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Complaint.

COMPLAINT.

Filed March 8, 1921.

The plaintiff, residing in the Town of Bloomfield, County of Essex and State of New Jersey, complaining of the defendants herein, says:

1. On or about June 30, 1919, the plaintiff herein was lawfully standing on Bloomfield avenue, Bloomfield, N. J., near the Erie Railroad crossing. 10

2. On or about said date the defendant, Morris L. Groner, was the owner of a certain automobile which was being operated on Bloomfield avenue about said place and was proceeding in an easterly direction.

3. Said automobile belonging to the defendant, Morris L. Groner, was at the time and place aforesaid driven and operated by the defendant, Harry N. Pryor, who was the agent of and in the employ of the defendant, Morris L. Groner, and was proceeding at said time and place in and about the business of said Morris L. Groner. 20

4. Said defendant's automobile was so carelessly and negligently operated by the defendant, Harry N. Pryor, as to cause the same to run into and strike the plaintiff.

5. The carelessness and negligence of the defendant, Harry N. Pryor, consisted in this:

a. Said defendant's automobile was being operated at an excessive rate of speed. 30

b. Said automobile did not give any warning of its approach.

c. Said automobile did not carry any lights.

d. Defendant did not maintain the proper control of said automobile.

6. Due to the negligence of the defendants, the said plaintiff was severely injured, underwent and suffered a fracture of his left leg and numerous contusions and bruises and was forced to expend much money in the 40

Answer of Morris L. Groner.

cure thereof and will be forced to spend money in the future, and claims damages against both the defendants, each or either of them in the sum of fifteen thousand dollars (\$15,000).

HEINE, BOSTWICK & BRADNER,
Attorneys for Plaintiff.

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ANSWER OF MORRIS L. GRONER.

Filed March 18, 1921.

The defendant, residing in the City of Newark, County of Essex, says:

1. He denies paragraphs 1, 4, 5 and 6 of the plaintiff's complaint.

20

2. He admits paragraphs 2 and 3 of the plaintiff's complaint.

FIRST DEFENSE.

Defendant says that plaintiff was guilty of negligence which contributed to the happening of the alleged accident, in that he, the said plaintiff, came into the path of the said automobile suddenly and without warning and without giving the driver thereof an opportunity to avoid the alleged accident.

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COULT & WOODRUFF,
Defendants' Attorneys.

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Answer of Harry N. Pryor.

ANSWER OF HARRY N. PRYOR.

Filed March 18, 1921.

The defendant, residing in the City of Newark, County of Essex, says:

1. He denies paragraphs 1, 4, 5 and 6 of the plaintiff's complaint. 10
2. He admits paragraphs 2 and 3 of the plaintiff's complaint.

FIRST DEFENSE.

Defendant says that plaintiff was guilty of negligence which contributed to the happening of the alleged accident, in that he, the said plaintiff, came into the path of the said automobile suddenly and without warning and without giving the driver thereof an opportunity to avoid the alleged accident. 20

COULT & WOODRUFF,
Defendants' Attorneys.

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Reply.

REPLY TO ANSWER OF HARRY N. PRYOR.

Filed March 17, 1921.

The plaintiff by way of reply to the first defense says that he denies each and every allegation therein.

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HEINE, BOSTWICK & BRADNER,
Attorneys for Plaintiff.

REPLY TO ANSWER OF MORRIS L. GRONER.

Filed March 17, 1921.

The plaintiff by way of reply to the first defense says that he denies each and every allegation therein.

20

HEINE, BOSTWICK & BRADNER,
Attorneys for Plaintiff.

30

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Judgment.

ESSEX COUNTY CIRCUIT COURT.

31137	}	<i>Action at Law.</i>	
EDWARD F. DAVIS,		<i>Verdict by a Jury.</i>	
<i>vs.</i>		<i>Judgment for</i>	
MORRIS L. GRONER and HARRY N.		<i>Plaintiff.</i>	10
KRYOR,		<i>Amount \$1,800.00</i>	
<i>Defendants.</i>	<i>Costs 57.26</i>		
		<i>Total \$1,857.26</i>	

Heine, Bostwick & Bradner, Attorneys for Plaintiff.

This action was tried before Judge Worrall F. Mountain, with a jury, at the Essex County Circuit Court, on October 5, 1921.

The cause having been heard and submitted to the jury, they return their verdict as follows:

They find in favor of the plaintiff, Edward F. Davis, and assess the damages against the defendants, Morris L. Groner and Harry N. Kryor, in the sum of eighteen hundred dollars.

Whereupon it is adjudged that the plaintiff recover of the defendant the sum of eighteen hundred dollars and costs which are taxed at the sum of fifty-seven dollars and twenty-six cents, making in the whole the sum of one thousand eight hundred and fifty-seven dollars and twenty-six cents.

Judgment entered and signed October 5, 1921.

WILLIAM S. GUMMERE,
Judge.

Book 96, C. C. J., page 413.

Edward F. Davis, direct.

ESSEX CIRCUIT COURT.

Wednesday, October 5, 1921.

10

EDWARD F. DAVIS,

vs.

HARRY N. PRYOR and
MORRIS L. GRONER.

Action at Law.

Before Hon. Worrall F. Mountain, *J.*, and a jury.

For plaintiff appear Messrs. Heine, Bostwick & Bradner,
by John W. Bostwick, Jr., Esq.

20 For defendants appear Messrs. Coult & Woodruff, by
Joseph Coult, Jr., Esq.

A jury is called and sworn.

Mr. Bostwick opens for plaintiff.

Mr. Coult opens for defendant.

Mr. Bostwick. If the Court please, I would like to ask
that the complaint be amended so as to make a change in
the name of one of the defendants. It should be Harry
N. Kryor, K-r-y-o-r, instead of P-r-y-o-r.

30

Mr. Coult. All right.

The Court. I will grant that motion.

EDWARD F. DAVIS, plaintiff, sworn in his own behalf.

Direct examination by Mr. Bostwick.

Q Mr. Davis, you are the plaintiff in this suit, are
you not? A Yes, sir.

Q In June, 1919, what business were you in? A I
was working for Mr. Cockefair.

40

Edward F. Davis, direct.

Q What were you doing for Mr. Cockefair? A Driving his truck to market with a load of vegetables.

Q On June 30th of that year you were driving his truck to market? A Yes, sir; on a Sunday night.

Q And from Brookdale, was it not? A From Brookdale to Newark.

Q You came down Bloomfield avenue? A Yes, sir. 10

Q Were you obliged to stop at any point along Bloomfield avenue for any reason? A I was obliged to stop right there before I hit the Erie Railroad crossing, in Bloomfield avenue; I had a hot box on the rear wheel of the truck.

Q It was west of the railroad crossing, was it, that you had to stop? A West; yes, sir.

Q How far west of that railroad crossing was it that you stopped? A About 200 feet.

Q Was anyone with you that night? A Mr. Cockefair was there, and also Mr. Parsons. 20

Q Was anybody with you on your truck? A No.

Q Anybody that night? A No one with me.

Q Your truck was an automobile truck or a wagon truck, which was it? A No, it was a truck pulled by a team of horses, a wagon truck.

Q You had a load on it? A I had a load of vegetables; yes, sir.

Q You were on your way to where? A Center Market, in Newark. 30

Q Why did you stop? A I stopped because it was hard pulling on the horses and I felt the grind on the rear wheel, so I stopped and got off to see what was the trouble, and I saw smoke coming from the rear wheel.

Q And where did you stop? A Right in front of Reilly's cafe.

Q In what position in the road did you stop your truck? A Right up against the curb, on the right-hand side of the road.

Q On the right-hand side? A Yes, sir. 40

Edward F. Davis, direct.

Q You say "against the curb." Did you have the wheels up against the curb? A The wheels up against the curb.

Q Mr. Cockefair was not with you that night, was he? A No, sir.

10 Q Was there another truck in the same vicinity at the time you stopped? A When I stopped there wasn't anything there; no, sir.

Q There was not anything? A Not anything at all; no, sir.

Q It came up later, did it? A Yes, sir; an hour later.

Q Whose truck was that? A That was Mr. Parsons' truck.

Q Was he alone? A No, he was not alone; Mr. Cockefair was with him when he came there.

20 Q Mr. Cockefair was with him when he came? A Yes, sir.

Q And he stopped there also? A He stopped there; yes, sir.

Q After you had stopped? A I had been there an hour before that truck.

Q And this truck stopped then, did it? A This truck was stopped then back of the wagon truck.

Q And where did it stop, immediately in back of your truck? A At least five feet in the back of it.

30 Q That is, the distance between your truck and the front part of Mr. Parsons' truck was about five feet; is that right? A Yes, sir.

Q In what position was that truck in the road? A That was right in back of my truck, right up against the curb.

40 Q And after that truck came along and stopped in back of your truck, at that time had your repairs been finished? A No—well, the repairs were not finished. I waited for him. I called Mr. Cockefair up on the 'phone to come down with a jack so as to hoist the wheel and take it off, and Mr. Parsons was going to market, and

Edward F. Davis, direct.

they put the jack on his car and came down and helped me out.

Q That is how Mr. Cockefair came to come along with Mr. Parsons? A Yes, sir.

Q And you were waiting for that jack? A I was waiting for the jack; yes, sir.

Q Did they help you with the car when they got there? 10
A Yes, sir.

Q How much longer were you obliged to stop there after that? A Well, at least—a little over half an hour.

Q Just what happened after you had finished your repairs? Just tell the Court and jury exactly what happened. A After the job was finished Mr. Parsons picked up the jack and took it back in his truck on the opposite side, towards the sidewalk, and put it back in the box under his truck. The pail stood in the center, between the center of the wagon—that is, between the front and rear wheel—and Mr. Cockefair said something to me, I don't remember just what it was, but I stood facing across the street. I had the pail in one hand and I had a block of wood in the other hand, and the horses shied, and I turned to look at the horses. That is all I remember. I know that I got hit. 20

Q Had you started across the street? A No, sir.

Q How far were you standing from the left-hand side of your wagon at the time you were hit? A I wasn't standing over two foot, at the most. 30

Q Where was Mr. Cockefair standing at that time? A He was nearer to the rear wheel than I was. I was standing at the center of the wagon, and Mr. Cockefair was nearer to the rear wheel, the back of the wagon.

Q Do you know where you landed after you were hit? A All I know, I was knocked unconscious for a few minutes, and I laid there until Mr. Cockefair took a blanket off of one of the horses and laid it under my head, and some man offered me a drink. I don't know what it was, but it appeared to me it was liquor, and I refused to 40

Edward F. Davis, direct.

take it, and Mr. Parsons went across the street and got me a glass of brandy, and I refused to take it, and I asked for water, and they brought me water. I should judge I was at least 30 feet in front of the horses when I landed on the road—in front of the horses.

Q And then you were taken to the hospital? A I
10 was taken to the Mountainside Hospital.

Q How long were you in the hospital? A I was in the hospital nine weeks.

Q And your injuries were what? A A fractured leg right below the hip and between the knee.

Q And you were there for nine weeks? A For nine weeks.

Q And you were attended by what physician? A Dr. David Clark Thompson.

Q After you left the hospital you went home, I suppose? A I left the hospital, and my leg was in plaster
20 of Paris, and I laid home in bed for at least six weeks, until this plaster was taken off, a piece at a time. I was in plaster all the way from my toes to my hip, all the way around, and the doctor took one piece—took it off, one piece up to my knee. When he took that piece off it was all the way around my side so that I couldn't move the leg; I had to keep it in place. That was taken off, and I had to use crutches for at least six weeks after that;
30 I used crutches until around Christmas time, and after I used crutches I used a cane for two months.

Q And you were not, of course, able to get any work? A No, sir; I wasn't able to do any work.

Q As long as you were carrying a cane? A I couldn't go back to my old work; the work was too heavy for me.

Q Did you try to do any work? A I tried to do work, as the doctor told me; I tried to carry coal up from the cellar, and I couldn't take one step after the other.

Q Did you make any effort to resume your work at Mr. Cockeyfair's place? A I went up there; I told him I did
40

Edward F. Davis, direct.

not think I could do it; the work was too hard for me at the time; I couldn't do any lifting.

Q You did finally get work, did you not? A Yes, sir; I got work in the Combination Rubber Manufacturing Company; I am working there today.

Q When did you get that employment? A I took that employment on February 18th. 10

Q How long before that was it that you had been able to dispense with the use of a cane? A I should judge about a month; I wouldn't say exactly, but somewheres around a month.

Q How much wages were you being paid by Mr. Cockefair at the time of this accident? A \$30 a week.

Q You had been working for him how long? A I started to work for Mr. Cockefair—I worked for Mr. Cockefair about six months.

Q Do you remember what was paid by you at the hospital for your accommodations there, for a room? A I was paying \$19.25 a week. 20

Q For nine weeks? A For nine weeks.

Q That was \$19.25 a week? A Yes, sir.

Q For nine weeks? A Yes, sir.

Q And Dr. Thompson's bill was how much? A Dr. Thompson's bill was \$100.

Q Did you have any other doctors' bills besides that? A I had a bill from Dr. Hubbard.

Mr. Coult. Is Dr. Thompson here? 30

Mr. Bostwick. He will be here.

Mr. Coult. I object to the witness testifying to the amount of doctors' bills, on the ground that he is not competent to say that the services were necessary or the charges reasonable.

The Court. No, but he is qualified to say that he paid it.

Mr. Coult. That is not relevant, your Honor.

The Court. Have you the doctors here? 40

Edward F. Davis, direct.

Mr. Bostwick. Dr. Thompson will be here; the other doctor is not.

The Witness. Dr. Thompson is here.

The Court. You have not the other doctors here?

10 *Mr. Bostwick.* No. Dr. Thompson was the man that attended the plaintiff; the other doctors administered anaesthesia, and so on. I will withdraw the last question.

Q Did you suffer any pain? A Yes, sir; I did.

Q Give us some idea of what the treatment was that you underwent in the hospital. A Well, I had my leg in a sling; it was hanging. I don't know what kind of instrument they call it; I call it a pair of icetongs. They were jabbed right into my knee—I mean into the bone. It was sort of a tripod and—I don't know what they call the instrument; I call them icetongs. They looked like icetongs to me, anyway. They were jabbed right clear into my knee, underneath the bone; and there were sort of weights with four poles on the bed, and this was worked on pulleys; these icetongs were pulling this knee up in that direction all the time (indicating), and there was another weight underneath that was pulling down on the heel of my foot, pulling the heel down and pulling the knee up. I laid there with those icetongs on my knee for at least five weeks, and I couldn't turn either way in the bed; I had to lay in one position. If I turned I felt those things going in my knee. I still have marks, holes, here where those things went into my knee, with the weights pulling them (indicating).

20
30

Q And you suffered during that period, of course? A I suffered quite a lot; I couldn't sleep very well; I had to call up the doctor every once in a while for the pain. He had to give me something so that I could sleep. I would fall asleep for an hour or so, and I would wake up again with pain.

40

Edward F. Davis, cross.

Q Is your leg entirely cured now? A I limp a little; I can't do exactly any heavy work for any amount of time; I don't feel strong on it; I feel every time—if I walk real fast, I feel as if there was something always griding or cracking all the time, if I walk fast for ten or fifteen minutes. If I walk slow I don't feel it.

Q Did you have any other expenses at the hospital besides the board, the \$19.25 a week? A Well, I had to pay for the operating room. 10

Q How much was that? A \$5. And Dr. Hubbard, for assisting Dr. Thompson with the anaesthesia.

Q Never mind that. A Dr. Cohen for taking the X-rays, and Dr. Schimmelpfennig.

Cross examination by Mr. Coult.

Q You say you worked for Mr. Cockefair for some months before this accident? A Yes, sir.

Q And during that time you were driving a horse-drawn truck? A A horse-drawn truck; yes, sir. 20

Q Between what points, from where to where? A I was going from Brookdale to Newark.

Q Every day? A Every night.

Q Every night? A Yes, sir.

Q Including Sundays? A Including Sundays, excepting Saturday nights, not Saturday nights.

Q So that six days a week, for how long previous to this accident— A I didn't go every night; that is, some nights—we went two and three nights until the season was just beginning, the rush in the vegetable line; some weeks I went three nights and some weeks four nights. 30

Q For how long? A As long as I was working there.

Q How long was that? I have forgotten how long it was. A I was working there for close onto six months.

Q So that six months previous to this accident you had been going back and forth to the market with this same rig? A This same rig; yes, sir.

Q And the same horses? A And the same horses. 40

Edward F. Davis, cross.

Q Now, on the night that this accident happened you noticed, you say, something wrong with the running of the truck? A Yes, sir.

Q So you drew up on the right-hand side of the road? A Yes, sir.

10 Q To investigate first? A Yes, sir. I felt the horses were pulling hard, and I knew there was something wrong, so I pulled up against the curb, and I got off and looked and seen that smoke was coming from the rear axle, and I knew I had a hot axle.

Q Did you get anything to cool the axle? A No, sir; I stuck there at least forty-five minutes, waiting for them to bring the jack down; I didn't do anything.

Q There was a smoking axle there, and you did not get anything to cool it with then? A No, sir.

20 Q Where did you go? A I went across the street and telephoned Mr. Cockefair.

Q Where did you go to telephone? A In Reilly's cafe, right across the street from where I stopped.

Q And did you wait there for the people to come? A Yes, sir; I waited there; I threw the blankets on the horses and waited there right on the truck.

30 Q Why did you not stop in the cafe? A I had to take care of the horses. One of the horses was shy of anything moving, so I stayed right there on the truck until they came.

Q How long did it take you to telephone? A It didn't take me five minutes to telephone; it only took me a few minutes.

Q And then you sat there for about three-quarters of an hour, did you say? A At least that; yes, sir.

Q Until the other truck came? A Yes, sir.

Q The other truck drew up behind your truck? A Yes, sir.

Q About five feet away? A Yes, sir.

40 Q Is that right? A Yes, sir.

Edward F. Davis, cross.

Q What was the first thing you did after it got there?

A Why, when the truck came there Mr. Parsons hollered; he asked me what the trouble was; I told them. They knew what it was; they didn't know just what wheel it was. So they got off and we jacked up the wagon.

Q You say you did not know what wheel it was? A Mr. Parsons didn't know. They got down and I helped him, and Mr. Cockefair also. 10

Q You jacked up the rear? A Yes, sir.

Q Did you take the wheel off? A Yes, sir.

Q And what did you do after you took the wheel off?

A I went across the street and borrowed a pail and got some water.

Q What for? A To cool off the axle.

Q Was that axle still hot? A Yes, sir.

Q After you had been standing there forty-five minutes? A Yes, sir. 20

Q Could you get the wheel off without cooling it? A We had a little trouble getting the wheel off; it was on tight.

Q Didn't you get the water to cool the axle so that you could get the wheel off? A No, sir.

Q Wasn't that the first thing that you did, when you come to think it over? A No, sir.

Q You got down off the wagon and went over and got the water to cool this smoking axle? A No, sir.

Q What did you do, did you sit there and let it smoke? A Yes, sir. 30

Q Did it keep on smoking all the time you were there?

A All I know, it was smoking, and I sat on the wagon until Mr. Parsons came down with the jack.

Q It never occurred to you to get water and cool it?

A No, sir.

Q Then you took the wheel off first and then you went and got the water? A Yes, sir.

Q Where did you get that? A Got that in Reilly's cafe. They have a faucet right out in front of the place. 40

Edward F. Davis, cross.

Q Where did you get the pail? A Got the pail in Reilly's cafe.

Q And you got the water out of the faucet in the front? A Yes, sir.

Q And then you went back to the wagon? A Yes, sir.

10 Q And by that time the wheel was off? A The wheel was off.

Q What did you do with the water? A We poured it right on the hub of the wheel.

Q What for? A To cool it off.

Q Did you have any axle grease? A Mr. Cockefair brought some axle grease down with him; yes, sir.

Q Did you put the grease on the axle? A Put the grease on the axle.

20 Q And put the wheel back on? A After we had the hub cooled off we put the wheel back on.

Q How much water did you use? A In fact, I used the whole bucket; I used more than one bucket.

Q Did you get more than one bucket? A Yes, sir; I don't know how many, but I got one or two buckets.

Q And each time you made a trip across the street to get the water? A Yes, sir.

Q And after you put the wheel back on where did you put the bucket? A The bucket laid right in between the wagon, between the front wheel and the rear wheel.

30 Q Any traffic on the street at that time? A No traffic on the street. There might have been automobiles passing.

Q Weren't there any automobiles passing at twelve o'clock on Bloomfield avenue? A Yes, sir; automobiles and trolley cars.

Q Why did you put the bucket out in the street there? A I didn't put it out in the street. The wagon takes up five or six feet, and I would say the road is at least 18 feet wide.

40 Q What kind of truck was this? A A large truck, drawn by a team of horses.

Edward F. Davis, cross.

Q How much will it carry? A I don't know; it will carry four tons.

Q And how much does the truck weigh, do you know? A That I couldn't tell you; no, sir.

Q How high is the load when you get it loaded as it was that night? A That night we had two barrels and a half high, as they call it. 10

Q Two barrels and a half high? A Yes, sir. The truck then stood at least about twelve feet from the ground in the air; that is, after it was loaded.

Q And how were the barrels piled, sideways? Were they piled out over the side of the truck? A The barrels—outside from the truck they might be about six inches, at the most; we piled the barrels across the wagon, and at least six inches of the barrels would stick out over the side of the truck.

Q Is not the body of your truck at least seven feet wide? A No, sir. 20

Q It comes out beyond the wheels on both sides, does it not? A The wagon comes out over the wheels?

Q Yes. A The body doesn't come out over the wheels. They have a frame on the side of the wagon; I should judge it is close onto a foot wide; that comes out over the wheels.

Q A foot over the road on each side? A Yes, sir.

Q Your wheels are wider than the trolley tracks, are they not? A No, sir; they can go right in the trolley track. 30

Q That is about five feet, is it not? A I don't know; I never measured it.

Q If it is five feet—the wheels—from track to track, and your truck comes out a foot on each side of the wheels, it would be seven feet, would it not? A It might be seven feet.

Q And when you get your barrels out on the side of your truck, you have got about nine feet altogether, have you not? A I never measured it. 40

Edward F. Davis, cross.

Q If your wheels are about five feet apart and your frame comes out a foot on each side of the wheels, and the barrels— A I didn't say they came out a foot; I say at least six inches. The wagon doesn't come out a foot, either.

10 Q Well, how close were you to the curb when you stopped? A I was right up against the curb.

Q And when you put the pail down, you put it between the automobile and the trolley track, did you? A No.

Q I beg your pardon! I will withdraw that. Between your truck and the trolley track? A There wasn't anything in between. I said I put it in between the center of the wagon, between the rear wheel and the front wheel.

20 Q You do not mean by that that you put it under the wagon, do you? A No, not exactly under the wagon; I should judge not far away from the wheels; that is, in between the rear wheel and the front wheel.

Q Right in the traveled roadway, alongside of your truck; isn't that right? A I don't say it was right in the road; it was in the road—

Q You say there was 18 feet between the side and the car track? A Yes, sir.

Q And your truck took up half of it? A Not half. I can get two trucks in that road between the curb and the trolley track from where I stood.

30 Q Your truck was taking up half of the road, was it not, or pretty nearly, was it not? A It wasn't taking up half of it, no, sir.

Q Well, your truck was there between the curb and the trolley track? A Yes, sir.

Q And you left this pail between the side of your truck and the trolley track? A Yes, sir.

Q Now, how close to the truck was it? A Not any further than that away from the truck (indicating).

40 Q You are indicating about two feet away from the truck? A Yes, sir.

Edward F. Davis, cross.

Q And there were automobiles going past your truck all the time you were there, were there not? A Yes, sir.

Q Well, why did you put it out there? A Where was I going to put it?

Q Is it not a fact that you put it in between the rear of your truck and the front of the truck behind you? A No.

10

Q Why, while you were working on the left rear wheel did you carry your pail out and put it between the front and rear wheels, when you could put it behind the truck? A Well, I didn't do it.

Q Why was it you chose that place for your pail? A (No response.)

Q Was there any reason for it? A There was no reason at all.

Q You did not want to have it in the way of people traveling on the street, did you? A It wasn't in the way; I didn't figure it in the way.

20

Q When the accident happened you did have the pail in your hand, did you not? A Yes, sir.

Q And I understood you to say that you had just picked it up? A I might have picked it up a second or a minute before that. I stood there; Mr. Cockefair said something to me—

Q And you stood there by the side of that truck? A Yes, sir.

Q How long had it taken you and the other two gentlemen to get the wheel off, cart this water, cool the axle and grease the axle and then put the wheel on? A At least half an hour.

30

Q At least half an hour? A At least half an hour.

Q And you were all three working on it? A Yes, sir. Well, Mr. Parsons and I were working on it; Mr. Cockefair wasn't doing much; he stood there.

Q Where did he stand? A He stood right in front of the rear wheel. We had the wheel off and up right alongside of the wagon.

40

Edward F. Davis, cross.

Q Which one of you was watching the horses all of this time? A Mr. Cockefair was watching the horses; he stood there near where we were working.

Q Well, you said he stood by the rear wheel. A That is where he stood.

10 Q Well, these horses were so restive and shy that you could not leave them to go in the cafe while you were waiting for Mr. Cockefair to come with the truck. Do you remember saying that? A I left the horses there and went over and waited for Mr. Cockefair.

Q Well, you said you had to stay on the truck because one of the horses was so shy. A One of them was; yes, sir.

Q Now, while you were working around the rear wheel no one was watching the horses, were they? A We were all there.

20 Q Well, nobody was holding them? A Well, I wasn't holding them either when I was on the truck; I sat there.

Q You sat there so as to be ready if anything happened? A Certainly.

Q And all the time you were working around the wheel would the horses shy? A One of the horses shied once in a while; yes, sir.

Q And where was your jack? A Under the rear wheel, under the axle.

30 Q And every time the horse shied the jack would come out, would it not? A We had the wheel blocked; we had the horses unhitched from the traces. I done that when I went over to telephone.

Q You never saw this automobile until it hit you; is that right? A I never saw the automobile; no, sir.

Q When you were questioned by your counsel you said you were looking at the horses at the time the automobile hit you? A I was looking in that direction; yes, sir.

Q And that was because the horse shied, is that right? A I don't know why he shied.

Edward F. Davis, cross.

Q Well, that is what took your eyes off of this automobile? A Yes, sir.

Q Because of the shying of the horse? A Yes, sir.

Q Well, the horse had been shying all the time you had been there, had it not? (No response.)

Q Had it not? A All the while I had been there?

Q Yes, while you were working around the back wheel. That is the reason you took the team off, and that is the reason you had the wheel blocked? Didn't you say a few minutes ago that the horse had been shying right along? A I didn't say it was shying right along. 10

Q Well, is it not a fact that he shied every time an automobile went by? A Yes, sir; he would.

Q Well, what was it that attracted you to him and away from your own safety when the automobile went by?

A I just hollered at him; that is all.

Q You knew that you were all the time in a place where automobiles had been passing and were passing? 20

A Yes, sir.

Q How far could you see to the west from where you were? A I could see up to Watsessing avenue.

Q How far is that? A I should judge around 500 yards.

Q And how long had you been out by the side of the truck with the pail before you were hit? A In my hand?

Q Yes. A I stood there two minutes. 30

Q And during that time you never looked to the west to see if an automobile was coming, did you? A I never looked, because I had no occasion to start across the street yet.

Q Were you starting across the street when you were hit? A No, sir.

Q You picked up the pail with the intention of going in the cafe with it, did you not? A Yes, sir.

Q You had no further use for the pail? A No, sir.

Q And you wanted to take it back? A Yes, sir. 40

Edward F. Davis, cross.

Q And you were in a hurry, were you not? A Mr. Cockefair said something to me and I stood there.

Q Mr. Cockefair said something to you? A Yes, sir.

Q And that is what caused you to pause? A I hadn't taken a step yet to move.

10 Q It just happened that you were there with the pail, and Mr. Cockefair said something to you, and you stood, and the horse shied, and you looked the other way, and something hit you? A Yes, sir.

Q And you do not know, except from what you are told, what did hit you, do you? A I don't know what did hit me.

Q You were in a hurry to get along, were you not? A I wasn't exactly in a hurry to get along. We took enough time to take that wheel off and put it on.

20 Q But, you see, at the time you were hit the wheel had all been taken care of, had it not? A Yes, sir.

Q The job was completed? A Yes, sir.

Q There wasn't anything left to do but to take the pail across the street, was there? A Yes, sir.

Q Now, were you not in a hurry to get the pail back to its owner? A Yes, sir; I was in a hurry, yes; but Mr. Cockefair said something to me; he said something about I will be late for market, or something, and I stood there.

30 Q You thought that, under the circumstances, Mr. Cockefair's remark about being late for market should induce you to stop instead of hurry on, did you? A I hadn't started.

Q How many times had Mr. Cockefair been calling your attention to the fact that you were late? A Just that once.

Q Up to that time he had been patient about the matter? A Yes, sir.

Q He did not worry about the delay? A I don't see why he should; we couldn't do it any faster than we were.

40 Q He was not constantly hurrying you up and complaining about the hot box, was he? A No, sir.

Edward F. Davis, re-direct.

Q And the first time that he complained that you were late for market you stopped and stood still; is that right?

A I stood there; I wasn't started. How could I stop when I wasn't started.

Q Where was Mr. Cockefair at the time he spoke to you? A He was near the rear of the wagon, the rear wheel.

10

Q Did you turn toward him when he spoke? A No, sir.

Q You did not turn around at all? A No, sir.

Re-direct examination by M. Bostwick.

Q Mr. Davis, if your truck was against the curb, then at least half of the projections beyond the wagon wheels were over the sidewalk, were they not? A Yes, sir.

Q So that all of the four feet, if it was four feet, additional to the width of the wagon, did not project toward the center of the street? A No, sir.

20

Q So that if your wagon wheels were five feet wide or the distance between the wheels was five feet, and the projections beyond the wheels and the body of the wagon and its load were two feet, that would make seven feet at the most from the curb to the farthest point in the street that the wagon extended; isn't that so? A Yes, sir.

Q Just before you were hit did you hear any horn blown? A No, sir.

30

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

Q Giving warning of the approach of an automobile or other vehicle? A No, sir.

By the Court.

Q About what time did you say this was, Mr. Davis? About midnight did you say? A About midnight, around midnight; yes, sir.

Q Were the lights on the trucks of Mr. Cockefair, or whatever his name is, Mr. Parsons lit? A I had a lantern

40

David Clark Thompson, direct.

underneath the wagon and Mr. Parsons had a tail light on his automobile.

Q Was that lit? A Yes, sir; they were both lit.

Q (*By Mr. Bostwick.*) Were the front lights on Mr. Parsons' automobile lighted? A Yes, sir.

10 DAVID CLARK THOMPSON, sworn in behalf of plaintiff.

Direct examination by Mr. Bostwick.

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

Q In Bloomfield? A Yes, sir.

Q Did you have occasion on June 30th or July 1st to attend Mr. Edward F. Davis? A I did.

Q Now, tell us about how you came to attend him? A He was taken into the ward at the hospital, and I hadn't yet gone on service at the hospital; I had just returned from over seas thirty days before; I was on July 1st to go back to practice; and I was told that Mr. Davis was in the hospital and that he wanted me to take care of him. I saw him and told him that I wasn't going on service in the ward until the 1st of August, and if I took care of him he would have to go into a private room, which he did; or he went into a semi-private room, which is the best and cheapest accommodation we have for private patients. So I took the case.

Q You examined him? A I examined him the following day. He was brought in during the night. He had a fracture of the left femur at the junction of the lower and middle third, about ten inches above the knee.

Q What kind of a fracture was it? A It was a comminuted fracture; that is, a fracture with more than two fragments. The ordinary fracture has two fragments, an upper and lower, and this had a third small fragment. Otherwise it was a simple fracture; it was not compounded.

David Clark Thompson, direct.

Q Did you treat him after he left the hospital? A I did.

Q For how long a time? A He was in the hospital just short of ten weeks.

Q What kind of treatment did you give him there? A There was a shortening—I don't remember now when I first saw him—he had three inches shortening in that leg, owing to the overriding of the fragments. He was at that time a very muscular man, and the pull of the muscles had caused the overriding—not a straight over-riding, but an overriding in this direction (indicating)—due to the action of the particular group of muscles, which turned the lower fragment above. So to overcome that I put him in an angle splint, which was suspended, and made traction in two directions, put a pair of tongs in the lower fragment, pulling it directly in alignment, and drew his leg on the lower incline with direct traction. 10 20

Q Did that necessarily or not involve pain? A Oh, yes, it is a painful fracture. The treatment did not increase the pain, if that is what you mean.

Q The treatment did not increase the pain? A No; it made him much more comfortable, in fact.

Q Did you treat him after he left the hospital? A Yes, I saw him. His treatment was practically completed at the time he left the hospital, with the exception of restoration of function. He went home in a plaster cast from his waist to his toes, and about four or five weeks later—I am not absolutely sure of the time—I went to his home and took that plaster off, and then ordered him to get about—he was on crutches—to use the leg, and showed them how to massage it at home, the best they could. 30

Q He wore crutches, by your advice? A I told him to do something with those crutches as soon as he could comfortably, and to do as much as he could with that leg up to the point of pain. 40

David Clark Thompson, direct.

Q Do you remember when was the last time that you examined him? A I should judge about six months following the accident.

10 Q What was the condition then with reference to full restoration of function, and so on? A He had a splendid result, so far as uniting of his fracture was concerned; the function of his knee was still a little limited; he couldn't flex it fully; after being on his feet for a while his leg would still swell some.

Q Was there some shortening? A There was three-quarters of an inch shortening.

Q And could you say whether or not that is likely to be permanent? A That is absolutely permanent.

Q The three-quarters of an inch shortening is absolutely permanent? A Yes.

20 Q And what can you say as to the degree of permanency of the injury? A You mean with regard—

Q The full use of his leg; to what extent, in other words— A I should expect him to be able to use his leg to the full extent.

Q In what length of time? A I should say a year and a half following the accident.

Q Do you remember the amount of your bill? A Yes, the amount paid was \$100.

30 Q Did you have assistance in connection with your treatment? A Yes, I had X-ray pictures and an anaesthetist.

Q Do you remember how much those bills were? A I never knew.

Q What would be a reasonable charge for the anaesthesia treatment in this case? A \$10 for each administration.

Q And how many administrations were there? A I have forgotten.

40 Q Was there more than one? A I can't say that; I think the only—I am not sure that we gave him anaes-

David Clark Thompson, cross.

thetia when we put him in a cast. He had one when we put the tongs on.

Q What doctors helped you? A Dr. Hubbard gave the anaesthesia. Dr. Schimmelpfennig took the X-ray pictures.

Q What would be a reasonable charge for the X-ray pictures? A That is a bit hard to say; depending upon the number of plates. You see, this was a particular case; in fact, we got—I had just come back from over seas, where I had done a lot of work with this type of fracture, and we had to have a portable X-ray machine, and the question of reasonable charge, and so forth, does not enter into it, because I personally paid \$150 for this machine, where I got \$100 out of the case; it is not a question of charge; and I followed up—this was the first case I had done at home, and I was demonstrating it to the men, and so forth, and I followed it up with pictures, but not that these pictures were charged for. I would say that a reasonable bill for a series of plates that are absolutely necessary would be in the neighborhood of \$60. 10 20

Q And the X-ray work was done by whom, doctor, Dr. Hubbard? A No, he gave the anaesthesia. Either Dr. Schimmelpfennig or Dr. Cohen. Dr. Schimmelpfennig had been in the service and had just returned, and I think he had taken up the work at that time. He was our regular man, but Dr. Cohen was substituting in his absence. 30

Q Your bill for \$100, was that a reasonable charge for the services that you rendered? A No, it is not a reasonable charge; the charge should have been about \$400.

Cross examination by Mr. Coult.

Q You got a good result in this case, doctor? A A very good result.

Q And the treatment that you employed is the usual method of treatment for comminuted fractures? A No, 40

David Clark Thompson, cross.

it depends entirely on the man that is injured—the fracture.

Q Is that what is called a Bucks extension? A No, it is a Hodgkins splint.

Q Well, it is very similar, is it not? A No, the Bucks is a straight suspension and this is an extension and suspension.

10 Q Well, the weights are employed for the purpose of keeping the leg at its proper length; and I suppose you use sand bags to keep it in proper position, do you not? A No. If you want to know the line of treatment—

Q Well, anyway, it is the standard method of treating fractures? A Well, it is the method that was used over seas by both the German and British armies.

Q And it is the proper method? A Yes, very.

Q The common method? A Yes.

Q There is nothing unusual about the method of treatment, is there? A No.

20 Q In fact, nowadays doctors treat all fractures in more or less the same method; that is, by putting the limb into an extension or a splint of this type? A No, that is not true; there are some still using the straight extension; a lot of them are.

Q But it is not good practice, is it? A Well, I don't think I ought to be called upon to criticize or defend a method of treatment.

30 Q Well, doctor, you have heard of doctors being sued for malpractice for not doing it, have you not? A Well, no, I do not think that they can question a man's methods, as long as he is competent.

Q Well, at any rate, this is the usual, modern way of treating fractures, is it not? A I think so.

Q Now, this man got around as promptly as you would expect in a man that had his injury, did he not? A Yes, sir.

Q And the result is as much as you could expect? A Yes, sir.

William A. Parsons, direct.

Q There is no reason why he should not work now as well as he ever did? A So far as I know.

Q Were you his family physician before the accident?

A Well, I had been at intervals; I don't know whether I was the family physician or not.

Q Do you know of your own knowledge whether he paid these bills? A No, Mr. Cockefair paid the bill. 10

Q Mr. Cockefair paid the bills? A Yes.

Q Do you yourself represent any insurance companies?

A No, sir.

Q What Mr. Cockefair paid the bill?

Objected to as irrelevant.

Objection sustained.

(Question withdrawn.)

WILLIAM A. PARSONS, sworn in behalf of plaintiff.

Direct examination by Mr. Bostwick. 20

Q Mr. Parsons, you were driving the second truck on this night, the one that came up in back of the Cockefair truck driven by Mr. Davis, were you not? A Yes, sir.

Q Did you see Mr. Davis struck by the automobile? A I did not.

Q Just tell us what you did see, please. A I heard the pail fly, and I walked around the side of my truck—

Q Just where were you at the time? A I was on the right-hand side of my truck, on the sidewalk. 30

Q On the sidewalk? A Yes, sir.

Q What were you doing there? A Putting the jack away.

Q And you heard the pail? A Yes, sir.

Q You did what? A I walked out in the street and I seen Mr. Davis laying down in the street.

Q Where did you see him lying? A About 30 feet in front of the horses.

Q Right exactly in front of them? A Not exactly in front on a line. 40

William A. Parsons, cross.

Q About thirty feet in front of them? A Yes, sir.

Q Did you see the automobile? A Yes, sir.

Q How far from Mr. Davis? A I should judge about 25 or 30 feet from him.

Q And what position in the street? A Towards Newark.

10 Q On the right-hand side or left-hand side of the street? A The right-hand side.

Q Near the trolley tracks or not? A He was off to the right of the tracks then.

Q You cannot say how far to the right, can you? A I could not.

Q And when you first saw the automobile had it stopped or was it still going? A It had stopped.

Q Had you heard any horn blown or other signal given? A I had not.

20 Q Before the pail was hit? A No, sir.

Q Had you any light on the rear of your truck? A Yes, sir.

Q Was it lighted? A Yes, sir.

Q Where was it hanging? A Under the truck.

Q Where was your truck with reference to the curb on the right-hand side of the road? A Right close to the curb.

Q Did you go up to Mr. Davis as he lay in the road? A I did.

30 Q Was he conscious at that time? A He was coming to.

Q Did you see that night either Mr. Groner or Mr. Kryor? A I did not.

Cross examination by Mr. Coult.

Q What sort of a truck did you have? A An automobile truck.

Q What was the weight of it? A About four tons.

Q How much would it carry? A Three and a half tons.

William A. Parsons, cross.

- Q What did you have on it this night? A Produce.
- Q In what? A Barrels.
- Q Where were you going? A To market.
- Q Did you have as many barrels of produce on as the truck would carry? A No, sir.
- Q Why not? A Didn't have them to put on.
- Q How many barrels did you have on? A I couldn't 10
say exactly.
- Q How high was the load? A Five feet.
- Q How many barrels high? A Two.
- Q Two barrels high? A Yes, sir.
- Q How many barrels wide? A Four.
- Q So that you had a load of produce in barrels set four abreast and two high? A Yes, sir.
- Q How wide is your truck? A Seven feet.
- Q Over all? A Yes, sir.
- Q And were the barrels piled out beyond the seven 05 20
feet? A No, sir.
- Q Just ran out— A Inside of the seven feet.
- Q So that your load was five feet high and seven feet wide on top of the truck? A Yes, sir.
- Q And it was much wider than the horse-drawn truck, was it not? A About a foot wider.
- Q How far were you from the place you started from?
A From where?
- Q How many miles had you made on your trip up to the time you got up to this place? A Three and a half 30
miles.
- Q What time did you start? A Oh, a few minutes before twelve.
- Q And you were going on a regular trip, were you not?
A Yes, sir.
- Q You had been making regular trips every night?
A 'Most every night.
- Q Did Mr. Cockefair go with you? A Not every night,
no.
- Q He did generally, did he not? A Not generally, no. 40

William A. Parsons, cross.

Q When you stopped your truck, how close to the one in front of you were you? A Five feet, I should judge.

Q What was the first thing that you remember that was done after you got there? A We took the jack out and jacked up the wheel.

Q Who did the work on the jack? A Mr. Davis and I.

10 Q Where was Mr. Cockefair then? A He was around watching! I didn't notice where he was walking.

Q What is the next thing that you did? A Took the wheel off.

Q And then what? A Cooled the box.

Q Was the pail there when you got there or not? A I couldn't say.

Q Do you remember Mr. Davis going for water across the street? A Mr. Davis made two or three trips across the street for water.

20 Q And then you greased the axle and put the wheel back on? A Yes, sir.

Q And took the jack out? A Yes, sir.

Q And you were just about putting the jack away in the rear of the truck when the accident happened? A Yes, sir.

Q Where were you putting it? A In the box.

30 Q Where is the box? A On the right-hand side of the truck there is a large box; I keep ropes and a jack there.

Q And that was the last thing that you were going to do before you got up on your truck and started, was it not? A Yes, sir.

Q Where was Mr. Cockefair then? A Somewheres around his truck; I didn't see him.

Q He had not gotten on the truck yet? A Mr. Cockefair?

Q Yes. A No.

40 Q He was on the street? A He was on the street when I left with the jack.

William A. Parsons, cross.

Q When you left with the jack where was Davis? A He was standing there by the truck.

Q Where? A By the rear wheel.

Q What was he doing at the rear wheel? A I couldn't say.

Q But he was at the rear wheel when you left him? A Yes, sir. 10

Q Do you know where the pail was then? A I do not.

Q The place where you stopped is the same place where there is a gasolene service station now, is it not?

A The gasolene service station is below a little bit.

Q You were right opposite the hotel there? A Just about opposite.

Q You were about 50 feet from the railroad track; that is, the front truck was? A It was further than that from the railroad track. 20

Q How far was the automobile from the railroad track? A I should judge about 150 to 200 feet.

Q 200 feet? A Yes, sir.

Q How far was the automobile from the railroad track after the accident? A I couldn't say exactly.

Q Why not? You can tell how far it was from the horses. A I didn't take particular notice of it.

Q You were giving us measurements, that Mr. Davis was lying 20 or 25 feet beyond the horses, and that the automobile was 25 feet beyond him. Do you remember saying that, or something like that? A Yes. 30

Q Well, can't you say how far the automobile was from that? A Maybe 100 feet, I can't say exactly.

Q 100 feet? A Between 75 and 100 feet.

Q I suppose you had your truck drawn up close to the curb? A Right to the curb.

Q And while you were standing there automobiles were passing and repassing on Bloomfield avenue? A Numbers of them.

Q Numbers of them? A Yes, sir. 40

Edward F. Davis, direct—cross.

Q How close together were they passing generally, just on the average? A The automobiles?

Q Yes. A Maybe every two or three minutes there would be a machine, or for . . .

Q How far apart were they, would you say, on the average—the distance? A There was no string of them.

10 Q There was a string of them? A No.

Q But they were going by constantly while you were standing there? A Every few minutes there would be one passing.

Re-direct examination by Mr. Bostwick.

Q And of this great number of automobiles that passed, this is the only one that took occasion to commit any damage at your place there, was it not?

Objected to.

20 A Yes, sir.

Mr. Coult. It is a conclusion whether the automobile committed damage.

The Court. I will admit it.

EDWARD F. DAVIS, plaintiff, recalled in his own behalf.

Mr. Bostwick. I want to ask this witness about these other bills now, if your Honor thinks he is qualified to answer as to what was paid.

30

Direct examination by Mr. Bostwick.

Q What was paid Dr. Hubbard for his assistance in the administration of anaesthesia? Do you remember what that was? A \$30.

Q And what other bills besides Dr. Hubbard's? A Dr. Cohen, \$10; Dr. Schimmelpfennig, \$20.

Cross examination by Mr. Coult.

40 Q You signed a statement in this case, did you not, Mr. Davis? A I did with the insurance people.

Edward F. Davis, cross.

Q With the insurance people? A Yes.

Q What insurance people?

Mr. Bostwick. I think that is irrelevant, your Honor. It does not make any difference about that.

Mr. Coult. I am inquiring whether he made a statement. I can inquire about that.

Mr. Bostwick. I object on the ground that it is not proper cross examination.

The Court. I sustain the objection.

Q I show you a statement and ask you if you signed this (paper shown to witness)? A I never made that statement.

Q Is not that your signature at the foot of that paper? A That is my signature. I never made that statement. I will tell you how that came. A man came to me and asked me for a statement—

Q Just a minute. I asked you if that was your signature.

The Court. Yes. Just answer the question.

A I was telling you how that was signed.

Q Is that your signature to that paper? A Yes, sir.

(The paper referred to its marked D. 1 for identification.)

Q Is it a fact that you stopped about 50 feet from the Erie Railroad track, on Bloomfield avenue? A Well, the time the man came up there, he asked me how far it was, exactly 50 feet, and I go up today and look at it and I know where the wagon stopped.

Q Is it a fact that you stopped 50 feet from the railroad track? A No, sir.

Q It is not a fact? A No, sir. The man came up to see me that night. I was in misery, in pain. He said he was from the Northern Insurance Company. I never heard of it. And he asked me to sign the blank, and he

Edward F. Davis, cross.

said he wanted a duplicate to take to the main office. I signed one sheet and a blank, so I signed it—two sheets.

Q I did not ask you about a statement to the insurance company; I asked you if you signed this statement?

A If you had the man who came up to me and got this statement, I could tell you. I signed a blank sheet. He
 10 said he came from the Northern Insurance Company, and I told Mr. Cockefair the next morning; he said he came from the Northern Insurance Company; he said that Mr. Kryor was insured. I would like to see the man that was up there and took this statement. When I signed it—I had a nurse there at the time I signed it, and she told him he couldn't stay there very long, because I was in pain.

Q You saw in this statement that you said the truck was 50 feet away from the railroad track, did you not?

A I didn't read it; no, sir.

20 Q I mean just now. A The man never took the statement and read it to me.

Q You signed it without reading it, did you? A I was in the hospital; I was in misery. The man said: "I don't want to stay and take any of your time," and he handed it to me, and I signed the blank.

Q You signed a blank? A Yes, sir.

Q Not a word on it? A No, sir.

Q And all this has been put on there after you signed
 30 it? A Yes, sir.

Q What do you mean by saying that it was not read over to you? A There was nothing to read over.

Q You said you signed blank sheets of paper? A Yes, sir.

Q Not a word on it? A No, sir.

Q And all of this has been written in since? A It might have been.

Q Well, you know that was a blank sheet when you signed it, do you not? A It was a blank sheet when I
 40 signed it, yes.

PLAINTIFF RESTS.

Morris L. Groner, direct.

MORRIS L. GRONER, sworn in behalf of defendants.

Direct examination by Mr. Coult.

Q Mr. Groner, where do you live? A 138 Roseville avenue.

Q What is your business? A Auto renting principally.

Q And was that your business in July, 1919? A Yes, sir. 10

Q Do you know Harry Kryor? A Yes, sir.

Q Was he working for you at that time? A Yes, sir.

Q How many cars were you operating then? A Well, I don't know whether I remember exactly.

Q Well, just give us your best recollection. A I think possibly four.

Q Are you familiar with the car which is alleged to have been in this accident? A Yes, sir.

Q What sort of a car was that? A It was a Locomobile touring car. 20

Q Of what year? A 1912.

Q Did you see it when it went out this night? A Well, yes; I seen it off and on all day, I guess.

Q What was the condition of that machine with reference to any marks or scars on the right front running-board when it went out that night? A There wasn't any.

Q When did you see it again? A The first thing the next morning. 30

Q Where? A At the garage.

Q And did you notice anything peculiar about it? A Yes, sir.

Q Had you heard of any accident at that time? A No, sir.

Q What time in the morning was it? A About eight o'clock, I should imagine.

Q And had you seen Mr. Kryor in the meantime? A No, sir. 40

Morris L. Groner, direct.

Q What time did he generally come on duty? A He came on at noon, one o'clock.

Q What did you find to be the matter with the car when you looked at it? A I found the front fender dented.

Q Where? A Just over the axle, slightly back of it.

10 Q Just describe that dent. A Well, the fender is an aluminum fender, and, of course, if you take the edge, there was just a slight—such as a pail might make.

Q You cannot say that. If counsel does not object to it, it is all right. But what was the shape of the dent?

A On a sort of a half moon shape.

Q Were there any scratches there? A Yes.

Q Where were they? A In the aluminum.

Q How did they run, in what direction? A Lengthways.

20 Q With reference to the dent? A Yes, sir.

Q What way was it? A Right with the dent.

Q The scratches? A Yes; they were right in the dent.

Q Did you have any photograph made of your car?

A Yes, sir.

Q When? A Very shortly afterwards.

Q Who did that? A Frank X. Keiling, Jr.

30 Q Have you got those photographs now? A Yes—I haven't got those photographs, but—

Q Why not? A The man died and I could never find them; they didn't know what he had done with them; he hadn't delivered them to me.

Q Had there been any change in the fender from the time of the accident up to the present? A No, sir; it is still the same.

Q And you did not have it repaired? A No, sir.

40 Q Well, why have you left it in that condition up to the present? A Well, the fender would have cost quite a little to have it fixed; I don't carry any insurance—

Morris L. Groner, direct.

Q You must not say that. You say it would cost quite a little money to fix it? A Yes, sir; it would have to be taken off and rolled out.

Q And it is in the same condition as it was the day after the accident? A Yes, sir.

Q Did you have any other photographs taken? A Yes, sir. 10

Q When? A After the man died, recently.

Q You mean since the death of the other photographer? A Yes, sir.

Q Who took those photographs? A His brother.

Q Have you got the photographs with you? A Yes, sir.

Q Let me see them. A (Witness produces photographs.)

Q I show you a photograph which seems to depict the front portion of an automobile, and I ask you whether or not that is a correct picture of the front right fender of your automobile at the time that photograph was taken (photograph shown to witness)? A Yes, sir. 20

Q Does that also represent the condition as it was when you saw the automobile the morning after the accident? A Yes, sir.

Mr. Coult. I will offer this.

Mr. Bostwick. I object, your Honor, because it is a picture only of the right forward fender of the car; it is a picture of only a part of the automobile. 30

The Court. I will admit it.

(Objection withdrawn.)

(The photograph referred to is marked Exhibit D. 2.)

Mr. Coult. I have four more. I can save time by offering them, if you say so.

Mr. Bostwick. All right.

Morris L. Groner, cross.

Q Were there any other marks on the automobile when you saw it the morning of the accident? A No, sir.

Mr. Coult. I offer another photograph, showing the front fender.

(Marked Exhibit D. 3.)

10 *Mr. Coult.* And another of the same subject.

(Marked Exhibit D. 4.)

Mr. Coult. And still another.

(Marked Exhibit D. 5.)

Mr. Coult. And still another.

(Marked Exhibit D. 6.)

Cross examination by Mr. Bostwick.

20 Q What occasion did you have for examining your automobile the next morning, Mr. Groner? A I didn't examine it; it was plain. It was parked in a public garage and it was right before me when I went to get the car.

Q Do you inspect your cars every day? A Yes, principally.

Q I beg your pardon! A Yes, mostly every day.

Q That is to say, you inspect the operating parts? A Yes, sir.

Q To be sure they were properly greased and oiled, and so on? A Yes, sir.

30 Q You cannot say that there were no other marks on this car after this accident, can you, except that dent in the fender? A I didn't see any and—

Q All you can say is that you didn't see any; you cannot say that there were no others, can you? A No, sir.

Harry Nelson Kryor, direct.

HARRY NELSON KRYOR, sworn in behalf of defendants.

Direct examination by Mr. Coult.

Q Mr. Kryor, where do you live? A 62 South Fourteenth street, Newark.

Q What is your business? A Chauffeur. 10

Q Now, in July, 1919, for whom were you working? A Mr. Morris Groner.

Q And that is the gentleman that was just on the witness stand? A Yes, sir.

Q And you are the other defendant in this case? A Yes, sir.

Q You recall the accident that is the basis of this suit, do you? A Well, it is two years ago; some of it.

Q Where had you been that night? A I got a call for a party. From where I got it I don't remember, but I brought them up to Great Notch Inn. 20

Q How did you go to Great Notch Inn? A I went up Bloomfield avenue, along Valley road to Great Notch Inn.

Q What time was it you started from Newark? A I don't remember.

Q Do you remember who were in the party? A Some of them, yes; three of them I know.

Q Who were the three that you recall? A The Mr. Erkanders, three of them. 30

Q Three Mr. Erkanders? A Yes, sir.

Q And there were some ladies in the party? A Yes, sir.

Q You do not know who they were? A No, I never seen them.

Q Had you had the Messrs. Erkander out before? A Yes, sir; lots of times.

Q You knew them? A Yes, sir.

Q How long did you stay at Great Notch? A I don't remember; I believe about—a little over half an hour, I believe. 40

Harry Nelson Kryor, direct.

Q You stayed how long? A About half an hour, I guess.

Q And were you in the Great Notch Hotel at the time they were there? A No, I stood on the outside.

Q With the car? A Yes, sir.

Q Where did you have your car parked? A Right
10 outside of the hotel.

Q And when you left there how did you go to Newark?
A I turned down Valley road to Bloomfield avenue, all the way down straight on Bloomfield avenue.

Q Straight down Bloomfield avenue? A Yes, sir.

Q Where did this accident happen? A What time, do you mean, or where?

Q Where? A On Bloomfield avenue.

Q Where on Bloomfield avenue? A Between Wat-
20 sassing avenue and the Erie Railroad.

Q How near to the Erie Railroad? A I should judge
about 200 feet, I guess.

Q Your automobile was involved in this accident, was it not? A Yes, sir.

Q And a man? A Yes, sir.

Q Did you see the man who was injured at any time before the happening of the accident? A No, sir; I did not.

Q At the time the accident happened how were you traveling? A I was driving—the front wheel on the left
30 side of the car was about a foot inside of the first right trolley track.

Q Which wheel, you say, was inside of the rail? A Possibly a little bit inside, about a foot, or something, inside of the first on the right side.

Q Which wheel? A The left wheel of the automobile.

Q And what is the tread of your machine? How much is it between the left and right wheel? A I don't know; I never figured that.

Q Well, how does it run on the trolley tracks. Will it
40 track on the trolley tracks? A No.

Harry Nelson Kryor, direct.

Q Is it wider or narrower? A No, it is about the same, I guess.

Q About the same as the trolley track? A About the same as the trolley track.

Q What did you notice, if anything, at the place where this accident happened, before you reached the place? A I heard a noise, that is all, and I stopped. 10

Q Had you seen anything? A I hadn't seen nothing; no, sir.

Q No automobiles or anything of that kind? A No, sir.

Q Do you remember any automobiles or trucks there of any kind? A Oh, yes, there was a truck there.

Q There was a truck? A Yes, sir.

Q What kind of a truck? A There was a motor truck and a horse-drawn truck in front of it. 20

Q Which one of those was nearest to you as you approached the place where the accident happened? A The motor truck.

Q What sort of a truck was that? A About a four-ton truck, big, well loaded up.

Q And how much space was there between the side of that truck and the first trolley track? A Well, there was possibly ten feet, I guess.

Q About ten feet? A Yes.

Q And how fast were you traveling as you approached this truck? A About twelve. 30

Q Twelve what? A Twelve miles or thirteen miles, around that neighborhood.

Q Twelve or thirteen miles per hour? A Yes.

Q And did you see more than one truck as you approached? A No, I could see only one truck, the motor truck.

Q And why was that? A Because the body—there was a heavy body on it and it was loaded up; I couldn't see anything in front of it. 40

Harry Nelson Kryor, direct.

Q You say you could not see anything in front of it?

A No, sir.

Q What was the first that you knew of the happening of an accident? A I felt water splash in my face, and I stopped.

10 Q Did you hear anything? A Just a little, faint noise, something hitting the fender; I didn't notice what it was.

Q Where did this water come from? A I don't know.

Q From what direction did it come? A Well, it came on the right side.

Q Did you have any lights on your automobile? A Yes, sir; four.

Q What kind? A Two gas lights and two kerosene lamps on the front.

Q What kind of gas lights did you have? A Acetylene gas.

20 Q And what kind of light did that give? A Oh, probably about 20 or 25 feet ahead.

Q How far could you see in front of you? A Well, I could see all the way down to the railroad track.

Q And did you see anybody or anything in the street besides that truck before the accident? A No, sir; I did not.

Q How close did you pass, the right-hand side of your machine pass, to the side of the truck? A Well, I should judge about five feet, or something like that.

30 Q About five feet between your car and the truck as you passed by? A Yes, sir.

Q Now, when you heard this noise and the water flew in your face, what did you do to stop your car? A Put on my brake.

Q Where did you stop? A About 15 or 20 feet from the horse truck, and turned in towards the curb.

Q Where was the rear of your car with relation to the horse truck or any part of the horse truck? (No response.)

40 Q Do you understand what I mean? A How far it was away from—

Harry Nelson Kryor, direct.

Q No, I will put it another way. When you stopped, can you tell us where the rear of your machine was by mentioning anything else there was on the street there? No, I could not.

Q Well, how did you stop with relation to the horse-drawn truck? A About 15 or 20 feet away from it, parallel with the curb; I swung in toward the curb. 10

Q Fifteen to 20 feet from what? A From the horse-drawn truck.

Q From what part of it? A From the front of it.

Q And you turned in where? A Towards the curb.

Q How close to the curb before you stopped? A Oh, about five feet.

Q And what did you do then? A I went back, and I seen a man laying in the street—Mr. Davis.

Q Well, where was he? A He was right in front of the horses. 20

Q What horses? A The horses that pulled the truck.

Q When you say "right in front of the horses," what do you mean? A Well, he was laying right on the street, about a yard away or so from the horses' heads.

Q Which direction from the horses' heads, towards the way your car was or back? A No, down towards my car.

Q So that he was just a little beyond the front of the horses when you found him? A Yes, sir. 30

Q And how far was it from the place where he was lying to the rear of your automobile? How far were you beyond him? A Oh, about eight feet, I believe; eight or nine feet.

Q Eight or nine feet that you were beyond him? A Yes.

Q Who got to him first? A I went up to him first.

Q You went to him first? A Yes, sir.

Q And what did you do? A I looked him over—I didn't know what happened for a minute, so I looked him 40

Harry Nelson Kryor, cross.

over, and he told me himself; he said, "I guess I got a broken leg."

Q And where did you go from there? A I was going to take him up to the hospital, but a gentleman came along with a closed car, and the four of us helped him into this closed car and he took him up to Mountainside
10 Hospital.

Q And then what did you do? A I went to the chief of police in Bloomfield and explained the case to him, told him—

Q Well, you cannot tell us what you told him. You reported the case to the police? A Yes, sir.

Q And then where did you go? A I went downtown with the Mr. Erkanders, with my car, and I reported back to the chief of police.

Cross examination by Mr. Bostwick.

20 Q You were not certain in answering the first question asked you, as to whether or not you remembered this accident; your recollection was dim about it; is that true?

A Well, I can't remember just everything; it is two years ago.

Q Accidents must be rather common in your experience as a driver, are they not?

Objected to.

30 Objection sustained.

A No, sir.

Q While you could not remember the accident very well, you remember all the details about it, just how far away you were, and so on, is that right? A (No response.)

Q Is that right? A Well, which way do you mean?

Q You do not remember the accident very well, but you remember how far away you were from these trucks when you went by, how far over the first rail of the trolley track you were, and how far away you were from the
40

Harry Nelson Kryor, cross.

track when you stopped, and how far the man was away from the horses when he lay in the road; all those things you remember very well, and yet you do not remember much about the accident; is that right?

Objected to.

Objection overruled.

10

A I explained it all.

Q You do not remember when you started for the Great Notch Inn, do you? A No, sir; I do not.

Q You do not remember whether it was in the morning or in the afternoon? A Oh, yes, I do.

Q Well, when was it? A Around midnight.

Q You started for the Great Notch Inn around midnight? A Yes, sir.

Q Is that true? A Yes, sir.

Q You started from where? A I don't remember where I got the people. 20

Q Was it in Bloomfield? A No.

Q Newark? A East Orange, I think.

Q And you got to Great Notch Inn in about what time? A Around half-past twelve, I believe.

Q And you stayed there half an hour? A Yes, sir.

Q Is that right? A Yes, sir.

Q And then you left Great Notch Inn about one o'clock? A Yes, sir.

Q And it took you about half an hour to drive down to the scene of this accident, is that right? A Yes; about half an hour, a little more. 30

Q And your idea, then, is that the accident happened about half-past one in the morning? A Exactly, I couldn't tell you the time when it happened.

Q Not exactly? A No.

Q How large a car was your touring car? A Seven-passenger touring car.

Q How many passengers did you have? A I had six, I believe. 40

Harry Nelson Kryor, cross.

Q Six? A Yes, sir.

Q You were going about twelve miles an hour? A Yes, sir.

Q Were you asleep? A No, sir; I was not.

Q Why were you driving twelve miles an hour? You were on your way home, were you not? A Sure.

10 Q Why were you going twelve miles an hour? A Well, I have been traveling Bloomfield avenue for the last seven years I have been driving, and coming from Montclair, the Erie Railroad crosses, and by going there so many times, I always slow down when I get to the railroad, to be careful.

Q And the fact that you always slow down as you approached that road is the reason why you say you slowed down on this particular night; isn't that so? A No; I always do.

20 Q Do you remember that on this particular night you slowed down to twelve miles an hour? A I always go about that way.

Q And where do you begin to slow down for this railroad? A Well, there is a little grade, and a man going twelve miles an hour in a car, and you come to a little grade, not to go any faster you put on your foot brake.

Q Well, how far from the railroad do you begin to slow down to twelve miles an hour? A About 300 feet, something like that.

30 Q About 300 feet? A Yes, sir.

Q Sometimes it is more and sometimes it is less? A Yes, sir.

Q And when you say you slow down you mean you slow down from a speed running from what to what? A (No response.)

Q Sometimes from forty-five miles an hour, I suppose? A No, sir.

Q Never that? A No, sir.

Q Thirty-five? A No, sir.

40 Q Never thirty? A No, sir.

Harry Nelson Kryor, cross.

Q Fifteen; is that right? A Yes, to ten.

Q Ten to fifteen? A Yes, sir.

Q You do not slow down from twelve to ten, do you?

A (No response.)

Q Fifteen miles an hour; is that right? A Well—

Q Well, there cannot be any doubt in your mind about it, can there? You know at what speed you travel, as a chauffeur for seven years, you say. Was it fifteen miles an hour that you slowed down to twelve? A No; I slowed down from twelve miles an hour.

10

Q You slowed down from twelve miles an hour; is that right? A Yes, sir.

Q Then the highest rate of speed you were going along that road that night was twelve miles an hour at any point; is that right? A Yes, sir.

Q Was it a clear night? A Yes, sir.

20

Q A good road? A Yes, sir.

Q No congestion of traffic? A No, sir.

Q You were on your way home? A Yes, sir.

Q Why did you stop your automobile?

Mr. Coult. When was that?

Mr. Bostwick. After the accident.

A Bloomfield avenue.

Q What? A Pulled in towards the curb.

30

Q Why did you stop it? A I had to stop to see what happened.

Q Nothing happened except some water flew in your face, did it not? A Yes; but I had to find out about it.

Q Well, does not water splash in your face along the street once in awhile? A Not on a clear night.

Q The only reason you stopped your car was because you felt some water splash in your face; is that right?

A Yes, sir.

40

Amos C. Erkander, direct.

AMOS C. ERKANDER, sworn in behalf of defendants.

Direct examination by Mr. Coult.

Q Mr. Erklander, where do you live? A 93 North Clinton street, East Orange.

10 Q What is your business? A In the candy jobbing business.

Q What is the name of your concern? A Erkander Brothers Company.

Q And where is that located? A 903 Broad street, Newark.

Q Do you recall the accident which is the basis of this suit? A I remember the evening in question.

Q Where had you been before this accident happened? A I do not remember having been anywhere particularly.

20 Q Do you remember having taken a drive? A Yes, sir.

Q Who was with you? A My two brothers, another gentleman and two or three young ladies.

Q Who was the other gentleman? A A Mr. Rimpler, from New York.

Q Where were you in the automobile when you were coming down Bloomfield avenue on your way home? A I was in the rear seat.

30 Q On which side? A On the left-hand side.

Q In that machine, besides the rear seat, there are two extra seats, are there not? A I don't know.

Q Do you recall how the whole party was seated in the rear? Can you give us the names and the places of the people who were there? A No, I cannot; it is rather indistinct.

Q And you know that you were on the left-hand side in the rear seat? A Yes, I remember that part.

40 Q Do you know where this accident happened? A No, except from the—except from what I have heard. I

Amos C. Erkander, direct.

did not know the location at the time; I had no reason to pay any particular attention to it.

Q What was the first that you knew of the happening of the accident? A When the machine came to a stop.

Q And what happened then? A Nothing particularly happened; I don't remember any occupants leaving the car, except the chauffeur, and, as far as I was concerned, I didn't know any particular reason why he stopped. 10

Q Were you conscious of any accident before the stopping of the car? A No, sir.

Q Something has been said here about water being dashed over the car. Do you recall that? A As the car stopped I remember seeing water on the glass.

Q On what glass? A On the windshield.

Q What sort of a windshield was it, do you remember? A No, I couldn't specify particularly. 20

Q I suppose it was in the usual place where windshields ordinarily are? A Yes, sir.

Q You say you did not get out of the car? A Not immediately.

Q Did you later? A I believe I stepped out for a moment or two.

Q Did you see the injured man? A No, sir.

Q When was the first that you knew that anybody had been hurt? A As soon as the car stopped and something was said about somebody being hit. 30

Q Who said it, do you know? A No, I do not remember.

Q Now, previous to the happening of this accident, what have you to say about the rate at which the automobile that you were in was being run? A It would be difficult for me to determine, except that I do know we were not going at any excessive speed.

Q Well, what sort of speed were you making? A Well, judging from my position, I should say not in excess of fifteen miles an hour. 40

Amos C. Erkander, cross.

Q (By Mr. Bostwick.) Fifty or fifteen? A Fifteen.

Cross examination by Mr. Bostwick.

Q You remember the evening, but you do not remember the accident; that is what you said on your direct examination?

10 *Mr. Coult.* Just a minute. What is the question? You are making a statement.

Q I say, you remember the evening, but you do not remember the accident; is that so?

Mr. Coult. I do not think that is a question, your Honor.

(Question withdrawn.)

20 Q You do not remember whether you got out of this car or not, do you? A I have a recollection that I did; yes, sir.

Q It is a faint recollection, is it not? A Somewhat.

Q You did not see the injured man? A No, sir.

Q So that you did not get out in order to see him, did you? A No, sir.

Q He was very near to your car, was he not? A I do not know.

30 Q You did not even see him from a distance, did you? A No, I did not see him there.

Q Did you know there was a man to be seen lying in the road? A Not particularly, no.

Q Well, "not particularly." What do you mean by that? A It was merely, as far as I knew, a proposition that something had been hit.

Q Did you look back to see whether anything had been hit? A I possibly did.

Q Well, did you? A I do not remember.

40 Q Well, is it not true that what you remember most about this matter is the evening and not the accident,

Paul E. Erkander, direct.

Mr. Erkander? A I remember the stopping of the car, yes, but just what happened I do not remember.

Q And you did not take the pains to find out, did you? A There was no particular reason why I should.

Q You did not care whether a man had been killed by your automobile or not, did you?

Objected to.

Objection sustained.

10

Q You did not go back to see if you could help this man, did you? A My recollection was when I went off, that was my idea, to ascertain if somebody had been hit, so that if I did go off it was with the idea of offering assistance.

PAUL E. ERKANDER, sworn in behalf of defendants.

Direct examination by Mr. Coult.

20

Q Mr. Erkander, where do you live? A East Orange.

Q And you are a brother of the gentleman who was last on the witness stand? A I am; yes, sir.

Q And you were an occupant of the automobile that was involved in this accident? A I was; yes, sir.

Q Where were you seated in the automobile? A In the rear seat.

30

Q On which side? A On the right-hand side.

Q What was the first that you knew that an accident had happened? A The first I knew, I heard a little noise, and the car came to a stop.

Q And did you get out? A Not immediately; no, sir.

Q Did you later? A Later I stepped out, but I stood along the car; I didn't walk away from it.

Q Had anybody else gotten out there? A The driver had gotten out.

40

Paul E. Erkander, direct.

Q And could you see him from where you were when you got out? A He had walked back—I was standing on the inside—I got out from the right-hand side of the car and stood on that side of the car, so that the car obstructed my view, as far as the rear of the road was concerned.

10 Q And could you see him from where you were when you got out? A He had walked back—I was standing on the inside—I got out from the right-hand side of the car and stood on that side of the car, so that the car obstructed my view, as far as the rear of the road was concerned.

Q Do you remember seeing any other vehicles there? A Why, I believe there were two trucks along the road in back of us.

20 Q How far were the horses of the second truck from the rear of your machine when you got out? A Well, that I couldn't state; I couldn't answer; I don't remember just how far the horses were.

Q Well, give us your best recollection.

Mr. Bostwick. Your Honor, he said that his own car stood between him and the scene of the accident and obstructed his view; he could not see.

30 A I said I got out of our car, or the car that we had hired, and, standing along the back door, I could see back along the curb, but I couldn't see anything in front of the other trucks as they were standing there; I could not see anything in front of them particularly.

Q I want you to give us your estimate of the distance that the rear of your car was ahead of the second truck.

A Ahead of the second truck—the first truck or the second truck?

Q The second truck. A I don't remember it being more than 15 or 20 or 25 feet, something like that.

40 Q And how near was your automobile to the curb when you got out of it? A Oh, right up alongside of the curb.

Paul E. Erkander, cross.

Q When did you first know that anybody had been hurt? A I first knew it when I was told by one of the—I don't remember whether it was the driver or somebody came running back and said there was a man hurt. That is all I know.

Q What have you to say about the speed at which that automobile had been running just before this accident happened? 10

Mr. Bostwick. I think the gentleman ought to be qualified on that question before answering it, if your Honor please.

Q Have you ever driven an automobile yourself? A I have, sir.

Q For how long? A Oh, for a few months.

Q What kind of an automobile? A An Overland roadster. 20

Q Did you have a speedometer on it? A Yes, sir.

Q Are you familiar with the speed of vehicles in miles per hour? A Well, a fair idea, not judging it to a fine point.

Q Not judging it to a fine point, can you tell us how rapidly that automobile was traveling before the accident happened? A Well, sometimes it is hard to say, sitting in the back of a car like that, how fast the car is going, but if you are driving you can readily tell how fast you are going. I should say about fifteen or sixteen miles an hour, between fourteen and sixteen miles an hour. We were just rolling along nicely and slowly. 30

Q What kind of a stop did you make when you came to a stop? A A quick stop, but not a jerky stop, just slowed right down to a stop.

Cross examination by Mr. Bostwick.

Q You say, Mr. Erkander, that you cannot remember that your car as it stood still in the road was more than 15 or 20 or 25 feet away from the second truck. Now, 40

Paul E. Erkander, cross.

can you tell us what you observed to be about the distance? I do not want you to say what you do not remember it was or was not, but what do you remember that your observation was as to what that distance was? A Well, no more than I answered that question the same way the first time: about 15 or 20 feet.

10 Q You cannot remember that it was more than that?

A No, I can't remember that.

Q You think yourself that the estimate of speed of fourteen or fifteen miles an hour is very unreliable, do you not? A I do not think it is very unreliable.

Q Don't you? A No.

Q You said that you could not judge very well the speed, sitting in the rear of the car? A Well, I couldn't judge as to the fineness of the speed, whether it was twelve or thirteen or possibly sixteen miles an hour; I couldn't
20 tell the exact mileage, but it wasn't very much more than fourteen miles an hour—fifteen.

Q And you were paying attention to the question of speed at that time, were you? A Not particularly, no.

Q You were entertaining some ladies, were you not? A I don't have to answer that.

Q Why? A I was sitting in the back of the car; I believe I was smoking a cigarette and talking to my friends.

30 Q I do not mean anything improper. You were entertaining some ladies, were you not? A Yes, sir.

Q And you were not paying attention to the speed of that car, were you? A Not particularly, no.

Q Nor to any other car on the road? A No. When you ask me a question like that, certainly, I know we were not going any sixty miles an hour at any time.

Q How do you know that? A I am wide awake; I have got my normal senses.

Q You mean you are now? A I was at that time,
40 too.

Marcus B. Erkander, direct.

Q And when you say you know that you were not going sixty miles an hour, is that the reason you think you were going about sixteen? A Not necessarily.

Q How fast were you going passing Bloomfield center? A I don't remember passing Bloomfield center.

Q You passed it, did you not? A Yes, but I don't remember seeing the center; I might not have looked out on the road at the time. 10

Q Do you remember any other place along the road where you did look out? A I might occasionally look out along the road.

Q Well, how fast were you going when you looked out on these other occasions? A About the same speed as I said before.

Q About fourteen or fifteen miles an hour? A About fifteen miles an hour.

Q All the way from Great Notch Inn down to this point about fourteen or fifteen miles an hour; is that right? A About that, yes. 20

MARCUS B. ERKANDER, sworn in behalf of defendants.

Direct examination by Mr. Coult.

Q Mr. Erkander, where do you live? A 93 North Clinton street, East Orange.

Q And you are a brother of the two gentlemen who were last sworn? A Yes, sir. 30

Q And do you remember the night that this accident happened? A Yes, sir.

Q Where were you at the time the accident happened? A On the front seat with the driver.

Q Which side was the driver sitting on? A He was on the right-hand side of me.

Q He was to your right? A It must have been a right-hand drive.

Q It was a right-hand drive? A Yes, sir. 40

Marcus B. Erkander, direct.

Q And you were on the left-hand side? A Yes, sir.

Q Where had you been? A For a ride, I would say.

Q Do you remember about what time you started from Newark? A Well, not exactly, no.

Q Well, about? A I would say about eight or nine o'clock.

10 Q Eight or nine? A Yes, sir.

Q And where had you gone from Newark? A We took a long ride.

Q Where did you go on your ride? A Well, along the River road, out towards Passaic, I think it was, and back around by the way of Great Notch.

Q Did you stop at Great Notch? A Yes, sir.

Q How long were you there? A Well, I would say possibly three-quarters of an hour to an hour.

Q Then where did you go? A Then we came on through and home.

20 Q And by what road were you coming to Newark? A Well, I remember Bloomfield avenue distinctly because of the accident.

Q Did you see anything of a man in the roadway before this accident happened? A I did not, sir, no.

Q Do you know whether the lights were lighted on the automobile—that is, the one that you were in? A Yes, absolutely.

30 Q What sort of a light did they throw ahead of your car? A A decent light, a good light, I would say.

Q What kind of a night was it? A The night was all right, clear.

Q How far could you see ahead of the car as you came down Bloomfield avenue towards the place where this accident happened? A It is hard to determine exactly; I would say 20 or 30 feet.

Q What was the first that you knew that an accident had happened? A Really, after the car had stopped. I didn't see how it happened, or anything about that. I knew that something happened because the driver stopped,

Marcus B. Erkander, direct.

and then I followed the driver out to determine what happened.

Q Was there anything that indicated that anything had been wrong previous to the time the car came to a standstill? A Not especially, that I noticed.

Q Which way were you looking? A Probably to my left, toward—well, the left on Bloomfield avenue would be north. 10

Q And how long had you been in the front seat? A All the way down; I had been in the front seat all evening.

Q Previous to the happening of this accident, while you were running along Bloomfield avenue, what have you to say about the speed at which your automobile was traveling? A Not over eighteen or twenty miles an hour at any point along the road.

Q At any point? A At any point along the road. 20

Q There was nothing to attract your attention, was there? A Nothing special, no.

Q Do you recall the stopping of the car? A Oh, yes.

Q What did you do when the car stopped? A I followed the driver out.

Q Where was the automobile when it came to a stop? A Why, it had turned in off the car track to the right, say about half-way between the track and the curb, and this man, the driver—I didn't even know his name at the time—he got out of the car, and I followed him, and I said to the rest of them— 30

Q No, you cannot tell us what you said. You followed him? A Yes.

Q And when you say "followed the driver" you mean Mr. Kryor here? A Yes, Mr. Kryor.

Q And where was the automobile with relation to where the truck with the horses attached was standing on the street? A Probably ten or twelve feet ahead—that is, towards Newark—ahead of the horses. 10

Marcus B. Erkander, cross.

Q And did you see Mr. Davis, the man who was hurt?

A That is, not close.

Q Where was he? A He was probably five feet in front of our car, or six feet, somewheres along there.

Q Did you have anything to do with helping him? A I did not, because he was already picked up.

10 Q He was picked up? A Yes.

Q Who were there with him? A There were other men that I had never seen before.

Cross examination by Mr. Bostwick.

Q You were, as a matter of fact, engaged in conversation with your friends in the rear of the automobile, were you not, all the way down from Great Notch? A It happens that I was not. I had no special reason to, because they were engaged with their own friends. They
20 were all friends in the party.

Q Well, you were one of the party, were you not? A Yes, sir; that is true.

Q And you were friendly with the other members of the party, were you not? A Yes, sir; they were my brothers.

Q Do you mean to say that you did not engage in conversation with the people in the rear of the car? A Not specially, no, not all the way down.

30 Q Well, you did generally, did you not, not specially?
A No, not generally.

Q Can you say that you did not do it at all? A Yes, I can say that.

Q That you did not engage in conversation with the people in the rear of that car? A Generally, yes.

Q Well, did you do it specially? A (No response.)

Q Did you do it at all? A I did one time speak to my brother.

Q Once? A Yes, sir.

40 Q On the way down from Great Notch? A Yes, sir.

Marcus B. Erkander, cross.

Q You turned around once and spoke to your brother?

A Yes, sir.

Q And that is the only time you had any conversation with the members in the party in the rear of the car from Great Notch all the way down to the time this accident happened; is that right? A That is all.

Q That is right? A Yes, sir. 10

Q And at the time the accident happened you were looking to the left of the road, off of the road? A (No response.)

Q Is that right? A No, sir; that is not right.

Q I did not hear that. A No, not at the time of the accident. Well, I was looking right and left. I don't know what the direction would be exactly.

Q North? A Northeast.

Q You were coming down Bloomfield avenue? A Yes, sir; I was looking northeast. 20

Q And if you were looking off the road, you were looking off the road, were you not? A I was glancing all over.

Q You were with the party all evening? A Well, we were riding all evening. With the party, yes; we were together all evening.

Q You were with them at Great Notch? A Yes, sir.

Q You were part of the party, were you not? A Yes. 30

Mr. Coult. Your Honor, if I have not got time to get as a witness the man who took this statement of Davis, I will have to take the stand myself. I do not like to do it. I just want to tell who this man is and that I know his signature. Have you any objection to my doing it?

Mr. Bostwick. Oh, no.

Joseph Coult, Jr., direct.

JOSEPH COULT, JR., sworn in behalf of defendants.

Direct examination.

10 *Witness.* I am an attorney and counsellor-at-law, and the attorney for the defendants in this case. I hold in my hand Exhibit D. 1 for identification on the part of the defendants, purporting to be a statement of Edward F. Davis made in this cause. It is witnessed by one H. D. Fulper, whose name appears as the agent who took the statement. I know Mr. Fulper and I am acquainted with his signature. That is the signature of the man that I know. He is an investigator in the employ of the Public Service Railway Company, with which company I am connected, and when this case first came to my hands I asked Mr. Fulper, outside of his regular duties for the Public Service, to interview this man and take a statement from him, and I received this statement, Exhibit D. 1, from 20 Mr. Fulper sometime shortly after the date of it.

Mr. Bostwick. I will object to the introduction of that paper in evidence, your Honor, on the ground that the evidence of Mr. Coult is not the evidence to prove it.

Mr. Coult. I have not offered it yet.

The Court. He has not offered it yet.

Cross examination waived.

30 *Mr. Coult.* I will offer in evidence D. 1 for identification.

Mr. Bostwick. I object to it.

Mr. Coult. If the Court please, it is a written statement, bearing the signature of one of the parties, the plaintiff, and as such it is entitled to go in evidence as an admission, subject to the explanation that he makes that at the time he signed it there was nothing there. His testimony is in dispute about that. At one time he said he signed it, and said it was not read to him, and then he made another statement, that the sheets were 40

Charge to Jury.

blank when he signed it; but I think we are entitled to have it go in for what it is worth.

Mr. Bostwick. Of course, I do not know what is in the statement; I have not read it; but I object to its admission because Mr. Davis specifically testified that he had not signed that statement.

The Court. I will admit it.

10

(The paper referred to is marked Exhibit D. 1.)

DEFENDANTS REST.

Mr. Coult sums up for defendants.

Mr. Bostwick sums up for plaintiff.

At one o'clock P. M. the Court takes a recess of one hour.

20

CHARGE.

The Court charges the jury as follows:

MOUNTAIN, J.

Gentlemen of the jury: This action has been brought by the plaintiff against two defendants, the owner of the car and the driver of the car, on the theory that the owner of the car was the master of the driver of the car, in the sense that the driver was the employee of the owner.

30

Now, it appears from the plaintiff's point of view that on the night of June 30, 1919, at about midnight, he was driving a truck in an easterly direction along Bloomfield avenue, and that when he had arrived at or near a place known as Reilly's Cafe, which is west of the railroad crossing, he noticed that the left rear wheel of his truck had become so hot that it needed attention, and he decided to stop. He was unable to jack up the rear of the truck, either because he was not strong enough to do it

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Charge to Jury.

alone or that he did not have the proper appliances, and he went into the cafe and telephoned to his employer, who came down on a truck with a Mr. Parsons, and the latter truck stopped, according to the plaintiff's testimony, about five feet behind the truck which had been driven there, with this hot box, by the plaintiff. In the course of cooling off and greasing the axle water was used, and that
 10 water was obtained in a pail from across the street. The plaintiff says that after the axle had been fixed he picked up a pail of water, and that while it was in his hand and a block in his other hand he heard Mr. Cockefair say something, and then the horse, or the horses, shied, and he turned to look at them, and the accident happened. The plaintiff says that at that time he was standing, as I understand it, about two feet from the center of his wagon, in the roadway, and when he was picked up he was about 30 feet in front of his horses.

20 As a result of this injury the plaintiff was in the hospital for nine weeks, with a leg that was fractured between the knee and the hip, and following that time in the hospital he was home in bed about six weeks in a plaster cast, and following that the treatment consisted in the use of crutches, and finally a cane.

The plaintiff says that at the time the accident happened he did not see the car and he heard no signal or horn.

30 The plaintiff alleges that as a result of the negligence of the defendant, or defendants, he has sustained the injury of which he complains and has suffered damages not only to his body, but has had to pay out money for doctors' bills, and has suffered a pecuniary loss through his inability to attend to his business.

The defense as outlined by the witnesses seems to be that the car that belonged to one of the defendants was driven by his employee, Harry Kryor, and that that car had been used that evening by the Messrs. Erkander for a trip to Great Notch Inn; that they were coming down
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Charge to Jury.

Bloomfield avenue on their way home, and Harry Kryor was driving the car, sitting on the right-hand seat; that it was a right-hand drive car; that Kryor did not see the plaintiff at all, and he contends that the first thing that apprised him of anything unusual was a splash of water in his face, or on his windshield. Kryor contends that he was going ten or twelve or thirteen miles an hour, and his lights were lit, and that when he passed this truck he passed within about five feet of it; that after he became aware of something having happened he stopped, and that when he stopped he was 15 or 20 feet in front of the horse-drawn truck, and that Davis, the plaintiff, was lying in front of the horses at a distance which he approximated to be one yard. The rate at which the defendant Harry Kryor was driving has been given by other witnesses, and varies, I think, from about fourteen to twenty miles an hour.

It appears from the testimony of the defendants that at the time the accident happened the lights on the car were lit. It appears from the testimony of the plaintiff that the rear light on the truck was lit. I merely call attention to these lights because, for the proper consideration of this case you will have to visualize the conditions that existed there that night, to determine whether the defendants were negligent or not, because both of these men—that is, the driver of the automobile and the pedestrian—had a right on the street, and it is for you to decide from the testimony as to whether the defendants were guilty of negligence in not observing the rights of the plaintiff.

It was the duty of the plaintiff that night to use reasonable care to take care of himself, to use reasonable care to avoid being injured, under all the circumstances of the case, considering the visibility and the time of night and the place where he was working. It was the duty of the driver of this automobile to use such care in the operation and control of his automobile as a reasonably

Charge to Jury.

careful and prudent man would have used under similar circumstances, also considering, among other things, the visibility, the place where he was running, or operating, his car, and the truck which he saw ahead of him. What care should he have exercised in approaching and passing that truck? It is for you to determine whether he was negligent or not in sounding or not sounding a horn (and I have no recollection of there being testimony that he sounded his horn), and in taking other precautions—that is, as to the distance he drove from this stationary truck and as to the speed at which he drove. Those things are all questions of fact for you to consider in your determination as to whether you will or will not find the defendants guilty of negligence.

The burden of proof in this case is upon the plaintiff to prove to your satisfaction that the defendant who operated that car was negligent and did not exercise reasonable care in his control and operation of that automobile. But before you can bring in a verdict for the plaintiff, even if you decide that the defendants were negligent, you must be satisfied that the plaintiff was not guilty of any contributory negligence; that is, that he did no act which contributed to his own injury, because if he did, that precludes him from recovery.

I charge you that if you find that the plaintiff has sustained the burden of proof, and if you further find as a fact that the plaintiff was injured by the negligence of Kryor, who was at that time the servant of Groner and acting within the scope of his employment, you may bring in a verdict against both defendants. What would your verdict be, and for what would you measure your damages? The plaintiff in that case would be entitled to compensation for the pain and suffering that he has undergone, for the bodily injury that he has sustained, and for the effect of that injury upon his health; that is, as to whether it is temporary or permanent. I do not recall that there was testimony that there was any-

Exceptions to Charge.

thing permanent, except a shortening of one of the legs, or limbs. The plaintiff would also be entitled to the expenses incidental to his attempts to cure himself. But those expenses must be reasonable expenses. He testified that he paid one doctor \$100 and another doctor \$10. The recipient of the former fee testified that it was unreasonable inasmuch as it was not enough. It further appears that the plaintiff paid \$10 for an anaesthetic, and \$20 for an X-ray bill, and \$5 for the privilege of the use of the operating room at the hospital, and \$19.25 a week for nine weeks for the room that he occupied at the hospital. If you find for the plaintiff, he is entitled, in addition to that, to recover the pecuniary loss which he has sustained by reason of his inability to work, such inability being caused proximately by the defendants' negligence, and his testimony was that he was injured on June 30, 1919, and that he was able to return to work on February 18th of the next year, and that prior to the accident he had been earning \$30 a week.

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20

(The jury retires.)

Mr. Coult. I ask an exception to that portion of the Court's charge in which the Court says that, if it appears to the jury that the plaintiff has sustained the burden and that the driver of the automobile was negligent, they can bring in a verdict for the plaintiff.

(Exception allowed.)

30

Mr. Coult. I pray an exception to that portion of the Court's charge in which the Court says that the verdict shall be against both defendants.

(Exception allowed.)

Mr. Coult. I except to the denial of the Court to charge the defendants' request to charge.

(Exception allowed.)

40

Defendant's Request to Charge.

DEFENDANTS' REQUEST TO CHARGE.

Defendants' counsel requests the Court to charge the jury as follows:

1. The jury in this case cannot find a judgment against both defendants, but, if they find for the plaintiff, must find a single verdict against one defendant.

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(Denied.)

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Notice of Appeal.

NOTICE OF APPEAL.

Filed October 19, 1921.

ESSEX COUNTY CIRCUIT COURT.

EDWARD F. DAVIS,	}	<i>Plaintiff,</i>	<i>Action at Law.</i>	10
<i>vs.</i>				
HARRY N. KRYOR and MORRIS L. GRONER,		<i>Defendants.</i>	<i>Notice of Appeal.</i>	

*To Messrs. Heine, Bostwick & Bradner, Attorneys of
Plaintiff.*

20

SIRS:

TAKE NOTICE that the defendant, Morris L. Groner, appeals to the New Jersey Supreme Court from the whole of the judgment entered in the above-entitled cause.

COULT & WOODRUFF,
Attorneys of Morris L. Groner, Appellant.

Service acknowledged by Heine, Bostwick & Bradner,
Oct. 19, 1921.

30

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Grounds of Appeal.

GROUNDS OF APPEAL.

Filed November 15, 1921.

New Jersey Supreme Court

10

EDWARD F. DAVIS,

Plaintiff-Appellee,

vs.

MORRIS L. GRONER,

Defendant-Appellant.

Action at Law.

*Grounds of
Appeal.*

The appellant states the following grounds of appeal:

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1. Because the Court charged the jury that if the jury should find for the plaintiff they should find a verdict against both defendants.

2. Because the Court refused to charge as follows: "The jury in this case cannot find a judgment against both defendants, but, if they find for the plaintiff, must find a single verdict against one defendant.

COULT & WOODRUFF,

Appellant's Attorneys.

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TO HEINE, BOSTWICK & BRADNER,

Attorneys of Appellee,

Newark, N. J.

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Opinion of Supreme Court.

OPINION OF SUPREME COURT.

Filed November 9, 1922.

NEW JERSEY SUPREME COURT.

JUNE TERM, 1922.

EDWARD F. DAVIS,

vs.

MORRIS L. GRONER.

10

Appeal from Essex Circuit Court.

Argued before Gummere, *C. J.*, and Justices Swayze and Trenchard.

For the appellant, Coult & Woodruff.

For the respondent, Palmer Bradner.

20

Per curiam:

This action was brought to recover compensation for personal injuries received by the plaintiff, who was run down by an automobile of the defendant, Groner, which was being driven by his chauffeur, one Kryor. The present suit is against the employer and employee, and the trial resulted in a verdict against both of them. From the judgment entered on that verdict the defendant, Groner, appeals; and the only ground upon which we are asked to reverse is that the Trial Court refused to charge the jury that they could not find a verdict against both defendants, but that, if they found for the plaintiff, they must find a single verdict against one defendant. The Court not only refused to charge the request, but charged the law to be directly the contrary.

30

We find no error either in the refusal to charge or in the actual instruction. In the case of *Whalen v. Penna.*

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Opinion of Supreme Court.

R. R. Co., 73 N. J. L. 192, we held that, "So far as this court is concerned, the rule is settled that where the injury is caused by the negligence of an agent acting in the line of his employment the action may be joint against such agent and a principal, or may be separate against either." The course pursued by the Trial Court, which is made
10 the subject of present complaint, was entirely justified by the decision just referred to and is controlling upon us.

As this is the only point involved in the appeal, the judgment will be affirmed.

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*Remittitur.***REMITTITUR.**

NEW JERSEY SUPREME COURT.

EDWARD F. DAVIS, <i>Plaintiff-Respondent,</i> <i>vs.</i> MORRIS L. GRONER, <i>Defendant-Appellant.</i>	}	<i>Action at Law.</i> <i>On Appeal from</i> 10 <i>Essex County</i> <i>Circuit Court.</i> <i>Remittitur.</i>
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This cause having been duly argued at the present term of court by Heine, Bostwick & Bradner, of counsel for the plaintiff-respondent, and Coult & Woodruff, of counsel for the defendant-appellant, and Court having considered the same and finding no error in the record or proceedings in the Essex County Circuit Court, 20

It is, thereupon, ORDERED and ADJUDGED that the judgment of the Essex County Circuit Court removed by the appeal in this cause be affirmed with costs and that the record be remitted to the Supreme Court to be proceeded with in accordance with this judgment and the practice of said Court.

On motion of

HEINE, BOSTWICK & BRADNER, 30
Attorneys for Plaintiff-Respondent.

Notice and Grounds of Appeal.

NOTICE AND GROUNDS OF APPEAL.

Filed December 2, 1922.

NEW JERSEY SUPREME COURT.

10 EDWARD F. DAVIS,

Plaintiff-Respondent,

vs.

MORRIS L. GRONER,

Defendant-Appellant.

*Notice and
Grounds of
Appeal.*

To Messrs, Heine, Bostwick & Bradner,
Attorneys for Plaintiff-Respondent.

SIRS:

20 TAKE NOTICE that the defendant-appellant, Morris L. Groner, appeals to the Court of Errors and Appeals in the last resort in all cases in New Jersey, from the whole of the judgment entered in this cause, on the ground that the Supreme Court erred in affirming the judgment of Essex County Circuit Court, in favor of the plaintiff-respondent, instead of giving judgment for the defendant-appellant.

30 Dated, November 29, 1922.

COULT & WOODRUFF,
Attorneys for Defendant-Appellant.

Due and legal service of the within notice and grounds of appeal is hereby acknowledged this 30th day of November, 1922.

HEINE, BOSTWICK & BRADNER,
Attorneys for Plaintiff-Respondent.

New Jersey Court of Errors and Appeals

EDWARD F. DAVIS,

Plaintiff-Respondent,

vs.

MORRIS GRONER,

Defendant-Appellant.

Action at Law.

*On Appeal from
Supreme Court,*

Affirming

Judgment of

Essex County

Circuit Court.

BRIEF OF PLAINTIFF-RESPONDENT.

This is an action of negligence which was tried before the Essex County Circuit Court on October 5, 1921.

The complaint charged that the plaintiff, Edward F. Davis, had received personal injuries as the result of being struck and injured by an automobile of which the defendant, Morris L. Groner, was the owner and which was operated at the time of the accident by Groner's servant or agent, Harry N. Kryor. The plaintiff claimed damages against "both the defendants, each, or either of them." Both the defendants in their answers admitted the relationship of master and servant and admitted that at the time of the accident the defendant, Harry N. Kryor, was acting within the scope of his employment and was on or about the business of his master, the other defendant, Morris L. Groner.

POINT I.

The charge of the Court was not legal error.

The Court charged as follows:

"I charge you that if you find that the plaintiff has sustained the burden of proof and if you further find as a fact that the plaintiff was injured by the negligence of Kryor, who was at the time the

servant of Groner and acting within the scope of his employment, you may bring in a verdict against both defendants.”

The relationship of master and servant and the fact that the accident occurred when the servant was engaged in and about the business of his master are facts which are admitted. Therefore, the case comes within the rules set down and settled by the case of *Whalen v. Pennsylvania Railroad Co.*, 73 N. J. L. 192; 93 Atlantic Reporter 993, which was also an action of negligence against a master and a servant, in which the Court held that: “So far as this Court is concerned, the rule is settled that where the injury is caused by the negligence of an agent acting in the line of his employment, the action may be joint against such agent and a principal or may be separate against either. *Brokaw v. North Jersey Railroad Co.*, 3 Vroom 328-333; *Newman v. Fowler*, 8 Vroom, 89-90, and this rule has inferentially received the approval of the Court of Errors and Appeals in the case of *Peterson v. Middlesex and Somerset Traction Co.*, 42 Vroom 296.”

It is true that in other states a number of cases may be found on either side of the question. The large majority of states are in favor of the rule as stated by the Whalen case, *supra*. Good collections of these cases are found in 32 Cyc. 1545, 12 L. R. A. (N. S.) 669; 25 L. R. A. (N. S.) 356.

The sole reason for taking contrary view to that expressed in the Whalen case is, apparently, that a joint verdict may prohibit the master from maintaining an action against the servant for indemnity. There is no question but that the master is primarily liable even in those states which take the contrary view to the State of New Jersey. See *Betcher v. McChesney*, 100 Atlantic Reporter, 124. If primarily liable, we cannot see why he is not jointly as well as severally liable. Assuming in a case like the present one that the plaintiff had sued the master alone, the latter would have been bound to pay

the verdict. If the plaintiff had sued the servant alone and recovered a judgment which could not be satisfied by the servant is the plaintiff then to be prohibited from suing the master, if not, then would the master be in any better position than he is in the present case? If the plaintiff is prohibited, then, we say, isn't it more just that as between the master and the plaintiff that the master should suffer the loss, occasioned by the servant, rather than the plaintiff. Then, too, if the Pennsylvania case is sound, the servant must be sued first. Is this logical?

In the present case we fail to see where the master is harmed by a joint judgment, especially where the facts of the relationship of master and servant are admitted and established. We have found no cases in this state where the master has recovered indemnity from his servant. Other states allow indemnity. Logically, in a case like the present one, it should be allowed. If the right to indemnity exists, it should exist even though there is a joint judgment and the master should still be allowed to bring his action for indemnity or perhaps be permitted to issue execution against the servant for the amount which the master has been compelled to pay in satisfaction of the judgment.

POINT II.

The defendant's request to charge was clearly legal error and therefore properly excluded.

The defendant requested the Court to charge as follows:

"The jury in this case cannot find a judgment against both defendants, but if they find for the plaintiff, must find a single verdict against one defendant."

Because of the defendant's admission of the relationship of master and servant the jury if they found the servant guilty of negligence were bound to bring in a verdict against both defendants in this case, nor could they re-

lease the servant without releasing the master. See *McGuinness v. Chicago, R. I. & P. O. Co.*, 9 L. R. A. (N. S.) 880, and cases in note.

POINT III.

It is respectfully submitted that the judgment in the Supreme Court be affirmed.

Respectfully submitted,

HEINE, BOSTWICK & BRADNER,
Attorneys for Plaintiff-Respondent.

PALMER BRADNER,
Of Counsel.

Arthur W. Cross, Law Printer, 243 Market Street, Newark, N. J.

New Jersey Court of Errors and Appeals

EDWARD F. DAVIS,

Plaintiff-Respondent,

vs.

MORRIS L. GRONER,

Defendant-Appellant.

Action at Law.

On Appeal from

New Jersey

Supreme Court.

BRIEF OF DEFENDANT-APPELLANT.

This is an appeal from a judgment of the Supreme Court affirming on appeal a judgment entered October 5, 1921, in the Circuit Court of Essex County.

The judgment in the Essex Circuit Court was in favor of the plaintiff Edward F. Davis and against the defendants Morris L. Groner, who is the appellant in this Court, and one Henry N. Kryor, jointly, in the sum of \$1,800, damages, and \$57.26, costs.

The defendant Kryor did not join in the appeal to the Supreme Court and is not a party to this appeal.

Plaintiff's complaint alleged that he was injured on June 30, 1919, by the defendant Kryor, a servant of Groner. After alleging certain acts of carelessness on the part of the defendant Kryor, the complaint goes on to say "due to the negligence of the defendants the plaintiff was severely injured," etc. The complaint therefore contained an allegation, among others, that the injury complained of was caused by the joint negligence of the defendants Groner and Kryor; though it does not state any specific act or omission on the part of Groner as a ground of recovery against him.

At the trial it appeared that Groner was not present when the accident occurred, took no part in the control or management of the automobile, and did not contribute to

the happening of the accident by any negligence, act or omission of his, nor that the accident was the result of the command or direction of Groner. The proof was on the contrary, that there was no ground for recovery against Groner except upon the ground of *respondeat superior*.

POINT I.

Can there be a joint judgment in this case?

The grounds of appeal filed in the Supreme Court (p. 70) raise a single question: can there be a joint judgment against master and servant in an action at law when the injury is alleged to have been the result of negligence on the part of the servant and not the result of a command or direction of the master and when no negligent act or omission of the master contributed to it, but when the servant is liable because of his negligence and the master liable solely of the employment?

This Court has never been called upon, so far as we can discover, to pass upon this question, on which there appears to be a conflict of authorities. We respectfully claim, however:

“The better rule and the one supported by the weight of authority, is that where the master is liable for the negligent or wrongful act of the servant solely upon the ground of *respondeat superior*, and not by reason of any personal share in the negligent or wrongful act, by his presence or express direction, he is not liable jointly with the servant, and a joint action cannot be brought against them” (26 Cyc. 1545).

We are asking this Court to follow the common law doctrine which has been followed in Massachusetts, Maine, Pennsylvania, Connecticut, and other Eastern States, and which was applied by the Supreme Court of New Jersey in the case of *Brokaw* against *The N. J. Railroad*

and Transportation Company and Campbell, 32 N. J. L. 328, upon the authority of the decisions in Massachusetts.

We urge this Court to follow the common law rule for the following reasons:

1. Because the gist of the action against the servant (being trespass) and the gist of the action against the master (being case) are entirely different, depend upon different evidence, involve different issues, no less at the present time than they always did.

2. Because such a joinder opens the door to improper and misleading practices, such as the introduction in evidence of admissions of the servant as a party, outside the *res gestae* and the scope of his employment, which could not, unless he were a party, be used against the master.

3. Because punitive damages are often recoverable against the servant where the master would not be liable for them, as in the case of *Peterson against The Middlesex & Somerset Company*, 59 Atlantic 456.

4. Because a joint judgment would create an anomalous situation when, after its rendition, the master should attempt to seek indemnity for his damages by reason of his servant's fault.

5. Because if joint judgments are to be permitted in such cases as this then the removal of causes to the Federal courts by non-resident defendants can be defeated in any case where injury is caused by the act of a servant who is a resident of the State of New Jersey or of the same State as the plaintiff.

ARGUMENT.

At common law a joinder of master and servant was not permitted where the master's responsibility was based upon *respondeat superior* alone.

1 Chitty Pleading 201 (*201), 12 Am. Ed. from 6th & 7th London Ed. Notes (2) and (X) and P. 130 (*131);

Parsons v. Winchell, 5 Cushing (Mass.) 592.

The reasoning of the English decisions appears to be founded upon the inherent repugnance to one another of the separate causes of action against the master and the servant, the servant being held responsible because he was the actor and the master being held responsible only because of the employment. This distinction is pointed out with great clarity in the case of *Hewett v. Swift, et al.*; 3 Allen 420, in which the Court says, p. 424:

“It is, however, objected that an action against the corporation for such misfeasance of their servant should have been an action on the case, and not one of trespass. Under our present forms of pleading, both are included under our action of tort, and as a matter of form no difficulty would arise in this respect that could not be easily removed, if it existed. But the objection taken lies deeper than that of the form of action merely, and questions the right to maintain a joint action of trespass against the corporation and their servant, in such a case as the present. If the corporation is chargeable in trespass for the act here complained of, then the joinder is proper, for in trespass all the actors are principals, and he who commands the act, as well as he who commits the trespass, may be joined.”

This case makes clear the distinction which exists where the action is not *trespass vi et armis* against the master and where the master's responsibility is based upon the employment only. In trespass all parties are principals. If the servant commits a trespass because of his master's direction, either express or implied, then both master and servant are principals and, therefore, joint *tort feorsors*. This is the principle enunciated in the case of *Brokaw v. N. J. R. & T. Co. and Campbell, supra*, which was cited as authority by the Supreme Court in *Whalen v. Penn. R. R. Co.*, 63 Atlantic 993, which latter case was held by the Supreme Court as controlling the present case. The *Brokaw* case, however, we respectfully urge, is not only no authority in favor of a joint judgment in such a case as this but is clearly opposed to such a doctrine, because in

that case the gravamen of the charge was *trespass vi et armis* and the master was held only because the act of his servant was authorized by the rules and regulations of the railroad company. The Court in that case said (32 N. J. L., p. 333):

“Both the defendants are charged as principals, and it does not appear that Campbell was the servant of the company, and if it did, the joinder would still be proper. A joint action of tort, in the nature of trespass, may be maintained against a corporation and its servants for a personal injury inflicted by the latter in discharging the duties imposed on him by the corporation *Hewett v. Swift, et al.*, 3 Allen 420; *Moore v. Fitchburg R. Co., et al.*, 4 Gray 465.”

We call the Court's attention to the fact that the authorities cited by Justice Depue in this opinion are both Massachusetts cases, which hold that the joinder of master and servant is permissible where the act was a *trespass* authorized expressly or impliedly by the master but which reprobated such a joinder where the master is made a party only because of the employment. The rule in Massachusetts is clearly enunciated in the case of *Parsons v. Winchell*, 5 Cushing 592, in which Justice Metcalf says, p. 593:

“To maintain an action against two or more jointly, the plaintiff must show a joint cause of action. In an action *ex delicto*, the act complained of must be the joint act of all the defendants, either in fact, or in legal intendment and effect. In trespass, all are principals, and he who commands a trespass to be committed, though absent when it is committed, is regarded as a trespasser, and may be sued alone, or jointly with him who obeyed his command. And it has been decided, where one of several proprietors of a coach and horses acted as driver, in the absence of the others, and injured a third party, by negligent driving, that he and the other proprietors were jointly liable to such party, in an action on the case. *Moreton v. Hardern*, 6 Dowl. & Ryl. 275, and 4 Barn. & Cres. 223. They

were all held to be responsible for the conduct of the person whom they suffered to drive, whether he was one of themselves or their servant. But the act of a servant is not the act of the master, even in legal intendment or effect, unless the master previously directs or subsequently adopts it. In other cases, he is liable for the acts of his servant, when liable at all, not as if the acts were done by himself, but because the law makes him answerable therefor. He is liable, says Lord Kenyon, 'to make a compensation for the damage consequential from his employing of an unskilful, or negligent servant.' 1 East, 108. The servant also is answerable to the party injured by his acts done as servant, and is answerable to the master for any damages which the master may be compelled to pay for his wrongful acts, unless those acts were directed by the master. But if the master and servant were jointly liable to an action like this, the judgment and execution would be against them jointly, as joint wrongdoers, and the master, if he alone should satisfy the execution, could not call on the servant for reimbursement, nor even for contribution. *Merryweather v. Nixan*, 8 T. R. 186, *Vose v. Grant*, 15 Mass. 505, 521."

Another Massachusetts case to which we draw the Court's attention is that of *Mulchey v. Methodist Religious Society, et als.*, 125 Mass. 487, in which Mr. Justice Gray lays down the rule as follows:

"If there was any negligence in the agents, Barler and Sleeper, for which they could be held liable, their principal, the society, would be responsible, not as if the negligence had been its own, but because the law made it answerable for the acts of its agents. Such negligence would be neither in fact, nor in legal intendment, the joint act of the principal and the agents, and they therefore could not be jointly sued. It is not like the case of a wilful injury done by an agent by the command or authority of his principal, in which both are in law principal trespassers and therefore liable jointly."

In connection with the reasoning of the case last cited, we wish to direct the Court's attention to the fact that in New Jersey an action such as the present one, if brought against the driver of the vehicle, must be in *trespass vi et armis* and cannot be in case. *Waldron v. Hopper*, 1 N. J. L. 339.

We assume it is not necessary to cite further authorities to the effect that the action against the master of a driver in such an action as this, if the injurious act was not authorized or is ratified, must be in case and not in trespass, as held in *Parsons v. Winchell*, *supra*, and distinguished on that ground in *Hewett v. Swift*, *supra*, upon the authority of which last mentioned case *Brokaw v. N. J. R. & T. Co., et al.*, was decided, quoting Parke, B., in *Sharrod v. Railroad*, 4 Exch. 581 (W. H. & G.).

In discussing the vice in improperly joining master and servant for the purpose of defeating the removal of cases from the State Courts into the Federal Courts, Judge Pollock of the United States Circuit Court for the District of Kansas, in the case of *Shaffer v. Union Brick Company, et al.*, 128 Federal Reporter 97, has collected numerous authorities in support of our present contention, among them an excerpt from an opinion by Judge Taft, now Chief Justice of the U. S. Supreme Court, in the case of *Warax v. Cincinnati N. O. & T. P. Ry. Co.*, as follows (p. 102):

"It will thus be seen that the master is not held on any theory that he personally interferes to cause the injury. It is simply on the ground of public policy, which requires that he shall be held responsible for the acts of those whom he employs done in and about his business, even though such acts are directly in conflict with the orders which he has given them on the subject. The liability of the servant, on the other hand, arises wholly because of his personal act in doing the wrong. It does not grow out of the relation of master and servant, and does not exist at all, unless it would also exist for the same act when committed, not as the servant, but as the principal. Liabilities, cre-

ated on two such wholly different grounds cannot and ought not to be joint."

Judge Pollock's opinion is lengthy and all to the point, and we cannot quote part of it without embracing the whole of it. We will, however, call the Court's attention to the syllabus by the Court, which reads as follows:

"To constitute a joint liability of master and servant for the negligence of the servant, there must be actual negligence, as contradistinguished from imputed negligence, of the master concurring with an act negligently committed by the servant."

We call the Court's attention to the case of *Betcher v. McChesney*, 100 Atlantic 124, decided by the Supreme Court of Pennsylvania in 1917, in which Justice Stewart, speaking for the Court, said (p. 124):

"Joint tort-feasorship can only be affirmed when the parties charged have a community of interest in and an equal right to direct the movements of each other in an undertaking; and master and servant cannot be engaged in common undertaking, as when they do so they cease to stand in that relation."

We also direct the Court's attention to the case of *Lissner v. Hughes*, 258 Federal 512, decided by the Court of Appeals for the District of Columbia in 1919, in which it was held that a joint judgment cannot be rendered against a master and servant for a trespass committed by the servant without the direction or command of the master but merely in the course of the servant's employment.

The case of *Whalen v. Penn. R. R. Co.*, 63 Atlantic 993, decided by the Supreme Court of New Jersey in 1906, has been relied upon by the respondent as an authority opposed to the position that we take in this brief.

With reference to this last cited case, we have to say, first, that it is not an authority for the contention that a joint judgment may be rendered against a master and servant where the master's responsibility is predicated upon *respondeat superior*. The question in the *Whalen*

case was one of joinder of parties in the declaration, which alleged a joint tort, that is, the failure to carry a passenger safely, responsibility for which rested upon both the company and the master of the vessel. This question was ^{raised on} an assignment of error, for that the Court erroneously refused to remove the case to the United States Court, removability of causes depending entirely upon the wording of the declaration as held by the United States Supreme Court in *C. & O. R. R. Co. v. Dixon*, 179 U. S. 131.

The Supreme Court of New Jersey in the Whalen case said:

“The negligence alleged is charged to be that of the defendants and the statement that the boat at the time of the accident was under the direction of Spencer (the captain of the boat) does not negative this allegation.”

This allegation is almost identical with the allegation in the present case—“due to the negligence of the defendants.” The Supreme Court, in the Whalen case, could no more reverse for the exception taken in that case than we could in our present case move to strike out the complaint on the ground which we are urging for a reversal on the proof. What the proof may have been in the Whalen case does not appear in the opinion. It may well have been that the negligence of the captain of the boat was in part responsible for the injury while the negligence of the owner of the boat in failing to properly equip or maintain it may have been also partly responsible; or the captain may have acted in accordance with rules and regulations of the company under its direction and command, either express or implied, which would render the master liable as principal in trespass, as in the Brokaw case.

As we have already pointed out, the Brokaw case is not only no authority for the decision of the Supreme Court in the present case, but is by inference an authority against it. The guarded suggestion in the opinion in the Whalen case that “so far as this Court is concerned the

rule is to settle that where an injury is caused by the negligence of an agent acting in the line of his employment the action may be joined against such agent and his principal, or may be separate against either," citing the Brokaw case, was unnecessary for the determination of the Whalen case and was not called for by the allegations in the declaration, and, as pointed out above, the Brokaw case was not an action founded upon negligence wherein the master's liability would be in an action on the case but for a trespass by the authority of the master under the circumstances that render him a principal and an actual joint *tort feasor* with his servant.

The whole trend of the Brokaw decision is to the effect that the Brokaw case is one which is outside of the rule enunciated in the case of *Parsons v. Winchell, supra*, and in line with the Massachusetts case of *Hewett v. Swift, supra*.

In conclusion, we respectfully suggest to the Court this query: If this judgment against the two defendants, master and servant, as joint *tort feasors*, is permitted to stand, and the plaintiff compels satisfaction from the master alone, and the master seeks indemnity from his loss against his careless servant, the sole author, in fact, of the injuries complained of, and the servant then sets up that the judgment is against joint *tort feasors*, and that under the law of New Jersey there can be no contribution between them as such, and that by the said judgment the master is estopped from proving that they were not such joint *tort feasors*, as they had been adjudged to be, what recourse has the master then except to ask some Court of New Jersey to cast aside the doctrine of estoppel by judgment and permit evidence in contradiction of a record which, in the absence of fraud or mistake, has adjudged the parties to be joint *tort feasors*?

We respectfully submit that the judgment of the Supreme Court should be reversed.

Respectfully submitted,

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