parked on the other side with their rear to the curb too, or only on one side? A No. Only on one side. Cars on the other side was headed towards South Union street.

Q So there were cars parked on both sides of the street? A Yes, sir. 40

*Howard Goldy, cross.*

Q On one side with the rear to the curb and on the other side they were parallel to the curb? A Yes, sir.

Q Room for two cars to pass going in opposite directions between the parked cars? A Plenty.

Q Well, was there room for three cars there? A Well, I couldn't say to that exact. 10

Q Where was this car when you first saw it, the car coming towards you? A Well, I couldn't say approximately where it was.

Q Was it still daylight? A I just don't remember. It was around 7 o'clock, I think. I am not positive.

Q Do you remember whether or not you had your lights on? A No, I do not. I am not sure. 20

Q As you saw this car coming along you pulled in to the right? A I pulled in to my right.

Q How far away from the parked cars on your right were you when you started to pull in to your right? In other words, what was the distance between the parked cars and your car as you were going along there? A About four feet.

Q You don't know how fast this other car was going? A I couldn't say exact, no. 30

Q You didn't see the boys? A I did not see the boys.

Q How far down in Caldwell Place were you when the other automobile passed you? A About to the first lamp post from South Union street on your left-hand side coming towards Broad.

Q About how far is that? A Well, I couldn't say exact. 40

*Alfred Siano, direct.*

Q Well, can't you give us any approximate idea? Is it one or two houses, or the width of the houses? A Well, I didn't take notice.

*Re-direct examination by Mr. Lyness.*

10 Q Was there sufficient space for this Ford car to pass you on its right? A Yes, sir.

Mr. Lyness: That is all.

ALFRED SIANO, a witness produced on behalf of the plaintiffs, being duly sworn according to law, on his oath saith:

20 *Direct examination by Mr. Lyness.*

Q How old are you, Alfred? A Sixteen.

Q Do you remember the fifth day of April, 1926? A Yes, sir.

Q Where were you on that evening? A I was near a lamp post on Caldwell Place.

Q Caldwell Place? A Yes, sir.

30 Q Did you see George Thomas and Anthony Dilbatis there at the time? A Why, they told me they were going home, they said good bye to me.

Q Had you been talking to them? A Yes, before they were going home.

Q What were you doing there? A I was working there.

Q Working? A Yes, sir.

Q What were you doing? A Parking cars.

40 Q What time of the evening was this? A Between seven and half-past.

*Alfred Siano, direct.*

Q Did you see George Thomas and Anthony Dilbatis crossing the street? A Yes, I did.

Q Will you tell us just what happened as they started across the street? A Well, as I was standing there I seen a car come past me fast, and I didn't notice it have any lights on; it just passed me as I looked and I seen two fellows going by, and then I looked down and I seen Anthony was going first and George was going second, and the car struck them and Anthony was thrown at least six feet from the car and George was ran over by the right wheel. 10

Q Did you see the car just previous to its striking the boys? A I couldn't say. I just seen the two boys, one was thrown, and the other one just the wheel go over. I don't know. 20

Q Well, can you tell us how fast this Ford car was going? A I think it was going from thirty to thirty-five.

Q Thirty to thirty-five miles an hour? A Yes, sir.

Q Did you hear the driver of the Ford car signal the boys that he was coming along? A No, sir.

Q What did you do after the accident, Alfred? A I started to run down and pick up George Thomas. 30

Q Did you pick him up? A No. I was just ready to pick him up when some man took him and put him in the car; I don't know what man it was, though.

Q Did you see where the Ford car was at that time? A Yes, sir. It went right on and turned the corner and went towards Rahway avenue. 40

*Alfred Siano, cross.*

*Cross examination by Mr. Kane.*

Q Where is this lamp post with reference to the corner? A Well, there is three houses from the corner, it is right in front.

10 Q Which side of the street is it on? A It is on the right-hand side of the street.

Q Now, were there any cars parked between that lamp post and the corner where the accident happened? A Yes, there is one or two.

Q Where were you standing? A There was space right where the lamp post was and I was standing in between the space.

20 Q Were you standing in between parked cars in the street, or on the sidewalk, or on the place between the curb and the sidewalk? A I was standing even with the cars, but I was in an empty space there.

Q In the street? A Yes, in the street.

Q Were the boys there with you before they left to go home? A Yes, I was on the sidewalk then talking to them and I went out towards the street and they went on home.

Q They went down the sidewalk? A They went down the sidewalk.

30 Q Do you remember whether it was bright or dark or dusk, or what the condition of the atmosphere was? A Well, it was getting dark.

Q You saw a car flash by in front of you, is that it? A Yes, sir.

Q You don't know whether it had any lights, or whether there was any horn blown, or anything else? A There was no horn blown because I was watching the car, or there was no light because I just looked at the driver. I didn't notice no light.

40 Q You were watching the car? A The driver. Not the car.

*Alfred Siano, cross.*

Q Could you see this car after it passed you? After it passed in front of where you were standing could you see the car as it went up the street? A Yes. I looked down at the boys. Just as soon as I seen the car go by I looked down at the boys.

10 Q Wasn't there a car or two parked from where you were standing up to the corner? A Yes, but I could see.

Q Weren't you standing in front of one of the parked cars? A Yes, I was standing parallel with them, I could see right down the street.

Q Tell us were you standing between the parked cars, or on the sidewalk, or where? A I was standing, if these are the cars, I was standing right here parallel with the cars.

20 Q And you want us to believe now, or understand, that while you were standing there between parked cars you could see down here a car that flew by you after it had passed you at this spot? A Well, I was at the end of the cars. These are the cars here and I was standing right here. I could see anything all the way down.

30 Q What were you doing standing there? What were you standing there for? A I was just standing there, that is all. No reason at all. Just watching cars there, that is all.

Q What part of the car struck these boys, did you see? A Front part of it.

Q How do you know? A Because I saw it. When the boys were hit I saw—

Q You were to the rear of the car that struck them, weren't you? A Yes.

40 Q The car passed you and the only thing you could see would be the rear of this car? A Yes, but I seen the boys, one of the boys fly, and the other one the wheel just went over him.

*Joseph Walker, direct.*

Q Did this car as it passed you pass close to where you were standing? A No. It was well in the middle of the street.

Q How far out from where you were standing? A Three feet.

10 Mr. Kane: That is all.

*Re-direct examination by Mr. Lyness.*

Q Did this Ford driver make any attempt to avoid striking these boys so far as you could see?

A No. Just kept right on going.

Mr. Lyness: That is all.

20 Mr. Lyness: The defendant admits ownership of this car, so it is not necessary to prove it.

The Court: There is more than one defendant, isn't there?

Mr. Lyness: Yes.

The Court: Well, which defendant?

Mr. Lyness: The defendant Devine admits the ownership of the car.

Mr. Kane: We admit the ownership of a car.

30

JOSEPH WALKER, a witness produced on behalf of the plaintiffs, being duly sworn according to law, on his oath saith:

*Direct examination by Mr. Lyness.*

Q How old are you, Joseph? A Twelve.

40 Q Do you remember the fifth day of April, 1926? A Yes, sir.

*Joseph Walker, cross.*

Q Were you present on Caldwell Place at about 7:30 that night? A Yes, sir.

Q Were you with George Thomas and Anthony Dilbatis? A Yes, sir.

Q Will you tell us what you saw, if anything, at that time and place? A Well, George and my friend—

10

Q Speak out. A My friend and I was—Bubby and them was on the hill wrestling, so we thought it was kind of late to get home so we went down, we was walking across the street, Bubby, and then ahead of us was them—we was behind them, they walked down there and just then this Ford car come down pretty fast and hit Bubby and George. George got hit on the mud-guard and Bubby got hit by the light.

Q Did you see what happened to the boys after they were struck? A Yes, sir. After they were struck George was unconscious and Bubby was thrown about five feet away from the car.

20

*Cross examination by Mr. Kane.*

Q How many boys were playing on that lawn? A Four.

Q Were you all going the same direction? A Yes, sir.

30

Q The Dilbatis boy and the Thomas boy were in front of you and the other chap. Now how far behind them were you walking? A We was about five feet from them.

Q Were you walking? A Yes, sir.

Q You say that you were all playing on the lawn and you thought it was getting late and you decided to go home? A Yes, sir.

Q Now, did you all walk out into the street together? A No, sir.

40

*Joseph Walker, cross.*

Q What did you do? A George and Bubby went ahead of us, so we went behind them, we went about five feet behind them, me and Eddie went. They were first down.

Q Did you walk right off the lawn right across the sidewalk into the street, or did you get  
10 into the street? A No, sir.

Q You were still on the sidewalk? A Yes, sir.

Q Had you been walking all the time? A No, sir. We stopped at the—

Q Were you running at any time? A No, sir.

Q Where did you stop? A At the sidewalk.

Q Who stopped on the sidewalk? A Me  
20 and Eddie.

Q You and Eddie? A Yes, sir.

Q Where was George and the other boy? A George was ahead of us. They went on the street first.

Q They were ahead of you and they went out into the street first? A Yes, sir.

Q They walked across the street? A Yes, sir.

Q How far out into the street did they get  
30 before the automobile came along? A About five feet.

Q Then the automobile hit them? A Yes, sir.

Mr. Kane: That is all.

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*Edward Attenthal, direct.*

EDWARD ATTENTHAL, a witness produced on behalf of the plaintiffs, being duly sworn according to law, on his oath saith:

*Direct examination by Mr. Lyness.*

Q How old are you, Edward? A Four- 10  
teen.

Q Do you know George Thomas and Anthony Dilbatis? A Yes, sir.

Q Do you remember the fifth day of April, 1926? A Yes, sir.

Q Were you with Anthony and George? A Yes, sir.

Q At the time on Caldwell Place? A Yes, sir.

Q Will you tell us just what happened? A 20  
We was coming out from the Shepard's side yard and we walked down Caldwell Place towards the corner, and Joe and I was in back of Bubby about five feet, and Anthony and George Thomas went ahead; and they were crossing the street about ten feet from the corner, and the Ford come down, didn't hear no horn, didn't see no light, coming about between twenty and twenty-five miles an hour, 30  
it struck George, he got hit on the left side and Bubby got hit on the right side. After while I looked around and I saw them there laying on the ground, so me and Joe Walker went over towards George Thomas and picked them up and a man came and put them in a car and took them to the hospital.

Q Did you see this automobile before it struck the boys? A Yes, sir.

Q Did you see any lights on the car? A No, 40  
sir.

*Edward Attenthal, cross.*

Q Did you hear the driver give a signal of his approach? A No, sir.

*Cross examination by Mr. Kane.*

10 Q Where was the car when you saw it the first time? A Coming down Caldwell Place.

Q Well, how far up Caldwell Place was it? How far away from where George and the other boy were crossing? A We saw it when it was about seventy-five feet from the corner.

Q You saw it seventy-five feet away? A Yes, sir.

Q Were there any automobiles parked along there on that side? A Yes, sir.

20 Q Where were you standing or walking or running, if you were, when you first saw this car seventy-five feet away? A I was in back of George and Anthony.

Q But where were you with reference to the curb, were you near the curb or on the sidewalk or up on the lawn? A Right on the curb.

Q Right on the curb? A Yes, sir.

Q And George and the other boy were walking across the street? A Yes, sir.

30 Q Now, are you sure there were not any lights on that car? A Yes, sir.

Q Or are you only guessing? A There were no lights.

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

Q Was it dark? A It was getting dark.

Q Well, it was dusk? A Yes, sir.

Q When George and the other boy were walking in front of you, came down off the lawn, did they walk across the street? A We stopped at the curb there.

40 Q For how long did they stop? A About five minutes.

*Edward Attenthal, cross.*

Q Where were you when they stopped at the curb? A We was still on the sidewalk.

Q You were still on the sidewalk? A Yes, sir.

Q And you could see seventy-five feet away and saw this car coming seventy-five feet away?

A I was looking up Caldwell Place. 10

Q What? A I was looking up Caldwell Place.

Q You were looking up Caldwell Place? A Yes, sir.

Q And you saw the car seventy-five feet away? A Yes, sir.

Q And at that time George and the other boy were standing on the curb? A Yes, sir.

Q Do you know whether or not they were looking up the same way you were looking? A I don't know. 20

Q Did you see them look up that way at any time? A No, sir.

Q But when they were standing on the curb you were on the sidewalk and you looked to the left you could see seventy-five feet away this car coming on? A Yes, sir.

Q After you saw that car coming on, what did George and the other boy do? A They walked right across the street. 30

Mr. Kane: That is all.

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*Frank Kukel, direct.*

CHARLES P. DEVINE, one of the defendants, being duly sworn according to law, on his oath saith:

*Direct examination by Mr. Lyness.*

10 Q Mr. Devine, you are one of the defendants in this action? A Yes, sir.

Q Did you own a car, a Ford car license No. 5777 last year? A Yes, sir.

Q You owned that on April 5, 1926, too, did you not? A Yes, sir.

Mr. Lyness: That is all.

20 FRANK KUKEL, a witness produced on behalf of the plaintiffs, being duly sworn according to law, on his oath saith:

*Direct examination by Mr. Lyness.*

Q Where do you live, Mr. Kukel? A 618 Jackson avenue.

Q Do you remember the fifth day of April, 1926? A I do.

30 Q Were you on Caldwell Place about 7:30 or 7 that evening? A Between 7 and 7:30.

Q Did you see Anthony Dilbatis and George Thomas? A Well, I didn't know who they were. I seen two boys get struck. I didn't see them exactly get struck but I heard the crash.

Q Those two boys that you saw there at that time were the two boys that were previously on the stand? A Yes, sir.

40 Q Will you tell us, Mr. Kukel, just what you did see at that time and place? A I seen the

*Frank Kukel, direct.*

two boys on the ground after they were struck, I heard the crash, and that is what called my attention to it, I seen the Ford car didn't stop, so I told my wife to get out of my car—

The Court: We do not care what you told your wife. 10

A And I gave chase. He didn't stop so I gave chase and I followed him through South Union street over Rahway avenue to Pearl street; in order to stop him I had to cut him off, and when I told him he struck a boy, he said he didn't. I said, I followed you up right from the spot. He said all right, I will come back with you. I turned my car and one of the riders in the car got out of the Devine's car, the car driven by Bartlett, got into my car, and when I turned back to Rahway avenue he turned the Ford car partly and then he proceeded back the other way, southerly on Pearl street. When I looked back and I seen he wasn't following me, I made up my mind to get somebody— 20

Q Tell us what you did. A I went for a motorcycle patrolman and I located one on Rahway avenue and I told him that the Ford car struck— 30

Mr. Kane: Not what you told him either.

Q Well, you brought the policeman back with you, did you? A I brought a policeman back with me.

Q And then what happened? A Then we took the car, I noticed the front left mudguard was smashed and the headlight bent back, no light on the car when I stopped the car, when I got him off on Pearl street. 40

*Krank Kukel, direct.*

Q No lights lighted on the car? A No lights, no rear or headlights.

Q Did you see these two boys actually struck by the car? A I did not. What called my attention to it was the thump when they were hit. I know the wheel passed over one of the boys.

10 Q The wheel of the car that sped away? A That sped away.

Q Did you see this car at the time or just previous to the time it struck the boys? A Well, I didn't see it, he passed me, I was parked on the right-hand side of Caldwell Place facing south and he came—or facing west, he came east over Caldwell Place, he passed my car and when he struck the boys that is what called my attention to it, I seen he didn't stop.

20 Q When he passed you can you tell us how fast the car was going then? A Close to thirty miles an hour, on the left-hand side of the street.

Q Thirty miles an hour? A Yes, sir.

Q And you say on the left-hand side of the street? A More to the left, yes, too fast for Caldwell Place, where jitneys come through and cars are parked.

Q Did you hear any signals given by the driver of this Ford car? A No signal at all.

30 Q Did Mr. Barclay, the driver of this Ford car, say anything to you at that time? A When I stopped him he claimed he didn't strike anyone. I said, "well, I just followed you up from Caldwell Place, you struck a boy"; I didn't know whether he struck one or two, but I knew he struck one; when he didn't stop I followed him.

40 Q Did you take notice of the car license number of this Ford car at the time? A I am not positive whether it was 5771 or 5775, but I know there was two sevens there. I didn't mark it down. And then after we located the car.

*William Barclay (for Plaintiffs), direct.*

Q Did Barclay say anything about who owned this car?

Mr. Kane: I object to that. You cannot bind Devine by something that was said by Barclay.

The Court: Was the owner there? 10

Mr. Kane: No, he wasn't there.

The Court: Objection sustained.

Mr. Lyness: That is all.

*Cross examination by Mr. Kane.*

Q Where was your car parked? A On the right-hand side of Caldwell Place facing west.

Q Were you parked parallel with the curb? A Parallel with the curb. 20

Q So this Ford car came right towards you? A Had plenty of room, yes. I was backed in against the curb. Motor shut off.

Q You say he was about the center of the road? A Yes. More to the left.

Mr. Kane: That is all.

30 WILLIAM BARCLAY, one of the defendants, being duly sworn according to law, on his oath saith:

*Direct examination by Mr. Lyness.*

Q Mr. Barclay, you are one of the defendants in this action? A Yes, sir.

Q The car in which you were driving on the evening of this accident was owned by whom? 40

*William Barclay (for Plaintiffs), cross.*

Mr. Kane: I object to that.

The Court: Objection sustained. That is no way of proving ownership. Mr. Devine says he owned it. There is no proof as yet that he was driving the car. Why don't you ask him that?

10

Q Mr. Barclay, were you driving a Ford car on April 5, 1926? A Yes, sir.

Q About 7 or 7:30 when these two boys were struck? A Yes.

*By the Court.*

Q Who owned it? A Mr. Devine.

Q The man who was on the witness stand?

20

Mr. Lyness: Stand up, Mr. Devine.

*By Mr. Lyness.*

Q Is this the man who owned the car? A Yes, sir.

Mr. Lyness: I would like to amend the name of the defendant here to read "William Barclay." I have William Bartlett.

30

*Cross examination by Mr. Kane.*

Q Mr. Barclay, have you ever been convicted of a crime? A No, sir.

Q Have you been convicted of driving an automobile on the 5th of April while under the influence of intoxicating liquor?

Mr. Lyness: Objected to.

40

The Court: Objection sustained.

*William Barclay (for Plaintiffs), cross.*

Mr. Kane: He denies it and I think I have a right to go further in and show it.

The Court: That is not a crime.

Mr. Kane: A misdemeanor.

The Court: Convicted before whom?

Mr. Kane: Before Judge Brown of the Elizabeth Courts here. 10

The Court: Then it is not such a crime that you can ask him whether he was convicted of crime, something he was convicted of in a police court. Besides that it is not cross examination at all. You do not dispute that the car belongs to Devine.

Mr. Kane: I do not dispute that at all but I have a right, I think, to show that particular point. 20

The Court: All right, if you think so.

Mr. Kane: Your Honor overrules it?

The Court: What is your purpose in showing it?

Mr. Kane: Well, I don't think I ought to disclose it at this time.

The Court: If you do not give me your reason for it, of course, then you have not any right at all. 30

Mr. Kane: I might say this, one of the elements, to show this man at the time, if he was involved in this accident, was not in and about our business, and some of the reasons for it.

The Court: They are not claiming that at all. It is not cross examination. You may have your exception.

Mr. Kane: All right.

Mr. Lyness: That is all. 40

*Anna Thomas, direct.*

ANNA THOMAS, a witness produced on behalf of the plaintiffs, being duly sworn according to law, on her oath saith:

*Direct examination by Mr. Lyness.*

10 Q Mrs. Thomas, you are the mother of George Thomas, the little boy who was previously on the stand? A Yes, sir.

Q Do you know anything about the occurrence of this accident? A No, I don't.

Q When did you see George, on April the 5th? A After I was notified by the hospital.

Q What time was that, Mrs. Thomas? A Well, I arrived there with the officer, I judge it was about eight, maybe after.

20 Q You arrived at the hospital with the officer? A Yes, sir.

Q Did you see George there? A Well, when I went in Anthony was being wheeled out, and I thought it was only one boy and I said no, that is not my boy. and then they told me my boy was inside.

Q Did you see George then or soon after? A Yes, I seen him then.

30 Q Where was he when you saw him? A He was being—the X-ray being taken.

Q How long did George remain in the hospital? A Six weeks.

Q Six weeks after April 5th? A Yes, sir.

Q Continuously? A Yes, sir.

Q Was he brought home after that? A Yes, sir; he was home three weeks in a cast and two out.

40 Q He was in the hospital six weeks and then brought home and remained for three weeks? A Three weeks in the cast.

*Anna Thomas, direct.*

Q And then what happened? A Then I took him back to the hospital in the ambulance and the cast was removed, and then I took him home and he remained two weeks in bed without the cast, and I had to massage him, do what the work was supposed to be done in the hospital, then after two weeks I brought him back to the doctor, as he instructed me, and then he told me he could go on crutches and I had to help him and massage him every day until the latter part of July, and bring him to have massages and baking treatments. 10

Q Did you care for George while he remained at home? A I did.

Q And you nursed him? A I did.

Q Who is the doctor that took care of George while he was in the hospital? A Dr. Weigel. 20

Q Have you been rendered a bill for his services? A I have one bill; yes, sir.

Q Have you received a bill from the hospital? A Yes, sir.

Q Where are those bills? A Right here (indicating). I don't know whether that is the final bill from Dr. Weigel or not.

Q Have you paid any of these bills, Mrs. Thomas? A No, I have not. Not yet. 30

Mr. Lyness: Mr. Kane, will you admit these bills in evidence?

Mr. Kane: Not unless the doctor is here to prove them.

Mr. Lyness: He will be here.

Mr. Kane: I think they should be marked, and then if he comes along—

Q These are the bills you received from the hospital for services? A Yes, sir. 40

*Joseph Dilbatis, direct.*

Mr. Lyness: I ask they be marked for identification.

(Bill of Dr. Weigel, amounting to \$150, marked P. 1 for identification.)

10 (Bill from St. Elizabeth Hospital, amounting to \$40, marked P. 2 for identification.)

(Bill from St. Elizabeth Hospital amounting to \$162.50, marked P. 3 for identification.)

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JOSEPH DILBATIS, one of the plaintiffs, being duly sworn according to law, on his oath saith:

*Direct examination by Mr. Lyness.*

20 Q Are you the father of Anthony Dilbatis?

A Yes, sir.

Q Do you know anything about this accident, Mr. Dilbatis? A No. Just went in the hospital.

Q When did you go to the hospital to see your son? A On the second day.

Q On the second day after the accident? A Yes.

30 Q Do you mean the following day after the accident occurred, is that right? A (No answer.)

Q Do you speak English? A No.

Mr. Lyness: I will withdraw this witness.

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*Mary Dilbatis, direct.*

MARY DILBATIS, a witness produced on behalf of the plaintiffs, being duly sworn according to law, on her oath saith:

*Direct examination by Mr. Lyness.*

Q You are the sister of Anthony Dilbatis? 10

A Yes, sir.

Q Do you know anything about the occurrence of this accident? A No, sir.

Q When did you first see Anthony after the accident? A Next morning about nine o'clock.

Q When were you notified that Anthony was taken to the hospital, if at all? A That same night, the night he got hurted.

Q Where did you see him? A He was in the ward. He was going to be taken downstairs to be operated on. 20

Q What time was that? A About nine o'clock in the morning.

Q When did you next see him? A In the afternoon.

Q Had he been operated on? A Yes.

Q What was his condition then so far as you could see? A Well, fair.

Q Did he have a cast on his leg? A Yes, he had a cast on. 30

Q Do you recall how long Anthony remained in the hospital? A About a month.

Q About a month? A Yes.

Q And then what happened? A Then he got the measles and he was taken home, and then he was home about three weeks, and then he was taken back again and had to be operated on again, and then they put another cast on again.

Q He was operated on a second time? A Yes. 40

*Mary Dilbatis, direct.*

Q After this second operation, how long did he remain in the hospital, if you know? A I judge about a month and a half or so. I just couldn't tell you how long.

Q Did you bring him home then? A Yes. He stayed there a while and then they took the  
10 cast off and then I brought him home and I had to take him every Tuesday to have his leg massaged.

Q Did you take care of him while he was at home? A Yes, I took care of him while he was home with the measles and while he was home from the hospital.

Q Has the hospital or the doctor rendered bills? A Yes, we have got the hospital bills, but we didn't get Dr. Weigel's bill yet.

Q Have you those bills with you? A My  
20 father has them.

Q Are these the bills you received from St. Elizabeth Hospital? A Yes.

Mr. Lyness: I ask they be marked. That is all.

(Bill of St. Elizabeth Hospital amounting to seven dollars, marked P. 4 for identification.)

30 (Bill of St. Elizabeth Hospital amounting to \$72.50, marked P. 5 for identification.)

(Bill of St. Elizabeth Hospital amounting to \$165.50, marked P. 6 for identification.)

*Charles P. Devine, direct.*

DEFENDANTS' CASE.

CHARLES P. DEVINE, recalled.

*Direct examination by Mr. Kane.*

Q You are one of the defendants in this case  
10 and you live where? A 417 Westminster avenue.

Q Where is that? A Elizabeth.

Q In April of 1926, were you living at that address? A Living at that address.

Q On that day you were the owner of this Ford automobile? A Yes, sir.

Q Do you know Barclay? A Yes.

Q Do you remember him getting the auto-  
20 mobile on that day? A Do I remember him getting it? Certainly.

Q Under what circumstances did he get the car from you? A Why, he took this man down to Livingston street, this Mr. Hoffman.

Q Do you know what he took him down there for? A Took him down on business for himself with Mr. Hoffman. I hired him to take this man down.

Q What is that? A I hired Mr. Barclay to  
30 take this man down.

Q How did you hire him? What were the terms of your hiring with him? A Why, I told him I would give him five dollars when he bring the man back again and come back with the car.

Q You told him to take this man down? A  
Take this man down.

Q To see his daughter? A Sister.

Q And to bring him back? A Bring him  
40 back.

*Charles P. Devine, cross.*

Q Did he bring him back? A No, he didn't bring him back.

Q Do you know whether or not he brought Hoffman down to his daughter's? A Do I know whether he brought him down?

10 Q Yes. A Well, I couldn't tell you that.

Q How do you know that he didn't bring Hoffman back? A Well, Mr. Hoffman come back to my place.

Q When? A About 5:30.

Q What time did he leave your place, or practically leave your place with Hoffman? A I should judge it was about quarter to three.

20 Q Your instructions to him were to bring Hoffman down to his daughter's house and bring him back? A And bring him back.

Q You say Hoffman came back about 5:30? A About 5:30.

Q But he wasn't brought back by— A No.

Q When did you next see Barclay after sending him off with Hoffman? A Why, I didn't see him for about a week after. The insurance agent come over.

Q Where was Barclay? He didn't come back to your place that night? A No.

30 Mr. Lyness: I object to that, your Honor.

Mr. Kane: Cross examine.

*Cross examination by Mr. Lyness.*

Q If Mr. Barclay didn't bring back Mr. Hoffman you wanted him to bring back your car, did you not? A Why, certainly.

40 Q He went down at your request, did he not? A At my request, certainly.

*Charles P. Devine, cross.*

*By the Court.*

Q What business are you in? A I had a saloon then at the time.

Q How did you come to hire Barclay? A He used to work for me, tending bar for me off and on, and this man wanted to go down there, so he was in the place at the time and I hired him to take him down. 10

Q Well, when you say take him down, take him down where? A Take him down to his daughter's on Livingston street.

Q Where was his daughter's? A She lived down on Livingston street in Elizabeth.

Q How far away from your place of business? A About two miles.

Q What were you to get from Hoffman? A I wasn't to receive anything from Hoffman. I was just doing it as a favor for him. 20

Q Then you were letting Hoffman have the use of your car for nothing? A Yes, sir.

Q And you were also giving practically five dollars? A To take him down.

Q So that Hoffman might have the use of your car, is that right? A Yes.

Q What relationship is there between you and this man Hoffman? A No relationship at all. 30

Q Just friends? A Just friends.

Q What time did the car get back? A Well, the car didn't get back at all. They had the accident.

Q What accident? A With the children. He didn't bring the car back at all.

Q Was the car broken? A Yes, it was broken.

Q Broken at the time of the collision with these children? A Well, I couldn't say. 40

*Charles P. Devine, cross.*

Q Where did you get the car? A I got it out of the garage.

Q Did you ever hire Barclay before for such purposes? A Yes, sir, sure.

Q Is he a chauffeur? A He was a chauffeur at the time.

10 Q What do you mean he was a chauffeur at the time? A Well, he drove his own car and he drove for me once before.

Q He had a car, did he? A Yes, sir.

Q Was there any time fixed for Barclay to bring the car back, or for Hoffman to get back?

A No, no time fixed at all.

20 Q Then the arrangement was that Barclay was to get five dollars from you to take your friend Hoffman from your saloon down to the home of Hoffman's daughter and bring him back to your saloon, is that right? A Right.

Q What time was he to bring him back? A Well, I didn't specify any time.

The Court: That is all I have.

*By Mr. Lyness.*

30 Q Mr. Devine, in coming from Livingston street, would a person come through Caldwell Place and be on a direct route to Linden? A Well, yes, sir; if he come up East Jersey street, certainly you would come through Caldwell Place.

*By Mr. Kane.*

Q You said, I think, that Barclay had worked for you as a bartender? A Yes, he worked for me as a bartender off and on.

40 Q He wasn't working for you at this time as a bartender, the day that you sent him off on

*William Barclay (for Defendants), direct.*

this errand? A No, not that day. He was off that day.

Q Wasn't he in the produce business? A He was in the produce business himself.

Q Didn't he work for his brother in the produce business at that time? A At that time?

Q Yes. A I couldn't say that. 10

Q Well, he wasn't working for you at that time, was he?

Mr. Lyness: I object to that. He says that he was.

The Court: No, he don't say he was. Go on, Mr. Kane.

Q He wasn't working for you at that time as a bartender? A No, not that time. 20

Q Well, had he worked for you as a bartender prior to that time? A Oh, off and on before that.

Q When was he off and on? When was the last time? A Well, it was about two weeks before that.

Mr. Kane: That is all.

30

WILLIAM BARCLAY, recalled.

*Direct examination by Mr. Kane.*

Q Mr. Barclay, at the time that you were driving along Caldwell Place in this car, who was with you in the car? A Fellow by the name of Henry and fellow by the name of Duff.

Q Where did you get them? A Why, I picked them up as I was coming up to— 40

*William Barclay (for Defendants), cross—re-dir.*

Q Where did you pick them up, tell me the corner, if you know? A Well, I don't quite remember now.

Q Was Hoffman in the car with you? A No.

10 Q Did you leave Hoffman at his daughter's home? A Yes, sir.

*Cross examination by Mr. Lyness.*

Q Were you on your way back to Linden, Mr. Barclay? A Yes, sir.

Q To Mr. Devine's place of business? A I was; yes, sir.

Q And you were instructed to bring him back, were you not? A Yes, sir.

20 *Re-direct examination by Mr. Kane.*

Q You were instructed to bring Hoffman back—to take him down to his daughter's and bring him back, weren't you? A I was what?

Q You were instructed by Devine to bring Hoffman down to his daughter's home and to bring him back to Devine's place of business? A Well, I was to bring him down but there was no agreement to bring him back.

30 Q You heard Mr. Devine testify that you were to bring him back, didn't you? A Yes, sir.

Q You say now that you were not to bring him back? A Well, I waited for him and he didn't show up.

Q You brought him down and left him at his daughter's house? A Yes, sir.

40 Q What time was that, that you left him at the daughter's house? A About quarter-past three.

*William Barclay (for Defendants), re-direct.*

Q What time was this accident that you had? A About 6:30, I believe.

Q How long does it take to drive from where you left Hoffman off to the point where this accident occurred, driving at an ordinary rate of speed? A About twenty, twenty-five minutes.

10

*By the Court.*

Q How long did you remain at Hoffman's house waiting for him? A About two hours.

Q You got down there about quarter-past three? A Yes, sir.

Q Then you left there about quarter-past five, is that right? A Yes, sir.

Q Did you send in to Hoffman to tell him that you were waiting for him? A There was nobody there to send in.

20

Q What do you mean there was nobody there? You could have gotten out of the car, couldn't you? A Yes.

Q What do you mean there was nobody there to send out? A Well, he told me to wait. I waited on the opposite corner for him.

Q Did he tell you how long to wait? A No, sir.

Q Why did you wait on the opposite corner? A Well, I don't know.

30

Q You don't know? Why didn't you wait in front of his daughter's house? Were you ashamed? A No, sir.

Q Why didn't you? Did he tell you to wait on the opposite corner? A No, sir.

Q Well, can't you give these gentlemen, these jurors, some information as to just why you didn't wait until you did get Hoffman? A Well, he came out of his daughter's and he went some place else and he told me to wait there.

40

*William Barclay (for Defendants), re-direct.*

Q Now, we have got a new story, haven't we?  
A No.

Q You brought him to his daughter's? A  
Yes, sir.

Q And after you had been waiting for him for  
some time, how long were you waiting for him  
10 when he came out? A Why, he was only in  
there about ten minutes.

Q And then he came out and told you he was  
going some place and to wait where you de-  
livered him until he got back, is that right? A  
Yes, sir.

Q And you were waiting there? A Yes, sir.

Q All alone? A All alone.

Q Asleep or awake? A I was awake.

Q Had you been drinking that day before  
20 you started on this drive? A Had a few beers.

Q What kind of beers? A I don't know  
what kind they sell.

Q You don't know, and you are a bartender?  
Was it etherized beer? A I couldn't tell you  
that.

Q What about Hoffman, had he been drink-  
ing, too? A Not as I know of.

Q How long had you been in Devine's place  
that day before Devine arranged with you to  
30 bring Hoffman down to his daughter's house?  
A About a half hour.

Q Was Hoffman there when you went in?  
A Yes, sir.

Q You don't know whether he had been  
drinking or not, or whether he had taken any-  
thing while you were in there? A Well, I  
didn't know him personally.

Q What was the arrangement under which  
you got hold of Devine's car? A Why, he said  
40 he wanted to go to Elizabeth.

*William Barclay (for Defendants), re-direct.*

Q Who said that? A Hoffman.

Q What about Devine? A He asked me  
would I drive him down. I asked him what was  
in it.

Q What did he say? A Told me he would  
give me five dollars.

Q To drive Hoffman down to his daughter's  
10 house? A Yes.

Q And you to wait there for him? A There  
was no agreement to that.

Q Then, so far as your understanding was  
concerned, you were simply to bring Hoffman  
down there? A Yes.

Q And then come back. Although there was  
no agreement about waiting for Hoffman you  
waited two hours down there for him, is that  
right? A I guess I did.

Q Well, when you started away from Hoff-  
man's house, the daughter's house, what course  
did you take back? A Why, went down through  
First street, I presumed I would pick him up  
along there that way, I didn't know where I  
would find him.

Q Then you went looking for him? A While  
on the way home I thought I would pick him up.

Q Where did you expect to find him? A  
Lord knows, I didn't know where he was going  
30 to.

Q Were you both having a spree? A No,  
no.

Q Here is a man that you are given five  
dollars to bring down to his daughter's house,  
he goes in there, come out in ten minutes, tells  
you to wait for him and he goes off some place  
else and then you go looking down First street  
after two hours looking for him, do you mean  
that? A Yes, sir.

10

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*William Barclay (for Defendants), re-direct.*

Q Why did you go looking for him? A To bring him back.

Q Then was it an arrangement when Devine told you that there was five dollars in it for you, you took Hoffman, was it the arrangement that you would follow Hoffman up and bring him back there? A Not necessarily, no.

Q Why did you go looking for him? A Well, I figured I brought him down, I figured I would bring him back.

Q You thought it was your duty to bring him back under that five-dollar arrangement, didn't you? A Yes, sir.

The Court: That is all.

20 *By Mr. Kane.*

Q You say that he came out of his daughter's house? A Yes, sir.

Q And went somewhere else. And then you went off in this direction that he went looking for him. How long did you wait in front of the daughter's house before you went looking for him? A About two hours.

Q In front of the daughter's house? A He told me he was coming back.

Q Didn't you drive away from the daughter's house? A No, sir.

Q Well, you said at one time, I think, that you pulled to the corner? A No, I didn't.

Q You didn't say that today, that you pulled to the corner? A No.

Q But you did go away from the daughter's house down First street or some other street looking for him? A About two hours later; yes, sir.

40

*Elmer P. Weigel, direct.*

*By Mr. Lyness.*

Q You were on your way back to Devine's when this accident occurred? A Yes, sir.

*By the Court.*

Q How long had you been working for Devine as a bartender? A Well, I never worked steady for him.

Q You were just a casual bartender for him? A Yes, sir.

ELMER P. WEIGEL, a witness produced on behalf of the plaintiffs, being duly sworn according to law, on his oath saith:

20

*Direct examination by Mr. Lyness.*

Q Doctor, you are a practicing physician and surgeon in the State? A I am.

Mr. Lyness: You will admit his qualifications, Mr. Kane?

Mr. Kane: Yes.

Q Do you recall having taken care of Anthony Dilbatis and George Thomas, doctor? A I do.

Q Will you tell us just what you treated them for and when the treatment was administered?

A These boys were admitted to the hospital on my service on the fifth of April, 1926; each of them had sustained a fracture of the left femur, that is the large bone of the thigh, about in the same position, both about in the middle of the thigh bone on the left side, with a history

40

*Elmer P. Weigel, direct.*

of having been injured in an automobile accident. We reduced both of these fractures under an anaesthesia, that is the boys were put to sleep by means of an anaesthetic and we manipulated the bone ends until we had them in what we considered a satisfactory position, and X-  
 10 rayed them. We found that in the case of Thomas, we succeeded in getting the bone in fairly good position, but in the case of the Dilbatis boy, we were unable to get them in good position. We applied plaster casts to both of them, and recommended that the Dilbatis boy have an operation to get these fragments together, as we had not been able to do by our previous manipulation. We decided that it would be wise to wait a period of about a week, so  
 20 that the bleeding that usually accompanies these fractures would be subsided; and during that time the Dilbatis boy developed measles and had to be removed from the hospital because of the danger of contagion to the other children. He was out of the hospital until the seventh of May, that is one month and two days from the day he was originally admitted. On the seventh of May he was readmitted to the hospital and an X-ray taken at that time showed that the ends of this  
 30 fractured bone were overlapping a distance of about two and one-half to three inches. His leg was that amount shorter than the other one. And we immediately did an open operation whereby these ends were drawn down, put end to end and fastened there by means of a suture, and another plaster cast applied. This was then followed by X-ray until the fragments were solid so that it was safe to remove the plaster dressing. When the plaster was removed it was  
 40 found that due to the long continued fixation

*Elmer P. Weigel, direct.*

that this boy had had on account of his having developed measles, during which time we were unable to operate on him, the motion of his knee was very much less than it would be ordinarily. In other words, his knee was practically completely stiff. And it took quite a long time. It  
 10 wasn't until the 22nd of July, that we discharged him; quite a long time of baking and massage, and at one time I administered another anaesthetic to him and forcibly bent that knee so that he would get some motion in that knee. He was discharged on the 22nd of July, 1926.

Q That is Dilbatis? A That is Anthony Dilbatis.

Q Now, doctor, did you have X-rays taken of the Dilbatis boy's leg? A I did.

Q Were they taken under your direction and supervision? A They were.

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

Q Will you just take them out and describe them to the jury? A These two X-rays here were the ones taken after we first attempted to manipulate it and thought we had it in fairly good position. Those were the original ones. Then here was the X-ray showing we had not  
 30 succeeded in getting them—there is the X-ray showing the overriding, which made us decide that an open operation would be necessary. That is the larger one of the three. Here is the X-ray taken after the boy was readmitted to the hospital, having been out about five weeks with the measles, showing the bone ends markedly overlapped; a complete fracture with the ends overlapped about three inches. Then here are the two X-rays taken after the operation, showing them in their proper position. These are the  
 40

*Elmer P. Weigel, direct.*

two final X-rays after his plaster was removed, showing the bones united in good position.

Mr. Lyness: I would like to offer those X-rays in evidence, your Honor.

Mr. Kane: No objection.

10 (X-rays entered in evidence as one exhibit and marked Exhibit P. 7.)

Q Doctor, can you tell us whether or not this young man suffered as the result of these operations? A This boy I feel very sure had a great deal more suffering and inconvenience, as the result of this fracture than one would ordinarily have, because of the prolonged fixation that was necessarily due to his intercurrent disease, namely, the measles, and of course had we been able originally to reduce this fracture, so that an operation would not have been necessary, he might have been well quite a little quicker and with considerably less suffering than he naturally had to go through because of the difficult type of the fracture, which demanded an open operation.

Q Now, doctor, what is the condition of the Dilbatis boy at this time? A The boy has the full length of his leg, in other words, there is no shortening; the motion of his ankle and hip is perfectly normal. He still has some slight limited motion of his knee joint. In comparing this I should say that he had approximately seventy-five per cent. of his normal motion of the knee joint. He tells me, the last time I examined him, that he has considerable pain in the leg on change of weather, damp weather seems to give him considerable pain, and that he tires quite readily. Other than that I think he is about normal.

*Elmer P. Weigel, direct.*

*By the Court.*

Q About the knee, will that improve or is that permanent? A Well, it is almost a year since the injury happened. I believe part of it may come back, but I think in all likelihood there will be a small percentage of permanent limitation of motion. 10

*By Mr. Lyness.*

Q Now, doctor, did you take or cause to be taken, X-rays of the Thomas boy's leg? A Yes.

Q And they were taken under your direction and supervision? A They were.

Q You have those X-rays here? A I have.

Mr. Lyness: I would like to offer them in evidence. 20

(X-rays entered in evidence and marked Exhibit P. 8.)

A In the Thomas boy we had quite a different experience. We succeeded upon admission in reducing this fracture to what we thought was very satisfactory position. The X-rays taken afterward show the bone in good position and we decided to leave it as it was. About ten days afterward, however, a second X-ray taken showed that our fragments had slipped and they did not maintain the position which we originally had for them. There are the original X-rays showing our first attempted reduction. We considered that satisfactory. 30

Q Doctor, have you the X-rays that were taken of this child's leg before the operation was performed? A I think I have. That was be- 40

*Elmer P. Weigel, direct.*

fore anything was done to the boy. There is the other one. It is away up at the upper end of the plate, but it shows a displacement. Those other two you have were the ones after our first attempted reduction. Here is the one shows our bones had slipped and we decided that he had to be operated upon.

Q That was the second operation, doctor?

A Well, it was the open operation. The first was simply an attempt to do it without making an incision into the skin, just by manipulating the bone ends under anaesthesia. There is his final result.

Q Can you tell us whether or not this young man suffered any pain as the result of this operation? A This boy was subjected to two operations; first of all the manipulation under anaesthesia, without making an incision, and then secondly the open operation, at which time we had to cut down through the skin and all the muscles to the bone, put these open ends together and tie them there, and he had to remain in plaster a period of seven weeks after his operation.

Q Doctor, did you render a bill to—

*By the Court.*

Q What is his condition now, doctor? A At the present time George Thomas has a solid leg, the alignment is very good, but he has from a half to three-quarters of an inch shortening. These fragments are not in as good position as the other boy's leg, and as the result of that he has got from a half to three-quarters of an inch shortening of that leg. He complains of getting tired upon use of the leg, and also complains of pain when the weather changes, damp weather

*Elmer P. Weigel, cross.*

gives him a good deal of discomfort. The motion of his knee is slightly limited, probably not quite as much as the other boy, estimating it in percentage I should possibly say that he has about ninety per cent. normal motion of his knee joint. The hip and the ankle about normal.

*By Mr. Lyness.*

Q Doctor, this shortening of the leg in your opinion is a permanent condition, is it? A It is.

*Cross examination by Mr. Kane.*

Q This pain he has, doctor, he will eventually recover from that, won't he? A I can't say definitely. He is very apt to.

Q What is the usual thing that happens in these cases, that the pain will eventually clear up? A Usually.

Q This Dilbatis boy has the full extension of that leg that he had in it before? A Full extension, yes.

Q So that he does not limp? A He limps when he gets tired. He does not limp because of any limited extension. He has complete extension.

Q Did I understand you to say that the intervening measles there had some bearing upon the knee condition? A The fact that the boy contracted measles prolonged his treatment a period of about four to five weeks. That additional fixation did have something to do with the limited motion of his knee joint.

*Elmer P. Weigel, re-direct.*

*Re-direct examination by Mr. Lyness.*

Q Doctor, did you render a bill for your services to Dilbatis and Thomas? A I did.

Q Will you tell us how much that bill is?  
A It was \$150 in each case.

10 Q Now, doctor, I show you two bills from the St. Elizabeth Hospital, three for Dilbatis and two for Thomas, and ask you if they are fair and reasonable charges for the time?

Mr. Kane: May I just see the bills before I offer any objection? I object to the doctor testifying as to the reasonableness of the hospital bills.

20 The Court: If you object, you will have to send for one of the sisters and bring her from her job to prove the bills.

Mr. Lyness: Mr. Kane, will you admit the bills in evidence?

Mr. Kane: No, I will not admit them in evidence unless they are properly proven. The doctor bill is all right. But the hospital bills, I will not admit them.

30 *By Mr. Lyness.*

Q Can you explain these hospital bills to us, how they arrive at the amounts due there?

Mr. Kane: I object to that because the doctor does not conduct the hospital. He is a doctor. He does know about doctor bills.

40 Q Doctor, are your charges of \$150 each for the Thomas and Dilbatis cases, are they fair and reasonable charges?

*Elmer P. Weigel, re-direct.*

The Court: That is not disputed, is it?

Mr. Kane: No. That is admitted, that is a reasonable charge.

Q Will you tell us from the records there of the hospital, that is the bills, doctor, how long these boys were in the hospital? 10

The Court: You already know how long the boys were in the hospital. That is not the proper way of proving it. You might just as well ask me to look at the bills and tell the jury.

Mr. Lyness: I will withdraw the question.

20 The Court: You may ask the doctor whether or not those hospital bills are reasonable, but the jury could not take them unless you further connect them. You will have to send for your bookkeeper.

Q Are those reasonable bills, doctor? A The charges here are at the rate of \$1.50 a day—

Mr. Kane: I object.

30 The Court: Objection overruled. You may have your exception. I am saying that the jury will be told to ignore these bills unless they are properly connected by proof. While the doctor is here he is in a position to determine whether the charges made by the hospital were reasonable. Why don't you subpoena one of the sisters there as the bookkeeper and bring her down here?

40 Mr. Lyness: I could not now. He is my last witness. I could not bring her down.

*Motion for Direction of a Verdict.*

The Court: Why didn't you arrange for the bookkeeper to be here?

Mr. Lyness: I did think the bookkeeper would be here.

10 The Court: The chances are if you had submitted your bills to Mr. Kane before, you would not have had any trouble.

Mr. Lyness: I can get someone down in about ten minutes, during the time we are summing up. That is all, doctor.

(Bill of Dr. Weigel marked P. 1 for identification entered in evidence and marked Exhibit P. 1.)

Mr. Lyness: That is all.

Mr. Kane: We rest.

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## MOTION FOR DIRECTION OF A VERDICT.

Mr. Kane: I want to make a motion for a direction of a verdict as to the defendant, Devine, on the ground that the testimony shows that this man Barclay, the other defendant, was not engaged in and about the business of Devine at the time this accident happened.

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The testimony is that he was to bring this man Hoffman down to a certain place; and he says after he got there Hoffman went off to some direction, and he went off and followed him. I will say inasmuch as they attempted to do that, that they then got off the line of duty. There was a deviation to a marked degree from the instructions given to him and therefore Devine cannot be held responsible for the accident to these

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two boys.

*Motion for Direction of a Verdict.*

The Court: Motion denied.

Mr. Kane: Prays exception.

The Court: You may have it.

Mr. Kane: I move further for a direction of a verdict on the ground that the evidence shows that the boys themselves were the negligent parties.

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The Court: That is denied, Mr. Kane.

Mr. Kane: Prays exception.

Mr. Kane sums up the case for the defendants.

Mr. Lyness sums up the case for the plaintiffs.

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*Charge to Jury.*

**CHARGE TO JURY.**

NEW JERSEY SUPREME COURT.

UNION COUNTY CIRCUIT.

January Term, 1927.

10

GEORGE THOMAS by Harold J. Thomas, his next friend, and HAROLD J. THOMAS,

*vs.*

CHARLES P. DEVINE and WILLIAM BARTLETT.

20

ANTHONY DILBATIS by Joseph Dilbatis, his next friend, and JOSEPH DILBATIS,

*vs.*

CHARLES P. DEVINE and WILLIAM BARTLETT.

Court's charge to the jury by Honorable Peter F. Daly, Circuit Court Judge, as follows:

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Gentlemen of the Jury: You have two distinct cases to determine, the one on the part of young Dilbatis, who sues through his father, as his next friend, and in that case the father individually is also a plaintiff. The other case is a suit by young Thomas, who sues through his father, as his next friend, and in which his father individually is also a plaintiff. The defendants in each case are Devine and Barclay.

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If these boys, or either of them, is entitled to a verdict, he is entitled to a verdict that will

*Charge to Jury.*

fairly and adequately compensate him for the physical injuries to which his body was subjected; and he is also entitled to a verdict that will fairly and adequately compensate him for the pain and suffering that he went through, as the result of the physical injuries to which his body was subjected. If he is entitled to a verdict he is also entitled to be fairly and adequately compensated for any permanent or continuing injury which, from the preponderance of the evidence, you find to a point of reasonable certainty, has flowed directly from this accident. If the boys, or either of them, is entitled to a verdict, then the father of such boy, or the fathers of such boys, are entitled to verdicts, or is entitled to a verdict that will reimburse him for the expenses which he reasonably and properly incurred in the reasonable and proper treatment of his boy's injuries. But, the reimbursement should be upon the basis of what has been proven in evidence before you, and any expenses which you might conjecture, or even believe were incurred by him which have not been properly and legally proved before you, you have no right to include, unfortunate as you might find that to be. The only item of expense that we have had evidence on, that has been admitted, is the item of Dr. Weigel's bill. You will remember that the hospital bills were objected to, and properly so, because proper proof of those bills was not presented.

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These two boys were both badly injured. That is admitted. It is contended, however, upon the part of the defense, that the accident which caused these injuries, or from which these injuries flowed, was the result of the acts of the boys alone, or even though there might have

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*Charge to Jury.*

been negligence upon the part of Barclay, as a driver of this car, yet there was contributory negligence upon the part of the boys.

You already know what negligence is; it is the failure to observe the conduct of a reasonably prudent person. You also know that the burden  
10 of proving negligence against a defendant is upon the plaintiff. Was there negligence in this case upon the part of Barclay, and was that negligence a proximate or immediately effective cause of the accident from which flowed the injuries to these boys, or either of them?

Barclay was on the witness stand and he said nothing about the accident. A question of fact for you to pass on is whether the preponderance of the evidence satisfies your minds that it was  
20 the particular car that he was driving which was the car that ran down these boys. There was one witness to the effect that he had heard a thump, or noise of some kind, and he looked around and saw these two boys lying in the road, and he says an automobile traveled away from the point where the boys were located. He had his car and he immediately gave pursuit and he brought back this car which he saw going away from the point of where the boys were  
30 lying, and it was the car of Barclay as driver. What does Barclay say about that? As I remember his testimony, he does not go into the details of the accident at all. The charge is made here in his presence that it was his car that drove down both these boys, and it is a rule of law that where a man is charged with the commission of an offence and he fails to deny that which is substantial to a proper determination of the dispute involved, that while his failure to deny is not in itself evidence that he did do  
40

*Charge to Jury.*

that which he was charged with, yet that failure is to be taken by twelve sensible men into serious consideration in determining whether or not he did do what he is charged with. And they have the right to ask themselves, in the proper determination of the case, where a material charge is made against a man on a matter  
10 that is substantial to the controversy itself, vital to the proper determination of the issue, why the man who has the opportunity to deny such a charge, does not deny it. Was it the car that Barclay was driving that drove down those boys, and if it was the car, was there negligence upon the part of Barclay, as the driver of the car, which was the proximate cause of this injury? And if it was his car, and there was negligence  
20 upon the part of Barclay that was the proximate cause of the injuries to these boys, then was there contributory negligence upon the part of these boys, or either of them? In determining whether or not there was contributory negligence upon the part of these boys, or either of them, the law says to a jury in their determination of questions of fact that they shall gauge the conduct of such boys, or such a boy, not by the standard of an adult, but by the conduct of what  
30 would have been the conduct under the like circumstances of a sensible prudent boy of like age, experience and education. And that is the test, when the charge is made of contributory negligence against a minor or infant. If you find that this accident, or that there was negligence upon the part of Barclay that was the proximate cause of the injuries to these boys, or to either of them, that it was his car that ran down these boys, and that there was no contributory negligence upon the part of the boys, or either of  
40 them, then you still have another question.

*Charge to Jury.*

Where does Devine come in? If it was the car that Barclay was driving that drove down these boys, then it was Devine's car, was it not? And if you find that it was Devine's car, that he was the owner of the car, and that Barclay is liable, then the question is, is Devine, as the

10 owner of the car, also liable. What does the law say about that? The law asserts that when you prove ownership of a car that is in an accident, that that carries with it, that proof of ownership, the presumption that at the time of the accident the automobile was either in charge of the owner himself, or if he was not in charge of it, then whoever was in charge of it was the agent or servant of the owner and in and about

20 the owner's business. However, the owner has the right to rebut that presumption, if he can, and he does that by evidence. So on that question, gentlemen, you start out with the presumption that if it was Devine's car that ran down these boys, and that Barclay was responsible, as I have explained, then the question is, does Devine rebut the presumption that Barclay, at the time of the accident, was in and about Devine's business? Devine admits that Barclay had that car at that time, if that was the car

30 that ran down the boys, under his employment; it was a casual employment, of course. He was not regularly employed as a chauffeur by Devine. He had been a casual bartender in Devine's saloon, and according to Devine's story on this day, Devine had engaged him for the sum of five dollars to take this car and drive Hoffman down to Hoffman's daughter's house and bring him back to the saloon; that is Devine's story. And Barclay says that that is true, up to that

40 point, and that he did drive Hoffman down to

*Charge to Jury.*

his daughter's house; that Hoffman located him, at the corner across from Hoffman's house, and that in about ten minutes Hoffman came out and went some place, and that he, Barclay, remained there for two hours, and then he starts out to hunt Hoffman and goes down to First

10 street to find Hoffman, and is on his way back, as I get his testimony, to deliver the car, without Hoffman; he has not been able to find Hoffman, to deliver the car back to the owner, Devine. Now, then, gentlemen, what was his job, from the evidence in this case? Was he employed by Devine for the sum of five dollars to take that car and bring Hoffman to Hoffman's daughter's house and to get him back to Devine's saloon, for one purpose or another, no matter what that

20 purpose, that is of no consequence? Was that his job to see that when he started out with Hoffman he was to bring Hoffman back to Devine's? Was that what Devine employed him for? I do not know. But there is the presumption, to start with, that when he had that car, he had the car as the employee of Devine, and at the time of the accident he was engaged in and about the scope of his employment, and it is the duty of Devine, as a defendant, the

30 burden is on him to rebut that presumption. Has he done it?

I have taken up all these questions that require any explanation from the standpoint of the law, and now you will take that law as I have given it to you, and you, within your province as the sole sovereigns in the determination of the realm of fact, apply the facts to the law as I have given it to you, and then give us the result of your conclusions.

with OCT. T. 1927 is hereby acknowledged  
this 26 day of October, 1927  
John H. Lyness  
Attorney for Plaintiffs - Appellees

Arthur W. Cross, Law Printer, 55-57 Lafayette Street, Newark, N. J.

### New Jersey Court of Errors and Appeals

GEORGE THOMAS, by his next  
friend, Harold J. Thomas,  
and HAROLD J. THOMAS, in-  
dividually,  
*Plaintiffs-Appellees,*

*vs.*

CHARLES P. DEVINE and WIL-  
LIAM BARCLAY,  
*Defendants-Appellants.*

*Appeal from  
New Jersey  
Supreme  
Court, Union  
County.*

ANTHONY DILBATIS, by his next  
friend, Joseph Dilbatis, and  
JOSEPH DILBATIS, individually,  
*Plaintiffs-Appellees,*

*vs.*

CHARLES P. DEVINE and WIL-  
LIAM BARCLAY,  
*Defendants-Appellants.*

*Action  
at Law.  
On Brief.*

#### BRIEF OF DEFENDANT-APPELLANT, CHARLES P. DEVINE.

##### Preliminary Statement.

The above entitled causes were tried together, by stipulation of counsel, in the New Jersey Supreme Court, Union County, before the Honorable Peter F. Daly, Judge of said court and a jury.

The plaintiffs obtained a judgment against both defendants for damages to compensate them for alleged wrongful injuries sustained by the plaintiffs, when they were struck by an automobile driven by the defendant, William Barclay,

while allegedly in the employ of the defendant, Charles P. Devine. An appeal having been taken by the defendant, Charles P. Devine, the matter is now before this court for review.

Counsel have stipulated that both appeals be argued together (State of Case, p. 21).

#### Statement of Facts.

The complaint of both plaintiffs, with the exception of the name and age of the individual plaintiff, are alike in that they both allege the same acts of negligence on the part of both defendants and the same fact of operation and control on the part of this individual defendant, Charles P. Devine (State of Case, pp. 2, 3, 4, 5; pp. 12, 13, 14, 15).

The answers filed by this defendant, Charles P. Devine, denies the allegations of negligence and the allegation of operation and control on his part and as a separate defense alleges that the defendant, Barclay, at the time of the happening complained of, was engaged in and about his own business and was not engaged in and about his, Charles P. Devine's business (State of Case, pp. 6-7; pp. 16-17).

The defendant, Charles P. Devine, relies on two grounds for setting aside of the verdicts rendered in favor of the plaintiffs and against him.

#### GROUND NO. 1.

Because the Court erred in refusing to direct a verdict to be rendered in favor of the defendant and against the plaintiffs, when requested to do so by the defendant.

Two reasons were given why a verdict should have been directed in behalf of the defendant, Charles P. Devine.

1. That the defendant, Barclay, at the time of the happening of the accident, was not engaged in and about the business of the defendant, Devine, in that he had deviated from that business for which he had originally been hired, namely, the taking of Mr. Hoffman to his sisters and returning to the business place of the defendant, Devine.

2. That the negligence of the plaintiffs was the cause of the accident.

Subdivision 2 of Ground No. 1 is abandoned.

The testimony of the defendant, Devine, as to the business for which the defendant, Barclay, was hired is as follows:

*By Mr. Kane.*

Q Under what circumstances did he get the car from you? A Why he took this man down to Livingston street, this Mr. Hoffman.

Q Do you know what he took him down there for? A Took him down on business for himself with Mr. Hoffman. I hired him to take this man down.

Q What is that? A I hired Mr. Barclay to take this man down" State of Case, p. 61, ll. 22 to 30).

The testimony of the defendant, Barclay, on this point, is as follows:

*By the Court.*

Q What was the arrangement under which you got hold of Devine's car? A Why, he said he wanted to go to Elizabeth.

Q Who said that? A Hoffman.

Q What about Devine? A He asked me would I drive him down. I asked him what was in it.

Q What did he say? A Told me he would give me five dollars.

Q To drive Hoffman down to his daughter's house? A Yes.

Q And you to wait there for him? A There was no agreement to that.

Q Then, so far as your understanding was concerned, you were simply to bring Hoffman down there? A Yes.

Q And then come back. Although there was no agreement about waiting for Hoffman you waited two hours down there for him, is that right? A I guess I did" (State of Case, p. 68, ll. 38-40; p. 69, ll. 1 to 20).

The defendant, Barclay, further testified as follows:

"By Mr. Kane.

Q Mr. Barclay, at the time that you were driving along Caldwell Place in this car, who was with you in the car? A Fellow by the name of Henry and fellow by the name of Duff.

Q Where did you get them? A Why I picked them up as I was coming to—

Q Where did you pick them up, tell me the corner, if you know? A Well, I don't quite remember now.

Q Was Hoffman in the car with you? A No" (State of Case, p. 65, ll. 35-40; p. 66, ll. 1-8).

Is is quite evident, from the above testimony, that the relationship of master and servant that had existed between the defendants, Barclay and Devine, had ceased because he had deviated from the purpose of his original hiring so as to render the defendant, Devine, blameless for any act of negligence on his part.

In *Jennings v. Okin*, 88 N. J. Law, 659, the defendant directed his son to go to the theatre, owned by him, to observe whether the signal lights on the street where certain building obstructions were located were still burning, and then to return home. The son, with the father's authority, took the father's automobile, performed his mission, but instead of immediately returning, invited two of his friends to enter the car for the purpose of enabling them to catch a certain train. This Honorable Court, in an opinion *by the learned Justice McInturn,*

*Under* such circumstances, it is settled that the father, as principal, could not legally, be called upon to assume liability for the incidents of the trip, and that from the moment it (the deviation) was undertaken, the relationship of principal and agent therefore subsisting was severed." *Evers v. Krause*, 70 N. J. L. 653; *Doran v. Thomsen*, 76 N. J. L. 754; *Missel v. Hayes*, 86 N. J. L. 348. This principle is further enunciated in *Cronecker v. Hall*, 105 Atlantic 213, 215.

It therefore necessarily follows, from the testimony adduced at the trial of these causes, which is the same, in substance, as that of *Jennings v. Okin, supra*, that at the time of the happening, herein under discussion, the defendant, Barclay, had deviated from the original course of his employment, to such a degree as to sever the relationship of principal and agent that had therefore subsisted with the defendant, Devine.

## GROUND NO. 2.

Because the trial court erred in refusing to permit an answer to the following question, during the cross examination of William Barclay:

**Q** Have you been convicted of driving an automobile on the 5th of April, while under the influence of intoxicating liquor?

The main reason given for the asking of this question, was to show that Barclay at the time of this happening was not in and about the business of the defendant, Devine. The question was also asked to test the credibility of the witness.

“The fact that a witness was intoxicated at the time of the events concerning which he testifies bears upon his capacity, for accurate observation and correct memory, and hence is proper to be shown and considered in passing upon his credibility, although it does not render him absolutely unworthy of credit, and it is proper to cross examine a witness fully as to whether he was intoxicated at such time.” 40 *Cyc.* 2574; *Joyce v. Parkhurst*, 150 Mass. 243, 22 N. E. 899.

It is true that the law as above stated, refers only to examining a witness as to whether or not he was intoxicated at the time of the event which he is testifying to, and that no reference is made to the asking of a question which will show his conviction because of such intoxication, but it is respectfully urged that if questioning, with reference to his inebriety is permissible then it should follow that questioning bearing on the same point but in slightly different terminology is also permissible. The fact that the jury might have been misled by an affirmative answer is not proper grounds for the exclusion of the testimony, for the Court, on request will

always guard against such error, *Williams v. Shepard*, 1 Green 76, 78; *Trenton Passenger Ry. Co. v. Cooper*, 31 Vroom 219, 222.

The Court further erred in refusing to permit an answer to the above-stated question because it was, as is quite evident, the only way this defendant could have shown by conclusive proof that Barclay had deviated from his employment, and as that ground was one of the defenses upon which this defendant relied, the evidence which this defendant endeavored to adduce was legal for at least that one purpose. *Williams v. Shepard*, *supra*; *Trenton Passenger Ry. Co. v. Cooper*, *supra*.

We respectfully submit that the judgment of the court below should be reversed for the reasons stated.

JNO. A. MATTHEWS,  
Attorney and of Counsel for  
Defendant-Appellant, Charles P. Devine.

# New Jersey Court of Errors and Appeals

GEORGE THOMAS,  
by his next friend  
Harold J. Thomas,  
and Harold J. Thom-  
as, individually.  
Plaintiffs-Appellees

vs.

CHARLES P. DIVINE  
and  
WILLIAM BARCLAY,  
Defendants-Appellants

Action at Law  
On Appeal from  
Supreme Court,  
Union County.

ANTHONY DILBATIS  
by his next friend  
Joseph Dilbatis, and  
Joseph Dilbatis, in-  
dividually,  
Plaintiffs-Appellees,

Set Below:  
Daly, C. C. J.

and

CHARLES P. DIVINE  
and  
WILLIAM BARCLAY,  
Defendants-Appellants

## BRIEF FOR PLAINTIFFS-APPELLEES

These are appeals by defendant Divine from judgments in favor of plaintiffs for injuries received by two boys being run down by an automobile owned by defendant Divine and driven by his driver defendant Barclay, who did not appeal. The cases were tried together and the appeals are argued together here.

### FACTS

George Thomas, nine years of age at time of accident, and Anthony Dilbatis, thirteen years of age at that time, the two infant plaintiffs, were playing with other boys on the lawn at Caldwell Place, Elizabeth, on April 5, 1926. The boys stopped playing about 7:30 o'clock in the evening, and started to go home. While crossing the street they were hit by defendant Divine's automobile driven by his driver, defendant Barclay. There were two other persons in the car at the time with Barclay, but they were not called as witnesses.

Divine's car was going from twenty to thirty-five miles an hour, the estimates vary, did not have any lights, did not give any warning, and did not stop after hitting the boys. The impact threw the Dilbatis boy, at least six feet, and the Thomas boy was run over by the right wheel. Each boy sustained a fracture of the large bone of the thigh (about the middle) on the left side. The boys were taken to the hospital, the fracture reduced, and casts applied, but the Dilbatis boy had to have an operation about a week later, as the surgeon was unable to get the bones in good position, and the Thomas boy also had to have an operation about ten days later, because the fragments of bone slipped and did not maintain the original position.

Verdicts were rendered for the Thomas boy for \$4500 and for his father for \$500 and for the Dilbatis boy for \$3300 and for his father \$500.

Appeals were taken on the grounds that the trial Court erred, first, in refusing to direct a verdict for defendants, and, second, in refusing to permit the defendant Barclay, when on the stand as a witness for plaintiffs, to answer on cross-examination the following question: "Have you been convicted of driving an automobile on the fifth of April while under the influence of intoxicating liquor?" Defendant Barclay was later on

the stand as a witness for defendants, but there was no attempt to pursue the subject other than to ask him if he had been drinking that day, to which he replied that he had a few beers, and the further question if they were having a spree to which he replied, "No, no."

There were three other boys who testified as to the accident, Siano, Walker, and Athenthal, and two men, Goldy and Kukel.

Although Barclay was called as a witness for the plaintiff and admitted driving the car and hitting the boys, he was not cross-examined at all as to lights, speed, etc., nor was he examined at all in that respect when called as a witness for the defendants. And as the only other witness for the defendants was the defendant Divine, who was not present at the time of the accident, the testimony, therefore, on behalf of the plaintiffs is totally uncontradicted.

### REFUSAL TO DIRECT VERDICT

The defendants moved to direct a verdict on two grounds: 1. Because the driver Barclay deviated from his instructions, and 2. Because the boys were negligent. Refusal of this motion is the first ground assigned for these appeals.

Defendant Divine engaged defendant Barclay to drive a friend, Hoffman, to Hoffman's sister's or daughter's (it is mentioned both ways in the testimony) house and to bring him back. A reading of the testimony of Divine and Barclay does not substantiate this contention of defendants that Barclay, deviated from his instructions but, on the contrary, refutes it. Barclay said he did not bring Hoffman back because he could not find him. He, therefore, returned without him. The accident happened on the return trip. Hoffman was not called as a witness.

Case, Divine's Testimony, pp. 61-65.

Case, Barclay's Testimony, pp. 65-71.

If there were any question at all as to the boys' negligence, which it is respectfully sub-

mitted there was not, it would clearly be a jury question.

Rinaldi vs. Levgar Structural Co., 97 N. J. L., 162, 163, 164.

(Errors and Appeals, 1921, Walker, Ch.)

**REFUSAL TO ALLOW QUESTION**

The second, and only other ground, assigned for these appeals is the refusal of the trial court to permit the following question on cross-examination of defendant Barclay when called as plaintiffs' witness:

"Have you been convicted of driving an automobile on the fifth of April while under the influence of intoxicating liquor?"

That this was not error would seem too clear to need the slightest argument. In the first place, it was not cross-examination: in the second place, it was not limited as to its application to the time of the accident, i. e, he might have become under the influence after the accident and been convicted of being in a condition not at all present at the time of the accident although present on the same day; in the third place, a judgment of the police court in such a matter has no bearing on the civil suit such as this; and, lastly, defendant's counsel refused to disclose his purpose in asking it.

Case, p. 54, lines 30-40; p. 55, lines 1-40

It is respectfully submitted that the judgments should be affirmed.

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W. S. Angleman,  
of Counsel.

October Term, 1927.

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