

the counties in the same manner as a judgment or other imposition is incitem would be raised.

In like manner, the other cases on pages twelve, thirteen and fourteen of the appellant's brief, which deal with the delegation of taxing power, are not in point. Here there is no attempted delegation of the taxing power. The Commission appointed under the statute will look to the respective counties to have its funds raised, just as boards of education look to the cities and counties respectively for the raising of their funds, and just as the courts, prosecutors, county board of elections, county election bureaus all look to the boards of chosen freeholders of the several counties for the raising of their funds (matters as to which is last named group the boards of chosen freeholders have absolutely no discretion as to the amount to be raised, and expenses by statute being made mandatory upon freeholders).

It is therefore respectfully submitted that the facts of the present case (as found in the order of the Chief Justice, and as affirmed by the Supreme Court) come within the terms of the 1908 Amendment as to a disagreement between Boards. In any respect as to the manner or method of rebuilding a bridge", and that the present order should stay.

Respectfully submitted,

ARTHUR T. VANDERBILT,
Attorney for and Counsel
with Defendant-Respondent.

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Notice of Appeal.

New Jersey Supreme Court 10

STEVE DORYK, by FRANCES DORYK
 KUZMAR, his next friend, and
 FRANCES DORYK KUZMAR, indi-
 vidually,

Plaintiffs,

v.

PERTH AMBOY BOTTLING COMPANY,
 a corporation,
 Defendant.

20

To John E. Toolan,
 Attorney of Plaintiffs.

TAKE NOTICE, that the defendant hereby appeals
 to the New Jersey Court of Errors and Appeals
 from all of the judgment entered herein on Feb-
 ruary 2, 1927, on the verdict rendered in this cause
 in favor of the plaintiffs. 30

Dated February 4, 1927.

Yours respectfully,

FRANK G. TURNER,
 Attorney of Defendant-Appellant.

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Grounds of Appeal.

NEW JERSEY COURT OF ERRORS AND APPEALS.

STEVE DORYK, by FRANCES DORYK
KUZMAR, and FRANCES DORYK
KUZMAR,

10

Plaintiff-Appellees,

v.

PERTH AMBOY BOTTLING COMPANY,
Defendant-Appellant.

To the plaitniffs and their attorney:

20 TAKE NOTICE, that the following are the grounds of appeal on which the defendant-appellant will rely herein:

1. The Trial Court erroneously admitted evidence of a conversation between the driver of the defendant's truck and one Herbert Meek.

2. The Trial Court erroneously permitted one Herbert Meek to testify concerning a happening on the temporary bridge of Perth Amboy prior to the time of the alleged accident.

30 3. The Trial Court erroneously permitted Joseph Doryk to testify as to conversation with the driver of the defendant's truck.

4. The Trial Court erroneously refused to order a judgment of non-suit in favor of the defendant on the ground that no negligence has been shown on the part of the defendant.

40

Grounds of Appeal.

5. The Trial Court erroneously refused to order a judgment of non-suit in favor of the defendant on the ground that the plaintiff was guilty of contributory negligence.

6. The Trial Court erroneously refused to order a judgment of non-suit in favor of the defendant on the ground that the driver of the truck had no authority as such to invite anyone to ride on the truck.

10

7. The Trial Court erroneously refused to order a judgment of non-suit on the ground that the plaintiff was an employee of the defendant and that the Workmen's Compensation Bureau had sole jurisdiction to determine the question between the plaintiff and the defendant.

20

8. The Trial Court erroneously refused to order a judgment of non-suit on the ground that the Supreme Court was without jurisdiction to hear and determine the said cause.

9. The Trial Court erroneously refused to direct a verdict in favor of the defendant on the ground that no negligence has been shown on the part of the defendant.

30

10. The Trial Court erroneously refused to direct a verdict in favor of the defendant on the ground that the plaintiff was guilty of contributory negligence.

11. The Trial Court erroneously refused to direct a verdict in favor of the defendant on the ground that the driver of the truck had no authority as such to invite anyone to ride on the truck.

40

Grounds of Appeal.

10 12. The Trial Court erroneously refused to direct a verdict in favor of the defendant on the ground that the plaintiff was an employee of the defendant and that the Workmen's Compensation Bureau had sole jurisdiction to determine the question between the plaintiff and the defendant.

13. The Trial Court erroneously refused to direct a verdict in favor of the defendant on the ground that the Supreme Court was without jurisdiction to hear and determine the said cause.

14. The Trial Court erroneously refused to instruct the jury as follows:

20 "The jury is instructed to bring in a finding whether the plaintiff Steve Doryk, at the time of the accident, was an employee of the defendant company and was actually performing a duty for the defendant at the time of the accident."

15. The Trial Court erroneously refused to instruct the jury as follows:

30 "The jury is further instructed to find whether the employment of Steve Doryk was at the time of the accident a mere casual employment or whether he was a regular employee."

16. The Trial Court erroneously refused to charge the jury as follows:

40 "If the boy was not an employee at the time of the accident he cannot recover in this case."

Grounds of Appeal.

17. The Trial Court erroneously charged the jury as follows:

10 "Was that boy there as an invitee of Mr. Schwartzberg, as president of the company, as I say, either expressly from Mr. Schwartzberg, or from the driver in such a way that Mr. Schwartzberg, having full knowledge of it, that the act of his employee, the driver, was his act, the same as though he was the one encouraging and inviting and inducing the boy to be on the truck? That is the question."

18. The Trial Court erroneously charged the jury as follows:

20 "But, if the boy was on that truck, and on that truck as an invitee at the time of the accident, then was there such conduct upon the part of the defendant that was actionable negligence? Was this boy thrown off the truck as a result of such an act, in the handling of that car, upon the part of the driver of that car, that a reasonably prudent person would not have been guilty of under the time, place and circumstances, or, did he fail to do anything which a reasonably prudent person would have done under the time, place and circumstances, which was the cause of the throwing off of this boy?"

30

19. The Trial Court erroneously charged the jury as follows:

Grounds of Appeal.

“Was that boy on that truck as a result of an invitation expressed, or so implied as to be equal to an express invitation upon the part of the defendant, through the president of the defendant company?”

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FRANK G. TURNER,
Attorney and of counsel with
the Defendant-Appellant.

20

30

40

Summons.

(Filed October 1, 1926.)

THE STATE OF NEW JERSEY.

To Perth Amboy Bottling Company, a corporation.

You are summoned to answer the annexed complaint of Steve Doryk, by Frances Doryk Kuzmar, his next friend, and Frances Doryk Kuzmar, individually, in an action at law in the New Jersey Supreme Court. And take notice

10

(L. S.)

that unless you file your answer to said complaint with the Clerk of the New Jersey Supreme Court, at Trenton, within twenty days after service upon you of this writ and the annexed complaint, the plaintiffs may proceed in the suit and judgment may be entered against you.

20

WITNESS, William S. Gummere, Esq., Chief Justice of our said Court, at Trenton, this 29th day of September, Nineteen Hundred and Twenty-six.

EDWARD J. KELLEHER,
Clerk.

JOHN E. TOOLAN,
Attorney.

30

40

Complaint.

(Filed October 1, 1926.)

NEW JERSEY SUPREME COURT,

MIDDLESEX COUNTY.

10	STEVE DORYK, by FRANCES DORYK KUZMAR, his next friend, and FRANCES DORYK KUZMAR, indi- vidually,	}	Action at Law.
	Plaintiffs,		
	<i>v.</i>		
	PERTH AMBOY BOTTLING COMPANY, a corporation, Defendant.		

20

FIRST COUNT.

Plaintiff herein, Steve Doryk, residing in the City of Perth Amboy, County of Middlesex, and State of New Jersey, by Frances Doryk Kuzmar, his next friend, complaining of the defendant, says that:

1. Defendant herein on or about the 17th day of April, 1926, was the owner of an automobile which was then and there being operated, through its servants and agents, in a general easterly direction at or near the intersection or meeting of New Brunswick Avenue and Lawrie Street, in the City of Perth Amboy, Middlesex County, New Jersey.

2. Plaintiff herein, at the time and place aforesaid, was a minor aged ten years who was riding in the said automobile by invitation and at the request, instance and solicitation of defendant.

40

Complaint.

3. The automobile aforesaid was a commercial vehicle used by defendant in its business. Said automobile at the time and place when plaintiff was riding therein was to the knowledge of defendant herein defective and in an unsafe condition to be operated upon the public highway in that the brakes or mechanical parts operating said brakes were in such defective and unsafe condition or had been adjusted in such a careless and unskillful manner that said automobile to the knowledge of defendant was likely in the course of its regular operation to suddenly jerk or stall in such manner that persons riding therein would be thrown from said vehicle.

10

4. Defendant herein, with the knowledge aforesaid, invited and solicited the plaintiff to ride in said automobile. Plaintiff herein, at the time and place aforesaid, was ignorant of the condition or defect in defendant's automobile.

20

5. Defendant herein, with the knowledge aforesaid, on the date and at the time and place aforesaid, and while plaintiff herein was riding as a passenger in said vehicle as aforesaid, operated and drove its automobile, through its agents and servants, at a reckless and negligent rate of speed and in such a careless and negligent manner as to cause and permit said vehicle to suddenly swerve or turn and to suddenly stop or jerk in such a manner that plaintiff herein was thrown from said vehicle to the roadway.

30

6. As a direct and proximate result of being thrown from defendant's automobile, plaintiff herein suffered and sustained severe and permanent injury, to wit: a fracture of the skull and severe injuries about the head, arms, legs, body

40

Complaint.

and face, as a result of which said injuries plaintiff suffered and sustained severe physical and mental pain and anguish and ever since said accident has been and in the future permanently will be disfigured and crippled and otherwise will in the future suffer from injuries of a nature and description which plaintiff is unable to explain that will render plaintiff herein unfit to do or perform the work that he would otherwise be able to do.

Plaintiff demands as damages the sum of fifteen thousand (\$15,000.00) dollars, on the first count.

SECOND COUNT.

Plaintiff herein, Frances Doryk Kuzmar, residing in the City of Perth Amboy, in the County of Middlesex, and State of New Jersey, complaining of the defendant says that:

1. Plaintiff repeats Paragraphs 1, 2, 3, 4, 5 and 6 of the first count.

2. At the time and place aforesaid plaintiff herein was the widowed mother of the said Steve Doryk and the person morally and legally responsible for his support, education and maintenance.

3. As a direct and proximate result of the injuries sustained by the said Steve Doryk as aforesaid, plaintiff herein was obliged to and did expend large sums of money for doctors, hospital and medicines and will in the future be obliged to expend large sums of money for doctors, hospital and medicines to have the said Steve Doryk cured of his injuries as aforesaid.

Plaintiff demands as damages the sum of one thousand (\$1,000.00) dollars on the second count.

JOHN E. TOOLAN,
Attorney for the Plaintiffs.

Answer.

(Filed October 19, 1926.)

NEW JERSEY SUPREME COURT,
MIDDLESEX COUNTY.

STEVE DORYK, by FRANCES DORYK KUZMAR, his next friend, and FRANCES DORYK KUZMAR, indi- vidually, <p style="text-align: right;">Plaintiffs,</p>	}	Action at Law.
v.		
PERTH AMBOY BOTTLING COMPANY, a corporation, Defendant.	}	

The answer of Perth Amboy Bottling Company at Perth Amboy, New Jersey, to the plaintiffs' complaint:

1. The defendant denies the allegations of the first and second counts of the complaint.

FIRST SEPARATE DEFENSE:

1. Defendant says that the said plaintiff Steve Doryk was guilty of contributory negligence at the time and place of the alleged accident charged in the complaint as follows:

2. He failed to exercise due care for his own safety. He carelessly and negligently placed himself in a position of danger unknown to and without the consent of or knowledge of the defendant. He carelessly and negligently and wrongfully trespassed upon the automobile of the defendant with-

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Answer.

out the knowledge or the consent of the defendant. He wrongfully and unlawfully placed himself upon the automobile of the defendant well knowing that by such wrongful act on his part he was likely to and would cause injury to himself.

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SECOND SEPARATE DEFENSE:

1. Defendant says that the said alleged accident charged in the complaint and the injuries, if any, to the said plaintiff Steve Doryk were caused by the sole negligence of the plaintiff Steve Doryk as follows:

2. Defendant repeats the second paragraph of the first separate defense.

20

FRANK G. TURNER,
Attorney of Defendant.

30

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Reply.

(Filed November 4, 1926.)

NEW JERSEY SUPREME COURT,

MIDDLESEX COUNTY.

STEVE DORYK, by FRANCES DORYK
KUZMAR, his next friend, and
FRANCES DORYK KUZMAR, indi-
vidually,

Plaintiffs,

v.

PERTH AMBOY BOTTLING COMPANY,
a corporation,
Defendant.

Action at Law.

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Plaintiffs herein deny each and every allegation
in defendant's answer.

JOHN E. TOOLAN,
Attorney of the Plaintiffs.

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Postea.

(Filed February 2, 1927.)

NEW JERSEY SUPREME COURT,

MIDDLESEX COUNTY.

10	STEVE DORYK, by FRANCES DORYK KUZMAR, his next friend, and FRANCES DORYK KUZMAR, indi- vidually, <div style="text-align: right; padding-right: 10px;">Plaintiffs,</div>	} Action at Law.
	<i>v.</i>	
	PERTH AMBOY BOTTLING COMPANY, a corporation, Defendant.	

20 This case was tried at the Middlesex Circuit, De-
 cember Term, before the Honorable Peter F. Daly,
 Circuit Court Judge, and a jury on January 27 and
 January 28, 1927.

30 The jury returned a verdict in favor of the plain-
 tiff Steve Doryk, by Frances Doryk Kuzmar, his
 next friend in the sum of four thousand (\$4,000.00)
 dollars, and in favor of the plaintiff Frances Doryk
 Kuzmar, individually, in the sum of five hundred
 (\$500.00) dollars, and against the defendant, Perth
 Amboy Bottling Company.

PETER F. DALY,
 Circuit Court Judge.

Judgment.

NEW JERSEY SUPREME COURT.

STEVE DORYK, by FRANCES DORYK KUZMAR, his next friend, and FRANCES DORYK KUZMAR, indi- vidually, <div style="text-align: right; padding-right: 10px;">Plaintiffs,</div>	} Action at Law. On Postea.	10
<i>v.</i>		
PERTH AMBOY BOTTLING COMPANY, a corporation, Defendant.		

20 It is ordered that judgment be and hereby is
 entered against the defendant and in favor of Steve
 Doryk, by Frances Doryk Kuzmar, his next friend,
 plaintiff for the sum of four thousand dollars, and
 in favor of Frances Doryk Kuzmar, individually,
 plaintiff, for the sum of five hundred dollars, be-
 sides costs to be taxed *nisi*.

Entered February 2, 1927.

On motion of

JOHN E. TOOLAN,
 Attorney. 30

\$4000.00 S. D.
 500.00 F. D. K

4500.00
 56.31

\$4556.31

Case.

NEW JERSEY SUPREME COURT,
MIDDLESEX COUNTY CIRCUIT,
December Term—1926.

10 STEVE DORYK, by FRANCES DORYK
KUZMAR, and FRANCES DORYK
KUZMAR,
v.
PERTH AMBOY BOTTLING COMPANY.

20 Transcript of stenographer's notes of evidence
in the above entitled cause, taken before Hon.
Peter F. Daly, Circuit Court Judge, and a jury, at
the Middlesex County Court House, in the City of
New Brunswick, New Jersey, on the twenty-sev-
enth day of January, A. D. 1927, at 12.20 P. M.

APPEARANCES:

JOHN E. TOOLAN, Esq., Attorney for the
Plaintiffs.

30 FRANK G. TURNER, Esq., Attorney for the
Defendants.

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

Mr. Toolan opens the case for the plaintiffs.

Mr. Turner: I understood counsel to say that
the boy was employed by the Perth Amboy Bottling
Company on the day of the accident. Do I under-
stand that?

40 Mr. Toolan: No, I do not put it that way. I do
not say employment, because I say that this boy

Herbert Meek, direct.

does not come within the provisions of the com-
pensation act. I say that this boy was engaged
with the anticipation that he would receive some
reward for that particular hiring on that day,
whether it be a bottle of soda, or a quarter, or a
half a dollar, or something of that description. 10
That is the nature of the employment that we
claim.

Mr. Turner: I also understood that the boy had
been employed by the same company on previous
Saturdays. That is right?

Mr. Toolan: No, I did not say that. I said on
previous and irregular occasions during the sum-
mer before that, and occasionally on indifferent
Saturdays, as the exigencies of the trade required
they would get either this boy or some other boy 20
to come in and give them a little lift. There was
no regular employment.

Mr. Turner: I will not make any motion on
that because as it stands now I think we should
go to our proofs.

Mr. Turner opens the case for the defendant.

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

Direct examination by Mr. Toolan:

Q. Herbert, how old are you? A. Sixteen.

Q. Where do you live, Herbert? A. 656 Sayre
Avenue.

Q. Perth Amboy, New Jersey? A. Yes, sir.

Q. Do you know Steve Doryk? A. Yes, sir.

Q. How long have you known Steve Doryk? A.
Ever since he moved there in behind the Perth
Amboy Bottling Company. 40

Herbert Meek, direct.

Q. Where is the Perth Amboy Bottling Works in Perth Amboy? A. On New Brunswick Avenue.

Q. Well, is it right on the street or not? A. It is about one hundred feet in from the street.

10 Q. How close to that does Steve Doryk live? A. He lives right in back of it about fifty yards behind the plant.

Q. Now, on the morning of the seventeenth of April, 1926, did you see Steve Doryk? A. Yes, sir.

Q. Where did you see him? A. He come up my house and I met him and we went out, we were going up to the baker shop where I worked, we were going to carry some boxes in, and on our way up we met "Stricky" with the truck.

Q. Who is "Stricky"? A. Gutowsky.

20 Q. Who did he work for at that time? A. "P. A. B. Co."

Q. Who? A. Perth Amboy Bottling Company.

Q. Where did you meet the truck driver? A. By Tony Lans.

Q. Where is that? A. On New Brunswick Avenue.

Q. How far from the Perth Amboy Bottling Works plant? A. About two or three blocks.

30 Q. What was "Stricky" or the driver doing at the time you saw him? A. He stopped his truck and he was just getting out to go in the store, and he told—

Mr. Turner: I object to what he told on the ground it would not be binding upon the defendant.

Mr. Toolan: I think we can show what the driver said to them. I do not think it comes within the line of the case of Blackman *v.* The Railroad.

40 The Court: Why is not that competent?

Herbert Meek, direct.

Mr. Turner: Anything the driver may have told is not binding on the defendant.

The Court: On the question of invitation?

Mr. Turner: Yes, sir.

The Court: Objection overruled.

Mr. Turner: Prays exception. 10

A. He asked us if we wanted to take a ride around town with him and we agreed. And when he come out—

The Court: Strike out "We agreed."

Q. Tell us what you did. A. When he come out we went up on Raritan Avenue to a store and delivered some soda and then we went down to the Madison— 20

Q. When you delivered the soda how was it done? How was it delivered? A. Steve handed it to me.

Q. Who handed it to you? A. Steve Doryk.

Q. What happened then? A. I put it on the ground and then Steve and I and the driver helped to carry it in.

Q. That was where? A. On Raritan Avenue.

Q. Then where did you go from there? A. To the Madison Hotel. 30

Q. What happened there? A. "Stricky" went in and we delivered some beer.

Q. Yes. Who delivered the beer? How was it delivered? Who was it delivered by? A. Steve pulled it in the back of the truck and I put it on the elevator and "Stricky" was downstairs, he took the elevator down.

Q. Then where else did you go? A. We went to a house down in town, I don't know the name of the street. 40

Herbert Meek, direct.

Q. Well, what else did you do that morning?

A. Then we come up to Smith Street and we were going out Smith Street towards the plant and we met Steve Doryk's brother Martin and some other fellow.

10 Q. Where did you meet Martin? A. On Maple and Smith Street, they were standing there.

Q. What happened then? A. "Stricky" stopped and gave him a ride up.

Q. When you say "Stricky" who do you mean? A. The driver.

Q. What is his full name? A. I don't know his first name.

Q. What is his last name? A. Gutowsky.

20 Q. At Maple and Smith Street what happened there? A. The driver stopped the truck and Martin Doryk and another lad jumped on and we started up, and as we were leaving there—we crossed the temporary bridge and just as we were going off the planks—

Mr. Turner: I object to that on the ground that it is immaterial and incompetent and irrelevant. This relates to some time prior to the alleged accident.

30 Mr. Toolan: It is the same morning and we will show—

The Court: I will allow it. You may take an exception.

Mr. Turner: I pray an exception.

A. (Cont.) And just as we were going off the plank on to them brick that was laid, the brakes locked, and on the other side of the railing—

Q. What happened when the brakes locked? A. The two wheels stood stiff and slid.

40 Q. What happened to the truck? A. The truck stopped with a jerk.

Herbert Meek, direct.

Q. And then what happened? A. And then the boss was on the other side of the railing and he turned around with his car.

By the Court:

Q. What boss? A. Schwartzberg. 10

By Mr. Toolan:

Q. What is his first name? A. Abe.

Q. Is he in court here? A. He is up there.

Q. Where is he? Will you point to him? A. (Witness indicates.)

Q. Where is he sitting? A. On the end of the bench.

Q. Which bench?

The Court: Do not let us take up time. 20
Let him stand up.

The Court: Is that the man?

The Witness: That is the man.

By Mr. Toolan:

Q. What was he doing? A. He was coming around on the other side of the railing going down towards Market Street, and he went slow and was watching across that truck, and then "Stricky" fixed the brake and we started off again and we went up to Tony Lans. 30

Mr. Turner: Where he says he fixed the brakes, I move that be stricken out. That is a conclusion.

The Court: Strike it out.

Q. What did you see him do? A. I was in the back of the truck and I don't know what he done.

Q. Why did you say he fixed the brakes if you 40

Herbert Meek, direct.

didn't see what he did? A. They locked and he broke them.

Q. What did he do? A. I don't know. I was sitting in the back of the truck.

10 The Court: Strike out all he said about the brakes, that is fixing the brakes.

Q. What happened to the wheels as you were coming off the wooden part of the bridge? A. The wheels locked and they wouldn't turn and they slid for about three or four foot and the car stopped.

20 Q. Well, what, if anything, did you see the driver do? Did you see him do anything? A. He just sat there and was pushing something. I don't know what he done. He just sat in the cab and started up and we went, and when we came up to Tony Lans, that is where "Tiff" and I—I got off the truck. Steve stayed on and Martin and the other fellow that was with Martin went home to bring lunch.

Q. Now, where did you get off the truck? A. At Tony Lans.

Q. How far is that from the plant of the Perth Amboy Bottling Company? A. Three blocks.

30 Q. Where were Steve Doryk when you got off? A. He stayed right in the back of the truck.

Q. Did you see Steve again that morning? A. After I went home I got lunch and when I was coming home with the lunch I met the baker and he gave me a ride up to the shop.

Q. Never mind all those things. Did you see Steve Doryk again that morning? A. Yes.

40 Q. Where? A. I went in front of the baker's taking off boxes, and I was coming out for some

Herbert Meek, direct.

boxes and I saw the truck with a white ice box on it and Steve—

Q. What truck is that? A. The Reo, the same truck we were on in the morning.

10 Q. Yes. A. Steve was standing in the back with his hands on the ice box, and the truck made— was going swing around New Brunswick Avenue into Laurie Street and it gave a jerk, but it didn't stop and Steve fell out and the truck—the driver didn't know it, and some mercantile driver was coming down, he hollered to him, and then "Stricky" stopped.

Q. Who was driving the truck at that time? A. The same one.

Q. Who was that? A. "Stricky."

20 Q. Where was Steve standing when you saw him? A. He was standing in the back of the truck right near the tail board.

Q. Was the tail board up or down? A. The tail board was up.

Q. How high was this ice box? A. It was about two and one-half foot.

Q. And where was Steve standing with reference to the ice box? A. He was standing at the end of the ice box right near the tail board.

30 Adjourned Until 2.00 P. M.

AFTERNOON SESSION 2.00 P. M.

Q. What was the position of the tail board? A. The tail board was up.

40 Q. And what happened as the truck was traveling along there? A. After the truck made the—it was straightening out east, after he made the swing off New Brunswick Avenue, the car gave a jerk and "Tiff" went frontwards and then backwards and fell off.

Herbert Meek, direct.

Q. When you say "Tiff" who do you mean? A. Steve Doryk.

Q. Did you see him land? A. He landed on the side of his head and "Stricky" kept on going. Stanley kept on going and there was a truck from the Mercantile Company with a driver stopped him and told him—

Mr. Turner: I object to what he told him.

Q. Then what did they do with reference to the boy? What did they do then? A. Stanley come back and lifted the boy and looked at him and some man come—

Mr. Turner: I object to what was said.

Mr. Toolan: He has not said anything about what was said.

A. Stanley came back and lifted him up and looked at him and another man took him by the feet and they put him in a car and went away. And I went in the baker shop and I stayed there, and the baker took the "P. A. B. Co.'s" car.

Q. Never mind that. How long have you known Mr. Schwartzberg, the man who was the proprietor of this bottling company? A. About a year.

Q. Did you ever work in the bottling plant? A. Yes, sir.

Q. Steadily? A. We would work until the job was finished, carrying bottles from box cars on the truck and when the job was finished then that would be the end. We would not have no more job.

Q. I mean, did you work all day? A. We worked all day.

Herbert Meek, direct.

Q. I mean, did you work regularly there or not? A. Not regularly. Off and on.

Q. Who hired you or who employed you? A. Sometimes the driver would call us and sometimes the boss would come out and call us in and ask us did we want to work.

Q. Did you ever see Steve Doryk work there? A. I saw Steve Doryk working in the back with his brother. He used to wash bottles, wash the beer bottles.

Q. How often would that happen? A. I saw him in there a couple of times.

Q. Were the times that you saw him there days following each other or not? A. Sometimes he would be there for a couple of days and then sometimes he would be there one day.

Q. Now, over what period is this that you are speaking? A. During vacation he was around there a lot and then sometimes on Saturdays when there wasn't school he would go around.

Q. When you were hired that way what were you paid?

Mr. Turner: I object to what this witness was paid.

Q. Do you know what they ever paid Steve when he was hired that way? A. When he was washing beer cases—

By the Court:

Q. Did you see him paid? A. I didn't see him paid.

By Mr. Toolan:

Q. Did you know Steve Doryk before this accident? A. Yes, sir.

Herbert Meek, cross.

Q. What sort of a boy was he? A. He was cheer-
fuller than he is now, he had his right sense. And
after the accident he—

10 Mr. Turner: I object to his testifying from
a medical standpoint, as apparently he was
about to testify.

The Court: Yes.

Q. You know Steve now, do you? A. Yes, sir.

Q. Is there any difference that you can see in
Steve? A. Yes, sir; sure.

Q. Between his condition before the accident
and after the accident? A. Before the accident he
could think better.

20 Mr. Turner: I object to that and ask it
be stricken out.

The Court: It is stricken out.

Q. Tell us how he acted before the accident and
how he acts after the accident, from what you have
seen? Don't tell us what you think but tell us
what you see. A. He seems to be different. He
changed after the accident.

30 Q. Well, tell us how he changed, that is what I
want to find out. A. He can't—he got to think be-
fore he can—

Mr. Turner: I object to this on the ground
he is not qualified.

The Court: Objection sustained.

Mr. Toolan: That is all I have. Cross ex-
amine.

Cross examination by Mr. Turner:

40 Q. Did you ever work in this bottling plant at
the same time that Steve worked there? A. Yes,
sir.

Herbert Meek, cross.

Q. How old is Steve? A. How old? Eleven
years.

Q. And you worked in there at the same time
he did, and when was that? A. Steve and his
brother were washing cases and we all worked
at that. 10

Q. How old is his brother? A. I don't know
how old his brother is.

Q. Is he big or little? A. He is about fifteen.

Q. Fifteen years old. Then he is as old as you,
do you know? A. I am a year older than him.

Q. On the day of this accident how near were
you to the place where Steve fell off the truck?
A. I was about fifteen feet.

Q. You saw Steve then when he fell off? A.
Yes, sir. 20

Q. You were not on the same truck, were you,
at the time he fell off? A. I wasn't on the truck
at the time he fell off, no, but I was on—

Q. You are sure about that? A. Yes.

Q. You said this ice box that was in front of
Steve was two and one-half feet high, did you? A.
It was about two and one-half feet high.

Q. How big an ice box was it, how long? A. It
was nearly as long as the back of the truck. There
was only a little space in between the ice box and
the tail board. 30

Q. Was the ice box as long as this half of the
table? A. It seemed to be as long as a half.

Q. As long as half the table? A. Yes, sir.

Q. Was there anything else in the truck besides
the ice box? A. I only saw an ice box on the truck.

Q. Do you know whether there was anything
else in it? A. I didn't see nothing else on the
truck. 40

Q. And yet you were right there and saw this

Herbert Meek, cross.

accident and saw the truck and that is all you saw was the ice box? A. I saw the ice box and Steve standing up against it in the back.

Q. You didn't see any bottles on the truck? A. No.

10 Q. Would you say they were not there? A. I didn't see them.

Q. What kind of a truck was this? A. A Reo speed wagon.

Q. And there was a cab in front, was there? A. Yes, sir.

Q. Now, was there a covering back of the seat of that cab? A. Covering? Yes, there was a cover in the back, only a square window to look out.

20 Q. Only a square there. That square was clear up to the top, wasn't it, that square where you look out was clear up to the top of the curtain? A. No. It was down a little ways from the top of the cab.

Q. How big was that square where you look out in the back of the cab?

The Court: Did he say "look out in the back of the cab"?

30 Q. Is that what you mean, look out in the back? A. I mean when the driver wants to turn a corner he looks out the window, he looks out.

Q. Is that in the back of the cab where the driver sits? A. The driver sits in front of the cab and in the back a curtain, there is a square window.

Q. In the back curtain, that is right back of the driver's seat, isn't it? A. Yes.

Q. How big is that square in that curtain? A. I don't know how big.

40 Q. Well, can't you show us how big it is? A.

Herbert Meek, cross.

It is about that big and about that high (indicating).

Q. Do you mean about a foot high?

The Court: He made more than a foot, he indicated more than a foot.

A. About that high (indicating).

Q. You say that is a foot, do you?

The Court: He does not say it is a foot.

Q. How many inches do you say that is? A. About ten inches.

Q. And how wide was this square? A. It is about thirteen inches wide.

20 Q. Thirteen inches wide and ten inches high. And was there anything in this square, any isinglass, or mica, do you know what I mean? You know what isinglass is, don't you? A. Yes, sir.

Q. Was that in there? A. No.

Q. Was there anything in it at all? A. There was nothing in there.

Q. You say that Steve was standing up back of this ice box? A. Yes, sir.

Q. And the ice box was how close to the tail board? A. There was just room enough for Steve to stand up in the back.

30 Q. Was he standing up with his face towards the front of the automobile, or how? A. He was standing up facing the front of the automobile with his hands on the ice box just like that (indicating).

Q. He wasn't sitting on the ice box, was he? A. No. He was standing.

Q. You are sure he wasn't sitting on the floor of the truck? A. He was standing up.

40 Q. All the time. How far away was this truck when you first saw Steve standing up? A. It was

Herbert Meek, cross.

right across the street, I saw when it was making the turn into Laurie Street.

Q. That was the first time you saw it? A. Yes, it just come past, cars were passing, they just come past the end of the truck and I saw Steve standing on the back.

10 Q. Is that the first time you saw him? A. That was the second time I saw him that day.

Q. No, I mean was that the first time you saw him on that particular trip? A. Yes.

Q. And how far away was the automobile when you first saw it? A. On the other side of the road.

Q. That was the first time you saw it. So you don't know whether Steve had been sitting down before that or not, do you? A. He was standing up from the time I saw him until he fell off.

20 Q. And how far did the car travel before he fell off? A. Just made the turn and he fell off and it went up about three-quarters of a block and it stopped.

Q. The driver didn't indicate that he knew that Steve had fallen off the truck, did he? A. No.

Q. And went right along. How fast was this car going at the time it turned the corner? A. It was going about fifteen miles an hour.

30 Q. Fifteen miles an hour. And how fast—did it go the same rate of speed right along until it finally stopped? A. No. After the jerk it started up again, he started from low speed and then the truck driver stopped him.

Q. Well, I see. Steve fell off when he turned the corner, didn't he? A. Yes.

Q. And he went around the corner about fifteen miles an hour, is that right? A. Yes.

40 Q. And how far did he go from that time before you saw any change in the motion of the

Herbert Meek, cross.

truck? A. Right then when Steve fell off the truck give a jerk and it started off again from a low speed and—

Q. Well, you mean—

The Court: Let him finish.

A. It started off from a low speed and he was going up to high speed when the truck driver stopped him.

Q. Do you mean he was shifting gears? A. No. I didn't see him shift no gears. It jerked like that and then he started off again and then he started off to go in high speed and the truck driver stopped him.

Q. Well, it jerked when he turned the corner? A. No.

Q. Then you said, didn't you, that Steve fell off when he turned? A. When he turned the corner, he was turning the car to go up on Laurie Street when it give a jerk and Steve fell off.

Q. Well, was that when he was turning the corner that Steve fell off? A. He had to turn the corner this way and then this way. When he was turning the second corner to go east on Laurie Street Steve fell off.

Q. When he was turning the second corner Steve fell off, is that right? 30

The Court: That is what he said.

Q. Now, you say that he had to turn two corners? A. He had to go up this way and turn around like this.

Q. Sort of a letter "S" turn, like the letter "S," do you mean like that? A. No. Like this (indicating).

Q. While he was making that second turn then 40

Herbert Meek, cross.

Steve fell off. Now, did you see this car make the first turn? A. I saw it make the first turn; he went around like this, and he was straightening out to go east on Laurie Street when it gave a jerk and Steve fell off and then he kept on going.

10 Q. You have said repeatedly that it gave a jerk. How much of a jerk did it give? A. Enough to throw Steve off like that.

Q. How much of a jerk was it that you saw? A. I don't know.

Q. Just show us if you can how much of a jerk it was. A. Like as if he put the brakes on and then he started off again.

Q. Like as though he put the brakes on? A. Yes, but it didn't bring it to a stop.

20 Q. As though he was going to slow up, is that what you mean? A. Yes.

Q. You have seen automobiles on the street where the driver puts the brakes on slightly and then takes the brakes off and starts up again, is that right? A. Yes.

Q. You have seen that many hundreds of times? A. Yes, but this time it wasn't like that. It was more quick.

30 Q. Came to a quicker stop, did it? A. It didn't come to a stop. It just went like that and kept on.

Q. It slowed up quicker? A. Yes.

Q. And then went on. Did you see whether the driver applied the brakes at that time? A. I didn't see him putting the brakes on. I was towards cater-cornered.

Q. You could not see the driver at all, could you? A. No.

40 Q. You didn't see the driver on this truck at all then, did you, until after the accident? A. I saw him when he got out of the car and come running.

Herbert Meek, cross.

Q. After the accident? A. After Tiff fell off. Right when Tiff—when he stopped.

By the Court:

10 Q. What do you mean you didn't see him before the accident? A. While he was passing me I saw him and then after he stopped I saw him get out on one side and somebody else got out.

By Mr. Turner:

Q. Somebody got out of the car, out of the front alongside of the driver, is that right? A. Yes.

Q. Did you go over to where Steve had fallen? A. No.

20 Q. Why? A. Because I was working for the baker and he told me to go in and stay by the store, that he was going to take the Reo, because they took "Stricky," he was going to take the Reo and follow them.

Q. So you went in to take care of the store? A. So I went in to take charge of the baker shop, and the baker's partner took his car and went away in it.

Q. You say that you had been riding on this same car that morning? A. Yes, sir.

30 Q. Where did you stand when you were riding on the car that morning? A. We were sitting in the front. Until we got up to—we were sitting in the front until we made a few stops, until we got downtown, and when Mr. Doryk's brother came out we went in the back.

Q. What? A. When Martin Doryk got on we went in the back of the truck and sat.

Q. Martin Doryk is Steve's brother. Did he get on the driver's seat? A. No.

40 Q. Where did he get on? A. He got on at Maple Street and Smith Street.

Herbert Meek, cross.

Q. Yes, but whereabouts did he get on the truck, what part of the truck? A. One was sitting down and one was standing. Martin was standing.

Q. Standing on what? A. On the running board.

Q. So that you got on the back of the truck?

10 A. We were in the back then.

Q. Then you crossed over the bridge, you said you crossed over the bridge, over what railroad, do you remember that? A. Yes, sir.

Q. You told us that the brakes locked when you were crossing over that bridge. Did you feel the driver put on his brakes as he went over that bridge? A. No. He went over the top of the bridge and he was like coasting down and it locked all of a sudden, and when he was going
20 off the planks, and the wheels stood stiff and scraped.

Q. You have told us that several times but what I want to know is did you see what the driver did? A. No.

Q. So you don't know whether the driver applied the brakes or whether he didn't, do you? A. They locked.

Q. Do you know whether the driver applied his brakes or not? A. I know he didn't apply them
30 because there was no car there.

Q. How do you know he didn't apply them? A. They went on all of a sudden.

Q. Can't you put brakes on all of a sudden? A. Yes, but there was no cars around there for him to stop for.

Q. Did you see what the driver did? A. No.

Q. Then you don't know what he did, do you? Why are you trying to tell us what the driver did if you didn't see him?
40

Herbert Meek, cross.

Mr. Toolan: He has not tried to tell us what the driver did.

The Court: He may answer that question as long as he has been asked why.

Q. Well, why did you say the driver put on the brakes? Did you see him put on the brakes? A. I didn't see him put on the brakes.
10

Q. What did you see him do? A. They all said the brakes locked.

Mr. Turner: I object to what they all said and ask it be stricken out.

The Court: That is stricken out.

Q. Is that why you say they locked, because they all said so? A. They locked.
20

Q. How do you know they locked, that is what you are asked? A. I don't know if they locked or not.

Q. Now, isn't it a fact that you saw Mr. Schwartz-
enberg when you were near the bridge? A. Yes.

Q. And isn't it a fact that Mr. Schwartz-
enberg ordered you boys to get off of the truck? A. No.

Q. What did he say to you? A. He didn't say a word. He just passed us.

Q. How near was he to you? A. He was about
30 ten feet.

Q. Was your truck moving at that time? A. The truck had stopped, and it was just starting to move.

Q. Didn't Mr. Schwartz-
enberg say to you to get off of that truck and keep off of it? A. No.

Q. And didn't you hear him tell the driver that you boys were not to be allowed on that truck? A. No.

Q. Now, isn't that the reason why the man
40

Herbert Meek, cross.

stopped on the bridge was because Mr. Schwartz-
enberg stopped him and told him to get you boys
off the truck? A. No. Mr. Schwartzberg didn't
say a word to him.

Q. And didn't say a word to you? A. No.

10 Q. On this day when you say that Steve fell off
the wagon had you been working for the Perth
Amboy Bottling Company that day? A. No. We
just took a ride with them.

Q. What time was it that you were to go to
work for the baker? A. I was supposed to be up
there in the morning.

Q. What time? A. About twelve o'clock.

20 Q. What time was it that you got on this Perth
Amboy truck, the Bottling Company truck? A.
About half-past eight or nine o'clock.

Q. Martin Doryk was riding on this truck and
you were riding on the truck and Steve was riding
on the truck before this time when Steve fell off,
you say, is that right? A. Yes.

Q. And you were all of you back of the driv-
er's cab, were you? A. Not all of us. We were
on the floor back of the driver's cab and Martin
and another fellow were in the front.

30 Q. Sitting in the front. Now, where did you
get on the truck? A. On New Brunswick Avenue.

Q. How far is that from where you got off? A.
Same place I got off.

Q. Do you mean you got on the same place
and got off the same place? A. Yes.

Q. Did Martin get on at the same time you did?
A. No. We met Martin downtown when we were
coming up.

40 Q. How fast was this automobile going at the
time Steve fell off, do you know? A. I don't know.

Herbert Meek, cross.

Q. Going slow or fast? A. It was going—it was
not going slow.

Q. Well, was it going fast? A. About ten miles
an hour.

10 Q. About ten miles an hour. Now, a few min-
utes ago you told us it was going fifteen miles an
hour, didn't you? A. Well, ten or fifteen miles
an hour.

Q. Now you say ten. It might have been a little
slower, might it not? A. No. He made the turn
and he was starting up and then he went—it like
caught when Tiff got thrown off and then he
went until the driver stopped him.

20 Q. You say that he had to make a turn going
around two corners. What street is that on, the
two corners? A. It ain't two corners. He had
to turn this way and then back straight again on
Laurie Street.

Q. He just made one turn, didn't he? A. He
had to swing north to clear the point and then
he swung east to straighten the car.

Q. Then there is just one turn, isn't there? He
just turned around a corner, didn't he? A. Yes.

30 Q. He didn't make two turns, did he? A. When
he was straightening up for east, that is when Tiff
fell off, to come east on Laurie Street.

Q. That is a sharp turn, that one turn, isn't it?
A. Yes, sir.

Q. That is the only real turn he makes, isn't
it? A. On New Brunswick Avenue when he comes
in he has to turn in to Laurie Street and then
straighten out to go down Laurie Street.

40 Q. It was when he was straightening out that
Steve fell off, and it was not when he was making
the turn, was it? A. When he made the turn to
go east on Laurie Street.

Herbert Meek, cross.

Q. That is when he was straightening out? A. No. He started his wheels to go down Laurie Street.

Q. Then Steve fell off on the turn? A. Yes.

10 Q. And Steve wasn't holding on then, was he, when he fell off? A. Yes, he had his two hands on the corners of the ice box.

Q. From where Steve was standing there wasn't anything between him and the corner where the turn was, was there? No vehicles or anything to interfere with Steve seeing it? A. Steve seeing what?

Q. To see the corner where the turn was before he made it Steve could see that turn from where he was? A. Yes.

20 Q. And you could see yourself that the truck was going to make the turn, couldn't you A. Yes. After he made it I could see.

Q. While he was making it you could see it, couldn't you? A. Sure.

Q. You watched him while he was making the turn, didn't you? A. Yes.

Q. Anything extraordinary about making that turn?

30 The Court: He does not know what extraordinary means.

Q. Anything unusual about it? A. No. It was just a turn.

Q. You have seen hundreds of automobiles make that same turn, haven't you? A. Yes.

Q. And they have to do what this driver had to do, didn't they? A. Yes, just the same.

By the Court:

40 Q. Did they do it the same way? A. Yes, just

Martin Doryk, direct.

the same, but they don't stop like that. They keep going.

Mr. Turner: That is all.

Redirect examination by Mr. Toolan:

Q. How many times did you ride with the driver on that truck? A. About thirty times. 10

Q. Did Mr. Schwartzberg ever see you on there before? A. Yes.

Q. Did he ever pay you money for being on there? A. Yes.

Mr. Toolan: That is all.

MARTIN DORYK, a witness produced on behalf of the plaintiff, being duly sworn according to law on his oath, saith: 20

Direct examination by Mr. Toolan:

Q. You are a brother of Steve Doryk's? A. Yes, sir.

Q. Do you remember the seventeenth of April, the day on which Steve was hurt? A. Yes, sir.

Q. Did you see Steve that day? A. Yes, sir.

Q. Where and what time? A. I saw him about half-past nine down on Maple Street in Perth Amboy. 30

Q. Maple Street and what other street? A. Maple and Smith Streets.

Q. Where was Steve when you saw him? A. Steve was on the back of the Perth Amboy Bottling Company's truck.

Q. And who was with him? A. The boy that was just up here, and the driver, and he stopped and picked me and another fellow up. 40

Martin Doryk, cross.

Q. Where did you go? A. I go right on Maple Street.

Q. How far did you go with him? A. Went all the way up to Tony Lans' barber shop.

Q. What did you do then? A. I got off there.

10 Q. Is that where Meek got off too? A. I don't know whether he got off there or not.

Q. Did Steve stay on or not? A. Steve stayed on. Two of them stayed on.

Q. What happened, if anything, after you left the corner of Smith and Maple Streets that day? A. Coming over the temporary bridge, why, when we was going over the car stopped all of a sudden, I don't know what he stopped for, or nothing, but the car stopped all of a sudden.

20 Q. Did you see the driver do anything? A. No, sir. All the driver told me was the brakes locked on him.

Mr. Turner: I object to what the driver told him.

The Court: It is stricken out.

Q. Did you see anybody else about that time? A. No, sir. Yes, I saw Mr. Schwartzberg coming from the other side of the bridge. The driver said there goes Abe.

30

Mr. Toolan: That is all I have. Cross examine.

Cross examination by Mr. Turner:

Q. The driver saw Mr. Schwartzberg's truck, was that the time the car was stopped? A. Yes, sir.

40 Q. Where were you sitting on the car? A. I was standing on the right-hand running-board.

Martin Doryk, cross.

Q. Where was Steve? A. Steve was sitting in the back with Herby.

Q. Was there any other boy on there—Meek? A. There was somebody else got on with me.

Q. Meek? A. No. He was sitting in the back with Steve, Meek was.

10

Q. Steve and Meek were sitting on the very rear of the car, very back end of the car, weren't they? A. Yes, sir.

Q. With their feet hanging off the back, were they? A. No, sir. They were sitting on the cases.

Q. And you got on the running-board? A. Yes, sir.

Q. And who else got on that wagon? A. Well, there was somebody got on with me, I don't just remember who it was.

20

Q. Some friend of yours? A. Yes, sir.

Q. There were four of you on the back of this wagon, is that right? A. There were two in the back and there was three sitting on the seat—two sitting on the seat and I was standing on the running-board.

Q. Who was on the seat? A. Stanley Gutowsky, the driver.

Q. Who else? A. I think it was my brother Joe, if I am not mistaken.

30

Q. Your brother Joe? A. Yes, sir.

Q. Was he on the seat with the driver? A. Yes, sir.

Q. How old is your brother Joe? A. Fifteen.

Q. How old are you? A. Nineteen.

Q. Now, when you got on this car was it moving or standing still? A. It was moving when I got on.

Q. Moving when you got on? A. Yes, sir.

Q. The friend of yours had gotten on and it was

40

Martin Doryk, cross.

moving when he got on? A. Yes, sir; we both jumped on.

Q. Both jumped on? A. Yes, sir.

Q. You rode on the running-board. Did you see Steve when he got on, whether he jumped?

10 A. Steve was already on when I got on.

Q. He was on the very tail end, wasn't he? A. No, sir. He was sitting right in behind the cab with the boy that was just up here.

Q. He was sitting back of the cab? A. Yes, sir.

Q. Was there any load on this truck? A. There was a few cases on, a few empty cases.

Q. At this time how was the tailboard of the truck, up or down? A. Up.

20 Q. Anything to prevent a boy from climbing up on the back of the truck? A. No. Yes, sir.

Q. What? A. Well, he couldn't—you couldn't fall off the tailboard because it was up, and there was only a very few cases on the truck.

Q. Was there anything to prevent a boy from climbing up on it? A. No, sir.

Q. Nothing to prevent you from jumping on the side? A. No, sir.

30 Q. How far did you ride on this truck after you jumped it? A. I rode from downtown up to Tony Lans' barber shop, about a mile and a half.

Q. Did you get off when the car stopped on the bridge? A. No, sir.

Q. How long did this car stop on the bridge? A. She stood on the bridge for about three minutes.

Q. Three minutes? A. Yes, sir.

40 Q. Was anything said during that time at all by Mr. Schwartzberg to any of you boys? A. No, sir.

Martin Doryk, cross.

Q. Did he see you riding on the running-board? A. Yes, sir.

Q. You are sure he didn't tell you to get off there? A. Didn't say a word.

10 Q. Did he stand right there and look at you? A. He just looked out the window and he kept right on going. He went too slow.

Q. What window? A. On the car. On his car.

Q. What car? A. On his car.

Q. Mr. Schwartzberg was riding in another automobile, was he? A. Yes, sir.

Q. And it was just as his automobile got alongside of the truck that the truck stopped, was it? A. He kept right on going right past the truck.

20 Q. The time the truck stopped was that just when Mr. Schwartzberg drove by in his car? A. Yes, sir.

Q. It was? A. Right when he started going Mr. Schwartzberg come past with his car. Mr. Schwartzberg saw his truck standing on the bridge.

Q. Was he going the same direction the truck was going? A. No, sir; he was going the opposite direction.

30 Q. Was he in the line of traffic, Mr. Schwartzberg, with the automobiles ahead of him? A. There was a few cars behind him.

Q. A few behind him? A. Yes, sir.

Mr. Turner: That is all.

Mr. Toolan: That is all.

Peter Janco, direct.

PETER JANCO, a witness produced on behalf of the plaintiff, being duly sworn according to law, on his oath, saith:

Direct examination by Mr. Toolan:

10 Q. Peter, do you know Steve Doryk? A. Yes, sir.

Q. Where were you employed on the seventeenth of April, 1926? A. I was in the shop then.

Q. Who were you working for? A. For Abe Schwartzberg.

Q. What does he do? What business is Schwartzberg in? A. Bottling.

Q. Were you working for what concern? A. For the Perth Amboy Bottling Company.

20 Q. How long had you been working for them? A. About a year and a half.

Q. Do you remember the day on which Steve Doryk was hurt? A. Yes, sir.

Q. You didn't see the accident? A. No, sir.

Q. Were you working that morning? A. Yes, sir.

Q. Did you see Steve Doryk at the plant that morning? A. I seen him in a garage.

30 Q. And what was he doing in a garage? A. He was standing.

Q. Anyone else there at the time? A. Well, I don't quite remember. I didn't take notice.

Q. Schwartzberg, did you see him there? A. Schwartzberg was there.

Q. Did he see Steve there? A. Yes, sir.

Q. Did you see Steve doing anything there that morning? A. In the morning I seen him. He was taking cases off the truck.

Q. Who was? A. Steve Doryk.

40 Q. Who else was there at that time? A. Why

Peter Janco, direct.

this here Kirby, or somebody else, Kirby and Steve Doryk. Two of them then was there.

Q. Unloading the cases? A. Yes, in the morning.

Q. Did you see the truck leave at that time it had the ice box on it? A. I seen—I was helping 10 to put the ice box on this truck, and when I had the ice box on the truck everything—then I went home for dinner.

Q. Who was there when you were putting the ice box on the truck? A. Abe Schwartzberg.

Q. Who else? A. And the timekeeper and Stanley Gutowsky.

Q. Did you ever see Steve Doryk about the plant before that time? A. Did I see him outside of the 20 building?

Q. Did you see him around the plant there, around the bottling works there before this day? A. Yes, sir.

Q. What did you ever see him doing there? A. I see him washing beer—labers off the bottles.

Q. How many times did you see him around there? A. I seen him quite a times—quite a few 30 times.

Q. How many times is that? A. Oh, well, I can't tell you exactly, because I never count them. 30

Q. Was Schwartzberg ever there when Steve was around? A. Yes, sir.

Q. Did you ever see Schwartzberg pay Steve anything? A. Yes, sir.

Q. What did you see him pay him? A. I seen him pay a quarter.

Q. How many times? A. And once a dollar. They were working on piece work. Him and his 40 brother.

Peter Janco, cross.

Q. You were not there then when the truck left?
A. No, sir.

Q. With the ice box on it? A. No, sir.

Mr. Toolan: That is all I have. Cross examine.

10

Cross examination by Mr. Turner:

Q. Now, you helped to load this truck, didn't you, Mr. Janco? A. I didn't get you.

Q. You helped to load this truck? A. I put the ice box on.

Q. What else was on it besides the ice box? A. Nothing but the ice box.

20

Q. How much space was there between the driver's cab and the ice box? A. There was no space at all. When the ice box got on you could just—tail-board covered the end and there was a little space for anybody to walk through, about this space (indicating), right from the cab to the tail-board.

Q. From the cab to the tail-board? A. Yes, sir.

Q. There was a foot of space? A. Why, the wide—it was only about eight inches wide.

Q. Eight inches wide? A. Yes, sir.

30

Q. And how much space was there from the ice box to the tail-board? A. Well, I don't know how much feet is the truck. Well, it was about six feet.

Q. My question is this: Did the ice box come right up against the tail-board? A. The ice box just fitted within that truck. Just a little over. Was about a half a foot from the tail-board of space.

40

Q. Six inches from the tail-board was space on the end and about eight inches from the side, is that right? A. Yes, sir.

Peter Janco, cross.

Q. It took up the whole box of the truck outside of that six inches in the box and eight inches on the side. There was eight inches on two sides, was there? A. No, sir, only on one side.

Q. How many of the men did it take to put that ice box on there? A. It took quite a few men. Took about four or five of us. 10

Q. Very heavy thing, wasn't it? A. Yes, sir.

Q. Steve didn't help you to load the ice box on that truck, did he? A. No, sir.

Q. Where was Steve when the ice box was being loaded on? A. He was in the garage.

Q. How far was the garage from the place where you loaded the ice box? A. The garage is in the shop.

Q. Right inside of the bottling works? A. Yes, sir. 20

Q. In feet how far was Steve from the place where the ice box was being loaded on? A. Do you mean from the truck?

Q. Yes. How many feet away? A. Well, he was right near the truck then.

Q. Do you mean right close by it? A. Yes, sir.

Q. What time was it that you finished loading the ice box? A. It was near twelve o'clock. I went home soon they loaded it. 30

Q. After you loaded that on what did the driver do, did you see what he did? A. No, sir.

Q. Was the motor running when you left? A. No, sir.

Q. You didn't know what time the driver was preparing to leave I suppose? A. No, sir. I just put the ice box on and went home. Wasn't quite twelve o'clock neither.

Q. What time did you get back from your lunch? A. I start at one o'clock. 40

Peter Janco, cross.

Q. You got back by one, before one? A. Yes, about twenty minutes before one o'clock and the truck was out.

Q. Was the truck gone with the ice box on it when you got back? A. Yes, sir.

10 Q. This ice box was a flat top box, wasn't it? A. Yes, sir.

Q. Was it laying flat in the truck? I mean to say was the top side up? A. Yes, sir.

Q. There wasn't anything on top of the ice box, in other words, you could sit on top of it if you wanted to? A. No. The covers were inside, thrown inside.

Q. Covers were inside? A. Yes, sir.

20 Q. Was there anything on top of it at all? A. Nothing on top of it at all.

Q. Was the top open? A. Top was open and the covers were inside.

Q. The tailboard of the automobile was closed, was it? A. Yes, sir.

Q. So the ice box could not fall off? A. No, sir.

Q. Would not need anybody to hold it on? A. No, sir.

30 Q. Steve lives right near the bottling works, doesn't he? A. Yes, sir; right in back of it.

Q. He hangs around the bottling works all the time when he is not at school, doesn't he? A. Yes, sir.

Q. So, as soon as he gets out of school he goes over to the bottling works and stays there? A. No, he don't come over. Once in a while only because I was working there. I ought to know.

40 Q. He used to come over there and ask the men to give him soda, didn't he? A. Once in a while he would do that, yes.

Peter Janco, cross.

Q. You have given him soda yourself, haven't you? A. I didn't give him no soda.

Q. Well, some of the other men do, don't they? A. Well, maybe some other man.

Q. I mean you have seen that? A. No, I didn't see that. 10

Q. He used to come over there about how often would you say before this accident? A. Well, he used to come around well, nearly—well, I can't tell you; sometimes one day after another, and sometimes one day in a week, or sometimes one day in two weeks, you know how it goes, when he wanted to come around.

Q. One of his brothers worked there, did they? A. Yes.

Q. Which one? A. One of his big brothers worked there once before too. 20

Q. The nineteen-year-old brother? A. Yes.

Q. Steve used to come over and talk to them, did he, and play there with them? A. Small Steve?

Q. Little Steve used to come over there and see his brothers? A. No, not then.

Q. Didn't? A. No.

Q. Didn't go near that. How long ago was it that you saw somebody give him a quarter? A. How long ago was it? 30

Q. Yes. A. This was in the summer time.

Q. Vacation time? A. Vacation time it was, yes.

Q. And when did he give the dollar, was that vacation time? A. Yes, sir.

Q. Was that the vacation before this? A. Was this summer, you know, 1926.

Q. 1926 summer. How much time did Steve spend over at the bottling works this last summer? 40

Peter Janco, cross.

A. How much time? What do you mean, every day?

Q. Yes. Last vacation? A. Well, sometimes he might go home twelve o'clock and help, once he come home twelve o'clock he went on that truck from school. 10

By the Court:

Q. Has he been there since he was injured?

A. Yes, sir.

By Mr. Turner:

Q. Steve has been over to the plant since he got hurt, has he? A. I didn't get you that time.

Q. Well, you say Steve was over there this last summer? A. Yes, sir. 20

By the Court:

Q. I am asking you has he been there since he was hurt? A. Yes, sir.

By Mr. Turner:

Q. Was it after he was hurt that he got this dollar from Mr. Schwartzberg? A. No, sir.

Q. Before that? A. Before that.

Q. Have you ever seen Mr. Schwartzberg give him any money for doing anything there since that time? A. Since what time? Since the time he been hurt? 30

Q. Since last summer did you see him give him any money? A. Yes, sir.

Q. How much did he give him last summer? A. That is all I seen him was only these two times.

By the Court:

Q. Has he given him any money since he was hurt? A. No. 40

Peter Janco, cross.

Q. Well, he was hurt last April? A. After he was hurt he didn't give him no money, but before that he did.

Q. Then he didn't give him any money last summer, if he has not given him any money since he was hurt, because he was hurt in April. You didn't understand, did you? A. No, I didn't get it. 10

By Mr. Turner:

Q. You said Steve was over there last summer; now, are you sure about that? A. Yes, sir.

Q. What did Steve do over at the plant last summer? A. He was washing beer, and went out with the truck once in a while.

Q. He was what? A. Washing beer.

Q. Washing beer last summer? A. Yes, sir. 20

Q. When you say washing beer I suppose you meaning washing the bottles? A. Yes, sir.

Q. That washing the bottles last summer, that was after he was hurt now? A. After he was hurt?

Q. Yes. A. Before he was hurt.

Q. You don't understand what I mean. Last summer was the summer after he was hurt. A. He didn't get hurt—he wasn't working there after he was hurt.

Q. Then he wasn't working there last summer, was he? A. Well, it was the summer before. It was summer. 1926. 30

The Court: 1926 was last summer. He was hurt in April, 1926.

A. Well, I didn't know quite when it was. I don't remember.

Q. When did you work there? A. I worked a year and a half for him.

Q. Did you work there last summer? A. Yes, sir. 40

Peter Janco, cross.

Q. Did you work there the summer before that?
A. Yes, sir.

Q. When did you stop working there? A. I stopped working there about in 1925, 1924.

10 Q. 1924 or '25? A. Yes, sir. You know, I quit and come back again; that is the way I was working.

Q. I want to know the last time you worked there, when was that? A. It was in 1926.

Q. What time did you leave there in 1926? A. It was about two months and a half or three months from now I quit there.

Q. Two months and a half or three months ago?
A. Yes.

20 Q. Then you quit this last fall or winter? A. Yes, sir.

Q. I am asking you about last summer, 1926 summer. Do you know what I mean by that? A. Yes, sir.

Q. Did you see Steve over there during the 1926 summer? A. Yes, sir.

By the Court:

30 Q. I thought you said that you hadn't seen him there since he was hurt? A. Yes, he was there since—after he been hurt.

Q. Did he work there any since? A. No, he didn't work after.

By Mr. Turner:

Q. What did he do during the summer of 1926, this last summer that he was there? A. He didn't do nothing then. He just was coming around the shop and the boss was chase him out then, after he was hurt.

40 Q. He chased him out? A. Yes, sir.

Peter Janco, cross.

Q. You saw that, didn't you? A. Yes, sir.

Q. How many times did he come around in 1926 summer? A. Well, only about three or four times, that is all I seen him.

10 Q. Was he chased out of there each time? A. No, sir.

Q. Some of the times he let him stay? A. Before he was hurt.

Q. No. Don't talk about before he was hurt. 1926 summer? A. Yes.

Q. Did they chase him out of there every time during the 1926 summer that he came around? A. No. I seen the boss chase him out twice that time.

20 Q. How many times did he come during the 1926 summer that he wasn't chased out? A. Well, he was then when the boss wasn't in, that is when he wasn't chased out.

Q. How many times was that? A. Twice about.

Q. When he came there during the 1926 summer did he come with other boys? A. No, sir; himself.

Q. Himself alone? A. Yes, sir.

Q. Were his brothers working there during 1926 summer? A. No, sir.

30 Q. So he just came there himself? A. His brother was working there in the summer, you know, in the summer time, with the truck. Joe Doryk.

Q. 1926? A. Yes, sir.

Q. Did he go to school during 1926, do you know? A. Doryk?

Q. Did you see him go to school? A. 1926?

Q. Yes. A. I don't know if he went to school or not.

40 Q. The times you saw him there was vacation time? A. Yes, sir.

Peter Janco, redirect.

Q. Did you ever see him there after vacation time, 1926? A. No, sir.

Q. You left there yourself in the fall of 1926? A. Yes, sir.

10 *Redirect examination by Mr. Toolan:*

Q. Did you ever see Steve or see the boss chase Steve out of there before he was hurt? A. No, sir.

Q. Do you know when this accident happened? A. I know when the accident happened.

Q. I mean do you know the date, what month it was in? A. No, sir. I don't remember that.

20 Q. Well, Mr. Turner has asked you a number of times whether or not you saw Steve there in the summer of 1926 and you said yes. Now, if you are told this accident happened in April of 1926 would you say that Steve was there after that time? That is, after he was hurt? A. Yes, he was there after he was hurt.

Q. How many times did you see him there? A. I seen him only about four times altogether. Twice I seen that the boss chased him, and twice I seen that he didn't get chased out.

Q. But did you ever see him work after he was hurt?

30 The Court: He said no.

A. No.

Q. How many times did you see him around there the summer before he was hurt? A. Before he was hurt? Quite a few times.

Q. The boss never chased him out? A. No, sir.

Mr. Toolan: That is all I have.

40

John Burke, direct.

JOHN BURKE, a witness produced on behalf of the plaintiff, being duly sworn according to law, on his oath saith:

Direct examination by Mr. Toolan:

Q. Mr. Burke, you live in Perth Amboy? A. 10 Yes, sir.

Q. What is your business? A. Principal of schools.

Q. You are principal of what schools in Perth Amboy? A. Sixth and eighth.

Q. Do you know Steve Doryk? A. Yes, sir.

Q. How long have you known him, Mr. Burke? A. Five years.

Q. You knew Steve prior to the seventeenth of April, 1926? A. Yes, sir. 20

Q. Did you know Steve's aptitude as a student before that time? A. Yes, sir.

Q. What sort of a student was Steve?

Mr. Turner: I object to this unless the witness is going to tell us what he observed himself.

The Court: Yes, of course.

Q. Confine yourself, Mr. Burke, in your testimony to your personal observations of this boy. 30 Did you come in contact with him before the seventeenth of April, 1926? A. Yes, sir.

Q. And you came in contact with him in just what way? A. In classroom supervision of his work; and in a supervision of his work, written work as a matter, or as a basis of class promotions and as—in the capacity of all youngsters getting in trouble once in a while.

Q. That is personal contact with him? A. Yes, 40 sir.

John Burke, direct.

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

Q. And have an opportunity to observe him when you were talking with him? A. Yes, sir.

Q. What would you say as to Steve being a normal child now?

10 Mr. Turner: I object to that on the ground that the witness is not qualified. I assume that he can tell what he saw and what he observed and not classify him.

Mr. Toolan: I will withdraw the question.

Q. Will you please tell me what sort of a boy Steve was as you observed him prior to the accident? A. Steve was what I would consider a
20 bright boy in school. Steve never in his first three years at school, never had any mark—

Mr. Turner: I object to his marks on the ground that they are incompetent and immaterial.

Mr. Toolan: I think it is evidential.

The Court: Objection sustained. Just what you saw, professor.

A. Well, Steve—

30 *By the Court:*

Q. You say you saw that he was a bright boy; what else? A. He was a bright boy. He was a normal boy, he was very alert and he grasped knowledge very quickly and he retained his knowledge.

By Mr. Toolan:

40 Q. What would you say about his ability to

John Burke, direct.

carry on a conversation? A. He was very versatile in carrying on a conversation in the class room.

Q. Have you observed him since the 17th of April, 1926? A. Yes, sir.

Q. What is his condition now as you observe it compared with his— 10

Mr. Turner: I object on the ground he is not competent.

The Court: Strike out his condition.

By the Court:

Q. What have you observed in this boy since? A. Since then I paid several visits to the hospital and at that time of course he was unable to talk to me. The only thing he wanted me to do all the time I was there to hold his—that is he would
20 take hold of my hand and I sat for an hour or two in the hospital, once or twice in the afternoon, and as soon as I was about to leave, why, he would burst out crying. Then after he came from the hospital his mother came over to me and asked me whether—

Mr. Toolan: Do not tell us your conversation with the mother.

30 *By Mr. Toolan:*

Q. Since he left the hospital what have you observed, if anything, about this boy? A. I admitted the boy to school, I think about June, sometime in June, or the latter part of May, possibly it might have been, I am not sure, I didn't look at the records, and the first morning that he was in school, the opening exercises he had to leave the room. His teacher reported it to me—

40 Mr. Turner: I object to what his teacher reported.

John Burke, direct.

Mr. Toolan: He is not telling what the teacher said.

A. I went up and I talked to Steve and he told me he had pains in the head.

10 Mr. Turner: I object.

The Court: Nothing what he told you. What you actually observed.

A. Well, he was unable to remain in a class room where there was any—well, outburst, or any noise, any loud talking, any harsh tones, or concert recitation from the class. He had to leave the room.

Q. Have you observed him since he went back to school in the Fall of 1926? A. Yes.

20 Q. And what have you observed since then? A. I observed that Steve, well, when he came back in 1926 I put him down in the special class.

Q. What do you mean by the special class? A. Well, we have a class under a special teacher composed of about seventeen of very low mental calibre, and some other boys, institutional cases, so I thought in order to give Steve individual attention or work, and also to not impair his health at all, in leaving the class room all the time, or annoying the class that he was in, why, I would put him in this special class. I was able to keep him in this special class two days, because I found out the annoyance down there acted on him just about the same way. I put him back into another room and I had him leave every morning during the singing. I asked the teacher if she was going to do any concert work, if she found out he was being affected by it, to dismiss him.

30 We sent Steve home many days at ten o'clock,

40

John Burke, direct.

and also at two o'clock. At the present time he sits in a class room, sometimes he will give you a very intelligent answer, and other times he will just sit and stare at you, and occasionally he will just give an outburst of laughter and fire his hands into his head. And then other times he has a desire to be pulling at somebody—

10

Mr. Turner: I do not see how this witness can tell about the desires of a boy.

Q. Tell us what he actually does. A. Well, he fools and keeps pulling at all those around him. That was the last time Steve was taken to the office, that was last week.

Q. Have you conversed with him since he returned to school? A. Yes.

Q. In the fall of 1926? A. Yes.

Q. What have you noticed about him in your conversation with him? A. Why, Steve to me now is very blank, he seems to be just in a daze. A noticeable trait is the inflection of his voice. It seems to be more of a—when you talk to him it seems to be more or less of a monotone.

Q. Well, could he carry on a conversation such as he could before his injury? A. No.

Mr. Turner: I do not think the witness is qualified to answer that question as to what the boy can do.

Q. Well, does he carry on a conversation with you as intelligently as he did before the accident? A. No.

Q. What have you got to say about his mental characteristics as you have observed them since the accident?

40

John Burke, cross.

Mr. Turner: I object to the witness testifying as to his mental characteristics on the ground he is not qualified.

The Court: I sustain the objection. He has already testified.

10 Mr. Toolan: That is all I have. Cross examine.

Cross examination by Mr. Turner:

Q. You have how many children in your school?

A. About fourteen hundred, fifteen hundred.

Q. Fifteen hundred? A. Around fifteen hundred.

Q. Are you the principal of the school? A. Supervising principal.

20 Q. How many times before April, 1926, did you converse with Steve? A. Well—

The Court: Before what time in 1926?

Mr. Turner: I said before April, 1926.

A. Well, I conversed with Steve around February 1 of 1926.

Q. Around February 1, 1926. When else? A. That I couldn't tell you. I conversed with him many times.

30 Q. You have fifteen hundred pupils? A. Between fourteen hundred and fifteen hundred.

Q. What was the occasion of your conversing with him on February 1, 1926? A. In regards to his promotion.

Q. What class was he in then? A. He was in 3B.

Q. How many years' work does that represent, 3B? A. A half a year.

Q. Yes, I understand, but to get to 3B how many years' work do they have to do? A. Four.

40 Q. Is that the fourth year's work, 3B? A. Yes.

John Burke, cross.

Q. You have a kindergarden? A. Yes.

Q. On year in kindergarden, and then 3B, that is three years' work in the school proper, isn't it?

A. Yes.

Q. How old was Steve when he was in 3B? A. I do not know. 10

Q. You don't know that? A. I don't know.

Q. Wouldn't it make a difference in your opinion as to his intelligence as to whether he was seven years old or whether he was eleven? A. Well, at that time naturally I would have my—his writings in front of me.

Q. How is that? A. At the time naturally I had my writings of his age, and so forth, in front of me.

20 Q. At any rate 3B represents three years' work in the school and if Steve was then eleven years old what have you to say as to whether he represented then a bright pupil at the age of eleven years in class 3B?

Mr. Toolan: There is no testimony as to that.

The Court: There is no evidence as to his age.

Mr. Turner: I am trying to determine on what he— 30

The Court: Why don't we get his age?

Mr. Turner: He was ten then, I think. Eleven now.

Q. Do you know how old he is? A. No.

Q. Your records show, don't they? A. Yes.

The Court: He said that, and he looked at them, and he made his basis from the records as well as his observation. 40

John Burke, cross.

Q. You haven't got your records with you? A. No, sir.

Q. If he were ten years old and in 3B what have you to say as to whether that would be a bright boy? A. Normal boy.

10 Q. Ten years old and having finished three years' work in school you would consider him a bright boy. At what age do they start in—

Mr. Toolan: I object.

The Court: He did not say he finished three years in school.

Mr. Turner: One year at kindergarten.

Q. What age do they start in at kindergarten?

20 Mr. Toolan: I object.

Q. What is the permissible age at kindergarten? A. Five and one-half or six years old.

Q. What is the permissible age? A. Five and a half—

Q. Aren't they allowed to start at five? A. Yes.

Q. Why did you say five and a half?

The Court: He said five, five and one-half or six.

30 Q. Are they allowed to start before they are five? A. No.

Q. If a pupil entered kindergarten at five and proceeded normally, at the age of nine he would be through 3B, wouldn't he? A. He would.

Q. That would be a normal child, wouldn't it, and the public school course is based upon normal children's efficiency, isn't it? A. Yes, sir.

40 Q. Outside of having talked to this boy on February 1, 1926, I understand you remember no other occasion that you talked to him? A. No. I talked

John Burke, cross.

to him on many occasions as a youngster. We rate our—the first two years—first three years we practically rate upon intelligence tests. And the rating of the teacher, combined with the opinion and rating of the principal and we just get each youngster and from that we reckon our promotions in the first up to 3A. 10

Q. Does that represent your talking with fifteen hundred pupils? A. No. That is only the first three grades which represents my talking to about possibly five hundred.

Q. How many times do you talk to them? A. Well, talking to them with their teacher twice a year.

Q. You talk with their teacher? A. And the youngster in company with the teacher twice a year. 20

Q. Twice a year? A. Yes.

Q. You admitted Steve, I think you said, in June, 1926? A. I think in the latter part of May or June.

Q. That class that you put him in what rating has that class? A. Special rating.

Q. Well, of course, but was it a rating? A. No rating at all.

Q. In other words, that depends upon the ability of the child? A. Yes. 30

Q. The teacher there is capable of teaching children no matter what their particular efficiency may be, is that right? A. Yes.

Q. Now, he stayed in that special class how many days? A. About two, I think, Two or three.

Q. And then what grade did you put him in after that? A. I put him in a grade of 3A.

Q. How long did he stay in 3A? A. Stayed in 40

John Burke, cross.

3A, well, I think he stayed in 3A about, well, a few months.

Q. And then where did you put him? A. He remained in the same grade.

10 Q. 3A? A. No. In the same room with the same grade of pupils, but 4B grade.

Q. He went into the 4B grade. The 4B pupils are in the same room with 3A, are they not? A. No.

Q. But he had a rating of 4B? A. 4B now.

Q. Who stays in the room with the 4B pupils? A. 4B.

Q. That is all, just 4B? A. 4B.

Q. What class is he in now? A. 4B.

20 Q. Up to what time was he going to school— was he going to school last week? A. Yes.

Q. This week? A. I think he was.

Q. He was in school Monday, wasn't he? A. Yes.

Q. Was he in school Tuesday? A. I do not know.

Q. Up to the time of this trial anyhow he was in school? A. Yes.

Q. He is still in 4B? A. Yes.

Q. How many times did you visit him in the hospital? A. I think I visited him about six times.

30 Q. Six times in the hospital. A. I might add that Steve, although he is in 4B, is not a 4B student. He is in there by virtue of the fact that the 4B teacher can get along with him better than anybody else up to that particular grade.

40 Q. I don't get that. A. I said I might state that Steve, although he is in 4B, he is not of 4B standing. That is, his intellect is not of the 4B standing. We put him in the 4B with this teacher at the time he was in 3A and automatically went into 4B at promotion time, for the purpose of

John Burke, redirect.

getting along with him the best of any of the teachers up to that particular grade. After we took him out of the special grade.

Q. In other words, he liked the teacher and the teacher liked the boy? A. Yes.

Q. Was that the reason you kept him with that teacher? A. Yes. 10

Q. What is her name? A. Slobodien.

Q. Do you know her first name? A. Bessie.

Q. What does she teach—3 A or 4 B? A. Anything that she is assigned. No particular assignment.

Q. But I understood you to say this was the 3 A room? A. We have no particular assignments. It depends upon the number that we have for 3 A, 3 B, 4 B, and we have to rate our teachers accordingly. 20

Q. Have you got any other 4 B pupils in this room? A. Yes.

Q. How many more? A. We have, I think there are thirty-four more.

Q. Thirty-four, well, then Steve is the thirty-fifth 4 B pupil in that room? A. Yes.

Q. And the rest of these boys haven't been in any accident, have they? A. No. 30

Mr. Turner: That is all.

Redirect examination by Mr. Toolan:

Q. Is Steve up to the average intelligence in that class now?

Mr. Turner: I object to that.

A. No.

Mr. Turner: I object to that. That is a conclusion. 40

Martin S. Meinzer, direct.

The Court: He has already said that although he is in 4 B he is only there because he likes the teacher and the teacher likes him, but that is not his grade intellectually. He has testified to that.

10 Q. When are promotions made, Mr. Burke? A. February 1.

Q. Are the ratings fixed now for promotions or not? A. They are.

Q. Can you tell us whether or not Steve is rated for promotion?

Mr. Turner: I object to that unless the ratings are produced.

20 The Court: I think we have had enough of this.

Mr. Toolan: I will not press it any further.

MARTIN S. MEINZER, a witness produced on behalf of the plaintiff, being duly sworn according to law, on his oath, saith:

Direct examination by Mr. Toolan:

30 Q. Doctor, you are practicing physician in the city of Perth Amboy? A. I am.

Q. And have been for how many years? A. Why, since about twenty years.

Q. Doctor, do you know Steve Doryk? A. I do.

Q. Did you attend him after his accident on April 17, 1926? A. I did.

Q. Where did you attend him, doctor? A. Perth Amboy City Hospital.

40 Q. When you first attended him, doctor, will you please describe the condition in which you found him? A. When I first saw him he was uncon-

Martin S. Meinzer, direct.

scious; a few hours later his face and eyes became very much swollen, and both eyes became injected with blood. He remained unconscious or in a stuporous condition until the fifth day of May.

10 Q. That is from the date of the accident? A. From the date of the accident, April 17. There would be—

Q. Doctor, what did this bloodshot condition of the eyes and face and so forth indicate? A. He had a fracture of the skull. He had struck on the top of his head and the skull had—there were fractures which radiated in all directions. The blood showed that there had been blood vessels torn above the eyes and face and the blood gravitated down.

20 Q. A severe fracture, Doctor, or not? A. It was a very severe fracture and he had numerous convulsions following the accident. He was either very quiet or else he was in a very restless state, crying out and screaming, very annoying to the other patients in the hospital, and this went on for days and nights. He had to be fed by drops with a medicine dropper, gave him water and milk for days with a medicine dropper.

30 Q. Doctor, how many fractures would you say there were in the head?

Mr. Turner: I object to his saying unless he knows.

Q. If you know. A. I didn't count the different radiations. I have an X-ray picture somewhere here.

Q. I show you a picture and ask you whether or not that is the X-ray picture of Steve Doryk?

40 Mr. Turner: I object to it unless the doctor took the picture, or unless—

Martin S. Meinzer, direct.

Mr. Toolan: The doctor does not have to take it.

A. This picture was taken for me, two radiographs. I did not take the picture myself, I did not operate the machine.

10

Mr. Turner: I object to the pictures on the ground that they are not proper.

The Court: Objection sustained.

Mr. Toolan: I submit these X-rays, under a recent decision of the Court, taken under the doctor's direction—

The Court: Yes, but you have not proved it.

Q. Doctor, who took these X-rays? A. Dr. Klein.

20

Q. At whose request? A. At my request.

Q. By whom were the X-ray pictures delivered to you? A. The X-ray pictures were delivered by Dr. Klein.

Q. As the X-ray pictures of what? A. Of the skull of this Doryk boy.

Q. At your request? A. At my request.

30

Mr. Toolan: I submit he is qualified.

Mr. Turner: I renew my objection.

The Court: Objection sustained. The doctor does not necessarily have to do the mechanical work of the picture, but if he does not do the mechanical work of the picture he cannot testify to it unless he is there actually directing the mechanical work of the picture. That is the decision.

Mr. Toolan: I will ask to withdraw the doctor for the moment. Step down, doctor.

40

(Witness withdrawn from the stand.)

Joseph Doryk, direct.

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

Direct examination by Mr. Toolan:

Q. You are a brother of Steve Doryk? A. Yes. 10

Q. Were you working on the 17th of April, 1926? A. Yes, sir.

Q. Speak out loud. Where were you working? A. In the Perth Amboy Bottling.

Q. Where? A. Perth Amboy Bottling.

Q. Speak louder. Where? A. In the Perth Amboy Bottling.

Q. What were you doing? A. I was sorting out bottles.

Q. And how long had you been working there? A. Oh, about two or three weeks straight. 20

Q. Do you remember the day that Steve was hurt? A. Yes, sir.

Q. Did you see Steve there that day? A. Yes, sir.

Q. What was Steve doing? A. Steve was taking empty cases off the truck.

Q. Who was there at that time? A. Abe Schwartzberg and Peter Janco and all the workers. 30

Q. How long did Steve stay there that morning? A. That morning? About an hour or so and then he went out with the truck.

Q. What is that? A. He stayed there about an hour and then he went out again.

Q. Out with what? A. With the truck.

Q. Did you see the truck go out? A. Yes, sir.

Q. What was on the truck? A. Big ice box.

Q. Who was on the truck? A. The driver and one salesman. 40

Joseph Doryk, direct.

Q. Driver and who? A. And a salesman. I didn't see him get the salesman. The driver went out in the yard and got gas in his truck and Steve was in the back—

10 Q. Speak out. I can't hear you.. A. Steve—the driver called Steve and said come on.

Mr. Turner: I object to what the driver told Steve on the ground it is incompetent and not binding on the defendant.

The Court: Objection overruled.

Mr. Turner prays exception.

20 A. He called Steve, he said, "Come on, take the empty cases off, we have got to hurry up and go to Carteret." All of us went out and got a big white ice box and we put it on the truck, all of us put it on the truck and then Steve was on the back, there was a little space, enough for Steve to stand, or somebody to stand, about eight inches wide, and about as long as the truck, and then he got on there, he got his gas full, tank full and then he started out.

Q. Where was the driver when Steve got on the back of the truck there? A. He was in the shop.

30 Q. Well, was the motor running then? A. The motor?

Q. Yes. A. No.

Q. Was Steve on the truck before the truck got started? A. Before it got started? He come out when the driver got on. He started the truck—when the driver started the truck he got on.

Q. Well, was the driver there when Steve got on? A. Yes, sir.

Q. Who else was there? A. All the workmen watching them go out.

40 Q. Well, who else was there? How about any

Joseph Doryk, direct.

of the bosses? A. No boss. The boss was in the morning.

Q. What? A. The boss was in the morning there.

Q. The boss wasn't there when Steve got on that time? A. Yes, sir. 10

Q. At the time Steve got on the truck who all were there? Tell us. A. All were there, all the working men, everybody, boss on the job and everything.

Q. When you say the boss who do you mean by the boss? A. Abe.

Q. Abe who? A. Schwartzenberg.

Q. Were you there when the truck left? A. Yes, sir.

Q. Where was Steve? A. Steve was on the truck. 20

Q. On what part? A. On the back, or on the side of the ice box on the corner there.

The Court: What is the matter with you? Nobody can hear when you are talking to the floor.

By the Court:

Q. Where was he? A. He was in the corner of the ice box with his two hands on the corner of the ice box. 30

Q. One corner? A. Yes, sir.

By Mr. Toolan:

Q. When you say one corner what do you mean? A. The corner.

Q. Where was Steve standing and where were his hands? A. Steve was standing on the corner of the ice box, on the corner near the end of the truck with his two hands on the ice box. 40

Joseph Doryk, cross.

Q. Well, was he alongside of the ice box or behind it or where? A. Alongside a little, right alongside, say about from here from the end of the truck.

10 The Court: That does not mean anything.

By the Court:

Q. Say that book is the ice box and this is the rear of the ice box, where was Steve? A. Steve was up here and his two hands on here.

Q. Was there a space on the side of the ice box? A. Yes.

Q. And there was a space in the rear of the ice box? A. Yes.

20 Q. Was he in both the space in the rear and the space on the side? A. He was on this side.

Q. Well, was he anywhere in the rear at all? A. No.

By Mr. Toolan:

Q. Is that where Steve was when the truck pulled out? A. Yes, sir.

Mr. Toolan: That is all I have.

30 *Cross examination by Mr. Turner:*

Q. Would you mind talking loud enough so I can hear you over here. Talk loud the way you do outdoors. What time of the day did this happen? A. He left the shop about half-past eleven.

Q. Eleven-thirty? A. And he was going to Carteret.

Q. You said that Steve was helping to unload cases, is that right? A. Yes, sir.

40 Q. How many people were there when Steve

Joseph Doryk, cross.

was helping to unload cases? A. The chemist and all the working men.

Q. Who? A. All the working men.

Q. How many men? A. All that worked there, about five.

Q. Did two work there or two hundred? A. Oh, 10 about five or six.

Q. These five working men stood around there, did they?

The Court: Five or six he said.

Q. Five or six men, did they stand there while Steve unloaded the cases? A. No. A couple of them stood there, and there was a plumber working there too, him and his two helpers.

Q. Did the five men help unload? A. No. The 20 driver and Steve.

Q. Who? A. The driver and Steve.

Q. How big is a case that Steve helped to unload? A. A case about a foot and a half, and about a foot—

Q. Two dozen bottles in it? A. No. In the big cases twelve bottles.

Q. How much did these cases weigh that Steve helped unload? A. About forty pounds.

Q. How much? A. About thirty pounds full. 30

Q. Where were they, away up on top of the truck? A. No. They was in the bottom of the truck.

Q. How did Steve get them out of the bottom of the truck? A. Carried them out.

Q. How did he get them off the bottom of the truck? A. The shop is straight with the truck, like a garage, and you walk right on the truck and take them right off.

Q. Picked them up and carried them off, did he? A. Yes. 40

Joseph Doryk, cross.

Q. Where is Steve, which one is Steve? A. The one over there.

Q. The boy standing up there? A. Yes.

Q. This boy is the one helped carry off the cases? A. Yes, sir.

10 Q. What did you do? A. I was sorting out my bottles.

Q. Sorting out the bottles? A. Small bottles, certain kinds.

Q. How old are you? A. Fifteen.

Q. How often had you worked there? A. Every time pretty near he saw me he gave me a job.

Q. This was Saturday, was it? A. Yes, sir.

Q. Had you worked there all that Saturday sorting out bottles? A. Yes, sir.

20 Q. How much pay did you get? A. I got, I guess, a dollar for a day, a dollar a half a day, I don't know what it was.

Q. For sorting out bottles? A. Yes, sir.

Q. When this truck was loaded you saw it then, didn't you? A. Yes, sir.

Q. Did you see the driver get on the truck? A. Yes, sir.

Q. Did you see the salesman get on the truck? A. No, I didn't see him in the garage get on the truck. I saw him outside get on the truck.

30 Q. You saw what? A. I saw him outside when he got on the truck.

Q. Getting on the truck, is that right? A. Yes.

Q. When the salesman got on the truck and when the driver got on the truck did Steve get on the truck after that? A. Yes.

Q. He did? A. He was on the truck when he left the garage, still on the truck.

Q. Still on the truck? A. Yes, sir.

40 Q. Then when it left the garage the driver was

Joseph Doryk, cross.

already on the truck and the engine was running? A. Yes, sir.

Q. And he pulled out of the garage? A. Yes. To the gas tank and filled his gas tank.

Q. Did Steve get off the truck at the gas tank? A. No, sir.

10

Q. Did he stand up all that time? A. Yes, sir.

Q. He didn't sit down at all? A. No, sir; he didn't have no place to sit down, unless he went on top, the top was open, top of the ice box was open.

Q. Nothing inside of it, was there? A. The covers were on top.

Q. Covers inside of the ice box. Did you see the truck leave the yard? A. Yes, sir.

Q. Was Steve still standing up then? A. Yes, sir.

20

Q. Was he holding on with his two hands or one? A. With his two hands on the corner of the ice box.

Q. Did he have his hands inside of the ice box? A. No. On top like this, there was an open space and his two hands on here.

Q. Who was it that put you to work? A. Abe Schwartzberg.

Q. Where was it that you were sorting out the bottles? A. In the shop.

30

Q. How far from the garage? A. About from here to that post (indicating).

Q. From you to the post? A. Yes.

Q. Any partitions or walls between you? A. No, sir.

Q. What is the difference then between the garage and the shop? A. Garage got a big open space and it has got an alleyway down deeper the garage is, trucks come and they come even with the

40

Joseph Doryk, redirect.

body with the shop, go off right from the truck in the shop.

Q. Had Steve been working there all that morning? A. Yes, sir.

10 Q. And did he work there the day before? A. No, sir. Day before? He was to school the day before.

Q. This was Saturday? A. Yes, sir.

Q. Did Steve work there every Saturday? A. Sometimes from—not all—not every time.

Q. Did he work there the Saturday before that? A. Saturday before that I think he was to—I guess he did. I know we were going to school yet.

Q. Do you go to school? A. No, sir.

20 Q. When did you stop school? A. This summer.

Q. 1926? A. In March I stopped school.

Q. March, 1926? A. Yes, sir.

Q. What grade were you in? A. 6B.

By the Court:

Q. Where was Steve when the driver got on the truck? A. Steve was in back of the truck.

The Court: That is all.

30 Mr. Toolan: That is all.

By Mr. Turner:

Q. When you say in back of the truck do you mean he hadn't gotten on the truck yet? A. He was on the truck in the back.

Q. When the driver got on? A. Yes, sir.

Q. Steve got on before the driver? A. No. He got on first and then the driver after.

40 Mr. Turner: That is all.

Martin S. Meinzer, direct.

MARTIN S. MEINZER, recalled.

Direct examination by Mr. Toolan:

Q. Doctor, how many fractures did Steve Doryk have?

10 Mr. Turner: I object to that because the doctor has testified from the photograph.

The Court: He has not said so.

Mr. Turner: I think he should tell how he knows then.

By the Court:

Q. How do you know, doctor? A. How do I know how many fractures he has?

20 Q. Yes. A. I know by the X-ray picture.

The Court: Objection sustained.

Q. What could you tell from your actual treatment and observation of him and your perception of his head at the time you treated him? A. I could tell that he had a fracture of the skull first physically, I could place my finger in an indentation on the top of his head. Secondly by the symptoms which he manifested, convulsions, unconsciousness, stupor, and the lack of decision or knowledge in regard to eating or drinking; in other words, a loss of consciousness which only comes about through an injury to the brain.

30

By Mr. Toolan:

Q. How long did that condition that you have just described keep up, doctor? A. The first word that he uttered was on the fifth day of May following the accident on April 17. He reached out and saw water, and he said, "Water." He saw

40

Martin S. Meinzer, direct.

some water in a glass.. That was the first word that he had mentioned or uttered.

10 Q. And thereafter was he able to talk coherently or not? A. No. He was incoherent for quite a time. He began to get one word after another, and then slowly he was able to get them together, to coordinate.

Q. Doctor, how long did you attend him? A. I attended him until the 20th day of May.

Q. And then what happened, Doctor? A. Well, I didn't attend him any longer, or didn't attend him after that, but he was far from being well.

20 Q. Why didn't you attend him then after that date, doctor? A. Well, there isn't very much to do in the way of medical treatment. Those conditions differ; return to normal, or whatever benefit they get, gradually comes by itself. There isn't any medicine to give them, or any electricity or massage or hydro-therapeutics, or anything of that sort.

Q. In other words, there was nothing further you could do? A. Nothing further I could do. That was the way I felt about it.

30 Q. Now, Doctor, what has been the boy's condition since the injury? A. Well, I don't know very much about him since the twentieth day of May; I have already described his condition from the time I saw him practically up until the twentieth day of May.

Q. Have you talked with him recently? A. Oh, I talked with him today.

40 Q. What have you to say about his condition as you observe it now? A. Why, the boy is far from being normal. He has a condition at the present time of a brain fatigue. When you first begin to talk to him he is pretty good, but after you talk

Martin S. Meinzer, cross.

to him and keep it up for a while his brain seems to grow tired, and then his answers are very often irrelevant and don't answer the question which you have directed to him.

10 Q. Doctor, is that condition, in your opinion, going to be permanent? A. In my opinion this boy has a permanent injury.

Mr. Toolan: That is all I have. Cross examine.

Cross examination by Mr. Turner:

Q. You saw his brother on the stand? A. I saw his brother; yes, sir.

20 Q. Do you say he is any more incoherent than his brother was? A. Yes, after you talk to him for a while until you tire him.

Q. He tires after you talk with him? A. Yes, his brain tires.

Q. It is a common thing for children to tire when you do talk to them, isn't it? A. No.

Q. When a grown person talks to them any length of time? A. Not tiring of this type.

30 Q. Unless you tell them stories, of course. What kind of conversation did you indulge in, you didn't tell him any stories? A. No, I just talked to him generally to test his mentality.

Q. You recall, I assume, that you treated him the last time in May, 1926? A. May 20, 1926, is the last time I saw him.

Q. Have you looked at your records to fix that date, Doctor? A. Yes.

Q. You haven't treated him since or done anything for him since? A. I have not.

40 Q. The only purpose for which you talked to him was so that you could be able to testify in this

Martin S. Meinzer, cross.

case today, I assume? A. I made an examination and talked to him to see what his mentality was today in reference to the last time I saw him.

Q. Did you know this boy before you treated him? A. No. I think not.

10 Q. Didn't you know the family either before that? A. I knew the family, yes, I knew his father was a shoemaker and lived down two or three blocks from me on Madison Avenue, but I didn't intimately know them. I may have been in the house sometime or other, but I don't just recall.

Q. But you were not the family doctor? A. No, I think not.

Mr. Turner: That is all.

20 *By the Court:*

Q. Doctor, when you say the condition is permanent, what condition, give the extent of the condition and the character of the condition? A. By saying that it is permanent in my opinion is that he has had an injury to the brain tissue itself and there has been a growth of scar tissue taken place to a certain degree. This boy gets convulsions on one side, known as Jacksonian epilepsy, which
30 come from scar tissue, or some spicula of bone, or some foreign body pressing on the brain. There has been a change brought about in the brain cells so that they haven't the same vitality as they had before the accident, and they tire easily, and his co-ordination has been permanently impaired. This is only my opinion, and doesn't have to be true, but that is the basis on which I make the statement.

40 Q. To what extent? A. Well, I have been in active practice for about twenty-one years and I have seen a great many—

Martin S. Meinzer, cross.

Q. No. To what extent has there been that impairment? A. Oh, the boy, if you talk to him a little while he doesn't answer your questions, his answer is irrelevant to the question which you have talked to him and he is slow in responding.

10 Q. That will not improve, is that what you mean by the condition is permanent? A. Whether it will improve or not I can't say positively, but I am of the opinion that it will not return to the normal condition as before the accident. I don't know whether I am answering your question or not, but that is the way I interpret it.

Q. We are trying to get—if there is a permanent injury and this boy is entitled to a verdict, trying to get the jury so they may measure damages properly, just what extent of permanent injury there is? A. Well, I don't think that is possible, your Honor, to say just to what extent. That is a pretty deep question. There is no way to measure that.
20

Q. In your judgment will his brain always be less than normal, what it normally would have been if it had not been for this injury? A. In my judgment, yes.

Q. To what degree, if you can tell? A. He won't be as quick to perceive as he was before.
30

Q. To what degree? Can you tell? A. No, I cannot. I can't measure it.

By Mr. Toolan:

Q. Would you say, doctor, that he is suffering from Jacksonian epilepsy? A. At times, yes.

Q. Just what do you mean by that, doctor?

Mr. Turner: I object to it. If the doctor has not treated him since May, 1926, I ob-
40

Martin S. Meinzer, cross.

ject to his testifying what has happened since that time, when he has not seen him.

Mr. Toolan: I did not ask him that. The doctor has said he is suffering from Jacksonian epilepsy.

10 *By the Court:*

Q. How do you know, doctor? A. I know after May 20 I can't testify to, but before May 20 he would occasionally get a convulsion on one side, the right side of his face would jerk and his right arm.

Q. You call that what? A. Jacksonian epilepsy.

20 Q. What is Jacksonian epilepsy? A. Jacksonian epilepsy, the reason it is called Jacksonian, or at least the Jacksonian epilepsy, we have a type of epilepsy in which the convulsion is over the entire body; this Jacksonian epilepsy in which just the face or an arm or just one member of the body goes through a convulsive stage, without loss of consciousness to the individual; whereas in the regular epilepsy they lose consciousness, as a rule, and there is a convulsion over the entire body.

By Mr. Turner:

30 Q. Doctor, you don't know anything about this boy subsequent to May 20, do you? A. No.

Q. As to whether he had any twitching of his arm or face? A. No. The last I can account for him is up to May 20.

Q. At that time he was under your treatment and had not yet returned to school, had he? A. No, he hadn't returned to school.

Q. In other words, he was then an invalid under your care? A. Yes.

40 Q. There has not been any time since May 20

Martin S. Meinzer, cross.

that you have been called in to examine the boy, or treat him, except for this trial now? A. That is right.

Q. Now, you have seen many cases of skull fractures, doctor, have you not? A. Yes, sir.

Q. And many cases where boys and young children had fractured skulls, is that right? A. Yes. 10

Q. What percentage of those fracture cases have cleared up so they have been perfectly all normal?

Mr. Toolan: I object.

The Court: I think the objection is well grounded.

Mr. Turner: My purpose is—

The Court: You may ask him what percentage in cases similar to this. 20

Q. Have you seen many cases where they have had a fracture such as this fracture is? A. No. This is a very severe fracture.

Q. How many have you seen where they have had a similar fracture? A. I don't know as I have ever seen a fracture in which there was as many fractures as there were in this particular case.

Mr. Turner: I ask that be stricken out because the doctor is testifying now from the X-ray. 30

The Court: Yes.

Q. From what you have observed yourself, leaving out any picture, what have you to say as to whether you have seen similar fractures? A. I have seen one case that I can recall at that time in which the lapse of consciousness was nearly the same time, and that individual later on became insane and was taken down to Trenton a year or two after. 40

Martin S. Meinzer, cross.

Q. Was that a child? A. That was an adult.

Q. Now, I am talking about children. Have you seen many cases of children? A. I have never seen that I can recall at the present time a child that remained unconscious for about five weeks
10 from a fractured skull.

Q. How many children have you ever seen with fractured skulls? A. A great many.

Q. Thousand? A. No.

Q. How many? A. Well, I can't just enumerate them, but, oh, I should say I have seen thirty or forty in the last twenty years.

Q. How many of them had a Jacksonian epilepsy afterward? A. Well, I can't tell you just how many, but I have seen other cases.

20 Q. Oh, approximately? A. Well, that is difficult to say.

Q. Fifty per cent? A. No.

Q. Twenty-five?

Mr. Toolan: I object, unless he confines this question to fractures of this description.

The Court: He is doing that as I understand it.

By the Court:

30 Q. About how many to your best recollection, doctor, the best estimate from your memory? How many cases of fractures in cases of children have you seen that were accompanied with a Jacksonian epilepsy? A. Say about five per cent.

By Mr. Turner:

Q. How many of those five per cent. cleared up, this Jacksonian epilepsy? A. Why, most of them cleared up.

40 Q. Most of them? A. Yes.

Martin S. Meinzer, cross.

Q. So that Jacksonian epilepsy is not a permanent condition, of necessity, is it? A. No.

Q. And what is it that causes it to clear up, if you know? A. Well, if the pressure is due to a blood clot, and that is reabsorbed, that would remove the cause. If it is due to a spicula of bone, that may become adjusted, nature may adjust it-
10 self to that pressure and in that way clear up.

Q. If it is caused by scar tissue, then what? A. If it is caused by scar tissue the scar may be absorbed.

Q. Nature adjusts that, doesn't it? A. She may.

Q. In other words, nature does everything possible to correct these conditions and do away with this so-called Jacksonian epilepsy? A. Yes, sir.

Q. So, you are not testifying that that is a permanent condition, are you? A. No, I am not testifying it is permanent. I am only testifying up
20 to May 20 he had Jacksonian epilepsy.

Q. In your opinion you don't say that that is a permanent condition? A. No, sir; I do not.

Q. You are basing your opinion as to whatever his permanent disability might be, you are basing that upon what transpired on and prior to May 20, are you not? A. I am basing my opinion of today—I don't know as I get your question quite
30 right.

Q. You are basing your opinion on what transpired on and before May 20? A. Yes. And with the examination of today.

Q. And you are basing your opinion as to what his mentality is and was by what transpired on and prior to May 20?

The Court: And his talk with him today.

A. And the examination of today. 40

Frances D. Kuzmar, direct.

Q. You can't give us any percentage of disability, can you, doctor?

The Court: He said he could not.

Q. You are still of the same opinion? A. Yes.

10 *By Mr. Toolan:*

Q. What was your bill? A. My bill was \$100.

The Court: Is there any dispute about the reasonableness of that charge?

Mr. Turner: Not at all.

FRANCES D. KUZMAR, a witness produced on behalf of the plaintiff, being duly sworn according to law, on her oath, saith:

20 *Direct examination by Mr. Toolan:*

Q. You are the mother of Steve Doryk? A. Yes.

Q. How old is Steve? A. Eleven going to be in March.

Q. He will be eleven in March? A. In March.

Q. You remember, do you, the day Steve was hurt? A. Yes.

Q. After Steve came home from the hospital how long was he home?

30 The Court: What time in March?

By the Court:

Q. When, in March, was Steve ten, what date?

By Mr. Toolan:

Q. When will Steve be eleven years old? A. March 4.

40 Q. How long was Steve around the house after he came back from the hospital? How long was

Frances D. Kuzmar, direct.

Steve sick after he came home from the hospital? A. Six months already.

Q. I know it is six months since the accident, but how long was Steve in the house after he came home? A. About he lay in the bed maybe two months. Two months he can't go out, he go out a little bit and come back again to bed and crying got pain in the head. 10

Q. Steve is going to school now, isn't he? A. Yes, he go to school.

Q. Steve went to school before the accident? A. Sure.

Q. Is there any difference between Steve now and before the accident? A. Is big difference.

Q. Big difference? A. Big difference.

Q. What kind of a difference? What way? A. I must watch him now like little baby. I can't leave him home like before, because he make me something danger in the house, he make fire and he burn down house, I must grab him in the arm and stop him. What is the matter, Steve? He start laughing, oh, mamma, all right; and sit down. 20

Q. Well, how was he before? A. Before like old man, he got smart in his talk everything and quite smart boy. Now like wild.

Q. How much was your hospital bill, Mrs. Doryk, do you know? A. \$114. 30

Q. Did you have any other bills besides Dr. Meinzer's bill? A. Dr. Meinzer fifty-five.

Q. Any other bills besides that? A. I got bills because I am pay. I am no use much money for that, only go to drug store and buy some medicine myself and help him. Sometime he cry any time I don't know what is going to do for him.

Mr. Toolan: That is all.

40

Frances D. Kuzmar, cross.

Cross examination by Mr. Turner:

Q. You are Mrs. Kuzmar, are you? A. Yes, sir.

Q. You are married again? A. Yes.

Q. Do you still live back of the bottling works?
Do you still live near the Perth Amboy Bottling
Works? A. Yes, I live back factory. 10

Q. Back of it? A. Back of factory.

Q. Steve goes to school now, doesn't he? A.
Yes, sir.

Q. How far is the school from your house? A.
Oh, about four blocks.

Q. Four blocks? A. I think that is four blocks.

Q. Which side of the railroad tracks are you on?
Do you know where the railroad is? A. Railroad
about maybe five, six blocks, maybe four blocks
away. 20

Q. Does Steve have to cross over the railroad
tracks to go to school? A. No, he no cross rail-
road tracks.

Q. The school and you are on the same side of
the railroad track? A. No. School other side of
Brunswick Avenue.

Q. What time does he go to school in the morn-
ing? A. Half-past eight.

Q. What time does he come back at night? A.
Half-past three. 30

Q. Any of your other children go to school? A.
Yes, I got girl, she going to Amboy Grammar
School.

Q. Is she younger or older than Steve? A. She
older, she going to be fourteen.

Q. Fourteen years old? A. Yes.

Q. What year was Steve born? A. March he
going to be eleven now. 1916. I got in the book.
I am forgetting now. 40

Frances D. Kuzmar, cross.

Q. Where was he born, in Perth Amboy? A.
Yes.

Q. Does Steve come home to lunch in the middle
of the day? A. No, he no come home to lunch.

Q. Takes his lunch with him? A. He go to
school, yes, he come home every day to lunch. 10

Q. To lunch? A. Yes.

Q. Comes home to lunch and then goes back in
the afternoon? A. Back again to school.

Q. Takes his books with him in the morning,
does he? A. Yes.

Q. And brings his books home at night? A. Yes.

Q. Does he study at night with his books? A.
Yes, he is study but—

Q. Does he do— 20

The Court: Let her finish.

A. If he starts read books he fall asleep.

Q. He goes to sleep. What time does he go to
sleep? A. About nine o'clock, but if he starts
something he fall asleep. He can't sit long time.

Q. Do your other children do homework, too?
A. Yes, my girl.

Q. Don't they go to sleep after they work a
couple of hours? A. My girl stay home, too.

Q. He does his homework every night, does he?
A. Every night. 30

Q. And takes it with him in the morning? A.
That girl show him, learn him a little bit all the
time.

Q. I understood you to say that Steve was in
bed for two months after the accident? A. Yes.
He is in bed but he is no stay all the time in bed.
Go outside a little bit, come in again and go to bed.

Q. He went back to school in June? A. No. He
go to school and stay by school hour or two hours, 40

Frances D. Kuzmar, redirect.

come back home, teacher send him home because he can't stay in school.

10 Q. So he went to school in June. He didn't stay in bed two months then, did he? A. He no stay steady in the bed, but he go to school, stay one hour, come back home, go to bed, laying in bed again, and sit up a little bit, lay again. He can't play, and be sick and he lay in the bed.

Q. Did he spend any time in bed, spend a whole day in bed after he came back from the hospital? A. After about two or three weeks steady in the bed.

Q. Did you say how much the doctor's bill was? A. \$114.

20 Q. That was the hospital bill. You got a bill from the doctor, too, didn't you? A. For the doctor.

Q. How much was that? A. Fifty-five.

By the Court:

Q. Do you owe him anything? A. No, I ain't got no more.

Q. You didn't pay Dr. Meinzer any more? A. No. I no owe no more Dr. Meinzer.

30 Q. You paid him? A. Yes.

Mr. Toolan: I do not think she understands it.

A. It is now, I don't know, maybe I must get again.

By Mr. Toolan:

Q. Have you paid Dr. Meinzer? A. No, I am not pay.

40 Mr. Toolan: That is all.

Case.

A. I ain't got no money to pay.

Mr. Toolan: That is all.

Adjourned until tomorrow, Friday, January 28, 1927, at 10:00 A. M.

NEW JERSEY SUPREME COURT, 10

MIDDLESEX COUNTY C'RCUIT,

December Term, 1926.

STEVE DORYK, by FRANCES DORYK
KUZMAR, and FRANCES DORYK
KUZMAR,

v.

PERTH AMBOY BOTTLING COMPANY. 20

Transcript of stenographer's notes of evidence in the above entitled cause, taken before Hon. PETER F. DALY, Circuit Court Judge, and a Jury, at the Middlesex County Court House, in the City of New Brunswick, New Jersey, on the twenty-eighth day of January, A. D. 1927, at 10:00 A. M.

APPEARANCES: 30

JOHN E. TOOLAN, Esq., Attorney for the Plaintiffs.

FRANK G. TURNER, Esq., Attorney for the Defendant.

40

Edward F. Klein, direct.

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

Direct examination by Mr. Toolan:

10 Q. You are a practicing physician in Perth Amboy, Doctor? A. I am.

Q. And specializing in what particular line? A. In radiographic work for X-ray.

Q. Did you, at the request of Dr. Meinzer, take any X-ray picture or pictures of Stephen Doryk? A. I did.

Q. Of what part of his body? A. Of his head.

Q. On what date, Doctor? A. On the sixth day of May, 1926.

20 Q. And have you those X-ray plates with you? A. I have.

Q. Will you look at those plates, Doctor, and tell us how many fractures there were in the skull?

Mr. Turner: I do not think the doctor is qualified to tell that yet.

Mr. Toolan: I will qualify him further if the doctor's qualifications are not admitted.

30 The Court: Just ask him what the X-ray shows, unless you question his qualification to make X-rays and read them.

Mr. Turner: Not to make X-rays, but perhaps to read them. I should think he should be qualified to read the X-ray.

Q. Doctor, how long have you been practicing medicine? A. Six years.

Q. And how long have you been specializing in any particular line of work? A. For the last five years in X-ray.

40 Q. During that time how many X-rays have you

Edward F. Klein, direct.

taken? A. Perhaps ten thousand plates in Perth Amboy City Hospital, perhaps fifteen hundred to two thousand in South Amboy Hospital, and perhaps ten thousand in my own office.

Q. When you take plates, Doctor, has it been your practice to do anything other than the actual photography or mechanical act of taking the picture? A. I read the plates. 10

Q. For whom? A. For the Perth Amboy and South Amboy Hospitals, and for approximately forty physicians in Perth Amboy and the surroundings.

Q. And you have been doing that for how long? A. For practically five years.

Mr. Toolan: I submit he is qualified. 20

Q. Now, doctor, will you please look at the X-ray or X-rays of Stephen Doryk and tell us what those X-rays show? A. The two plates that I have here one marked R-827, which indicates that plate on the right side of the head, and the other L-827, that of the left side of the head show a considerable number of multiple fractures of the skull running from the back of the head, or back of the skull forward to the top of the head, or anteriorly.

Q. And how many distinct fractures are there, doctor? A. There are approximately eight or nine large or long linear fractures I should say from four to five small fractures on top of the head. 30

Q. Those fractures begin where, doctor? A. Apparently they all seem to run from the back of the skull forward to the top of the head and terminate there.

Mr. Toolan: That is all I have. Cross examine. 40

Bessie Slobodien, direct.

Cross examination by Mr. Turner:

Q. Doctor, these fractures could they come from the boy's striking his head on something, just from one blow? A. I don't know.

10 Q. Do the fractures represent just one fracture with these lines running out from the fracture? A. The way the fractures run in the X-ray plate indicates one serious or very severe injury.

Q. Just one? A. One injury, rather than series, yes.

Redirect examination by Mr. Toolan:

Q. All these various fractures you have described are part of that one injury? A. I think so.

20 Mr. Toolan: That is all I have.

The Court: Do you offer the plates?

Mr. Toolan: Yes, I want to offer the plates.

(X-ray plate entered in evidence and marked Exhibit P-1.)

(X-ray plate entered in evidence and marked Exhibit P-2.)

30 BESSIE SLOBODIEN, a witness produced on behalf of the plaintiffs, being duly sworn according to law, on her oath, saith:

Direct examination by Mr. Toolan:

Q. Miss Slobodien, you are a school teacher in Perth Amboy? A. I am.

Q. You are so engaged now? A. Yes, I am.

Q. Do you know Stephen Doryk? A. I do.

40 Q. Is he in your room at the present time? A. He is.

Bessie Slobodien, cross.

Q. And you teach or have been teaching since September of 1926 what grade? A. 4-B.

Q. And is Stephen Doryk in that room? A. He is.

Q. Is that his grade or not? A. Well, he—that shouldn't be his grade, no.

10 Q. Have you observed or had an opportunity to observe his condition since the beginning of September of 1926, at the opening of the school year? A. Yes, I have.

Q. Will you please tell us what you observed? A. I have observed that in the morning Steve seems to be wide awake, but later on he seems to be very fatigued, and at various times he asks to go home because he says he is all in. And also he will sit and stare at me for the longest while and when I question him as to whether he wants anything 20 or not he just grins. That is the only answer I get from him. Either that, or he puts his head down.

Q. Did you know Steve before April 17, 1926? A. Yes, I did.

Q. What did you observe about him prior to that time? A. Why, nothing unusual.

Mr. Toolan: That is all I have. Cross examine.

Cross examination by Mr. Turner:

30 Q. Was he in your class last year? A. Why, he was in my class in September, 1925.

Q. What class did you teach then? A. 3-A.

Q. And then you went from 3-A into what? A. Into 4-B.

Q. Is 3-A higher than 3-B? A. Yes, it is.

Q. So the next class for him to go in then after leaving 3-A would be 4-B? A. 4-B.

40 Q. He finished his work in 3-A, didn't he? A. Yes, he did.

Bessie Slobodien, cross.

Q. And he was promoted to 4-B, that is right?
A. Yes.

Q. And when was he promoted to 4-B? A. February, 1925.

Q. February, 1925? A. Yes.

10 Q. You don't mean that, do you? A. I had him—

Q. Bearing in mind this is 1927. A. 1926.

Q. In February, 1926, he was promoted to 4-B?
A. To 4-B.

Q. And you were then the teacher of 4-B, were you? A. Yes, but he didn't—no, I had 3-A then again.

Q. When did you become the teacher of 4-B? A. This term, September, 1926.

20 Q. And you didn't have him then when he first entered 4-B? A. No, I did not.

Q. And later on he was put in 4-B when you took the class? A. Yes, he was.

Q. Does he come to school every day? A. Yes, he does.

Q. You have how many pupils in your class? A. Forty-three.

Q. Just what do you teach in 4-B? A. Spelling, arithmetic, geography, language, music. That is about all.

30 Q. Now, do you have your records here for your class? A. No, I haven't any with me.

Q. Well, Steve does home work for your class, does he? A. Well, he is supposed to.

Q. What is that? A. He is supposed to.

Q. Well, he has to, don't he? They all have to, don't they? A. Yes, they have to.

Q. You give him home work to do every night, don't you? A. I do.

40 Q. And he brings his home work in the morn-

Stephen Doryk, direct.

ing? A. He doesn't bring anything in worth while looking at.

Q. Doesn't bring anything in? A. No, he doesn't.

Q. Did you hear his mother testify that he does home work?

Mr. Toolan: I object. 10

Q. What home work are they supposed to bring in, in the morning? A. Some arithmetic generally.

Q. That is the only thing? A. That is about all I give in 4-B.

Mr. Turner: That is all.

Mr. Toolan: That is all.

STEPHEN DORYK, one of the plaintiffs, being
duly sworn according to law on his oath, saith: 20

Direct examination by Mr. Toolan:

Q. Steve, how old are you? A. I am going to be eleven in March.

Q. Speak out loud. Where do you live, Steve?
A. I live in Vincent Place.

Q. Where? A. Vincent Place.

Q. That is in what city, Steve? A. That is in Perth Amboy.

30 Q. Do you know where the Perth Amboy Bottling Works has its factory? A. Yes, sir.

Q. How close is that to your home? A. That is in front of our house.

Q. In front of your house? A. Yes, sir.

Q. Steve, do you remember the day on which you were hurt? A. No.

Q. Well, you know you were hurt, don't you, Steve? A. Yes, sir.

40 Q. And on that morning what did you do early that morning? A. I went over Herbert's house.

Stephen Doryk, direct.

Q. Herbert who? A. Herbert Meek.

Q. That was the boy who was on the stand yesterday? A. Yes, sir.

Q. What time did you go over to Herbert's house? A. I went over there eight o'clock.

10 Q. And then what did you and Herbert do? A. We went up by Tony Lans the barber.

Q. Speak a little louder, will you, Steve? A. We went up by Tony Lans the barer, and then Stanley Gutowsky, he come down there and he says, do you want to make a few cents; and we says yes; so we went—

Q. Just a minute. Who is Stanley Gutowsky? A. The driver.

20 Q. The driver for whom? A. For Perth Amboy Bottling Works.

Q. What did Stanley say? A. He says if we want to make a few cents.

Q. Make a few cents how, Steve? A. Go with him.

Q. Go with him and do what? A. And help him carry the cases.

Q. And what did you do? A. We went down Smith Street, we got—we went down the hotel we took some—

30 Q. Speak a little louder, Steve. How did you go with him, Steve? A. On the truck.

Q. And where did you go, speak out loud? A. We went down Smith Street.

Q. Yes. A. And there we took some soda off to a hotel, so the driver went downstairs and he sent out—

40 Mr. Turner: I object to anything the driver said on the ground it is not binding on the employer.

Stephen Doryk, direct.

Mr. Toolan: He did not testify to what the driver said.

Q. Don't tell us what the driver said. What did the driver do when you got to the hotel, Steve? A. He went downstairs and he let the elevator up.

10 Q. Speak out. A. He let the elevator up, and then he put some soda on and beer and we let it go down, but I didn't go down on the elevator. And then when we got finished with that, went to another store, we got finished with that and then we went back to a little house. And then we went over to Maple, on the corner of Maple Street and Smith Street and we saw my brother Martin, and then the driver stopped and took them over—

20 Q. Took who? A. The driver took my brother Martin.

Q. That was Martin the boy who was on the stand yesterday? A. Yes, sir.

Q. And who was with Martin, do you know, Steve? A. I don't know. It is one of his friends.

Q. Now, Steve, then where did you go after Martin got on at Maple and Smith Streets? A. We was going up to the temporary bridge and she give a jerk.

30 Q. And then what happened? A. Nothing. It didn't do nothing. It stopped, and then she started again, and then we went—

Q. Where did you go then, Steve? A. Went down to the factory. We went down, we stopped by Tony Lans' barber shop, and my brother got off there, and Herbert got off there and I went down to the shop, and we got in the shop there and the driver took me—told me to take the empty cases off while they bring the ice box in.

40 Q. Now, Steve, how many empty cases were on the truck? A. About ten.

Stephen Doryk, direct.

Q. While you were taking the cases off who was there? A. Abe Schwartzberg and the workers.

Q. The what? A. The workers.

Q. Where is Abe Schwartzberg, do you see him in the court room? A. Over there (indicating).

10 Q. Where? A. There he is standing up.

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

Q. How long have you known Abe Schwartzberg? A. Since I moved there.

Q. Since you moved there. Well, did you ever work there before, Steve? A. Yes, sir. I was washing bottles, and we was getting two cents a case, and we weren't—we made—

Q. Speak out loud. You got how much a case?

20 A. Two cents a case.

Q. How long did you work at that, Steve? A. All vacation.

Q. Well, every day, do you mean? A. Was about all vacation.

Q. What? A. About all vacation.

Q. What I want to know, Steve, did you work there every day, or not, or every once in a while, or just how did you work? A. We worked there for about, for two weeks straight.

30 Q. Doing what, Steve? A. Washing bottles.

Q. And what did you get for doing that, Steve? A. We got money.

Q. How much? A. I got a dollar and my brother got a dollar.

Q. A dollar for how long? A. I don't know.

Q. How long did you have to work to get a dollar? A. He was paying us by days.

Q. By the day? A. Yes.

40 Q. Well, was there any other way—how did they decide on the dollar, Steve How was that fixed or

Stephen Doryk, direct.

arrived at, do you know? A. We sorted so many bottles, we washed so many bottles.

Q. And how were you paid for washing bottles?

A. At first they used to pay us every day, and then they used to pay us that week.

Q. Now, Steve, on this day, after you took these cases off the truck what happened then? A. Then he was getting the ice box.

Q. What did they do with the ice box, Steve? A. They put it on the truck.

Q. Who put it on the truck? A. The working men there.

Q. And then after the ice box was on the truck what happened? A. They give me a little space to stand. They closed the tail-board up—

20 Mr. Turner: Wait just a minute. I want to object to anything that transpired between the employees of the defendant company and this boy, on the ground it would not be binding on the employer.

Q. Who was there at the time, Steve?

Mr. Turner: Wait just a minute. The Court has not ruled.

The Court: There is nothing for me to pass upon. I understand what you object to.

Mr. Turner: The boy made a statement as to what happened and my objection is to the question.

The Court: What is the question?

Mr. Toolan: There is not any question pending.

The Court: If I have anything to pass on, I will pass on it, Mr. Turner. I do not

40

Stephen Doryk, direct.

know of anything. Is there anything you want stricken out?

Mr. Turner: The boy had not said it yet. He was just about to say it. That is my objection.

10 The Court: In other words, you are anticipating. Go on.

Q. Steve, who was there when this ice box was put on? A. Abe Schwartzberg and his workers, Abe Schwartzberg was there but he didn't say a word to me.

Q. What is that? A. Abe Schwartzberg was there, and his workers, but Abe Schwartzberg didn't say a word to me.

20 Q. Steve, when this ice box was on the truck what happened then? A. Then they closed the tail-board up and I had a little space to stand.

Q. How much space? A. That little space (indicating).

Q. Show us with your hands how wide. A. About that wide—no, about that wide and about that long and that wide (indicating).

The Court: About eight by six, does he indicate, eight inches by six inches?

30 Mr. Turner: I think it was a little more when he held his hands. I do not know.

Q. Show us again, Steve. A. About that long and about that wide (indicating).

The Court: About twelve inches by eight inches, I should judge.

Mr. Turner: I think so.

40 Q. Now, Steve, where were you? A. I was on the truck.

Stephen Doryk, cross.

Q. Who was there when you got on the truck? A. Abe Schwartzberg.

Q. Who else? A. And his workers.

Q. Who do you mean by his workers? A. And the driver was there too.

Q. Who is the driver? A. Stanley Gutowsky. 10

Q. And what did you do after you got in the truck? A. I was holding the ice box.

Q. And what happened then? A. Then we went out in the yard to fill the gas tank up with gas.

Q. Yes. Were you in the truck then? A. Yes.

Q. All right. After you filled up with gas what did you do? A. We went out.

Q. Out where? A. To Carteret.

Q. Did you get to Carteret, Steve? A. No.

Q. What happened? A. On Laurie Street we was going in Laurie Street, well, she jerked. 20

Q. Yes. A. And it threw me right off.

Q. How did it throw you off, Steve? A. She went front, and then went back and threw me off.

Q. How did you fall, Steve? A. My back facing the road.

Q. Your back facing the road. Well, did you fall frontwards or backwards? A. Backwards.

Q. And where did you hit, Steve? A. My head.

Q. How do you feel now, Steve? A. My head hurts. 30

Q. Anything else bother you? A. Yesterday when I was going home on the jitney I was dizzy in my head and my belly—stomach was just like I vomit, only I saw some spit, then I come up a little.

Mr. Toolan: That is all. Cross examine.

Cross examination by Mr. Turner:

Q. Steve, did they tell you how much they were 40

Stephen Doryk, cross.

going to pay you on the day that you rode with the ice box? A. No.

Q. Had you done those things before? A. Yes, sir.

10 Q. And how much did they pay you then? A. They used to pay me a quarter, sometimes they used to pay me a quarter or a half a dollar.

Q. A quarter or a half a dollar. Did you work for them on other Saturdays? A. Yes.

Q. And on those other Saturdays you got a quarter or a half a dollar? A. Yes.

Q. How many Saturdays did you work for them, Steve? A. I don't know.

Q. Well, did you work every Saturday? A. No.

20 Q. How many Saturdays? A. I don't know.
Q. Pretty nearly every Saturday? A. Pretty near.

Q. And every time that you worked did they give you a quarter or a half a dollar? A. Sometimes he used to give me soda.

Q. Sometimes they gave you what? A. Soda.

Q. But did they give you a half a dollar for working all day? A. Yes.

30 Q. And a quarter for working half a day? A. Sometimes they used to give me a quarter for working all day and a half a dollar for working all day too.

Mr. Toolan: Keep your voice up, Steve.

The Court: Sometimes it was a quarter for all day and sometimes a half a dollar for all day.

Q. On these other days that you had worked who hired you then? A. The boss.

40 Q. Who do you mean by the boss, Steve? A. Abe Schwartzberg.

Stephen Doryk, cross.

Q. On this particular day, this day, you know, when the ice box was on the truck, who hired you that day? A. The driver.

Q. Had the driver ever hired you before? A. Yes.

10 Q. When the driver hired you who gave you your pay, who gave you the quarter or half a dollar? A. The bookkeeper.

Q. Do you mean the bookkeeper in the plant? A. Yes.

Q. In the bottling works? A. Yes.

Q. What time was it that they asked you if you wanted to earn some money this day? A. About nine or ten o'clock.

20 Q. You said, Steve, that Abe Schwartzberg was there when you got on the truck, is that right? A. Yes.

Q. Did they say anything when he was there about how much you were going to get paid? A. No.

Q. Did they say anything to you when he was there about what work you were to do? A. No.

Q. But did you work when Abe Schwartzberg was there? A. Yes.

30 Q. Now, tell us, Steve, what work you did when Abe Schwartzberg was there. A. Abe Schwartzberg hired us to carry in the boxes off for the bottles to get. So he give me a quarter and Herbert Meek a half a dollar and my brother a dollar.

Q. Was that the same day when the icebox was on the truck? A. No.

40 Q. Well, now, on that day when the ice box was on the truck what work did you do when Abe Schwartzberg was there? A. I was carrying the cases, empty cases off.

Stephen Doryk, cross.

Q. Was he right there when you carried them off? A. Yes, sir.

Q. So he could see you carry them? A. Yes, sir; and he didn't say a word either.

10 Q. Didn't say anything to you at all about it? A. No, sir.

Q. How many cases did you carry off when Mr. Schwartzberg was there? A. I carried about ten off.

Q. About ten? A. Yes, sir.

Q. You told us, Steve, that you were going to go somewhere. Where were you going to go on the truck? A. Carteret.

Q. Did you know whereabouts? A. Whereabouts what?

20 Q. What I mean, do you know what store you were going to go to or what house? A. No.

Q. And who was it that asked you to go to Carteret? A. Driver.

Q. Was Mr. Schwartzberg there when the driver asked you to go? A. Yes.

Q. What did the driver tell you that you had to do, what work did you have to do? A. He didn't tell me—in the morning he told me to carry the cases off while they got the ice box.

30 Q. When you got back on the truck did anybody tell you to get back on? A. How?

Q. I mean, after you carried the bottles off did anybody tell you to get back on the truck to go to Carteret? A. Yes, sir.

Q. How is that? A. Yes, sir.

Q. Who told you that? A. The driver.

Q. Now, was Mr. Schwartzberg there when the driver told you to do that? A. Yes, sir.

40 Q. And were you still working for the company at that time? A. Yes, sir.

Stephen Doryk, cross.

Q. You were? Do you know, Steve, about what time it was when you started out on the truck? A. About nine or ten o'clock.

Q. Well, it was towards noon, wasn't it? No, I mean the time when you started out with the ice box? A. That was about eleven or twelve o'clock. 10

Q. Eleven or twelve? A. Yes, sir.

Q. How far did you get before anything happened? A. I got up to Laurie Street and then she jerked.

Q. How many miles is that? A. That is about three or four blocks.

Q. And then something happened when you got up there? A. Yes, sir.

Q. Do you know what happened when you got up there? A. It jerked. 20

Q. Well, did you feel that? A. It pushed me front, and then threw me right off.

Q. Did you feel the jerk? A. Yes.

Q. It threw you right off? A. Yes.

Q. Now, Steve, if you hadn't had this accident were you going to do any more work that day for them? A. Yes.

Q. What were you going to do after that? A. I was going to help him carry the cases. 30

Q. Help them carry cases? A. Yes, sir.

Q. You had carried cases before this, had you? A. Yes.

Q. I mean before this day, on other days? A. Yes.

Q. How big is one of the cases, Steve, I mean how long is it and how wide is it? A. About that long (indicating).

Q. How many feet do you think that is, two feet? A. About twenty-four inches. 40

Abraham Schwartenberg, direct.

Q. And how wide is it? A. And about that wide (indicating).

Q. How many feet would you say that is? A. That is about twelve inches.

10 Mr. Turner: That is all.
Mr. Toolan: That is all.

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

Direct examination by Mr. Toolan:

Q. Mr. Schwartenberg, you are a stockholder in the Perth Amboy Bottling Company? A. I am, sir.

20 Q. Hold any office in that company? A. I am the president of the company.

Q. And you are the person in the active charge and direction of its affairs? A. Yes, sir.

Mr. Toolan: That is all I have.
Mr. Turner: That is all.
Mr. Toolan: We rest.

MOTION FOR NON-SUIT.

30 Mr. Turner: I move for a non-suit in this case on the ground that no negligence has been shown on the part of the defendant.

And on the ground that the plaintiff is guilty of contributory negligence.

And on the further ground that the driver of the truck had no authority, as such, to invite anyone to ride on the truck.

40 And on the further ground that this appears now, by the proofs, to be a case of an employment, even though it may be held by the Court to be a casual employment, never-

Stanley Gutowsky, direct.

theless it is an employment, and I submit that the Court is without jurisdiction to hear and determine this cause, on the ground that the Workmen's Compensation Bureau has the sole jurisdiction to determine questions between employer and employee. 10

I call the Court's attention to the fact that the complaint in this case is not based upon an illegal employment, in other words, an employment in violation of the Child Labor Law; the complaint is based merely upon negligence.

On the complaint in this case, I submit, and under the proofs in this case, I submit that the Court is without jurisdiction.

The Court: The motion is denied. You 20 may have an exception.

Mr. Turner prays exception.

DEFENDANT'S CASE.

STANLEY GUTOWSKY, a witness produced on behalf of the defendant, being duly sworn according to law, on his oath, saith:

Direct examination by Mr. Turner:

30 Q. Mr. Gutowsky, on the day of this accident were you driving this truck? A. Yes, sir; I was.

Q. Talk loud enough so we can all hear you. A. Yes, sir; I was.

Q. And on this day what time did you start to drive this truck? A. First trip out of the shop was about eight o'clock.

Q. What kind of a truck was it? A. A Reo speed wagon.

Q. Did it have a cab on it? A. Yes, sir. 40

Q. Tell us how the cab was made on the truck,

Stanley Gutowsky, direct.

the appearance of it? A. Well, the cab was made, she covered the whole top, there is a small window in the back, you could see from, and there is room for three in the seat.

10 Q. Now, on that day, did you, in the morning, have Steve Doryk on the truck? A. I did.

Q. What was Steve doing on the truck that morning? A. What was he doing on the truck that morning?

Q. Yes. A. Why, he come downtown with me.

Q. He came downtown with you? A. Yes, sir.

Q. What did Steve do when you got downtown?

A. He sat on the truck and he handed me the cases down.

Q. Handed you the cases? A. He did.

20 Q. And then how long did you stay down there?

A. Downtown? Oh, we had about two or three stops. We was back about ten o'clock.

Q. When Steve got on the truck where did he get on? A. He got on about three blocks up from the plant.

Q. Had you known Steve before? A. I did.

Q. Had Steve helped around the plant before?

A. Yes. He was carrying some empty boxes around the plant.

30 Q. How long before that? A. Before the accident? About a week before the accident.

Q. Did the bookkeeper pay him there, do you know, for that? A. I did not see him paid.

Q. You didn't before? A. I did not.

Q. How frequently had Steve worked there? A. Well, I don't know because I am most of the times I was out on my route. I was there only in the morning and I get back in the night about eleven o'clock and nobody was there.

40

Stanley Gutowsky, direct.

Q. Had he ever worked for you before? A. Why, no.

Q. On the wagon? A. The only time he come with me was when I was up around town. But when I went on a long run I had my helper most of the time.

10

Q. When you didn't have a helper did Steve sometimes go with you? A. Why, no. I took an older boy. I took him once in a while just to make a trip downtown.

Q. When Steve acted as your helper did he get paid for it? A. No, sir. I did not pay him.

Q. You didn't pay him? A. No, sir.

Q. Didn't he get paid when he went back to the plant? A. Well, I don't know. I didn't see him get paid.

20

Q. On this day, the day of this accident, how did Steve come to get on your truck? A. The day of the accident?

Q. Yes. When he first got on? Just take your mind back to the time he first got on, how did he come to get on? In other words, what did you say to Steve and what did he say to you? A. Well, I stopped in front of the barber shop in the morning, I stopped to get a pack of cigarettes, or a piece of candy, or something, the two of them were standing in front of the barber shop when I come out; so I only had about ten cases, and I told the boys did they want to take a ride with me. So they said yes. So they hopped on and we went.

30

Q. What did you want the boys for? A. Well, just to let some of the boys hand the cases off to me.

Q. To help you hand off the cases? A. The cases.

By the Court:

40

Q. Who were these two that you say that you

Stanley Gutowsky, direct.

asked to get on? A. Herbert Meek and Steve Doryk.

By Mr. Turner:

10 Q. The plaintiff was one of them, wasn't he? Steve Doryk, the plaintiff, the plaintiff who was hurt, was one of them? A. Yes.

Q. After they got on there they did help you, did they? A. They did.

Q. Now, then, eventually you went back to the plant before noon, didn't you? A. Yes, sir.

Q. When you got back to the plant did Steve help you up there? A. Why, no, he didn't help me up there, because there was plenty of men around the shop to help me there.

20 Q. What? A. I said there was about five or six working men in the shop there to help me there.

Q. Did Steve actually carry off any of the cases when he got back there? A. He did not.

Q. Now, when you—did you pay Steve up to that time anything? A. No, sir.

Q. When you started out you were going to Carteret, were you? A. Yes, sir.

Q. Did you talk to Steve about going to Carteret? A. No, sir; I did not.

30 Q. Whereabouts were you going to go in Carteret? A. I just don't remember the street.

The Court: He says he does not remember.

A. It is up around about a mile away from the Carteret Ferry.

Q. You were going to deliver an ice box up there? A. Yes, sir.

40 Q. Did you have any more delivery of cases to make that day? A. I did not.

Stanley Gutowsky, direct.

Q. Well, when you got Steve up to the plant did you tell him you didn't have anything more for him to do?

Mr. Toolan: I object. This is very leading.

The Court: It is very leading.

10 Q. Did you have any talk with him about whether you had— A. No, sir; I did not.

Q. So that up to that time you hadn't discharged Steve, had you? A. No, I had not.

Q. Did you have any talk with Steve at all about whether he should keep on working or should stop? A. I did not. I didn't have any time. Because Saturday is a busw day down there.

20 Q. How is that? A. Saturday is a busy day down there.

Q. When you got ready to start out who got on your truck? A. Steve.

Q. Who? A. Steve got on the truck.

Q. Where did Steve get on? A. He got on right in the plant there.

Q. By the plant? A. Yes, sir.

Q. Who else got on? A. That is all.

30 Q. Well, was anybody on the seat with you? A. Yes. Me and Dave Lynch, a salesman of the plant.

Q. Dave Lynch and yourself and Steve? A. Yes.

Q. Where did Steve first get on the truck? A. Inside of the plant.

Q. You saw him there, did you? A. Yes, sir.

Q. Saw him get on? A. Yes, sir. No, I didn't see him get on. He got on himself.

Q. He got on himself but you saw him on there, didn't you? A. Yes, I seen him on.

40 Q. And you saw him on there when you started? A. Yes, sir.

Stanley Gutowsky, direct.

Q. Was Mr. Schwartenberg there? A. He was not.

Q. Was he there while the cases were being unloaded? A. He was not.

Q. Was he there at the plant? A. No, sir.

10 Q. Well, at any rate you started out and Steve was on the truck when you started out? A. Yes, sir.

Q. Now, did you say anything to Steve as to whether he should get off that truck or not? A. Well, I didn't see him until I got out by the gas pump.

Q. You didn't say anything up to that time, did you? A. Yes, sir.

20 Q. Now, when you got out there did you say anything to Steve? A. Well, I was pumping the gas in and the salesman was holding the hose for the tank, and the boy was on the truck, and I told the boy to get off, and the boy got off, and we started off.

Q. Did Steve get off the truck there at the gas tank? A. He did, yes, sir.

Q. Did you see him get off? A. Yes, sir; I did.

30 Q. What do you know after that about what happened? A. Why, we started off, and just about half way the block I was hailed by a truck driver. I pulled up my brakes and I stopped and I got out of the truck, and I was looking in the back and I seen somebody laying out in the road. I went back and I noticed the kid by his hat, he had a small hat, laying alongside of him, and I picked the kid up, and the car stopped along the road, and rushed him to the hospital.

40 Q. Now, when you were out with the truck that morning will you tell us when you got over the bridge, the temporary bridge over the railroad

Stanley Gutowsky, direct.

tracks, when you got on that bridge did anything happen there? A. Why, when I was going over the temporary bridge I seen the boss coming along over the bridge, so I slowed up, and he waived his hand like this to me, but I didn't know what he meant, so I kept on going. 10

Q. How long did your car stop on that bridge, or did you stop at all? A. I slowed up until I put my truck in second speed then.

Q. There has been testimony here that your brakes locked on the bridge? A. Why, the only time the brakes locked was when I used my brakes.

Q. Did you use your brakes on the bridge? A. Why, yes, I did.

20 Q. When you speak about your brakes being locked, just what do you mean by your brakes locking? A. Why, they lock, when you put your brake on, well, they lock, and you stand still for a while, and then when you put it in first speed she goes off again. It ain't what you call really locked, because when they really lock on you it takes a mechanic to take some of the bolts off to loosen her up and put her in shape again.

30 Q. Did you have any trouble with your brakes that morning? A. No, sir, I did not.

Q. Did you have any trouble with your brakes at any time that day? A. No, sir.

Q. Now, after you got the gas, when you started out did you observe where Steve was when you got back on the truck? A. I don't understand you.

Q. Did you see where Steve was when you got back on the truck? A. When I got back on the truck?

40 Q. After you got your gas you got back on the truck, where was Steve then? A. He was in front

Stanley Gutowsky, direct.

by the cab, because he had this much room in front, the ice box was on that side and you had about this much room on this side. He was standing next to the cab there when I told him to get off.

10 Q. You say you saw him get off, did you? A. Yes, sir, I did.

Q. Now, when you started off, after getting gas, where was Steve then after he had gotten off of the truck, as you say, where was he when you started off? A. Why, he got off and he walked by the door there, and then I started off, and that is all I remember there.

Q. And from the time you started off until you saw him in the road did you see him in between that time at all? A. No, sir; I did not.

20 Q. Did you know that Steve was on your truck? A. I did not.

Q. From the time you left the gas tank until the accident? A. No, sir.

Q. Do you know the bakery where Mr. Meek, who testified yesterday, where he worked? A. Yes, sir.

30 Q. How far is that bakery away from the place where Steve fell off? A. That must be close to one hundred foot. More than that, I guess it is about maybe one hundred and fifty feet.

Q. This place where Steve fell off, what is the condition of the roadway there? I mean by that, is there any turn in the road there, or is it a straight road, or what? A. Why, you go up New Brunswick Avenue and then there is just a turn this way to your left.

Q. How wide are those two streets? A. About seventy-five feet wide.

40 Q. Did anything happen when you turned into that other street? A. That other street?

Stanley Gutowsky, cross.

Q. I mean to say, did anything happen to your automobile, any change in motion, or anything of that sort? A. No, sir.

Q. Well, how did you go around there, in high, low, or what? A. High speed.

Q. What? A. High speed. 10

Q. How fast did you go around that corner? A. About ten or twelve miles an hour.

Q. Did you hear any noise when you went around that corner, did you hear any holler or noise of any kind? A. No, sir; I did not.

Q. Did the car give any jerk when you went around the corner? A. No, sir; it did not.

Mr. Turner: Cross examine.

Cross examination by Mr. Toolan: 20

Q. This accident happened on Laurie Street, did it not? A. It did.

Q. Just off from New Brunswick Avenue? A. Yes, sir.

Q. Laurie Street and New Brunswick Avenue run into each other at an angle something like that, do they not (indicating)? A. Yes, sir.

30 Q. So that as I understand it, you were coming up New Brunswick Avenue going east, is that so? A. Yes, sir.

Q. And you just took that slight bend to the left? A. I did.

Q. To go into Laurie Street, is that so? A. Yes, sir.

Q. And you were only going ten or twelve miles an hour? A. I did.

Q. So that your car was under good control, wasn't it? A. Yes, sir.

40 Q. And it wasn't necessary for you to take any

Stanley Gutowsky, cross.

sudden or sharp turn to the left in order to get into Laurie Street, was it? A. No, sir.

Q. You could take that, there wasn't any other traffic coming in any way that you had to dodge out of the way of? A. No, sir; there was not.

10 Q. So that you could just take a gradual turn there, couldn't you? A. Yes, sir.

Q. That sort of a turn, going ten or twelve miles an hour, would not be sufficient to throw anybody off the truck, would it? A. No, sir.

Q. As a matter of fact, you didn't take any sharp turn there, did you? A. Sharp turn around that corner?

Q. Yes. A. Well, it isn't such a sharp turn around that corner.

20 Q. I say, you didn't take any sharp turn going into Laurie Street? A. Why, I had to make that turn to go through Laurie Street.

Q. I say you wouldn't call it a sharp turn, would you? A. Why, it is pretty sharp.

Q. Isn't it just a matter of gradually veering off to the left? A. Yes, sir.

Q. That is true, isn't it? A. Yes, sir.

Q. What sort of a tail-board was on this truck? A. Do you mean how high she stood up?

30 Q. What sort of a tail-board was it? A. Just a regular plain tail-board with chains on it to hold the back tight.

Q. How high was it? A. Well, it is about that high (indicating).

Q. This was a Reo speed wagon, was it not? A. Yes, sir.

The Court: Let us get that on the record.

Q. Yet us have that again.

40 The Court: About a foot and a half, is it?

Stanley Gutowsky, cross.

Mr. Toolan: Yes, that is about what it is.

The Court: What do you think?

Mr. Turner: About a foot and a half.

Q. And this was a Reo speed wagon, was it not? A. Yes, sir. 10

Q. Open body, is that right? A. Yes, sir.

Q. How high would you say that the top of the tail-board was from the ground? A. The top of the tail-board from the ground?

Q. Yes. A. About two and one-half or three foot.

Q. This was the regular build Reo speed wagon? A. Do you mean all the way up to the platform?

Q. Was the tail-board up when you left the factory? A. Yes, sir; it was. 20

Q. How high was the top of the tail-board when it was up? A. To the bottom of the ground, do you mean?

Q. Yes, to the ground? A. Well, that must have been about three to three and one-half foot.

Q. Would it be over the top of Steve's head? A. No, sir.

By the Court:

Q. What? A. It would not be over the top of Steve's head. 30

By Mr. Toolan:

Q. In other words, do you think Steve could stand on the ground behind this truck and look over the top of the tail-board? A. Well, I guess he could.

Q. As I understand it, you picked Steve up that morning at the barber shop, didn't you? A. Yes, sir; I did. 40

Q. Steve and Herbert Meek? A. Yes, sir.

Stanley Gutowsky, cross.

Q. And you asked them to come along with you to help you unload cases? A. I did.

Q. And what they told about you visiting the Madison Hotel that morning is correct, isn't it? A. Yes, sir.

10 Q. You had to make a delivery in the Madison Hotel? A. Yes, sir.

Q. And you went downstairs to work the elevator, didn't you? A. Yes, sir.

Q. And Steve pushed the cases off the truck to you, or to Herbert Meek, and Herbert Meek carried them over to the elevator, and you were downstairs working the elevator? A. Yes, sir.

20 Q. And when you left there you went to some private dwelling, didn't you, somewhere, to make a delivery? A. We went up to Raritan Avenue to make a delivery then.

Q. Didn't you go down in the southern section of Perth Amboy after you left Madison Avenue? A. That is towards the other way, on the outskirts of the town.

Q. Well, where did you go after you left the Madison, out to Raritan Avenue? A. Out to Raritan Avenue.

30 Q. You made a delivery there and they helped you there? A. Yes, sir.

Q. You picked up Martin Burke and this other lad that morning, didn't you? A. Yes, sir.

Q. Where did you pick them up? A. On the corner of Maple and Smith Street.

Q. So that part is correct, isn't it? A. Yes, sir.

40 Q. Did they ride up to this Raritan Avenue delivery or not with you, or did they get off before you got there? A. No. They got off by the barber shop.

Stanley Gutowsky, cross.

Q. So that Herbert Meek got off at the barber shop? A. Yes, sir.

Q. And Martin Burke got off there, is that correct? A. Yes, sir.

Q. And this other man who was with Martin Burke? A. He got off there too. 10

Q. In other words, everybody got off at the barber shop except little Steve, isn't that so? A. Yes, sir.

Q. Did you ask him to go on down to the factory with you and help you unload the cases? A. No, sir; I did not. I thought he was going home.

Q. You knew he was on there, didn't you? A. He was sitting in the front seat with me going down.

20 Q. Sitting in the front seat with you, so that you took him right on down to the plant? A. Yes, sir.

Q. You were not afraid to take him down to the plant, were you? A. I was if the boss was there, he didn't allow me to have any kids on the truck.

Q. Yes, I know, but notwithstanding the fact that you knew that rule, you drove right down there on this busy Saturday morning with Steve sitting in the front seat with you, didn't you? A. Yes, sir.

30 Q. Were you afraid of the boss then? A. Sure, I was. I will get fired.

Q. Isn't it a fact, Gutowsky, that Schwartenberg, the boss, himself often employed Steve and Herbert and Martin and Joe Burke and the other boys that used to play around there to do little jobs around the factory? A. Why, I don't know much about that because most of the time I am out on my routes. I am there eight o'clock in the morning and I shoot right out eight o'clock on the week days.

40 Q. So that you won't say anything about it be-

Stanley Gutowsky, cross.

cause you say you don't know? A. No, sir; I don't know.

10 Q. Well, were you there at the time when they unloaded this load of boxes and piled them up somewhere there that Steve spoke about? A. Why, yes, I was there in the afternoon when I come in there.

Q. And they were working there, weren't they, those boys? A. Yes, sir.

Q. So that he did employ them every once in a while, didn't he, to do little odd jobs? A. Yes, I seen them there once in a while.

20 Q. So that, isn't it a fact, Stanley, that if you needed somebody to help you on the wagon, that the boss would let you get one of these youngsters, and at the end of the day pay them a quarter, or half a dollar for being with you, isn't that true? A. Why, no he didn't allow me to have any kids on the truck.

Q. For instance, Herbert Meek, didn't he ever help out on the truck? A. Why, when I got downtown with two or three cases on then I would take a kid with me; the boss never sees me do it.

30 Q. Isn't it a fact that you used to take these boys with you sometimes and the boss would pay them when you told him that these lads helped you during the day? A. No, sir.

Q. And isn't it a fact that you would sometimes pay them with money, that is the boss or bookkeeper, isn't that so? A. No, sir.

Q. And isn't it a fact that sometimes you drivers would pay them by giving them a couple of bottles of soda water? A. No, sir.

40 Q. Do I understand you that it was a hard and fast rule that you were not to have these kids on the truck? A. That is right.

Stanley Gutowsky, cross.

Q. Yet on this Saturday morning you drove down there with Steve in the front seat? A. Yes, sir.

Q. When you got down to the factory who was there? A. Why, there was the working men inside there and the bookkeeper. 10

Q. Well, how about Abe Schwartenberg? A. He was not there.

Q. He wasn't there? A. No, sir.

Q. Wasn't there at any time that morning? A. He was there in the morning but he left.

Q. What time? A. Come in around seven—he left there about half-past seven.

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

Q. Did you see him back there again that morning? A. No, sir, I did not. 20

Q. Didn't see him at all? A. No, sir.

Q. I suppose it was an absolute rule not to have anybody on the truck, isn't that so? A. Nothing but my helper.

Q. And yet your boss had seen you when you were on your way up to the plant this morning, didn't he, with Steve on the truck? A. Yes, sir.

Q. With Herbert Meek on the truck, with Martin Burke on the truck, and with this other man on the truck, isn't that so? A. Martin Burke wasn't on the truck yet. 30

Q. You saw your boss when you were coming down the temporary bridge over the railroad, didn't you? A. Why, I was going up the temporary bridge—I was coming down, yes, they was on. That is right.

Q. They were on? A. Yes, sir.

Q. Because you were coming in the direction of the factory, isn't that true? A. Yes, sir. 40

Stanley Gutowsky, cross.

Q. And your boss was going in the opposite direction? A. Right.

Q. He saw you with all these men on there, didn't he? A. Yes, sir.

10 Q. And it was a rule that you should not have them on, that is right? A. Yes, sir.

Q. And notwithstanding that you went right back to the factory with little Steve on, didn't you? A. Yes, sir.

Q. When you got to the factory didn't Steve help you unload these cases? A. He did not.

Q. What? A. He did not.

20 Q. What did Steve do while they were being unloaded? A. Why, he was inside of the plant, I guess, taking a drink of soda, or something, because I didn't see him around there then.

Q. Did you see him go in the plant and take a drink of soda? A. I seen him go inside, but I guess that is what he must have did.

Q. Isn't it a fact he came to you, Stanley, and said, take the top off this bottle, Stanley, so I can have a drink? A. No, sir; he didn't do that.

30 Q. Well, he was familiar enough around the plant that he could walk in and get a drink of soda without anybody objecting, isn't that so? A. Not when the boss was there.

Q. When the boss wasn't there, there was somebody there in charge of the plant, wasn't there? A. Why, the bookkeeper was there, but he is, most of the time he is in his office and he is never out.

Q. Who was in charge of the plant when the boss was away? A. Why, there was the bookkeeper.

40 Q. Well, how about this fellow Bill, the chemist? A. I don't know much about it because most of the time I am not in there.

Stanley Gutowsky, cross.

Q. Who did you take your orders from? When you refer to the boss you mean Schwartenberg? A. Yes, sir.

10 Q. Who did you take your orders from when Schwartenberg wasn't there? A. The bookkeeper.

Q. That bookkeeper was there when Steve was around this morning, wasn't he? A. Why, he was inside but I didn't see him around by the truck.

Q. Well, how far is inside from the place where the trucks come in? A. About from here to that pole, but it is around a bend like.

Q. Which pole, this pole (indicating)? A. Yes, sir.

The Court: That is sixteen feet.

20 Q. Who told you to take this ice box to Carteret? A. The bookkeeper.

Q. Did he come out to tell you? A. No, sir. I always go inside. Go inside and he tells me what to take out.

Q. How many men did it take to put this ice box on the wagon? A. There was about four of us, two on each side.

30 Q. This boy Janco who was on the stand yesterday, he helped you, didn't he? A. Yes, sir.

Q. Did Martin Doryk, Steve's brother, help? A. No, sir.

Q. He was working there that morning, wasn't he? A. I don't know.

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

Q. Steve was around there all the while that was being loaded on, wasn't he? A. I didn't see him since he got off. I didn't see the boy since he got off.

40 Q. Well, when you got the tailboard up and the ice box on and everything else, Steve was on the

Stanley Gutowsky, cross.

truck, wasn't he? A. When I got the tailboard up and the ice box on, yes, he was on the truck.

Q. Did you see him get on? A. Sure, I must have seen him get on.

10 Q. Not what you must have. Did you see him get on? A. Yes, sir.

Q. You didn't say anything to him while he was getting on, did you? A. I didn't say nothing until he got outside.

Q. Until you got outside where? A. By the gas pump, that is when I told him to get off.

Q. Well, why did you let him get on and wait until you got out by the gas pump before you told him to get off? A. I didn't figure he was going with me.

20 Q. You had picked Steve up and asked him to help you that morning, hadn't you? A. Yes, sir.

Q. And didn't you think this youngster probably thought that he had the job of being with you all day long? A. No, sir.

Q. You testified on direct examination under questioning from Mr. Turner that you didn't say anything to him about getting off, or informing him that he was fired, or through his work, or anything else, up until you got out by the gas pump, did you? A. Yes, sir.

30 Q. That is true? A. I told him to get off when we got outside by the gas pump.

Q. How far are the gas tanks from the place where you loaded this ice box on the truck? A. About twenty-five feet.

Q. Why didn't you tell him to get off when you first saw him get on? A. I didn't figure the boy was coming with me.

40 Q. What did you think he was doing on the

Stanley Gutowsky, cross.

truck? A. I thought he was going to get off on the corner and go home.

Q. Get off on what corner? A. Right around the bend there.

Q. Right around what bend? A. No more than I pull out of the plant. 10

Q. You thought— A. I thought he wanted to get off right by Herbert Meek's block there where Herbert lives.

Q. Herbert Meek's place is how far from the bottling plant? A. That is one block away.

Q. You thought he wanted to get off by Herbert Meek's? A. That is by the corner there.

Q. So you let him stay on your truck to ride twenty-five feet from where you started up to the gas tanks? A. Yes, sir. 20

Q. And then told him to get off, isn't that so? A. Yes, sir.

Q. Why didn't you take him out where you thought he wanted to go? A. I couldn't take a chance.

Q. What kind of a chance? A. The boss is liable to be coming up and I am liable to get Hell again.

Q. You hadn't gotten any Hell so far that day, did you? A. I got plenty of it down there.

Q. I am talking about Steve Doryk, you didn't get any on account of him that day, did you? A. Well, when I seen the boss raise his hand up like this I knew that meant something. 30

Q. You didn't know whether it was soda water or Steve, but you thought it was Steve, is that right? A. I didn't get you.

Q. I say, you didn't know whether it was because of soda water or Steve, but you figured it was on account of Steve, is that right? A. Yes, sir.

Q. When you told Steve to get off the truck you 40

Stanley Gutowsky, cross.

told him because you didn't want him to come with you, didn't you? A. Yes, sir.

Q. As I understand it, there is sort of a curtain down there back of the cab, is there not? A. No, sir. There is a small window in back of the cab.

10 Q. About what size, would you say? A. Oh, it is about six inches wide and about a foot long.

Q. Well, it is a sort of a window that you can see back behind you? A. Yes, sir.

Q. Have you got one of those reflecting mirrors up in the front of the cab? A. No, sir; not in the front of the cab. I have got it on the side.

Q. You could see Steve in that, could you? A. No, sir.

20 Q. When you told Steve to get off where did he go? A. I told him to get off?

Q. Yes. A. I don't know where he went.

Q. Did you see him get off? A. Yes, I seen him get off.

Q. How far did you follow him with your eyes? A. Well, I told him to get off, he got off, and I started out. That is all I know about that.

Q. Well, did you wait until he was off? A. Yes, sir.

30 Q. Before you started? A. Yes, sir.

Q. And what direction did you see him going in? A. Well, when he got off he started walking towards the plant.

Q. Yes, and how far was he away from the truck, the rear end of the truck, before you started? A. I just seen him take about five or six steps and then I started off.

40 Q. Well, you would say he was ten feet from the rear end of the truck before you started, is that right? A. Yes, sir.

Stanley Gutowsky, cross.

Q. And then you started out in this Reo speed wagon? A. Yes, sir.

Q. So that in order to get on that truck he had to cover that ten feet and go faster than you were going to catch up to you, didn't he? A. Yes, sir.

10 Q. And that is what he did to get on, according to your theory?

Mr. Turner: I object to that, because he didn't see him get on.

A. Yes, sir.

Q. You didn't stop, did you, between the time you started there at the plant and the time you were told of the accident? A. No, sir.

20 Q. You never stopped. You don't know where Steve got on? A. No, sir.

Q. You didn't see him on? A. No, sir.

Q. Did anybody in the plant yell at you as you were going out that Steve was on? A. No, sir.

Q. You said on your direct examination that the only time the brakes locked was when you put your brakes on? A. Yes, sir.

Q. And when you say when brakes really lock you need a mechanic to get them loose? A. Yes, sir.

30 Q. You mean by that the brakes absolutely freezing up, don't you? A. Yes, sir.

Q. When you say the only time your brakes locked was when you put your brakes on, you don't mean they would freeze up on you, do you? A. No, sir.

Q. You mean on this Reo speed wagon when you put your brakes down they would catch, wouldn't they? A. Yes, sir.

40 Q. And stay on? A. They would stay on, and

Stanley Gutowsky, cross.

then they would stop, and then when I would put her in first speed she would go off again.

Q. In other words, the only way to release them when they went down that way was to put the car in first speed? A. Yes, sir.

10 Q. So that every time you put your brake on that Reo speed wagon the brakes stay on until you shift gears, is that right? A. When I put my brake on?

Q. Yes. A. Well, sometimes—

Q. Not sometimes. What did they do on this day? A. This day?

Q. Yes. A. Why, when you put your brake all the way down to the floor, that is when she locks, but when you just put her about half way she won't lock on you.

20 Q. Isn't it a fact that you did tell these kids, when you saw the boss coming over the bridge there, that your brake locked? A. No, sir; I did not, because the kids wasn't in the front. They was in the back.

Q. Well, didn't you tell Martin Burke then that your brake locked? A. No, sir, I did not.

Q. Didn't your truck stop coming down the temporary bridge there at about the time you saw your boss? A. Why, I didn't stop altogether. I shifted to second speed.

30 Q. You were coming down the incline there, weren't you? A. Yes, sir.

Q. This is a gradual incline, it is not a very sharp hill, is it? A. No, sir.

Q. Not a very steep grade? A. Why, it is pretty steep when you are coming up with some cases on.

Q. Well, you didn't have many cases on, did you? A. No, sir.

40 Q. You only had about ten? A. That is all.

Stanley Gutowsky, cross.

Q. You didn't have to put your car in second speed to hold that car on that kind of a grade, did you? A. That is what I did. I did put it in second speed.

Q. Did you do it because you had to do it or not?

A. Why, no. I slowed up. I seen the boss coming, he went with his hand, with his finger like that to me, well, I almost stopped, and then I shifted in second speed and I went off again.

Q. Why did you shift her into second speed?

A. I thought he wanted me, but I kept right on going.

Q. You shifted then into second speed because you thought the boss wanted you? A. Yes, sir.

Q. And not because you wanted to hold the car back going down that incline, is that right? A. No, sir.

Q. You didn't put her in second as a brake, in other words? A. No, sir.

Q. Do you mean to say then when you slowed up on the bridge, going down that incline— A. Yes, sir.

Q. —that you couldn't keep it in high and carry along without shifting into second? A. Why, I could keep in high if I wanted, but I shift her in and started her off again.

Q. And is that the time—did your rear wheels skid? A. No, sir; they did not.

Q. Did you put your brake on so far that it locked at that point? A. Why, no, sir.

Q. You slowed up then, you say, almost to a stop, is that right? A. Almost to a stop.

Q. You don't know how these boys got the idea that your brakes locked? A. No, sir; I do not.

Q. Your brakes did lock on you that day, did

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Stanley Gutowsky, cross.

they not, that morning going over the Washington Street bridge? A. Yes, sir.

Q. They locked going over the Washington bridge? A. That is when you put them all the way down and they lock.

10 Q. That same morning? A. Yes, sir.

Q. And what happened then? A. That morning?

Q. Yes. A. That is when the officer was taking me down to the station.

Q. Yes. After the accident? A. Yes, sir.

Q. Right after the accident? A. Right after the accident.

20 Q. You reported to Officer Dwyer at the corner of New Brunswick Avenue and Washington Street, didn't you? A. New Brunswick and Washington Street?

Q. Or rather New Brunswick and Convery Place? A. Well, he seen us coming fast so he hopped in.

Q. His post is about a block from where this accident happened, isn't that true? A. Yes, sir.

Q. Officer Dwyer went down to headquarters with you, that is correct? A. Yes, sir.

30 Q. And going right straight down the street, when you got on the Washington Street bridge, which is how far from the accident? A. Washington Street bridge?

Q. Yes. A. That is about three-quarters of a mile from the accident.

Q. Going over the Washington Street bridge with Officer Dwyer in your truck your brakes locked? A. Why, I—

40 Q. Did they lock? A. They locked, but I put them on because there was a car in front of me,

David Lynch, direct.

and I put them all the way down and they locked, in front of me.

Q. And when your brakes locked then right after the accident you came to a quick stop, didn't you? A. Yes, sir.

Mr. Toolan: That is all. 10

Redirect examination by Mr. Turner:

Q. Who do you work for now? A. I don't work.

Q. What is that? A. I am supposed to be driving a truck in South Amboy. Started Thursday on the job, but I couldn't, on account of the case here.

Q. Who was that for? A. For Bessner.

Q. You don't work for the Perth Amboy Bottling Company? A. I do not. 20

Q. How long since you have worked for them? A. I guess about since August, sometime, August or September.

DAVID LYNCH, a witness produced on behalf of the defendant, being duly sworn according to law, on his oath, saith:

Direct examination by Mr. Turner:

Q. Mr. Lynch, where do you live? A. 130 Washington Avenue. 30

Q. At the time of this accident were you in the employ of the Perth Amboy Bottling Company? A. Yes, sir.

Q. In what capacity? A. Salesman.

Q. Do you remember the day of this accident? A. Yes, sir.

Q. Now, on that day when did you first get on the truck? A. On the day of the accident?

Q. Yes. A. I first got on the truck the day of 40

David Lynch, direct.

the accident when he pulled out to the gas tank to fill the car full of gas.

Q. Up to that time had you ridden on the truck that day at all? A. No, sir.

Q. Did you help put on the ice box? A. No, sir.

10 Q. Now, when you got out to the gas tank just tell us what happened there that you saw and heard in reference to Steve Doryk. A. When I got out to the gas tank this boy was sitting on the front seat. And Stricky handed me the hose, just as he pulled—

Q. Stricky is who? A. The driver.

Q. Do you mean Stanley Gutowsky? A. Yes. He handed me the hose and I put the hose in the tank and he pumped the gas in.

20 Q. Where is the tank on this Reo speed wagon? A. Right in the front, right under the seat.

Q. Go ahead. A. Rather in front of the driver, not under the seat, right in the front where he drives. And this boy was sitting in the front, and as I say—as Stricky was pumping in the gas I was holding the hose, and we filled the tank with gas and Stricky said to this boy, he said, you had better get off; and the child didn't say no more, and Stricky got on the car, and the kid got off, and that was all I seen of him, and that is all I know. 30 Until—

Q. Did you see this boy, Steve Doryk, after the automobile started? A. No, sir.

Q. After you left the plant up to the place where the accident happened about how fast did the car go? A. The car that I was riding on do you mean?

Q. Yes. A. When he made the turn?

40 Q. Well, up to the time he made the turn how fast did he go? A. Well, he couldn't go very fast on account of a hill there, see. You have got to

David Lynch, direct.

make a grade, there is a hill, I should judge about twelve or thirteen miles an hour, fifteen miles an hour at the most.

Q. When you made the turn how fast did it go?

A. About ten or twelve miles an hour.

Q. Did you hear any noise or holler or alarm of any kind when he made this turn? A. No, sir. 10

Q. What happened after that? A. Why, we went up about one hundred feet and there was a Mack truck coming down, and he pointed, he said, see what you done; and the driver looked back and he seen this kid laying in the road, and he pulled to the curb and he run back and I run after him, and he picked this boy up, and it was this little fellow that got off the front of the truck that was laying there. So— 20

Q. And up to that time from the time you left the gas tank did you have any knowledge that this boy was on this truck? A. I did not myself; no, sir.

Q. Well, you say you did not yourself; did anybody have any knowledge—

Mr. Toolan: I object.

The Court: Objection sustained.

Q. About what time of the day was it that you started out? A. About around eleven-thirty. 30

Q. Who was on the truck when you left the gas tank? A. Me and the driver.

Q. Do you recall the time when you made this turn into Laurie Street? A. Yes, sir.

Q. What happened at that time? A. Why, nothing that I know of until we got hailed by the driver of the Mack truck there was nothing happened at all. 40

David Lynch, cross.

Q. Was there any jerk or anything about the automobile? A. No, sir.

Q. Did the automobile change its course in any way outside of making the turn? A. No, sir.

10 Q. Anything unusual happen about the operation of the automobile? A. No, sir.

Mr. Turner: Cross examine.

Cross examination by Mr. Toolan:

Q. That is not a very sharp turn there, is it, from New Brunswick Avenue into Laurie Street? A. Why, no, it is not very sharp.

Q. It can be taken by just gradually changing your course, isn't that so, veering off to the left? A. Yes, sir.

20 Q. As I understand it, you didn't ride on the truck from the garage out to the gas pump? A. No, sir; I did not.

Q. That is a distance of about twenty-five feet? A. Why, no, it is not, Mr. Toolan. It is only about ten feet.

Q. Where did you come from, the office? A. From the office, yes, sir.

Q. You walked out of the office door to the truck? A. Yes, sir.

30 Q. When you got over to the truck Steve was sitting in the front seat? A. Yes, sir.

Q. He wasn't, you are sure, standing in the back of the truck? A. No, sir.

Q. Up behind the cab? A. No, sir.

Q. He was sitting in the front seat? A. Sitting in the front seat.

40 Q. The gas tank in a Reo speed wagon is right in front of the seat, is it not, under the hood? A. It is right here in the front with the driver.

David Lynch, redirect.

Q. You started to fill the tank and as I understand it, the driver said, you had better get off here? A. Just as I came to the truck, understand, just as he stopped the car to go to the gas tank there, I just happened to come right there at that moment, and I stepped on the truck and this boy was sitting on the front, and he handed me the hose, and I put the hose in the tank and he pumped the gas, he filled the tank, he jumped into the seat behind the wheel and he said to the child, you had better get off, just like that; and the boy, he got off and went on the ground and that is the last I seen him. 10

Q. He didn't convey the idea to that child that he wanted him to get off the front seat so you could get in, and have the child to go around in back, did he? A. No, sir; he did not say nothing of the kind. He just said, get off; that is all I heard him say. 20

Q. Well, he didn't say get around in back, did he? A. No, sir.

Q. But after he said you had better get off, did you, or he, to your knowledge, make any observation to see whether the child was on the back of the truck? A. No, sir; I did not. 30

By Mr. Turner:

Q. Mr. Lynch, when you left the plant that morning was Mr. Abe Schwartenberg there? A. No, sir.

Q. Had he been there that morning? A. I did not see him.

Q. And you were there how long? A. I came in the plant about ten o'clock, or a little after ten, and I left the plant at eleven-thirty. 40

Steve Sutch, Jr., direct.

STEVE SUTCH, JR., a witness produced on behalf of the defendant, being duly sworn according to law, on his oath, saith:

Direct examination by Mr. Turner:

10 Q. Mr. Sutch, by whom are you employed? A. By the Raritan Mercantile Company, Perth Amboy.

Q. What is your work with that company? A. Chauffeur.

Q. Do you remember the day of this accident? A. Yes, sir.

Q. And what were you doing on that day? A. I was carting brick from South River to Metuchen.

Q. What kind of a car were you driving? A. Mack truck.

20 Q. Did you see anything happen on the road? Did you see this accident? A. Well, the only thing I saw is the guy come around the corner there and the lady runned out of the house and pointed at me to stop the truck, this Reo truck, so I held my hand out and stopped him, and I said, look what you did. I didn't know whether the kid fell off the truck, or got hit on the road, but I thought he hit a dog first, because it laid on the road there and I thought it must be a dog; so the lady waved to me like this here and pointed at the truck, so I held him off, because I was just coming around the corner and this guy was coming around, too, but I didn't notice the kid fall off the truck, or got hit on the street. So I stopped him off just on account of the lady there waving at me.

30 Q. Were you going the same direction that the other car was going? A. I was going right together with him.

40 Q. Right together with him? A. Yes, sir.

Steve Sutch, Jr., direct.

By the Court:

Q. What do you mean? Were you passing him?
A. No, sir. I was going against him.

The Court: Of course. That has already been testified to a half a dozen times. 10

By Mr. Turner:

Q. Then after that what did he do? A. Well, the guy was sitting alongside of him he jumped out quick and run back and then the driver went right after him. By the time I got there they was putting the kid in the car already so I kept right on going on my business.

Q. Did you see this automobile—how far from you did you see it? A. Oh, about the distance from here to the road. 20

Q. Did you see it at the time of the accident?
A. At the time of the accident?

The Court: He said he did not see the accident.

Q. When you first saw the truck? A. Yes.

Q. Was the boy in the road then? A. I didn't see the boy.

Q. You didn't see the boy at that time? A. No, sir. 30

Q. Afterwards did you see the boy? A. I saw him laying out in the middle of the street there.

Q. Now, from the time you first saw this truck until it got up to you tell us how it went. A. Why, I told you before.

Q. How is that? A. When I come around the corner a lady run out of the house.

The Court: What this question means is how fast was it going. 40

Steve Sutch, Jr., cross.

Q. How fast was the truck going? A. What truck, mine or his?

Q. The Reo? A. I should say about ten or twelve.

Q. How did it go? Tell us what course it took.

10 Mr. Toolan: I object. I do not believe it is relevant.

The Court: I think it is taking up unnecessary time. However, I do not know. Go on.

Q. Tell us how it traveled? Can you tell us that? A. Well, I hailed him off when the lady pointed.

20 *By the Court:*

Q. That is not what you are asked. What course did it take on the road, was it to the right, or left, or middle, or where? A. He was on the right.

By Mr. Turner:

Q. When you saw the truck coming along was there any jerking in the truck? A. I didn't notice any.

30 Q. You saw the truck? A. I saw the truck.

Q. Did you see any attempt, or anything done on the part of the driver of that truck to stop until you held out your hand? A. Why, if I wouldn't have held out my hand he would have went right on, I believe.

Mr. Turner: Cross examine.

Cross examination by Mr. Toolan:

40 Q. In other words, the first time your attention

Edward K. Hanson, direct.

was called to this truck at all was when the lady came out and pointed? A. Right.

Q. You had no occasion to observe it before that time? A. Well, I kind of thought there was something the matter then.

Q. That is the first time your attention was drawn to this truck? A. Yes, sir. 10

Q. And the child was then already on the side—already on the highway? A. On the road.

Q. And how far had the truck gone beyond the point where the child was lying? A. Well, from the child where I stopped him, about from here to the other side of the road here, about that distance.

Q. In other words, he had gone from where you are to the back of the room here? A. Right. 20

The Court: That is forty-four feet.

Mr. Toolan: From the time before your attention was called to the truck. That is all.

EDWARD K. HANSON, a witness produced on behalf of the defendant, being duly sworn according to law on his oath, saith:

Direct examination by Mr. Turner: 30

Q. Doctor, you practice where? A. Fords.

Q. How long have you practiced? A. Fifteen years.

Q. Where were you educated for medicine? A. University of Pennsylvania.

Q. Been engaged in active practice since that time? A. I have.

Q. Are you familiar with skull fractures? A. I am. 40

Edward K. Hanson, direct.

Q. Did you see this plaintiff, Steve Doryk? A. I did.

Q. When and where did you see him? A. On the fifteenth of June, 1926, I saw him at his residence.

10 Q. Have you seen him since that time? A. No, I have not.

Q. Did you see him on the witness stand this morning? A. No, I did not.

Q. You have seen him in court, however, since? A. No, I have not.

Q. I mean to say, have you actually seen him here? A. No, I have not seen him at all.

Q. You said it was June you saw him? A. June 15, 1926.

20 Q. That was shortly after the accident, the accident being in April, is that right? A. Yes.

Q. Tell us what you found when you examined him. A. I called at this boy's residence and I waited there about fifteen minutes until they found him, and he came skipping up through the yard, and I held a conversation with him; and examined his head, tried his reflexes. I found that the boy's speech was stammering, not to a very marked degree; his reflexes were normal; the boy's mentality seemed to be fairly good.

30 Q. Did you see his brother on the stand yesterday? A. I did.

Q. How would you say that his mentality compared with his brother's?

Mr. Toolan: I object.

The Court: Do you think that is a proper question?

40 Mr. Turner: I think so, sir, because that seems to be the only way by which we can

Edward K. Hanson, cross.

arrive at any standard on intelligence in this particular family. There may be a difference, of course, in children, but we have to allow for that.

The Court: Yes, but with such a casual opportunity as that, or with such a slight opportunity as that to make a comparison I do not think that would carry any probative weight with it. 10

Q. You saw the type of boy he was? A. Yes, sir.

Q. And his surroundings? A. Yes, sir.

Q. What have you to say as to whether, at the time you examined him, he was normal or near normal? A. He was near normal. For the injury that he had he made a very wonderful recovery. 20

Q. In your opinion, is this boy going to suffer through any permanent disability because of this accident? A. No, I don't think so. He has, at this time, as Dr. Meinzer testified yesterday, a Jacksonian epilepsy. They told me how he acted at times, that he would get twitchings. I haven't seen him since that time. Jacksonian epilepsy passes off. It is transitory.

Q. It is not true epilepsy? A. No, it is not. It is due to pressure on the cortex of the brain. 30

Q. When you saw him did he have any evidence of Jacksonian epilepsy? A. No, he did not. This was merely by hearsay in the history of the case that I am speaking of that.

Cross examination by Mr. Toolan:

Q. Doctor, you say that considering the nature of the accident he had a very remarkable recovery. Do you mean by that, that he had a very severe 40

Edward K. Hanson, cross.

fracture? A. Yes, he had a fracture; I will modify it to this extent, saying ninety per cent. of fractures of the skull die. There are wonderful results if you get them well.

10 Q. A fracture as severe as this, it is remarkable that he is living? A. All fractures.

Q. Are you familiar with the nature and extent of this boy's fracture, doctor? A. I am.

Q. It is a rather unusual and very serious fracture, is it not? A. It is a fracture of the skull.

Q. Well, now, doctor, there are fractures and fractures of the skull, are there not? A. Yes. They all come under the heading of fractures.

20 Q. And if a man has a fracture of the skull which is just what is known as a lineal fracture, or a fracture of one line, on one place, that is one sort of a fracture? A. Yes, there are a number of different types of fractures to the skull.

Q. This boy, so the doctors tell us, had a fracture with nine or ten distinct fractures. That would be more serious, would it not, than a single fracture? A. No, I don't think so. There is no fracture, no injury to the head that is so slight that it should be neglected, or none so severe that it should be despaired of.

30 Q. Yet there are fractures of the skull that a man might recover from quite easily, and others which might impair him permanently, is that not so? A. There are some fractures of the skull where the meninges have been torn, where there was pressure upon the cortex, where people have a permanent injury.

Q. I say, some fractures they recover from very easily and others are far more severe? A. It depends upon the damage to the cortex of the brain.

40 Q. Certainly, that is just exactly what I am say-

Edward K. Hanson, cross.

ing, there is this distinction between fractures, is there not? A. Yes.

10 Q. You would not say a fracture that simply stunned a person for an hour or so was as serious or aggravated as a fracture that rendered a child unconscious from April 12 until May 5, would you? A. They are not stunned for an hour with a fracture, Mr. Toolan.

20 Q. I may be wrong in my technical terms, but I am trying to make it so the jury can understand it. Take a person who has been stunned or rendered unconscious for an hour or so as a result of a fracture, you would not say that that fracture was as serious as one that rendered a child, such as this Doryk child, unconscious from April 17th until May 5, would you? A. Yes, sir; I would. A man is brought into my office with a fracture of the skull, unconscious, I made a diagnosis of fracture of the skull, sent for the ambulance, and he died on the way to the hospital.

30 Q. So that a man can come in with a fracture, with no apparent ill effects from it, and die on the way to the hospital, the chances are that much greater to a person who has a fracture of the description that this Doryk child had, isn't that so? A. There is no comparison. This boy is alive.

Q. Yes, I appreciate that. Physically you mean? A. Yes, and mentally, Mr. Toolan.

Q. You know, Doctor, do you not, that it is a fact that a fracture of this description might cause insanity?

Mr. Turner: I object to that on the ground that is too remote.

The Court: I will allow that.

40 Mr. Turner: Prays exception.

Edward K. Hanson, cross.

The Court: You may have it. It is proper cross examination in view of the doctor's testimony.

A. What is that question again, please?

10 (Question repeated by stenographer.)

A. No, I hardly think so.

Q. Well, do you think that a fracture of the skull bestows a beneficial effect upon the recipient? A. No, Mr. Toolan, I hardly think so.

Q. Well, what I want to find out is just what you do think a fracture does to somebody? A. Well, a fracture certainly disorganizes the anatomical relation of a skull to the underlying structures.

20 Q. What do you mean by the anatomical relation? A. Just what I say, anatomical relation.

Q. Please explain it in plain language so the jury and I will understand it. A. Well, a skull is fractured, a skull is broken, usually it causes a hemorrhage. Sometimes it causes damage to the brain, or to the covering of the brain. A clot is formed. That clot usually is absorbed, relieving the pressure; that is when a person regains consciousness. Sometimes there might be a spicula of bone pressing upon the cortex, which will give you certain symptoms of pressure of the Jacksonian type here. Nature will adjust that. Sometimes that piece or spicula of bone is absorbed. Sometimes the brain is—nature throws fluid in there and pushes the brain sometimes away from this spicula of bone and leaves like a little well there, and the pressure is relieved, and the Jacksonian epilepsy disappears. The paralysis will disappear.

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Abraham Schwartenberg, direct.

Q. That is sometimes? A. Sometimes, yes. If the person recovers.

Q. And sometimes it does not? A. Why, absolutely.

The Court: Why take up time with this? Go on, Mr. Toolan, if you wish. The boy's head was fractured. The jury have gotten that. 10

Mr. Toolan: I will not press him any further. That is all.

Mr. Turner: That is all.

ABRAHAM SCHWARTENBERG, recalled.

Direct examination by Mr. Turner:

Q. Mr. Schwartenberg, on the day of this accident did you see this Reo truck on the Central Railroad bridge? A. I did. 20

Q. What did you do when you saw it? A. Why, I stopped my car when I saw this Reo with my driver with—going on with five or six kids on this truck, I stopped my car and I pointed my finger at him and I hollered at him, get rid of them kids.

Q. What did the driver of the Reo truck do? A. Well, I don't know if he acted upon it. I went right straight on home. It was about dinner time and I went home for dinner. 30

Q. Did you have any rule about the drivers taking boys on these trucks? A. There is a standing rule in the office that no driver can have any boys riding on his truck, and we have discharged more than one driver for it.

Q. This Reo truck, were you familiar with this truck, yourself? A. I never drove it.

Q. Did you ever ride in it? A. I rode in it occasionally. 40

Abraham Schwartenberg, direct.

Q. So far as you know what was the condition of the brakes? A. I do not know anything unusual, at least there was nothing unusual reported to the office or to myself.

10 Mr. Toolan: I object to that.
The Court: Objection sustained.
Mr. Toolan: I move it be stricken out.
The Court: It is stricken out.

Q. You saw the Reo truck on the railroad bridge that morning? A. I did.

Q. What did the truck do? How did it act? A. When the driver saw me coming he slowed down.

Q. Yes. What else did he do? A. That is all I know of.

20 Q. Did you see the truck start off? A. Oh, yes.

Q. Well, how did it start off? A. Nothing—in a regular way.

Q. What time was this when you saw the truck on the railroad bridge? A. It must have been about twenty minutes to twelve, something like that.

Q. Well, what did the truck have on it at that time? A. He must have had on some empty cases.

30 Mr. Toolan: I move that be stricken out.
The Court: It is stricken out.

Q. What did you see on the truck? Not what it must have been. A. Empty cases.

Q. What did you do after you met that truck on the railroad bridge? A. I went home.

Q. How long did you stay home? A. Oh, about perhaps three-quarters of an hour. No. It must have been about a half an hour.

40 Q. Where did you go then? A. Mr. Lynch came to my house, one of my salesmen.

Abraham Schwartenberg, direct.

Q. Did he report to you about an accident? A. He reported to me that I was wanted in the—

Q. Don't tell what he said to you. He reported to you about an accident? A. About an accident.

Q. What then did you do? A. I went to police headquarters. 10

Q. From the time you saw this Reo truck on the railroad bridge until the time you went to police headquarters did you go to the plant? A. I did not understand that.

(Question repeated by stenographer.)

A. Yes, I did, after I went to police headquarters I stopped over at the hospital and then I went to the plant.

Q. My question was, from the time you saw the truck on the railroad bridge, when you held up your hand at the driver, from that time until you went to police headquarters did you go to the plant? A. No. I went home. 20

Q. Were you at the plant when this ice box was loaded onto the truck? A. No, I was not.

Q. Did you see this ice box loaded on the truck? A. No, I did not.

Q. Did you see the plaintiff Steve Doryk at your plant that morning? A. No, I did not. 30

Q. At any time that morning? A. That morning, I did not.

Q. You did see him on the truck though, didn't you? A. I did not recognize the boy. I saw four or five boys on that truck, and it got me a little hot, because I couldn't stand for it, and I did not recognize just who was on the truck, what boys were on that truck.

Q. Now, this boy, Steve Doryk, had he ever 40

Abraham Schwartenberg, cross.

worked around your plant sorting bottles and washing bottles? A. Not that I know of.

Q. Did you, yourself, spend your time at the plant? A. Absolutely.

10 Q. Did you have somebody there when you were away? A. Yes, the bookkeeper is in charge when I am away.

Q. You don't know whether the bookkeeper employed this boy or not, do you? A. I do not know.

Q. The bookkeeper had power to employ anybody, did he? A. No. He has not.

Cross examination by Mr. Toolan:

20 Q. Martin Doryk was working in your factory the day this accident happened, wasn't he? A. Who?

Q. Martin Doryk. A. His brother?

Q. Yes. A. Perhaps. That might be so. I don't know.

Q. Martin was only fifteen years old, wasn't he? A. He might be fifteen years old but he lied to me. We employed no one unless he must be sixteen.

30 Q. Now, Mr. Schwartenberg, isn't it a fact that from time to time you have employed all the little lads that play around that neighborhood? A. No, we do not.

Q. To do work around the factory? A. No, sir.

Q. Isn't it a fact they will wash bottles for you in the factory there at two cents a case? A. No, sir.

Q. And isn't it a fact you have gone over into the park opposite your factory there and called the youngsters over to do work of that character? A. Kids of those years?

Q. Yes. A. No, sir.

40 Q. And isn't it a fact that they unload a truck

Abraham Schwartenberg, cross.

any time that came there with a truck load of boxes? A. Not that I know of.

Q. On this day of the accident you were going right by your truck, weren't you? A. I was.

Q. Going in the opposite direction? A. Yes, sir.

10 Q. Why didn't you stop and tell your driver to put those boys off the truck? A. Why didn't I stop? Well, it wasn't possible to stop there.

Q. Why wasn't it? A. Why, because you are right in traffic going up the bridge. That would not be a proper way to stop.

Q. Well, you could stop there, couldn't you? A. I couldn't; no, sir. All I did I pointed my finger and I hollered at him to get rid of the kids.

20 Q. You have got a telephone in your home, haven't you? A. I have.

Q. There is a telephone to the factory, isn't there? A. Yes.

Q. When you got home did you call up the factory? A. I did not.

Q. Admonish him for having those boys? A. No, I did not.

Q. You say this was about twenty minutes of twelve? A. About that.

30 Q. Isn't it a fact it was quite a bit earlier than that? A. No, it cannot have been, because I went home for dinner.

Q. Yes, I know you went home for dinner, but this boy left the factory that morning with only a few cases on to deliver, isn't that so? A. The driver?

Q. Yes. A. Yes, they might have made three or four trips downtown.

Q. Well, didn't he leave the factory about nine o'clock? A. Perhaps.

40 Q. And he made a delivery, according to his tes-

Motion for Direction of Verdict.

timony, at the Hotel Madison and one on Raritan Avenue and then he came back to the plant? A. Yes.

10 Q. And when he came back to the plant on that occasion that was the time that he had the Doryk boy with him? A. Well, that I don't know. That I wouldn't say. He might have gone downtown for another delivery again. The time I met him at the railroad was about twenty minutes to twelve.

Q. Of course, you didn't see the Doryk boy there at all that morning? A. No, I did not.

Mr. Toolan: That is all.

Mr. Turner: That is all. We rest.

Mr. Toolan: We have nothing further.

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Motion for Direction of a Verdict.

Mr. Turner: I move for a direction of a verdict on the same grounds as the motion for nonsuit. I think I have covered on that motion all the questions I wish to raise.

The Court: Motion denied.

Mr. Turner: Prays exception.

Mr. Turner sums up the case for the defendant.

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Mr. Toolan sums up the case for the plaintiffs.

Adjourned until 1:45 P. M.

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Court's Charge.

NEW JERSEY SUPREME COURT,

MIDDLESEX COUNTY CIRCUIT,

December Term, 1926.

STEVE DORYK, by FRANCES DORYK
KUZMAR, and FRANCES DORYK
KUZMAR,

v.

PERTH AMBOY BOTTLING COMPANY.

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

Members of the Jury: In this case counsel for the defendant has made several requests to charge, or rather, the first two are requests that the jury be requested to return a specific yes or no to certain questions of fact. As to those two first requests that the jury return specific answers, they are both denied. It is entirely in the discretion of the Court. The Court in its discretion finds that they should not be asked the jury; that duty should not be put on the jury in the way requested.

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As to the third request it will be read this way:

"Even though Steve Doryk was in employment for the service or benefit of the defendant at the time, be it directly or indirectly, or whether it was of any real benefit to the defendant, no matter what the character of his employment might have been, there can be no recovery if the defendant, or his authorized representatives, did not know that the boy was on the Reo truck."

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Court's Charge.

That is true. It does not make any difference why the boy was there. If they did not know that he was on the truck, of course, there cannot be any recovery.

10 If you find that Steve Doryk was in the employment of any kind for the defendant at the time of the accident, that would give him no greater right against the defendant because of that fact. If there was no negligence, there can be no recovery of damages merely because the boy may have been doing some service, or in the employment of the defendant at the time.

Five is absolutely refused.

20 You have a very serious case to pass on, serious from many viewpoints. As a matter of fact, in nearly every case that may be presented to you, it is a serious case, but this seems to have such special features that make it more serious, from the standpoint of the test of duty that is given to you. For example, you have a little chap here who was seriously injured, and naturally you, as wholesome human beings, have a very strong sympathy for that little chap. It seems to me that with every wholesome man or woman the first appeal and the strongest appeal, from the ordinary human standpoint, is an appeal to the emotions, the good clean emotion that every wholesome man and woman must necessarily have in their being, otherwise they would not be wholesome men and women. It makes it very, very difficult in some cases for jurors to live up to their duty, and yet they have sworn an obligation to a Higher Power than anything here on earth, to live up to that duty, and that is to dispassionately determine questions of fact without influence in such determination from those appeals to our sympathies

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Court's Charge.

and our pities, and without permitting those emotions, that I have been speaking about, to control to any degree the mental determination of the questions of fact.

This boy was but a little over ten years of age at the time of this accident, and it may be conceded that it was a serious injury to his head, a very serious injury to his head. You have heard testimony along the line of the effect on this boy's mind, the effect on his general disposition, and your hearts must swell with sympathy because of this unfortunate accident, for the boy; and yet it would be a frightful thing if, because you had sympathy for this boy, you would say that this defendant should pay, in dollars and cents, for that injury, when, from the facts in the case you should return, if that was the case, a verdict that he was not responsible under the law and the facts. When you sit on a jury, you are asked to ignore all those human appeals that address themselves directly and merely to the hearts of men and women. You are also asked to forget those baser feelings that result in anger and envy and hatred and a desire for revenge, a desire to punish; you are asked to forget those, too. So it is when a man or woman is called on a jury, there is no finer compliment that can be paid to his character, and to his Americanism, than such a selection as that, because it necessarily carries with it a feeling that the juror is so big mentally that he will be able, with strength, and with clearness, and with impartiality, to cold-bloodedly pass upon the questions of fact presented to him. That I am sure and I am confident you jurors will do. If this accident was the proximate result of the actionable negligence of this defendant, then this

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Court's Charge.

10 boy would be entitled to a verdict at your hands for such amount as will compensate him for the pain and suffering that he went through, for the physical injuries that he actually sustained, and that you know he sustained, from the preponderance of evidence in the case. He will also be entitled to compensation for any permanent or continuing injury that, from the preponderance of the evidence in the case you may find is there, provided your belief, from the preponderance of the evidence is so strong that it amounts to a matter of reasonable certainty.

20 There has been serious dispute raised in this case as to whether or not there is a permanent or continuing injury, and further, that if there be a permanent or continuing injury, as to the extent of it, as to how long it will continue, and as to the intensity or degree of permanent or continuing injury there may be, if there is any there at all. But all those questions are to be passed upon by you, not from the standpoint of even reasonable conjecture, or intelligent speculation, but you must be satisfied that there is permanent and continuing injury, and satisfied as to the extent of that reasonable certainty, before you have a right as

30 jurors to compensate for that. But if, from the preponderance of the evidence in the case, you are satisfied to a point of reasonable certainty that there is permanent or continuing injury, then you have a duty to compensate for that. Of course, this boy is not entitled to a verdict unless, from the facts in this case, and the law that governs those facts, this defendant was legally liable for the accident which directly resulted in the injury

40 to this boy. There has been some serious and ex-

Court's Charge.

tended questioning as to employment in this case. As to whether or not he was a regular or a casual employee in this case has not been raised by the pleadings, but what the boy was doing at the time, and what the boy had been doing in immediate connection with the time, has been properly put in evidence to assist you in the determination of whether that boy was on the truck at the time of the accident in such way as to make this defendant liable. 10

What is substantially the boy's story and the story of other witnesses? I am not going into full details, and you must remember that whatever I may say about the evidence in this case is only said for the purpose of assisting you, but you have the duty to determine for yourselves what was the evidence and what conclusions to draw from the evidence. Anything that I may say that would be suggesting an opinion or a conclusion to your minds has absolutely no control upon you. You are sovereigns in the province of the determination of fact. 20

The boy substantially says that he had been engaged from time to time about this bottling establishment, for the purpose of cleaning out the bottles, and that he had also helped the driver from time to time, as I get his story, in carrying or moving cases in which the bottles were; that that was the kind of an employment, and that sometimes he would get a glass of soda for doing it; sometimes he would be paid twenty-five cents, and sometimes fifty cents, and sometimes one dollar. In this he is corroborated, if you believe that it is the truth, the testimony that comes from others in corroboration, by other boys who were called to the witness stand. 30 40

Court's Charge.

10 What does the defendant say about that? The defendant says there never was any employment of any kind; therefore, the question of whether it comes under the Employer's Liability Act is not raised, it cannot be raised, because he says there was never any employment of any kind or character; and further than that, that if anyone else tried to get this boy's services, as a matter of employment, or tried to make him employ him, that such a man never had any authority, direct or indirect, from him to do it. You will remember his testimony to the effect, when he was asked if the bookkeeper was in charge of this place when he was away, and whether he had any right to employ these boys, and he said no; therefore, so far as the defendant is concerned, he says there was never any employment of any character; and if what he says himself is so, then the relationship of master and servant, employer and employee, never existed between this boy and the defendant. But, as I said before, what this little chap was doing there is of serious import to you, in order that you may reach a proper determination of whether that boy was on the truck at the time of the accident in such a way, and through such reasons, that if there was negligence upon the part of the driver of the truck that caused this accident, that this employer of the driver of the truck would be legally liable. The question is, was this boy on that truck at that time as an invitee, or a mere licensee, an invitee of the defendant; was that boy on that truck at that time with the knowledge of the defendant? That is a serious question of fact in this case. You will remember the testimony of the little chap, the plaintiff, Steve, that the president of this company was present at the time

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Court's Charge.

that he got on the truck, for the ride, during which this accident occurred, according to the plaintiff's story, and there are other boys who have been called on the witness stand, who say that the president of this company was there at the time that Steve got on the truck. Was that boy on that truck as a result of an invitation expressed, or so implied as to be equal to an express invitation upon the part of the defendant, through the president of the defendant company? How did the boy get on the truck, in the first place, that day? The driver said that he invited this boy for the purpose of assisting him in moving the boxes that were on that truck, and that he brought the boy on the truck, from where the boy had gotten on, to this bottling establishment; the driver says that Mr. Schwartz- enberg was not there; Mr. Schwartzenberg says he was not there; Mr. Lynch says he was not there; and the boys say that he was there, some of the boys, including the plaintiff Steve. There you have a serious question of fact. Mr. Schwartzenberg says that there was a standing rule in his office that these "kids," meaning these little boys, these "kids," as he puts it, should under no circumstances be permitted on the truck, and that if one of his employees, like a driver, would permit any boy of such age as the age of this plaintiff on the truck, he was to be fired or discharged for it, and some had been, because they had done it. If you should find that this boy was on that truck by an invitation of this driver, and that the driver, in permitting that boy on there, was violating such an express command as Mr. Schwartzenberg said he gave that driver, of course, he, as principal, under such circumstances as that, would not be liable. If Mr. Schwartzenberg was not there

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Court's Charge.

when that boy got on that truck, and had no knowledge that that boy was on that truck, and it was against his rule given to his drivers not to permit those boys on, of course, it would be the height of injustice, much as we might have sympathy for this boy to hold Mr. Schwartzberg's company responsible. Was that boy there as an invitee of Mr. Schwartzberg, as president of the company, as I say, either expressly from Mr. Schwartzberg, or from the driver in such a way that Mr. Schwartzberg, having full knowledge of it, that the act of his employee, the driver, was his act, the same as though he was the one encouraging and inviting and inducing the boy to be on the truck? That is the question. If you reach the conclusion, from a preponderance of the evidence in this case, that this boy was there on that truck by invitation of Mr. Schwartzberg, the president of this company, in such a way, as I have said, either expressly or impliedly, and if it is implied in such a way that is just as strong an invitation as though it came directly and fully from the lips of Mr. Schwartzberg, then you will have a further question. If this boy was a licensee,—before I come to the further question,—of course, the law says that a licensee is just the same as a trespasser, and if a man or woman or a boy or girl is riding on another's car, without invitation, but as a trespasser, stealing a ride, or getting on there against the will of whoever is in charge of the car, and there is an accident which results in injury to such licensee or trespasser, the driver is never responsible, unless that accident is the result of the wilful and wanton negligence of the driver of the car; and, of course, there is no evidence in this case to justify a conclusion that this

Court's Charge.

accident was the result of the wilful and wanton negligence of the driver of this truck. If you find that the boy was an invitee at the time, an invitee of the defendant, then was this accident caused by the negligence of the driver of this truck? You will remember what the driver said, and you will remember what Mr. Lynch, the salesman, said, that this boy was on that truck when it left the yard and went a distance of about ten feet to the gasoline tank, and that the boy was told to get off, told by the driver to get off, and the boy actually got off, and it is testified that neither one nor the other of them knew that this boy got on that car again, if he ever did get on; of course, if that is true, neither one of them knew he was there, and the boy had been told to get off, that ends this case, if you find that is so. But, if the boy was on that truck, and on that truck as an invitee at the time of the accident, then was there such conduct upon the part of the defendant that was actionable negligence? Was this boy thrown off the truck as a result of such an act, in the handling of that car, upon the part of the driver of that car, that a reasonably prudent person would not have been guilty of under the time, place and circumstances, or, did he fail to do anything which a reasonably prudent person would have done under the time, place and circumstances, which was the cause of the throwing off of this boy?

To prove negligence the burden is always upon the plaintiff to satisfy you, through a preponderance of the evidence, but not to a point of reasonable certainty, like in the case of permanent or continuing injuries, which I have referred to, but if you are satisfied that the preponderance of the evidence, the greater weight of the evidence is to

Court's Charge.

the effect that there was negligence upon the part of the defendant which was the proximate cause of the accident, which was the proximate cause of the injuries to another.

10 So you will take this case and if you find from the preponderance of the evidence in this case that this boy was an invitee at the time of this accident, and that this accident was the result of the sole and exclusive negligence of the defendant driver, then this boy is entitled to a verdict; and if he is entitled to a verdict, then his mother is entitled to a verdict; she is also a plaintiff; he is a plaintiff through his mother as his next friend, his father being dead, and the mother would be entitled to a verdict, if the boy is entitled to a verdict, that will reimburse her for the expenses that she reasonably and properly incurred for hospital bills, doctor's bills, and the like, which you find from the evidence she did incur; she would also be entitled to compensation for the loss to her because of any reduced earning capacity there may be in the boy, which would have flowed to her, and which you, from the preponderance of the evidence, are satisfied would have flowed to her. That cannot be made a matter of guess work. The limit she asks is \$1,000; that does not control you, except that it could not possibly be more than that, since the pleadings have limited it to that. There has not been much evidence along that line, and it is such a problematical matter, and since you can not resort to guess work, it would be safer, and I so charge you in the circumstances, and because of the meagreness of testimony along that line, if you find that the mother is entitled to a verdict, limit it simply to what she actually in-

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Court's Charge.

curred along the line of medical and surgical expenses and hospital bills and the like.

If you find, however, that although there was negligence upon the part of the defendant that was the proximate cause of this accident, but there was also negligence upon the part of this boy, contributory negligence upon his part, then, although there would be negligence, although there was negligence upon the part of the defendant, the boy could not recover.

This boy, as has already been stated, is a little over ten years of age, and in determining whether or not there was contributory negligence upon his part, you must understand it is not the same test as in the case of an adult; the test, in such a case as this, is upon the basis of what a boy of similar age, education and experience, what his conduct would have been under the time, place and circumstances. Contributory negligence means that kind of negligence without which there would not have been any injury, even though there was negligence upon the part of the defendant.

To sum up in a few words, which would be practically repetition, if you find that this boy was an invitee of the defendant at the time of the accident, and the accident was the result of the sole and exclusive negligence of the driver of the defendant's car, then and then alone are the boy and his mother entitled to verdicts. Before you can find such verdicts as that you must be satisfied, through a preponderance of the evidence, that that is so.

You may take the case.

Mr. Turner: I would like to except to the refusal of the Court to charge the first request.

Mr. Turner: I would like to except to the re-

Court's Charge.

fusal of the Court to direct the jury to make specific findings.

10 Mr. Turner: I would like to except to that part of the charge wherein the Court says that it is for the jury to determine, from the facts that have been adduced, whether the defendant is liable, as an invitor of the boy. In other words, whether—

The Court: The relationship of invitee—

20 Mr. Turner: Yes, whether the relationship of invitee and invitor existed between the plaintiff and the defendant, on the ground that there is no evidence of any invitation on the part of Mr. Schwartzberg, the president of the defendant company. I understand the Court charged that there must have been such invitation on the part of Mr. Schwartzberg in order to hold the defendant company.

Mr. Turner: I except to that part of the charge wherein the Court says that if there was negligence upon the part of the driver of the truck that caused this accident, that then the employer of the driver of the truck would be liable.

30 The Court: Yes, but I also added that if the boy was an invitee of the defendant at the time of the accident. All the way through I emphasized that.

Mr. Turner: And I except to that part of the charge wherein the Court refers to the boy as an invitee, on the ground that the claim of the plaintiff is, and the theory of the case is that the boy was engaged in a casual employment at the time of the accident, and that the relationship of master and servant existed in that it was such casual employment.

40 Mr. Turner: I except to that part of the charge wherein the Court permits the jury to decide whether there was an implied invitation on the

Defendant's Requests to Charge.

part of Mr. Schwartzberg as to the boy's riding on the truck at the time of the accident.

Mr. Turner: I think that covers the questions I have in mind.

Defendant's Requests to Charge.

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The Court is respectfully requested to instruct the jury as follows:

(1)

"The jury is instructed to bring in a finding whether the plaintiff Steve Doryk, at the time of the accident, was an employee of the defendant company and was actually performing a duty for the defendant at the time of the accident."

(2)

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"The jury is further instructed to find whether the employment of Steve Doryk was at the time of the accident a mere casual employment or whether he was a regular employee."

(3)

"Even though Steve Doryk was an employee at the time of the accident and his employment was casual, there can be no recovery if the employer or his authorized representatives did not know that the boy was on the Reo truck."

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(4)

"The fact that Steve Doryk may have been an employee gives him no greater rights against the defendant because of that fact. If there was no negligence there can be no recovery of damages merely because the boy may have been an employee."

(5)

"If the boy was not an employee at the time of the accident he cannot recover in this case."

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10 MAY. 1. 1927

Record Publishing Company, Law Ptg., Perth Amboy, N. J.

New Jersey Court of Errors and Appeals

STEVE DORYK, by Frances Doryk Kuzmar, his next friend, and FRANCES DORYK KUZMAR, in- dividually, <i>Plaintiffs-Appellees,</i>	} <i>On Appeal.</i>
<i>vs.</i>	
PERTH AMBOY BOTTLING COM- PANY, a corporation, <i>Defendant-Appellant.</i>	

BRIEF OF PLAINTIFFS-APPELLEES.

Statement.

On April 17, 1926, Steve Doryk, a boy age ten years, was riding on a truck owned and operated by the defendant company. While the truck was in the act of turning from New Brunswick Avenue into Lawrie Street the plaintiff claims that the truck suddenly jerked as a result of the brakes on the truck locking and Steve Doryk was thrown to the pavement, landing on his head and sustaining a very severe fracture of the skull. The uncontradicted testimony indicated that the plaintiff, Steve Doryk, was unconscious from the date of the accident until May 5th following and that he sustained severe and permanent injury as a result of the fracture of the skull. The complaint is in two counts; the first count claims damages for the injury suffered by the plaintiff, Steve Doryk; the second count is for damages sustained by Frances Doryk Kuzmar, the mother of Steve Doryk, as a result of the injuries suffered by her son, Steve, in said accident.

The case was tried at the Middlesex Circuit and the jury returned a verdict in favor of Steve Doryk in the amount of Four Thousand (\$4,000.00) Dollars and in favor of Frances Doryk Kuzmar in the amount of Five Hundred (\$500.00) Dollars.

The defendant-appellant presents his argument under twelve different points. We will meet the argument by discussing the various propositions argued by defendant in the order in which he presents same.

POINT I.

The evidence clearly indicated that the defendant was negligent.

The defendant in his argument that there was no negligence shown on the part of the defendant corporation cites a number of cases which hold that where a truck driver without any authority from his master either permits or invites a boy to ride upon the truck, the master is not responsible on the theory that the employee exceeded his authority and consequently was not the agent of the master in extending the invitation; wherefore, the doctrine of *respondeat superior* does not apply. It is not necessary in the instant case for us to disagree with the soundness of the doctrine enunciated in the cases cited by defendant to sustain this proposition. The case was not tried on the theory that the driver was authorized to bind the defendant corporation when he invited the plaintiff to ride on the defendant truck. We do contend, however, that the evidence clearly shows that the plaintiff was on the truck by the implied invitation of Mr. Schwartzberg, the president and manager in active charge and direction of the affairs of the defend-

ant company. There was some conflict in the evidence on this subject. The matter was, however, a jury question and the Court properly submitted the question of invitation to the jury.

We will analyze and set forth the relevant evidence on the question of invitation.

The defendant company is a corporation. The president of the defendant company and the one in active charge of their business was one Abraham Schwartzberg who testified (p. 102, state of case) as follows:

Q Mr. Schwartzberg, you are a stockholder in the Perth Amboy Bottling Company?

A I am, sir.

Q Hold any office in that company?

A I am the president of the company.

Q And you are the person in the active charge and direction of its affairs?

A Yes, sir.

The truck on which Steve Doryk was riding was operated and driven by an employee of the defendant company, one Stanley Gutowsky who testified (p. 103, state of case):

Q Mr. Gutowsky, on the day of this accident were you driving this truck?

A Yes, sir; I was.

It is the contention of the plaintiff that Steve Doryk was on the truck by express invitation of the driver and by implication from Mr. Schwartzberg, the president of the company.

In view of the testimony which we are about to quote, the matter of invitation was undoubtedly a question for the jury. (See *Gibson v. Skidmore*, 112 Atl. 747.) The Court submitted this question to the jury in its charge and the jury apparently found in favor of the plaintiffs.

We will now analyze the testimony of the various witnesses with respect to this specific question. This testimony is so plain and convincing that we respectfully submit that the trial court was in duty bound to submit the question of invitation to the jury.

The first witness called by the plaintiff was one Herbert Meek. This witness testified (p. 12, state of case):

Where is the Perth Amboy Bottling Works in Perth Amboy?

A On New Brunswick Avenue.

Q Well, is it right on the street or not?

A It is about one hundred feet in from the street.

Q How close to that does Steve Doryk live?

A He lives right in back of it about fifty yards behind the plant.

Q Now, on the morning of the seventeenth of April, 1926, did you see Steve Doryk?

A Yes, sir.

Q Where did you see him?

A He come up my house and I met him and we went out, we were going up to the barber shop where I worked, we were going to carry some boxes in and on our way up we met "Stricky" with the truck.

Q Who is "Stricky?"

A Gutowsky.

Q Who did he work for at that time?

A "P. A. B. Co."

Q Who?

A Perth Amboy Bottling Company.

Q Where did you meet the truck driver?

A By Tony Lans.

Q Where is that?

A On New Brunswick Avenue.

Q How far from the Perth Amboy Bottling Works plant?

A About two or three blocks.

Q What was "Stricky" or the driver doing at the time you saw him?

A He stopped his truck and he was just getting out to go in the store, and he told—

(Objected to by Mr. Turner.)

A He asked us if we wanted to take a ride around town with him and we agreed. And when he come out—

The Court: Strike out "We agreed."

Q Tell us what you did.

A When he come out we went up on Raritan Avenue to a store and delivered some soda and then we went down to the Madison—

Without quoting the testimony further, this witness goes on (on pp. 13 &c.) to describe how he and the plaintiff rode around the City with the driver of the truck, assisting him in his work of delivering soda water.

This witness further testified (p. 15, state of case) that when they were returning to the plant of the defendant company they met the boss, Mr. Abe Schwartzberg:

Q And then what happened?

A And then the boss was on the other side of the railing and he turned around with his car.

Q What boss?

A Schwartzberg.

Q What is his first name?

A Abe.

At the time the driver of the truck passed Schwartzberg there were four boys on the truck. The driver of the truck proceeded back to the

plant of the defendant company. Three of the boys, including this witness and two others, got off the truck at the barber shop of Tony Lans where this witness and Steve Doryk got on the truck (p. 16, state of case). The plaintiff, however, remained on the truck (p. 16, state of case):

Q Where was Steve Doryk when you got off?

A He stayed right in the back of the truck.

The fact is, as will be hereafter pointed out, that Steve Doryk remained on the truck and went down to the bottling plant of the defendant company with the driver; remained there all morning; worked about the plant, and went out with the driver some time later in the morning when the accident happened.

Counsel for the defendant endeavored to prove that Schwartenberg, the president of the company, ordered the boys off the truck when he met them in the morning. This witness testified to the contrary (p. 29, state of case):

Q Now, isn't it a fact that you saw Mr. Schwartenberg when you were near the bridge?

A Yes.

Q And isn't it a fact that Mr. Schwartenberg ordered you boys to get off the truck?

A No.

Q What did he say to you?

A He didn't say a word. He just passed us.

Q How near was he to you?

A He was about ten feet.

The plaintiff contended that it was a general custom for the bottling company and its em-

ployees to have the young boys in the neighborhood help about the plant and on the delivery truck. This witness testified that he rode on the truck on more than thirty occasions. (See p. 33, state of case):

Q How many times did you ride with the driver on that truck?

A About thirty times.

Q Did Mr. Schwartenberg ever see you on there before?

A Yes.

Q Did he ever pay you money for being on there?

A Yes.

The next witness was Martin Doryk, a brother of the plaintiff, Steve Doryk. This witness with a companion was standing on the corner of Maple and Smith Streets, Perth Amboy, New Jersey, about 9:30 on the morning of the accident. The driver of the truck was then returning to the bottling company plant. This witness and his companion got on the truck. The plaintiff, Steve Doryk and Herbert Meek were already on the truck. The witness and Herbert Meek and the other boy rode from Maple and Smith Streets to the barber shop of one Tony Lans about a mile and a half away (p. 36, state of case):

Q How far did you ride on this truck after you jumped it?

A I rode from downtown up to Tony Lans' barber shop, about a mile and a half.

The plaintiff, Steve Doryk, however, did not get off. He remained on the truck (p. 34, state of case):

Q Did Steve stay on or not?

A Steve stayed on. Two of them stayed on.

This witness also testified that Mr. Schwartenberg, the president of the defendant company, saw the four boys on the truck as they were crossing the temporary bridge over the railroad tracks on Smith Street, Perth Amboy; that although Schwartenberg passed within ten feet of them, he said nothing and permitted them to continue on the truck (pp. 36 and 37, state of case).

The next witness, Peter Janco, was employed by the defendant company for about a year and a half. He was working at the plant on the 17th of April, 1926, the day of the accident. On the morning of the accident the plaintiff, Steve Doryk, was about the plant of the defendant company after he had finished his work with the driver delivering cases about the City (see p. 38, state of case):

Q Did you see Steve Doryk at the plant that morning?

A I seen him in a garage.

Q And what was he doing in a garage?

A He was standing.

Q Schwartenberg, did you see him there?

A Schwartenberg was there.

Q Did he see Steve there?

A Yes, sir.

Q Did you see Steve doing anything there that morning?

A In the morning I seen him. He was taking cases off the truck.

Q Who was?

A Steve Doryk.

This witness testified further (p. 39, state of case) that Steve Doryk was present when the workmen were putting an ice box on the truck and that the president of the company, Schwartenberg was also there as was the timekeeper who

was generally in charge of the plant when Mr. Schwartenberg was away.

Q Did you see the truck leave at that time it had the ice box on it?

A I seen—I was helping to put the ice box on this truck, and when I had the ice box on the truck everything—then I went home for dinner.

Q Who was there when you were putting the ice box on the truck?

A Abe Schwartzenberg.

Q Who else?

A And the timekeeper and Stanley Gutowsky.

We will show through other witnesses that Steve Doryk was standing immediately alongside of the truck while this work was going on; that Schwartenberg, the president of the company, was there and that he saw Steve working and that he accepted his services.

This witness further testified (p. 39, state of case) that Steve Doryk frequently worked about the plant and that he saw Schwartzenberg pay him on several occasions.

Q Did you ever see Schwartzenberg pay Steve anything?

A Yes, sir.

Q What did you see him pay him?

A I seen him pay a quarter.

Q How many times?

A And once a dollar. They were working on piecework. Him and his brother.

This testimony appears on page 41 from the same witness:

Q In feet how far was Steve from the place where the ice box was being loaded on?

A Do you mean from the truck?

- Q Yes. How many feet away.
 A Well, he was right near the truck then.
 Q Do you mean right close by it?
 A Yes, sir.

On page 43 this witness testified that Steve was frequently about the plant of the defendant company during the summer vacation preceding this accident. Counsel for the defendant endeavored to prove through this witness that the boss, Mr. Schwartenberg, often chased the plaintiff, Steve, from the premises before the accident. The witness testified (p. 48, state of case) that Mr. Schwartenberg chased the plaintiff away after the accident but never before the accident, but on the contrary that he employed not only the plaintiff, Steve Doryk, but other boys from the neighborhood.

Another witness was Joseph Doryk who was likewise working at the plant of the defendant company on the day of this particular accident. This witness testified (p. 63, state of case) that the plaintiff, Steve Doryk, was working about the plant on the morning of the accident.

- Q Did you see Steve there that day?
 A Yes, sir.
 Q What was Steve doing?
 A Steve was taking empty cases off the truck.
 Q Who was there at that time?
 A Abe Schwartzenberg and Peter Janco and all the workers.
 Q How long did Steve stay that morning?
 A That morning? About an hour or so and then he went out with the truck.

This witness testified (p. 64, state of case) that just prior to the accident the truck left the shop and on it this time was the driver, a salesman and

the plaintiff, Steve Doryk. Just before leaving the shop the driver told Steve to get on.

Q Speak out. I can't hear you.

A Steve—the driver called Steve and said come on.

A He called Steve, he said, "Come on, take the empty cases off, we have got to hurry up and go to Carteret." And all of us went out and got a big white ice box and we put it on the truck, all of us put it on the truck and then Steve was on the back, there was a little space, enough for Steve to stand, or somebody to stand, about eight inches wide, and about as long as the truck, and then he got on there, he got his gas full, tank full and then he started out.

It was while the truck was on its way to Carteret to deliver this ice box that the accident happened.

The witness further testified (p. 65, state of case) that the boss, Mr. Schwartenberg, was there when Steve got on the truck.

Q The boss wasn't there when Steve got on that time?

A Yes, sir.

Q At the time Steve got on the truck who all were there? Tell us.

A All were there, all the workingmen, everybody, boss on the job and everything.

Q When you say the boss who do you mean by the boss?

A Abe.

Q Abe who?

A Schwartzenberg.

On page 67 we find the following:

Q Did the five men help unload?

A No, the driver and Steve.

Q Who?

A The driver and Steve.

This witness testified (pp. 68 and 69, state of case) that Steve was on the truck while the driver filled the gas tank in the yard of the defendant company and that Steve was also on the truck and that the driver and the salesman saw Steve on the truck when it started out of the yard for Carteret. The truck only went a few blocks when the accident happened.

The plaintiff, Steve Doryk, testified (p. 92, state of case) that Stanley Gutowsky, the driver of the truck, met him in front of the barber shop on New Brunswick Avenue and asked him to get on the truck. Steve said the driver asked him if he wanted to make a few cents (p. 92, state of case):

Q What did Stanley say?

Q He says if we want to make a few cents.

Q Make a few cents how, Steve?

A Go with him.

On pages 92 and 93 the plaintiff describes where he went with the driver and how he assisted him in making delivery of the soda water to various customers. On their return from this work Steve returned to the plant with the driver (p. 93, state of case):

Q Where did you go then, Steve?

A Went down to the factory. We went down, we stopped by Tony Lans' barber shop, and my brother got off there, and Herbert got off there and I went down to the shop, and we got in the shop there and the driver took me—told me to take the empty cases off while they bring the ice box.

Q Now, Steve, how many empty cases were on the truck?

A About ten.

Page 94, state of case:

Q While you were taking the cases off who was there?

A Abe Schwartenberg and the workers.

Steve testified (p. 94, state of case) that he had worked at the plant of the defendant company on various occasions; that during the summer preceding the accident he worked at the plant of the defendant company for about two weeks.

The plaintiff testified (pp. 96 and 97, state of case) that he was present at the plant of the defendant company while they were loading the ice box on the truck; that the president of the company, Schwartenberg, was also there and that Schwartenberg saw him get on the truck when they started out on the fatal ride (p. 96):

Q Steve, who was there when this ice box was put on?

A Abe Schwartzenberg and his workers, Abe Schwartzenberg was there but he didn't say a word to me.

Q What is that?

A Abe Schwartzenberg was there, and his workers, but Abe Schwartzenberg didn't say a word to me.

Q Steve, when this ice box was on the truck what happened then?

A Then they closed the tail-board up and I had a little space to stand.

Page 97:

Q Who was there when you got on the truck?

A Abe Schwartzenberg.

Q Who else?

Q And his workers.

Q Who do you mean by his workers?

A And the driver was there, too.

Q Who was the driver? A Stanley Gutowsky.

Q And what did you do after you got in the truck?

A I was holding the ice box.

The plaintiff testified (pp. 98-99, state of case) that he had worked for the defendant company on various other occasions. There was no regular employment, but on Saturdays he would assist about the plant and be paid twenty-five cents, fifty cents or sometime be given a bottle of soda water. On the day of the accident Steve testified that the driver hired him; that the boss, Abe Schwartenberg, did not speak to him about pay. In answer to a question on cross examination Steve testified that on other occasions when the driver hired him the bookkeeper would pay him (p. 99, state of case):

Q When the driver hired you who gave you your pay, who gave you the quarter or half a dollar?

A The bookkeeper.

Q Do you mean the bookkeeper in the plant?

A Yes.

Page 99:

Q Well, now, on that day when the ice box was on the truck what work did you do when Abe Schwartzberg was there?

A I was carrying the cases, empty cases off.

Page 100:

Q Was he right there when you carried them off?

A Yes, sir.

Q So he could see you carry them?

A Yes, sir; and he didn't say a word either.

Q How many cases did you carry off when Mr. Schwartzberg was there?

Q I carried about ten off.

Q And who was it that asked you to go to Carteret?

A Driver.

Q Was Mr. Schwartzberg there when the driver asked you to go?

A Yes.

The first witness called by the defendant was the driver of the truck, Stanley Gutowsky. This witness substantially corroborates all of the testimony of the plaintiff's witnesses as to how Steve happened to be on the truck. He frankly testified (p. 104, state of case) that Steve was on the truck in the morning helping him to deliver cases and that on other occasions he had seen Steve working about the plant (p. 104):

Q What was Steve doing on the truck that morning?

A What was he doing on the truck that morning?

Q Yes.

A Why, he come downtown with me.

Q He came downtown with you?

A Yes, sir.

Q What did Steve do when you got downtown?

A He sat on the truck and he handed me the cases down.

Q When Steve got on the truck where did he get on?

A He got on about three blocks up from the plant.

Q Had you known Steve before?

A I did.

Q Had Steve helped around the plant before?

A Yes. He was carrying some empty boxes around the plant.

Q How long before that?

A Before the accident? About a week before the accident.

Q Did the bookkeeper pay him there, do you know, for that?

A I did not see him paid.

Page 105:

Q Had Steve ever worked for you before?

A Why, no.

Q On the wagon?

A The only time he come with me was when I was up around town. But when I went on a long run I had my helper most of the time.

Q When Steve acted as you helper did he get paid for it?

A No, sir. I did not pay him.

Q You didn't pay him?

A No, sir.

Q Didn't he get paid when he went back to the plant?

A Well, I don't know. I didn't see him get paid.

This witness further testified that on the date of the accident he actually asked the boys to get on the truck and go with him. On page 105, state of case, he testified, " * * * * and I told the boys did they want to take a ride with me. So they said yes. So they hopped on and we went."

This witness testified further (pp. 106-107, state of case) that Steve remained on the truck and went back to the plant with him. The driver

admitted (p. 107, state of case) that after he took Steve back to the plant he did not tell Steve that he was through with him for the day.

Q Well, when you got Steve up to the plant did you tell him you didn't have anything more for him to do?

Mr. Toolan: I object. This is very leading.

The Court: It is very leading.

Q Did you have any talk with him about whether you had—

A No, sir; I did not.

Q So that up to that time you hadn't discharged Steve, had you?

A No, I had not.

This witness testified (pp. 117-118, state of case) that Schwartenberg, the president of the company, saw him driving over the temporary bridge on Smith Street, Perth Amboy, with four boys in the truck. He also said (p. 118) that it was a rule that he was not to have any boys riding with him. Notwithstanding this fact it appears from his testimony (p. 115) that everybody got off the truck but Steve and he drove Steve right down to the plant with him on his return to the plant that morning.

Page 115, state of case:

Q In other words, everybody got off at the barber shop except little Steve, isn't that so?

A Yes, sir.

Q Did you ask him to go down to the factory with you and help you unload the cases?

A No, sir; I did not. I thought he was going home.

Q You knew he was on there, didn't you?

A He was sitting in the front seat with me going down.

Q Sitting in the front seat with you, so that you took him right on down to the plant?

A Yes, sir.

This witness testified (p. 116, state of case) that he saw Steve Doryk and several other boys work about the plant on previous occasions.

Q Well, were you there at the time when they unloaded this load of boxes and piled them up somewhere there that Steve spoke about?

A Why, yes, I was there in the afternoon when I come in there.

Q And they were working there, weren't they, those boys?

A Yes, sir.

Q So that he did employ them every once in a while, didn't he, to do little odd jobs?

A Yes, I seen them there once in a while.

While the witness endeavors to deny that Schwartenberg knew Steve was around the plant that morning and in fact testified that Schwartenberg was not there while Steve was at the plant, he does admit that the bookkeeper was the boss at the plant when Schwartenberg was away. The bookkeeper, so this witness testified, was at the plant when he brought Steve back to the plant after delivering some soda water in the morning (p. 119, state of case):

Q Who did you take your orders from? When you refer to the boss you mean Schwartenberg?

A Yes, sir.

Q Who did you take your orders from when Schwartenberg wasn't there?

A The bookkeeper.

Q That bookkeeper was there when Steve was around this morning, wasn't he?

A Why, he was inside but I didn't see him around by the truck.

Q Well, how far is inside from the place where the trucks come in?

A About from here to that pole, but it is around a bend like.

Q Which pole, this pole (indicating)?

A Yes, sir.

The Court: That is sixteen feet.

The defendant relies almost entirely on the testimony of two employees of the defendant company, namely, Stanley Gutowsky, the driver of the truck, and one David Lynch, a salesman, in support of their contention that Steve Doryk was ordered off the truck before the truck started on its way to Carteret. In view of the conflicting testimony of these witnesses the jury would be justified in questioning its absolute veracity.

Gutowsky testified (pp. 109-110, state of case) that at the time he ordered the plaintiff off the truck the plaintiff was standing in the rear of the truck immediately behind the cab.

Q After you got your gas you got back on the truck, where was Steve then?

A He was in front by the cab, because he had this much room in front, the ice box was on that side and you had about this much room on this side. He was standing next to the cab there when I told him to get off.

The witness, David Lynch, testified (p. 128, state of case) that at the time Gutowsky told Steve to get off, Steve was sitting on the front seat.

Q Now, when you got out to the gas tank, just tell us what happened there that you saw and heard in reference to Steve Doryk?

A When I got out to the gas tank this boy was sitting on the front seat.

Both of these witnesses admit that Steve got on the truck when they started for Carteret (p. 120, state of case) but that they drove about twenty-five feet from the garage to the gas tank and that it was while they were taking gas that the driver told Steve to get off the truck. Taking the driver's own testimony (pp. 122-123, state of case) the jury would be justified in discrediting his story because he relates that when he started his truck Steve was about ten feet behind the truck. It is doubtful if this lad of ten years could have run fast enough to overtake the truck and get on while the tail-board was up.

Q And what direction did you see him going in?

A Well, when he got off he started walking towards the plant.

Q Yes, and how far was he away from the truck, the rear end of the truck, before you started?

A I just seen him take about five or six steps and then I started off.

Q Well, you would say he was ten feet from the rear end of the truck before you started, is that right?

A Yes, sir.

Q And then you started out in this Reo speed wagon?

A Yes, sir.

Q So that in order to get on that truck he had to cover that ten feet and go faster than you were going to catch up to you, didn't he?

A Yes, sir.

Q And that is what he did to get on, according to your theory?

Mr. Turner: I object to that, because he didn't see him get on.

A Yes, sir.

Q You didn't stop, did you, between the time you started there at the plant and the time you were told of the accident?

A No, sir.

The jury evidently did not believe that it would have been physically possible for Steve to have caught the truck after it started if he had actually gotten off.

The last witness produced by the defendant was the president of the company, Abe Schwartenberg, who testified that he did not see Steve Doryk at the plant on the morning of the accident. He does, however admit (p. 145, state of case) that he saw his truck prior to the accident on the temporary bridge on Smith Street with four boys on the truck. He did not stop his car and admonish the driver but claims that he shook his finger at the driver, indicating that he wanted him to put the boys off. Under cross examination (p. 145) he said that he did not admonish the driver subsequently or call him on the telephone at the plant about having these boys on the truck.

In view of all the testimony on behalf of the plaintiff's witnesses and the fact that it is in part corroborated by the defendant's own witnesses, we respectfully submit that the question of invitation was certainly for the jury.

The plaintiff, Steve Doryk, the boy who was with him, Herbert Meek, and the driver all testified that the driver asked the plaintiff and Herbert Meek to ride on the truck. The driver admits

that the plaintiff assisted him in making delivery of some soda water; that when this task was completed all of the boys got off the truck except the plaintiff. The driver then took the plaintiff down to the plant where, according to the testimony of the plaintiff, he worked in unloading some cases from the truck. In this he is corroborated by the testimony of Peter Janco, an employee of the defendant, and by his brother, Joseph Doryk. The driver of the truck and David Lynch, another employee of the defendant company, admitted that Steve was about the plant all morning; that he actually got on the truck to go with them to Carteret. They claimed that they ordered him off. This Steve denied.

The plaintiff, Steve Doryk, Joseph Doryk and Peter Janco all testified that Steve worked about the plant on the morning of the accident; that he assisted in unloading empty cases from the truck and was there when the truck was being loaded with the ice box; that during this time all the employees of the plant; the president of the plant, Mr. Schwartenberg, and the bookkeeper of the company, who was the boss when Mr. Schwartenberg was not present, were all about the plant and saw Steve working. Two of the witnesses, Steve Doryk and his brother, Joseph Doryk, testified that Mr. Schwartenberg was present when Steve got on the truck on the last occasion just before the accident. All of the plaintiff's witnesses and defendant's driver, Stanley Gutowsky, admitted that Steve Doryk and other boys frequently worked about the plant and that they were compensated for this work.

The question of invitation where there is conflicting evidence is for the jury (*Gibson v. Skidmore*, 122 Atl. 747).

Where there is conflict of evidence on a disputed issue the Court will not set aside the verdict unless the clear weight of evidence is against the finding of the jury.

"Where evidence of witnesses in a cause on trial is in conflict, it is the province of the jury to determine which of it is to be taken as true; to determine the credibility of the witnesses and in which direction the weight of evidence exists; and the verdict will not be set aside unless it be against the clear weight of evidence or is found to be the result of the feeling, bias or prejudice of the jurors." *Faulkner v. Paterson Ry. Co.*, 65 L. 181.

The defendant argues as his second proposition under this point that there was no evidence of negligence.

The plaintiff tried the case on the theory that the defendant so negligently operated its truck as to permit or cause it to suddenly jerk with sufficient violence to throw the plaintiff from the rear end of the truck to the pavement. See page 97, state of case, where the plaintiff himself describes what happened:

Q What happened?

A On Laurie Street we was going in Laurie Street, well, she jerked.

Q Yes.

A And it threw me right off.

Q How did it throw you off, Steve?

A She went front, and then went back and threw me off.

Q Well, did you fall frontwards or backwards?

A Backwards.

The entrance from New Brunswick Avenue to Lawrie Street is not a right angle turn. Lawrie Street runs into New Brunswick Avenue at a

rather sharp angle. The driver of the defendant truck, Stanley Gutowsky, testified (pp. 111-112, state of case) as follows:

Q And it wasn't necessary for you to take any sudden or sharp turn to the left in order to get into Laurie Street, was it?

A No, sir.

Q So that you could just take a gradual turn there, couldn't you?

A Yes, sir.

Q That sort of a turn, going ten or twelve miles an hour, would not be sufficient to throw anybody off the truck, would it?

A No, sir.

According to plaintiff's theory the brakes on the truck suddenly locked and caused the truck to jerk and it was this jerk that threw the plaintiff from the rear end of the truck. The plaintiff contended that the brakes were not in proper working order and that they had locked that morning before and after the accident (p. 14, state of case):

Q At Maple and Smith Street what happened there?

A The driver stopped the truck and Martin Doryk and another lad jumped on and we started up, and as we were leaving there—we crossed the temporary bridge and just as we were going off the planks—

(At this point attorney for the defendant objected to the testimony and the objection was overruled and exception taken.)

A (Cont.) And just as we were going off the plank on to them brick that was laid, the brakes locked.

Q What happened when the brakes locked?

A The two wheels stood stiff and slid.

Q What happened to the truck?

A The truck stopped with a jerk.

This witness described the action of the truck and the plaintiff at the time of the accident (p. 17, state of case) as follows:

Q And what happened as the truck was traveling along there?

A After the truck made the—it was straightening out east, after he made the swing off New Brunswick Avenue, the car gave a jerk and "Tiff" went frontwards and then backwards and fell off.

The driver of the truck, Stanley Gutowsky, admitted that immediately after the accident while he was on his way to the police station with Officer Dwyer the brakes locked. This was within three-quarters of a mile of the place where the accident happened (p. 126, state of case):

Q Going over the Washington Street bridge with Officer Dwyer in your truck your brakes locked?

A Why, I—

Q Did they lock?

A They locked, but I put them on because there was a car in front of me, and I put them all the way down and they locked, in front of me.

Q And when your brakes locked then right after the accident you came to a quick stop, didn't you?

A Yes, sir.

It was the contention of the plaintiff that it was the quick or sudden locking of the brakes that caused the truck to jerk that precipitated the plaintiff from the rear end of the truck to the pavement.

There can be no question that it was proper for the plaintiff to show the conduct of this very truck on the morning of the accident both before and after the happening of the accident. See *Exton v. Central R. R.*, 62 N. J. L. 8, where the Court says:

“Evidence of similar occurrences, to the annoyance and injury of passengers previous to the time of the accident in question, was admissible to show the dangers to passengers, existing there, and also as tending to show that the servants of the railroad company in charge of the depot had, or ought to have had, knowledge of such dangers.”

Counsel for the defendant argues that the mere fact that the truck jerked is not sufficient evidence to permit the jury to draw an inference that it was negligently operated. We submit, however, that in view of the testimony respecting the condition of the brakes, the fact that they had locked before and after the accident and the manner of the happening of this particular accident, the violence of the jerk that precipitated plaintiff to the pavement made the matter of defendant's negligence a question for the jury. See the case of *Consolidated Traction Co. v. Thalheimar*, 59 N. J. L. 474, where the Court said:

“The occurrence of a lurch or jerk of a street car of sufficient violence to throw off the car a passenger who had notified the conductor of her desire to get off at Fifth Street and who, after the conductor called out Fifth Street, had arisen and gone to the rear door in preparation for alighting, justifies an inference of some breach of the duty owed to her by the carrier and falls within the maxim ‘*res ipsa loquitur.*’”

POINT II.

The plaintiff is not guilty of contributory negligence.

The defendant argues under this point, first, that the plaintiff was negligent in that “he did not hold on to the ice box for, if he had, he would not have fallen off.” Later on the same page we find the statement “On the undisputed evidence the boy was guilty of contributory negligence because he placed himself in a position where he says he had to hold on, and then failed to hold on.” It is a fact that the plaintiff was holding on to the ice box. See testimony of Herbert Meek, page 17:

Q Yes.

A Steve was standing in the back with his hands on the ice box.

On page 97, State of Case, the plaintiff also testified that he was holding on to the ice box:

Q And what did you do after you got in the truck?

A I was holding the ice box.

It is only necessary under this point to call the Court's attention to the fact that counsel for the defendant in his argument on this question cites absolutely no evidence to indicate that the plaintiff was guilty of contributory negligence. It is fair to presume that there is no evidence in the case indicating contributory negligence; otherwise counsel would have been able to point it out to the court in his argument. In any event the question of contributory negligence was for the jury.

See *Durant v. Palmer*, 29 N. J. L. 544.

POINT III.

Plaintiff was not an employee of the defendant and consequently defendant was not entitled to a non-suit on this ground.

A sufficient answer to defendant's argument on this proposition can be found in counsel's own statement, namely, "There should have been a non-suit because plaintiff CLAIMED to be an employee."

The case was not tried on the theory that plaintiff was an employee. There is no allegation in the pleadings to this effect. May we direct the Court's attention to the State of the Case, pages 10 and 11, where counsel for the plaintiff immediately after his opening stated that it was not the contention of the plaintiff that the boy was an employee. The plaintiff never contended that he was an employee within the meaning of the Compensation Act. We did claim that on the day in question the plaintiff was invited on the truck by the driver and also by Mr. Schwartenberg; that he actually did some work while on the truck and while at the plant of the defendant company. Counsel for the defendant now seeks to avoid liability on the theory that the boy was an employee within the meaning of the Compensation Act. At the trial, however, they stoutly denied that the boy was in their employ. See testimony of Mr. Schwartenberg, pages 143-144:

Q Now, this boy, Steve Doryk, had he ever worked around your plant sorting bottles and washing bottles?

A Not that I know of.

Q Did you, yourself, spend your time at the plant?

A Absolutely.

Q Did you have somebody there when you were away?

A Yes, the bookkeeper is in charge when I am away.

Q You don't know whether the bookkeeper employed this boy or not, do you?

A I do not know.

Q The bookkeeper had power to employ anybody, did he?

A No. He has not.

It is impossible for us to understand how counsel for the defendant can argue that the boy was an employee within the meaning of the Compensation Act when both the plaintiff himself and the defendant, through its president and manager, denied that the boy was an employee within the meaning or contemplation of that Act.

The broadest construction that can be placed on the character of the services being rendered by the boy in view of the testimony heretofore quoted under point one, would make plaintiff nothing more than a casual employee and consequently without the pale of the Compensation Act.

See *Bosco v. Segal, et als.*, New Jersey Advance Reports, Vol. IV, No. 49, page 951.
Scott v. Payne Bros., 85 N. J. L. 466.
Sabella v. Brasileiro, 86 N. J. L. 505.

At the time of the accident the plaintiff, Steve Doryk, was ten years old. He would not be eleven years of age until March, 1927 (see p. 80, State of Case). The accident happened on April 17, 1926.

In this situation even if the plaintiff were an employee, he would not be barred by the Compensation Act. See Section 9 which provides:

"Nothing in this Act contained shall deprive an infant under the age of sixteen of the right or rights now existing to recover damages in a common law or other appro-

priate action or proceeding for injuries received by reason of the negligence of his or her master."

May we again call the Court's attention to the weakness of defendant's argument under this point in that he utterly fails to cite any testimony to support his argument?

POINT IV.

The Trial Court should not have directed a verdict in favor of the defendant.

May we direct the Court's attention to the argument heretofore made under the preceding points in support of our contention that the Court should not have directed a verdict in favor of the defendant?

POINTS V and VI.

The Court committed no error in declining to charge the jury to bring in a specific finding as requested by the defendant.

There was no evidence in the case to justify the jury in bringing in a specific finding that the plaintiff was an employee of the defendant (see argument under Point III of this brief). Counsel for the defendant nowhere in his brief cited any evidence that would have justified the jury in bringing in such a finding. The Court on this ground alone would have been justified in refusing this request.

A similar proposition was presented to the Court in the case of *Stiedlar v. Pennsylvania R. R.*, 94 L. 197, where it was held:

"Rule 110 of the Supreme Court, which provides that the trial court 'may' submit certain specific written inquiries of fact to

the jury, is not intended to deprive the court of its discretion as to procedure in such matters and is not mandatory."

POINT VII.

There was no error in the refusal of the Court to charge as requested under Point VII.

Counsel's argument under this point is entirely inconsistent with his argument under the previous points. He has previously argued that if the plaintiff was an employee he could not recover. Under this point he takes exception to the fact that the Court refused to charge that if the plaintiff was not an employee he could not recover.

For the reasons heretofore stated the question of employment was not an issue in the case and the Court, therefore, was justified in declining to charge as requested. It would simply confound and confuse the jury on a matter that was entirely outside the issues.

POINT VIII.

The Court committed no error in the charge complained of under Point VIII.

The defendant's statement, in his argument under Point VIII, that the case was tried on the theory that the plaintiff was an employee, is a positive misstatement of the theory upon which the case was tried. Here again counsel simply makes the bald statement without supporting the statement by any reference to the evidence. Nowhere in the case did we endeavor to show that the plaintiff was an employee in the sense that would place him within the scope of the Compensation Act. We did show that he worked on the truck on the morning of the accident at the solici-

tation of the driver of the truck; that he also worked about the plant of the defendant company with the knowledge and within the observation of the president of the company; that the president of the company accepted his services. This testimony was simply to indicate that the plaintiff was on the truck by implied invitation of the defendant and did not occupy the position of a trespasser. The excerpt complained of clearly and distinctly stated the law respecting the plaintiff's contention that the plaintiff was an invitee. A reading of the Court's entire charge will clearly indicate that there was no error committed by the Court.

POINT IX.

There was no error in the excerpt of the Court's charge complained of under Point IX.

Mr. Schwartenberg (page 102, State of Case) was the president and person in active charge and direction of the affairs of the defendant company. On page 144, State of Case, he testified that he spent his time about the plant; that in his absence the bookkeeper was in charge, but that the bookkeeper had no power to employ any one. Surely, the president of a company, who is in active charge and direction of its affairs, who apparently has the power of hiring and discharging employees and directing the destiny of the corporation, also has the authority to accept the gratuitous services of a person working about the plant and on the delivery truck in such manner as to put that person in the position of an invitee and make the company responsible for the ordinary care and prudence that the law exacts towards invitees.

We respectfully submit that if counsel for the defendant wanted to raise the specific question of the right of a president of a corporation, who was in active charge and direction of its affairs, to bind the corporation by an implied invitation, that he should have submitted a specific request to this effect. In the absence of such specific request he cannot complain of the Court's failure to cover this question.

See *Osburn v. De Young*, 99 N. J. L. 204-210.

POINT X.

The Court committed no error in admitting the evidence complained of under Point X.

It was entirely competent for the plaintiff to show that the brakes locked before and after the happening of the accident, particularly when such proof was confined to the day of the accident.

See *Exton v. Central Railroad*, 62 N. J. L. 7.

POINT XI.

The Court committed no error in admitting the testimony complained of under Point XI.

The cases cited by the defendant under his argument under this point are clearly distinguishable from the situation that existed in the instant case. In the case of *Blackman v. West Jersey Co.* and *Stults v. East Brunswick Co.*, cited by the defendant, an effort was made to bind the defendant company by admissions made by their employees outside and beyond the scope of their employment. The plaintiff in this case did not endeavor to bind the defendant company because the driver of the truck invited the plain-

tiff to ride. The case was tried on the theory that unless the plaintiff was invited by the defendant company or somebody authorized by them to extend such an invitation, that the plaintiff was not entitled to recovery. We do, however, think that it was evidential to show that the driver of the defendant truck actually asked the plaintiff to ride with him.

It is singular that the defendant now complains of this testimony because counsel for the defendant developed through the testimony of his own witness, Stanley Gutowsky, the driver of the truck, that he, Stanley Gutowsky, met Steve on the street and invited him on the truck to help deliver some cases of soda water (see pp. 104-105, State of Case):

"I told the boys did they want to take a ride with me. So they said yes. So they hopped on and we went."

The defendant cannot complain of the testimony that he developed himself.

POINT XII.

The Court committed no error in admitting the testimony mentioned under Point XII.

The testimony complained of under Point XII is not within the line of the case of *Blackman v. West Jersey Co.* The fact that the driver of the truck asked the boys to get on the truck and ride with him could not harm the defendant company for the reason that the driver could not bind the defendant company by his invitation because he was acting outside and beyond the scope of his authority. We do, however, think it was relevant on the question of invitation to show that the driver himself, as he admitted on pages 104-105, State of Case, actually asked the

boys to ride with him. On the question of invitation it would certainly be relevant to show that the driver of the truck had chased boys from the truck or forbidden them to ride. Why is it not likewise relevant to show that the driver asked the boys to ride on the truck, especially when it is later shown in the testimony that one of the boys who was invited on the truck rode with the driver to the plant of the defendant company and did work for the company in the presence and with the assent of the president and general manager of the company?

It is respectfully submitted that the verdict appealed from should be affirmed.

JOHN E. TOOLAN,
Attorney for and of Counsel with
Plaintiffs-Appellees.

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