

30 MAR. 1. 1917

New Jersey Court of Errors and Appeals

VORIS FOX,	}	ACTION AT LAW.	10
Plaintiff,			
Appellant,			
vs.			
FORTY-FOUR CIGAR COMPANY,	}		20
Defendant,			
Appellee.			

BRIEF OF APPELLANT IN REPLY.

1.

It is contended that the defendant had no power to purchase the car in question for the use of the daughter of the president, and that therefore it could not be held liable for injuries received by the plaintiff while it was being so used. There is no proof in the case that the defendant company was without power to purchase the automobile in question for the use of the sick daughter of the president of the company, but even if there was such testimony, it would not constitute a defense to this action. 30

Thompson, in his work on Corporations, says:

“A moment’s reflection will show that the doctrine of *ultra vires* has no application to the question of the liability of a corporation for torts committed by its agents in the scope of their employment. Power to do wrong is never in theory conferred upon a corporation by the legislature.

10 A corporation, therefore, is not endowed by its creator with the faculty of committing wrong. If, therefore, the corporation can never be liable for a tort except committed *intra vires*, it could never be liable for a tort at all. Nothing is now better settled in American law than that, in order to charge a corporation with liability for a tort committed by its servant or agent, it is not necessary to show that the act out of which the tort sprung was *intra vires*; but, on the other hand, that the corporation cannot prove by way of defense that it was *ultra vires*."

5 Thomp. Corp. Sec. 6279.

20 One of the illustrations given by Thompson is as follows: He says, "Let us suppose that a corporation chartered only as a railroad and banking company has no authority to run a steamboat, it is liable to a passenger negligently injured by its servants while so operating."

Central R. R. Co. v. Smith, 76 Ala. 572;
52 Am. Rep. 353.

5 Thomp. Corp. Sec. 6281.

30 Thompson further says: "Obviously, the mere fact that the act was *ultra vires* in the sense of being gratuitous will not relieve the corporation from liability to pay damages for any wrong committed in the doing of it."

5 Thomp. Corp. Sec. 6282.

The theory above advanced by Thompson in his work on Corporations is sustained by our own courts. In the case of the *State v. The Morris and Essex Railroad Company*, 23 N. J. L. 360, Chief Justice Green in writing the opinion of the Supreme Court, repudiates the doctrine that the corporation is not liable for torts committed in the doing of an *ultra vires* act and adopts the language of Mr. Binney in his argument in the case of *Chestnut Hill Turnpike Co. v. Rutter*, 6 Binney, 12, saying in conclusion: "This doctrine leads to absolute impunity

for every species of wrong and can never be sanctioned by any court of justice."

In the case of *Salisbury v. Erie R. R. Co.*, 66 N. J. L. 233, Justice Van Sickle held that the Erie Railroad Company was liable in damages for an accident occurring in the following manner: A foreman of the Railroad Company was engaged with the aid of several employees of the Railroad Company in removing old ties. The foreman had the power either to give the ties away or destroy them. He gave the ties to one of the section-hands, who requested the use of a push car in taking them home. Against the absolute instructions and rules of the company, the foreman loaned the push car to the section-hand, who in using it for the purpose of taking the ties to his home, ran into and injured the plaintiff.

10

It is obvious that the Railroad Company had no power under its charter to maintain the push car in question for the gratuitous use of its employees for their own personal business, and had it been purchased or maintained for such use, the act of the Railroad Company would have been *ultra vires*.

20

It cannot be seriously contended, however, that a different conclusion could have legally been reached in the Salisbury case if the car had actually been purchased by the Railroad Company for the use to which it was being put at the time of the accident. In other words, it can certainly not be argued that if in the Salisbury case it had appeared affirmatively that the Railroad Company had actually purchased the car for the purpose for which it was being used on the day of the accident, that it could have escaped liability upon the ground that such an act was *ultra vires*.

30

In the present case, the testimony clearly shows that among other things the car was purchased for the use of the sick daughter of the president, and that Max Lipschutz, the son, who was driving it on the day of the accident, drove it on numberless other occasions for that purpose. We contend that it is no defense to say that the company had no right to

purchase it for the purpose for which it was being used on the day of the accident.

10 The question was asked, Would a father who had purchased a baseball and bat for his son be liable for the son's negligent conduct in the use of such playthings? The case is not a parallel one to the case at bar, for when the father purchases the articles for the use of the son, they are practically and to all intents and purposes a gift to the son, and become the son's private property, for the negligent use of which he alone is responsible.

Nor is the present case similar to that line of cases where the courts have held that the owner of a car is not liable for damages due to the negligent operation of the car by a person to whom he had loaned it, and the person to whom it was loaned was using it for his own personal benefit.

20 It must be remembered that the plaintiff contends that the car was not only being used for the purpose of entertaining Mr. Lipschutz's daughter, but was also being used by Max Lipschutz for the purpose of inspecting the signs belonging to the defendant company.

2.

30 It is further contended that Mr. Lex, the Assistant Secretary, who wrote the letter, was without authority to make any statement which was binding on the Forty-four Cigar Company. The proof shows that he was Assistant Secretary of the Forty-four Cigar Company and it appears from the several letters, which were excluded over objection, that he was dealing with the matter as the authorized agent of the company. It is a justifiable, if not a conclusive inference from the letters that he was duly authorized by the company to speak for it in regard to the Voris Fox litigation.

Statements of the general manager of a corporation made at its office of which he was apparently in charge, as a consequence of which proceedings

in an action by the corporation were actually stayed accompanied by evidence of his subsequent acting with authority in the matter, are admissible in evidence against the corporation.

Carey v. Wolfe & Co., 72 N. J. L., 510.

To the same effect is the case of *Agricultural Insurance Company v. Potts*, 55 N. J. L., 158-161.

In the case of *Hill v. Adams Express Company*, 77 N. J. L., 19, it was held that where an adjustment of a loss was referred to an officer of a company who took the matter up with the representative of the plaintiff, the relevant declarations made by such general manager in the course of such negotiations and germane to the matter in hand are admissible in evidence against the Express Company in an action between the same parties growing out of the same transaction.

In the present case there was no proof whatsoever that Lex, the secretary, was without authority to speak for the company in the matter.

It must furthermore be borne in mind that the letter in question was also written by Max Lipschutz, who was an officer of the company.

3.

It is contended that the letter is not receivable in evidence as an admission or for the purpose of contradiction or impeachment, because it does not state that the fact was that the car was being used for the company's business, but merely that testimony would be given that such was the case.

Wigmore in his work on Evidence, says, section 1048, vol. 2, 1216:

“Just as a witness' testimony is discredited when it appears that on another occasion, he has made a statement *inconsistent with that testi-*

mony, so also the party is discredited when it appears that on some other occasion he has made a statement *inconsistent with his present claim*. This is the simple theory upon which a party's admissions are every day received in evidence on behalf of his opponent. The basis upon which may be predicated a discredited inconsistency on his part includes the whole range of facts asserted in his pleadings and in the testimony relied on by him."

10

And at section 1018, speaking to the subject of "self contradiction", he says:

"It is the repugnancy and inconsistency that demonstrates his error and not the superior credibility of the prior statement."

20

In addressing himself to the subject on "what amounts to self-contradiction" he says, section 1040:

"As a general principle, it is to be understood that this inconsistency is to be determined not by individual words or phrases alone, but by the *whole impression or effect* of what has been said or done. On a comparison of the two utterances, are they in effect inconsistent? Do the two expressions appear to have been produced by inconsistent beliefs?"

30

We submit that, viewed in this light of the above principles, the letter was admissible as an inconsistent statement. It surely cannot be said that a witness will deliberately undertake to testify falsely or that a party will deliberately undertake to suborn such false testimony. When one says, "I will testify to such a fact" is not that *prima facie* a statement that such is the fact, and is it not inconsistent with a subsequent statement that such is not the fact? Likewise, when a party to a suit says "My witnesses will testify to such facts," is it not reasonable to suppose that such are the facts? In short, do not the letters in this case practically amount to a stipulation as to what the real facts in the case actually were?

It is further contended that the statements are inadmissible, because so far as Mr. Lex, the assistant secretary is concerned, he had no personal knowledge whatsoever of the matter. Wigmore, in discussing this proposition, says, section 1053:

“The primary use and effect of an admission is to discredit a party’s claim by exhibiting his inconsistency in other utterances. It is therefore immaterial whether these other utterances would have been independently receivable as the testimony of a qualified witness. It is their inconsistency with the party’s present claim that gives them logical force and not their testimonial credit. In particular, *personal knowledge*, as indispensable to a witness is here not required.” 10

Wigmore cites *Kitchen v. Robbins*, 29, Ga., 713-716, 1222, in which case the court said: 20

“Are no admissions good against a party, unless founded on his personal knowledge? The admissions would not be made except on evidence which satisfied the party who is making them against his own interest, that they are true, and that is evidence to the jury that they are true. Admissions do not come in on the ground that the party making them is speaking from his personal knowledge, but upon the ground that a party will not make admissions against himself unless they are true. The fact that he makes them against his interest can be reasonably explained only on the supposition that he is constrained to do so by the force of the evidence. The source from which a knowledge of the facts is derived, is a circumstance for the jury to consider, in estimating the value of the evidence, but that is all.” 30

It must be remembered also, that in the present case, the statement is also made by Mr. Max Lipschutz, who had personal knowledge of all of the facts in the case.

5.

It is further contended that Max Lipschutz, in taking the car out on the day of the accident, acted in opposition to the express orders and directions of the president of the company. Even if this circumstance be admitted to be true, and it be further admitted that the president had authority to issue such orders, it would be of no avail as a defense.

10

McCann v. Cons. Traction Co., 59 N. J. L. 481.

Salisbury v. Erie R. R. Co., 66 N. J. L. 233.

It is respectfully submitted that the judgment should be reversed.

20

BOURGEOIS & COULOMB,

Attys. for Appellant.

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TESTIMONY.

NEW JERSEY SUPREME COURT,
ATLANTIC COUNTY.

10

VORIS FOX,
vs.
FORTY-FOUR CIGAR COM- } ACTION AT LAW.
PANY, a Foreign Corpo- }
ration. }

20

Mays Landing, N. J., May 24, 1916.

TESTIMONY.

Before HON. HOWARD CARROW, Judge, and jury. 30

APPEARANCES:

For Plaintiff: MESSRS. BOURGEOIS AND COULOMB.
For Defendant: HON. LEWIS STARR.

MAX LIPSCHUTZ, SWORN.

Direct examination.

By Mr. Bourgeois:

Q. Do you know the Forty-four Cigar Company?

A. Yes, sir.

10 Q. I think you are one of its officers. A. Yes, sir.

Q. What office do you have? A. Assistant treasurer.

Q. Who is the president of the company? A. Mr. B. Lipschutz.

Q. Who is the manager? A. Mr. George M. Lex.

Q. Who is the secretary? A. Mr. Funk.

Q. Mr. Lex is the manager at the present time? A. He is assistant secretary.

20 Q. Where does the Forty-four Cigar Company have its offices? A. Eleventh and Wharton.

Q. They do quite extensive advertising through New Jersey, do they not? A. Yes, sir.

Q. By signs and so on? A. Yes, sir.

Q. Do you remember the sixteenth of August, last? A. Yes, sir.

Q. Let me ask you first, is that letter-head one of the letter-heads of your company? A. Yes.

Q. And is the name George M. Lex signed to that letter, Mr. Lex's signature? A. Yes.

30 Q. And the name Max Lipschutz your signature there? A. Yes.

Q. Have you ever seen that before? A. Yes.

Q. Now, Mr. Lipschutz, on the day in question, that is, on the sixteenth of August of last year, what was the object of your touring through South Jersey? A. Well, I had promised my sister who is sick

since that accident, a little ride, an outing for her friends, and it was for that purpose and that alone, that I took them out that afternoon.

Q. Were you at that time engaged on the business of the company? A. Well, as I always look around, it may be called that and it may not, but the idea of taking them out was for pleasure alone.

Q. Did you state to the officers of your company that you were out on the business of the company that day? A. They always take it for granted — 10

Q. Did you tell them or not? A. Not that I can remember.

Q. Look at this letter again and tell me whether you told your secretary you were out on the business of your company that day? A. Yes, I did.

Mr. Starr: I object to that. The contents of the paper cannot be disclosed to the witness or the jury without the paper is introduced in evidence, and there is nothing to show that it is competent evidence against this defendant. The testimony is irrelevant, immaterial and improper. 20

Mr. Bourgeois: What is that about showing the letter?

The Court: He said that the letter from this witness to the company would not bind the company.

Mr. Bourgeois: No, the Judge is mistaken about it. I will ask it this way. 30

Q. Did you state to the officers of your company, or at least one of them, the assistant secretary, that you on that occasion were out on the business of the company?

Mr. Starr: I object to that as not binding the company and this is an attempt to discredit the witness produced by the plaintiff. The testimony is irrelevant, incompetent and immaterial.

(Question repeated.)

The Court: The Court will allow that question.

10 (Exception noted for defendant.)

A. I can't just exactly remember that now, it has been so long ago.

Q. Didn't you state just a few minutes ago that you did so state?

20 Mr. Starr: I object. My objection is as I stated before. This is an attempt to impeach the witness produced by the plaintiff, and even if he had made such a statement it is not binding upon this company.

The Court: Mr. Bourgeois disclaims any intention of impeaching the witness. He is trying to discover the fact as to whether this witness was or was not about his employer's business on this occasion. What he stated would not bind the company, of course. It is merely for the purpose of making this investigation.

30

(Exception noted for defendant.)

(Question repeated.)

A. I say, I can't just exactly remember it right now, it has been so long ago.

Q. No, I want to know when I asked you the question a couple of minutes ago, showed you the letter and asked you the question, if you didn't say, "Yes, I did." A. No.

(Former question and answer repeated as follows: "Q. Look at this letter again and tell me whether you told your secretary you were out on the business of your company that day. A. Yes, I did.")

10

Q. Now, Mr. Lipschutz, with whom have you talked about this case since the fifteenth day of December, of last year, when you signed that letter? A. I haven't talked to anybody. I have been too busy.

Q. Of course, you have talked with the company's attorney about it, haven't you? A. This morning on the train.

Q. Well, but you have talked with him more than this morning? A. No.

Q. Never? Are you quite sure about that? A. I think so. 20

Q. Have you talked with the gentleman at the Judge's left?

Mr. Starr: That is objected to as irrelevant and immaterial.

(Question allowed. Exception noted for defendant.)

30

Q. Mr. Lipschutz, did you ever talk with the gentleman at Judge Starr's left about it? A. When the accident happened, at that time he was down to see us, asked me how it happened, and I gave him the explanation of it at that time.

Q. Now, have you talked with your father about it since that time? A. At that time we did.

Q. But not since then? A. No, we have been very busy.

Q. I see. Haven't had the time, I suppose, to speak about a little matter like this since the sixteenth of August? A. Well, it was a serious matter, but we had very little time to talk about anything but business.

Q. In other words, you are willing to forget this?

10 A. Well, I always try to remember everything I possibly can.

Q. Did you talk with Mr. Funk, the secretary, about it? A. Coming down this morning.

Q. Never before? A. No. He isn't in town very often. He is traveling most of the time.

Q. Who was in the car with you at that time? Tell me, please. A. Why, my wife and my baby on the front seat with myself, my mother-in-law and my grandmother, who is eighty or eighty-five years old, she can't stand much speed, and my sister and two of
20 her friends, and my sister has always been nervous and never could ride very fast, so we were just taking a slow ride.

Q. I don't care anything about that. I just wanted to know who they were is all. You said that you were kind of on business for the company, looking at the signs, but out on pleasure. Won't you explain to the jury what you mean? A. Well, I was driving through the country on a pleasure trip and if I seen a Forty-four sign, I was very glad to see it, and know
30 that it was in its place and doing good business.

Q. As you were going along, did you look to observe them and see that they were in condition? A. They are so bright in color you can't miss them, but I didn't look for them. They were there.

Q. If you didn't look for them, what was the use of you saying to the assistant secretary that you were on the business of the company?

Mr. Starr: That is objected to as irrelevant, immaterial and improper and an attempt to contradict and impeach the testimony of his own witness, and there is no testimony in the case to warrant that kind of a question.

(Question allowed. Exception noted for defendant.)

(Question repeated.)

10

A. Well, as long as I had seen the signs, and they were paying my salary, it was nothing more than right I should look at them.

Q. In other words, at that time you were in the employ of the company? They were paying you for the day? A. I always received my salary, but on that day I was out on pleasure.

Q. But you were receiving pay from the company for it, weren't you? They paid the salary for that day? A. My salary is by the year. 20

Q. And you, for the purpose of sort of justifying the receipt of the salary, I suppose, looked at the signs as you went along; is that right?

Mr. Starr: That is objected to as leading, irrelevant, immaterial, improper and incompetent.

Mr. Bourgeois: It is leading. If your Honor thinks I am not entitled to cross-examine this witness it is not proper, but I think under the testimony that has been given and the fact that he is an adverse witness, I should be permitted to ask him leading questions. 30

(Question repeated.)

The Court: I see no objection.

(Exception noted for defendant.)

Q. Is that right, Mr. Lipschutz? A. Yes.

Q. And having looked at them, you considered that you were on the business of the company?

Mr. Starr: That is objected to as immaterial.

10

A. Not necessarily at all.

Mr. Starr: That is objected to as immaterial, irrelevant, incompetent and improper.

Mr. Bourgeois: Strike the answer out.

Q. Now, on the fifteenth of December you signed a statement that you were driving that car for business and pleasure combined, didn't you?
20

Mr. Starr: That is objected to.

Mr. Bourgeois: I have the privilege of cross-examining.

Mr. Starr: I object to that as the purpose of the testimony is evidently to elicit the contents of some paper which is not introduced in evidence. It may
30 not be evidential and the testimony is irrelevant, improper, immaterial and incompetent.

The Court: He can ask him whether he stated in any way the fact which he wants to bring out, whether he made any statement.

Mr. Starr: That is not this question.

Mr. Bourgeois: I will make it specific for you.

Q. Mr. Lipschutz, did you, on the fifteenth day of December, 1915, make a statement over your signature or verify a statement over your signature that the car was on the day of the accident driven by you for business and pleasure combined?

10

Mr. Starr: That is objected to on the ground stated before, it is irrelevant, immaterial, incompetent and improper, and the purpose is to disclose to the witness and to the jury the contents of the paper which is not introduced in evidence.

The Court: The Court indicated you might ask him whether or not the fact is that upon that occasion he made a statement, without regard to any writing, of the nature which you desire to show. You can make a searching inquiry as to whether the witness was about the business of his employer or not.

Mr. Bourgeois: I will withdraw that question temporarily and ask another.

Q. Did you, on or about the fifteenth day of December, 1915, make a statement to anybody that at the time the accident happened this car was being driven by you for pleasure and business combined?

30

Mr. Starr: That is objected to on the same ground as I stated before.

The Court: I want to examine this question. If you have any further questions you may ask them and revert to this after awhile.

Q. Now, I will ask you one other question, that is the question I withdrew, whether or not you stated over your signature or verified over your signature a statement made by the assistant secretary to Bolte, Sooy and Gill, on the letter-head of the company, on the fifteenth of December, 1915, that the car was being driven for business and pleasure combined by you?

10 Mr. Starr: That is objected to upon the grounds as stated before, and upon the further ground that it is a privileged communication, because if such a statement was made, Mr. Sooy of that firm represented the defendant here, the Forty-four Cigar Company, and it seems to me the testimony is irrelevant, immaterial, incompetent and improper on every possible aspect of this case.

The Court: That practically involves the same
20 question as the others.

Mr. Bourgeois: Yes, but I want to show that he has at one time said he was driving it for business and pleasure, and the next time he said he could not remember, it had been so long.

The Court: Mr. Bourgeois, the real question is whether any statement which he might have made in any form, if he had put it in the form of an affidavit,
30 in the form of a letter, would have bound his employer. If you have any further questions, kindly proceed with them.

Mr. Bourgeois: I am going to follow that up by offering in evidence this letter as an admission against the company, not as a statement from any-

body else, but as an admission by the company. I will withhold the rest of it.

(Witness temporarily withdrawn.)

DR. HENRY C. MUNRO, SWORN.

Direct examination.

10

By Mr. Bourgeois:

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

Q. And surgeon? A. Just physician.

Q. And have been practicing for how long a time?

A. Six years.

Q. Where? A. Pleasantville, New Jersey.

Q. With whom were you practicing in August of 20 1915? A. Dr. Clyde M. Fish.

Q. Do you remember on the night of the sixteenth of August, of last year, Voris Fox being brought to your place? A. Yes, sir.

Q. Will you tell the jury what his condition was?

A. He was brought in about somewhere around five-thirty in the evening, and he was badly covered with mud and a mixture of mud and blood over his face, and carried into the office, and he wasn't—although he was conscious he was still bewildered. He was complaining severely of his right hip and his left arm. Upon examination I found a very bad contusion of the right hip and right knee. I examined his left arm and could find no trouble with his left arm, but on examination of the head, found a cut extending over the left side, right side of his head,

30

with a fracture of the skull and hemorrhage coming from beneath the skull. I immediately sent for his wife, she came down and I acquainted her with his condition and immediately removed him to the hospital.

Q. What precaution did you take before removing him to the hospital? A. Tried to control the hemorrhage from the scalp or his skull.

Q. What means did you employ for that purpose?

10 A. Compact gauze on top of it and bandaged it tightly.

Q. To what extent? A. Several thicknesses of gauze, two or three inches of compact gauze on top of it and bandaged it as tightly as possible.

Q. Were you successful? A. No, sir.

Q. You say he was taken to the hospital? A. Yes, sir.

Q. Did you go? A. I went along.

20 Q. What was done with him after he was taken to the hospital? A. Taken into the hospital and he was prepared immediately for an immediate operation. He was taken at once to the operating room, as soon as the operating room could be gotten ready, and his head was shaved and Dr. Senseman operated on him.

Q. You were present when he operated? A. Yes, sir.

30 Q. Doctor, won't you explain to the jury just what was taken from his head? A. This cut is here just at the hair line in the front, anteriorly; the middle of the ear posteriorly. That was his original cut. That laid wide open. This little cut is partly cut here where the surgeon —

Q. That is the cut across the top of the head? A. Yes. The surgeon extended that incision somewhat, but this was the original cut. That laid open. The

surgeon didn't open that at all. He took out this portion of the bone. The hemorrhage was coming from back underneath his skull here.

Q. Now, what became of the bone that was taken out? Is that gone entirely? A. That is gone entirely.

Q. What is it that covers the brain over now? What prevents you from seeing the brain? A. Just the layers of the scalp.

Q. What is the thickness of those layers of the scalp, approximately? A. That would be simply guessing, but I would say one-sixteenth of an inch. 10

Q. What is the thickness of the skull, of the bone part of the skull? Do you recall what it was in his head? A. I couldn't answer that correctly, but I would say about one-eighth of an inch. That is a little thicker than usual, one-eighth of an inch; about one-tenth of an inch.

Q. Tell me whether or not that wound is permanent or whether the skull will grow again. A. No, 20 the wound is permanent.

Q. What effect will that wound probably have upon his actions and upon his health? A. In my opinion it will have a deleterious effect.

Q. In what manner? A. That he will be constantly thinking of that and he is apt to develop epilepsy later on in life.

Q. What do you mean by epilepsy? A. Maybe develop uni-lateral convulsions.

Q. What we call epileptic fits, is that what you mean? A. Yes, sir. 30

Q. And what is the result of that? What difference does that make whether you have them or don't have them? A. Causes extreme depression and lowers the mentality.

Q. Are they dangerous? A. Not necessarily dan-

gerous at the time being, but they naturally undermine your physical condition.

Q. Shorten your life? A. Yes, sir.

Q. Now, what effect is probable from his thinking of this hurt all the while as he probably will? What effect is that likely to have on him? A. It is likely to cause mental depression.

Q. What effect is probable to follow to his mentality from mental depression? A. Mentality is not
10 apt to be near so good.

Q. Lowers it? A. Lowers it, yes, sir.

Q. Now, is he likely to have anything follow at the present time from this hurt? Would it be likely to cause him headaches or anything of that sort? A. Yes, sir, he is apt to suffer severely from headaches.

Q. How long will those headaches probably continue? A. They may be periodic. May have them for years.

Q. Now, Doctor, what have you to say as to his
20 security in passing through life with this hole in his head? Is he as safe from accident as I am or as you are? A. I don't think so.

Q. Why? A. I would be afraid to trust him on top of a building in his business.

Q. Why would you be afraid to trust him on top of a building? He is a bricklayer by trade, isn't he? A. Yes, sir.

Q. Why would you be afraid to trust him on top of a building? A. Be apt to become dizzy, or if he hap-
30 pened to have a slight attack of epilepsy on top of a building, he would be apt to tumble off.

Q. Would it make any difference to him if he were to reach down to get a brick or anything of that kind? Can he do that as well as he could if his skull was all there? A. I couldn't answer that question.

Q. He can tell that? A. I won't be positive about that.

Q. What would be the effect to him if a brick or board should happen to strike him in that place where the skull is now gone, the probable result? A. Cause a quick contraction of his arm and his leg and be apt to fall.

Mr. Bourgeois: This declaration does not contain any allegation, as I see it, with regard to the injury to his hip and arm. I would like the privilege of amending the declaration to include the injury to his hip and arm. You have no objection to that, have you, Judge? 10

Mr. Starr: No.

Q. What was the injury to his hip? You said there were contusions there. That means bruises, doesn't it? A. Yes, sir, the muscles were badly bruised about his hip and on my first examination I really thought his hip was fractured, but it proved later it was not fractured, just badly contused. 20

Q. Would the injury to that hip cause him any inconvenience now? Probably, I mean. Would it probably cause him inconvenience? A. I don't think so.

Q. You think it would be over? A. Yes.

Q. Assume that during wet weather he should suffer pains in that hip, to what would they probably be attributable? A. I am unable to answer that question. I do know that in wet weather they frequently have pains in injured regions like old fractures. 30

Q. At any rate, it would only be temporary? It wouldn't be permanent? A. No, that would't be permanent, in my opinion.

Q. What about his arm, what was the condition of that? A. His arm, that was bruised slightly, but he

wasn't severely injured in his arm. It was on account of his head injury that he was complaining of his arm.

Q. Now, Doctor, is the condition that we find him in today, with a part of his skull gone over this particular part, a usual or an unusual condition? A. It is unusual.

Q. What portion of the brain lies directly beneath this removed portion of the skull? A. Principally the
10 motor areas.

Q. Then it is likely to affect his control over his muscles, his walking, standing, stooping? A. Yes, sir.

Cross-examination.

By Mr. Starr:

Q. Have you been the family physician for Fox
20 before this accident happened? A. Yes, sir.

Q. For how long? A. Period of about five years.

Q. What had been the condition of his health prior to that time? A. Very good. He had ——

Q. How frequently have you seen him since the accident happened last August? A. Every other day for some time after he had come home from the hospital up until ——

Q. Do you remember when he came home from the hospital? A. I could soon tell.

30

(Witness refers to paper.)

A. On September eleventh when I first saw him after the hospital.

Q. How long after that did you see him, every other day? A. Up until November—the last dressing was on November eighth.

Q. Now, had the scalp healed when he came from the hospital? A. No, sir.

Q. And since November, how frequently have you seen him? A. I don't know as I have seen him since November for any other trouble.

Q. You haven't treated him at all since last November? A. Except I was in to see his wife on two or three occasions and naturally seen him.

Q. But he hasn't received any treatment from you since last November? A. No.

10

Q. You say that the trouble with the left arm was merely incidental to the brain injury? A. Yes, sir.

Q. Has he any trouble with his left arm now? A. It hasn't quite the power in it that the other arm has.

Q. Now, so far as his right hip is concerned or right leg, has that difficulty entirely cleared up? A. In my opinion it has. I haven't conversed with him about that in any way at all.

Q. Do you know whether or not he has been working since the accident? A. I don't know. I don't really know whether he has or not.

20

Q. Was there any injury to the brain tissue? A. None that I could notice at the time of the operation.

Q. Is there anything from his condition now, either physical or mental, which would indicate to your mind that there was any injury to the tissue of the brain? A. Yes, there was. He complains of severe headaches and he has not been quite the same man since.

30

Q. When did you discover that? A. Why, during the time that I was dressing him he was quite a different man in several respects.

Q. And that condition lasted how long? A. Up until I seen him the last time. Then I am unable to say since then.

Q. Well, now, is there any method known to medical science by which a plate or covering could be put over the opening in the skull? A. I believe at one time, several years ago, they did use plates, but they haven't been successful and they don't use them.

Q. Do the medical men in an injury of this kind prefer to leave the scalp to cover the place where the accident happened rather than put in a plate? A. Yes, sir.

10 Q. Why is that? A. For fear that the pressure of the plate will cause trouble.

Q. Do you know of instances where men have been injured in this way where there is an opening in the skull covered merely by the scalp where they work? A. Yes, sir.

Q. It doesn't prevent a man from carrying on his occupation, in other words? A. No; depending on what their occupation was.

20 Q. I suppose care has to be exercised in not having any hard substance come in contact with the location of the injury? A. Yes, sir.

Q. Is there any pressure in this particular case on the brain tissue by reason of the scalp? A. Not just at present.

Q. He can walk normally? A. Yes, sir, as far as I know.

By Mr. Bourgeois:

30 Q. Doctor, in your opinion, would it be safe for Fox to work at a high elevation? A. No, sir.

Q. Like the Rudolf or the St. Charles or the Traymore or any of those large hotels? A. No, sir.

By Mr. Starr:

Q. Isn't it a fact, Doctor, that where there has been a portion of the skull removed that there is a bony formation that takes the place of that part that is removed? Nature supplies? A. Fills in?

Q. Yes. A. Not to my knowledge, no, sir. There may be to a slight degree, but never to fill in a cavity of that kind.

10

By Mr. Bourgeois:

Q. You mean with reference to a man of his age?
A. Yes, sir.

Q. The bone is supplied in small children, isn't it, it grows over? A. Yes.

Q. At what age does a man cease to grow, that is, at what age does his bone cease to grow? Can you tell me approximately? A. Approximately about the age of puberty, fourteen, sixteen.

20

DR. THEODORE SENSEMAN, SWORN.

Direct examination.

By Mr. Bourgeois:

Q. Doctor, you live in Atlantic City? A. I do. 30

Q. And practice medicine? A. I do.

Q. How long have you been practicing medicine in Atlantic City? A. Eighteen years. I have been practicing surgery for eighteen years.

Q. In other words, you have made a specialty of surgery rather than medicine? A. I have.

Q. Do you remember Fox, Voris Fox, coming to you? A. I do.

Q. What condition did you find him in when he came into the hospital? A. He was in the second stage of concussion of the brain with a compound comminuted fracture of the skull.

Q. Tell us what you mean by second concussion, because we don't know anything about it. A. Concussion of the brain is due to a laceration, tearing of the brain structure consequent upon a blow. The first stage is the stage of unconsciousness, which may be a simple losing of equilibrium or may be a distinct unconsciousness. It may last from seconds to hours. At the end of the first stage they pass into what is known as the second stage, in which they become conscious to the extent that they can be aroused, but they are irritable and you cannot carry on an intelligent conversation with them. They have got their temperature, fever, increase in the pulse. It can be summed up in the one word irritability. They are in a stage of irritability. It is the second stage of concussion in which they come out again into consciousness, but are irritable and want to be left alone. It is a pretty hard thing to explain in simple words.

Q. They want to be left alone? A. Yes.

Q. To die? A. Yes.

Q. Now, what was done for him? A. He was moved to the operating room and his scalp wound enlarged, the portion, the center of the hole in his

Q. Won't you explain all about the part of the skull that came out and why it came out? A. In the center of this depression the bone was comminuted, that is, broken up into small pieces. Several of them were jammed directly into the brain tissue,

some of them underneath the edges of the rest of the skull, that portion surrounding, and then there were cellute fractures, cracks, that ran in almost every direction from the center out like a—it looked just like the end of an egg if you open it, all smashed in. There was, of course, hemorrhage coming from underneath the edges of the bone and from that portion of the brain which was cut by the small pieces of bone which were driven in. There was also a cut at one of the posterior branches of the main artery, 10 the covering of the brain, the meningeal artery that comes up here and divides in two ways. These pieces of bone that were in the brain were removed, the edges of the skull lifted up, the pieces that were jammed underneath pulled out, and then in the line of all these cellute cracks the skull was cut out around them so as to lift the skull away clear from the brain. The covering of the brain was open and the blood that had accumulated underneath the covering, underneath the skull—in other words, there 20 is a membrane all over the brain underneath the skull, there was considerable hemorrhage under that, and that was opened down to the brain structure, and this blood allowed to come out and the brain put in there, and then gauze packed all around the outside between the brain and the outside to control the hemorrhage that was coming from the top of the brain structure.

Q. Now, Doctor, was it possible, in view of the number of small breaks to the skull, to have lifted the 30 portions out of the brain and left the skull bone there? A. No.

Q. Then it was necessary to remove that portion of the skull? A. Absolutely.

Q. Will that portion of the skull ever go back again? A. Well, if he lives long enough it might, but

he would have to live two or three lives in order to do that.

Q. So far as he is concerned, the probabilities are that it will not? A. There is a very small infinitesimal amount of bone growing out from the edges, but—well, it is not possible for a man like him to live long enough for the bone to entirely close over such a vast space as that.

Q. Then the injury is a permanent injury? A. 10 Absolutely.

Q. Now, Doctor, what result will probably follow that hurt to his brain, his skull and brain? A. In eighty per cent., some eighty per cent. of the cases of concussion have symptoms which last from months to the remainder of their lives, periodic headaches, a change in the character of the individual; he is liable to epileptic attacks from pressure, and cases of concussion with these fractures are sometimes followed by insanity.

20 Q. You say eighty per cent. from concussion. Can you tell me what per cent. of people who have suffered a concussion as severe as this was and who have had the skull removed as this was, recovered at all? A. Recovered?

Q. Yes. A. The mortality in an injury of that sort is from ninety to ninety-six per cent.

Q. Ninety to ninety-six per cent. die out of a hundred? A. Absolutely. The fact of the matter is when they save those kind of cases they like to show them.

30

The Court: What did you say?

A. When those cases get well they like to show them, not as a matter of curiosity but of distinct medical interest.

Q. Then this might be considered as a very se-

vere concussion, one of the most severe, is that right?

A. Yes, it was a severe concussion, a severe injury.

Q. What will be the effect on his nervous system?

No, I don't want to ask you that. Well, what probably will be the effect on his nervous system? A.

Just what I said a while ago, he is apt to have these periodic headaches and there is associated with a large number of these cases a change in the mentality and the characteristics of the person, that is to say, if they are of a cheerful disposition previous to such an accident they are apt to become morose. There seems to be just an opposite condition that sometimes and quite frequently follows such injuries to the brain. 10

Q. You say sometimes follows insanity. Does this come from this changed condition and dwelling upon the condition? A. Following concussion. I have

had four cases in eighteen years of insanity following concussion of the brain where no other cause could be attributed for the insanity. 20

Q. In your opinion, Doctor, would it be safe for Fox to work at a high elevation at his trade, or any other business? A. That largely depends upon his symptoms, the way he handles himself. I shouldn't think it would be a safe thing for him to go to a high altitude, high building.

Q. Assuming that when he stoops down that this brain part drops into the hole that is there, that it makes him dizzy, then would you say it would be safe for him to work at his trade at a high elevation? A. I should say no, absolutely. 30

Q. This injury or hurt is on the right-hand side of his head? Which side of his body would be affected? A. The left. That is directly over the centers that control the muscles of the left side of the body.

Q. Then if he were to develop epilepsy that would evidence itself on the left side of the body? A. He would have what they call Jacksonian epilepsy. That is, he would have epilepsy of one member. It might affect his arm or his leg. It is possible it might be so extensive as to affect both.

Q. Both leg and arm only on one side? A. Yes. If it became that extensive then it would affect the right side of his face and the left side of his body.

10 Q. Right side of his face, that would be the eye and the mouth? A. The right side of the face down to the neck is controlled by the right side, but the left side of the body is controlled by the right side. They cross inside of the brain.

Q. If it were that extensive, it would affect both his left arm and leg so that he couldn't use crutches? A. If it became that extensive, yes.

Q. Now, what was the injury to his hip? Do you remember about that, or was that not extensive? A.
20 It was simply a contusion. I examined it for possible fracture but couldn't find any evidence of fracture, but he had a contusion, a bruise of the hip probably due to a twisting of the muscles and ligaments.

Q. Assume that Fox suffers every night with severe headaches, to what would you attribute them? What is the probable cause of them? A. In all probability it is the result of his concussion. It might possibly be also produced to a certain extent by the fracture, although cases of pure simple concussion
30 in which there is no fracture at all suffer the same way.

Q. But it would all come from that hurt in his head? A. It would come from the injury in the head, yes.

Q. Will he have, in your opinion, the same strength in his left hand today as he had before this injury?

A. I haven't tested that. I don't know any reason why he should not have.

Q. Assume that he does not have the same strength in his left hand today that he had before the injury, to what would you attribute the loss? A. There is only one thing to attribute it to. That is to his condition. You see, he had—some of those centers of his brain were injured. Dr. Munro perhaps was not close enough to the operation to see, but there were portions of the bone that were driven into the brain and were pulled out of the brain structure, and some of those centers were temporarily injured, but they have recovered themselves, because the brain stands for considerable injury of that kind. 10

Q. Is there any part of the brain lost? A. Oh, there were some portions of it, yes. The areas of the brain surrounding these centers are what we call sound areas. We can lose quite considerable of our brain substance, just how much I don't know, but there never is a fracture of that extent and that kind in which there isn't some brain tissue lost. 20

Q. And that is never replaced, is it? A. Replaced by scar tissue, not by brain tissue.

Q. Was any portion of the brain where the motor centers were, lost? A. They cannot have been, because if so, he would have shown the evidence in paresis of the parts controlled by that center.

Cross-examination.

30

By Mr. Starr:

Q. Doctor, when did you last make an examination of Mr. Fox? A. I think Mr. Fox was in my office day before yesterday.

Q. And when before that had you seen him? A. About four or five weeks previous to that.

Q. Had he been under your treatment since he came from the hospital? A. No, not under my treatment, but I always make these cases come back so I can follow them. Not under my direct treatment.

Q. When you examined him yesterday, did you make any examination with reference to his physical condition or mental condition? A. No, not to his
10 physical condition. I talked to him. Of course, that is more or less subjection, those symptoms. His pupillary reaction is sluggish. I can't compare that to what it was before the injury, because I don't know. It may have been so then.

Q. Did you discover anything at all with reference to his physical condition? Did he show any impairment? A. Other than what he tells me, his subjective symptoms.

Q. The objective symptoms that you found would
20 not indicate there was any impairment to his physical condition? A. There would be none other than paresis, paralysis. Barring that, there would be no other objective symptoms other than that pupillary reaction.

Q. As far as his mental condition, did you discover any impairment of that in any of your examinations since the accident? A. No. That would be a matter of comparison. I didn't know the man before. It would be pretty hard for me to judge.

30 Q. He can talk intelligently? A. Oh, yes, sure.

Q. And if there had been any marked loss of brain tissue of the motor areas, that would have shown itself in some physical impairment before this time? A. Yes.

Q. When you say the mortality in cases of this kind ninety to ninety-six per cent., you mean by

that that the cases never recover from the first injury? A. Yes.

Q. They die either with the operation or immediately after the operation? A. Either as the result of the injury or with the help of the operation or both.

Q. This is one of the cases in which the surgeon was successful in keeping the man alive? A. I don't know about that. He got well. I won't say any more. 10

Q. I suppose he is entitled to give you the credit for that? A. I don't know about that.

Q. Have you discovered any evidence whatever of incipient epilepsy? A. No.

Q. Or epilepsy of any kind? A. No.

Q. Paralysis? A. No.

Q. Or any evidence of insanity? A. No. It would be a little early to look for it.

Q. Now, is there any method known to the medical profession by which a plate or covering could be put over the injured area? A. That has been tried, but it has not been satisfactory. It did more damage than it did good. 20

By Mr. Bourgeois:

Q. Doctor, how long a period sometimes elapses before people are attacked with epilepsy after a concussion of the brain? A. Ten years.

Q. How long after such an accident before insanity sometimes sets in? A. That varies. I know of one case, one of my cases that I spoke of was eight years, the other one was six months. The other two between that somewhere. I have forgotten just what they were, but they were the limits. 30

Q. Within what period does epilepsy evidence itself after such a concussion, that is, ordinarily? A. It would take from six months on. In other words, if he gets epilepsy, it will be due to contraction of the scar tissue and pressure and it takes from six months on for that to become so firm as to produce sufficient pressure.

Q. And it might not develop until six or eight or ten years after and then develop, is that not true?

10 A. That is possible.

Q. Is it probable? A. Well, it is liable. Possibilities and probabilities are both the same thing in these kind of injuries.

Q. Won't you state to the jury so I can get it on the record the size of this wound in his skull? I want to know the length of it and the width across?

A. Well, I will have to give you that from my memory, unless you want me to measure it now.

20 Q. Have you anything to measure it with? A. I haven't anything to measure it with now.

Q. Then tell us from your memory or come and look at it if you want to. A. The edges of the bone, you see, that is filled in, I should say about four inches by two and one-half. It is a sort of an oblong. It is an oval cut. It is four inches one way and two and a half the other, about.

30 Q. What is the depth of the depression as the skull appears at the present time? A. The thickness of the skull, which in that neighborhood is about three-quarters of an inch.

Q. What was the thickness of his skull? A. About three-quarters of an inch in that place. It varies in different portions of the skull, but it was about three-quarters of an inch.

Q. What is the use of having such a thick skull? What practical purpose does it serve? A. It protects your brain.

Q. That is the object of it? A. That is the object of it absolutely. Moreover, the continuity of the skull maintains an even blood pressure in the brain and these cases that suffer these headaches and other symptoms the dizziness on stooping down, is due to an alteration of the blood pressure in the portions of the brain. That portion of the brain uncovered by skull has not the same blood pressure that the other portions of the brain has where they are protected by skull, and that might very well produce it. That is one theory of the production of dizziness. 10

By Mr. Starr:

Q. Doctor, you speak of the condition of epilepsy which might result from contraction of the scar tissue. If such a situation arose, could that be remedied by an operation? A. It has been done. You have got to lift off the brain. Provided you haven't a scar formation in the brain substance proper. If you have, of course, you couldn't relieve that, because you don't know when you are cutting into a sound area of the brain or when you are cutting into a motor area. There is no difference in the appearance of the brain. This scar might—a contraction of the scar might be from an injury of the brain proper. It might be due to scar pressure from the outside. 20

Q. When you were performing the operation immediately after the injury was there any paralysis of any portion of the body? A. No, not that I noticed. 30

Q. Well, that would indicate, would it not, that the brain tissue, the motor area, had not been very seriously injured? A. I don't believe it was injured at the time of the accident at all.

VORIS FOX, SWORN.

Direct examination.

By Mr. Bourgeois:

Q. Mr. Fox, you are the plaintiff in this suit? A. Yes, sir.

10 Q. And your trade is what? A. Bricklaying.

Q. Bricklayer? A. Bricklaying, yes.

Q. Tell me at the beginning whether or not some months ago you consulted me with reference to working? A. I did.

Mr. Starr: I object to that as immaterial and irrelevant.

Q. Thereafter, what did you do?

20

Mr. Starr: I made the objection.

The Court: Is it a matter of any consequence?

Mr. Bourgeois: Yes. I am going to show when he went to work.

The Court: Why do you not ask him the specific question?

30

Q. What did you do after you consulted me about it? A. Why, I looked up a protection to put on my head to go to work.

Q. And did you go to work? A. I did.

Q. When did you go to work? A. The seventeenth day of February.

Q. Were you working or had you been working during the day of the sixteenth of August, last? A. I was.

Q. Where? A. On the Scullville school house.

Q. Where did you live? A. Pleasantville.

Q. How did you reach Scullville school house from your home? A. Why, I went from my home down what they call the New Road from Pleasantville to Washington Avenue, out Washington Avenue to Main Street, down Main Street to Zion Road and down Zion Road to—well, the road turns back to the Scullville School. I don't know what the name of that road is. 10

Q. In going that route did you have to cross the Linwood Road? A. I did.

Q. On Zion Road you crossed Linwood Road? A. I did.

Q. Who was working with you? Who was your tender? A. Colored man by the name of Thomas Sheppard. 20

Q. How did you go? What means of vehicle? A. Motorcycle.

Q. Do you remember coming home that night, starting for home? A. I remember starting for home, yes.

Q. Who was with you, if anybody? A. Thomas Sheppard.

Q. Do you remember approaching the crossing of the Linwood Road? A. I do.

Q. What, if anything, did you do as you approached that crossing? A. I slowed down and blowed the horn on the motorcycle twice. 30

Q. What was the condition of the road just before you got to the crossing on the Zion Road? A. Why, the condition—what do you mean, in regards to the crossing?

Q. Yes, I want to know first whether it is level or down grade or whether it is hard or sandy. A. It is down grade.

Q. And what with relation to the condition of the hardness or softness? A. Why, the road that I was on was fairly hard, good solid gravel road.

Q. As you approached the crossing, what did you do, if anything, with regard to the speed of your motorcycle? A. I reduced the speed.

10 Q. At what rate of speed were you traveling when you approached the crossing, when you got to the crossing, we will say? A. Why, I should say between twelve and fifteen mile an hour.

Q. And where were you when you blew your horn for the crossing? A. Well, anywheres from fifty to seventy-five feet beyond the crossing, before I got to the crossing.

20 Q. As you approached the crossing, did you have any warning of any other vehicle being in that vicinity? A. None whatever.

Q. By any horn or motion or noise or anything at all? A. Not until I struck the crossing, that is, the Linwood Road proper. Then I heard a noise to my right and as I looked to the right I saw the—as I took it to be, an automobile. I saw the radiator and front wheels.

Q. How far was that automobile from you when you first saw it? A. Well, I should say about eight feet.

30 Q. What, if anything, did you do, if you had time to do anything? A. I hadn't time to do anything.

Q. Could you tell how fast the automobile was going? Could you form any notion of it at all? A. No, sir.

Q. What did you next do after that, so far as you know? A. Well, the next I remember I was on my way to the doctor's office in Pleasantville.

The Court: Did he say how far the automobile was away when he saw it?

Mr. Bourgeois: About eight feet to the side of him when he saw it and heard it.

Q. Where were you when you first saw it? You told, but tell again. A. I was right in Linwood Road proper.

Q. What part of the Linwood Road proper? A. 10
On the right-hand side of the Zion Road, and, as I say, as I came to the edge of the Linwood Road proper I heard this noise and I looks to my right, I sees this automobile, or took it to be.

By the Court:

Q. How far was the automobile away? A. About eight feet to the right when I saw it.

Q. Then did you drive right in front of the auto- 20
mobile? A. I hadn't time to get anywheres else.

By Mr. Bourgeois:

Q. What part, if you can tell, of the Linwood Road were you struck, in the middle of it or on the left-hand side of it, nearest side to you or on the opposite side of it? A. Well, as near as I can recollect, about the center of the road.

Q. You were going back and forth there each day, 30
weren't you? A. I was.

Q. What was the condition as you came to that crossing? Did you have an opportunity, a good chance to see? A. No.

Q. What was the trouble there? A. Well, on the

right-hand side there is a peach orchard, that is, coming from Scullville to Pleasantville, and a lot of brush like, undergrowth along the edge of the road.

Q. I show you a photograph of this crossing and ask you whether or not that represents the situation there as it was at the time you were going back and forth there? A. Yes, sir, it does.

Q. And you were proceeding in the same direction that you look in this photograph? A. Exactly.

10

Mr. Bourgeois: I offer this photograph in evidence for illustration.

(Photograph marked Exhibit P1.)

Q. Mr. Fox, the main road that is shown there is which road? A. The Zion Road.

Q. And the Linwood Road is shown where? A. Running across there.

20

Q. The intersecting road? A. Yes.

Q. Could you see an approaching automobile as you were coming along the right-hand side of that road? A. Why, it is possible to see one about fifty feet or so above the Zion Road.

Q. But when you get down to it then could you see? A. No.

30

Q. When you get down to the crossing, when you get down to the Linwood Road, could you see then, before you get to the road, I mean? A. Well, as I say, no, not until you got within about fifty feet of the Linwood Road, then you could look up and see about fifty feet up Linwood Road from Zion Road.

By the Court:

Q. Continuing on down to the corner of the Linwood Road and Zion Road, how far could you see down the Linwood Road? A. Well, after you come to the Linwood Road there is—the edge of the road or the middle of the road you could look up and see to the top of the hill, which I don't know what the distance of that would be. I should say probably a hundred and fifty or two hundred feet or more. 10

Q. But you had a view of fifty feet beginning about fifty feet from the corner of Zion Road? A. Yes.

Q. You could see fifty feet up the road? A. I should say about that, yes.

By Mr. Bourgeois:

Q. In other words, when you were fifty feet away you could see fifty feet up that road? A. Yes.

Q. Did you see the automobile coming? A. Not at 20 that time.

Q. Did you look for any automobiles or vehicles coming there? A. I did.

Q. And the machine, was it within that fifty feet at that time, or was it back where you couldn't see it? A. Back where I couldn't see it.

Q. Was any horn sounded on the automobile so that you could hear it, so that you did hear it? A. I didn't hear any.

Q. How did this collision happen? Did you run 30 into the automobile or did the automobile run into you? A. The automobile run into me.

Q. Then you were on the road first, if it ran into you, I suppose?

Mr. Starr: I object to that as leading.

The Court: Strike it out.

Q. Now, what wages did you make, what were your earnings prior to the time of this accident? A. Well, do you mean of an average or what my weekly salary would be?

Q. I want your weekly wages first. A. My weekly wages, if I was working all the week, was \$27.50.

10 Q. Did you or did you not have practically continuous employment? A. I did.

Q. Did you work all the time, in other words? A. I did.

Q. Did you ever make more than twenty-seven dollars and fifty cents? A. I have at times, yes.

Q. Did you just prior to this accident a little while? A. Yes.

Q. Where? A. Hotel Traymore.

20 Q. How much did you make there? A. Why, it amounted to twenty-eight dollars and sixty cents a week.

Q. Just a trifle more than the twenty-seven fifty? A. Yes.

Q. Under whom have you been accustomed to work? A. Why, Mr. Benson.

Q. How many years have you worked for him? A. Why, I should say about six years.

Q. Has your employment been continuous and steady or not? A. It has.

30 Q. Can you tell me what your average earnings were per year, or as near as you can tell what were they? A. Well, I should say twenty to twenty-one dollars a week.

Q. Averaged twenty to twenty-one dollars a week right straight through? A. Yes.

Q. Now, since the accident, did you do any work between the sixteenth day of August and the—what

date was it in February? A. Seventeenth day of February.

Q. —seventeenth day of February? A. I haven't done any work whatever, no.

Q. Since that time have you endeavored to work? A. I have.

Q. With what success? A. Well, every night after working all day I have a headache which lasts until I go to bed.

Q. Does it stop when you go to bed or after you get to sleep? A. Well, after I get to sleep, of course. I have got to get rest in order to get relieved. A couple of times I noticed—the way I took notice of it is being late for the car going to work, and had to run maybe a square or so, and my hip would give out on me, but otherwise, walking, it doesn't bother me. Over exertion it bothers me. In stormy weather my head bothers me.

Q. Your head? A. Yes.

Q. How does your head bother you in stormy weather? A. It pains in the injury.

Q. What effect did it have on you when you stooped down? A. Well, that isn't so much when I stoop down as when I go to get up again. When I rise up I have a slight dizziness.

Q. Are you able to work at the present time as you could before this injury? A. No, sir.

Q. Now, what is the difference? A. Well, I can't say exactly what is the difference, unless it is the thought of it being on my mind, that is, thinking of the injury all the time and my own safety, that my mind is taken away from my work so that I fall back in the required amount to be done.

Q. Do you mean by that that you can't do as much work as you did? A. Yes.

Q. Well, can you lift as much as you could before? A. I don't think I can.

Q. Can you lift the bricks you—you use your left hand to lift bricks with? A. Yes, sir.

Q. Can you lift them up as readily and easily as you did before? A. I haven't noticed that so much, because there isn't much weight to a brick, you see, but, as I say, it is more the thoughts of it being on my mind all the time that hinders me from my work.

Q. What is it that is on your mind when you are working? What are you fearful of? A. Fearful of
10 getting dizzy and stumbling over or running into a brace around the building or something like that, or on large buildings I am afraid to go on at all.

Q. What do you mean by large buildings? A. Structural work, such as the hotels and office buildings like they put up in cities.

Q. Why are you afraid to go on them? A. Because there is so much work overhead, so many people working above you all the time, I am fearful of
20 stuff dropping down, a board or piece of concrete or something like that, or a bolt dropping down and striking me in the head.

Q. Do they frequently drop? A. Oh, yes.

Q. With regard to your nervous condition, do you notice any difference now between your nervousness or nervous condition, nervous system, than before the accident? A. Well, I rather think I am more irritable around home and such like.

Q. You don't feel quite so free? A. No.

Q. Is there ever any time except when you are
30 asleep that you are not conscious of the injury to you? A. Very seldom I am not conscious of the fact.

Q. Think of it all the time? A. Mostly all the time.

Q. How about when you go out among your friends, do you think of it then? A. Oh, yes.

Q. You have said that when you commenced to work you put something over it. What did you have to put over it? A. Why, the only protection I could get was a football helmet, guard for football, you know.

Q. Is that what you wear? A. I had it covered, yes. Made in cap shape, you know. That was the only protection I could think of or could have recommended to me.

Q. Now, Mr. Fox, after this injury how soon did you become conscious, do you recall? A. Well, do you mean entirely conscious so as to hold a conversation or anything like that? 10

Q. No, conscious so that you would know whether you had pain or not? A. Well, I should say about an hour.

Q. Then how soon after the operation, or don't you know? A. Well, I can't say about that, because I kind of lost track of the dates.

Q. Won't you tell the jury whether or not you were in pain, whether this injury caused pain to you? A. Yes. 20

Q. Well, what kind of pain? Tell them about it. A. Well, it caused pain like most anyone would have that would be knocked real severe or a cut. You have the same pain as you would from most any kind of a bruise.

Q. How long did that pain, what I call physical pain, how long did that continue? A. Well, that continued for quite a while. Continued, I should say, 30
four months, anyway.

Q. During that four months where were you? A. Part of the time in the hospital, part of the time home.

Q. When you were in the hospital, were you in bed or up and about? A. When I was in the hospital I was in bed.

Q. How long after you were home, if at all, were you in bed? A. Well, when I went home I had just gotten up, able to be up in a wheel chair, but I went home and after I got home I kept fairly quiet for at lease three months or more.

Q. What provision was made for holding your scalp in position? Didn't go around with your head as it is now? A. Oh, no.

Q. What did you have? A. Bandage.

10 Q. Where? A. All over the whole head.

Q. Were you able to see people at that time or were you kept quiet by yourself? A. Oh, I could see a few people at that time, but not very many at a time.

Q. You say you went to work on the seventeenth of February. With whom did you go to work again? A. With Mr. Benson.

Q. Were you able to get as good a position as you could have obtained had this injury not happened?

20 A. No.

Q. Why? A. Because I could have had steady work on the St. Charles Hotel, making steady time, if it hadn't happened. I was afraid to accept the job.

Q. St. Charles Hotel being built by the same people that you worked for on the Traymore? A. Yes, sir.

Cross-examination.

30

By Mr. Starr:

Q. Since you started to work, Mr. Fox, in February, how much time have you been employed? A. How much time have I been employed?

Q. Yes. A. Well, I have been employed ever since the seventeenth of February.

Q. Every day? A. Oh, no. No, I would work probably a couple of days and take a day off.

Q. Well, now, has there been any week during that time that you have worked the whole six days of that week? A. No.

Q. How many days have you laid off since the seventeenth of February, when you began to work?

A. I don't know just exactly how many, because the weather knocks us out. On small jobs like I am working on now, the weather knocks us off considerable, 10
too.

Q. Have you been laid off on account of the weather? A. Oh, yes.

Q. Have you laid off on any occasion because of the injury? A. Yes.

Q. How many days have you laid off because of that? A. Well, I didn't keep track of those.

Q. Approximately how many? A. Well, I should say—put them all together, I should say about four 20
weeks.

Q. And what has been your pay per day since you have been working? A. Five dollars per day.

Q. Five dollars a day? A. Yes.

Q. And what was your pay before the accident? A. Why, just previous to the accident, from Mr. Benson, was five dollars a day. That is the scale of wage in Atlantic City.

Q. So you have been getting the regular scale of wage, five dollars a day, ever since you began to work in February? A. Yes, sir. 30

Q. Have you had any physical discomfort from the —

Jury excused until 1.20 P. M.

(Side bar.)

The Court: I want to deal with these letters now. Mr. Bourgeois, is this the only letter you have?

Mr. Bourgeois: Yes.

The Court: You think this letter is binding upon
10 the company?

Mr. Bourgeois: I think it is prima facie binding upon the company. It puts the burden of explaining it on them. That letter on the face of it shows it is on the letter-head of the company, it is written by an officer of the company, in which he says it is the company's business. That is prima facie proof that it is the company's business. It is from the company, Forty-four Cigar Company, by assistant secretary.
20 That is prima facie an admission that the man was working for the company at that time.

Mr. Starr: I want to get on the record my objections to this letter. In the first place, I object to the letter because there is nothing to show that the gentlemen who signed the letters, either Lex or Lipschutz, had any authority whatever by writing the letter to bind the corporation. In the second place, I desire to prove, unless it is admitted, that Mr. Sooy,
30 when this letter was written, was the attorney. I did not know of the existence of this letter. I am frank to say it is more a surprise to me than anything in the case. If I had known of the existence of the letter I could furnish you with the authorities, because I had precisely the same question in the Court of Chancery, and I examined the cases at that time and

found that either a communication made by the attorney to the client or by the client to the attorney is privileged and cannot be introduced in evidence.

The Court: I will give you a chance to prove he was the attorney. I think that is sound law upon the ground of public policy. You say what Mr. Lipschutz did was on the bottom of a privileged communication?

10

Mr. Starr: On the bottom of a privileged communication, and the privilege extends to the entire communication. Also that the reference to the insurance company in this letter makes it immaterial. There is no possible way in which he can eliminate one sentence or one clause in the letter and make the balance of it admissible or competent. My next objection is that the letter cannot be used for the purpose of impeaching, contradicting or in any way discrediting the testimony of the plaintiff's witness, young Lipschutz. I also object to the letter upon the ground that it is irrelevant, immaterial, incompetent and improper.

20

Recess taken until 1.20 P. M.

Afternoon Session 1.20 P. M.

30

VORIS FOX, resumed.

By Mr. Bourgeois:

Q. What was the total amount of the expense of this accident to you, I mean for physicians' bills,

medicines, hospital service and all combined? A. I didn't figure the total up, but I have got each and every bill.

Q. Will you tell me what the bills are? A. I have them in my pocket.

Q. Take them in whatever order you have them.

A. This is Dr. Munro, a hundred and twenty-five dollars; Dr. Senseman is two hundred and fifty dollars; the nurse from August—well, that is the latest
10 one, that is from August twenty-sixth, one week and one day thirty dollars; August twenty-first, the hospital, thirty-two dollars and seventy-five cents; September second, twenty-six dollars.

Q. Is that the hospital? A. Yes; September seventh was fifteen dollars; September eleventh, ten dollars and seventy-five cents.

Q. Did you have any druggist bills or anything of that sort? A. No, the doctors included that.

Q. Who took care of you after you got home? A.
20 Dr. Munro.

Q. Have a nurse? A. No.

Q. Your wife took care of you? A. My wife took care of me, yes.

Mr. Bourgeois: That makes four hundred and ninety dollars and fifty cents.

Q. That is the total amount, is it, of the expense, that is, the money outlay? A. Yes.

30

By Mr. Starr:

Q. Have you had any physical discomfort from the injury in the head? A. Well, in what respect do you mean?

Q. Does it pain? A. Oh, yes.

Q. Does that injury pain you? A. Oh, yes.

Q. To what extent? A. Why, it is very severe, after working, or, as I said before, in cloudy or stormy weather.

Q. How long were you confined to the bed after you came back from the hospital? A. Well, as I said before, I was up and around in a wheel chair when I left the hospital, and I was in bed the majority of the time for three months after I left the hospital, in the neighborhood of three months or 10 more.

Q. When did you go out of the hospital? A. September—about the seventeenth or eighteenth of September.

Q. Have you lost in weight any since the accident? A. Well, I haven't weighed myself lately.

Q. Well, from your observation? Do you think you are as heavy now as you were before the accident? A. No, I don't really think I am.

Q. How much lighter? A. Well, there isn't a great 20 deal of difference in the weight.

Q. Have you had any medical attendance from either of these physicians since you left the hospital?

A. Oh, yes.

Q. How long has the doctor — A. Excuse me. I misunderstood you. You said medical attendance?

Q. Yes. A. I haven't taken any medicine only the dressing on the head.

Q. Dr. Munro treated you how long? A. Well, he 30 treated me up until sometime in November.

The Court: Does it appear what his age is? How old are you?

A. Thirty-three past.

Q. Thirty-three? A. Yes.

Q. How long have you lived in the neighborhood of Pleasantville? A. Since the spring of 1908.

Q. Where did you live before that? A. New York.

Q. Were you in the habit of traveling this road, the Zion Road, frequently? A. Why, yes. That is I had been—I had made, I don't know, I think it was three or four trips down there just previous to the accident.

10 Q. How long had you owned a motorcycle? A. How long had I owned it?

Q. Yes. A. Since 1913.

Q. Did you use the motorcycle to go to your work? A. I did.

Q. That is, if it was away from Pleasantville you would use the motorcycle every day? A. Yes, sir.

Q. Was it a tandem machine? A. Had a rear attachment, yes.

Q. It was a rear attachment? A. Yes.

20 Q. And you were working at English Creek on that day? A. Well, I suppose it is in that neighborhood. It is in the jurisdiction of English Creek. It was Scullville school house.

Q. How far is that from where the Zion Road crosses the Linwood Road? A. Why, I should say in the neighborhood of five miles.

Q. What time did this accident happen, do you remember? A. About quarter of five.

30 The Court: In the afternoon?

A. Oh, yes, in the afternoon.

Q. And where did Sheppard live? A. He lived in Atlantic City.

Q. What time did you quit work? A. Four-thirty. I left the job at four-thirty.

Q. That was the quitting time, wasn't it, four-thirty? A. Yes. We quit about five minutes early that night on account of running out of material.

Q. Did you start right home? A. We did.

Q. This road that you traveled from English Creek toward Pleasantville is a fairly well traveled road, is it? A. Yes.

Q. One of the main roads in that part of the country? A. I believe it is.

Q. And the Zion Road is also one of the main roads? A. That is the road I was on. 10

Q. I mean the Linwood Road is one of the main roads? A. I don't know about the Linwood Road. I never traveled that very much.

Q. Does it give the appearance of being well traveled? A. Well, no, it isn't as good a road as the Zion Road for travel.

Q. Well, there are ruts in the road, are there, that show it is traveled by horses and automobiles and things of that kind? A. Oh, yes, it is traveled. 20

Q. What part of the automobile struck the motorcycle? A. Front part of the automobile.

Q. Which side? Was it directly the front part of the machine or one side of the machine? A. As near as I can recall, the front part, directly the front part of the machine.

Q. Did you ever see the automobile to see what portion was broken? A. No, sir.

Q. And do you recollect anything at all after the automobile struck your motorcycle? A. No. 30

Q. What part of the motorcycle was struck? A. Why, from about a little beyond midway back, from that on out to the front.

Q. When you were struck were you at right angles in front of the automobile or on an angle? A. That I couldn't say.

Q. I don't mean at right angles. I mean parallel with the front of the automobile or on an angle with the front of the automobile? A. That I couldn't say. I lost recollection.

Q. Of course, you didn't lose recollection until the actual collision happened? Now, at that time, just as the automobile came in contact with the motorcycle, was your machine at an angle with reference to the front of the machine, your motorcycle at an angle with reference to the front of the machine or was it parallel with the front of the machine? A. Well, I should say it was across, that is, in that shape, in front of the automobile.

Q. Directly in front of the radiator of the automobile? A. I should think so, yes. I should say it was, to the best of my recollection.

Q. You say the Zion Road as it approaches the Linwood Road starts down hill, does it not? A. Well, very little, the Zion Road. The Linwood Road has a —

Q. Didn't you say on your direct examination it was down hill on the Zion Road as you approached the Linwood Road? A. Little down hill to it, yes.

Q. How fast had you been going from the time you left the school house until the accident happened? A. Not over twenty mile an hour.

Q. Not over twenty miles an hour? A. No.

Q. Don't you usually travel faster than that? A. No, sir.

30 Q. Were there any ruts in the Zion Road close to the Linwood Road? A. Not that I know of.

Q. It was all hard surface, was it? A. Yes, sir.

Q. And which side of the road were you on? A. Right-hand.

Q. How far toward the right with respect to the center of the road were you? A. Well, that I

couldn't say exactly. I should judge about anywheres from four or five feet or more.

Q. Then you were four or five feet to the right from the center of the road? A. Yes.

Q. When you were struck had you changed the course of your motorcycle? A. Not that I know of.

Q. You still kept right on on the right-hand side of the road until the collision actually happened? A. Yes.

Q. You didn't swerve to the right? A. No, sir. 10

Q. I show you a photograph which is marked "August 19th, 1915, No. 1," and ask you if you recognize the location of that picture? A. Yes.

Q. That is a picture where the camera was standing in the Linwood Road looking across Zion Road, is it not? A. Yes.

Q. And you were coming in the direction where the left-hand side of the picture is toward the right-hand side, were you not, down the Zion Road? This is the Zion Road that runs this way. A. Yes. 20

Q. Is that right? A. I can't recollect this here.

Q. There is a guard fence built along the Zion Road? A. Yes, sir.

Q. On the far side of the Linwood Road, is there not? A. Yes, sir.

(Photograph marked D1 for identification.)

Q. I show you another photograph under date of August nineteenth, 1915, marked 3; do you recognize that? A. Yes, sir. 30

Q. That is the picture looking in the same general direction as the other one, except the camera is closer to the Zion Road, is it not, than the other one?

A. Yes, sir.

Q. And you were coming from the direction as in-

licated on the left-hand side of the picture toward the right-hand side? A. Yes, sir.

Q. Now, won't you indicate by this lead pencil where the motorcycle was when the collision actually happened on this picture marked No. 3? A. I should say about here, the nearest of my recollection.

Q. About where I mark it with a cross there? A. Yes.

10 Q. Is that right? A. I should say about there.

Q. Now, before the collision actually happened how far had you traveled from a point where you could see up the Linwood Road toward the direction the automobile was coming? A. How far—what do you mean, how far I traveled?

Q. How far, looking at this picture toward the left up the Zion Road, what was the distance to the point where you could see an automobile coming on the Linwood Road? A. I should say about fifty feet.

20

(Photograph marked D2 for identification.)

The Court: Do I understand him to say he could see fifty feet from the corner?

Mr. Starr: Fifty feet from the point where the accident happened, as I understand it.

Mr. Bourgeois: He did not say he could see up
30 the Linwood Road fifty feet.

Q. As I understand your testimony you could see up the Linwood Road from a point fifty feet up the Zion Road before you reached the place you were struck; is that right? A. I could see up the Linwood Road a little ways, yes.

Q. I am not asking you how far you could see up the Linwood Road. I am asking you at what point on the Zion Road could you see up the Linwood Road?

Mr. Bourgeois: How far up?

A. I can't figure out what you mean. How far up the Linwood Road, do you mean, to say? I could see the road, say in here from about fifty feet above there. 10

Q. The Linwood Road is practically straight, is it not, toward the south? A. Well, it is practically straight from this hill. There is a hill here.

Q. How far is that hill away from the intersection of the Zion Road? A. I should say about a hundred and fifty or two hundred feet, probably more.

Q. Of course, when you are in the center of Linwood Road you can see up to the top of the hill, can't you? A. Oh, yes. 20

Q. If you are fifty feet from the point where the accident happened toward the west, up the Zion Road, could you see the top of the hill? A. No.

Q. At what point could you see the top of the hill? A. Why, you couldn't see the top of the hill until you got within—well, I should say about fifteen or twenty feet.

Q. How far could you see up the Linwood Road when you were fifty feet up the Zion Road from the point where you were struck? A. You couldn't see more than fifteen feet up the Linwood Road, if you could see that. 30

Q. Did you ever take any observations to see whether you could see an automobile if you were traveling on a motorcycle down the Zion Road, if the automobile was coming on the Linwood Road?

A. Well, you could—way up the Zion Road, well, I should say half a mile, you could see back toward what they call the Bargaintown school house, on the Linwood Road. You can see up there, I judge the same distance as you would be back —

Q. Prior to this day, the time the accident happened, had you ever gone to that road for the purpose of making an observation to see how far you could see an automobile coming down the Linwood
10 Road? A. No.

Q. Have you done it since that time, since the accident? A. No.

Q. And your testimony is merely from your recollection of what happened on that day? A. Yes, sir.

By Mr. Bourgeois:

Q. Mr. Fox, do you know if the Zion Road is a State Road? A. I couldn't say.

20 Q. Which is the more used road, the Zion Road or the Linwood Road? A. I would say the Zion Road.

Q. Now, where the Zion Road crosses Linwood Road, when you get in the middle, we will say, the middle of the Zion Road and the middle of the Linwood Road, can you see up the Linwood Road by looking at right angles, or do you have to look back over your shoulder, if you know? A. Well, at the center part of the intersection I would say you
30 would have to look a trifle to the rear.

Q. In other words, they don't cross at right angles? A. No, they are not exactly at right angles.

By Mr. Starr:

Q. Do you know where the motorcycle was picked

up after the accident? Have you any knowledge on that? A. No, sir.

By the Court:

Q. When you got by the corner of Zion Road and Linwood Road what did you do with reference to looking? A. After I got by the corner?

Q. Yes. A. After I got by the corner I heard a noise to the right and I looked to the right and saw the two front wheels and radiator of an automobile, as I took it to be. 10

Q. How far was it off? A. About eight feet, I should judge, guessing at it. I should say about eight feet from me.

Q. What prevented your seeing it before, if anything? A. Well, at the right-hand corner of those two streets is a peach orchard, and then I would call an undergrowth of bushes like along the edge of the road, between the road and the peach orchard. 20

Q. Well, what did you do when you saw the automobile? A. I don't remember doing anything. I hadn't time to do anything. It struck so quick.

Q. Well, had you looked before that? A. I had.

Q. When did you commence to look? A. As I said about fifty foot or more up the road.

Q. How far could you see? A. As soon as I could see the Linwood Road at all I was looking for whatever should come across.

Q. How far could you see up the road? A. At that time about fifteen or twenty feet up the road. 30

By Mr. Starr:

Q. When you started to look toward your right how far were you from the intersection of the two roads? A. About fifty feet.

Q. About fifty feet? A. I should judge.

Q. At that time how far up the Linwood Road could you see? A. About fifteen or twenty feet.

Q. Now, isn't there a level spot where there is no shrubbery or underbrush whatever to obstruct the vision at the southwest corner of those two roads?

A. Southwest corner? Which corner would you call that?

Q. That was your right as you were coming home.

10 It was your right. Wasn't there a level spot where you could see around the corner? A. It seems to me there was a small spot there, yes.

Q. When you started to look had you gotten beyond the place where the bank was? There is a bank there, isn't there, and then a level spot, and then comes the road? A. I believe so.

Q. Had you gotten beyond the bank when you started to look? A. No.

20 Q. Then you looked, as I understand, before you reached the edge of the bank? A. Yes.

Q. Did you look again until you were struck? A. Yes, I looked to my left then. After I saw nothing to my right I looked to my left and by that time I heard a noise to my right and looked to the right again.

Q. How many feet did you travel from the time you looked first until you were struck? A. Well, I should judge about fifty, well not fifty feet, quite. I would say about fifty feet.

30 Q. And all you did, you looked to the right first and looked to the left? A. Yes.

Q. And as soon as you looked at the left, then you heard this noise and you were then eight feet from the machine? A. About that, I should judge.

Q. So you went the distance of fifty feet from the time you first began to look until you were struck

and the time it took to turn your head to the right and to the left; is that right? A. Well, yes, because I didn't —

Q. How high is that bank? A. That I don't know.

Q. Where does the peach orchard begin? How far back from the junction of the two roads? A. Well, it is, I should judge right on the property line of that property there.

Q. It doesn't run right down to the corner of the two roads, does it? A. I don't think so. 10

Q. How many feet back is the peach orchard located from the corner of the roads? A. That I couldn't say.

By Mr. Bourgeois:

Q. You say you ran about fifty feet while you were turning your head to the right and the left. Did you simply turn your head to the right and the left like that or did you do something after turning it? 20

(Question objected to as leading.)

Q. What did you do when you turned your head to the right? A. The first time?

Q. Yes. A. I looked ahead then.

Q. How long were you looking? Did it take you a little bit of time or did you do it instantly? A. Oh, it took me a little time to make sure there was nothing in the road. 30

Q. Then when you turned to the left, how long was your head that way? A. Until I almost reached the corner, the intersection.

The Court: When you say you looked ahead what do you mean, down the Linwood Road?

A. Zion Road.

Q. When you turned to the left, you looked up the Linwood Road? A. Yes, when I looked to the left I looked up the Linwood Road, yes.

The Court: He says he looked ahead. Does that mean he looked down the Linwood Road?

Q. I understood you to say you turned your head
10 to the right? A. Yes.

Q. That was looking down the Linwood Road, wasn't it? A. Yes.

Q. Then you turned it to the left. That looked up Linwood Road? A. Yes.

Q. Then when you had your head turned to the left you heard a noise on your right-hand side? A. Yes.

Q. Then you turned around again and saw the automobile within eight or ten feet of you? A. Yes,
20 sir.

By Mr. Starr:

Q. How far toward the left could you see up the Linwood Road? A. Why, you could see quite a ways, I should judge. I couldn't say just exactly how far.

30 WILBERT SPEECE, SWORN.

Direct examination.

By Mr. Bourgeois:

Q. Mr. Speece, you are one of the constables of Atlantic County? A. I am.

Q. Did you go to the scene of this accident, Zion Road and Linwood Road, some time soon after the accident? A. Yes, sir.

Q. How soon after? A. About half hour afterwards.

Q. When you got there whom did you find there?
A. Mr. Lipschutz and there was four or five other machines there. Quite a crowd of people.

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

Q. And did you see the motorcycle? A. Yes, sir. 10

Q. Do you know whether or not the motorcycle had been moved before you got there? A. No, sir.

Q. Don't know. A. No, sir; I don't know whether it had been moved.

Q. Where was the Lipschutz machine, the machine of the cigar company? A. Down in the swamp.

Q. How far—did you measure the course it took?
A. Yes, sir.

Q. Tell the jury the course it took and the distance. 20

(Witness refers to paper.)

Mr. Starr: I object to the use of the memorandum unless the witness can justify the validity of using it.

Q. Did you make those measurements at the time?

A. I certainly did.

Q. In your handwriting? A. Yes, sir. 30

Q. And you have had the custody of it ever since?

A. Yes, sir.

Q. Can you state those distances without reference to the memorandum accurately? A. I think so.

Q. Then do it without the memorandum, if you can, and if you cannot, you can refresh your mem-

ory. A. Fifty-two feet from the center of the road to the fence.

Q. The fence was where? A. On the Linwood Road. That is fifty-two feet from the center of the Zion Road to the fence on the Linwood Road, and forty-five feet from the fence to the end of the machine in the swamp.

Q. Where did the machine leave the Linwood Road to go into the swamp? Can you tell me where that was? A. Forty-five feet beyond where it stopped. In other words twenty-eight feet from the end of the fence.

Q. Twenty-eight feet distant from the end of the fence? A. Yes, sir.

Q. Then it went into the swamp at that point? A. Yes, sir.

Q. Could you tell from the tracks of the wheels what course it took from the middle of Zion Road until it came to the point where it went off? A. Came right straight down the Zion Road and then kind of shoved out that way down into the swamp.

Q. What was its course across Zion Road? Was it straight across or was it diagonal? I don't mean diagonal, because the roads are diagonal, but when it crossed Zion Road, what was its course along Linwood Road? A. Well, the tracks of the machine beared a little towards the swamp.

Q. When it was twenty-eight feet distant from the fence it went into the swamp? A. It shoved back into the swamp, knocked down the fence.

Q. It went into the swamp how many feet? A. Forty-five feet.

Q. That was on an angle? A. Yes, sir.

Q. When it stopped in the swamp, forty-five feet in, you say, it was where with relation to the fence?

A. It was forty-five feet from the fence.

Q. Forty-five feet from the fence? A. Yes, sir.

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

Q. Did you measure the distance it ran in the swamp, the marsh there, I mean where the wheels went? Did you measure that distance? A. Only the forty-five feet which she went in.

Q. What was the nature of that swamp? A. Well, it was marshy.

Q. What was the condition of the car with regard to its wheels? Was it standing up on the marsh? 10

A. No, sir, it was down in the marsh.

Q. How far? A. Down to the hub, front hub.

Q. Which part of it was down to the hub? A. Front.

Q. What about the rear part? A. Well, it wasn't down as far as the front.

Q. Were you there when they got it out? A. No, sir.

Q. What sort of a car was it? A. Touring car.

Q. How many passengers? A. I couldn't say. 20

Q. Did you notice what was in the swamp where that went? A. Why, there was cat of nine tails.

Q. How tall were they? A. They run around about five feet.

Q. How close to the road did they extend? A. Well, about twenty feet they started to commence.

Q. About ten feet? A. About twenty.

Q. Then the car went in the first twenty feet and struck nothing excepting the marsh? A. Yes, sir.

Q. Then it commenced to strike these cat of nine tails and went on twenty-five feet through them before it finally stopped? A. Yes, sir. 30

Q. That was how many feet from the middle of the road, did you tell me? A. It is fifty-two feet from the middle of the road to the fence, and forty-five feet from the fence in.

Q. In there? A. Yes.

Q. It went a diagonal course? A. Yes, sir.

Q. You spoke about a fence. Where had there been a fence? A. On the right-hand side of the road. There is a fence on both sides. A little creek goes there and it is on both sides of it.

Q. What happened to the fence? A. The fence was down.

10 Q. Was it down all along there or just where the car had gone through? A. Just where the car went in.

Q. How was that fence built? A. Well, it had plank on top. I think it was five foot posts, five by six, something like that.

Q. Where was the plank? A. Laying down on the road.

Q. Yes, but what was the top rail of it? Was that a plank or piece of timber? A. Leave me look at this paper, I will tell you what it was.

20 Q. You look at the paper then. A. Four by four top rail, two inch plank.

Q. Where was the two inch plank? A. On top.

Q. Then above the plank was the top rail, four by four? A. Four by four.

Q. Did the car just go between two posts? A. No, it knocked the post down. The post was down.

Q. Well, the post was down where the car had gone over it? A. Yes, sir.

30 Q. What was the size of those posts? A. Six by five.

Q. Now, what was the appearance of the car, the front part of it? A. Well, it was bent, the fender was bent.

Q. Did you know—of course, you don't know where Fox was struck at all? A. No, sir.

Q. Was there any indication other than the bent

fender of any accident there? Was there any blood on the hood or anything of that kind? A. I didn't see any.

Q. What other damage did you notice to the car except the fender bent? A. The front spring was bent, front left spring.

Q. Which fender? A. Front left.

Q. What about the shoe on that side, was that all right or don't you know? A. No, the shoe was in bad condition.

Q. Was Max Lipschutz there while you were making these measurements? A. No, sir.

Q. Who was there at the time you got there? A. When we arrested Max?

Q. No, I don't want you to say anything about arresting Max. When you got there who was there? A. Officer Delaney went down with me the next day in a machine.

Q. Were there any people there that you knew? A. No, sir; there was nobody there except officer Delaney and the man that drove the car, when we took the measurements.

Q. I mean when you went down that afternoon? A. There was quite a few people there. Dr. Raith was there and there was quite a crowd of people. I don't know who they were.

Cross-examination.

By Mr. Starr:

Q. Mr. Speece, were these measurements made the same day? A. No, sir.

Q. Then, as I understand it, you were there about half an hour after the accident happened? A. Yes, sir.

Q. And made no measurements? A. No, sir.

Q. And when were the measurements made? A. Next morning.

Q. Had the machine been taken away or was it still there? A. Machine had been taken away.

Q. So when the measurements were made, the machine was not there? A. No, sir.

Q. This fence that you say was broken down or had the appearance of being broken down, was that
10 along the Zion Road or Linwood Road? A. Linwood Road.

Q. Linwood Road? A. Yes, sir.

Q. And where did the fence begin? A. The fence began about ten foot from the Zion Road. I think that is where it commenced.

Q. You speak of it as a fence. It was a guard rail there, wasn't it? A. Guard, yes. There was a top rail four by four and a two inch plank down below that.

20 Q. I show you photograph marked Exhibit D2 for identification and ask you whether you recognize that or not. You are looking down the Linwood Road, and the Zion Road runs across? A. Yes, sir.

Q. Now, was this the fence that you say was broken down, or the fence over here? A. Fence over here.

Q. Fence on the Linwood Road? A. Yes, sir.

Q. Was that fence of the same character as shown in this photograph? A. Yes, sir.

30 Q. It is a four by four top rail? A. Yes, sir.

Q. With posts, and then midway between the ground and the top is this plank? A. Two-inch plank, yes, sir.

Q. Now, the measurement of fifty-two feet that you give, you say that was from the center of the road to the fence? A. Yes, sir.

Q. Which road do you mean? A. From the center of the Zion Road to the fence on the Linwood Road.

Q. That is to the beginning of the fence? A. Yes. No, to where it broke down.

Q. How much of it had been down, do you know? A. Just a few posts was down.

Q. Well, how much? A. Possibly ten or twelve feet.

Q. So that the fence began in the neighborhood of forty feet from the center—the fence began in the neighborhood of forty feet from the center of the Zion Road; is that right? A. No, I guess it was a little closer than that. About thirty feet. It was up close to the Zion Road. 10

Q. So that if the automobile went through the fence, it must have gone through the fence about thirty feet from the center of the Zion Road; is that right? A. No.

Q. Just explain it. I don't understand. A. You bring me the picture and I will show you. 20

Q. All right. A. Now, here is where he went. He went right down into there, knocked the fence down and went right in here.

Q. I understand that very well. We are not at cross purposes on that, but what I want to know is this: How far was the end of the fence before it was knocked down from the center of the Zion Road?

A. It wasn't over twenty feet from the end of this road here until it got down there when the fence commenced. That was put there to guard this stream. 30

Q. It was part of the bridge — A. Yes, sir.

Q. — that is shown on this picture on the Linwood Road? A. Yes, sir.

Q. So that the fence began about twenty feet? A. About twenty feet.

Q. I understood you to say that the automobile didn't go right down straight along the center of the road, but swerved to the right? A. Yes, sir.

Q. When did you observe the tracks of the automobile, the day you made the measurements or the day before? A. No; the same day I went down there.

Q. And the tracks of the automobile swerved to the right? A. Yes, sir.

Q. Is that right? A. Yes, sir.

10 Q. And ran from the center of the Linwood Road into the meadow? A. Yes, sir.

Q. Now, what was the distance from the center of the road to the point where the automobile ran into the meadow, left the road and went into the meadow? A. You mean to here? Fifty-two feet from the center of the road.

Q. Fifty-two feet from the center of the road? A. Yes, sir.

Q. The center of the Zion Road? A. Yes, sir.

20 Q. To the point where — A. It went into the swamp.

Q. Into the swamp? A. Yes, sir.

Q. You said before it was fifty-two feet from the center of the road to the fence? A. That is to the fence where it went in. I said it was between ten and twenty feet to where the fence commenced.

Q. Yes, I understand that, but was it fifty-two feet from the center of the road to the fence that was left standing? A. It was fifty-two feet from the middle
30 of the road to where the car knocked down the fence and started in the swamp.

Q. Well, was there any fence left standing between the place where it went into the swamp and the center of the Zion Road? A. Fence on the left.

Q. I am speaking of the other side, on the right?

A. No, I don't think there were. I won't answer that question.

Q. This picture doesn't show any fence there, does it? A. No, sir.

Q. And the fifty-two feet that you measured was from the center of the road to the part of the fence that was left standing; is that right? A. This is where the car started in, right here.

Q. Was fifty-two feet from the center of the road to the part of the fence that was left standing? A. 10
No, sir.

Q. How far was that? A. It was fifty-two feet in here where the post was knocked down. I didn't measure to this fence at all.

Q. You say it was only twenty feet from the near side of the fence that was knocked down? A. Where the fence commenced. The fence commenced in here somewhere.

Q. That was all knocked down, wasn't it? A. It wasn't there. We followed the tracks. That is 20
where we measured to, where this post was standing here, down to here.

Q. Now, the fence which began about twenty feet from the Zion Road was all down? A. Yes, sir.

Q. There is some high land immediately adjoining the traveled portion of the road, isn't there? A. Yes, sir.

Q. And it gradually gets low and swampy? A. Yes, sir, down hill.

Q. Goes down hill? A. Yes, sir.

Q. Do you recognize that photograph showing the 30
condition of the automobile? A. Yes, sir.

Q. Is that about right? A. Yes, sir.

Q. The left shoe torn? A. Yes, sir.

Q. And the left spring bent? A. Yes, sir.

Q. And the left lamp broken? A. Yes, sir.

Q. Apparently the right side of the machine was all right? A. Yes, sir.

(Photograph marked D3 for identification.)

WILLIAM GUISEPPE, SWORN.

10

Direct examination.

By Mr. Bourgeois:

Q. Mr. Guiseppe, you live where? A. The other side, Raith's.

Q. Speak a little louder. A. I can't talk good.

Q. Where do you live? A. I live right on Linwood Road.

20 Q. How near to Zion Road? A. About fifteen minutes.

Q. Do you remember an accident that happened at Zion Road and Linwood Road last August? A. Yes.

Q. Where were you? A. I was working over there.

Q. Where were you working? A. Well, I can't talk very good.

Q. Yes, you can. Tell us the best you can. A. I make a mistake. I can't say good.

30 Q. You know where Mrs. Somers Lee lives? A. Yes.

Q. How near to her house were you working? A. That is Raith on this side.

Q. On the opposite side of the road? A. Yes.

Q. Did you see an automobile go past just before the accident happened? A. No, sir. Well, I can't understand.

Q. Did you see an automobile? Did you see this Lipschutz car go down the road just before the accident? A. No.

Q. Do you understand what I say? A. No, no understand.

(Witness withdrawn.)

10

THOMAS SHEPPARD, SWORN.

Direct examination.

By Mr. Bourgeois:

Q. Mr. Sheppard, are you the gentleman that Fox says was with him the night of the accident? A. I am, sir.

Q. You had been riding on the machine from English Creek down? A. Yes, sir.

Q. How fast do you think you were traveling when you came to Zion Road? A. About —

Q. I mean when you came to the Linwood Road? A. As near as I can come at it we were going about twelve, fifteen miles an hour. Not over fifteen, anyway. He slowed off coming down.

Q. Where did you begin to slow down? A. Up there by the cemetery.

Q. Do you know whether or not Fox blew his horn as he came to the road? A. Three times.

Q. Three times? A. Three times blew his horn, yes, sir.

Q. When did you first see the automobile? A. When it hit me.

Q. When it hit you? A. Yes, sir.

Q. Did you look before that time? A. Yes, sir.

Q. Could you see anything? A. No, sir, couldn't see anything until just as I looked around again, I says, "Lord," just like that, bam. I didn't know no more.

Q. Nothing more? A. No, sir.

Q. It knocked you unconscious, did it? A. Yes, sir.

Q. Where were you when you next regained consciousness? A. In the hospital.

By the Court:

Q. Where did you commence to look? A. Just by this end of the orchard.

Q. When you first looked what did you see? A. I didn't see anything at all.

Q. Wasn't there any automobile in the road? A. No, sir, we couldn't see any automobile in the road at all.

Q. When was it you saw the automobile then? A. Just the minute I was hit.

Q. You looked again? A. Yes, sir, right at the road then.

By Mr. Bourgeois:

Q. Did you hear any automobile horn blow? A. No, sir.

30

By the Court:

Q. Do you mean to say there was no automobile in view when you got by the corner? A. We didn't get by the corner exactly.

Q. When you got so you could see down the Lin-

wood Road there was no automobile? A. I didn't look until I was hit. Just the minute I looked I was hit, just that quick. I looked around and I was hit.

Q. Had you looked before that? A. Before I came to the Linwood Road I looked.

Q. How far could you see? A. Oh, I could see all the way over the road, then, about, I guess, three hundred yards.

Q. And you didn't see any automobile on the road? A. No, sir, I didn't see no automobile and no signs of an automobile or anything on that road. It was in a hollow—it runs hills and holes—I suppose. 10

By Mr. Bourgeois:

Q. That is, Linwood Road is hilly, up and down? A. Yes, sir.

Q. There is one quite considerable hill, isn't there, about two or three hundred feet back from the Zion Road? A. Yes. 20

Q. And then there is Mr. Lee's house there? A. I don't know whose house it is.

Q. There is a house there, isn't there? A. Yes, there is a house up there.

Q. When you got down near to the road could you see or was your view obstructed by that brush? A. You couldn't see anything. There is a hill there and there is a lot of brush all along there.

Cross-examination. 30

By Mr. Starr:

Q. How long have you been traveling that road, Sheppard? A. I think I went over to Scullville the first of May and I came home every Saturday after-

noon. Went out every Monday morning. I was working over there.

Q. How long had you been going over on a motorcycle? A. About three days, I think it was.

Q. Before that time you walked? A. No, went over in an automobile.

Q. How long had you been traveling with Mr. Fox, the plaintiff here? A. About three days.

10 Q. That is, three days, going over in the morning and back at night? A. Friday we started over there and Saturday and Monday.

Q. This accident happened on Monday, didn't it? A. On Monday, yes, sir, the sixteenth.

Q. Did you live at Pleasantville? A. Sir?

Q. You live in Atlantic City? A. Yes, sir.

Q. And you were riding back of Mr. Fox on the machine? A. Yes, sir.

20 Q. You didn't look in the direction of the Linwood Road at all, as I understand it, until you were struck? A. Just as I whirled around the automobile was right up. I says, "Lord," and just that quick I was hit.

Q. So you don't know where the automobile was as you were approaching that road? A. No, sir.

Q. And how close was the automobile to the motorcycle when you first saw it? A. It was up on me when I was hit. I just saw it and was hit right away. I didn't have time to wink my eyes.

30 Q. That is the first time you looked? A. First time I looked when I got down there, yes, sir.

Q. Wasn't that motorcycle running at least twenty miles an hour when you were struck? A. Not then, no, sir.

Q. Don't you remember telling a gentleman who investigated this matter just after the accident happened that you were going twenty miles an hour?

A. No, sir, I didn't tell him any such thing. I told him —

Q. Didn't you tell him that when you were struck you were going twenty miles an hour? A. No, sir, no, sir.

Q. Do you know at what time the accident happened, what time it was? A. As near as I can come at it, it was nearly half-past five, I think. I am not sure, but we stopped work out there at four o'clock where we were. 10

Q. You stopped work at four? A. Yes, sir. Half-past four I mean to say.

Q. Did you have a watch on? A. No, he had a watch; Mr. Fox had a watch.

Mr. Bourgeois: Why didn't you look at it after the accident happened to see what time it was?

A. I was dying. I couldn't see anything.

Q. Can you tell us where the motorcycle was with respect to the center of the Linwood Road when the collision happened? Do you know that? A. Well, the way it looked when it was coming to us, it was right about midway of us, the way it looked when it struck us. 20

Q. Where was the motorcycle, in the center of the road or on the right-hand side? A. About near the center of the Linwood Road when we were hit.

Q. What about the Zion Road? Were you on the center or right-hand side of that? A. We were on the right-hand side of the Zion Road. 30

Q. How far from the center toward the right were you? A. I don't know exactly.

The Court: Does he say which side of the road the automobile was on? Was it on the right-hand or left-hand side?

A. The automobile was right in the center of Linwood Road and we were very near in the center of Linwood and Zion, crossing over.

Q. Now, when you were coming down the Zion Road, were you in the center of the road or on the right-hand side of it? A. We were on the right-hand side of it.

Q. Did the motorcycle change its course until the collision happened? A. No, sir.

10

By Mr. Bourgeois:

Q. Why didn't the motorcycle change its course?

A. Didn't have time.

Q. Well, did your motorcycle run into the car or the car run into you? A. The car run into the motorcycle or run into us. We were on the motorcycle.

Q. You said, at least, Judge Starr asked you a question that inferred that you only looked the one time, and that was after you got into the Linwood Road. A. After we got into Linwood Road, that is the only time I looked over, and just as I looked —

20

Q. When you were back from Linwood Road on Zion Road, approaching it, then did you look across there? A. Yes, sir.

Q. That is what I understood you to say? A. Yes, sir, that is what I said first.

Q. You didn't see anything then? A. No, didn't see anything then.

30

By Mr. Starr:

Q. Where were you when you looked, how far from the Linwood Road? A. I guess three hundred yards.

Q. That is nine hundred feet? A. Somewheres around there.

WILLIAM GUISEPPE, recalled and examined through interpreter.

(Interpreter sworn.)

Direct examination.

By Mr. Bourgeois:

10

Q. Did you go down to the accident just after it happened? A. Right away.

Q. Where was Fox? A. In front of the automobile.

Q. Lying in the mud or on the machine? A. His feet were in the water and his head inside of the machine, in the machine.

Q. Where was the machine? A. In the swamp.

Q. About how far from the Zion Road was the machine, if you can tell me? A. About fifty or sixty 20 feet.

Q. Did you see the automobile as it was coming down the hill past where you were working? A. Yes, sir.

Q. Was it going fast or slow? A. Fast when I saw it.

Q. How far were you from where the accident happened? A. About half a minute walk.

Q. You live with whom? A. I lived in my own home.

30

Q. For whom were you working? A. For a dentist in Atlantic City.

Q. For Dr. Raith? A. Yes.

Q. On which side of the Linwood Road was Dr. Raith's house? A. Left-hand side.

Q. As you go toward Linwood? A. Yes.

Q. Is there any other house between Dr. Raith's house and Zion Road or Linwood Road? A. There is another one more.

Q. Whose house is that?

The Interpreter: He don't know his name. William Campbell, he thinks.

10 Q. When you got to the place of the accident where was the motorcycle? A. In the road.

Q. What part of the road? Just where?

The Interpreter: He didn't take particular notice about the motorcycle. He was paying more to the fellow that was lying down.

Q. Where was Sheppard at that time, the colored man? A. He was lying in the road.

20 Q. How far did you mire into the swamp when you went out to get Fox? How far down did you sink, your feet?

The Interpreter: He don't know about that.

Q. Who helped you carry Fox into the road, back to the road?

The Interpreter: Why, there was somebody else, but he don't know who it was.

30

Q. Where was the driver of the car, of the automobile? A. Sitting down in the auto.

Q. Did you see them drag the automobile out? A. No.

Cross-examination.

By Mr. Starr :

Q. On the day of the accident were you working at Dr. Raith's house? A. Yes, sir.

Q. What time did the accident happen?

The Interpreter: He doesn't know.

10

Q. What were you doing?

The Interpreter: He was feeding the chickens.

Q. You were in the chicken yard, then, were you? A. Yes.

Q. Now, this other house that you speak of, that is right opposite, on the opposite side of the road, isn't it, from where Dr. Raith's house is? A. There is two houses across the road.

20

Q. Well, now, this place you were working that day is between the Zion Road and Bakers Mills, isn't it? A. Nearest the Zion Road.

Q. But it is between the two? A. Yes.

Q. And the swamp where the automobile went into is between the Zion Road and where you were working; isn't that a fact? A. Yes, sir.

Q. So the automobile didn't pass you at all, did it? A. No, sir.

Q. The accident happened and the automobile went into the marsh before it reached where you were working? A. Yes, sir.

30

Q. Do you recognize that photograph? A. No, sir.

Q. Well, a day or two after this accident happened there was a photographer came out there to take pictures, didn't he? A. Yes, sir.

Q. And you indicated to him where you were standing and the direction in which you were looking, didn't you? A. Yes, sir.

Q. And the photographer took a picture of what could be seen from where you standing in the direction in which you were looking? A. Yes, sir.

(Photograph marked D4 for identification.)

10 Q. What was the first thing that attracted your attention with reference to the accident?

The Interpreter: Why, he was standing and he was looking at the motorcycle coming on.

DR. WILLIAM P. RATH, SWORN.

20 Direct examination.

By Mr. Bourgeois:

Q. Doctor, you have a house off shore, don't you? A. Yes, sir.

Q. On Linwood Road? A. I never found out the name of it.

Q. Do you know where Zion Road is? A. Yes, sir.

30 Q. As you go over from Northfield along Zion Road and you strike the road your house is on, which way do you turn, to your right or to your left? A. When I am going out to my house from Atlantic City?

Q. Yes. A. I turn to the right.

Q. Where does Mrs. Lee live? A. She lives up to the left of Zion Road.

Q. How near where she lives do you live? A. Well, I am a poor judge of distance, but half of a city block, anyway, between the two houses.

Q. Do you pass her house when you go to your house? A. No, because I take a little cut out there to avoid that corner. I don't go to the corner, because there is a little cut out there that runs right up to the house.

Q. Your house is on the same side of Zion Road as her house, isn't it? A. No; on the same side of 10 the Linwood Road.

Q. But not on the same side of the Zion Road? A. No, on the opposite side.

Q. Were you there the day of the accident? A. After it happened, yes.

Q. How soon after it happened? A. Why, I should judge about fifteen or twenty minutes. I don't know exactly.

Q. What did you see when you came there? A. Saw the automobile and the motorcycle and people. 20

Q. Where was the automobile? A. In the swamp.

Q. Did you make any measurements to find out how far? A. No, only from what I observed.

Q. Where was the motorcycle? A. That was on the opposite side of the Linwood Road, just on the edge of the road.

Q. Where with relation to the Zion Road? A. Oh, I should judge thirty or forty feet.

Q. In from the Zion Road? A. Yes.

Q. How far in did the automobile travel on Lin- 30 wood Road before it went off into the marsh land? A. About four car lengths, I should judge, four or five car lengths.

Q. That is the automobile lengths? A. Yes.

Q. That would be forty or fifty feet, presumably? A. Presumably. I am no good on feet.

Q. Where was Fox when you got there? A. They had taken him away.

Q. Also Sheppard? A. Yes.

Q. Where was Mr. Lipschutz? A. He was standing around near the car.

Q. Where were the other occupants of his car?

A. They had been sent into Atlantic City, I believe.

Cross-examination.

10

By Mr. Starr:

Q. Do you recognize that map? This is supposed to be the Linwood Road and this is supposed to be the Zion Road; there is the bridge and there is the swamp. A. Now, we have got it.

Q. This is your house here, is it not? A. Yes, sir.

Q. I will mark it "Raith." A. The reason you fooled me, you have got that pond marked a lake.

20 Q. This is your house that is marked "Raith"?
A. Yes.

Q. And the Zion Road is marked "Zion Road" in lead pencil? A. Yes, sir.

Q. And the Linwood Road is marked "Linwood Road" in lead pencil? A. Yes, sir.

Q. This road here close to the arrow is the cut off you speak of? A. Yes.

30 Q. Now, the motorcycle when you got there was, you say, located — A. It was lying right here at the edge of the bridge.

Q. Up near the bridge? A. Right near the end of the bridge.

Q. Where I marked in lead pencil "M"? A. It wasn't on the road. It was off to the edge of the road.

Q. About where I locate that with a cross? A. Just about, yes.

Q. I will mark it "M." And the automobile was on the right-hand side of that road into the swamp?

A. Across this little creek. That is just a little stream. It brought up about here, I should judge.

Q. I will mark that with a circle. You think it was about there? A. Yes. It was about four or five car lengths from the road, but it had gone past that little ditch that runs out of there.

10

(Map marked D5 for identification.)

STATINA LEE, SWORN.

Direct examination.

By Mr. Bourgeois :

20

Q. Mrs. Lee, you live where? A. Well, I live at Bargaintown. Some people call it Bargaintown.

Q. That is on Linwood Road? A. That is what you are calling Linwood Road.

Q. And you live where with relation to the Zion Road, where the crossing between the Linwood Road and the Zion Road is? A. Well, I live on the right coming the way Mr. Fox was. I live on the right of Zion Road.

30

Q. And if you turned around and went up to your house, you turn on the right of the Zion Road and you live on the right of the Zion Road? A. Yes, sir.

Q. How far is that from the Zion and Linwood Road crossing, do you know? A. No, I don't know.

Q. You don't know the feet? A. No, I don't know.

Q. Do you remember the day of the accident? A. I do.

Q. Just before that accident happened did you hear an automobile go past your house?

Mr. Starr: That is objected to as irrelevant and immaterial. There is nothing to show how far this might be from the scene of the accident. She lives on the right-hand side of the Linwood Road, but she
10 does not know how far it is from the junction.

The Court: She means she doesn't know the number of feet.

A. No, sir, I never measured it.

By the Court:

Q. How far is it, Madam? A. Really, I couldn't
20 tell, because I have never measured it.

Mr. Bourgeois: I will show it.

(Objection overruled. Exception noted for defendant.)

By Mr. Bourgeois:

Q. Do you frequently hear automobiles go past
30 your home? A. I do.

Q. Where do you live with relation to the hill?
A. Right on top of it.

Q. You live on top of the hill that runs down to the Zion Road? A. Yes, sir.

Q. Can you tell from the sound of an automobile approximately how fast it is going, that is, whether

it is going fast or slow? A. Oh, I can tell whether it is going fast or slow, yes.

Q. Do automobiles usually make any difference to their speed as they go over that hill and go on down?

Mr. Starr: That is objected to as irrelevant and immaterial.

(Question withdrawn.)

10

Q. You heard this automobile go past? A. I did.

Q. Was it going fast or slow? A. Fast.

Q. Did it slacken its speed as it went down over the hill? A. No.

Q. How long after you heard that automobile go past your house before you heard the crash? A. I couldn't measure in minutes, but almost immediately.

Q. Then you went down there? A. I went right down there.

20

Q. What did you see when you got there? A. Well, I saw the automobile out in the swamp, and the first thing that attracted me was that colored man, badly hurt, groaning.

Q. Was Guiseppe there then when you got there, this Italian? A. I think he was.

Q. Did you see them when they brought Fox in? A. I did.

Q. What was done with him? A. Laid him down alongside of the road.

30

Q. Where was Mr. Lipschutz then? A. Oh, I don't know. He was around there; I don't know just where he was; he was there.

Q. Can you tell anything about how fast that machine was going, or can't you tell it in miles? A. No, not unless I seen the speed meter.

Q. You can tell whether it was going fast or slow?
A. I could tell it was going fast, yes.

Cross-examination.

By Mr. Starr:

Q. You say you live at the top of the hill? A.
Right on the top of that hill on Linwood Road.

10 Q. How far back from the road? A. Really, I
don't know.

Mr. Bourgeois: Back from which road?

Mr. Starr: The Linwood Road.

Mr. Bourgeois: He wants to know how far your
house sets back from the Linwood Road?

20 A. I never measured it. Just the door yard out
in front and a hedge.

Q. The house is built right on the road? A. Yes.

Q. Front porch and a narrow lawn? A. Yes.

Q. What were you doing that day? A. Setting
there in the house.

Q. In the house? A. Yes.

Q. Which room in the house were you sitting? A.
The kitchen.

Q. That is the back part of the house? A. Yes.

30 Q. What were you doing? A. Well, I couldn't
just exactly tell what I was doing.

Q. Did you see the automobile as it approached
your house or after it left your house? A. I never
seen the automobile.

Q. Then you didn't see the automobile at all? A.
Not until after the accident, no, sir.

Q. Until you found it in the swamp? A. Yes.

Q. Then, of course, you can't give us any intelligent information as to whether it was going fast or slow? A. I can tell it was going fast by the noise it made.

Q. Is that the only way? A. Yes.

By Mr. Bourgeois:

Q. What was it that attracted your attention to that automobile? A. Why, the speed, the noise it was making. 10

By the Court:

Q. Could you tell the direction in which the car was going? A. Yes, sir.

Q. Which direction was it going? A. Right down that hill.

20

By Mr. Bourgeois:

Q. When the crash came what did you have to do to see? A. I had to go out and down the road.

Q. I know, but did you look out the window before to see? A. I didn't look out the window, because the peach orchard is there.

Q. Did the crash raise any conclusion in your mind as to what had happened?

30

Mr. Starr: That is objected to as irrelevant and immaterial.

Q. Why did you go out of the house to look? A. Because I thought there had been an accident.

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

THOMAS O. LEE, SWORN.

Direct examination.

By Mr. Bourgeois:

Q. Captain, you are the father-in-law of Mrs. Lee, aren't you? A. Yes, sir.

Q. You know where she lives? A. Yes, sir.

10 Q. At the time of the accident were you living at their home? A. Yes, sir.

Q. How far is their house from Zion Road, about? A. Well, it is pretty hard to tell, but I suppose somewhere in the neighborhood of a square, or may be a little over a square, whatever you might call it.

Q. Three or four hundred feet? A. Yes, something like that.

Q. Do you remember that afternoon seeing the motorcycle coming down Zion Road? A. Why, yes,
20 I passed that motorcycle I suppose about four or five hundred yards, may be a little more, up the road, towards Davis'.

Q. What speed were they going?

Mr. Starr: That is objected to as irrelevant, immaterial, incompetent and improper.

The Court: I cannot see any necessary connection between what rate of speed these men were going
30 four or five hundred yards away.

Mr. Bourgeois: All right. I do not want to put something in that is of no value.

Cross-examination.

By Mr. Starr :

Q. You say that the top of the hill from the junction of the two roads, that is, the Zion Road and the Linwood Road, is about a square? A. Well, somewhere not far from a square or square and a half, something like that. I couldn't say. May be four or five hundred feet, something like five or six hundred feet, may be. 10

Q. A square or square and a half would be more than four or five hundred feet? A. Well, it is somewheres in that neighborhood. Ground, you know, isn't a fair measurement. You can't tell by your eye.

Q. It is anywhere from three to six hundred feet — A. Yes, somewheres in that neighborhood.

Q. — beyond the junction of the roads? A. Yes.

Q. And as I understand, your daughter-in-law lives right on top of that hill? A. On top of the hill. 20

Q. Couldn't it be more than six hundred feet? A. I don't think so.

Q. When you speak of a square and a half, do you mean the squares in Atlantic City? A. Yes, I meant city squares.

MAX LIPSCHUTZ, recalled.

30

Direct examination.

By Mr. Bourgeois :

Q. Mr. Lipschutz, the cigar company was the owner of this car, I understand? A. Yes, sir.

Q. What did it use the car for? A. When?

Q. What use did it make of an automobile? A. Business.

Q. What sort of business? A. Well, business of looking up different matters pertaining to our business.

10 Q. And the different matters that you would look up would be what sort? A. Various different matters. They would range from interviewing an incoming customer to carrying cigars or a good many other things.

Q. You said that on this occasion you looked at the signs as you went along, as you had done frequently before?

Mr. Starr: That is objected to as leading.

20 Mr. Bourgeois: I am not asking a question. I simply am calling his attention to something he has testified to before.

Mr. Starr: It is leading, irrelevant, immaterial, incompetent and improper.

The Court: Finish your question.

(Question repeated.)

30 Q. Now, on what previous occasions had you looked at the signs when you were passing along in an automobile?

Mr. Starr: That is objected to as irrelevant, immaterial, incompetent and improper.

(Objection overruled. Exception noted for defendant. Question repeated.)

A. Why, in Atlantic City, along Atlantic Avenue, where we have quite a few, they always attract my attention to look at them, whether I am on business or not.

Q. And when had you been observing them prior to this day?

Mr. Starr: That is objected to on the same grounds as stated before.

10

(Objection overruled. Exception noted for defendant. Question repeated.)

A. Whenever I would see them. It has always been second nature for me to look at them, being quite interested.

Q. What is the object of looking at them, inspecting them, as it were?

Mr. Starr: That is objected to as immaterial, irrelevant, incompetent and improper.

(Question allowed.)

A. If on business to see if they are in good condition, and otherwise, through a force of habit.

Q. Then if you had been on business and had inspected these signs, it would have been to find out if they were in proper condition or in need of repairs; is that the idea?

30

Mr. Starr: That is objected to as leading, improper, incompetent and immaterial.

(Objection overruled. Exception noted for defendant. Question repeated.)

A. Not necessarily so.

Q. On what occasion did you go out in the machine with the specific purpose of looking at these signs, ever?

Mr. Starr: That is objected to as irrelevant, immaterial, incompetent and improper.

(Objection overruled. Exception noted for defendant.)

A. Can't remember.

Q. But you do remember having gone out to inspect them in connection with other business?

A. You see I was down there —

Mr. Starr: That is objected to on the ground it is leading, improper and incompetent.

(Objection overruled. Exception noted for defendant. Question repeated.)

A. Not that day.

Q. No, not that day, but other days? A. Not while I was down there.

Q. I don't care whether you were down there or not, but you have done it, haven't you? A. You mean in my other work?

Q. Anywhere at all? A. In town, in the City of Philadelphia, yes, certainly.

Q. Then you have gone out and inspected them when you haven't been on business, that is, other business, haven't you?

Mr. Starr: That is objected to as irrelevant, immaterial, incompetent and improper.

A. No.

By the Court:

Q. On this occasion did you look at the signs of the Forty-four Cigar Company? A. I may have.

Q. Well, didn't you say you did? A. Well, I can't just remember if I did or not. I see so many of them I can't tell if I saw them on that trip or not. You see, I was out on a pleasure trip, and I don't see where that entered into it.

Q. What did you mean by saying in your testimony this morning that it was pleasure and business? A. Well, I was taking the family out and I consider that pleasure. 10

Q. What was the business you were doing? A. Well, I consider it business to look at the signs as I went along the road, if there were any there.

Q. What for, to see whether they were in good shape or not? A. See how they looked, if they were there, from interest, force of habit, being in the position I occupy with this concern. 20

Q. How many signs did you look at? A. There weren't many there. It wasn't very well populated. There was very few.

Cross-examination.

By Mr. Starr:

Q. Now, you were in Atlantic City on a vacation, were you not — A. Yes, sir. 30

Q. — at this time? And your wife and baby were there? A. Yes, sir.

Q. And your father and mother? A. Yes, sir.

Q. You had a chauffeur for the machine, did you not, employed by the company? A. Yes, sir.

Q. On this day when you took the machine, who suggested taking a ride for pleasure? A. Why, my sister had asked me to take her out and I promised to do so.

Mr. Bourgeois: I object. That is hearsay.

(Objection overruled.)

10 Q. Had your sister some friends visiting her from out of Atlantic City? A. No; from Atlantic City.

Q. And was that the first suggestion from any source that you take the machine out to have a pleasure ride with your sister? A. Yes, sir.

Q. From your sister herself? A. Yes.

Q. Was your father in Atlantic City that day? A. Not that day he wasn't. He went to Philadelphia.

Q. You were employed at a yearly salary by the
20 company, were you not? A. Yes.

Q. As assistant treasurer? A. Yes, sir.

Q. And you were not paid each day that you worked or anything of that kind? A. No, sir.

Q. Did your salary go on while you were on your vacation? A. Yes, sir.

By the Court:

Q. When did your vacation begin and end? A.
30 The dates I don't know just offhand.

Q. How much time did you have for a vacation? A. About three or four weeks, I think.

By Mr. Starr:

Q. Where was your father living in Atlantic City? A. At the Nevada Apartments, Seaside Avenue.

Q. And you and your wife and baby were there with him? A. Yes, sir.

Q. And your sister Esther? A. Yes, sir.

Q. What was the condition of her health at that time? A. That is the reason we went down to see her. Very bad.

Q. Was she in good health or otherwise? A. No, she is suffering from heart trouble and she is today.

Q. She is confined to the house today so she couldn't get out? A. Yes, since this accident. 10

Q. Had you received any instructions from your father or any of the other officials of the company to go out through the country to examine the signs? A. No, sir.

Q. When you started out that day was it for the purpose of examining the signs or transacting —

The Court: Was it part of your business, the duties of your employment, to look at the signs? 20

A. Not that day it wasn't, because I had promised my sister a ride for pleasure alone, and I did.

(Mr. Starr's question repeated.)

Q. — any business for the company or to give your sister and her friends a pleasure ride? A. That was it.

Q. Which was it? A. To take them out for a ride. My wife was also along. 30

Q. Where did you go that day? A. Well, we started out and went to Pleasantville over the Boulevard and then we rode over through Pleasantville. I am not very well acquainted with the roads.

Q. Speak up a little louder. A. I am not well acquainted with the roads. As far as I can remember,

it was through Pleasantville and somebody said we should go through some of the other roads, as we had always come over the Boulevard, and we did and went through and stopped at some farm house for fruit and so on and coasted back and then we wanted to stop for some milk up above and that is when that happened.

Q. Did you make any stops at all while you were out that day? A. If I can remember, I think my
10 grandmother asked for some fruit and we passed some fruit stands, as there happened to be quite a few of them.

Q. And you stopped there? A. For fruit.

Q. How many times did you stop, if you can recall, with reference to getting fruits or anything of that kind? A. Only that once, if I can remember rightly.

Q. Did you stop to get out of the automobile to examine any signs? A. No, sir.

Q. Or transact any other business for the com-
20 pany? A. No, there wasn't very much around that territory.

Q. Your father is president of the company, is he not? A. Yes, sir.

Q. Had you received any instructions from him with reference to what you should do for the company on the day the accident happened? A. Yes, sir.

Q. What did he tell you he wanted you to do for the company? A. He told me to go to Andrew
30 Jacoby, our jobber in Atlantic City, and work with him that day in determining the amount of distribution we had in the City of Atlantic City.

Q. Did you do that or did you take out the automobile? A. Well, I wanted to keep my promise to my sister and I took her out. I thought I could do that the next day.

Q. Your father, as president of the company, manages it and gives orders? A. Yes, sir.

Q. And you take orders as to your duties from him? A. Always.

Q. As I understand it, instead of complying with his directions and working with Jacoby, you kept your promise with your sister and took her out in the automobile; is that right? A. Yes, sir. I wanted to do that the next day.

Q. You expected to do the Jacoby work the next day? A. Because my sister had been promised. 10

Q. Is this automobile a touring car? A. Yes, sir.

Q. Seven passenger? A. Yes, sir.

Q. Who were the passengers in the machine?

By the Court:

Q. What kind of a car was it? A. A Stutz, 1915.

Q. Was it a pleasure car or business car? A. Seven passenger pleasure car. 20

By Mr. Starr:

Q. It was a regular touring car? A. Yes, sir.

Q. Was there any sign on it? A. No, sir.

Q. No sign of the cigar company or anything of that kind? A. License tags, is all.

Q. Did they have a Pennsylvania or New Jersey license tag? A. Pennsylvania.

Q. Who were the passengers in the car? A. My wife and my baby were on the front seat with me driving, and my mother-in-law and my grandmother on the two auxilliary seats on the side in the back that lift up and disappear, and on the back was my sister and two of her friends, she in the middle of 30

two girl friends that she had promised to go out that day.

Q. The two girl friends and your sister were in the back seat and your mother-in-law and grandmother were on the auxilliary seats and you and your wife and child were in front? A. Yes, sir.

Q. How old is your sister? A. My sister is about sixteen.

Q. And your grandmother is how old? A. Well,
10 she must be between eighty and ninety.

Q. And she lives where? A. She is in Allentown. She doesn't speak English.

Q. What time did you start out, do you remember?
A. Not exactly. It has been so long ago, I never paid any attention to it.

By Mr. Bourgeois:

Q. Now, you say that you went out for the benefit
20 of your sister Esther, is that right? A. Promise that I had made to her.

Q. A promise you had made to her? A. Yes, sir.

Q. And if you did look at the signs for the company at that time, then you were on a pleasure trip for the benefit of your sister Esther, and for the benefit of the company looking over the signs?

Mr. Starr: That is objected to as leading and calling for a conclusion.

30

Mr. Bourgeois: I am cross-examining him on this now.

Mr. Starr: It is a conclusion and irrelevant, immaterial, incompetent and improper.

(Question repeated. Objection overruled. Exception noted for defendant.)

A. Not necessarily. That is a matter of opinion.

By the Court:

Q. I want to ask you this question, Mr. Lipschutz: When you say signs you mean Lipschutz Forty-four Cigars? A. Yes, sir. 10

Q. Your Forty-four Cigar Company manufactures and sells cigars to dealers? A. Yes, sir.

Q. Throughout all this section? A. Yes, sir.

Q. And they have a peculiar sign of their own called "Forty-four Lipschutz Cigar"? A. Bright red and yellow colors.

Q. And it is on all the stores? A. We try to have them there.

Q. And you make it your business to have them on all the stores which sell cigars; is that it? A. That isn't my business, no. Used to be years before I came on the inside. Today I am employed on the inside only. 20

Q. When you were taking this trip what were you doing? A. On a vacation, that is all.

Q. You were on a vacation at that time, but what up to that time had been your duties with the company? A. At the time of my vacation?

Q. Yes. A. As superintendent of the factories.

Q. Superintendent of the factories? Had you anything to do with looking at signs? A. No. That was out of my jurisdiction at that time. I had no more charge of that any more. I did before. That was my first occupation. 30

Q. What was your first occupation? A. Tacking signs.

Q. When did you commence to do that? A. Well, when I first went with the concern I was about seventeen.

Q. How long did you do that? A. For about three years.

Q. How long ago has that been? How old are you now? A. I am going to be twenty-six on the twenty-fifth.

Q. Had you at or about the time of this collision
10 anything to do with putting up signs, inspecting signs, or any business in connection with signs for this company? A. No, sir.

Q. What are you talking about when you say you looked at the signs? A. Through force of habit, it being my old job.

Q. Through force of habit? A. Yes, sir, being interested in the Forty-four Cigar Company.

Q. If you looked at a sign what would you look at it for? A. Just to see how many there were up
20 there, just to get an idea.

Q. Would you report back to the company? A. Well, not on a vacation.

Q. What is that? A. Not on a vacation. I would be apt to forget it, if I did want to.

By Mr. Bourgeois:

Q. But, if you hadn't been on a vacation you would have reported back, would you? A. If it had been
30 my work I would have, but I didn't have that work to do.

By the Court:

Q. Wasn't it your work? A. No, sir, not at all. I was attending to the factories then. The advertising was in new hands.

Q. You say you hadn't anything to do with the advertising.

By Mr. Bourgeois :

Q. What did you mean this morning when you said you were partly on pleasure and partly on business? What kind of business were you on? A. Of course, it may have been a leading answer I gave there, but what I meant by that, I am not supposed to be an attorney here, but always had been interested in signs, being the first position that I occupied, naturally, when I went out on a pleasure trip it has always been second nature, sort of like a fire horse when he hears a bell to run, and so I did look at them. 10

Q. Somebody has to do that work, don't they? A. People paid for it.

Q. If you go over and do it, it saves somebody else the time? A. Not at all. 20

Q. You were just down on a vacation? A. Yes, sir.

Q. And that is the first time you had taken the car out? Did I understand you to say to Judge Starr that was the first time you had taken the car for pleasure on that vacation? A. That I can't remember, if it was the first or twenty-first.

Q. I understood you to say to him it was the first. Didn't you say it was the first? A. I don't remember. 30

Q. Well, was it the first? A. I can't remember now if I couldn't remember then, could I?

Q. Don't you know it wasn't the first? A. I just answered you that I don't remember.

Q. Do you remember about two weeks before that

time of being up before 'Squire Weeks in custody or along with Mr. Grant, the motorcycle inspector?

Mr. Starr: That is objected to as immaterial, incompetent and improper.

Mr. Bourgeois: I just want to refresh his memory and ask him whether he was then on pleasure or business.

10

Q. Do you remember that occasion?

Mr. Starr: I make the same objection, it is immaterial, incompetent, irrelevant and improper.

Mr. Bourgeois: He says he cannot remember whether he was out before or not.

The Court: You know, don't you, whether you
20 were riding in this automobile before this day?

A. Oh, yes, lots of times I had been riding in it. He asked me a different question.

Q. Had you been out on business in the car when you were down there during your vacation? A. No, that was pleasure down there.

Q. Never out on business at all? A. Not that I can remember, no.

Q. Never a single time? A. No.

30

Q. Do you think you remember all of the times you were out? A. Well, it has been so long ago I may have forgotten.

Q. How did you go down to Jacoby's when you went and saw him? A. From where.

Q. From the Nevada Apartment? A. On foot, by trolley car, and sometimes in the machine.

By the Court:

Q. You say you are assistant treasurer of this company? A. Yes, sir.

Q. Where is the company located? A. Eleventh and Wharton.

Q. Philadelphia? A. Yes, sir.

Q. How long have you been assistant treasurer of the company? A. To the best of my knowledge, about four years. 10

Q. What are the duties of the assistant treasurer? Are they defined by rules, by-laws or anything? Have you any duties outside of your office as assistant treasurer? A. Except to attend to the factories.

Q. Where are the factories? A. New Brunswick and Philadelphia, Allentown, Camden.

Q. Well, have you any other duties outside of looking after those factories? A. No, sir.

Q. How is that? A. No, sir.

20

By Mr. Bourgeois:

Q. Don't you look after the accounts? A. No, sir, I should say not.

Q. Don't you look after your patrons, your customers? A. No, I have enough to attend to the factories today.

Q. Didn't you at that time? A. No.

Q. Not at that time? A. No. It is enough.

Q. Just work part of the time and have four weeks vacation? A. Yes. 30

Q. How much of your vacation had expired at the time this accident happened? A. That I can't say exactly.

Q. You can tell me approximately, can't you? A. Perhaps a week.

By the Court:

Q. I think you said your father told you to do something? A. Yes.

Q. What was that? A. He told me that I should go down to Mr. Jacoby's the following day and to go over with him the territory in Atlantic City and see what percentage of distribution we had on our cigars, and that not being in my line of work, although I promised to do it, and I promised to take
10 my sister out, I took her out first and let that go for later.

Q. Did that embrace that country ride you were taking? A. No, sir, it wasn't supposed to be outside of Atlantic City.

By Mr. Bourgeois:

Q. But, you did extend it outside of Atlantic City?

20 A. I didn't go on that trip at all.

Q. Didn't you go the next day? A. No, the next day the machine was broke and we had enough trouble.

Q. You didn't need the machine, did you, to go to Jacoby's? A. No, not necessarily.

Q. You could go down there on foot or trolley car? A. Oh, yes.

Q. Why didn't you go down there and do that business the next day? A. I don't think anybody
30 would have been in condition to do that after seeing the sight I did.

Q. Did it make any impression on you? A. It certainly did.

Q. Then why was it you were not able to remember any more about it this morning? I thought it was a mere passing incident with you. A. It was not.

Q. How was it you couldn't tell with some definiteness this morning about the incident? A. What incident?

Q. Why, the fact that you had been there that day and who was with you and what business you were on? A. I answered every question I could remember, I think.

Q. You have stated that you were on business and pleasure. Now, you say you were only on pleasure. A. That question has been gone over, hasn't it? 10

Q. I beg pardon? A. That question has been gone over by the Judge.

Q. Is that the answer? A. Yes, sir.

Q. This was your own sister Esther? A. Yes.

Q. She is your own sister and not your sister-in-law? A. No.

Q. Your grandmother, was that your father's mother? A. That was my father's mother.

Q. How long did your car remain in Atlantic City after the accident? A. Few days. 20

Q. A few days? Then where did it go? A. We sent it back to Philadelphia to have it repaired.

Q. Then the people of the cigar company used it? A. Yes.

Q. How was it that you had that car down here, or did your father have it down? A. My father had it down.

Q. And you simply had the use of it because you were the assistant treasurer? A. Not necessarily.

Q. Well, you do have the use of it, don't you, 30 when you want it for business purposes in Philadelphia? A. For business, yes.

Q. Down here if you want it for business purposes, you have the use of it, don't you? A. For business, yes.

Q. Your chauffeur isn't always with you when you are driving that car, is he? A. As a rule he is.

Q. He wasn't on this occasion, was he? A. No, he was left in Philadelphia for special work.

Q. He wasn't with you at any time you were driving that car during this vacation trip? A. No, sir.

Q. He wasn't with you on the incident when Mr. Grant spoke to you? You were alone then, weren't you? A. No.

10 Q. Well, nobody was driving for you? You were driving the car yourself, weren't you? A. I don't remember to what incident you refer.

Q. Don't you know you were? Don't you know you were driving the car when Grant spoke to you about speeding?

Mr. Starr: That is objected to as irrelevant, immaterial and incompetent.

20 A. It is a different thing altogether.

Mr. Starr: I object as irrelevant, incompetent, immaterial and improper.

The Court: I think that question should be excluded.

30 Q. Don't you know that you were alone on one occasion two weeks before this accident happened, driving that car? A. Oh, I couldn't remember that.

Q. You couldn't remember that, it is so long ago? A. That is, to answer truthfully.

Q. Will you say you were not alone? A. I won't answer that, either.

By the Court:

Q. Had you been in the habit of using this machine for pleasure? A. Sometimes, Judge. Very few times we ever had any chance, except when we came down here to see my sick sister.

By Mr. Bourgeois:

Q. Where were you living at the time you were 10
having your vacation? A. With my father.

Q. And where was your sister Esther living? A.
Same place.

Q. Where was your grandmother living? A. Down
on Pacific Avenue.

Q. Where? A. I don't know the address. Pacific
and Carolina, some place down there.

Q. In answer to Judge Starr you said that this oc-
casion was the first time you had taken the machine
out. In answer to the Judge you say you had taken 20
it out for pleasure a few times before. Which is
correct? A. In Philadelphia or Atlantic City?

Q. In Atlantic City or Philadelphia. Any explan-
ation you have got for it? A. Well, in Philadelphia
we would take it out a few times when it wasn't be-
ing used for business, and also down here.

Q. How many times, if at all, had you taken it out
for any purpose before the day in question, that is,
before the sixteenth of August, while in Atlantic
City? A. That I can't answer. 30

Q. Had you taken it out at all? A. Well, I drove
it down there and may have taken it to the grocery
and back.

Q. To where? A. Out around the block, and so
forth, but I was instructed to go on these trips.

Q. Had you taken it out on a business trip after you came there? A. No.

Q. Had you taken it out at all after you came there before this day? A. No, I don't think so.

Q. You had brought the car down a week before and had not taken it out until this day when the accident happened? A. That I can't say if it was a week before the accident happened. You will remember this happened a year ago and I can't just re-
10 member all those dates.

Q. What ever time it was you were in Atlantic City before the accident happened, you had not taken that car out? A. To the best of my knowledge, no.

Q. Where were you living at the time you were on the Boulevard and saw Grant? Weren't you living in Atlantic City then? A. I don't remember seeing Grant.

Q. Well, do you remember being before 'Squire Weeks?
20

Mr. Starr: I object to that.

Mr. Bourgeois: He all the time goes around in a circle and says things I am quite sure he is mistaken in, and I simply want to find out if he is mistaken or I am mistaken.

The Court: Is there any doubt about the fact that he used the machine?

30

Mr. Bourgeois: I do not think there is, but he says this is the first time he took it out.

The Court: Do you say this is the first time you took it out?

Mr. Starr: He said previously he had taken it out before.

The Court: What is the fact about the matter? Won't you answer?

A. I have answered that the car has been taken out before. I drove that car down there for a little vacation and that day I took it out for pleasure.

Q. I asked you whether you had taken the car out 10 when you were in Atlantic City before the day on which this accident happened? A. Naturally I explained I had to go to the corner and back.

Q. What did you mean by saying to Judge Starr that this was the first time you had taken the machine out? A. First time I had driven it myself down to Atlantic City. We always had the chauffeur drive it. That is the way I understood that.

Q. You meant when you said this is the first time 20 you had taken the car out that that was the first time you had driven it down to Atlantic City alone? A. And taken it out. That was the first time it was in my charge alone.

By Mr. Starr:

Q. You spoke about tacking signs. How long had it been before this accident happened last August that you had any duty with reference to tacking signs or putting up signs, or anything to do with the signs of 30 this corporation? A. About four years ago I left that go.

Q. Now, as I understand, when you took this car out, took your sister for a ride, as you passed a sign of the Forty-four Cigar you would look at it? A. Naturally.

Q. Is that what you meant? A. Yes, sir, that is all I meant.

Q. Had you expected or did you perform any duty whatever with reference to the signs when you started out? A. No.

Q. Or while you were riding — A. No, sir.

Q. — did you perform any duty with reference to the signs? A. No, sir.

10 Q. Or had you been expected by the company —

By the Court:

Q. Well, did you make any inquiry about any signs? A. When did I?

Q. Yes. A. I haven't bothered with that for four years.

20 Q. On that day did you look to see whether your signs were on these stores as you went by, for the purpose of seeing your distribution in that neighborhood? A. No, I didn't look, but if I happened to come across them I seen them. I didn't look. I was out for pleasure, as I have explained.

By Mr. Starr:

Q. Did you stop at any store to see whether your sign was there? A. No, sir.

PLAINTIFF RESTS.

30

MOTION TO NON-SUIT.

Mr. Starr: If your Honor please, I move for a non-suit in this matter on the ground that no actionable negligence chargeable to this defendant corporation has been shown, and that Max Lipschutz was not the agent of the defendant and not charged with any duty with reference to the operation of the machine on that day, and the use of the machine was not by him as the agent and servant of the corporation on that occasion, and that the defendant corporation is not chargeable with any acts of Max Lipschutz with reference to the operation of the machine. 100f

Recess taken until 9.30 A. M., Thursday, May 24, 1916.

2008

Mays Landing, N. J., Thursday, May 24, 1916.

Trial of the cause resumed at 9.30 A. M.

(Side Bar)

Mr. Bourgeois: I want to introduce the testimony of Mr. Sooy and I want to argue also the admissibility of that letter. 3008

Mr. Starr: I object to the opening of the plaintiff's case. The case came to an end last night, the plaintiff closed and we discussed the motion to non-suit, and I think it is unfair to the defendant at this stage to permit any additional testimony.

The Court: I think it is only right that the Court should receive any evidence that will throw any light on the questions involved.

Mr. Starr: Allow me an exception?

The Court: No. It is discretionary.

10 Mr. Bourgeois: I think it would be just as well to have the argument before I put Mr. Sooy on the stand, because I do not think his testimony is essential, but I want it there. Our first proposition is that this is not a confidential communication. The second ground is, in addition to that being an admission on the face of it, it shows a course of conduct that is admissible against the Forty-four Cigar Company. When they were told, as Max says, that they turn around and write this letter which shows
20 a course of conduct on their part that is inconsistent with the answer they filed, in which they say they had nothing to do with it.

Mr. Starr: There is another objection which I urge independently of whether or not it is a privileged communication, and that is this, that it is not admissible against the defendant even as an admission as to the facts stated. There is nothing to show that Mr. Lex had any authority to bind this corporation by writing that letter. There is nothing to show
30 that Max Lipschutz had any authority by an admission to bind the company.

(Open court)

W. FRANK SOOY, sworn.

Direct examination.

By Mr. Bourgeois:

Q. Mr. Sooy, you are an attorney at law? A. Yes, sir. 10

Q. Do you remember the happening of an automobile accident on the sixteenth of August of last year in which Max Lipschutz was the driver? A. I remember there was such an accident, yes.

Q. Will you tell me whether or not you, on the fifteenth day of December of 1915, or the firm of Bolte, Sooy and Gill represented the Forty-four Cigar Company? A. I would rather tell you what we did. I don't know how to answer the question just exactly right. 20

Q. Well, then, tell me what you did?

Mr. Starr: I object to that. I do not know what the testimony may be, whether it will be relevant or not. It seems to me that this witness is not permitted to detail a long line of transactions and so forth between these various parties, which may be relevant and may not, and I think the questions should be put by counsel and the answers made in response to those questions. 30

Q. I guess, Mr. Sooy, you can answer that question, can't you, whether you represented them on the fifteenth of December following the sixteenth of that August? A. What happened on the fifteenth?

Q. You received a letter on the fifteenth. I will show you the letter and then you can refresh your memory? A. I got this letter from the Forty-four Cigar Company.

Q. Yes, but did you represent them at that time? Were you their attorney at that time? A. I don't know. I represented Max Lipschutz when he was charged with assault and battery before Judge Weeks.

10 Q. That was about the fifteenth or eighteenth of August? A. It was shortly after this accident. Some considerable time after the accident. And after that hearing I met Mr. Lipschutz, Senior, and Mr. Lipschutz, Junior, and I talked the situation over with them, and after talking it over with them I saw Mr. Stern of your office, and Mr. Stern was then contemplating bringing suit against the Forty-four Cigar Company, Max Lipschutz and Mr. Lipschutz, Senior. I talked with Mr. Stern to get him
20 to bring suit —

Mr. Starr: I object to any statements made by this witness to Mr. Stern. I object on the ground that we are not bound by the statement, and the testimony is irrelevant, immaterial and incompetent.

The Court: Mr. Stern was representing your concern at the time?

30 Mr. Bourgeois: Yes.

The Court: The objection is overruled.

(Exception noted for defendant.)

A. I talked with Mr. Stern and endeavored to

have him bring the suit only against the Forty-four Cigar Company, leaving out Mr. Lipschutz, Senior, because he was not in any way connected with the accident, and Mr. Lipschutz, Junior, because, as I represented to Mr. Stern, he was the agent of the company.

Mr. Starr: I move that be stricken out.

The Court: Strike it out.

10

Mr. Starr: I move to strike out the conversation between Mr. Stern and this witness on the ground that the defendant company is not bound by that and it is incompetent.

The Court: The Court will rule that the defendant company, of course, is not bound by the conversation between Mr. Sooy and Mr. Stern, but for the purpose of determining just what the relationship was between Mr. Sooy, his firm, and the defendant company, I think what happened, what transactions occurred will enable the Court to determine that question. 20

Mr. Starr: May I have an exception?

(Exception noted for defendant.)

A. As a result of that conference, Mr. Stern 30 agreed to bring his suit against —

Mr. Starr: I object. I move that be stricken out as incompetent, immaterial and improper.

The Court: Strike that out. What Mr. Stern

agreed to do must be eliminated from the case. It is what you did.

A. I communicated with the Forty-four Cigar Company.

Mr. Starr: I move that be stricken out. It does not appear whether it is by writing or by correspondence.

10

The Court: That is immaterial. Do you move to strike it out?

Mr. Starr: Yes.

The Court: The motion is denied.

(Exception noted for defendant.)

20

A. And advised them that Mr. Stern would bring his suit against Max Lipschutz and not against the Forty-four Cigar Company, or Mr. Lipschutz, Senior.

Mr. Starr: I move that be stricken out on the same ground, that it is not admissible against this defendant.

(Answer repeated.)

30

Mr. Starr: I will withdraw the objection.

A. —if the Forty-four Cigar Company would file an answer in which they admitted that the company owned the car, and that Max Lipschutz was driving the car combining his driving the car with—driving

it for the purpose of business and pleasure both, and that he was an officer of the company. Then ex-Mayor Weaver communicated with me and told me

The Court: Did he represent the Forty-four?

A. Yes, Judge Weaver, representing the Forty-four Cigar Company, then communicated with me, and I sent him a form of answer covering the agreement I had had with Mr. Stern — 10

By the Court:

Q. For the Forty-four? A. Yes.

Q. You were acting for the Forty-four Cigar Company? A. I am just telling what happened. I don't know how to determine this myself. He didn't file the form of answer I sent him and I was advised that I was representing Max Lipschutz. 20

By Mr. Bourgeois:

Q. And not the Forty-four Cigar Company? A. I was advised then that I was representing Max Lipschutz and that Judge Starr, I think it was, would take care of the Forty-four Cigar Company, or that they would, either one of the two, I forget just exactly who would.

Q. After that time did you receive this letter? A. 30
After I had written? Yes.

By the Court:

Q. After you had written when? A. After I had written—I don't know the date of the letter I had

written. This is in reply to the letter I wrote to— I thought it was the Forty-four Cigar Company. Evidently to Mr. Max Lipschutz, because this says Mr. Max Lipschutz. After I had written that letter to him in which I said if the company would admit that they owned the car —

Mr. Starr: I object to the witness detailing the contents of the letter.

10

The Court: Yes.

(Question repeated.)

A. After I had written the letter I referred to as having written, after I had had my conversation with Mr. Stern.

By Mr. Bourgeois:

20

Q. Did you receive this letter? A. Yes.

(Letter marked P2 for identification.)

Cross-examination.

By Mr. Starr:

30 Q. Mr. Sooy, you had prepared an answer, had you not, to be filed in this case on behalf of the Forty-four Cigar Company? A. I don't think I prepared it to be filed. I think I prepared it and sent it to Mr. Weaver.

Q. It was to be used as a defense in this action? A. That was my idea, yes.

Q. Do you remember when that was ? A. No, I don't remember the date at all.

Q. Of course, it was after the suit was brought?

A. Oh, yes, it must have been after the suit.

Q. Had you ever been formally discharged by the Forty-four Cigar Company after you had prepared that answer until this letter was written? A. Now, let's see —

(Question repeated.)

A. Why, I was notified by the Forty-four Cigar 10
Company that I was representing Max Lipschutz.

Q. That was later, was it not, after this letter was
written to you? A. Yes, yes.

By Mr. Bourgeois:

Q. Were you ever formally employed by the Forty-
four Cigar Company? A. Not—no, I wasn't.

Q. You received pay for what you did? Whose
check did you get for the work you did? A. Well, I 20
sent my bill to Max Lipschutz. I suppose it was Max
Lipschutz's check.

By Mr. Starr:

Q. Don't you know it was the Forty-four Cigar
Company check? A. I don't remember, no. I have
no recollection at all as to where the check came
from.

Mr. Bourgeois: Was it the Forty-four Cigar 30
Company check?

Mr. Starr: That is my understanding.

A. I am not clear on that at all. I just know I

got paid for my services. Didn't make much difference where the check came from.

Mr. Bourgeois: Do you want to admit it was their check?

Mr. Starr: No, I do not want any admission.

A. I was subpoenaed last night and didn't have
10 any opportunity to look over these files and all.

By Mr. Starr:

Q. You handed this letter to Mr. Stern, did you not? A. Yes, I handed that letter to Mr. Stern.

By Mr. Bourgeois:

Q. And he didn't hand it back to you?

20

By Mr. Starr:

Q. And Mr. Stern at that time was associated in the office of Bourgeois and Coulomb? A. Yes.

By Mr. Bourgeois:

Q. And Mr. Stern didn't hand it back to you? A. No, I handed it to Mr. Stern to show him —

30

Mr. Starr: That is objected to.

(Mr. Sooy's previous answer repeated as follows: "And advised them that Mr. Stern would bring his suit against Max Lipschutz and not against the Forty-four Cigar Company or Mr. Lipschutz, Senior,

if the Forty-four Cigar Company would file an answer in which they admitted that the company owned the car ——”)

By Mr. Bourgeois:

Q. Was that what you intended to say? A. No. Against the Forty-four Cigar Company and not against Max Lipschutz or Mr. Lipschutz, Senior.

Q. Why was the letter handed to Mr. Stern? 10

Mr. Starr: That is objected to as immaterial, irrelevant, incompetent and improper.

The Court: The objection is sustained.

Q. Let me ask this question: Mr. Sooy, was the correspondence that you had, including the letter that you received, intended by you and your clients to be confidential? 20

Mr. Starr: That is objected to as irrelevant, immaterial, incompetent and improper.

The Court: The objection is sustained. That is for the Court and not for counsel.

Q. Why, Mr. Sooy, was this letter handed to Mr. Stern by you? 30

Mr. Starr: I make the same objection, that it is immaterial upon the question of whether this letter is admissible, what motive Mr. Sooy had or what motive Mr. Stern had in securing possession of this letter.

The Court: The ruling will stand.

(Exception noted for plaintiff.)

Mr. Bourgeois: Now, I am going to offer this letter in evidence as an admission against the Forty-four Cigar Company.

10 Mr. Starr: I object upon the grounds that were stated at side bar when the matter was discussed there. It seems to me that in view of the testimony of Mr. Sooy, this is a mere privileged communication so far as the defendant is concerned and so far as Max is concerned it cannot be used on that ground, as well as the other objections which I urged to your Honor when we were discussing this matter at side bar, the objection that the letter is immaterial, irrelevant, incompetent and improper and inadmissible.

20 Recess taken until 10.15 A. M. Friday, May 26, 1916.

Mays Landing, N. J., Friday, May 26, 1916.

Trial of the cause resumed at 10.15 A. M.

W. FRANK SOOY, recalled.

30 Direct examination.

By Mr. Bourgeois:

Q. Mr. Sooy, how did you come to turn the letter of December fifteenth, 1915, over to Mr. Stern of our firm?

Mr. Starr: I object to that on the ground that the testimony is immaterial, irrelevant, incompetent and improper.

The Court: If the purpose is to show that Mr. Sooy had authority from the defendant to do so, it would be competent. That is the only ground.

(Question repeated.)

10

Mr. Starr: May I have an exception?

The Court: The only testimony that would be admissible in regard to that transaction would be this, showing that Mr. Sooy had authority from the defendant to turn that letter over to Mr. Stern.

Mr. Bourgeois: Is the question admitted or denied? I do not know how to get at it any other way.

20

The Court: Is that what you are trying to prove?

Mr. Bourgeois: That is what I am trying to show.

The Court: If that is the reason, it is admitted.

(Exception noted for defendant.)

A. To carry out the agreement I had with Mr. Stern as to the form of answer that would be filed by the Forty-four Cigar Company in the event suit was brought by the plaintiff in this case. 30

Mr. Starr: I move that be stricken out as irrelevant, immaterial and incompetent. It does not show any evidence of authority whatever.

Q. Brought against whom in this case by the plaintiff? A. Against the Forty-four Cigar Company, leaving out as defendants Max Lipschutz and his father.

By the Court:

Q. Had you any authority from the defendant to turn that letter over to Mr. Stern? A. I had written
10 the defendant stating that —

Mr. Starr: That is objected to. It seems to me we are transgressing the rules of evidence in this case. If there is any correspondence in existence between Mr. Sooy and this defendant, it can be produced and then we will know just exactly where we stand.

Q. Will you produce the correspondence you had, leading up to the receipt of this letter of December
20 fifteenth? First produce the letters you wrote and the answers to them. A. I had written a letter of December thirteenth to —

Q. Did you write before that? December ninth, I think you wrote a letter, didn't you? A. On December ninth, I had written a letter to the Forty-four Cigar Company, of which this is a copy.

Mr. Bourgeois: We ask you to produce the letter written by Mr. Sooy to the Forty-four Cigar Company under date of December ninth, 1915.
30

Mr. Starr: I have no such letter here and no such demand has ever been made on me.

Mr. Bourgeois: I make that now. The defendant is presumed to have all documents in court pertaining to the case.

Q. Is this a copy of the letter you wrote? A. Yes, that is a copy of the letter.

Mr. Bourgeois: I shall offer it in evidence.

Mr. Starr: I object to that letter upon the ground that there has been no foundation laid for the introduction of a copy, no demand has been made for the production of the original, and it is a confidential communication from the attorney to the client, and there is nothing in that letter that would warrant the inference that Mr. Sooy was justified in turning the letter in question over to the attorney for the plaintiff. That is the only question that is being discussed here, as to whether or not there was a waiver of privilege so far as the defendant was concerned, and that letter is not evidential of that fact and it is irrelevant, immaterial and incompetent. I make another objection, that the statements contained in that letter are not binding upon or evidential against the defendant in this case. 10 20

The Court: The objection will stand. I will look at all the correspondence. This is primarily a Court question.

(Exception noted for plaintiff.)

(Letter marked P3 for identification.)

30

Q. Now, Mr. Sooy, I will ask you to produce a letter received by you from the Forty-four Cigar Company under date of December eleventh in answer to Exhibit P3 for identification? A. There is the letter.

Mr. Starr: I object to that letter upon the ground that it is not evidential against this defendant.

Mr. Bourgeois: That letter is offered, among other things, for the purpose of showing that after the eighth day of December, Mr. Sooy did not represent the Forty-four Cigar Company.

10 Mr. Starr: And my objection to the paper upon that ground is that there is nothing to show that the letter is binding upon the Forty-four Cigar Company, nothing to show the authority of the assistant secretary, who wrote the letter or signed the letter.

Mr. Bourgeois: We have some other letters that bear on that same thing.

The Court: All right, go ahead and I will consider them altogether.

20

(Letter marked P4 for identification.)

Q. Now, have you a letter that you wrote to Max Lipschutz following the date of December eleventh?

A. Yes, sir.

Q. I think December thirteenth? A. December thirteenth.

30 Mr. Bourgeois: I will offer that letter for identification. I will mark it for identification and offer it in a few minutes.

Mr. Starr: I make the same objection to this letter as I did to the other copy. This is a copy, not the original, and we have not been called upon to produce the original. In any event, the defendant

here is not bound by the statements contained in that letter, and it is a privileged communication, and as against this defendant in this cause it is irrelevant, immaterial and incompetent. There is another objection with reference to that letter which has occurred to me. This is a letter written to Max Lipschutz, and it seems to me in any event it is a confidential communication between attorney and client.

(Letter marked P5 for identification.)

10

Q. Have you a letter written to you from Forty-four Cigar Company under date of December eighth?

A. Yes.

Q. Will you produce it, please? Was that written in answer to a letter from you, or was this an original letter from them to you? A. That is an original letter.

Mr. Starr: Is this letter offered?

20

Mr. Bourgeois: It will be.

Mr. Starr: I object to the introduction of the letter on the same grounds as stated before, there is no evidence to show that the person who signed the letter had any authority to bind the corporation. It is inadmissible, irrelevant, incompetent and immaterial and it is a confidential communication between attorney and client, and the defendant company is not bound by the contents of the letter.

30

(Letter marked P6 for identification.)

Q. Mr. Sooy, did you write to the Forty-four Cigar Company prior to December eighth? A. Prior to December eighth, 1915?

Q. Yes, I mean with relation to the — A. A letter to John Weaver, representing the Forty-four Cigar Company on December third. Now, wait a minute. Yes, on December third I wrote a letter to the Forty-four Cigar Company.

Q. Let me see it, please. Did you get a reply to that letter? A. Yes, sir.

Q. Will you let me see the reply, please? A. On December fourth.

10

Mr. Bourgeois: That does not contain anything except a matter that is not of importance.

Q. Did you have any other letters to or from them, the Forty-four Cigar Company, bearing upon this question of the admissions of allegations one, two and three? A. I had written two letters to Mayor Weaver, representing the Forty-four Cigar Company, of Philadelphia, one on November twenty-third

20 and one on December —

Q. They were both prior to the letter of December eleventh which you received from the Forty-four Cigar Company, terminating your employment? I think that is all, Mr. Sooy. One Question. Did you make investigation to learn whether or not the Forty-four Cigar Company ever paid you any fee?

30 A. Yes, I find that I was paid or check was sent me on January twenty-fifth, 1916, by Max Lipschutz, in a letter signed by Max Lipschutz, in which he told me that he was paying the enclosed bill.

The Court: Was the bill to him?

A. Yes, the bill—I say the bill was to him. I would like to show the correspondence. There is the letter in which the check came.

Q. "My personal check" —

Mr. Starr: I object to that letter on the ground that it is not binding upon the defendant and it is a privileged communication between attorney and client and it is not evidential of any fact in issue in this cause, irrelevant, immaterial, incompetent and improper.

(Letter marked D7 for identification.)

01
10

Mr. Bourgeois: On cross-examination yesterday, Judge Starr asked him whose check it was and then he asked him if it was not the check of the Forty-four Cigar Company, and I offered to stipulate it was, and now I guess we are entitled to show the fact.

The Court: Well, he says he got the check from Lipschutz.

By the Court:

02
20

Q. You sent him a bill and he paid you; is that it?

A. That is the purport of the testimony, yes.

Q. Well, is it the fact? A. Yes, I sent him a bill. I forget how the bill was addressed, but I got a check from Max Lipschutz.

By Mr. Bourgeois:

03

Q. These copies that you have produced here of letters, were they duplicate copies of letters, the originals of which were sent? A. Yes, they were duplicates of the originals.

04
30

Cross-examination.

By Mr. Starr:

Q. You didn't send the letters, did you, personally? A. No, I dictated them, signed them.

Q. That is all you know about it? A. That is all I know about it.

10 Q. Are you under subpoena to be here today, or did you come voluntarily? A. I was under subpoena yesterday and returned today at Mr. Bourgeois' request.

Q. Were you required by subpoena to produce these papers this morning? A. No.

Q. You did that voluntarily? A. I brought the papers voluntarily.

20 Q. Have you a copy of the bill which you rendered to Max Lipschutz? A. No, I haven't. I endeavored to look it up this morning on the books, but I don't look at the books often enough to know just how to find it, and, therefore, couldn't find it.

Q. Is that the bill which you rendered Mr. Lipschutz (handing paper to witness)? A. It must be the bill.

Q. And the charge of one hundred and fifty dollars is for fee in this case, isn't it, Fox against the Cigar Company? A. That is the way it is itemized here, yes.

30 Q. So that the charge that you made was for a fee in this particular case? A. No, sir.

Q. That is the way the bill is rendered, isn't it? A. That is the way the bill is rendered, yes, sir.

Mr. Bourgeois: Now, I am going to offer in evidence these letters for two purposes, the letters and copies. One is for the purpose of showing that this communication was not a confidential communication, and the second is for the purpose of showing that before the letter of December fifteenth was written, whatever relation Mr. Sooy had with the Forty-four Cigar Company, had terminated, and, therefore, their letters written to him after the termination of his services could not be considered as a confidential communication. If you will read those letters through, you cannot help but see that there was an agreement made between Mr. Stern of our firm ——— 10

Mr. Starr: I object to this statement of the contents of the letters. It is simply a question to determine whether there is sufficient evidence to warrant your Honor in permitting this letter to go in evidence, and it seems to me highly improper, the contents of those letters, except as to that particular circumstance. 20

(Side bar.)

Mr. Bourgeois: The first reason I am going to argue is that that letter is not a confidential communication, and that one cannot read these letters through without discovering the fact to be as it was, that there was an agreement between Mr. Stern, of our office, and Mr. Sooy, of Bolte, Sooy and Gill, that if the plaintiff brought the suit not against Max Lipschutz or his father, but against the Forty-four Cigar Company, whom Max Lipschutz was then employed by, that certain things were to be done, that is, they would admit that Max Lipschutz was running that 30

car in the business of the company, that it was the company's car, and that he was an officer of the company. Those three things clearly appear from the letters as to what the agreement was, supporting Mr. Sooy's testimony of yesterday.

10 The Court: It is the policy of the law that when a client writes his lawyer in regard to any matter or thing in connection with litigation pending or about to become pending that it is privileged. That is, I think, the law of New Jersey. I shall hold that to be the law.

20 Mr. Starr: I restate the objections I made before and insist they are all of them binding with reference to the introduction of this letter. The other correspondence, it seems to me, is not material, certainly not material upon the issue in this case, only possibly as to the question of whether or not this particular bit of evidence, the letter itself, is admissible, and that is a matter that must be determined by your Honor as a court question, and these other letters that are introduced in evidence are not for the consideration of the jury upon the main question of liability in this case.

30 Mr. Bourgeois: I think that is right. If the letter is admissible, I shall not offer those other letters, because your Honor determines this question, as I understand it; unless you want me to offer them; but if the letter is not admitted, then I shall offer them for the purpose of having them for review.

The Court: I will admit the evidence and deny the motion to non-suit, giving you leave to renew your motion at the end of the case on all the grounds.

Mr. Starr: May I have an exception and it may be understood that all the objections that were urged against the admissibility of this letter and also as a basis for non-suit in the various discussions we have had may be considered upon this application?

The Court: Yes.

Mr. Starr: And your Honor will allow an exception upon all those grounds?

10

The Court: Yes.

(Exception noted for defendant.)

Mr. Starr: It does not make any difference whether a client is a party to a suit or not, the attorney is never permitted to disclose a confidential communication from any source, whether a party to a suit or some party outside of the record. The privilege is as to the communication, and unless that privilege is waived by the client, the declaration or the communication is not admissible. I urge these objections also as to the admissibility of this letter.

20

The Court: I will consider them.

(Letter previously marked P2 for identification now marked Exhibit P2.)

30

(Open court.)

DEFENDANT'S TESTIMONY.

ESTEL D. RIGHTMIRE, SWORN.

Direct examination.

10 By Mr. Starr:

Q. Mr. Rightmire, where do you live? A. Ventnor City.

Q. What is your profession? A. Civil engineer and surveyor.

Q. Did you make a map of the intersection of these two roads, the Linwood Road and the Zion Road? A. Yes, sir.

Q. And is that the tracing here? A. Yes, sir.

20 Q. And that tracing is made to what scale? A. One inch equals fifteen feet.

Q. One inch equals fifteen feet? A. Yes, sir.

Q. And was it made according to measurements? A. Yes, sir.

Q. And are the lines of the road and bridges and fences and things of that kind accurately shown? A. Yes, sir.

Q. The top of the map is toward the north, is it not? A. Yes, sir.

30 Q. Now, the road that runs from the top to the bottom of the map, is that known as the Linwood Road? A. Well, it is a road that runs from Steelmanville to Bargaintown Mill.

Q. Is that the road that has been called the Linwood Road here? A. Yes, sir.

Q. And the road that runs across the map, that is

the Zion Road, is it not? A. Well, it is the Northfield and English Creek Road, county road. It is termed here, I understand, the Zion Road.

Q. English Creek Road or the Zion Road is a county road? A. Yes, sir.

Q. Improved? What is the character of the other road? A. Township road.

Q. And at the intersection, or for a short distance on either side of the intersection with the Zion Road, what is the character of the surface of the roadway? 10

A. On which road?

Q. On the Zion Road. A. Why, it is a sandy, gravelly road, fair condition.

Q. Are the houses that are in that neighborhood indicated on the map? A. On the northerly side of the county road, or Zion Road.

Q. What is the nearest house on the southerly side of the county road? It isn't shown on the map. Do you remember? A. I haven't it located. I don't know just how far it is. I should judge it is about 20 three hundred feet.

Q. Now, won't you tell us what this line is called, the top of the bank at the southwest corner of the junction of the two roads? A. That is an elevation above the roads.

Q. About how high is it? A. Three feet and three-tenths above the road.

Q. At what point? A. Near the intersection.

Q. Well, is it where it is indicated, this line bank, three feet, two inches? A. Yes, sir. 30

Q. That is the point where you made the measurement? A. Yes, sir.

Q. Between that point and the intersection of the two roads what is there? Is there any elevation there or flat surface? A. Flat surface, comparatively flat.

Q. And is the traveled portion of the Linwood

Road, south of the Zion Road, indicated on the map, the width of it? A. It is.

Q. Eighteen feet? That is right, is it? A. Yes, sir.

Q. And does the map accurately indicate the angle at which the two roads cross each other? A. Yes, sir.

Mr. Starr: I offer the map.

10 (Map marked Exhibit D5.)

Cross-examination.

By Mr. Bourgeois:

Q. What is the width of the English Creek—Northfield Road? A. The width of gravel is twenty feet.

20 Q. That, you say, is a county road. Was that improved under the State Road Act? A. Yes, sir, county and State.

Q. And the width of the gravel on what we call the Linwood Road is how much? A. Eighteen feet.

Q. Is there anything more along that road than simply one set of ruts? A. Well, it is just about where it is traveled, yes.

Q. Now, you say, the height of the embankment here, where the line you have drawn and lettered is, is three feet? A. Yes, sir.

30 Q. Doesn't the land from that line that you mark as three feet in height slope off until it comes to the intersection of those two roads, the graveled portion? A. No, it does not.

Q. How does it go? A. It gradually goes down for a few feet and then from there on it has a gradual slope out to the road.

Q. What is the angle at which the Linwood Road from the south approaches the Northfield—English Creek Road? A. Sixty-six degrees.

Q. And a square is ninety degrees, isn't it? A. Yes, sir.

Q. Then a person going along or at the middle of the Northfield Road, if he wanted to look down the Linwood Road, would have to look back over his shoulder, wouldn't he, if he was facing towards Northfield? A. Yes.

10

Q. Now, what is the distance from the center of the Northfield Road and the center of the Linwood Road to the middle of the bridge over the little creek on Linwood Road north of the English Creek-Northfield Road? A. Sixty-four feet.

Q. Will you measure out from the fence on the northerly side of the little ditch or creek that appears on the map a distance of forty-five feet and tell me where that is? A. From where?

Q. From the fence at the bridge on the northerly side of the creek or stream. You have marked it by an (X), have you? A. Yes, sir.

20

Q. About one inch to the right of the circular lead pencil mark? A. Yes, sir.

Q. Now, Mr. Rightmire, will you measure from the intersection of the Linwood Road or center of it with the Northfield Road a distance of fifty-two feet? Now, measure from the fifty-two feet across to the point that you have indicated on the map as being forty-five feet inland from that fence? A. Sixty feet.

30

Q. That is one hundred and twelve feet in all? A. Yes, sir.

Q. What is the scale of this map? A. One inch equals fifteen feet.

Q. Now, what is the per cent. of grade of the Lin-

wood Road passing from the middle of the Northfield Road southerly? A. That I don't know. I didn't measure that.

Q. You noted the grade but don't know how much? A. Yes. There is some grade but I don't know just how much.

Q. When was that map made? A. January, 1916.

Q. Then at that time there was no vegetation, I suppose, along this hill here? A. Outside of some
10 brush.

Q. There was some standing brush there? A. Yes.

Q. How high was that? A. I don't just recall. There was some brush there.

Q. No leaves on it, of course? A. No.

By Mr. Starr:

Q. Did you measure to ascertain how far it was from the center of the Zion Road to the top of the
20 hill on the Linwood Road toward the south? A. No, I did not.

CHARLES A. BROWN, SWORN.

Mr. Bourgeois: Where were these pictures taken? Where was the camera placed, about?

30 Mr. Starr: Each one is marked.

Mr. Bourgeois: If you will show that is where the camera was placed, that is all I care.

Direct examination.

By Mr. Starr:

Q. Mr. Brown, where do you live? A. Atlantic City.

Q. And you are a photographer? A. Yes.

Q. On the nineteenth of August, did you take any photographs with reference to the vicinity of the junction of these two roads, the Linwood Road and the Zion Road? A. I did.

Q. It was on the nineteenth of August, was it? A. 10
Yes, sir.

Q. Now, I show you photograph which has already been marked Exhibit D1 for identification, and marked number one in the corner. Won't you tell the jury where the camera stood when that picture was taken, in what direction it was pointing? A. The camera was—this is the Zion Road, or is this the Linwood Road?

Q. This is the Linwood Road in that direction, going to the top of the picture, Zion Road is going 20
across the picture, as I understand it. A. This photograph was made just as this data up here, seventy-five feet. It was measured, I believe, when we made the photograph at the time, seventy-five feet, right in the center of the road.

Q. Center of the Linwood Road looking toward the Zion? A. Toward the Zion.

Q. And the camera was located how far from the Zion Road? A. From the Zion Road, I believe, it was about fifty or fifty-five feet. 30

Mr. Bourgeois: Do you know anything about where the camera was except from the notes?

A. I do, if I see the picture, but I didn't measure it myself. It was measured at the time the photo-

graph was made. Didn't measure with no ruler.

Q. You say it was about how far? A. About fifty-five feet from the Zion Road, that picture there you have in your hand.

Mr. Starr: I offer that photograph.

(Photograph marked Exhibit D1.)

10 Q. Now, I show you the photograph which is marked in the corner number two, and ask you whether you took that photograph, and where the camera was located? A. I can find the place myself where the camera was, if I remember this picture. This was made from the center of the Zion Road looking towards the Linwood Road, I believe.

Q. About how far was the camera from the center of the Zion Road? A. About fifty feet.

20 Q. And the house that is shown here, is that the house, the Dr. Raith house, that is spoken of, with the Italian and the chicken yard? Do you remember that? A. Yes, I do. That is the house.

Q. You went there afterwards and took a photograph from the chicken house, did you not? A. I did, yes.

Mr. Starr: I offer that photograph.

(Photograph marked Exhibit D7.)

30

Q. I show you a photograph which is marked three in the corner and D2 for identification, and ask you whether that picture was taken by you and where the camera was located? A. I made this picture, and this is similar to the same picture, only the camera was moved a little toward the Zion Road.

Mr. Bourgeois: I will admit them without his testimony, because it is quite evident he does not know a thing about where the camera was. He only reads your notation about it.

A. They were measured at the time, I believe.

Q. Measurements were made at the time, were they? A. Yes, sir.

Mr. Starr: I offer this in evidence. 10

(Photograph marked Exhibit D2.)

Mr. Starr: Also a similar photograph, which is marked four in the corner.

(Photograph marked Exhibit D8.)

Mr. Starr: One marked five. 20

(Photograph marked Exhibit D9.)

Mr. Starr: And a similar one marked five also.

(Photograph marked Exhibit D10.)

Mr. Starr: And a similar one marked six.

(Photograph marked Exhibit D11.) 30

Q. I show you another photograph with some chickens in the corner. Where was that photograph taken from? A. That was made where the Italian was, at that house.

Q. The chicken yard? A. Yes.

Q. And the camera was pointed in what direction?

A. Toward the Linwood Road and the Zion Road.

Q. The junction of the two roads? A. Yes.

Mr. Starr: I offer that in evidence.

(Photograph marked Exhibit D4.)

Q. Did you also take a photograph of the Lipschutz machine? A. I did.

10 Q. Is that a picture of it as you saw it? A. Yes, sir.

Q. When was that taken? A. I believe that was made August nineteenth.

Mr. Starr: I offer that in evidence.

(Photograph marked Exhibit D3.)

No cross-examination.

20

— — —
BENJAMIN LIPSCHUTZ, SWORN.

Direct examination.

By Mr. Starr:

Q. Mr. Lipschutz, are you the father of Max Lipschutz? A. Yes, sir.

30 Q. And are you also president of the Forty-four Cigar Company? A. Yes, sir.

Q. Do you remember the day this accident happened? That is, you remember the fact of the accident? A. Yes, sir.

Q. Where were you that day? A. Philadelphia.

Q. What instructions had you given Max with reference to what he should do on the day of that accident? A. I gave him instructions to go around with Andrew Jacoby from one store to another and see the distribution of the goods.

Q. Where? A. In the City of Atlantic City.

Q. Did you give him any instructions to go out into the country with the machine? A. No, in the country. I told him not to go in the country with his sister. Business before pleasure.

10

Q. You knew of the request of the sister for an automobile ride, did you? A. He told me that she made a request before the appointment with Jacoby but I said, "She will wait the next day, and keep the appointment with Jacoby, and not to go for any pleasure."

Q. Max was the assistant treasurer of the Forty-four Cigar Company, was he? A. Yes.

Q. What part of the business did he have charge of? A. To go from one factory to another and see how the goods is made and to employ foreman and people employed in the shops.

20

Q. With reference to the manufacture of the goods? A. Making the cigars.

Q. Did he have anything to do with the advertising feature of the company or anything of that kind? A. No, sir.

Q. Did he have anything to do with the placing of signs throughout the country? A. No, sir.

Q. That wasn't part of his employment? A. No, sir, we got other people for that.

30

Q. On this day the accident happened, did he have any authority from you as president of the company or from any other officer of the company, to your knowledge, to take the automobile out and inspect the signs around Atlantic City in the coun-

try? A. No, sir, in the country. The whole company, Mr. Funk, Mr. Lex and myself —

(Objected to.)

Q. Just answer the question. Had he any duty to perform so far as the company was concerned with reference to the inspection or location of signs around Atlantic City, the country around Atlantic
10 City? A. None whatever.

The Court: Or would it be in keeping with his duties as an officer and employe of the company to go around the country and see what the output was as indicated by the signs on stores and places?

A. He wasn't to do that.

Cross-examination.

20

By Mr. Bourgeois:

Q. How long has the Forty-four Cigar Company owned this car? A. Couple of years.

Q. What did they buy it for? What was the object? A. Object to entertain a customer when he comes in town, a prospective customer or a regular customer, and to go, take me home, and what is necessary in the business.

30 Q. Take you home? A. Yes, to take me home or to go to the bank or to take a customer out.

Q. Who else used it besides you? A. My son.

Q. And who else besides your son? A. Mr. Funk, Mr. Lex.

Q. In other words, all of the officers of the company; is that right? A. The officers and my wife and children.

Q. Yes, but primarily it was bought for the purpose of the company and the benefit or convenience of the officers of the company; is that right? A. That is right, but also for the purpose of taking out my sick daughter.

Q. Your sick girl? A. Daughter.

Q. In other words the company bought it for the purpose of taking out your sick girl occasionally? A. Yes.

Q. How often had she been taken out in it? A. 10 Good many times.

Q. Where, in Philadelphia? A. Philadelphia and Atlantic City.

Q. And sometimes in Atlantic City? A. Yes.

Q. During what course of time, what period of time? A. All the time since we had the machine.

Q. Ever since you had the machine? Was that one of the reasons it was bought by the company? A. For both reasons.

Q. Now, when it was taken out in the city for the benefit of your daughter, who drove it? A. Chauffeur. 20

Q. Always, or sometimes did your son? A. Well, sometimes.

Q. Sometimes your son? When it was used for business purposes, who drove it? A. Chauffeur.

Q. And who else? A. Sometimes the son.

Q. Now, when your son would drive the car for business purposes, what would be the nature of the business? A. Take a customer to the train or to hotel or bring him to the shop. 30

Q. And would he not also use it for the purpose of checking up your trade? A. No, he didn't have no time for that.

Q. I know, but he was assistant treasurer, wasn't he? A. Yes.

Q. For instance, you wanted him to go to see Mr. Jacoby; that was for the purpose of checking up your trade, wasn't it? A. That was a special arrangement made during his vacation, that I was in the city and he should go with Jacoby for a certain dispute about distribution. I didn't have no time, so I ordered him, in the presence of Jacoby, Saturday night, he should go with Jacoby and examine the distribution of the goods, not signs, how many places
10 the goods is placed, to see how many dealers got our goods in the City of Atlantic City. Not any signs. The dispute with Jacoby and myself was that they didn't give us enough distribution. He said that he did. So we made up, Jacoby and myself, made up to go out Monday, my son and Jacoby to go out Monday and to go from one store to another and bring a report to me how many people got the cigars, how many dealers, but not to go anywheres else, but only from one store to another, and my son
20 and nobody else.

By the Court:

Q. How would you find out whether a dealer had your cigars? By the sign? A. No, inside, on the case, or in the case.

Q. What had the sign to do with it on the outside? A. Nothing at all. Only the distribution of the goods, that was the question for that day.

30

By Mr. Bourgeois:

Q. I think the Judge didn't mean for just that day. Any time, what did the sign on the outside have to do with it? Did that indicate they sold your goods? A. No, good many have the sign that wouldn't

have the goods. That don't indicate the goods is there. The sign might be there for a year and they wouldn't have no goods. The jobber got to see that the goods be there, and we are after the jobber to prove that the goods is there. His duty is to have the dealers keep our goods.

The Court: What does the sign indicate? As a rule, doesn't it indicate that the man who has the sign over his store is selling your stuff or not? 10

A. That is the way. We put the sign down in the beginning to show that the goods is there, and if the jobber neglects to sell him goods, the sign might be there and the goods might not be there.

Q. That is a part of the agreement, isn't it, when you agree to place your goods in a man's store and he agrees to handle them, a part of the agreement is that you will put your signs there to advertise it; isn't that so? A. No agreement whatever. We ask him the favor. If he will let us do it. If he will do it, we do it. If he don't the goods is there without the sign. 20

By the Court:

Q. Do I understand you do sell to people who don't put your sign up? A. Yes, if they don't want signs, we can't compel them. We ask them as a favor. 30

Q. That is an advertisement of yours? A. Yes.

Q. Does that fairly indicate what stores you are selling or not, or hasn't it anything to do with it? A. If signs is on places, the goods is supposed to be there, but a good many dealers haven't got the goods and the sign is there.

By Mr. Bourgeois:

Q. That is the exception to the rule, though, isn't it? It is the exception to the rule that a man who is in the cigar business will let you advertise your cigars unless he handles them? A. That is right.

Q. How long had you been in Atlantic City before the sixteenth of August of last year with your car and your family? A. With the family I was there
10 since June.

Q. Since June? A. Yes, but with the car it was there only—I don't remember. We didn't come with the car right away. A little later.

Q. Little after June? A. Yes.

Q. How long had Max been down with you prior to the sixteenth of August? A. Quite some time.

Q. Four or five weeks? Was he there during July? Was he there the Fourth of July? A. I think he was.

20 Q. And from that time on he remained there, didn't he? A. Yes.

Q. While he was on sort of a vacation he attended to some business, didn't he? A. No.

Q. Then, why did you tell him to go and attend to the Jacoby business? A. For this special dispute with the jobber I asked him.

Q. But that was business, wasn't it? A. Yes. The jobber came for the man to go around.

30 Q. Then he did attend to some business while he was down there, didn't he? A. That day.

Q. Even though he called it his vacation? A. That is the only day. In fact, he didn't attend to any business. That day he didn't go for the business. He went for pleasure and it was all off. Never went.

Q. You say you told him not to go to the coun-

try. Why did you tell him not to go to the country tomorrow? A. What do you mean tomorrow?

Q. Why before that day. Why should you have supposed he was going to the country instead of attending to what you told him to do? A. You don't understand me. Saturday night, Saturday evening, my son and myself was by Jacoby's, made arrangements that he should go Monday morning with Jacoby to see the trade, about the distribution, as that day is the collection day, the collecting day for Mr. Jacoby, so my son would be with him to look at the dealers, how many got cigars. The same Saturday night my son told me that he made a promise to his sister to take her out for pleasure. I said, "Well, you can't do it; you made appointment for business," and Sunday I spoke again that he should go on with Jacoby. Monday, before I left for business, I said, "You go with Jacoby for business, but not for pleasure." Monday night I came home, that ended it. 10

Q. What time did you have your appointment with Jacoby, for what time of the day? A. In the morning. 20

Q. Well, why would that have interfered with him going out at five o'clock in the afternoon? A. That would have taken all day long and until late in the night.

Q. For which? A. To go out with Jacoby to see the whole trade, and then he wouldn't be through, because it is so much.

Q. Didn't he go out in the morning on that trade? 30
A. No.

Q. Didn't he go out in the morning with Jacoby?
A. No.

Q. Are you quite sure about that? A. Sure of that.

Q. And wasn't he going around attending to that same business when this accident happened? A. No, sir.

Q. Wasn't attending to that business? Just taking your daughter out? A. Daughter and the whole family, with her friends.

Q. Now, when your son is in Philadelphia going around with the machine, it isn't infrequent for him to report about the condition of your signs, is it? A.
10 That would mean going over the head of our sign department.

Q. I don't mean that. That may be true, but it is not infrequent for him to do it, is it? A. I don't know if he done anything like that.

Q. Let me ask you, suppose you were going out in that machine and you saw one of your signs that was in bad condition or down, would you say nothing about it, simply because you had a department to look after it, or would you bring it to the attention
20 of the department? A. I would.

Q. You would bring it to the attention of the department? A. Yes.

Q. Didn't your son frequently do that thing in Philadelphia? A. He might have done it more than I know, because he is very busy in the factories, going from one town to another, and the most of the time out of town in the factories.

Q. He is on the street a good bit? A. No; in the factories, or from one factory to another, but always inside, or we go to buy tobacco and he hasn't
30 got no time for that.

Q. Now, I will ask you again, when he was out on the street, if he saw a sign that needed attention, didn't he report that to the company and didn't your company act upon it? A. He might have done that. I don't know.

Q. And if he were out and reported a sign down, even in the country, he would report that to the company and you would act upon it, wouldn't he? A. If, but I don't know of any.

By the Court:

Q. What is that? A. If he would report, that would be acted upon, but I don't know of any reports from the country. 10

Q. Do you say you don't know of his doing so? A. I don't know if he did so, any sign from the country, or a report about any sign from the country. The matter was—he was in the family and he had to take care of the family and the machine and he didn't look for anything about signs when he went out with the family, with the child.

By Mr. Bourgeois:

Q. Mr. Lipschutz, you are president of the company, and your son is assistant secretary. He also is a director of the company, isn't he? A. Yes. 20

Q. Now, isn't it a fact that he performs duties outside of what you have just said were his specific duties? He does other things around there? He has other charge of that company than simply to go to those factories, one from the other? A. That is his duty.

Q. I know that is his duty, but doesn't he do other things besides that for the company? A. He might, but it isn't—he ought not to do it. He has got plenty to do for making the cigars. 30

Q. If he gets busy and it is something outside of his ordinary duty for the company, you folks don't reject it because he wasn't specifically told to do it,

do you, but you accept it, don't you? A. That is a question. If he should take some other duties, there will be disharmony in the business. If he should take signs, the sign department will get in trouble for him interfering. If he would take sales manager, the sales managers has the business. Therefore, he attends only to making cigars.

The Court: His business is to make cigars and
10 nothing else?

A. Nothing else only that the cigars shall be made right.

Q. Suppose your son Max were out today, we will say, and he ran across a man that he could make a customer for your cigars, do you mean to say to me that he would not try to sell your cigars but would let the thing go until you got the salesman down there, or would he try to sell them?

20

Mr. Starr: I object to that on the ground that it is irrelevant, immaterial and incompetent. It presupposes a case that has not been proven to exist.

The Court: It is in the line of cross-examination. It goes to the question of the scope of his authority.

(Exception noted for defendant.)

30

Q. I say, suppose Max were out somewhere today and had an opportunity of making a good customer for you, would he put that aside and do nothing except send word to the salesman to come down and make a customer of this man, or would he make a customer of him himself and report to the company?

A. Now, let me tell you what happened, what I know.

Q. No, I want you to tell me what he would do, if you know, in the course of business, not some isolated case, but tell me what he would do. A. He would forget all about it.

Q. He wouldn't make a customer at all? A. Right. That is right. He is so involved, so interested in making the cigar right that the selling it he ain't interested.

10

By the Court:

Q. You mean to say you have different departments? A. Yes, sir.

Q. How many departments have you? A. Selling department, advertising department, manufacturing department, executive department, revenue department, everything has a separate department. There is a department for every branch.

Q. And does one department interfere, take a hand in the business of another department? A. No, sir. 20

Q. Why not? A. Well, it would disharmonize the business. Everybody got to take care of his own business.

By Mr. Bourgeois:

Q. Suppose Max should not forget all about it, but should make a customer of that man and should send in an order to the company, would the company refuse to honor that order because it had not come through a salesman? 30

Mr. Starr: I object on the grounds as stated before.

The Court: I think it is a proper question.

(Exception noted for defendant.)

A. Well, it would have to go to the salesman.

Q. I didn't ask you that. I want to know if they would refuse to honor the order because it was not taken by the salesman? A. That order would be given over to the salesman —

10 Q. And he would report it to the company? A. — and the salesman would go and see the customer and get the order and bring it in.

Q. Would he get the order over again or would he ship the goods? A. He would be over there and attend to that. That would be his duty altogether.

Q. I want to know what they do in practice. Suppose Max did happen to think about it, you know, and he made a sale of cigars while he was down in Atlantic City, and he went up to the office and he reported that he had sold cigars down in Atlantic City, and you say it would go to the salesman. The salesman would have the order already taken from the man in Atlantic City. Do you mean to say that the salesman, before he shipped the order, would go down to Atlantic City and see the customer, spend that time or would he ship the goods? A. We wouldn't ship the goods from Philadelphia.

20 Q. Where would you ship the goods? A. That would have to be the jobber in Atlantic City, would have to do that.

30 Q. Would you notify your jobber in Atlantic City to ship the goods or would you have your salesman come down and go and get the order over again from the man and then have him go and notify your jobber? A. The jobber here would do it.

Q. Then you would act upon Max's information

and it would be referred to the jobber in Atlantic City and he would go and deliver the goods? A. That would have been, but it isn't. We got extra people here with the jobber. Besides the jobber we got men that go around and do that.

By the Court:

Q. How many men have you in your employ altogether? A. All over the factories? 10

Q. Yes. A. Possibly two thousand.

Q. How many? A. I don't know exactly. I can't tell exactly, but over a thousand.

Q. Well, how many heads of departments have you? A. Well, first we have got a tobacco department, buying tobacco, then we have got a storing department. Then stripping tobaccos, strip and cure them. Then the manufacturing of cigars. That is a department. In the manufacturing of cigars there is several departments, different branches of bunches, and rolling and packing and so forth, and then comes the sales department, office department and advertising department. 20

Q. Your son is assistant treasurer. What are his duties as assistant treasurer? A. Well, when they need money, it is considerable to get up how to get the money, how to spend the money, how much tobacco to buy. He is my assistant, and he has to get after tobacco to know how much tobacco we got to buy, how much money to invest in tobacco. 30

By Mr. Bourgeois:

Q. In spending the money it takes two of you, does it? A. Yes, sir.

Q. One can get it in but it takes two to let go of it; is that the idea? A. Sure.

By the Court:

Q. Are you the treasurer? A. I am president and treasurer.

Q. You are president and treasurer and your son is your assistant? A. Yes, sir.

Recess taken until 1.20 P. M.

10

AFTERNOON SESSION 1.20 P. M.

BENJAMIN LIPSCHUTZ, resumed.

Further cross-examination.

By Mr. Bourgeois:

20 Q. Mr. Lipschutz, what is the name of your sick daughter? A. Esther.

Q. That is the one that Max had out with him that day? A. Right.

By Mr. Starr:

Q. Mr. Lipschutz, as a matter of fact, since Max has been in charge of the manufacturing end of the business, has he had anything to do whatever with
30 the signs?

Mr. Bourgeois: That is objected to as leading.

A. No.

The Court: I think that is a proper question. It is allowed.

Q. What was the answer? A. No.

Q. Now, has he or has he not at any time since he has been in charge of the manufacturing end of the business, made any reports that you ever heard of with relation to the signs in the various parts of the country, or the advertising matter? A. I don't know.

Q. What say? A. I don't know as he did.

Q. To your knowledge, has anything of that kind ever happened? A. Well, I think he might. 10

Q. What say? A. He might.

Q. Do you know of any instance where that has occurred? Do you know of any instance where he has made any report to the company or to you with reference to the advertising or the signs since he has been in charge of the manufacturing end of the business? A. Well, I do know that he saw a sign not in shape, but I don't know if he reported it.

Q. You don't know whether he reported it or not? A. I don't know. 20

Q. How long has he been in charge of the manufacturing end of the business? A. For four years.

By Mr. Bourgeois:

Q. Did he report the sign that was out of shape to you? A. No, not to me.

MAHLON FUNK, SWORN.

30

Direct examination.

By Mr. Starr:

Q. Mr. Funk, you are the secretary of the Forty-four Cigar Company, are you not? A. Yes, sir.

Q. How long have you been secretary? A. Oh, seven or eight years, I judge.

Q. What portion of the business of the Forty-four Cigar Company had Max Lipschutz anything to do with in August, 1915? A. He hadn't anything at all to do with it only in the manufacturing end of it. In the business end he had nothing to do with it at all.

Q. In the manufacturing end of it? A. Yes, sir.

10 Q. Are you a director also of the company? A. Yes, sir.

Q. At that time had he anything to do with the advertising end of the business or the maintenance or inspection of signs? A. None whatever.

Q. To your knowledge, had he exercised any authority with reference to the advertising or the maintenance or inspection of signs since he has been in charge of the manufacturing end of the business? A. Not at all.

20 Q. And how long has he been in the manufacturing end of the business, in charge of that? A. I think about four years or more. Four and one-half years.

Q. Did he have any other duties to perform with reference to the corporation except the manufacturing end of the business? A. That is all; no other duties.

Q. And to your knowledge, did he ever perform any other duties in reference to the conduct of the business except the manufacturing end of it? A.

30 Not since he has been in charge of the factories.

Q. Do you know of any authority, special or otherwise, by which Max was entitled to take out the car of the company on the day of the accident in order to inspect signs around Atlantic City, in the country around Atlantic City? A. I do know that he had no orders to take this car out.

Q. Or make any inspection of signs at all? A. Make no inspection of signs.

Cross-examination.

By Mr. Bourgeois:

Q. How do you know he had no orders, Mr. Funk?

A. I know that he was in Atlantic City on his vacation and the company so advised him. 10

Q. And you were where? A. I was also in Atlantic City.

Q. Where were you stopping in Atlantic City? A. I was in Chelsea. Had a cottage.

Q. You, of course, were not with Max all the time his father was with him? A. I was in Philadelphia most of the time.

Q. What you mean to say is that he had no orders so far as you know, and had no orders so far as any act of the directors was concerned? A. Yes, sir. 20

MAX LIPSCHUTZ, recalled.

Direct examination.

By Mr. Starr:

Q. About what time of the day did this accident happen? A. To the best of my knowledge, it was about five o'clock. 30

Q. And when it happened, where were you going? A. We were going back home. That was our intention.

Q. Where had you been? A. We had been riding

around the country. Whatever road looked good, that is the road we took.

Q. Had you any defined route to take when you started out? A. No, we didn't care when we got back so it didn't make any difference.

Q. Did you follow any defined route? A. No. Didn't know the roads well enough.

Q. As you approached the intersection of these two roads, the Zion Road and the Linwood Road,
10 what did you do with reference to any warning? A. Blew my horn.

Q. And how far were you from the intersection of the roads when you blew the horn? A. About a city square.

Q. About how many feet? A. I am no good on feet or anything like that.

Q. What say? A. I might say from here to that tree out there.

20 By Mr. Bourgeois:

Q. Which tree? A. The tree right straight out through here.

Q. Through by the fence? A. Yes, sir, right straight out.

Q. About a hundred and fifty feet? A. Well, if that is what that distance is, it must be that.

By Mr. Starr:

30

Q. You were driving the car and your wife was sitting in the front seat with you? A. With my baby in her arms.

Q. When did you first see the motorcycle? A. When I was in the middle of the road that crossed the one I was on.

Q. That is, in the middle of the Zion Road? A. The names of the roads I am not sure of.

Q. That was the road you were traveling on? A. I know I was coming down the road and the next thing I knew I seen a streak of gray as I was in the center of the road that I was about to cross.

Q. Was any sign of warning given by the motorcycle man? A. I didn't hear any.

Q. How fast was the motorcycle man going to the best of your observation? A. Well, I wouldn't say in miles but he was going fast enough to look like a gray streak to me. You can judge for yourself how fast that looks. 10

Q. What did you do then? A. Why, for the moment I decided to give him the road, and jeopardize my family, because I knew he never could stop.

Mr. Bourgeois: Never mind the jeopardy.

Q. What did you do next? A. I swerved to the right and jumped into that ditch or swamp, whatever it is. 20

Q. What did the motorcycle man do when you were close together? A. He didn't seem to do anything but keep straight coming. He didn't take advantage of the road or anything.

Q. What was your idea in swerving to the right? A. To let him take my road or make it in back of him.

Q. Had you intended to go across the road? A. Yes. 30

Q. What was your object in going across the road? Had you intended to go to any particular place? A. My wife had made inquiries for a drink for the baby, milk or water, and there was a house at the top of the hill.

Q. I show you Exhibit D2. Is that the house you refer to? A. Yes, sir.

Q. You were intending to go to that house? A. Coming right this way.

Q. You were going to that house? A. Yes, sir.

Q. Where did the motorcycle strike your machine?

Mr. Bourgeois: I object to that as leading. There
10 is no evidence that that was the case.

Q. What part of the automobile was struck by the motorcycle?

Mr. Bourgeois: No evidence of that. No evidence by him that the motorcycle ran into him.

The Court: He can testify what the situation was.

20 Q. Just explain to the jury what happened when you say you swerved to the right. Tell the jury what occurred. A. My knowledge of how it looked to me?

Q. Yes. A. Well, I was coming down this road, and my intention was to cross this road, whatever the name of it is, I don't know, and go to the top of the hill to stop for something to drink for the baby. As I was in the center of the road that crosses the one I was on—I always look to the right first—this happened to be to my left, and I turned around and I
30 seen a gray streak. If I would have stopped, my impression was that he would have hit me in the side and one of the bodies would have hit us in the car, and to give him a chance to avoid the accident, and also myself, I jumped—I was too far past the road that I was crossing to turn into that without upsetting into that swamp, and I took a chance of

hitting it with four wheels flat, and I hit the swamp hoping that he would take the road at our left or get in behind me, but he didn't. He hit me in the left front fender. That is the way it looked to me, gentlemen.

Q. Is that a picture of your machine after the thing happened? A. Yes, sir.

Q. Was there anything broken on the right side of the machine at all? A. No, sir. This was the fence that took down that broke that lamp and bent that spring there. The post that was standing up that I tore down to get into that to get off the road to give him the road bent that spring and smashed that lamp. The mud guard is where he hit me, where we came together. 10

Q. What about the wheel? A. I wouldn't want to say if that shoe was worn before the accident or not. I don't remember.

Q. You say the motorcycle struck the mud guard on the left-hand side? A. That is the way it looked to me. Might I add that a piece of aluminum that was part of that motorcycle was discovered a few days later — 20

Mr. Bourgeois: Did you discover it?

A. No, it was discovered by the chauffeur.

Mr. Bourgeois: Do not tell it, then. 30

Q. Did you stop your machine or try to stop it before you got into the meadow? A. No.

Q. You kept right on? A. I kept going hoping he would get in back of me or take that.

Q. And after the machine went into the meadow or the swamp, did you observe where the motorcycle

was on the ground? A. To the best of my knowledge I think it was on the opposite side of the—I wouldn't want to say where it was. It was in the road. I didn't look for the motorcycle.

Q. Which road, the road you were on or the other road? A. The road I was on.

Q. Do you know whether it was the far side of the road that he was on or the near side, so far as your machine was concerned as it approached that
10 road? A. Do you mean was he on the near side of the road I was crossing?

Q. Yes. A. Yes, he was.

Q. That is, after it crossed over, he was on that side of the road you were on? A. That is why I hoped he could get in back of me.

Q. How fast were you going when you approached that road? A. Not over twenty miles an hour.

Cross-examination.

20

By Mr. Bourgeois:

Q. Was your baby pretty thirsty? A. I don't know. You will have to ask him. So his mother told me.

Q. I am asking you. A. His mother told me that.

Q. When did she tell you he was thirsty, before or after the accident? A. Why, she told me that before. I was going for the milk.

30 Q. You were going at a pretty good rate of speed so as to get it quick? A. No, I couldn't go fast.

Q. Why didn't you get the milk or the water at the hill just before you came to the road, Somers Lee's house there right on the top of the hill? A. Didn't notice any there.

Q. Didn't you notice any hill? A. No, I didn't notice.

Q. Didn't see any house there? A. There might have been some, but I didn't make pictures of them.

Q. You couldn't have been going so fast you didn't see these things? A. No.

Q. If they were there you must have seen them? A. If I had looked for them I would have seen them.

Q. The baby being thirsty, of course, you didn't look for anything of that kind. You looked for cows in the field? A. No. When she told me the baby was thirsty, I stopped at the first house I seen. 10

Q. That was the one across the road, was it? A. It happened to be the one I pointed out.

Q. Then she must have told you the baby was thirsty after you had passed Lee's house on the opposite side of the Zion Road? A. That I wouldn't argue. I don't know.

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

Q. All you know the baby was thirsty and you went as fast as you could? A. No, I wasn't allowed to go fast. 20

Q. You only went twenty miles an hour? A. Yes.

Q. At twenty miles an hour you would be making about eight feet a second? A. That I don't know, how fast that is.

Q. Assume it is eight feet a second at twenty miles an hour, how much space would you need to stop your car? A. I don't know. It all depends on the load in the car.

Q. Take the load you had in it then. You must have had seven people in it including the baby. A. The condition of the road and the condition of everything. 30

Q. What distance would you require to stop your car going at twenty miles an hour? A. Oh, I don't just exactly know. It is a matter of condition of the road.

Q. Give us some estimate. A. I couldn't give you, because that would be foolish.

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

Q. You have driven a car? A. I have. When the circumstances are there I know the conditions and the weight and I can stop.

Q. When you are driving over a road you are not familiar with, don't you drive with greater care? A. Always.

10 Q. Then you were driving with care because you didn't know what you were going to come in contact with? A. I didn't know the roads.

Q. Going at twenty miles an hour could you stop your car in the length of the car? A. I wouldn't want to answer that because it depends on the road and the car.

Q. You know what the road was there. There was a gravel road, no chance of skidding or anything of that kind? A. I can't remember that part. It has been a year.

20 Q. So much business, I suppose? A. No, it has been so long ago.

Q. Could you stop your car in twice the length of it? A. I had it under control.

Q. I am assuming that, at twenty miles an hour. A man driving twenty miles an hour has his car under control. A. He ought to.

Q. Can you stop your car in twice the length of it at twenty miles an hour? A. It depends on the road.

30 Q. Could you stop it in three times the length of it? A. I wouldn't want to answer that question.

Q. Could you stop it at all? A. Absolutely, and perhaps very quickly.

Q. How quickly do you think? A. Well, if I was given an ordinary chance, could have stopped it very easily.

Q. Within what distance could you stop it if you are given an ordinary chance? A. Well, the distance of the car.

Q. Going at twenty miles an hour, if you had the opportunity, could you stop in the distance of the car? A. Depending on the load and the —

Q. Well, the load you had? A. Yes.

Q. I suppose a loaded car will stop a little bit quicker than the other kind? A. Not always. It depends on the road.

10

Q. You say you can stop it in the distance of the car and that car is about fifteen feet long, isn't it? A. I don't know if it is. I have never measured it.

Q. Well, isn't that about what it is? A. Well, I wouldn't want to say.

Q. Isn't it a seven-passenger car? A. Yes.

Q. That would be about a hundred and forty-inch wheel base, probably? A. That I don't know.

Q. Well, at any rate, it isn't longer than sixteen feet, is it? A. Well, if I don't know if it is fifteen, I don't know if it is sixteen, do I?

20

Q. Don't you? A. No.

Q. You don't know anything about distances? A. I wouldn't want to say on the distance.

Q. Some of these photographs that you have taken here show how far you can see down that road. I am calling your attention to D8, and this says you can see from a point where this automobile is, which appears to be about one hundred feet up the Linwood Road, you can see for seventy feet up the Zion Road. That is according to the photograph. Now, if you were going at twenty miles an hour, you were traveling seven and one-half feet to the second, and to have traveled that approximately one hundred feet, it would have taken you thirteen seconds. Why didn't you see the man and stop? A. Well, your

30

figures and your seconds may be all right, but I wouldn't answer them for the simple reason if I had seen him, I would have stopped.

Q. Then if you were going only at twenty miles an hour and you could have stopped the car in the length of the car and you were driving carefully, because it was over a new road — A. Yes.

Q. —and you could see as is said here, as is shown in that photograph, why didn't you see the man
10 and stop before you struck him? A. Well, when I drove down I looked to the right and looked to the left, as I explained. When I was in the center of the road I seen him.

Q. You saw him in the center of the road? A. If I had stopped he would have hit me. I took a chance and jumped into the swamp for him to get in back or go this way, but he side-swiped our machine and that is all there is to it.

Q. Side-swiped your machine? A. That is, came
20 alongside of the left mud guard.

Q. Side-swiped it? Where is that photograph? A. It is dented.

Q. Look at that photograph and you can see that the end of the mud guard struck something and bent it in and creased the inside part of the mud guard.
A. You see, the way a mud guard is constructed —

Q. I just asked you if you can see it. A. Yes.

Q. You see the mud guard is dented right in the end of it? A. Yes.

30 Q. And you see where it is creased up, the side part of the mud guard? A. That is due from a side blow.

Q. If it was a side blow, wouldn't it have pushed it over? A. No, it would have bent that up very easily.

Q. You see this part of the rubber where it was taken off? A. Yes.

Q. Does that look to you as if the wheel had struck something or other and the revolution of the wheel had just pulled that rubber off of it? A. No, absolutely no. If I am given a chance I can explain that wheel,—it is recalled to me—to the jury today.

Q. Judge Starr will give you a chance in a few minutes, I think. You say you didn't stop until you got in the meadow? A. No. The meadow stopped me. There was no use stopping.

Q. Tell me why it was if you were traveling only twenty miles an hour and you could have stopped the car in the length of the car, after this man side-swiped you, why didn't you stop the car? Why did you go on up there fifty-two feet in the middle of the road and then swerve off for sixty some feet in the marsh before the car came to a stop? A. I turned and kept the car going for the marsh to give him the road. 10

Q. Did you think he needed the road all the way up sixty-two feet from the Zion Road? A. I thought he needed as much as I could give him, the way he was coming. 20

Q. Didn't you know the man was hanging to the front of your automobile? Didn't you see his head there across the hood of your automobile? A. I seen nothing. After I seen that flash coming I turned off to give him the road, and when I stopped I seen him.

Q. It couldn't be you were going so fast you didn't see anything? A. No. 30

Q. And you never knew at all that Fox was lying over the hood of your car, with his head bleeding, and was picked up from there when you got out in the marsh? A. I helped pick him up. I got out of the car and helped carry him over to the side of the road.

Q. When did you find out he was there? A. When the car stopped.

Q. Never until that time? A. I seen him by the time it was stopped.

Q. Didn't see him until after you had got in the marsh? A. No. I don't recollect. All I know, when I got out of the car I seen him there, and assisted to take him over.

Q. You thought he had gone to the rear of your
10 car? A. No, no.

Q. I thought you said you gave him a chance to go back of you? A. I gave him the chance to get in back or take my road and he never took either one of them. We came together right there and then I shot for the marsh before we came together.

Q. How do you account for it that you didn't go out into the marsh until you had gotten up there fifty-two feet? A. I started to turn away to give him my road. Where I struck the marsh I don't know.
20 That wasn't figured out before this accident happened.

Q. Do you realize the fact that if you were coming straight down this road, the Linwood Road, and you didn't swerve at all, but you went straight across, you would strike that marsh about fifty-two feet from the road? A. Let me get that road straight before I answer you.

Q. You see, there is a different direction to the two roads on the different sides of that Zion Road. You
30 were coming down this way and you went right straight on into the marsh? A. What is the question?

Q. Do you realize the fact that as you were coming along there a straight line right along that road would have taken you off in the marsh at fifty-two feet, where you did go off? A. Why, certainly I do.

Q. Then you went right straight on, didn't you, after you struck Fox, until a straight line took you right off into that marsh? A. I turned to the right a little.

Q. Did you? A. That is my impression of the way the accident happened, anyhow. You don't get much time for thinking in those small moments.

Q. But you have more time to think when your car is going twenty miles an hour than when it is going forty miles an hour? A. All the time. 10

Q. And have more time to think when your car is going twenty miles an hour than when it is going sixty miles an hour? A. Oh, yes, but not when one is coming at you so fast.

Q. You don't have much show when the other fellow is coming at you so rapidly? A. I should say not, not if you are in his way.

Q. He didn't upset your car, did he? A. If I had stopped there was a possibility of it.

Q. You couldn't have stopped, could you? A. If 20 I had thought he wouldn't have went around.

Q. Do you think when you view the fact that you went fifty-two feet on the road and then into the marsh sixty with a car, that at that time you could have stopped it in the middle of that road? A. That was a matter for me to decide from the moment, and I decided to keep going to give him my road. That I explained four times.

Q. I know you have, but I didn't just accept it the way you told it, you know. Did you think he wanted 30 to go up the Linwood Road, too? A. I didn't think he wanted to do anything but try to save himself, and I gave him all the possible assistance I could.

Q. Did you see him on the hood of your car before your car went into the marsh? A. Well, I couldn't say. You can't remember those things. After I seen him I wanted to get away.

Q. I guess that is right. A. You bet.

Q. You wanted to get away as soon as you found he had been hurt? A. Not on your life. I assisted to carry him.

Q. What time did you start on this little trip? A. That I don't know.

Q. Was it in the morning or afternoon? A. I can't remember, it has been so long ago, whether it was in the morning or afternoon.

10 Q. So much business? A. No, it has been so long ago.

Q. Didn't that interfere with your memory? A. Well, it might.

Q. Can't you tell whether you started in the morning or afternoon on that trip? A. I wouldn't want to say unless I was sure.

Q. Would you hesitate to give us your best recollection about it? A. That would be the same as answering yes or no, and not being sure, I don't like

20 to answer that question.

Q. You don't like to answer? A. Not remembering correctly.

Mr. Bourgeois: I am entitled to an answer unless he says he does not know positively.

The Court: Answer the question.

A. I don't know, positively.

30 Q. You don't know at all? A. No, sir.

Q. Whether it was morning or afternoon? A. No.

Q. And you don't know how fast you were going except you were going twenty miles an hour? A. Yes.

Q. And you didn't see the house you had just passed on the left? A. I don't remember that.

Q. What? A. No.

Q. And you didn't see the man on the hood of your car after you struck him until you got into the marsh? A. Don't forget I was driving on the right. It is a right-drive car.

Q. His head was lying on the top of the hood, couldn't you see that from the right-hand side of the hood? A. Are you sure of that?

Q. That is the testimony.

10

Mr. Starr: His head was on the mud guard.

Q. His head was on the left mud guard. Is that where it was? A. To the best of my recollection his head wasn't visible from the driver's seat until the driver stood up.

Q. Then you didn't know he was on there at all? A. No.

Q. What did you mean a little while ago when you told me you saw him just as you were going into the marsh? A. I stood up. 20

Q. You were in your car and the car in motion and you stood up? A. Just before she stopped.

Q. Did you put the brakes on to stop it? A. Didn't have to.

Q. In other words she stopped herself, she stalled herself after she had run off the road and run through that soft marsh for a distance of sixty feet? A. Slid through there. Brakes wouldn't do any good if you put them on. 30

Q. Don't you know if that car had been going twenty miles an hour as soon as she went into that marsh she would have stalled? A. No.

Q. You don't know enough about a machine? A. I do know she wouldn't.

Q. You do know she wouldn't have stalled at

twenty miles an hour when she went into the marsh?

A. Yes.

Q. And you say the first you saw of the motorcycle was when you were in the middle of the Zion Road, is that right? A. The names of the roads I don't know.

Q. Well, the middle of the road where he was traveling? A. Yes, when I was in the middle of the road, crossing that road, I turned to my right first and
10 turned to my left. That is when I seen him close to me.

Q. You were at the middle of the road? Then which side of the road was he on? Was he on the left-hand side coming down, the opposite side to that on which you approached? A. You will have to explain that to me on the map so I don't make any mistake. I want to get that right.

Q. You say that when you first saw him you were in the middle of the road? A. Right here.

20 Q. Right where? A. Right here.

Q. Well, that line crosses the middle. Is that where you were? A. Yes.

Q. Was he on the further side of the road from you or was he on the nearer side? A. Do you mean was he over here or over here?

Q. Yes. A. Well, I think he was about in the center.

Q. If you were in the middle and going twenty miles an hour and he was in the center going twenty
30 miles an hour, why didn't he strike your rear wheel instead of striking your front wheel? A. Well, I don't know except he didn't take advantage of my turning out for him.

Q. Was there anything you neglected to take advantage of? A. Everything that would possibly save us both.

Q. You tried to take advantage of everything? A. Yes, sir.

Q. Except stop your car? A. Well, I didn't think that was good policy to do so. I was afraid he would hit us.

Q. Did you try to stop your car or put more speed on? A. I put more speed on to get away and let him get in back.

Q. When did you put more speed on? A. As soon as I seen him, which was in the center. That is 10
what took me into the marsh.

Q. When you were in the center of the road you put more speed on? A. Certainly, because I was opposite him and if I had stopped he would have hit me. I couldn't back up right away, could I?

Q. When you were in the center of the road you put on more speed? A. I tried to.

Q. Do you remember a little while ago you told Judge Starr he was coming down on the near side of the road to you? A. Well, I don't know. 20

Q. Whether you told him or not? Do you remember telling him? A. I am telling you just as I remember.

Q. Do you remember telling Judge Starr a few minutes ago that Fox was coming down on the near side of the road to you? A. Well, I don't believe I did. If I did, it must have been between the center and the middle there.

Q. Was it between the center and the middle or was it on the further side? A. If I answered that 30
where I saw in a flash—to the best of my knowledge he was on that road towards the center.

Q. On which side of the road? A. That I can't answer.

Q. You don't know whether he was beyond the middle or toward the middle? A. No.

Q. You want that statement you made corrected, that he was on the near side? A. Between the center and over here.

Q. What do you mean by the near side of the road, anything in particular? A. It depends on which side you mean is the near side.

Q. You were going this way. A. Well, then, he was between the center and over here.

Q. And you didn't see him until you got to the
10 center? A. Yes.

Q. Then he was in back of you? A. No, he was aside of me.

By Mr. Starr:

Q. Max, you wanted to make an explanation in reference to the appearance of that left-hand front wheel and the shoe. What did you want to tell the jury? A. Why, it just occurred to me that my
20 father made the remark to me —

Mr. Bourgeois: I object.

Q. No; with reference to that. A. It had been worn.

Q. What do you mean? A. It was a tire we were watching to see how long it would go without blowing, as all the rubber was taken off of it, and it even stayed up after the accident, as so few of them do.

30 Q. As a result of the accident or the collision, was part of the surface of the shoe torn off? A. No. To my best knowledge I think that shoe was exactly that way before the accident. We were watching the rubber wear off of it.

Q. It had none of the tear on the surface? A. No, I think that rubber was off of it there. Before that

accident happened we were watching it, because a good many of them don't last that long.

Q. What damage was there to the left side of your automobile? A. Well, the frame was bent and it has been repaired since. The mud guard was dented in and the hood was bent.

Q. On the left-hand side? A. Yes, covering the motor and the cowl dash had a bump in it which I think is in there today.

Q. Now, the break of the lamp, was that caused by colliding with the motorcycle or going through the fence? A. What is that? 10

Q. The broken head lamp. A. Why, no. That was taken down by the fence. I know we took some fence down along there.

By Mr. Bourgeois:

Q. You say now that the shoe was a worn shoe before the accident happened at all? A. Yes. We paid special attention to it, because we were watching it wear off. 20

Q. Can you explain to the jury how it happened that you got that worn part right front so it would take a good picture of it? A. Well, I didn't take the pictures of it. The photographer took that.

Q. Did you place the car so that the worn part of the shoe would come first? A. Not so that the worn part would come first, but I placed the car there for him to take the picture. 30

Q. The worn part did happen to come first; that is right? A. As the picture shows.

Q. And when Judge Starr examined you on the direct examination, you didn't think to tell the jury that this torn part of the shoe was not the result of the accident, did you? A. Repeat that question.

Q. When Judge Starr was examining you on direct examination you didn't think to tell the jury that the worn part of the shoe was that way before the accident? You didn't think about that then? A. I wasn't asked, was I?

Q. Well, I don't know whether you were or not. A. If I would have been I think I would have told it.

Q. Do you remember telling how the accident ripped the shoe? A. No, I didn't.

10 Q. Didn't you? A. Don't think so.

Q. Didn't you tell in describing it how the accident ripped the shoe there and how it bent — A. How it bent the mud guard and springs.

Q. At any rate, now, you say, that was worn and not ripped off? A. Yes.

Q. You are quite sure about that? A. Yes.

Q. Did you ever see rubber wear at right angles like that? A. Don't forget that that can be torn on the road.

20 Q. Now — A. Yes, sure, on that one shoe, yes.

LILIAN LIPSCHUTZ, SWORN.

Direct examination.

By Mr. Starr:

30 Q. Are you the wife of Max Lipschutz? A. I am.

Q. On the day of this accident, in what part of the machine were you riding? A. Right next to him in the front seat.

Q. You were on the right or left-hand side of the car? A. The left-hand, I believe.

Q. You were on the left-hand side? Who else was in the machine? A. The baby was on my lap, and in back of me was my mother and his grandmother, and directly in back was my sister-in-law and her two friends.

Q. Had you made any stops that day that you were out in the machine? A. Well, I believe about one or two to buy some fruit or something.

Q. Stop anywhere else? A. No.

Q. Did you have any defined route to take that day? A. None special. Just anywhere we went. 10

Q. Do you remember approaching this road where the accident happened? A. Well, I don't remember it distinctly. After the accident happened my mind

Q. Won't you just tell the jury what you observed in reference to the matter? A. What I saw, we were simply riding and I didn't think of anything whatsoever, and just as we came towards the road, the baby happened to ask for a drink, and I said to my husband, "Go directly over the road to that house and get her a glass of milk or anything you can get," and when we came to the road I didn't hear anything, and all of a sudden I saw something flying at us and I shut my eyes and didn't know anything else that happened until we came into the marsh and I opened my eyes. 20

Q. Your husband was on the left-hand side? A. The right-hand to me.

Q. The right-hand side of the machine? You were on the left-hand side? A. Yes. 30

Q. Your mother was on which side of the machine? A. I don't remember distinctly.

Q. How close was the motorcycle to you when you first observed it? A. Oh, almost on me. It came so quickly I just shut my eyes and I didn't know anything more.

Q. Had your husband given any warning or signal? A. Oh, yes, he always blows the horn.

Q. What did he do? A. Blew the horn.

Q. What is your recollection with reference to the speed at which your husband was driving the machine? A. I don't believe it was more than twenty miles.

Q. With regard to the motorcycle, was that going fast or slow? A. Yes, it appeared to me very fast.

Q. And after the impact of the collision, you say you don't recollect anything that happened? A. I don't know anything that happened. I simply closed my eyes until we stopped, and then I opened them and my baby cried and I saw Mr. Fox lying on the mud guard or whatever you call it.

Q. With respect to the cross road, where was the automobile when you say you saw this motorcycle? A. Oh, I don't remember distinctly. I couldn't tell you. I don't know.

Q. Do you know what part of the automobile was struck by the motorcycle? A. I imagine the left front where the mud guard is. That is where I thought it was coming at us.

Q. Had the motorcycle gotten ahead or in front of the machine when the collision happened? A. I don't know; I couldn't tell you.

Cross-examination.

30

By Mr. Bourgeois:

Q. What time of the day was it when you left Atlantic City? A. We started out, I think, around two or two-thirty.

Q. In the afternoon? A. After lunch we went out.

Q. Where did you first go? A. We just went around town. We went through the Boulevard over to Pleasantville; not Pleasantville, the other side.

Q. Turned to the left and went down towards Somers Point? A. I don't remember. We just went through the country.

Q. You don't know how far you went, how many miles you went in all? A. No, couldn't tell you.

10

LAURA WEINBERG, SWORN.

Direct examination.

By Mr. Starr:

Q. Mrs. Weinberg, you live where? A. New York.

Q. Are you the mother of Mrs. Lipschutz? A. Yes, sir.

20

Q. In what part of the machine were you riding the day of this accident? A. In the chair.

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

Q. And Max's grandmother was on the chair on the left-hand side? A. My next side.

Q. Do you remember the place where the accident happened? A. No.

Q. That is, you remember the fact that there was an accident? A. Sure I do. That is all I can remember.

30

Q. Did you see the motorcycle? A. No, sir.

Q. Didn't see it? Do you know which direction you were looking at the time the thing happened? Looking ahead or on the side? A. I am always looking ahead, because I was in an accident in New York with a motorcycle. I must tell you that because all

of you gentlemen know how motorcycles run. They fly like engines.

Q. You say you were looking ahead. Did you see the motorcycle at all until the accident happened?

A. No, sir.

Q. Do you recall whether or not Max gave any signal or warning as you approached this road? A. Positively. I always make him do it because I am so nervous.

10 Q. What sort of signal did he give? A. He was blowing the horn.

Q. What about the motorcycle man, did you hear any signals given by him? A. No, sir.

Q. Do you know which side of the automobile was struck or where the automobile was struck? A. When I was in the ditch, the first thing I seen, a gentleman by my side, and I didn't look for a thing like this, you know. I began to scream and that is all I can say, and the men took us out of the machine.

20 Q. As you approached the place where the accident happened was Max driving the car slowly or rapidly? A. When he goes with me he has got to drive slowly, because last year I was very much more poorly than you see me now, and when he took me out for a ride he had to take me very slowly, especially as he had a grandmother eighty-five years old, and it was her first time out in the car, and she wouldn't go quick.

30 Q. Did he go rapidly that day or not? A. No, sir, he went very slowly, because since I had the accident I was always afraid for a car to go in.

Cross-examination.

By Mr. Bourgeois:

Q. Have you been more or less nervous since the accident than you were before? A. I should say it made me nervous.

Q. It did make you nervous? A. You are right.

Q. Did it make you a little bit nervous when you saw yourself going out into the marsh in the machine? A. We didn't go in the marsh. We went very slowly. We couldn't go quick. 10

Q. In the marsh? A. In the ditch?

Q. Yes. A. I got so frightened I didn't know where we were. It just took a second.

Q. Did it make you nervous? A. Yes.

Q. Did it make you nervous when you saw the machine stop and settle to its hubs and water all around you? A. I am sure anybody can imagine you would be nervous. 20

Q. Did that make you more nervous? A. Sure did.

Q. You have been more nervous ever since? A. I should say yes.

Q. I suppose you didn't suspect that the machine — A. I am so nervous I made my husband sell his machine.

Q. I suppose you didn't suspect when you were going along that real low, slow rate of speed, that that car would ever take you out sixty feet in the marsh and stop you there? A. We didn't go slow that time. 30

Q. You didn't go slow that time? A. We didn't go quick, I mean.

Q. You went fast then? A. No, sir.

Q. Does Max always speed up when he is going

for a marsh with the machine? A. I don't know anything about it.

Q. Do I understand you to say that motorcycles over in New York go fast? A. I should say yes. You are right they go fast.

Q. That is over in New York? A. Of course, I don't know anything about here. I know about New York.

10

DEFENDANT RESTS.

BOTH SIDES REST.

The Court: Further reflection convinces the Court that the correspondence ending with the letter of defendant company dated December fifteenth, 1915, must be excluded from the case.

20

Mr. Bourgeois: Does that exhibit go from it, too?

The Court: All of the letters.

Mr. Bourgeois: You order it excluded?

The Court: Yes.

30 Mr. Bourgeois: Allow us an exception?

The Court: Yes.

(Exception noted for plaintiff.)

Mr. Bourgeois: If your Honor please, I offer in

evidence the letters beginning with December eighth up to December fifteenth.

(Offer denied. Exception noted for plaintiff.)

MOTION TO DIRECT A VERDICT.

Mr. Starr: If your Honor please, I move to direct a verdict for the defendant in this case, based upon the proposition that there is no evidence at all that would warrant the inference that there was any authority or any relation existing between Max Lipschutz and the defendant as master and servant which would entitle the plaintiff in this case to recover a verdict against the defendant. I do not know as I can say anything more than I did to your Honor when we had the motion for the non-suit. The situation is precisely the same as it was then. 20

The Court: There are no facts or circumstances from which it can be legitimately inferred that Max Lipschutz was at the time of the collision engaged in the furtherance of defendant's business. Gentlemen of the jury, you are therefore directed by the Court to return a verdict for the defendant.

(Exception noted for plaintiff.)

EXHIBITS.**EXHIBIT P6 Iden.**

	Benjamin Lipschutz	Mahlon A. Funk	Max Lipschutz	George M. Lex
	President	Sect'y and	Assistant	Assistant
10	and Treasurer	Sales Manager	Treasurer	Secretary.

**Forty-four Cigar Company
Incorporated.**

Lipschutz's
44
Cigars

Adlon
Cigars

Business Established by Benjamin Lipschutz 1893
Main Office and Factory

N. E. Cor. 11th and Wharton Streets, Philadelphia
P. O. Address, Southward Station

20 Address all communications to Company
Dec. 8,
1915.

Messrs. Bolte, Sooy & Gill,
21 Law Building,
Atlantic City, N. J.
Gentlemen:—

We are to-day in receipt, through Mr. John Weaver of a draft of an answer prepared by you in the matter of suit brought against us by Brois Fox. We would be pleased to have you advise us if you have taken any action whatsoever toward filing this answer, or if you have filed any papers in the matter, as far as the "44" Cigar Company, a Corporation is concerned.

Mr. Weaver, in error, returned to you the copy of the Summons, instead of sending it to the Insur-

ance Company, as you no doubt, know that the interests of the "44" Cigar Company, a Corporation are being looked after by the Insurance Company, and we presume that the Insurance Company will file their answer for us.

Mr. B. Lipschutz is now absent in the West, and the writer understands through Mr. Max Lipschutz that Mr. B. Lipschutz and Mr. Max Lipschutz are being looked after by you therefore, we would ask that you advise us immediately whether you have filed any papers whatsoever, as far as the "44" Cigar Company a Corporation is concerned. 10

We would like to have this matter adjusted at once, as we are very desirous of all matters pertaining to this case, as far as the "44" Cigar Company a Corporation is concerned being handled by the Insurance Company, and should you take any action in filing any documents as far as the "44" Cigar Company is concerned, it is apt to complicate matters somewhat. 20

Please give this matter your immediate attention.

The writer tried to reach you on the 'phone to-day but was unsuccessful.

Yours very truly,

"44" Cigar Company,
Geo. M. Lex.

L.R.

EXHIBIT P4 Iden.

Benjamin Lipschutz	Mahlon A. Funk	Max Lipschutz	George M. Lex
President	Sect'y and	Assistant	Assistant
and Treasurer	Sales Manager	Treasurer	Secretary.

Forty-four Cigar Company
Incorporated

Lipschutz's	Adlon
44	Cigars

- 10 Cigars
Business Established by Benjamin Lipschutz 1893
Main Office and Factory
N. E. Cor. 11th and Wharton Streets, Philadelphia
P. O. Address, Southward Station.
Address all communications to Company
Dec. 11,
1915.

Messrs. Bolte, Sooy & Gill.
21 Law Building,

- 20 Atlantic City, New Jersey.
Gentlemen:—

We have your favor of the 9th inst, and have carefully noted your comments.

There is little that we can add to our letter of Dec. 8th, other than to advise that the interests of the "44" Cigar Company are being looked after entirely by the Insurance Company.

- 30 We believe that you readily understand there are peculiar features to this case that may lead to further litigation, should a verdict be rendered against us.

Please leave the Insurance Company attend to looking after the "44" Cigar Company's interests and you look after the interest of Mr. B. Lipschutz and Mr. Max Lipschutz personally, as they no doubt have arranged for.

ure, and as Mr. Max Lipschutz was an Officer of the Company, we feel, under the terms of the contract, that he had a perfect right to drive the car.

You can rest assured that Mr. Max Lipschutz at the trial will testify.

First:—That the Company owned the car

Second:—That he was driving the car, combining both pleasure and business

Third:—That he is an Officer of the Company.

- 10 In order to fulfill your wishes in the matter, I am having a postscript in this letter which is signed by Mr. Max Lipschutz.

Very truly yours,

“44” Cigar Co., Inc.

(Signed) Geo. M. Lex.

Asst. Sec.

L-AH

P. S.

W. Frank Sooy, Esq:—

- 20 The facts as covered by Mr. Lex above will be testified to by me at the trial.

Very truly yours,

(Signed) Max Lipschutz.

EXHIBIT P7 Iden.

- 30 Benjamin Lipschutz Mahlon A. Funk Max Lipschutz George M. Lex
 President Sect’y and Assistant Assistant
 and Treasurer Sales Manager Treasurer Secretary.

Forty-four Cigar Company
 Incorporated

Lipschutz’s

44

Cigars

Adlon

Cigars

Business Established by Benjamin Lipschutz 1893
 Main Office and Factory

N. E. Cor. 11th and Wharton Streets, Philadelphia.
P. O. Address, Southward Station

Address all communications to Company
January 25th. 1916.

Wm. Frank Sooy,
c/o Bolte, Sooy & Gill,
Atlantic City, N. J.

Dear Sir:—

Enclosed you will find my personal check for
\$150.10 covering your bill for services rendered. 10

I wish to thank you for the many courtesies extended me, and the promptness in which you handled the matter. I presume that you fully understood Mr. Lex on the 'phone several days since, and I will have your cooperation along the lines suggested.

The trial is scheduled for Friday the 28th. inst. If you have any suggestions to make to me that will be of benefit, would be pleased to have you submit same before the trial comes off.

Again thanking you for your kindness, I am 20

Respectfully yours,
Max Lipschutz.

L-BH

JUDGMENT RECORD.

NEW JERSEY SUPREME COURT,
ATLANTIC COUNTY.

10 VORIS FOX,

vs.

FORTY-FOUR CIGAR COM-
PANY.

JUDGMENT RECORD.
JUDGMENT FOR DE-
FENDANT.
LEWIS STARR,
ATTORNEY.

Forty-four Cigar Company, the defendant in this
cause, was summoned to answer unto Voris Fox, the
20 plaintiff therein, in an action at law upon the follow-
ing complaint:

(Summons issued November 22, 1915.)

The plaintiff, residing in the City of Pleasantville,
County of Atlantic and State of New Jersey, com-
plains and says:

30 1. That the defendant is a foreign corporation,
maintaining its principal office in the City of Phila-
delphia, State of Pennsylvania, and doing business
in the State of New Jersey.

2. That Max Lipschutz is one of the officers of the
said corporation, and at the time hereinafter men-
tioned was its agent and employee.

3. That on or about the sixteenth day of August, 1915, the said corporation was the registered owner of a certain touring car known as a "Stutz," and the said Stutz car was under the control of the said Max Lipschutz, a stockholder, director and officer as well as an agent and employee of the said company, and that the said Max Lipschutz was then and there using the said car while engaged in the business of the said company.

10

4. That on the same day the plaintiff, being the owner of a certain motorcycle, was propelling it at Bargaintown on Zion Road near a cross road, known as Linwood Road, in Atlantic County, State of New Jersey, and going in a direction toward Pleasantville, and while operating the said motorcycle in a lawful and careful manner, without any fault on his part, the defendant company, through its said agent, servant and employee, who was operating the said touring car or automobile, coming from Bargaintown school house, in a direction toward the Pleasantville Waterworks, recklessly and negligently and without any warning, ran into and collided with the motorcycle operated by plaintiff, demolishing the said motorcycle, throwing the plaintiff, rendering him unconscious and dragging him about one hundred feet or more into a swamp, and inflicting serious and painful injuries to the plaintiff.

20

5. That as a result of the said negligence on the part of the defendant company through its agent and servant, the plaintiff has suffered and still does suffer great pain and suffering, and has been prevented from that day, and still is prevented and will be prevented, from carrying on his usual employment and occupation, that of bricklayer, and has

30

been unable to earn the money that he was accustomed to earn before he received the said injuries at the hands of the defendant company.

6. That as a result of the negligence on the part of the said defendant corporation, its agent and servant, the plaintiff has received a permanent injury and disfigurement to his head which seriously affects and will seriously affect his health, and his
10 ability to carry on his occupation.

7. As a result of said injuries aforesaid received at the hands of defendant company, its agents and servants, plaintiff has been obliged to lay out various sums of money for doctors' bills, medicine, etc., as well as the loss of the value of the said motorcycle.

For all of which plaintiff demands the sum of twenty-five thousand dollars.

20

BOURGEOIS & COULOMB,
Attorneys of Plaintiff.

(Filed Dec. 1, 1915.)

The defendant, a foreign corporation, by this answer:

1. Admits the facts set forth in paragraph one of
30 the complaint.

2. Admits that Max Lipschutz is one of the officers of said defendant, but denies that, at the time referred to in the complaint, he was the agent and employee of this answering defendant.

3. Admits that on August 16, 1915, defendant was the registered owner of a certain touring car known as a "Stutz," and admits that on said day said car was being driven by said Max Lipschutz.

4. Denies that the said automobile was being driven by the said Max Lipschutz as stockholder, director or officer, or as agent or employee of the defendant.

10

5. Admits that the said Max Lipschutz was a stockholder, director and officer of the said defendant on the 16th of August, 1915.

6. Denies that the said Max Lipschutz, at the time referred to in paragraph three of said complaint, was using the said automobile while engaged in the business of the defendant.

7. Avers that the said Max Lipschutz, at the time referred to in paragraph three of said complaint, was using said automobile for his own pleasure, and his own purposes, and not engaged in the business of the said defendant, or as the agent or employee of the said defendant. 20

8. Denies the facts set forth in paragraph four of said complaint.

9. Denies the facts set forth in paragraph five of said complaint. 30

10. Denies the facts set forth in paragraph six of said complaint.

11. Denies the facts set forth in paragraph seven of said complaint.

FIRST DEFENSE.

1. This defendant is not, in any way, chargeable or responsible for the conduct of the said Max Lipschutz in the operation of said automobile, as referred to in the said complaint.

SECOND DEFENSE.

10 1. The defendant performed each and every duty it owed to the plaintiff.

THIRD DEFENSE.

1. The conduct of the plaintiff contributed to the injury complained of.

FOURTH DEFENSE.

20 1. The conduct of the plaintiff, in the operation of his motorcycle, referred to in said complaint, was the proximate cause of the injury complained of.

LEWIS STARR,
Defendant's Attorney.

(Filed Dec. 10, 1915.)

This cause was tried before Howard Carrow,
30 Judge of the Circuit Court, with a jury, in the Atlantic Circuit, on May 24th, 25th and 26th, 1916.

The jury rendered a general verdict against the plaintiff, and in favor of the defendant.

Whereupon it is adjudged that the complaint of the plaintiff be dismissed and that the defendant recover of the plaintiff, its costs, which are taxed at sixty-eight dollars and ten cents.

Costs \$68.10

Judgment entered June 5, 1916.

WM. S. GUMMERE,
C. J.

10

NOTICE OF APPEAL.

NEW JERSEY SUPREME COURT.

VORIS FOX,

Plaintiff,

vs.

FORTY-FOUR CIGAR COM-
PANY,

Defendant.

ACTION AT LAW.
NOTICE OF APPEAL.

20

To Lewis Starr, Esq., Attorney for Defendant:

Take notice that the plaintiff appeals to the Court of Errors and Appeals of the State of New Jersey from the whole of the judgment entered in this cause, on the following grounds:

30

1. Because the trial Court erred in directing a judgment in favor of the defendant.

2. Because the trial Court should have permitted the case to go to the jury.

3. Because the trial Court erred in excluding letters marked P1 to P7, inclusive, for identification.

4. Because the trial Court erred in holding that there were no facts or circumstances from which it could be legitimately inferred that Max Lipschutz was at the time of the collision engaged in the furtherance of defendant's business.

BOURGEOIS & COULOMB,
Attorneys for Plaintiff.

AFFIDAVIT OF SERVICE.

20 NEW JERSEY SUPREME COURT.

VORIS FOX,

Plaintiff,

vs.

"44" CIGAR COMPANY,

Defendant.

} AFFIDAVIT OF SER-
VICE.

30

STATE OF NEW JERSEY, }
COUNTY OF CAMDEN, } ss.

JOSEPH J. SUMMERILL, JR., being duly sworn, according to law, on his oath says:

On the 10th day of July, A. D. 1916, I served upon Lewis Starr, the attorney of record of the defendant mentioned in the above-entitled cause, a copy of the attached notice of appeal, by handing the same to him personally.

JOSEPH J. SUMMERILL, JR.

Sworn and subscribed before me this 10th day of July, A. D. 1916.

E. C. WADDINGTON, 10
Master in Chancery of N. J.

[ENDORSED]

Service of the within notice of appeal
is hereby acknowledged this day
of July, 1916.

Atty. for Deft.

20

30

1810

Received of the Hon. Secy of the Navy
the sum of \$1000 for the purchase
of a copy of the
of the

James J. Secy of the Navy

and returned to the Hon. Secy of the Navy
the sum of \$1000

H. C. Wainwright
Master in Charge of the

[Signature]

Witness my hand and seal
at the City of New York
the 10th day of July 1810

10
Attest for the

30

New Jersey Court of Errors and Appeals

VORIS FOX,	} Action at Law. On Appeal.
Plaintiff-Appellant,	
vs.	
FORTY-FOUR CIGAR COMPANY,	} Defendant-Respondent.
Defendant-Respondent.	

BRIEF OF APPELLANT

Statement of Facts

Voris Fox, appellant, is a bricklayer by trade, and on the 16th day of August, 1915, and for some time prior thereto, had been working at his trade on a school house at Scullville, Atlantic County. He resided at Pleasantville in Atlantic County, and went to and from his work on a tandem motorcycle. On this 16th day of August, Thomas Shepard, his helper on the same work, was riding with him.

In going to and from his work, he went from Pleasantville on the main road (commonly called the Shore Road) to Zion Road and over Zion Road to the road that leads to Scullville School, and thence to the school. Within the distance tra-

versed by appellant on Zion Road, it is crossed by Linwood Road. At the point of crossing, Zion Road runs practically east and west, and Linwood Road runs practically northeast and southwest. Northeasterly from the middle of Zion Road, the Linwood Road changes direction and bears somewhat further to the north.

On the 16th day of August aforesaid, at about quarter of five in the afternoon, Fox and Sheppard were passing along Zion Road, traveling in an easterly direction at about twelve or fifteen miles an hour as they approached Linwood Road. At the same time, an automobile of defendant driven by Max Lipschutz, a director and officer of defendant company, was approaching Zion Road over Linwood Road, proceeding in a northeasterly direction, at a high rate of speed, the result of which was a collision, the front left-hand wheel and mud guard or radiator of the automobile striking the motorcycle midway between the front and rear wheels, throwing appellant, who was seated front on the motorcycle and driving same, upon the hood and left mud guard of the automobile, and throwing Sheppard, who was seated behind Fox, to the left-hand side of the road, the automobile proceeding in a straight direction for a distance of fifty-two feet, where it crashed through a fence along the easterly side of the Linwood Road, left the road and proceeded over a piece of marsh land or swamp, across a ditch or stream about four feet in width and stopped, mired to the hub, forty-five feet distant from the side of the Linwood Road and one hundred twelve feet from the middle of Zion Road.

When the machine finally stopped, Fox, appellant, was still lying on the front of the hood and mud guard. Both Fox and Sheppard were uncon-

scious, and the motorcycle, of course, was demolished. Fox was bleeding profusely from the brain. He was placed in another automobile, hurried to the office of Dr. Monroe in Pleasantville, where the wound was bandaged, and he was then hurried to the Atlantic City Hospital, where it was found that an operation was necessary to possibly save his life, and a portion of his skull, about an inch and a half or two inches in width and three inches in length, oblong in shape, was removed.

At the time of the trial, the skin or scalp had grown across this wound, but Fox being thirty-four years of age, there was no growth of the skull, and there was a depression of the scalp within this hole about three-fourths of an inch or one inch in depth.

The defense upon the trial was that at the time of the accident the car was being carefully operated; that plaintiff negligently contributed to the accident, and that the car was not being used for the purposes of the company, and therefore the company was not liable to plaintiff.

During the progress of the cause for the purpose of showing that the car was being used for the purposes of the company, and for the purpose of showing an inconsistent statement made by Lipschutz, certain letters to W. Frank Sooy, Esq., were offered and admitted in evidence. After the testimony had been concluded, the letters were excluded by order of the Court, to which an exception was noted. The judge then directed a verdict in favor of the defendant, to which exception was taken; hence this appeal.

POINTS**I**

The Court erred in excluding from the case the letters addressed to W. Frank Sooy, marked 1 to 7 inclusive, and especially P-2, admitted in evidence (p. 127, l. 1; p. 180, l. 15) for the following reasons:

(a) Said letters were material to the issue and tend to show that Max Lipschutz was using the car for defendant's purposes.

(b) Said letters, being written by an officer of the company on the letter head of the company, pertaining to business alleged to be business of the company, were *prima facie* evidence against defendant company.

(c) Mr. Sooy never represented the defendant company, and therefore the letters were not confidential communications.

(d) That at the time letter P-2 was written to Mr. Sooy, he, Mr. Sooy, did not represent defendant, and therefore that letter was not a confidential communication.

(e) Said letters were not privileged or confidential.

II

The Court erred in directing the jury as follows:

“There are no facts or circumstances from which it can be legitimately inferred

that Max Lipschutz was at the time of the collision engaged in the furtherance of defendant's business. Gentlemen of the jury, you are therefore directed by the Court to return a verdict for the defendant."

for the following reasons:

(a) The testimony of Max Lipschutz was sufficient to support an inference that he, Max Lipschutz, on the day in question, was driving the car for the purposes of the company.

(b) The testimony of Benjamin Lipschutz showed that the car had been purchased for the use of Esther Lipschutz, and that it was being used on the day in question for the benefit of Esther Lipschutz.

(c) The testimony in the case was sufficient to warrant the jury in finding a verdict for the plaintiff.

Testimony

"VORIS FOX, testified (pp. 31 to 33) as follows:

"Q. Were you working or had you been working during the day of the sixteenth of August, last? A. I was.

"Q. Where? A. On the Scullville school-house.

"Q. Where did you live? A. Pleasantville.

"Q. How did you reach Scullville school house from your home? A. Why, I went from my home down what they call the New Road from Pleasantville to Washington

Avenue, out Washington Avenue to Main Street, down Main Street to Zion Road and down Zion Road to—well, the road turns back to the Scullville school. I don't know what the name of that road is.

“Q. In going that route did you have to cross the Linwood Road? A. I did.

“Q. On Zion Road you crossed Linwood Road? A. I did.

“Q. Who was working with you? Who was your tender? A. Colored man by the name of Thomas Sheppard.

“Q. How did you go? What means of vehicle? A. Motorecycle.

“Q. Do you remember coming home that night, starting for home? A. I remember starting for home, yes.

“Q. Who was with you, if anybody? A. Thomas Sheppard.

“Q. Do you remember approaching the crossing of the Linwood Road? A. I do.

“Q. What, if anything, did you do as you approached that crossing? A. I slowed down and blowed the horn on the motor-cycle twice.

“Q. What was the condition of the road just before you got to the crossing on the Zion Road? A. Why, the condition—what do you mean, in regards to the crossing?

“Q. Yes, I want to know first whether it is level or down grade or whether it is hard or sandy. A. It is down grade.

“Q. And what with relation to the condition of the hardness or softness? A. Why, the road that I was on was fairly hard, good solid gravel road.

“Q. As you approached the crossing, what did you do, if anything, with regard to the speed of your motorcycle? A. I reduced the speed.

“Q. At what rate of speed were you traveling when you approached the crossing, when you got to the crossing, ing, we will say? A. Why, I should say between twelve and fifteen mile an hour.

“Q. And where were you when you blew your horn for the crossing? A. Well, anywhere from fifty to seventy-five feet beyond the crossing, before I got to the crossing.

“Q. As you approached the crossing did you have any warning of any other vehicle being in that vicinity? A. None whatever.

“Q. By any horn or motion or noise or anything at all? A. Not until I struck the crossing, that is, the Linwood Road proper. Then I heard a noise to my right and as I looked to the right I saw the—as I took it to be, an automobile. I saw the radiator and front wheels.

“Q. How far was that automobile from you when you first saw it? A. Well, I should say about eight feet.

“Q. What, if anything, did you do, if you had time to do anything? A. I hadn't time to do anything.

“Q. Could you tell how fast the automobile was going? Could you form any notion of it at all? A. No, sir.

“Q. What did you next do after that, so far as you know? A. Well, the next I remember I was on my way to the doctor's office in Pleasantville.

“The Court: Did he say how far the automobile was away when he saw it?

“Mr. Bourgeois: About eight feet to the side of him when he saw it and heard it.

“Q. Where were you when you first saw it? You told, but tell again. A. I was right in Linwood Road proper.

“Q. What part of the Linwood Road proper? A. On the right-hand side of the Zion Road, and, as I say, as I came to the edge of the Linwood Road proper I heard this noise and I looks to my right, I sees this automobile, or took it to be.”

At page 35, line 15:

“Q. In other words, when you were fifty feet away you could see fifty feet up that road? A. Yes.

“Q. Did you see the automobile coming? A. Not at that time.

“Q. Did you look for any automobiles or vehicles coming there? A. I did.

“Q. And the machine, was it within that fifty feet at that time, or was it back where you couldn't see it? A. Back where I couldn't see it.

“Q. Was any horn sounded on the automobile so that you could hear it, so that you did hear it? A. I didn't hear any.

“Q. How did this collision happen? Did you run into the automobile or did the automobile run into you? A. The automobile run into me.”

At page 46; line 20:

“Q. And you were working at English Creek on that day? A. Well, I suppose it is

in that neighborhood. It is in the jurisdiction of English Creek. It was Scullville school house.

“Q. How far is that from where the Zion Road crosses the Linwood Road? A. Why, I should say in the neighborhood of five miles.

“Q. What time did this accident happen, do you remember? A. About quarter of five.”

“THOMAS SHEPPARD testified as follows (pp. 67-69):

“Q. Mr. Sheppard, are you the gentleman that Fox says was with him the night of the accident? A. I am, sir.

“Q. You had been riding on the machine from English Creek down? A. Yes, sir.

“Q. How fast do you think you were traveling when you came to Zion Road? A. About—

“Q. I mean when you came to the Linwood Road? A. As near as I can come to it we were going about twelve, fifteen miles an hour. Not over fifteen, anyway. He slowed off coming down.

“Q. Where did you begin to slow down? A. Up there by the cemetery.

“Q. Do you know whether or not Fox blew his horn as he came to the road? A. Three times.

“Q. Three times? A. Three times blew his horn, yes, sir.

“Q. When did you first see the automobile? A. When it hit me.

“Q. When it hit you? A. Yes, sir.

“Q. Did you look before that time? A. Yes, sir.

“Q. Could you see anything? A. No, sir, couldn't see anything until just as I looked around again, I says, 'Lord,' just like that, bam. I didn't know no more.

“Q. Nothing more? A. No, sir.

“Q. It knocked you unconscious, did it? A. Yes, sir.

“By the Court: Q. Where did you commence to look? A. Just by this end of the orchard.

“Q. When you first looked what did you see? A. I didn't see anything at all.

“Q. Wasn't there any automobile in the road? A. No, sir, we couldn't see any automobile in the road at all.

“Q. When was it you saw the automobile then? A. Just the minute I was hit.

“Q. You looked again? A. Yes, sir, right at the road then.

“By Mr. Bourgeois: Q. Did you hear any automobile horn blow? A. No, sir.

“By the Court: Q. Do you mean to say there was no automobile in view when you got by the corner? A. We didn't get by the corner exactly.

“Q. When you got so you could see down the Linwood Road there was no automobile? A. I didn't look until I was hit. Just the minute I looked I was hit, just that quick. I looked around and I was hit.

“Q. Had you looked before that? A. Before I came to the Linwood Road I looked.

“Q. How far could you see? A. Oh, I could see all the way over the road, then, about, I guess, three hundred yards.

“Q. And you didn’t see any automobile on the road? A. No, sir, I didn’t see no automobile and no signs of an automobile or anything on that road. It was in a hollow—it runs hills and holes—I suppose.

“By Mr. Bourgeois: Q. That is, Linwood Road is hilly, up and down? A. Yes, sir.

“Q. There is one quite considerable hill, isn’t there, about two or three hundred feet back from the Zion Road? A. Yes.

“Q. And then there is Mr. Lee’s house there? A. I don’t know whose house it is.

“Q. There is a house, there, isn’t there? A. Yes, there is a house up there.

“Q. When you got down near to the road could you see or was your view obstructed by that brush? A. You couldn’t see anything. There is a hill there and there is a lot of brush all along there.

“WILBERT SPEECE, testified as follows (pp. 56-61, l. 30):

“Q. Mr. Speece, you are one of the constables of Atlantic County? A. I am.

“Q. Did you go to the scene of this accident, Zion Road and Linwood Road, sometime after the accident? A. Yes, sir.

“Q. How soon after? A. About half hour afterwards.

“Q. When you got there whom did you find there? A. Mr. Lipschutz and there was four or five other machines there. Quite a crowd of people.

“Q. Did you see his automobile? A. Yes, sir.

“Q. And did you see the motorcycle? A. Yes, sir.

“Q. Do you know whether or not the motorcycle had been moved before you got there? A. No, sir.

“Q. Don't know. A. No, sir; I don't know whether it had been moved.

“Q. Where was the Lipschutz machine, the machine of the cigar company? A. Down in the swamp.

“Q. How far—did you measure the course it took? A. Yes, sir.

“Q. Tell the jury the course it took and the distance.

“(Witness refers to paper.)

“Mr. Starr: I object to the use of the memorandum unless the witness can justify the validity of using it.

“Q. Did you make those measurements at the time? A. I certainly did.

“Q. In your handwriting? A. Yes, sir.

“Q. And you have had the custody of it ever since? A. Yes, sir.

“Q. Can you state those distances without reference to the memorandum accurately? A. I think so.

“Q. Then do it without the memorandum, if you can, and if you cannot, you can refresh your memory. A. Fifty-two feet from the center of the road to the fence.

“Q. The fence was where? A. On the Linwood Road. That is fifty-two feet from the center of the Zion Road to the fence on the Linwood Road, and forty-five feet from the fence to the end of the machine in the swamp.

“Q. Where did the machine leave the Linwood Road to go into the swamp? Can you tell me where that was? A. Forty-five feet beyond where it stopped. In other words twenty-eight feet from the end of the fence.

“Q. Twenty-eight feet distant from the end of the fence? A. Yes, sir.

“Q. Then it went into the swamp at that point? A. Yes, sir.

“Q. Could you tel from the tracks of the wheels what course it took from the middle of Zion Road until it came to the point where it went off? A. Came right straight down the Zion Road and then kind of shoved out that way down into the swamp.

“Q. What was its course across Zion Road? Was it straight across or was it diagonal? I don't mean diagonal, because the roads are diagonal, but when it crossed Zion Road, what was its course along Linwood Road? A. Well, the tracks of the machine beared a little towards the swamp.

“Q. When it was twenty-eight feet distant from the fence it went into the swamp? A. It shoved back into the swamp, knocked down the fence.

“Q. It went into the swamp how many feet? A. Forty-five feet.

“Q. That was on an angle? A. Yes, sir.

“Q. When it stopped in the swamp, forty-five feet in, you say, it was where with relation to the fence? A. It was forty-five feet from the fence.

“Q. Forty-five feet from the fence? A. Yes, sir.

“Q. In the swamp? A. Yes, sir.

“Q. Did you measure the distance it ran

in the swamp, the marsh there, I mean where the wheels went? Did you measure that distance? A. Only the forty-five feet which she went in.

“Q. What was the nature of that swamp?
A. Well, it was marshy.

“Q. What was the condition of the car with regard to its wheels? Was it standing up on the marsh? A. No, sir, it was down in the marsh.

“Q. How far? A. Down to the hub, front hub.

“Q. Which part of it was down to the hub? A. Front.

“Q. What about the rear part? A. Well, it wasn't down as far as the front.

“Q. Were you there when they got it out?
A. No, sir.

“Q. What sort of a car was it? A. Touring car.

“Q. How many passengers? A. I couldn't say.

“Q. Did you notice what was in the swamp where that went? A. Why, there was cat of nine tails.

“Q. How tall were they? A. They run around about five feet.

“Q. How close to the road did they extend? A. Well, about twenty feet they started to commence.

“Q. About ten feet? A. About twenty.

“Q. Then the car went in the first twenty feet and struck nothing excepting the marsh? A. Yes, sir.

“Q. Then it commenced to strike these cat of nine tails and went on twenty-five feet

through them before it finally stopped? A. Yes, sir.

“Q. That was how many feet from the middle of the road, did you tell me? A. It is fifty-two feet from the middle of the road to the fence, and forty-five feet from the fence in.

“Q. In there? A. Yes.

“Q. It went a diagonal course? A. Yes, sir.

“Q. You spoke about a fence. Where had there been a fence? A. On the right-hand side of the road. There is a fence on both sides. A little creek goes there and it is on both sides of it.

“Q. What happened to the fence? A. The fence was down.

“Q. Was it down all along there or just where the car had gone through? A. Just where the car went in.

“Q. How was that fence built? A. Well, it had plank on top. I think it was five foot posts, five by six, something like that.

“Q. Where was the plank? A. Laying down on the road.

“Q. Yes, but what was the top rail of it? Was that a plank or piece of timber? A. Leave me look at this paper, I will tell you what it was.

“Q. You look at the paper then. A. Four by four top rail, two-inch plank.

“Q. Where was the two-inch plank? A. On top.

“Q. Then above the plank was the top rail, four by four? A. Four by four.

“Q. Did the car just go between two posts? A. No, it knocked the post down. The post was down.

“Q. Well, the post was down where the car had gone over it? A. Yes, sir.

“Q. What was the size of those posts? A. Six by five.

“Q. Now, what was the appearance of the car, the front part of it? A. Well, it was bent, the fender was bent.

“Q. Did you know—of course, you don’t know where Fox was struck at all? A. No, sir.”

“Q. Was there any indication other than the bent fender of any accident there? Was there any blood on the hood or anything of that kind? A. I didn’t see any.

“Q. What other damage did you notice to the car except the fender bent? A. The front spring was bent, front left spring.

“Q. Which fender? A. Front left.

“Q. What about the shoe on that side, was that all right or don’t you know? A. No, the shoe was in bad condition.”

ESTEL D. RIGHTMIRE, testified as follows (p. 133-134):

“Q. What is the angle at which the Linwood Road from the south approaches the Northfield—English Creek Road? A. Sixty-six degrees.

“Q. And a square is ninety degrees, isn’t it? A. Yes, sir.

“Q. Then a person going along or at the middle of the Northfield Road, if he wanted to look down the Linwood Road, would have to look back over his shoulder, wouldn’t he, if he was facing towards Northfield? A. Yes.

“Q. How, what is the distance from the center of the Northfield Road and the center of the Linwood Road to the middle of the bridge over the little creek on Linwood Road north of the English Creek-Northfield Road? A. Sixty-four feet.

“Q. Will you measure out from the fence on the northerly side of the little ditch or creek that appears on the map a distance of forty-five feet and tell me where that is? A. From where?

“Q. From the fence at the bridge on the northerly side of the creek or stream. You have marked by an (x), have you? A. Yes, sir.

“Q. About one inch to the right of the circular lead pencil mark? A. Yes, sir.

“Q. Now, Mr. Rightmire, will you measure from the intersection of the Linwood Road or center of it with the Northfield Road a distance of fifty-two feet? Now, measure from the fifty-two feet across to the point that you have indicated on the map as being forty-five feet inland from that fence? A. Sixty feet.

“Q. That is one hundred and twelve feet in all? A. Yes, sir.

“Q. What is the scale of this map? A. One inch equals fifteen feet.

“Q. Now, what is the per cent of grade of the Linwood Road passing from the middle of the Northfield Road southerly? A. That I don't know. I didn't measure that.

“Q. You noted the grade but don't know how much? A. Yes. There is some grade but I don't know just how much.

"Q. When was that map made? A. January, 1916.

"Q. Then at that time there was no vegetation, I suppose, along this hill here? A. Outside of some brush.

"Q. There was some standing brush there? A. Yes.

"Q. How high was that? A. I don't just recall. There was some brush there.

"Q. No leaves on it, of course? A. No."

MAX LIPSCHUTZ, testified (p. 2, l. 15) as follows:

"Q. Mr. Lex is the manager at the present time? A. He is assistant secretary.

"Q. Where does the Forty-four Cigar Company have its offices? A. Eleventh and Wharton.

"Q. They do quite extensive advertising through New Jersey, do they not? A. Yes, sir.

"Q. By signs and so on? A. Yes, sir.

"Q. Do you remember the sixteenth of August, last? A. Yes, sir.

"Q. Let me ask you first, is that letterhead one of the letterheads of your company? A. Yes.

"Q. And is the name George M. Lex signed to that letter, Mr. Lex's signature? A. Yes.

"Q. And the name Max Lipschutz your signature there? A. Yes.

"Q. Have you ever seen that before? A. Yes.

"Q. Now, Mr. Lipschutz, on the day in question, that is, on the sixteenth of August

of last year, what was the object of your touring through South Jersey? A. Well, I had promised my sister who is sick since that accident, a little ride, an outing for her friends, and it was for that purpose and that alone, that I took them out that afternoon.

“Q. Were you at that time engaged on the business of the company? A. Well, as I always look around, it may be called that and it may not, but the idea of taking them out was for pleasure alone.

“Q. Did you state to the officers of your company that you were out on the business of the company that day? A. They always take it for granted—

“Q. Did you tell them or not? A. Not that I can remember.

“Q. Look at this letter again and tell me whether you told your secretary you were out on the business of your company that day? A. Yes, I did.”

* * * * *

Page 3, line 30:

“Q. Did you state to the officers of your company or at least one of them, the assistant secretary, that you on that occasion were out on the business of the company?”

* * * * *

Page 4, line 10:

“A. I can't just exactly remember that now, it has been so long ago.

“Q. Didn't you state just a few minutes ago that you did so state?”

Page 4, line 35:

“A. I say, I can't exactly remember it right now, it has been so long ago.

“Q. No, I want to know when I asked you the question a couple of minutes ago, showed you the letter and asked you the question, if you didn't say, 'Yes, I did'?”
A. No.

“(Former question and answer repeated as follows: 'Q. Look at this letter again and tell me whether you told your secretary you were out on the business of your company that day. A. Yes, I did.')”

“Q. Now, Mr. Lipschutz, with whom have you talked about this case since the fifteenth day of December, of last year, when you signed that letter? A. I haven't talked to anybody. I have been too busy.”
* * * * *

Page 5, line 35:

“Q. Now, have you talked with your father about it since that time? A. At that time we did.

“Q. But not since then? A. No, we have been very busy.

“Q. I see. Haven't had the time, I suppose, to speak about a little matter like this since the sixteenth of August? A. Well, it was a serious matter, but we had very little time to talk about anything but business.

“Q. In other words, you are willing to forget this? A. Well, I always try to remember everything I possibly can.

“Q. Did you talk with Mr. Funk, the secretary, about it? A. Coming down this morning.

“Q. Never before? A. No. He isn't in town very often. He is traveling most of the time.

“Q. Who was in the car with you at that

time? Tell me, please. A. Why, my wife and my baby on the front seat with myself, my mother-in-law and my grandmother, who is eighty or eighty-five years old, she can't stand much speed, and my sister and two of her friends, and my sister has always been very nervous and never could ride very fast, so we were just taking a slow ride.

“Q. I don't care anything about that. I just wanted to know who they were is all. You said that you were kind of on business for the company, looking at the signs, but out on pleasure. Won't you explain to the jury what you mean? A. Well, I was driving through the country on a pleasure trip and if I seen a Forty-four sign, I was very glad to see it, and know that it was in its place and doing good business.

“Q. As you were going along, did you look to observe them and see that they were in condition? A. They are so bright in color you can't miss them, but I didn't look for them. They were there.

“Q. If you didn't look for them, what was the use of your saying to the assistant secretary that you were on the business of the company?”

* * * * *

Page 7, line 10:

“A. Well, as long as I had seen the signs, and they were paying my salary, it was nothing more than right I should look at them.

“Q. In other words, at the time you were in the employ of the company? They were paying you for the day? A. I always re-

ceived my salary, but on that day I was out on pleasure.

“Q. But you were receiving pay from the company for it, weren't you? They paid the salary for that day? A. My salary is by the year.

“Q. And you, for the purpose of sort of justifying the receipt of the salary, I suppose, looked at the signs as you went along; is that right?”

* * * * *

Page 8, line 5:

“Q. Is that right, Mr. Lipschutz? A. Yes.

“Q. And having looked at them, you considered that you were on the business of the company?”

* * * * *

“A. Not necessarily at all.”

Page 9, line 25:

“Q. Did you, on or about the fifteenth day of December, 1915, make a statement to anybody that at the time the accident happened this car was being driven by you for pleasure and business combined?

“Mr. Starr: That is objected to on the same ground as I stated before.

“The Court: I want to examine this question. If you have any further questions you may ask them and revert to this after awhile.”

Page 85, line 35:

“Q. Mr. Lipschutz, the cigar company was the owner of this car, I understand? A. Yes, sir.

“Q. What did it use the car for? A. When?

“Q. What use did it make of an automobile? A. Business.

“Q. What sort of business? A. Well, business of looking up different matters pertaining to our business.

“Q. And the different matters that you would look up would be what sort? A. Various different matters. They would range from interviewing an incoming customer to carrying cigars or a good many other things.”

* * * * *

Page 86, line 30:

“Q. Now, on what previous occasions had you looked at the signs when you were passing along in an automobile?”

* * * * *

Page 87, line 1:

“A. Why, in Atlantic City, along Atlantic Avenue, where we have quite a few, they always attract my attention to look at them, whether I am on business or not.

“Q. And when had you been observing them prior to this day?

“Mr. Starr: That is objected to on the same grounds as stated before.

“Objection overruled. Exception noted for defendant. Question repeated.

“A. Whenever I would see them. It has always been second nature for me to look at them, being quite interested.

“Q. What is the object of looking at them, inspecting them, as it were?

“Mr. Starr: That is objected to as immaterial, irrelevant, incompetent and improper.

“Question allowed.

“A. If on business to see if they are in good condition, and otherwise, through a force of habit.”

Page 88, line 15:

“Q. But do you remember having gone out to inspect them in connection with other business?”

“A. You see I was down there—

“Mr. Starr: That is objected to on the ground it is leading, improper and incompetent.

“Objection overruled. Exception noted for defendant. Question repeated.

“A. Not that day.

“Q. Not that day, but other days? A. Not while I was down there.

“Q. I don't care whether you were down there or not, but you have done it, haven't you? A. You mean in my other work?

“Q. Anywhere at all? A. In town, in the City of Philadelphia, yes, certainly?”

“Q. Then you have gone out and inspected them when you haven't been on business, that is, other business, haven't you?”

* * * * *

Page 89, line 5:

“Q. On this occasion did you look at the signs of the Forty-four Cigar Company? A. I may have.

“Q. Well, didn't you say you did? A. Well, I can't just remember if I did or not. I see so many of them I can't tell if I saw them on that trip or not. You see, I was out on a pleasure trip, and I don't see where that entered into it.

“Q. What did you mean by saying in your testimony this morning that it was pleasure and business? A. Well, I was taking the family out and I consider that pleasure.

“Q. What was the business you were doing? A. Well, I consider it business to look at the signs as I went along the road, if there were any there.

“Q. What for, to see whether they were in good shape or not? A. See how they looked, if they were there, from interest, force of habit, being in the position I occupy with this concern.

“Q. How many signs did you look at? A. There weren't many there. It wasn't very well populated. There was very few.”

W. FRANK SOOY testified (p. 113, l. 5) as follows:

“The Court: Did he represent the Forty-four? A. Yes, Judge Weaver, representing the Forty-four Cigar Company, then communicated with me, and I sent him a form of answer covering the agreement I had had with Mr. Stern—

“By the Court: Q. For the Forty-four? A. Yes.

“Q. You were acting for the Forty-four Cigar Company? A. I am just telling what happened. I don't know how to determine this myself. He didn't file the form of answer I sent him and I was advised that I was representing Max Lipschutz.

“By Mr. Bourgeois: Q. And not the Forty-four Cigar Company? A. I was ad-

vised then that I was representing Max Lipschutz and that Judge Starr, I think it was, would take care of the Forty-four Cigar Company, or that they would, either of the two, I forget just exactly who would.

“Q. After that time did you receive this letter? A. After I had written? Yes.

“By the Court: Q. After you had written when? A. After I had written—I don’t know the date of the letter I had written. This is in reply to the letter I wrote to—I thought it was the Forty-four Cigar Company. Evidently to Mr. Max Lipschutz, because this says Mr. Max Lipschutz. After I had written that letter to him in which I said if the company would admit that they owned the car—

“Mr. Starr: I object to the witness detailing the contents of the letter.

“The Court: Yes.

“(Question repeated.)

“A. After I had written the letter I referred to as having written, after I had had my conversation with Mr. Stern.

“By Mr. Bourgeois: Q. Did you receive this letter? A. Yes.

“Letter marked P-2 for identification.”

Page 114, line 30:

“Q. Mr. Sooy, you had prepared an answer, had you not, to be filed in this case on behalf of the Forty-four Cigar Company? A. I don’t think I prepared it to be filed. I think I prepared it and sent it to Mr. Weaver.

“Q. It was to be used as a defense in this action? A. That was my idea, yes.

“Q. Do you remember when that was? A. No, I don’t remember the date at all.

“Q. Of course, it was after the suit was brought? A. Oh, yes, it must have been after the suit.

“Q. Have you ever been formally discharged by the Forty-four Cigar Company after you had prepared that answer until this letter was written? A. Now, let’s see—

“(Question repeated.)

“A. Why, I was notified by the Forty-four Cigar Company that I was representing Max Lipschutz.

“Q. That was later, was it not, after this letter was written to you? A. Yes, yes.

“By Mr. Bourgeois: Q. Were you ever formally employed by the Forty-four Cigar Company? A. Not—no, I wasn’t.

“Q. You received pay for what you did? Whose check did you get for the work you did? A. Well, I sent my bill to Max Lipschutz. I suppose it was Max Lipschutz’s check.”

Page 116, line 30:

Mr. Sooy’s previous answer repeated as follows:

“And advised him that Mr. Stern would bring his suit against Max Lipschutz and not against the Forty-four Cigar Company or Mr. Lipschutz, Senior, if the Forty-four Cigar Company would file an answer in which they admitted that the company owned the car—

“By Mr. Bourgeois: Q. Was that what you intended to say? A. No. Against the Forty-four Cigar Company and not against Max Lipschutz or Mr. Lipschutz, Senior.

“Q. Why was the letter handed to Mr. Stern?”

Page 118, line 35:

“Q. Mr. Sooy, how did you come to turn the letter of December fifteenth, 1915, over to Mr. Stern of our firm?”

* * * * *

Page 119, line 30:

“A. To carry out the agreement I had with Mr. Stern as to the form of answer that would be filed by the Forty-four Cigar Company in the event suit was brought by the plaintiff in this case.”

Page 120, line 1:

“Q. Brought against whom in this case by the plaintiff? A. Against the Forty-four Cigar Company, leaving out as defendants Max Lipschutz and his father.

“By the Court: Q. Had you any authority from the defendant to turn that letter over to Mr. Stern? A. I had written the defendant stating that—”

* * * * *

“Q. Will you produce the correspondence you had, leading up to the receipt of this letter of December fifteenth? First produce the letters you wrote and the answers to them. A. I had written a letter of December thirteenth to—

“Q. Did you write before that? December ninth, I think you wrote a letter, didn't you? A. On December ninth, I had written a letter to the Forty-four Cigar Company, of which this is a copy.

“Mr. Bourgeois: We ask you to produce the letter written by Mr. Sooy to the Forty-four Cigar Company under date of December ninth, 1915.

“Mr. Starr: I have no such letter here

and no such demand has ever been made on me.

“Mr. Bourgeois: I make that now. The defendant is presumed to have all documents in Court pertaining to the case.

“Q. Is this a copy of the letter you wrote? A. Yes, that is a copy of the letter.”

* * * * *

Page 121, line 30:

“Q. Now, Mr. Sooy, I will ask you to produce a letter received by you from the Forty-four Cigar Company under date of December eleventh in answer to Exhibit P-3 for identification? A. There is the letter.”

Page 122, line 20:

“The Court: All right, go ahead and I will consider them altogether.

“Letter marked P-4 for identification.

“Q. Now, have you a letter that you wrote to Max Lipschutz following the date of December eleventh? A. Yes, sir.

“Q. I think December thirteenth? A. December thirteenth.

“Mr. Bourgeois: I will offer that letter for identification. I will mark it for identification and offer it in a few minutes.”

* * * * *

Page 123, line 10:

“Letter marked P-5 for identification.

“Q. Have you a letter written to you from Forty-four Cigar Company under date of December eighth? A. Yes.

“Q. Will you produce it, please? Was that written in answer to a letter from you, or was this an original letter from them to you? A. That is an original letter.

“Mr. Starr: Is this letter offered?”

“Mr. Bourgeois: It will be.”

* * * * *

“Letter marked P-6 for identification.

“Q. Mr. Sooy, did you write to the Forty-four Cigar Company prior to December eighth? A. Prior to December eighth, 1915?”

Page 24:

“Q. Yes, I mean with relation to the—
A. A letter to John Weaver, representing the Forty-four Cigar Company on December third. Now, wait a minute. Yes, on December third I wrote a letter to the Forty-four Cigar Company.

“Q. Let me see it please. Did you get a reply to that letter? A. Yes, sir.

“Q. Will you let me see the reply, please? A. On December fourth.

“Mr. Bourgeois: That does not contain anything except a matter that is not of importance.

“Q. Did you have any other letters to or from them, the Forty-four Cigar Company, bearing upon the questions of the admissions of allegations one, two and three? A. I had written two letters to Mayor Weaver, representing the Forty-four Cigar Company, of Philadelphia, one on November twenty-third and one on December—

“Q. They were both prior to the letter of December eleventh which you received from the Forty-four Cigar Company, terminating your employment? I think that is all, Mr. Sooy. One question. Did you make investigation to learn whether or not the Forty-four Cigar Company ever paid

you any fee? A. Yes, I find that I was paid or check was sent me on January twenty-fifth, 1916, by Max Lipschutz, in a letter signed by Max Lipschutz, in which he told me that he was paying the enclosed bill.

“The Court: Was the bill to him? A. Yes, the bill—I say the bill was to him. I would like to show the correspondence. There is the letter in which the check came.

“Q. ‘My personal check’—

“Mr. Starr: I object to that letter on the ground that it is not binding upon the defendant and it is a privileged communication between attorney and client and is not evidential of any fact in issue in this cause, irrelevant, immaterial, incompetent and improper.

“Letter marked D-1 for identification,”

* * * * *

Page 125, line 20:

“Q. You sent him a bill and he paid you; is that it? A. That is the purport of the testimony, yes.

“Q. Well, is it the fact? A. Yes, I sent him a bill. I forget how the bill was addressed, but I got a check from Max Lipschutz.

“By Mr. Bourgeois: Q. These copies that you have produced here of letters, were they duplicate copies of letters, the originals of which were sent? A. Yes, they were duplicates of the originals.”

Page 128, line 35:

“The Court: I will admit the evidence and deny the motion to non-suit, giving you leave to renew your motion at the end of the case on all grounds.”

Page 180, line 10:

“Both sides rest.”

Page 180, line 15:

“The Court: Further reflection convinces the Court that the correspondence ending with the letter of defendant company dated December fifteenth, 1915, must be excluded from the case.

“Mr. Bourgeois: Does that exhibit go from it, too?

“The Court: All the letters.

“Mr. Bourgeois: You order it excluded?

“The Court: Yes.

“Mr. Bourgeois: Allow us an exception?

“The Court: Yes.

“Exception noted for plaintiff.

“Mr. Bourgeois: If your Honor please, I offer in evidence the letters beginning with December eighth up to December fifteenth.

“Offer denied. Exception noted for plaintiff.”

The exhibits were as follows:

Exhibit P-6 Iden.

Page 182:

Benjamin Lipschutz	Mahlon A. Funk
President	Sec'y and
and Treasurer	Sales Manager
Max Lipschutz	George M. Lex
Assistant	Assistant
Treasurer	Secretary.

FORTY-FOUR CIGAR COMPANY
INCORPORATED

Lipschutz's
44
Cigars

Adlon
Cigars.

Business Established by Benjamin Lipschutz
1893. Main Office and Factory N. E. Cor. 11th
and Wharton Street, Philadelphia P. O. Address,
Southward Station.

Address all communications to Company.

Dec. 8

1915

Messrs. Bolte, Sooy & Gill.

21 Law Building,
Atlantic City, N. J.

Gentlemen:

We are to-day in receipt, through Mr. John Weaver of a draft of an answer prepared by you in the matter of suit brought against us by Vrois Fox. We would be pleased to have you advise us if you have taken any action whatsoever toward filing this answer, or if you have filed any papers in the matter, as far as the "44" Cigar Company, a Corporation is concerned.

Mr. Weaver, in error, returned to you the copy of the Summons, instead of sending it to the Insurance Company, as you no doubt, know that the interests of the "44" Cigar Company, a Corporation are being looked after by the Insurance Company, and we presume that the Insurance Company will file their answer for us.

Mr. B. Lipschutz is now absent in the West, and the writer understands through Mr. Max Lipschutz that Mr. B. Lipschutz and Mr. Max Lipschutz are being looked after by you therefore, we would ask that you advise us immediately whether you have filed any papers whatsoever, as far as the "44" Cigar Company a Corporation is concerned.

We would like to have this matter adjusted at once, as we are very desirous of all matters per-

taining to this case, as far as the "44" Cigar Company, a Corporation is concerned being handled by the Insurance Company, and should you take any action in filing any documents as far as the "44" Cigar Company is concerned, it is apt to complicate matters somewhat.

Please give this matter your immediate attention.

The writer tried to reach you on the 'phone today but was unsuccessful.

Yours very truly,

"44" CIGAR COMPANY,

L. R.

Geo. M. Lex.

Page 184:

Exhibit P-4 Iden.

Dec. 11

1915

Messrs. Bolte, Sooy & Gill,
21 Law Building,
Atlantic City, New Jersey.

Gentlemen:

We have your favor of the 9th inst. and have carefully noted your comments.

There is little that we can add to our letter of Dec. 8th, other than to advise that the interests of the "44" Cigar Company are being looked after entirely by the Insurance Company.

We believe that you readily understand there are peculiar features to this case that may lead to further litigation, should a verdict be rendered against us.

Please leave the Insurance Company attend to looking after the "44" Cigar Company's interests and you look after the interest of Mr. B. Lipschutz

and Mr. Max Lipschutz personally, as they no doubt have arranged for.

Will you please advise us that you fully understand these instructions.

Yours very truly,
 "44" CIGAR COMPANY, INC.

George M. Lex,
 Asst. Sect'y.

L/R

Page 185:

Exhibit P-2—5, 26, 16 M.

December 15th, 1915.

Bolte, Sooy & Gill,
 21 Law Building,
 Atlantic City, N. J.

Attention of W. Frank Sooy, Esq.

Gentlemen:

The writer has your letter of the 13th inst. addressed to Mr. Max Lipschutz.

The answer as filed by the Insurance Company is about what we expected, nevertheless, the policy that they issued to us calls for Business and Pleasure, and as Mr. Max Lipschutz was an Officer of the Company, we feel, under the terms of the contract, that he had a perfect right to drive the car.

You can rest assured that Mr. Max Lipschutz at the trial will testify.

First: That the Company owned the car.

Second: That he was driving the car, combining both pleasure and business.

Third: That he was an Officer of the Company.

In order to fulfill your wishes in the matter, I

am having a postscript in this letter which is signed by Mr. Max Lipschutz.

Very truly yours,
 "44" CIGAR COMPANY, INC.

(Signed) Geo M. Lex,
 Asst. Sec.

L-AH

P. S.

W. Frank Sooy, Esq:

The facts as covered by Mr. Lex above will be testified to by me at the trial.

Very truly yours,
 (Signed) MAX LIPSCHUTZ.

Page 186:

Exhibit P-7 Iden.

January 25, 1916.

Wm. Frank Sooy,
 c/o Bolte, Sooy & Gill,
 Atlantic City, N. J.

Dear Sir:

Enclosed you will find my personal check for \$150.10 covering your bill for services rendered.

I wish to thank you for the many courtesies extended me, and the promptness in which you handled the matter. I presume that you fully understood Mr. Lex on the 'phone several days since, and I will have your cooperation along the lines suggested.

The trial is scheduled for Friday, the 28th inst. If you have any suggestions to make to me that will be of benefit, would be pleased to have you submit same before the trial comes off.

Again thanking you for your kindness, I am,

Respectfully yours,

MAX LIPSCHUTZ.

L-BH

BENJAMIN LIPSCHUTZ, testified as follows (p. 138, l. 30):

“Q. Mr. Lipschutz, are you the father of Max Lipschutz? A. Yes, sir.

“Q. And are you also president of the Forty-four Cigar Company? A. Yes, sir.”

* * * * *

Page 139, line 1:

“Q. What instructions had you given Max with reference to what he should do on the day of that accident? A. I gave him instructions to go around with Andrew Jacoby from one store to another and see the distribution of the goods.

“Q. Where? A. In the City of Atlantic City.

“Q. Did you give him any instructions to go out into the country with the machine? A. No, in the country. I told him not to go in the country with his sister. Business before pleasure.

“Q. You knew of the request of the sister for an automobile ride, did you? A. He told me that she made a request before the appointment with Jacoby but I said, ‘She will wait the next day, and keep the appointment with Jacoby, and not to go for any pleasure.’

“Q. Max was the assistant treasurer of the Forty-four Cigar Company, was he? A. Yes.”

* * * * *
Page 140, line 20:

“Q. How long has the forty-four Cigar Company owned this car? A. Couple of years.

“Q. What did they buy it for? What was the object? A. Object to entertain a customer when he comes in town, a prospective customer or a regular customer, and to go, take me home, and what is necessary in the business.

“Q. Take you home? A. Yes, to take me home or to go to the bank or to take a customer out.

“Q. Who else used it besides you? A. My son.

“Q. And who else besides your son? A. Mr. Funk, Mr. Lex.

“Q. In other words, all of the officers of the company; is that right? A. The officers and my wife and children.

“Q. Yes, but primarily it was bought for the purpose of the company and the benefit or convenience of the officers of the company; is that right? A. That is right, but also for the purpose of taking out my sick daughter.

“Q. Your sick girl? A. Daughter.

“Q. In other words the company bought it for the purpose of taking out your sick girl occasionally? A. Yes.

“Q. How often had she been taken out in it? A. Good many times.

“Q. Where, in Philadelphia? A. Philadelphia and Atlantic City.

“Q. And sometimes in Atlantic City? A. Yes.

“Q. During what course of time, what period of time? A. All the time since we had the machine.

“Q. Ever since you had the machine?

Was that one of the reasons it was bought by the company? A. For both reasons.

“Q. Now, when it was taken out in the city for the benefit of your daughter, who drove it? A. Chauffeur.

“Q. Always, or sometimes did your son? A. Well, sometimes.

“Q. Sometimes your son? When it was used for business purposes, who drive it? A. Chauffeur.

“Q. And who else? A. Sometimes the son.”

Page 147, line 20:

“Q. Mr. Lipschutz, you are president of the company, and your son is assistant secretary. He also is a director of the company, isn't he? A. Yes.

“Q. Now, isn't it a fact that he performs duties outside of what you have just said were his specific duties? He does other things around there? He has other charge of that company than simply to go to those factories, one from the other? A. That is his duty.

“Q. I know that is his duty, but doesn't he do other things besides that for the company? A. He might, but it isn't—he ought not to do it. He has got plenty to do for making the cigars.”

Page 152, line 20:

“Q. Mr. Lipschutz, what is the name of your sick daughter? A. Esther.

“Q. That is the one that Max had out with him that day? A. Right.”

Page 153, line 2:

“Q. How, has he or has he not at any time since he has been in charge of the man-

ufacturing end of the business, made any reports that you ever heard of with relation to the signs in the various parts of the country, or the advertising matter? A. I don't know.

"Q. What say? A. I don't know as he did.

"Q. To your knowledge, has anything of that kind ever happened? A. Well, I think he might.

"Q. What say? A. He might.

"Q. Do you know of any instance where that has occurred? Do you know of any instance where he has made any report to the company or to you with reference to the advertising, or the signs since he has been in charge of the manufacturing end of the business? A. Well, I do know that he saw a sign not in shape, but I don't know if he reported it.

"Q. You don't know whether he reported it or not? A. I don't know.

"Q. How long has he been in charge of the manufacturing end of the business? A. For four years."

Law

In the case of *Yordan v. Hess*, 13 John., Rep., 490, which was a question of usury, wherein an attorney at law disclosed a statement made to him by one of the parties after the relation of attorney and client has ceased, the Supreme Court of New York said:

"If the testimony of Brackett was admissible, it most fully established the usury. The plaintiff twice admitted to this witness

that the note was given for a greater sum than was received by the defendant. * * * With respect to the testimony of Brackett, it does not fall within the rule which protects the client from a disclosure of any communications made by him to his attorney. The confessions by the plaintiff to Brackett were made after he ceased to be his attorney, and although they were substantially a reiteration of what had been communications made by him to his attorney and client existed, yet they appear to have been voluntary disclosures, in no way sought for or drawn out by the witness. An attorney cannot, after he ceases to be the attorney of a party, disclose what was communicated to him in that capacity, but this is the privilege of the client, and if he chooses after this relation has ceased, to volunteer any communication, he is not protected although they may be in substance the same as were given whilst the relation existed."

A communication between attorney and client, to be privileged, must have been communicated while the relation of attorney and client existed.

In the case of *Shillicothe, etc., v. Jamison*, 48 Ill., 281, the Supreme Court said:

"The question then arises whether it appears that Gibbons did testify to facts which he learned from his clients while the relation of attorney and client continued, as he was a competent witness as to facts learned from other sources or even from his former client if communicated after the relation had ceased."

In the case of *Jennings v. Sturdevant*, 42 N. E., 61-62, the Supreme Court of Indiana held that conversations between an attorney and former client at a time when the witness was not acting as attorney for the person with whom he was conversing was not privileged.

In the case *In re Turner's Estate*, 31 Atl., 867, the Supreme Court of Pennsylvania held that a request made to an attorney to assist one in securing a bequest which the attorney refused to do, was not privileged although the attorney had on other occasions represented the same person.

In the case of *Lanasa v. State*, 71 Atl. Rep., 1058, the Court of Appeals of Maryland held that to render communications between attorney and client privileged they must be made during the existence of the actual relation or during interviews and negotiations looking to the establishment of such relation, and must relate to professional advice as to the subject-matter about which such advice is sought.

“A communication to an attorney not in his capacity as such is without privilege if made before the relation was entered into or after it was ended.”

Vol. 4, Whigmore on Evidence, Sec., 2304.

Cuts v. Pickering, 1 Ventr., 197.

In *Foster v. Paul*, 12 Pick. (Mass.), 89, at page 98, Chief Justice Shaw held that a communication to be privileged must be made during the attorney's employment and not before, (citing *Bul. Np.*, 284), nor after (citing *Cobden v. Kendrick*, 4 Turn., 432), and further held that the privilege did not extend to matters not communicated to his client as confidential but facts known of his own

knowledge (citing *Lord Say & Seal's*, 10 Mod., 40).

In the case of *Marsh v. Hare*, 36 Barb., 649-654, the Supreme Court of New York said:

“A statement made to an attorney is no more privileged than one made to any other person unless it is made for the purpose of obtaining professional advice on the subject of such statement. If it is a statement which has no reference to the professional employment it falls within the exception to the rule of exclusion although made while the relation of attorney and client exists. This is the rule in all the standard works upon evidence, and no case can be found to the contrary. If the statement had been made with a view of obtaining professional advice from the witness in regard to the validity of the transaction of which the assignment was a part, it would have been privileged, but the evidence expressly negatives this and shows that it was made merely for the purpose of conveying a piece of information. I have assumed from the facts disclosed by the evidence that the relation of attorney and client was at an end as regards the action in which the judgment assigned was obtained.”

In the case of *State v. Loponio*, 36 N. J. L. J., 373, our Court of Errors and Appeals held that a communication to an attorney, to be privileged, must have been intended to be privileged, and that while it was not necessary that an employment should actually exist, there must be an intention to employ.

A communication by plaintiff to his attorney for

the purpose of its publication to defendant is not privileged.

Bartlett v. Bunn, 56 Hun, 507.

A communication made by a party to a suit to an attorney to be communicated to the adverse party is not privileged.

Henderson v. Terry, 62 Tex., 281.

Company's letter shows that contents were intended to be disclosed to attorney of adverse party.

Documentary evidence is not rendered incompetent by the fact that the party offering it improperly obtained possession of it, if otherwise competent.

Trask v. People, 151 Ill., 523, 38 N. E., 248.

MAX LIPSCHUTZ testified (p. 2, l. 35) as follows:

“Q. Now, Mr. Lipschutz, on the day in question, that is, on the 16th day of August of last year, what was the object of your touring through South Jersey? A. Well, I had promised my sister, who is sick since that accident, a little ride, an outing for her friends, and it was for that purpose and that alone that I took them out that afternoon.

“Q. Were you at that time engaged on the business of the company? A. Well, as I always look around, it may be called that, and it may not, but the idea of taking them out was for pleasure alone.

“Q. Did you state to the officers of your company that you were out on business of

the company on that day? A. They always take it for granted.

“Q. Did you tell them or not? A. Not that I can remember.

“Q. Look at this letter again and tell me whether you told your secretary you were out on the business of the company that day. A. Yes, I did.”

Page 6, line 15:

“Q. I don't care anything about that, I just wanted to know who they were is all. You state that you were kind of on business for the company looking for the signs, but out on pleasure. Won't you explain to the jury what you mean? A. Well, I was driving through the country on the pleasure trip, and if I seen a Forty-four sign, I was glad to see it and know that it was in its place and doing good business.

“Q. As you were going along did you look to observe them and see that they were in condition? A. They were so bright in color you couldn't miss them, but I didn't look for them; they were there.”

Page 6, line 35:

“Q. If you didn't look for them, what was the use of your saying to the Assistant Secretary that you were on the business of the company? A. Well, as long as I had seen the signs and they were paying my salary, it was nothing more than right I should look at them.”

Page 85, line 35:

“Q. Mr. Lipschutz, the Cigar Company was the owner of this car, I understand? A. Yes, sir.”

Page 86, line 3:

“Q. What use did it make of an automobile? A. Business.

“Q. What sort of business? A. Well, business of looking up different matters pertaining to our business.”

Page 86, line 12:

“Q. You state that on this occasion you looked at the signs as you went along, as you had done frequently before. * * * Now on what previous occasions had you looked at the signs when you were passing along in an automobile? A. Why in Atlantic City along Atlantic Avenue where we have quite a few. They always attract my attention to look at them whether I am on business or not.

“Q. When had you been observing them prior to this day? A. Whenever I would see them. It has always been second nature for me to look at them, being quite interested.

“Q. What was the object of looking at them, inspecting them as it were? A. If on business, to see if they are in good condition, and otherwise through force of habit.”

Page 88, line 2:

“Q. On what occasion did you go out in the machine with the specific purpose of looking at these signs ever? A. Can't remember.

“Q. But you do remember having been out to inspect them in connection with other business? A. You see I was down there—

* * * * *

“Q. Not that day? A. No, not that day, but other days while I was down there.

“Q. I don’t care whether you were down there or not, but you have done it, haven’t you? A. You mean in my other work?

“Q. Anywhere at all. A. In town, in the City of Philadelphia, yes, certainly.”

Page 89, line 1:

“Q. On this occasion did you look at the signs of the Forty-four Cigar Company?

A. I may have.

“Q. Well, didn’t you say you did? A. Well; I can’t just remember if I did or not. I see so many of them I can’t tell if I saw them on that trip or not. You see I was out on a pleasure trip and I don’t see where that entered into it.

“Q. What did you mean by saying in your testimony this morning that it was pleasure and business? A. Well, I was taking the family out, and I considered that pleasure.

“Q. What was the business you were doing? A. Well, I considered it business to look at the signs as I went along the road if there were any there.

“Q. What for, to see whether they were in good shape or not? A. See how they looked if they were there, for instance, force of habit, being in the position I occupy with this concern.

“Q. How many signs did you look at? A. There weren’t many there; it wasn’t very well populated; there was very few.

Page 138, line 25:

BENJAMIN LIPSCHUTZ testified, line 30:

“Q. Mr. Lipschutz, you are the father of Max Lipschutz? A. Yes, sir.

“Q. Are you also President of the Forty-four Cigar Company? A. Yes, sir.”

Page 139, line 15:

“Q. Max was Assistant Treasurer of the Forty-four Cigar Company, was he? A. Yes.”

On cross-examination, page 140, Benjamin Lipschutz testified, line 25:

“Q. How long has the Forty-four Cigar Company owned this car? A. A couple of years.

“Q. What did they buy it for? What was the object? A. Object to entertain a customer when he comes in town, a prospective customer, or a regular customer and to go take me home, and what is necessary in the business.

“Q. Take you home? A. Yes, to take me home, or to go to the bank, or to take a customer out.

“Q. Who else used it besides you? A. My son.

“Q. Who else besides your son? A. Mr. Funk, Mr. Lex.

“Q. In other words, all the officers of the company, is that right? A. The officers and my wife and children.

“Q. Yes, but primarily it was bought for the purposes of the company and for the benefit and convenience of the officers of the company, is that right? A. That's right, but also for the purpose of taking out my sick daughter.

“Q. Your sick girl? A. Daughter.

“Q. In other words, the company bought it for the purpose of taking out your sick girl occasionally? A. Yes.

“Q. How often had she been taken out in it? A. Good many times.

“Q. Where, in Philadelphia? A. Philadelphia and Atlantic City.

“Q. And sometimes in Atlantic City? A. Yes.

“Q. During what course of time, what period of time? A. All the time since we had the machine.

“Q. Ever since you have had the machine. Was that one of the reasons it was bought by the company? A. For both reasons.

“Q. Now when it was taken out in the city for the benefit of your daughter, who drove it? A. Chauffeur.

“Q. Always, or sometimes did your son? A. Well, sometimes.

“Q. Sometimes your son. When it was used for business purposes, who drove it? A. A chauffeur.

“Q. And who else? A. Sometimes the son.”

Page 141, line 35:

“Q. I know, but he was Assistant Treasurer, wasn't he? A. Yes.”

Page 150, line 20:

“Q. Mr. Lipschutz, what is the name of your sick daughter? A. Esther.

“Q. And that is the one that Max had out with him on that day? A. Yes.”

It appearing from the uncontradicted testimony that the defendant purchased the car for the purpose of taking Esther Lipschutz out, and that Max Lipschutz had frequently used the car for the pur-

pose of taking her out, both in Philadelphia and in Atlantic City, and it further appearing that Max Lipschutz testified that he was engaged at the time of the accident on business and pleasure, and that he had represented to the company that at the time he was engaged on business and pleasure, it was error for the Court to direct a verdict against the plaintiff.

Max Lipschutz was a director and officer of the defendant company. He had been accustomed to driving the automobile for the purpose for which it was purchased by the company, including the taking out of his sister.

If Max Lipschutz had not contradicted himself on the witness stand, it is submitted the Court would have been bound to have directed the jury to find that the defendant company was liable for the injury caused by the car, and that in view of the fact that Max Lipschutz contradicted his testimony touching the matter, at most only raised a question to be submitted to the jury as to the liability of the defendant, and did not warrant the Trial Judge in directing a verdict against the plaintiff.

It is submitted that the rule of law applicable to this case is:

Where a master purchases an automobile for the use of a particular person, or a number of persons, and an accident happens by reason of the negligence of the driver while one of the persons for whose use the automobile was purchased is an occupant therein, and the driver asserts that he was not at that time driving the automobile on the business of the owner, it raises a jury question.

In the case of *Missell v. Hayes*, 86 L., 348, Hayes, the defendant had purchased an

automobile for the general use of his immediate family, and for that purpose was operated by himself and his two sons. At the time of the accident, one of the sons was driving the automobile. It also contained the father, his wife and daughter, all members of his immediate family, and two others: one, a young lady guest of the daughter, and the other a young man guest of the son. It was urged that those facts were sufficient to form a basis for the finding that the son was acting as the servant of the father and within the scope of his employment as such.

The Court distinguished the case of *Doran v. Thompson*, 76 L., 754, and held that the case was properly submitted to the jury for the jury to determine whether the automobile was at the time of the accident being used in the father's affairs or business.

In the case at hand, the jury should have been permitted to find whether the automobile at the time of the accident was being used for the purposes of the defendant company, inasmuch as Esther Lipschutz, the sick daughter of the president, and for whose use the automobile had been purchased, was an occupant therein at that time for her health, and notwithstanding the fact that the mother of Max Lipschutz' wife and a friend of Esther were in the car at the time.

In the case of *Denison v. M'Norton*, 228 Fed., 401,

wherein the defendant in error while crossing the railroad adjoining the public square in the City of Cleveland, was struck by defendant's automobile driven by his

son, sustaining severe injuries, on account of which the suit was brought. At the close of the testimony defendant asked direction of a verdict in his favor, which was denied and the case submitted to the jury, which gave verdict for plaintiff on which judgment was entered. The grounds relied on for reversal were:

(1) That defendant was not liable for the alleged negligence of the son in operating the automobile for lack of relation of master and servant.

Defendant was actively connected with a manufacturing corporation; his home was about seven miles from his business; his immediate family consisted of defendant, his wife, four sons and one daughter, living at home. Two of the sons, as well as the daughter, were adults, one of the adult sons being engaged in the business with which the father was connected. The third son, William, was about twenty years old, and was employed in the same business. The fourth son, sixteen or seventeen years old, was still in school. The defendant owned the car, which was used not only for taking him and his sons back and forth between home and business (as well as for some business purposes) but also for purposes of pleasure and recreation for the family, not only on week days but on Sundays. No chauffeur was kept, and this car was the only one defendant or any member of his family had. The father drove comparatively seldom. Usually one of the sons drove, and it is fairly inferable that William was usually the one to drive when in the car by reason of his greater experience

as a driver. On the day of the accident which was Sunday, the father and mother were away from the city on a few days' absence, the four sons and the daughter remaining at home. An automobile trip to a resort some sixty miles distant being planned, the daughter put up and took lunch for the refreshment of the party. The car, carrying the four sons and the daughter, as well as another man, a friend of the family, who as the daughter testified, "was visiting us," the maid was the only member of the household left at home.

The Court at page 404 said:

"As to whether the son was engaged in the father's business, it is a rule supported by the better weight of authority, (although there are cases seemingly taking a contrary view) that where a father provides an automobile for the purpose of furnishing members of his family with outdoor recreation, the use of the car for such purpose is within the scope of the father's business, analogous to the furnishing of food and clothing or ministering to their health."

In the case at hand the car was being used for one of the purposes for which the defendant company purchased it, and at the time of its use was therefore within the scope of defendant's business.

An important element in the case at hand is the fact that the car was being driven at the time the accident happened for the health and recreation of Esther Lipschutz and for one of the very purposes for which it was purchased.

The case of *Denison v. M'Norton* above men-

tioned makes it clear that there is a vital distinction between a case where a member of the family takes the car out for his own pleasure without the owner father's consent, and a case where such member takes the car out for the health and recreation of another member of the family. Nor is the defendant absolved from liability by reason of the fact that testimony was offered to show that Benjamin Lipschutz, the father of Max, and the president of the company, gave instructions to Max Lipschutz, the Assistant Treasurer of the company, that he, Max, should not take his sister out on that day. There is nothing in the testimony to show that the conduct of the business of the company by the Assistant Treasurer was subject to the orders of the president. The taking of Esther in the automobile for her health was just as much a part of the business of the company, in view of the purposes for which the automobile was purchased, as was the collection of bills, or the adjusting of accounts. All pertain to the business of the company, and the uncontradicted testimony shows that Max Lipschutz had been accustomed to driving the automobile for not one but various purposes of the company. It is not a question of whether the agent is obeying or disobeying orders of the owner, but only a question of whether or not the agent is engaged in the business of such owner.

In the case of *Moon v. Matthews*, 76 Atl. Rep., 219, the Supreme Court of Pennsylvania held:

“That while acting for his master, a servant may have disobeyed his commands would not take his act out of the scope of his employment so as to absolve the master from liability for an injury inflicted by the servant.”

At page 220 Mr. Justice Potter says:

“Since the scope of the servant’s employment is necessarily dependent on circumstances, a hard and fast rule cannot be laid down as to the scope of any particular employment, and it is ordinarily a question for the jury whether or not a particular act comes within the scope of the servant’s employment.”

In the case of *Guinney v. Hand*, 26 Atl., 20, the question was whether the driver of a beer wagon was at the time of the accident in the employ of the defendant. It was admitted that he was actually driving the defendant’s wagon, but asserted that at the time of the accident he was in the temporary service of one of its customers to whom he had a few minutes before delivered a barrel of porter, which customer had asked him to go on a certain errand for him in connection with the porter he had just delivered. During the trip the accident happened.

At page 21, Chief Justice Sterrett, for the Supreme Court of Pennsylvania, said:

“Whether the driver was acting within the scope of his employment was clearly a question for the jury.”

In the case of *Bennett v. Busch*, 75 N. J. L., 240, the defendant, while on a business trip in an automobile, made his headquarters at a hotel, the automobile being kept in a garage several blocks away. On the evening of the accident, at arriving at the hotel the defendant, after telling his chauffeur that he was going out in the machine that night, directed him to go downstairs in the hotel and get oil. Instead of obeying his

instructions literally, the chauffeur drove the automobile to the garage. Later and while he was there the collision occurred. Held that whether the chauffeur was acting within the general scope of his authority was properly submitted to the jury, although in this particular instance the use of the machine was in disobedience of the literal instruction of the master.

In the case of *Holler v. Ross*, 68 L., 324, at page 328 our Court of Errors and Appeals stated the law, quoting from the case of *Stone v. Hill*, 45 Conn., 47 as follows:

“For all acts done by a servant in obedience to the express orders or directions of the master, or in the execution of the master’s business within the scope of his employment, and for acts in any sense warranted by the express or implied authority conferred upon or concerning the nature of the services required, the instructions given and the circumstances under which the act is done, the master is responsible. For acts which are not within these conditions, the servant alone is responsible.”

In the case of *Bennett v. Busch*, *Ibid*, the Court said:

“Where fair-minded men might honestly differ as to the conclusions to be drawn from facts, whether controverted or uncontroverted, the question at issue should go to the jury.”

BOURGEOIS & COULOMB,
Atty’s. Appellant.

NEW JERSEY

Court of Errors and Appeals

VORIS FOX,
Plaintiff-Appellant, }
vs. }
"44" CIGAR COMPANY,
Defendant-Respondent. }

Respondent's Points.

FACTS.

The pertinent and essential facts are set forth in the brief of appellant. There was a direction for the defendant—the action being against the defendant grounded upon the alleged negligence of one Max Lipschutz. The primal question is, Did the relation of master and servant exist at the time of the accident? A secondary question is involved in the exclusion of certain letters offered by the plaintiff.

LAW.

POINT ONE.

As the defendant is a corporation, the burden was cast upon the plaintiff to show that at the time of the

accident the driver of the automobile was a servant of the corporation and engaged in business for his master. This, we say, the evidence fails to disclose. It was not open to the jury to find, either from the evidence introduced or any legitimate inference that could be drawn therefrom, that the driver was on his master's errand. That such fact must be established is elementary, and shown by numerous cases cited in the exhaustive brief of the appellant. We need but cite *Missel v. Hayes* in this Court, reported in 86 *Law*, page 348. The Court said:

"To constitute the relation of master and servant as to third persons it is not essential that any actual contract should subsist between the parties or that compensation should be expected by the servant.

"While the relation of master and servant in its full sense invariably and only arises out of a contract between a servant and a master, yet such contract may be either express or implied. The real test as to third persons is whether the act is done by one for another with the knowledge of the person sought to be charged as master, with his assent expressed or implied, even though there was no request on his part to the other to do the act in question."

Applying this test, it is obvious that the direction was the only course open to the trial court.

The direct testimony touching the purpose of the mission of the driver of the automobile is given by Max Lipschutz and Benjamin Lipschutz. The pertinent part is at pages 6, 89, 91, 92, 93, 95, 96, 100, 139, 141 and 152. The driver was assistant treasurer of the company and an employee. At the time of the accident he was on his vacation, and was taking a pleasure trip at the request and for the benefit of his sister. At page 89 we have:

"Q. Now, you were in Atlantic City on a vacation, were you not— A. Yes, sir.

Q. —at this time? And your wife and baby were there? A. Yes, sir.

Q. And your father and mother? A. Yes, sir.

Q. You had a chauffeur for the machine, did you not, employed by the company? A. Yes, sir.

Q. On this day when you took the machine, who suggested taking a ride for pleasure? A. Why, my sister had asked me to take her out, and I promised to do so.

Q. Had your sister some friends visiting her from out of Atlantic City? A. No; from Atlantic City.

Q. And was that the first suggestion from any source that you take the machine out to have a pleasure ride with your sister? A. Yes, sir."

At page 95:

"Q. When you were taking this trip what were you doing? A. On a vacation, that is all.

Q. You were on a vacation at that time, but what up to that time had been your duties with the company? A. At the time of my vacation?

Q. Yes. A. As superintendent of the factories.

Q. Superintendent of the factories? Had you anything to do with looking at signs? A. No. That was out of my jurisdiction at that time. I had no more charge of that any more. I did before. That was my first occupation."

Benjamin Lipschutz, the president of the company, is asked, at page 139:

"Q. Did you give him (meaning Max) any instructions to go out into the country with the machine? A. No, in the country. I told him not to go in the country with his sister. Business before pleasure.

Q. You knew of the request of the sister for an automobile ride, did you? A. He told me

that she made a request before the appointment with Jacoby, but I said, 'She will wait the next day, and keep the appointment with Jacoby, and not to go for any pleasure.'

Q. Max was the assistant treasurer of the Forty-four Cigar Company, was he? A. Yes.

Q. What part of the business did he have charge of?

A. To go from one factory to another and see how the goods is made and to employ foreman and people employed in the shops.

Q. With reference to the manufacture of the goods? A. Making the cigars.

Q. Did he have anything to do with the advertising feature of the company, or anything of that kind? A. No, sir.

Q. Did he have anything to do with the placing of signs throughout the country? A. No, sir.

Q. On this day the accident happened, did he have any authority from you as president of the company or from any other officer of the company, to your knowledge, to take the automobile out and inspect the signs around Atlantic City in the country? A. No, sir, in the country. The whole company, Mr. Funk, Mr. Lex and myself—

Q. Just answer the question. Had he any duty to perform so far as the company was concerned with reference to the inspection or location of signs around Atlantic City, in the country around Atlantic City? A. None whatever."

It is true that the president testified as follows (page 141):

"Q. Yes, but primarily it was bought (speaking of the automobile) for the purpose of the company and the benefit or convenience of the officers of the company, is that right? A. That is right, but also for the purpose of taking out my sick daughter.

Q. Your sick girl? A. Daughter.

Q. In other words, the company bought it for the purpose of taking out your sick girl occasionally? A. Yes."

From this testimony appellant urges that it was open to the jury to find that on the occasion of the accident the driver, Max Lipschutz, was on the business of the defendant. It should not be overlooked that the defendant is a corporation and cannot be bound by any act or statement unless made by one duly authorized to act and speak. See *King v. Gas Company*, 70 *Law*, page 679; and *Thomson v. Central Passenger*, 80 *Law*, page 328.

Both witnesses say that the driver was not on the company's business and that the mission was one of pleasure at the request of the sister of the driver. It was made in direct opposition to the command or instructions of the president of the company. It is true that the driver testified that while riding he was looking at the signs of the company, and it may be urged that this was in the interest of the company. But the testimony is full to the effect that this was no part of the duty or business of the driver, and the ride was not initiated for that purpose. At best it was a mere incident of the primary purpose, which was pleasure. It may also be urged that since the president testified that the automobile had been bought for the purpose, among others, to give rides to the sick daughter, that at the time of the accident the driver was on the business of the company. There are several answers to this suggestion. First, the president had told the driver not to use the car that day, but to attend to some business with Mr. Jacoby. Second, notwithstanding the statement of the president of the company, it cannot be that giving rides to the sick daughter of the president is any part of the company's business. Third, there is nothing in the case to indicate that the president was authorized by the corporation to make the statement that he did or that it knew of the alleged use of the car. There is no evidence to bring such a fact to the attention of the

corporation or that there was ever any holding out by the corporation or ratification. The principle enunciated in *Thomson v. Central Passenger, supra*, seems pertinent and applicable. The Court said:

"The corporation is not bound by an unauthorized agreement made by its president outside of the scope of his express or implied authority and not in the course of its ordinary business which it, through its directors, has neither ratified, acquiesced in or knowingly profited by."

POINT TWO.

It was not error to exclude the letters offered by the plaintiff.

At the time of the motion to nonsuit (page 107) the letters had not been offered. The trial judge allowed the case to be reopened, and at the time the case was closed the only letter offered was *Ex. P 2*, which was offered at page 129. After the case was closed the Court, on its own motion, page 180, said:

"Further reflection convinces the Court that the correspondence ending with the letter of defendant company dated December fifteenth, 1915, must be excluded from the case."

As only *Ex. P 2* had been offered, the exclusion could refer only to it, but later counsel said, "If your Honor please, I offer in evidence the letters beginning with December eighth up to December fifteenth."

We insist that in this situation, both sides having rested, the only letter that can be considered by this Court is *Ex. P 2*, and in any event the letter dated December 15th and that dated January 25th, 1916, must be excluded from consideration under plaintiff's own offer.

For the purpose of the discussion, however, we shall assume that the Court will consider all the letters printed in the case. Counsel for the appellant called the driver as his witness and endeavored to elicit from him the contents of one or more of the letters, and he stated in

substance that the object of his effort was to show that the letters would contradict the witness. If it be true that the contents of the letters show that the witness had made the statement different from that he made under oath, then the object was to impeach him, which was not permissible. He was the appellant's witness, and while the law permits one who calls a witness to contradict him, it does not permit impeachment, and this was the plain purpose on the part of counsel. Later counsel said that his purpose was to show by the letters that the company had admitted that the driver was on its business. Objection was made by counsel who tried the cause that the introduction of the letters involved the breach of a privilege of defendant, the letters being addressed to their attorneys, Messrs. Bolte, Sooy & Gille. The cases cited on appellant's brief show that communications between client and attorney are privileged, and the privilege can be waived only by the client. This is the undoubted law. A number of the cases which he cites say that this privilege does not extend to statements made after the relation ceases. We regard this as the law, but think it is without application, for the letters in question were written at a time when the relation was continuing. That the letters concerned the suit in question, and that they were written to Messrs. Bolte, Sooy & Gill as representing the defendant company, is plain from the letters, which speak for themselves. The only letter the exclusion of which could possibly have harmed the appellant is the one of December 15th, *Ex. P 2*. We earnestly insist that that shows a relation of attorney and client, and was plainly privileged. While it does not expressly or directly appear in the case, it may be inferred that the defendant company was insured and that the insurance company was raising some question as to its liability, and the defendant company was evidently seeking to anticipate the insurance company in the event of its claiming no liability under its policy. This was a matter which was peculiarly of great importance to the defendant com-

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pany, and correspondence touching the same was of highly privileged character.

But aside from this a reading of the letter will show that there was no admission that the driver was on the business of the company. What the letter says is:

"You can rest assured that Mr. Max Lipschutz at the trial will testify.

First—That the company owned the car.

Second—That he was driving the car, combining both pleasure and business."

You must read into this letter that it was the business of the company and assume that because it says that Mr. Lipschutz will so testify that it was a fact. Moreover, this letter was not binding on the defendant. There is not the slightest evidence that the writer who signed himself "Assistant Secretary" was such, or that he had authority to bind the company. There is no presumption of such authority in favor of an assistant secretary, and no previous transaction or holding out was shown which would have justified the jury in finding that the letter was signed by properly constituted authority. The same applies to the postscript reputed to be signed by Max Lipschutz, although there was no proof of his signature. At best the statement is the conclusion of the writer, and not a fact from which the jury would have been permitted to find that the driver was on an errand of the defendant.

There is another aspect of the case which should be borne in mind. If Messrs. Bolte, Sooy & Gill were not representing the defendant company at the time of the receipt of the letters they were representing Max Lipschutz, then certainly the letters would not be binding upon the company. What is said touching the letter of December 15th applies to all the letters.

The above are the only points covered by the exceptions and discussed in the brief of counsel.

Neither show any legal error, and we respectfully submit the judgment should be affirmed.

C. L. COLE,
Attorney for Respondent.

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