

INDEX

	PAGE
Notice and Grounds of Appeal.....	1
Summons	2
Complaint	3
Answer of Morris Gottfried.....	6
Amendment to Answer.....	9
Answer of Albert W. Moge.....	11
Reply to Answer of Morris Gottfried.....	13
Reply to Answer of Albert W. Moge.....	14
Substitution of Attorney.....	15
Postea	16
Stipulation re-Printing Record.....	18
Stipulation to Submit on Briefs.....	19
Notice of Argument.....	20

TESTIMONY.

Max Gottfried,	
direct examination	21
cross “	29, 39
re-direct “	40

1874

Received of the Treasurer of the
Board of Directors of the
City of New York
the sum of \$1000.00
for the purchase of
the land for the
City of New York
at the rate of \$1000.00
per acre

Witness my hand and seal
this 1st day of January
1874

NOTICE AND GROUNDS OF APPEAL.

Filed April 30, 1929.

New Jersey Court of Errors and Appeals

MAX GOTTFRIED,	} <i>Plaintiff,</i>	<i>Action</i>	10
<i>vs.</i>			
ALBERT W. MOGE and MORRIS GOTTFRIED,	} <i>Defendants.</i>	<i>at Law.</i>	
		<i>On Appeal.</i>	
		<i>Notice and</i>	
		<i>Grounds</i>	
		<i>of Appeal.</i>	

To Samuel D. Williams, Esq., Attorney of defendant Morris Gottfried, 24 Branford Place, Newark, N. J. 20

SIR:

PLEASE TAKE NOTICE that the plaintiff appeals to the Court of Errors and Appeals in the last resort in all causes in New Jersey, from the whole of the judgment entered in this case.

AND TAKE NOTICE that the following is the ground of appeal which the plaintiff appellant will rely upon:

1. Because the trial court granted a non-suit against the plaintiff-appellant and in favor of the defendant-respondent Morris Gottfried. 30

Dated: April 23, 1929.

Respectfully,

PALMER & COOPER,
Attorneys of plaintiff-appellant.

SUMMONS.

The State of New Jersey to: Albert
W. Mage and Morris Gottfried.

(SEAL) YOU ARE SUMMONED to answer the
annexed complaint of Max Gottfried
10 in an action at law in the Essex
County Circuit Court. And Take Notice that
unless you file your answer to said complaint
with the Clerk of the Circuit Court, at Newark,
within twenty days after service upon you of
this writ and the annexed complaint, the plain-
tiff may proceed in the suit and judgment may
be entered against you.

WITNESS, WORRALL F. MOUNTAIN, Judge of the
Circuit Court, at Newark, this 19th day of March,
20 Nineteen Hundred and Twenty-eight.

JOHN H. SCOTT,
Clerk.

HENRY GOTTFRIED,
Attorney.

30

40

COMPLAINT.

ESSEX COUNTY CIRCUIT COURT.

 MAX GOTTFRIED,

Plaintiff,
vs.
 ALBERT W. MAGE and MORRIS
 GOTTFRIED,

Defendants.

*Action
 at Law.*

10

Complaint.

Plaintiff, residing in the city of Newark, County of Essex and State of New Jersey says that:

1. On or about the Eleventh day of January, 1928, the plaintiff was a passenger, by invitation, in a certain automobile owned and operated by the defendant, Morris Gottfried, in a northerly direction on Osborne Terrace, a public thoroughfare in the city of Newark, County of Essex and State of New Jersey. 20

2. On the date aforesaid, the defendant, Albert W. Mage, was the owner of a certain automobile which he was driving in a westerly direction on Shepherd Avenue, also a public thoroughfare in the city of Newark, aforesaid. 30

3. That the said defendant, Albert W. Mage, did so carelessly, negligently and recklessly operate his said automobile, at a high and excessive rate of speed, and without giving the proper warning as required by law, and that the said Morris Gottfried, did operate his said automobile so carelessly, negligently and recklessly, at a high and excessive rate of speed, without due 40

Complaint.

regard to his duty to the plaintiff as a passenger in said automobile, that, due to the negligence of either or both of the said defendants, their automobiles did collide with great force and violence, at the intersection of Osborne Terrace and Shephard Avenue, aforesaid.

10 4. Due to the aforesaid collision, the plaintiff was with great force and violence thrown to the ground, and sustained severe injuries, to wit: He sustained lacerations of the forehead, which injury will result in a permanent scar. The back of his head was lacerated and plaintiff sustained bruises and contusions about the body, head, arms and legs, lacerations of both legs, back and left arm severely injured, and
20 the nerves of the left side of plaintiff's face were paralyzed, leaving left cheek numb, which injury is of a permanent nature.

5. The plaintiff also sustained an injury to his right eye, whereby the nerves of his eye were severed, which resulted in the impairment of his vision, and he was otherwise permanently injured so that he has suffered and still suffers great pain and agony resulting from the injuries, and from the nervous shock resulting from the
30 violence of the injuries, which nervous shock has produced lack of sleep, headaches, dizziness and other permanent injuries of a technical nature which plaintiff is unable to explain.

6. The plaintiff, by reason of the said carelessness and negligence of the defendants, was obliged and did expend divers large sums of money for doctors, medicines and other necessities in endeavoring to cure himself of the said injuries, bruises and wounds sustained by him,
40 and did further suffer loss of income by reason

Complaint.

of being unable to pursue his duties of his employment, and also was obliged to expend and will in the future continue to expend large sums of money in endeavoring to cure himself of his ills.

Wherefore, plaintiff demands from the defendants, as damages, the sum of Ten Thousand Dollars (\$10,000.00). 10

HENRY GOTTFRIED,
Attorney for Plaintiff.

20

30

40

ANSWER OF MORRIS GOTTFRIED.

ESSEX COUNTY CIRCUIT COURT

10	MAX GOTTFRIED, <div style="text-align: right; padding-right: 20px;"><i>Plaintiff,</i></div> <div style="text-align: center; padding: 5px 0;"><i>vs.</i></div> ALBERT W. M A G E and MORRIS GOTTFRIED, <div style="text-align: right; padding-right: 20px;"><i>Defendants.</i></div>	}	<i>Action at Law. Answer.</i>
----	--	---	---------------------------------------

The answer of the defendant, Morris Gottfried, of Madison, New Jersey, shows:

20 1. As to the allegations of paragraph 1 of the complaint, this defendant admits so much thereof alleging that on the 11th day of January, 1928, this defendant was the owner and was operating the car or automobile in which the plaintiff was riding, in a northerly direction on Osborne Terrace, a public thoroughfare of the City of Newark. This defendant denies the balance of the allegations of said paragraph.

30 2. As to the allegations of paragraph 2, this defendant has not sufficient knowledge or information to form a belief.

3. This defendant denies that part of paragraph 3 alleging negligence on the part of this defendant, and as to the balance thereof is advised that he need make no answer thereto.

4, 5. As to the allegations of paragraphs 4 and 5 this defendant has not sufficient knowledge or information to form a belief.

40 6. This defendant denies that part of paragraph 6 alleging carelessness and negligence on

Answer of Morris Gottfried.

the part of this defendant, and as to the balance thereof has not sufficient knowledge or information to form a belief.

This defendant denies that the plaintiff is entitled to damages in the sum of Ten Thousand (\$10,000.00) Dollars, or any other sum, as against this defendant.

10

AFFIRMATIVE DEFENSES.

This defendant, by way of affirmative defense to the plaintiff's complaint, avers:

1. That at the time and place mentioned in said complaint plaintiff was riding in the car of this defendant in pursuance of a pre-arranged custom in and by which defendant, Morris Gottfried, at the special instance and request of this plaintiff, did transport this plaintiff from their home in Madison to their place of business or employment, in the City of Newark; and that by reason thereof plaintiff and this defendant were engaged in a common venture, going from and to a common destination for a common purpose, and were, therefore, as a matter of law, engaged upon a joint enterprise.

20

2. That for a long time prior to the date of the accident complained of in the plaintiff's complaint, plaintiff had been riding with this defendant, and that on the day of the accident complained of this defendant did drive and operate his car or automobile in the same manner and at the same rate of speed at which said car had been operated by this defendant on previous occasions; and that if, as is alleged, the manner of this defendant's operation of said car was negligent, careless or reckless on the day of the accident complained of the plaintiff did assume the risks and dangers attendant

30

40

Answer of Morris Gottfried.

upon riding with this defendant, knowing the rates of speed and the manner in which this defendant customarily operated his said automobile.

10 3. That the accident complained of in the plaintiff's complaint was caused exclusively by the negligence of the defendant, Albert W. Mage, which consisted in this:

20 That at the time and place mentioned in said complaint he, the said Albert W. Mage, did operate his car at a high and excessive rate of speed in a westerly direction on Shepard Avenue, at the intersection of said Avenue with Osborne Terrace; did fail to make observation as to the presence of this defendant's automobile at said intersection; did fail to give warning by
 30 signal or otherwise of his approach to said intersection; did fail to give heed or pay attention to the warnings given of the approach of this defendant's automobile at said intersection, and did so operate his car as to lose control of the same, so that it was caused to collide with the car of this defendant, causing the car of this defendant to upset or turn over; that he, the said Albert W. Mage, was in divers other ways negligent, and that his negligence caused or contributed to the happening of the accident complained of in the plaintiff's complaint.

SAMUEL D. WILLIAMS,
 Attorney for Defendant,
 Morris Gottfried.

Consent to the filing of the within Answer as of time is hereby given this day of April, 1928.

40

HENRY GOTTFRIED,
 Attorney for Plaintiff.

AMENDMENT TO ANSWER.

ESSEX COUNTY CIRCUIT COURT.

MAX GOTTFRIED,

*Plaintiff,**vs.*ALBERT W. MAGE and MORRIS
GOTTFRIED,*Defendants.**Action
at Law.*

10

*Amendment
to Answer.*

The defendant, Morris Gottfried, by way of further affirmative defense to the plaintiff's complaint, shows:

That on the day of the accident set forth in the plaintiff's complaint, and for a long time prior thereto, the plaintiff, Max Gottfried, was and had been an employee of this defendant in a business conducted by this defendant in the City of Newark, Essex County, New Jersey.

20

That the accident complained of in the plaintiff's complaint occurred while the plaintiff was en route from his home in the Town of Madison, Morris County, New Jersey, to the place of business of this defendant, where he was to engage in his daily employment for this defendant.

30

That this defendant had not given to the plaintiff, nor had the plaintiff given to this defendant a notice in writing, such as is provided by the statute, to the effect that the employment was to be considered by either this defendant or by the plaintiff as outside of the terms and provisions of the Workmen's Compensation or Employers' Liability Laws.

40

Amendment to Answer.

That by reason of the aforesaid this defendant avers that the accident complained of in the plaintiff's complaint occurred in the course of the plaintiff's employment by this defendant, and is, therefore, an accident for which this defendant's liability to the plaintiff, if any, is limited
 10 to the liability established by the Workmen's Compensation and Employers' Liability Laws, the same being statutes of the State of New Jersey.

This defendant further avers that the plaintiff's right of action as against this defendant, by reason of the accident complained of in the plaintiff's complaint, is limited to the proceedings provided in the Workmen's Compensation Law, and that the right of action provided in said
 20 Law is exclusively under the jurisdiction of the tribunal set up under the provisions of said law, namely, the Workmen's Compensation Bureau.

That by reason of the aforesaid this defendant will move for a dismissal of the plaintiff's complaint as against this defendant.

SAMUEL D. WILLIAMS,
 Attorney for Defendant,
 Morris Gottfried.

30 Consent to the filing of the within Amendment as of time is hereby given this 22nd day of March, 1929.

PALMER & COOPER,
 Attorneys for Plaintiff.

ANSWER OF ALBERT W. MOGE.

ESSEX COUNTY CIRCUIT COURT.

 MAX GOTTFRIED,

Plaintiff,
*vs.*ALBERT W. MOGE and MORRIS
GOTTFRIED,
Defendants.

*Answer of
at Law.*

10

*Action
Albert
W. Moge.*

ALBERT W. MOGE (referred to in the complaint as Albert W. Mage) residing in the City of Newark, County of Essex and State of New Jersey says that:

20

FIRST DEFENSE.

1. He has no knowledge of the matters set forth in paragraph 1 sufficient to form a belief, but puts the plaintiff to his proof.

2. He admits paragraph 2.

3. He denies so much of paragraph 3 as relates to this defendant, but admits so much of said paragraph as relates to plaintiff, Morris Gottfried.

30

4. He has no knowledge of the matters set forth in paragraphs 4, 5 and 6 sufficient to form a belief, but puts the plaintiff to his proof.

SECOND DEFENSE.

5. The accident mentioned in paragraph 3 of the complaint occurred solely through the negligence of said Morris Gottfried aided and abetted

40

Answer of Albert W. Moge.

by the plaintiff, Max Gottfried—the said Morris Gottfried and said Max Gottfried being brothers, as this defendant is informed and believes.

10 6. Said negligence consisted in the operation of said automobile by defendant, Morris Gottfried, and the plaintiff, Max Gottfried at an excessive rate of speed, on the wrong side of the road, without proper brakes, without proper signals and recklessly and unlawfully.

JAMES J. GIBB,
Attorney for Defendant.

20

30

40

**REPLY TO ANSWER OF MORRIS
GOTTFRIED.**

ESSEX COUNTY CIRCUIT COURT.

<p>MAX GOTTFRIED,</p> <p style="text-align: center;"><i>Plaintiff,</i></p> <p style="text-align: center;"><i>vs.</i></p> <p>ALBERT W. MOGE and MORRIS GOTTFRIED,</p> <p style="text-align: center;"><i>Defendants.</i></p>	}	<p><i>Action at Law.</i></p> <p><i>Reply to Answer of Defendant Morris Gottfried.</i></p>	10
--	---	---	----

Plaintiff, by way of reply to the answer filed by the defendant Morris Gottfried, says that:

1. Plaintiff joins issue with defendant, Morris Gottfried, on his answer to the complaint filed in the above matter. 20

REPLY TO AFFIRMATIVE DEFENSES.

1. Plaintiff denies the allegations contained in paragraphs numbered one and two in the first affirmative defense of Defendant, Morris Gottfried.
2. Plaintiff is advised that he need make no answer to Paragraph three of Defendant Morris Gottfried's affirmative defense. 30

HENRY GOTTFRIED,
Attorney for Plaintiff.

SUBSTITUTION OF ATTORNEY.

Filed December 11, 1928.

ESSEX COUNTY CIRCUIT COURT.

<p>MAX GOTTFRIED,</p> <p style="text-align: center;"><i>Plaintiff,</i></p> <p style="text-align: center;"><i>vs.</i></p> <p>ALBERT W. MOGE and MORRIS GOTTFRIED,</p> <p style="text-align: center;"><i>Defendants.</i></p>	}	<p><i>Action at Law.</i></p> <p><i>Substitution of Attorney.</i></p>	<p>10</p> <p>20</p>
--	---	--	---------------------

I hereby consent to the substitution of Palmer & Cooper, as Attorneys for the Plaintiff in the above case, in my stead. 20

Dated: December 10, 1928

(Signed) HENRY GOTTFRIED,
Attorney for Plaintiff.

30

40

POSTEA.

ESSEX COUNTY CIRCUIT COURT.

10	45832 MAX GOTTFRIED, <div style="text-align: right; padding-right: 20px;"><i>Plaintiff,</i></div> <div style="text-align: center; padding: 5px 0;"><i>vs.</i></div> ALBERT W. MOGE and MORRIS GOTTFRIED, <div style="text-align: right; padding-right: 20px;"><i>Defendants.</i></div>	}	<i>Action at Law. On Non Suit April 22, 1929. Costs \$81.60</i>
----	--	---	---

20 Judgment on Non Suit in the above entitled Action was rendered on the twenty-second day of April, A. D. nineteen hundred and twenty-nine in favor of the defendant Morris Gottfried and against the plaintiff Max Gottfried.

Judgment entered and signed April 22, 1929.

WILLIAM S. GUMMERE,
Judge.

Recorded in Book 107 Circuit Court Judgments, page 285.

30

STATE OF NEW JERSEY, }
COUNTY OF ESSEX. } ss.

I, JOHN H. SCOTT, Clerk of the County of Essex in the State of New Jersey.

40 Do HEREBY CERTIFY That the foregoing is a true and correct copy of all the papers in the Case of Max Gottfried, Plaintiff *v.* Albert W. Moge and Morris Gottfried, Defendants together with a copy of the Judgment Record entered in

Postea.

Judgment Record Book 107, page 285, April 22, 1929, prepared for an Appeal Case No. 45832. and the same is taken from and compared with Original Copies of All records together with entry of Judgment and as the same now remains on the files of said Office.

IN TESTIMONY WHEREOF, I have
hereunto set my hand and affixed the
(SEAL) official seal of said County at Newark,
N. J., this second day of May A. D.
1929.

JOHN H. SCOTT,
Clerk.

10

20

30

40

STIPULATION.

Filed 4/26/29.

NEW JERSEY COURT OF ERRORS
AND APPEALS.

10	MAX GOTTFRIED, <div style="text-align: right;"><i>Plaintiff,</i></div> <div style="text-align: center;"><i>vs.</i></div> ALBERT W. MOGE and MORRIS GOTTFRIED, <div style="text-align: right;"><i>Defendants.</i></div>	}	<i>Action at Law. Stipulation.</i>
----	---	---	---

20 It is hereby stipulated and agreed by and between Samuel D. Williams, attorney for the defendant Morris Gottfried, and Palmer & Cooper, attorneys for the plaintiff, that it shall be unnecessary for the plaintiff to print any of the testimony in the plaintiff's case on appeal, with the exception of that of the plaintiff himself, in view of the fact that there was no testimony given by any other witnesses at the trial which had any bearing on plaintiff's employment by the defendant or any of the terms or conditions thereof.

30

Dated: Newark, N. J. April 23, 1929.

SAMUEL D. WILLIAMS,
Attorney of defendant
Morris Gottfried.

PALMER & COOPER,
Attorneys of plaintiff.

STIPULATION.

Filed 4/29/29.

NEW JERSEY COURT OF ERRORS
AND APPEALS.

<p>MAX GOTTFRIED,</p> <p style="text-align: right;"><i>Plaintiff,</i></p> <p style="text-align: center;"><i>vs.</i></p> <p>ALBERT W. MOGE and MORRIS GOTTFRIED,</p> <p style="text-align: right;"><i>Defendants.</i></p>	<p><i>Action at Law.</i></p> <p><i>On Appeal. Stipulation.</i></p>	<p>10</p>
--	--	-----------

It is hereby stipulated by and between the attorneys of the plaintiff and the attorney of the defendant Morris Gottfried, that oral argument in the above entitled cause shall be dispensed with and the case submitted for the consideration of the court on briefs. 20

Dated: Newark, N. J. April 26, 1929.

PALMER & COOPER,
Attorneys for Plaintiff.

SAMUEL D. WILLIAMS, 30
Attorney of defendant
Morris Gottfried.

NOTICE OF ARGUMENT.

Filed 4/28/29.

NEW JERSEY COURT OF ERRORS
AND APPEALS.

10

MAX GOTTFRIED,

Plaintiff,

vs.

ALBERT W. MOGE and MORRIS
GOTTFRIED,

Defendants.

*Action
at Law.*

On Appeal.

*Notice of
Argument.*

20

SIR:

PLEASE TAKE NOTICE of the argument of the issue joined in this cause before the New Jersey Court of Errors and Appeals, to be held at the State House, in the city of Trenton, in the State of New Jersey, on the third Tuesday of May next, at ten o'clock in the forenoon, or as soon thereafter as the said court can attend to the same.

Dated: Newark, N. J. April 23, 1929.

30

PALMER & COOPER,
Attorneys for plaintiff-appellant.

To Samuel D. Williams, Esq., Attorney of defendant-respondent Morris Gottfried, 24 Bradford Place, Newark, N. J.

40

Max Gottfried, direct.

TESTIMONY.

ESSEX CIRCUIT COURT.

Monday, April 22, 1929.

MAX GOTTFRIED,

vs.

ALBERT W. MOGE, *et al.*

10

*Action at
Law.*

Before Hon. William A. Smith, *J.*, and a jury.

For the plaintiff appears Henry Gottfried (by John W. Palmer).

For defendant Morris Gottfried appears Samuel D. Williams. 20

For defendant Albert W. Moge appears James J. Gibb.

(A jury is called and sworn.)

MAX GOTTFRIED, the plaintiff, sworn in his own behalf.

Direct examination by Mr. Palmer.

30

Q Mr. Gottfried, on January 11, 1928, how old were you? A Twenty-five.

Q Are you married or single? A Married.

Q Where did you live or board at that particular time? A At Madison, N. J.

Q With whom did you board there? A Morris Gottfried.

Q Is he your brother? A Yes, sir.

Q At that time whom did you work for? A Morris Gottfried. 40

40

Max Gottfried, direct.

Q What kind of a place of business did Morris Gottfried have? A Butcher market.

Q Whereabouts? A 717 Bergen street, Newark.

Q What kind of work did you do for him?

10 A Butcher.

Q What were your wages? A \$30 a week.

Q Was there or was there not any kind of an arrangement existing between you and your brother Morris that the wages which you received had anything to do with the transportation to and from your place of business? A There was not.

20 Q How would you from time to time either get in from Madison where you lived, or get home from Newark to Madison aside from those times when you went back with your brother? A Whenever I didn't want to go back with him I went to a friend's house and slept there, or I took the bus or his car and drove back.

Q When you used the friend's car to Madison how would you come back the next morning?

A In the friend's car.

Q Were you under any duty or anything that made you ride back and forth with your brother, or could you go home—

30

Mr. Williams: I object to that.

Objection sustained.

Q Did you or did you not pay board at your brother's house? A I paid board.

Q Did the fixing of your salary at \$30 a week have any bearing on your board at all? A No, sir.

40 Q On the morning in question how is it that you and your brother Morris came to be together

Max Gottfried, direct.

in the same car? A Why, he asked me if I would ride to work with him that morning; I told him yes.

Q About what time was it that you left Madison, do you remember? A Possibly twenty-five minutes past seven.

Q Was there any regular time for opening the butcher shop? A Why, he had a regular time to open the butcher shop. 10

Q Who did the opening of the butcher shop, you or your brother? A My brother.

Q In the course of that ride from Madison to the shop were you and your brother going in a northerly direction along Osborne Terrace? A Yes, sir.

Q What is Osborne Terrace paved with near its junction with Shephard avenue? A Asphalt. 20

Q What was Shephard avenue paved with? A The same.

Q In the vicinity of Osborne Terrace and Shephard avenue how close together were the houses? A The houses come pretty near up to the corners.

Q How close together are they? A They are pretty close together; there are no lots around there. 30

By the Court.

Q They average less than a hundred feet apart? A Yes, sir.

By Mr. Palmer.

Q As he drove along Osborne Terrace in a northerly direction about how fast was your brother Morris driving the car? A Thirty or forty miles an hour. 40

Max Gottfried, direct.

Q Was there any conversation which took place between you and your brother in the course of that ride along Osborne Terrace?

Mr. Williams: I object to that. I suppose you mean about the warnings.

10 Mr. Palmer: No. Which had anything to do with the speed of the car.

Mr. Williams: Negligence has been admitted. I do not see the materiality of any warnings he gave his brother Morris; they can have no bearing on the operation of the other defendant's car that I can see.

20 The Court: I suppose if he had a conversation with his brother about the speed of the car it can be shown to negative contributory negligence.

Q Was there any conversation between you and your brother Morris in which the speed of the car was mentioned? A Yes, sir.

Q What was said? A I asked him to slow up and take it easy; that they were dangerous crossings.

Q Where was it you mentioned it? A Coming down Lyons avenue and going over Osborne Terrace.

30 Q As he got to the intersection of Osborne Terrace and Shephard avenue what do you estimate his speed was? A Between thirty and forty miles an hour.

Q At that time did you hear any horn blown by anyone coming in a westerly direction along Shephard avenue? A No, sir.

Q Was there a horn blown? A No, sir.

40 Q What was the first view you had of a vehicle going west on Shephard avenue? A Just as we came to the corner I seen a vehicle coming.

Max Gottfried, direct.

Q Where was it? Coming from your right or left? A From my right.

Q How far away was it from the crossing?

A When I saw it?

Q Yes. A It was just to the crossing.

Q Where was your car when you first saw this other car? A We were about ten feet to the crossing—that is, away from the crossing. 10

Q You were about ten feet back from the crossing, is that it? A Yes, sir.

Q What did this other car do from that time on and what did your car do until the collision? A The car continued up, and the Ford car, in order to avoid an accident, turned with him up Shephard avenue.

Q The Ford car is the car your brother was driving, you mean? A Yes, sir. 20

Q Go on. A That's all that I remember.

Q At the time you first saw the other car going west on Shephard avenue, what did you estimate its speed to be? A Approximately thirty or forty miles an hour.

Q What was the next thing you knew? A The next thing I heard was a crash, and that's the last thing I remember.

Q When does your recollection again begin? A I was laying on the sidewalk and being picked up and lifted into the police patrol. 30

Q Where were you taken in the police patrol? A To the City Hospital.

Q Who treated you at the City Hospital? A Dr. Symes.

Q You only stayed there, I believe, for first aid, did you not? A Yes, sir.

Q What did Dr. Symes do with regard to your eye? A He shaved the eyebrow off and took seven stitches. 40

Max Gottfried, direct.

Q And from there where were you taken?

A To Renner avenue—pardon me—back to the Sixth Precinct in the police patrol.

Q And from there where were you taken? A And from there to Renner avenue.

10 Q What is there at Renner avenue? A My brother's father-in-law lived there.

Q How long did you stay there? A Three days.

Q From there where were you taken? A To Madison, N. J.

Q How long were you prevented from attending to your work as a result of this accident?

A Two months.

Q How long were you confined to the house as a result of the accident? A Six weeks.

20 Q Did you receive any salary from your brother while you laid up? A No, sir.

Q Did you or did you not pay board while you were laid up? A I paid board.

Q What was your eye like after this accident when you had a chance to get a view of it in the mirror? What did it look like? A The eye was all puffed up and the eyeball was all red and bloodshot, and there was a deep gash over the eye.

30 Q How were you in other parts of your body? What did you observe? A My both legs were all bruised; my right shoulder was bruised, and my forehead was bruised.

Q For what period of time was your eye bandaged up or covered? A My eye was bandaged for three months.

40 Q At the expiration of that time, what if anything did you observe with the way you could see out of your right eye? A I had a very poor vision from the right eye.

Max Gottfried, direct.

Q In what way was it different from the way it was before you got the blow? A There was a screen like smoke in front; very hazy.

Q How long did it keep up? A It's still that way.

Q Is that condition getting better or standing still or getting worse as far as you can observe? A It remains the same way. 10

Q What steps, if any, have you taken to cure that trouble? A I went to a specialist.

Q Who is that? A Dr. Andrew Rados.

Q Have you done what the doctor told you to do? A Yes, sir.

Q You have carried out instructions, have you? A Yes, sir.

Q Aside from the condition in your eye, do you suffer now with any after-effects from that accident? 20

At one o'clock P. M. the court takes a recess until two o'clock p. m.

AFTER RECESS.

MAX GOTTFRIED, the plaintiff, resumes the stand. 30

Direct examination (continued) by Mr. Palmer.

Q (Question read.) A Sore shoulder, on damp days it is sore.

Q About these injuries to your legs—what were they like? A Why, they were—several cuts were in them that left scars—and the bruises.

Q How badly were your legs bruised; that is, what was the condition of them after the 40

Max Gottfried, direct.

accident? A They were all swollen so I couldn't bend them or walk on them.

Q You say you couldn't bend your knees? A I couldn't bend them at the knees they were all sore and scabs.

10 Q For how long did your legs trouble you so you couldn't walk on them? A About seven weeks.

Q That trouble has cleared up now? A Yes.

Q But you suffer some from your shoulder in damp weather? A Yes, sir.

Q How constant is this trouble with your eye? Is it there intermittently or all the time? A It's there all the time.

20 Q In your job with your brother were there any particular hours which you had? In other words, was there any particular time you had to be at the shop in the morning? A No, sir.

Q How about quitting time? A I closed the store at six, but if there was any work Friday night I would work until nine o'clock.

Q When did your work begin with your brother each day and when did it end? A The work began when I got in the store.

30 Q When did it end? A It would end whenever he closed the store.

Q Did you see this stick that was in your eye? A No, sir.

Q You never did see that? A No, sir.

Q Were you conscious or unconscious when it was taken out? A I didn't feel it coming out. I was semi-conscious—I was dazed.

Q After you were able to resume work did you go to work? A Yes, sir.

40 Q When were you able to resume work? A I don't know the exact date; it was about nine weeks after the accident.

Max Gottfried, cross.

Q And then whom did you work for? A Morris Gottfried.

Q Your brother? A Yes, sir.

Q Did your wages begin again then? A Yes, sir.

Cross examination by Mr. Williams.

10

Q How long prior to the date of this accident had you worked for your brother? A Pretty near a year; I don't just know how long.

Q At the time you started to work for him you didn't live in Madison, did you? A No, sir.

Q Where did you live then? A In Maple avenue.

Q Newark? A Newark.

20

Q With him? A Yes, sir.

Q Did he have this same car? A Yes.

Q Was it your practice to go back and forth from your place of employment and your home in this same car? A When I did, yes, sir.

Q You have no car of your own? A Not at that time.

Q You were married at that time? A Yes, sir.

Q When you went to live at Madison, it was the same time that Morris and his family went to Madison, wasn't it? A Yes, sir.

30

Q I mean that you went when he went? A Yes, sir.

Q How long had you been receiving \$30 a week as salary prior to this accident? A Why, several months; I can't remember how long.

Q And you had been working about a year? A Yes, sir.

Q As a butcher? A As a butcher.

40

Max Gottfried, cross.

Q Had you had any previous experience as a butcher prior to the time that you went with your brother? A No, sir.

Q Were there any other employees than you in the store at or about the time of this accident? A Why, yes, sir.

10 Q Who? A It was part time only.

Q Who? A There was a young man used to help drive the car; I can't remember his name.

Q He wasn't a butcher? A No, sir.

Q Were there any other butchers employed by your brother at the time? A When I first started for him there was.

Q How about at the time of the accident? Were there any then? A No, sir.

20 Q After you became a full-fledged butcher, if that is what they call it, and from that time to the time of the accident, were there any other butchers employed by your brother? A Until the time of the accident?

Q Yes. A No, there weren't.

Q Then outside of you, the only other employee was this boy who drove the automobile. A Yes, sir.

30 Q By the way, the automobile he drove was this very automobile, wasn't it? A Yes, sir.

Q This car was used to deliver goods as well as to transport you and your brother home and back to work? A Yes, sir.

Q That store opened at 7:30, didn't it? A That's what time he opened his store; 7:30.

Q What time would you usually leave Madison? A When I went down with him, do you mean?

40 Q Yes. A A quarter past seven or ten minutes past seven.

Max Gottfried, cross.

Q You usually made the trip from Madison to Newark, then, in twenty minutes? A No, sir.

Q I thought you said the store opened at 7:30? A Generally it wasn't 7:30 on the moment. It might have been ten minutes late or ten minutes earlier.

10

Q Were you usually ten minutes late or ten minutes earlier? A Not usually.

Q You usually were on time, weren't you? A Yes, sir.

Q Did you usually leave at about 7:10? A No, we used to leave at a quarter of seven or 6:30 at times.

Q How long prior to this accident had you two been living in Madison? A Two or three months.

20

Q During that two or three months what was the usual time at which you left Madison to go to your place of employment in the morning? A Some mornings it was a quarter to seven, ten minutes to seven, seven o'clock—we had no usual time.

Q Did you have your breakfast before you got there? A Yes, sir.

Q Where did you have that? A In Madison.

30

Q At home? A At home.

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

Q Isn't it a fact that you usually had your breakfast somewhere on the way to your place of employment? A No, sir.

Q And not at home? A No, sir.

Q That isn't a fact? A No, sir.

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

Q In the three or four months that you lived in Madison with your brother prior to this

40

Max Gottfried, cross.

accident, can you say how many times you didn't come to Newark with him in the morning? A No, I just couldn't tell you that.

10 Q During the same period of time can you say how many times you didn't go to Madison with him from your place of employment? A No.

Q Was it any part of your employment prior to this accident to drive this car during the daytime in the delivery of goods? A When there were special orders going out, yes, sir.

Q On the morning of the accident can you recollect what time you left Madison? A No, sir.

20 Q Can you recollect whether on the morning of this accident there was by agreement an intent to go other than from your home in Madison to your store in Newark? A No, sir, there was no agreement made. We were to go to the store.

Q Did you go over the route that you usually traveled? A Yes, sir.

Q The same streets that you usually took you took this morning? A Yes, sir.

Q Did you ever drive over to Newark or back to Madison?

30

Mr. Palmer: In what?

Mr. Williams: In this car.

Mr. Palmer: I object to that as immaterial.

Objection overruled.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

40 A Yes, sir.

Max Gottfried, cross.

By the Court.

Q That is, were you doing the driving? A No, sir.

By Mr. Williams.

Q You never drove it over to Madison or from Madison? A No, sir. 10

Q Whenever your brother was with you he did the driving? A Yes, sir.

Q Can you remember any particular reason why on the morning of this accident you were earlier or later in leaving Madison than was your usual custom? A There was no particular reason, no, sir.

Q You can't remember any? A No, sir.

Q You said, as I get your testimony, that on this particular morning he asked you if you would ride with him that morning, and you said you would. Is that correct? A Yes, sir, he asked me if I was going with him that morning and I said yes. 20

Q Is it correct that he asked you if you ride, or did he say, "Will you go with me?" A "Will you go with me?"

Q Where were you when he said that? A I was in bed. 30

Q He wakened you? A He did every morning.

Q That was his usual practice? A Yes, sir.

Q Can you remember how he wakened you on the morning of this occurrence? Can you remember his language? A He just shook me.

Q Did he say, "Wake up, Max," or "Get up, Max," if you remember? A No, when he shook me I knew it was time to get up. 40

Max Gottfried, cross.

Q It was then that he said, "Will you go with me?" A Yes, sir.

Q Is that what he said? A "Will you go with me?" Yes, sir.

Q Did he say it this morning? A Surely.

10 Q Can you remember whether he had said that the preceding morning? A Yes, sir.

Q Did he say that every morning? A Every morning that he took me.

Q He said that most mornings, didn't he? A No, sir, some weeks he took me three times and some weeks five times; I can't remember.

Q I am asking you whether he used the same language every morning that he did take you as he did on the morning in question? A Yes, sir.

20 Q "Will you go with me this morning?" That's right, isn't it? A Yes, sir.

Q According to your direct examination there were occasions when you went to Madison in someone else's car—borrowed it or used it to go home. A Yes, sir.

Q On those occasions would he make the same inquiry of you in the morning? A Yes, sir.

30 Q "Will you ride with me this morning?" or, "Will you go with me this morning?" A Yes, sir.

Q When you came home with someone else's car where would you put the car? A In his garage.

Q You had a two-car garage? A Yes, sir.

Q So far as you knew, did he have any knowledge that you had done that?

40 Mr. Palmer: I object to that because that calls upon this man to tell what the mental processes of another man were.

Max Gottfried, cross.

The Court: I suppose he means whether his brother saw the car.

Mr. Palmer: His brother wouldn't know.

The Court: He might.

A No, sir.

Q On the evening preceding this accident you hadn't come home in anyone else's car? A No, sir. **10**

Q You went home with your brother Morris?

A Yes, sir.

Q In his car? A Yes, sir.

Q Whereabouts on Lyons avenue or on Osborne Terrace were you when you said to your brother that he was to slow up and take it easy at dangerous crossings, or words to that effect? **20**

A I warned him at Lehigh avenue and Osborne Terrace.

Q Where is Lehigh avenue with respect to Shephard avenue? How many blocks? A It's several blocks.

Q Anywhere else? A Then I warned him on the next corner. He didn't slow up between those two corners.

Q You mean the next corner toward Shephard? A Yes, I warned him there because he didn't slow up. **30**

Q Did you warn him again? A No.

Q Did you make any attempt to get out? A I couldn't very well get out.

Q Did you make any attempt to control the car? A No, sir.

Q To put on the brake or anything like that? A No, sir.

Q Did you remonstrate with him at the next street? A No, sir. **40**

Max Gottfried, cross.

Q When you gave him this warning at Lehigh avenue and Osborne Terrace was there any particular reason why you gave it? I mean was there heavy traffic at that point? A The particular reason why I done that is because I happened to know that the cross streets are dangerous.

10 Q The crossing at Lehigh avenue and Osborne Terrace wasn't any more dangerous than other crossings, was it? A That was the first crossing we came to.

Q How many crossings were there after Lehigh avenue before you came to Shephard? A There were two.

Q You said something about warning him on Lyons avenue. Can you remember where you did that? A I can't remember; it was in the city.

20 Q Can you remember why you gave him the warning? I mean by that, can you remember whether or not the traffic conditions influenced you in giving the warning? A Yes, sir.

Q Do you mean you can't remember? A The traffic conditions did.

Q The traffic conditions did influence you in giving the warning? A Yes, sir.

30 Q By that you mean that there were other cars crossing or things like that? A Yes, sir.

Q Is that right? A Yes, sir.

Q Had you ever worn glasses before the date of this accident? A No, sir.

Q You don't wear them now? A No, sir.

Q Isn't it a fact that for at least two weeks subsequent to this accident you received your pay from your brother Morris? A Two weeks subsequent? No, sir.

40

Max Gottfried, cross.

Q Two weeks after the accident? A No, sir.

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

Q Were your arrangements for boarding made with Morris or with his wife? A With his wife.

Q So far as you can recall, was there any difference in the salutation made to you in the morning by Morris when you did come home in another car or when you had come with him? A There might have been a small difference; there might have been a difference in a word or two.

10

Q Can you say what that difference was? A No.

Q Did the difference in any way indicate to you that Morris knew you had a car there in his garage? A No, sir.

20

Q Can you ever remember a time when Morris knew that you did not go home with him the night before and made the same salutation that you say he made: "Get up. Will you come with me this morning?" A No, sir.

Q Will you describe as briefly as you can the route you followed from your home in Madison to your place of employment in Newark by train?

30

By the Court.

Q Did you ever make it by train? A I went to New York once by train.

Q I mean to business. A I never went to business by train.

Mr. Williams: I thought in the opening or in this examination he said he went by train.

40

Max Gottfried, cross.

Mr. Palmer: I said he went by bus or used another car.

By Mr. Williams.

10 Q Where would you board the bus in going from Madison to Newark? A Over at the Post Office or Springfield avenue, Newark.

Q How far would either of those be from where you live? A I don't get that.

Q How far is the Post Office from where you lived in Madison? A The Post Office in Newark.

Q Where in Madison? How far would the place where you boarded the bus be from your home? A One block.

20 Q Where would it take you in Newark? A Broad and Market, or Military Park.

Q Would it take you near to your place of employment? A No, sir, Bergen street and Springfield avenue; that would be about a mile and a half.

Q That would be the place nearest to your place of employment, would it? A Yes, sir.

30 Q Can you say how long that trip would take in to business going from Madison to Springfield avenue and Bergen street and then going the other mile or so to the store by what means of transportation you used?

Mr. Palmer: I object.

Objection overruled.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

40 A The bus would take me from the house to Springfield avenue and Bergen street in about

Max Gottfried, cross.

twenty-five or thirty minutes and then it would take me about five or six minutes to make the rest of the trip.

By the Court.

Q By what means? A Trolley car.

10

By Mr. Williams.

Q Five minutes from Springfield avenue and Bergen street to where? A Clinton avenue; that the nearest.

Q Then what would you do? A Then I would have to walk the block from Clinton avenue to Bigelow street.

Q Can you remember in the three or four months you lived in Madison prior to the accident how many times you took the bus coming down? A Probably a dozen times.

20

Cross examination by Mr. Gibb.

Q When you saw Mr. Moge's car it was partly across Osborne Terrace, was it not? A When I saw Mr. Moge's car it was just to the corner.

Q How far away was your car? A About ten feet from the corner.

30

Q Ten feet from the southerly corner? A From the crosswalk.

Q You said that there was no horn blown? Do you mean by that that you didn't hear one?

A I didn't hear any horn blown.

Q You don't know whether there was a horn blown or not? A I couldn't say.

Q If you were two or three hundred feet down Osborne Terrace at the time the horn

40

Max Gottfried, re-direct.

was blown you wouldn't be able to hear it, would you? A I couldn't say.

Q The car you were in was what year car?

A The Ford car?

Q Yes. A I believe it was a 1926 model.

Q It made a lot of noise, didn't it? A No.

10 Q Did your brother apply the brakes? A When he seen the other car he applied the brakes.

Q How far away was he at that time? A He must have been about ten feet also from the corner.

Q What direction did his car take after he applied the brakes? A He turned up Shephard avenue to avoid a collision.

20 Q Otherwise you would have gone straight across on Osborne Terrace? A Yes, sir, straight across Osborne Terrace.

By the Court.

Q If you had not gone with your brother that morning and had gone by the bus you would not have gotten to the place of business as soon as you would have gotten there with your brother? A No, sir.

30 Q I mean, that was the quicker way. A Yes, sir.

Re-direct examination by Mr. Palmer.

Q Was there any particular hour for you to be at the shop in the morning.

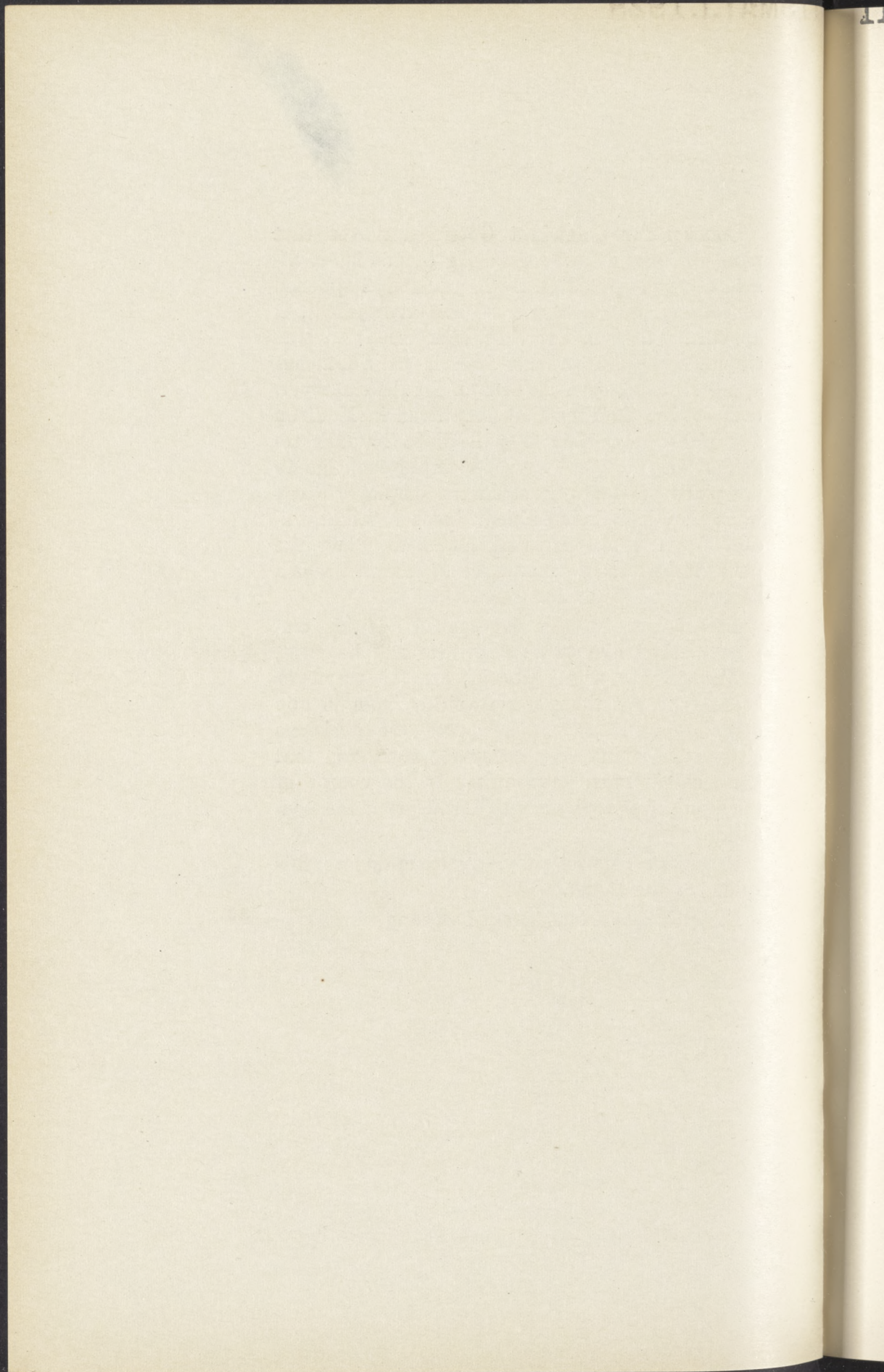
The Court: He has testified that there wasn't.

Counsel for defendant Gottfried moves that plaintiff be non-suited on the ground that it affirmatively appears that this accident happened out of and in the course of his employment, it appearing that at the time Max Gottfried was employed by his brother Morris as a butcher and that it had been the custom for the employer, both during the time that they lived in Madison and previously when they lived in Newark together, for the employer and employee to go to the place of employment in the employer's car when they left their common home together, except for the few isolated instances when the plaintiff had some conveyance of his own which he borrowed from someone else. 10

The Court: (After argument.) If his employer asked him to go with him and he went, undoubtedly it was beneficial for the employer because he got there more quickly than in any other way. I have looked over the decisions cited and I think they cover the case, and that the accident must have arisen in the course of the plaintiff's employment. I will grant the non-suit. 20

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal. 30



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

New Jersey Court of Errors and Appeals

MAX GOTTFRIED,

Plaintiff,

vs.

MORRIS GOTTFRIED,

Defendant.

*Action
at Law.*

On Appeal.

BRIEF FOR DEFENDANT-APPELLEE.

Facts.

Max Gottfried sued his brother Morris and another in the Essex Circuit Court, claiming damages for injuries alleged to have been sustained by him by reason of the negligent operation by the defendants, or either or both of them, of their respective automobiles at or near the intersection of Osborne Terrace and Shepard avenue, in the City of Newark, on August 24, 1927. He alleged that he was an occupant of the car of his brother as an invitee at the time of the accident.

At the trial before the Honorable William A. Smith and a jury on April 22, 1929, the defendant-appellee, Morris Gottfried, by his counsel, in the opening admitted negligence in the operation of the car and went to trial upon two of the affirmative defenses pleaded; first, an assumption of risk by the plaintiff; and, second, that the accident complained of arose out of and in the course of the plaintiff's employment, and that, therefore, the plaintiff was limited as to his rights against his brother Morris to such recovery as he might be entitled to under the Workmen's Compensation Law of this State.

At the conclusion of the plaintiff's case a motion for non-suit was made on behalf of the defendant-appellee on the second ground above specified, and after argument the motion was granted and a non-suit directed by the trial court in favor of the defendant-appellee, Morris Gottfried, and against the plaintiff, Max Gottfried.

Subsequently, a judgment final was entered on this non-suit and from this judgment the plaintiff-appellant appeals.

The only ground of the appeal, as set forth in the notice, and the only ground argued in the plaintiff's brief is the granting by the trial court of the non-suit.

By stipulation the only testimony printed in the State of the Case is that of the plaintiff himself; it being the only testimony bearing on the issue upon which the non-suit was moved, granted and appealed from.

Plaintiff disclosed early in his testimony that the defendant Morris was his brother and that at the time of the accident he worked for him (Case, p. 21, ll. 38-40).

FIRST POINT.

Defendant-appellee urges, as his first ground in support of the non-suit, that plaintiff's employment by this defendant at the time of the accident being shown by the evidence, the Court was justified upon this showing alone in non-suiting the plaintiff; the disposition of any further queries such as the one as to whether or not the accident arose out of and in the course of employment being in the first instance the sole and exclusive province of the tribunal set up by the Legislature for that specific purpose under the Workmen's Compensation Law.

By the Workmen's Compensation Law the Legislature afforded protection and a measure of security not only to the employee but also to the employer—security and protection against the delays, the expense and the frequently ruinous amounts of verdicts returned by juries in civil suits for damages for personal injuries. It can not be doubted that these were among the important elements influencing the Legislature in providing this Act. After its passage the employer knew to a certainty the nature and extent of his legal obligations to his employee in consequence of personal injuries, and he also knew and was secure in the knowledge that his interests as well as those of his employee would be conserved by the tribunal set up by the Legislature, and under the rules and regulations provided in the Act that he would no longer be harrassed by suits at law—the mere defense of which was in itself very often a considerable burden and expense, and the recoveries in which might and often did wipe out the fruits of years of effort and enterprise.

The cases tried—the questions mooted and determined by the Workmen's Compensation Bureau—may well be classified under three general groups: Was there employment? Did the accident arise out of and in the course of that employment; the nature and extent of the injury and the amount of compensation to be awarded for that injury. These questions are all under the Act and, in the first instance, the exclusive province of the Bureau—not the Circuit or any other court of this State.

The first of these questions the plaintiff in the case at bar answered in the affirmative, and it is most respectfully urged that when he did so the learned trial judge at the Circuit could not but

take the first opportunity afforded in the orderly procedure of the trial before him to relegate that plaintiff to the tribunal where he belonged—and that opportunity first came in the motion to non-suit.

It is further respectfully urged that to hold other than is contended in this first ground is to permit any employee to try out in a suit at law any or all of the questions which under the Compensation Act should be tried in the first instance by the Bureau—to give to the employee an election as to the tribunal in which his case will be heard. If this be possible, the Workmen's Compensation Law has lost one of its most important and valuable benefits to the citizens of this State.

Had the plaintiff in the case at bar promptly proceeded under the Compensation Law, and had the Bureau, upon the facts produced before it by the plaintiff, determined that the accident for the consequences of which he now seeks compensation did not arise out of and in the course of his employment, he could then have prosecuted his action at law, and his employer—this defendant—would have been barred from the defense pleaded by him, and upon which his non-suit is founded. His reason for not doing so was obviously the fear that he would certainly be successful and receive the award provided in the schedule for the injury sustained—approximately \$2,000.00, as compared with the \$10,000.00 which he seeks to recover in the case at bar.

It is respectfully submitted that the action of the trial court in granting this defendant's motion to non-suit was justified upon the reasons above set forth.

SECOND POINT.

“The relation of master and servant continues during the carriage of the servant to and from his work when done by the master, or with his consent, where from the character of the service such transportation is beneficial both to the master and the servant.”

This is the principle laid down by this Court in *Cicalese v. Lehigh Valley Railroad Company*, 75 N. J. L. 897. It has never been departed from by this Court. It has been followed by the Courts of this State without exception.

The Cicalese case was not one arising under the Compensation Law. It came to this Court on assignments of error in the trial court's charge respecting the measure of duty owing to the plaintiff by the defendant: Was it that owed to an employee or merely that owed to a licensee? The status of the parties at the time of the accident was, therefore, of vital importance, and this Court held that status to be that of master and servant, and in order to do so laid down the principle quoted above. At the time of the accident the employee was on his way home after his day's work was finished, and was using a conveyance furnished by the employer. That conveyance made it more convenient—easier for the employees to reach their work and get back—and the more conveniently, the more quickly they reached their work the greater the benefit to the employee.

In 1919 this Court cited with approval the principle of the Cicalese case in *Depue v. Salmon Co.*, 106 Atl. 379; a case in which the principle was applied to impute to the master the negligence of the servant in the operation of a car furnished to the employee by the employer so

that he could the more quickly reach his place of employment. Here again the benefit to the employee is the convenient and quick transportation to and from his work, and to the master the saving of his employee's time and the consequent increase in his working hours.

In 1926 the Supreme Court in *Soden v. Public Service Transportation Co.*, 134 Atl. 560, reversed the Common Pleas Court and affirmed the Compensation Commissioner in holding that an accident arose out of and in the course of employment where the facts were that it was the practice of the defendant to transport its bus drivers to their respective stations in a passenger automobile driven by one of the bus drivers. Upon the occasion in question the driver of this car, apparently to satisfy his own curiosity, deviated from the usual and direct route to the bus station and while returning from that deviation the accident occurred. This case was considered by this Court and its decision appears in 103 N. J. L., p. 713.

In view of the earlier decisions by this Court in support of the principle of the Cicalese case, the writer believes that this Court divided evenly in the Soden case because of the element of deviation in that case, and which, of course, is not present in the case at bar.

In 1927 the Supreme Court followed the principle of the Cicalese case in *Rachels v. Pepon*, 5 Misc. Rep. 122; a case under the Compensation Law where the query was as to whether the accident arose out of and in the course of the employment. Here the employee was in the habit of boarding this employer's truck in Passaic and proceeding in it to Hoboken, where he assisted in loading it and later in the making of deliveries

from it. On the night in question he had obtained the employer's consent to proceed to Hoboken by other means, and while doing so was killed. The Court said:

“Under the facts in this case we think his service began when he left Passaic and proceeded toward Hoboken. While his actual work began in the latter place, yet to reach there was an act within and necessary in his service toward his employer.”

In none of these cases does it appear that monetary or other like consideration was paid the employer for the transportation. In all of them, and in others which might be cited, the actual work of the employer began only when the place of employment was reached. In all of them the benefit to the employee was a quick and convenient transportation to the place of employment, and to the employer the benefit that must of necessity follow in obtaining the prompt arrival of his employees at the place of employment. And, these are the benefits to both employer and employee in the case at bar.

That there existed between employer and employee an arrangement or agreement whereby the master was to transport the servant to and from his work is assumed by plaintiff's counsel in one of the early questions propounded to his client, for he says (Case, p. 22, ll. 11-16):

“Was there or was there not any kind of an arrangement existing between you and your brother Morris that the wages that you received *had nothing to do with the transportation to and from your place of business?*”

This question, of course, pre-supposes that there was (and that counsel knew there was) an arrangement for transportation. Beginning here and continuing all through the plaintiff's case

and into his brief the theory seems to persist that in order for the employment to continue during transportation it must of necessity be transportation for hire and arise out of an express agreement or arrangement. It is submitted that there is no authority in the cases of this State for the first proposition, and that the second ignores the principle that what may be expressly agreed may be implied from the acts of the parties.

Plaintiff frankly admits that it was his practice from the inception of his employment, and while both parties lived close by the place of employment, to be transported to and from his work by his brother (Case, p. 34, ll. 14-15). Again he says that it was his practice to go back and forth in the very car involved in this accident (Case, p. 29, ll. 26-27), and over the same route followed on the day of this accident (Case, p. 32, ll. 24-27); that he had no car of his own (Case, p. 29, ll. 26-27); that the car was used in his brother's business (Case, p. 30, ll. 26-34); and that at times he drove it in the delivery of goods for his brother (Case, p. 32, ll. 11-14).

He demonstrated—although he would not admit the effect of his demonstration—that riding in his brother's car was the quickest as well as the most convenient means of getting to and from his work, for he says that it usually took them twenty minutes to make the journey (Case, p. 30, ll. 35-40), and later he admitted that the use of his brother's car was the quickest way of getting to work (Case, p. 40, ll. 29-30); that there were three other means of travel open to him—by train, which he never used (Case, p. 37, ll. 34-35); by bus, which in the three months he had lived in Madison he had not used more than a dozen times (Case, p. 39, ll. 19-22); and by means

of the cars of friends, which on occasion he would borrow when he had spent the evening away from home (Case, p. 27, ll. 20-26). He could not say how many times this had occurred (Case, p. 31, ll. 39-40; p. 32, ll. 1-10).

He says that when he came by bus he would alight in Newark, about a mile and a half from his place of employment, then proceed by trolley to within a block of that place and walk the balance of the way (Case, pp. 38-39).

Plaintiff was a butcher, had evidently learned his trade with his brother, and had worked for him about a year prior to the accident (Case, p. 30, ll. 20-28).

It is respectfully urged that from the above testimony the learned trial court is well justified in finding first that there was a practice set up as between these two brothers, and followed—except in those instances where the plaintiff's social engagements interfered—for the brother to transport the plaintiff from his place of employment to the home which he shared with him as a boarder. It seems hardly necessary to urge that this practice was of mutual benefit both to the employer and to the employee, and continued the employment during the transportation.

The picture shown by the testimony is that of a small butcher who had as his assistant his brother, who at the same time boarded at his home, and what more natural, what more convenient, and what more to their mutual benefit than that an arrangement should be set up, by mutual acquiescence and observance, that the most convenient, the easiest and the quickest method of transportation for them both from their home to their place of employment and back again should be used.

The plaintiff paid nothing for his transportation, and to that extent he benefited. He was transported conveniently and quickly, and to that extent he benefited.

The defendant by the arrangement was enabled to have with him when he opened his store the only assistant that he used in his business, and he was assured by the use of this means of transportation that he would not be subjected to the inconvenience, the delay and the annoyance incident to any tardiness in his brother's attendance upon his employment, occasioned by the exigencies of the use of the usual public means of transportation open to him in getting from a place so remote from the southerly part of Newark, as is Madison.

It is respectfully submitted that there are no degrees of benefit mentioned in the legal proposition laid down by this Honorable Court in the Cicalese case, and that if there was some benefit accruing to both of these brothers the Court was justified in granting the motion to non-suit.

THIRD POINT.

The plaintiff's case was based upon the theory of invitation. His pleadings allege it, his opening to the jury asserted it, the examination of the plaintiff clearly shows that to be the theory upon which the liability of the defendant was predicated. It was the theory upon which the case was presented both at the trial and here in the plaintiff's brief. The first reference to it in the testimony is at the top of page 23 of the State of the Case.

“Why, he asked me if I would ride to work with him that morning; I told him yes.”

Apparently, it was the practice of the defendant Morris to awaken his brother, the plaintiff, every morning (Case, p. 33, ll. 30-31) and at that time to make this so-called invitation. A careful analysis of the testimony will disclose, however, that it was not in reality an invitation but rather an inquiry to ascertain—on those occasions when the brothers had not returned together the preceding night—whether Max had a borrowed car in which he could ride to work that morning. The salutation was the same every morning (Case, p. 34, ll. 16-19). It did not vary on those mornings when he had borrowed another car to get home the night before and would, presumably, use it to go to work in the morning (Case, p. 34, ll. 20-31). There was no difference in the salutation when Morris knew his brother had another car (Case, p. 37).

As between two brothers—one the employee of the other—it is submitted that the most favorable construction that can be placed upon this testimony is that it was an inquiry to ascertain what means of transportation Max had at his disposal; did he have a car in which to get to work. That it was an invitation reiterated every morning during the year of this employment stretches credulity to the breaking point, and is so improbable as not to entitle it to the benefit of the presumption that might otherwise be based upon it at the close of the plaintiff's case.

In addition, it is submitted that such an invitation is inconsistent with the status of these two men—employer and employed—and that what the plaintiff terms an invitation was in effect a direction to ride with the employer unless he had at his disposal a means of transportation as quick as the employer's car. In this connection it is worthy of note that plaintiff's counsel

made no attempt to reframe his questions so as to properly develop whether or not plaintiff was under a duty to ride with defendant after an objection to the form of his first question along that line had been sustained (Case, p. 22, ll. 27-30).

It is most respectfully submitted that plaintiff had failed in the presentation of his case to support the theory of invitation; that had he done so such a theory would have been inconsistent with the status of the parties at the time of the accident, and that for the reasons urged herein the action of the trial court in granting this defendant's motion to non-suit should be affirmed and plaintiff's appeal dismissed.

SAMUEL D. WILLIAMS,
Attorney for Defendant-Appellee.

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

New Jersey Court of Errors and Appeals

MAX GOTTFRIED,
Plaintiff-Appellant,

vs.

ALBERT W. MOGE and MORRIS
GOTTFRIED,
Defendants-Respondents.

*Action
at Law.*

*On Appeal
from Essex
County Cir-
cuit Court.*

BRIEF OF PLAINTIFF.

Statement of Facts.

So far as we have been able to ascertain, there has been no case decided in New Jersey which involved facts similar to those in the present case.

The defendant Morris Gottfried operates a butcher shop in Newark. He is married and maintains a home in Madison, about ten miles from Newark. He had working for him as a butcher his brother Max, the plaintiff herein. Max boarded at the home of his brother and paid the rate of board which would have been paid by a stranger. When he was first employed by the defendant Morris Gottfried it was agreed that his salary would be \$30.00 a week, and there was absolutely nothing said or agreed upon as to how the plaintiff was to go to work or how he was to get back after working hours were over; and it is very clear that at the time of the hiring the wages did not take into consideration, or were not intended to take into consideration either the fact that Max would board at the home of his brother or that the brother might from time to time bring Max along to work in the

morning and might from time to time give him a ride out to Morris' house after the hours for work had ended in the evening for as a matter of fact, at the time of hiring Morris lived in Newark and did not move to Madison until seven or eight months after Max entered his employ. The evidence disclosed at the trial was that Max was a married man but was separated from his wife and at the conclusion of the day's work he would very frequently stay in Newark for the evening with one friend or another, and many times when this happened some of these friends would loan him their car and he would drive to Madison, spend the night at his brother's home and Max would then drive that friend's car back to Newark in the morning and return it to the friend and then return to work. The facts also disclosed that on other occasions he would come in to work from Madison on a bus. There were also many occasions when his brother Morris would waken him in the morning and inquire as to whether or not Max would like to ride in with him (Morris), and on these occasions if Max had not driven home the night before in the car of a friend, he would accept the invitation of Morris and would ride in with his brother, the brother always doing the driving.

On the morning of January 11, 1928, Morris Gottfried awakened his brother Max, the plaintiff, and asked him if he cared to ride in with him (Morris), that morning. Max said he would be glad to do so and they started for the place of business in Newark. At the time of the accident Morris was driving his Ford car in a northerly direction along Osborne Terrace, Newark, and at the point where that street intersects Shepard avenue there was a collision between the car of Morris and the car of the defendant Moge

due, it is claimed, to the negligent way in which both Morris Gottfried and Moge operated their respective cars at the time.

The evidence also discloses that at least twice before the accident occurred Max Gottfried had requested his brother to "take it easy" while crossing some of the cross streets in that neighborhood. There was also evidence from disinterested witnesses that the defendant Morris Gottfried's car was being driven at a rate of speed of from 30 to 45 miles per hour. Indeed, the defendant Morris openly admitted in court that he had been negligent in his operation of the car (see p. 24, l. 12).

At the conclusion of the plaintiff's case the trial court non-suited the plaintiff as to the defendant Morris Gottfried, on the ground that he was an employee of that defendant at that time and was therefore limited in his remedy to the terms of the Workmen's Compensation Act of the State of New Jersey, and it is from this judgment of non-suit that the plaintiff appeals.

The Testimony.

All the testimony that there is in this case which concerns the terms of employment, from which no inference can be drawn that at the time this accident occurred the plaintiff was in the defendant's employ, is as follows:

On p. 22 the plaintiff testified that he was employed as a butcher in his brother's place of business at 717 Bergen street, Newark, N. J., and that his wages were \$30.00 a week. At l. 10 he was asked:

Q Was there or was there not any kind of an arrangement existing between you and your brother Morris that the wages which

you received had anything to do with the transportation to and from your place of business? A There was not.

Q How would you from time to time either get in from Madison where you lived, or get home from Newark to Madison aside from those times when you went back with your brother? A Whenever I didn't want to go back with him I went to a friend's house and slept there, or I took the bus or his car and drove back.

Q When you used the friend's car to Madison how would you come back the next morning? A In the friend's car.

* * * * *

Q Did the fixing of your salary at \$30.00 a week have any bearing on your board at all? A No, sir.

Q On the morning in question how is it that you and your brother Morris came to be together in the same car? A Why, he asked me if I would ride to work with him that morning; I told him yes.

On p. 23, l. 10 he was asked:

Q Was there any regular time for opening the butcher shop? A Why, he had a regular time to open the butcher shop.

Q Who did the opening of the butcher shop, you or your brother? A My brother.

On p. 26, l. 20 appears the following:

Q Did you receive any salary from your brother while you were laid up? A No, sir.

Q Did you or did you not pay board while you were laid up? A I paid board.

On pp. 28 and 29, l. 20, the following appears:

Q In your job with your brother were there any particular hours which you had? In other words, was there any particular time you had to be at the shop in the morning? A No, sir.

Q How about quitting time? A I closed the store at six, but if there was any work Friday night I would work until nine o'clock.

Q When did your work begin with your brother each day and when did it end? A The work began when I got in the store.

Q When did it end? A It would end whenever he closed the store.

On p. 28, l. 35:

Q After you were able to resume work did you go to work? A Yes, sir.

Q When were you able to resume work? A I don't know the exact date; it was about nine weeks after the accident.

Q And then whom did you work for? A Morris Gottfried.

Q Your brother? A Yes, sir.

Q Did your wages begin again then? A Yes, sir.

In his cross examination he testified (bottom of p. 32) that he himself never drove this car to or from work and that it was always driven by his brother Morris. On page 33 he testified that on awakening him his brother asked "Will you go with me," and explained that it was on account of that invitation he went in the car that morning. On page 34, line 15, he testified that some weeks his brother would drive him in about three times and some weeks it might be five times. On page 37, line 5, he testified that the arrangements which he had made for boarding at his brother's home were made with his brother's wife. On page 38 he testified as to the route he would follow on these occasions when he would leave Madison in the bus and on the other occasions when he would leave Newark in the bus to get home to Madison. He also testified that when making the trip by bus from Madison it would take about 30 to 35 minutes. On page 31, it would appear from the cross examination that when he rode in with his brother Morris the trip would take even longer than this, because Morris would leave home sometimes at

6:30 in the morning and sometimes at 6:45, with the idea of opening the store at 7:30. On p. 39 he testified that in the three or four months that he had lived in Madison he had come down by bus at least a dozen times. On p. 40 he was asked by the Court if coming down with his brother was quicker than coming down by bus, and he stated that it was.

It was also testified by the plaintiff that there was no particular hour for him to be at the shop in the morning.

This is the entire testimony produced in this case that has any bearing whatsoever on the terms of the employment or any understanding or agreement had between these brothers, and we feel it shows conclusively that there never was any agreement on the part of the defendant Morris to furnish transportation to the plaintiff; that the plaintiff very frequently used other means of getting to and from his work; that he was under absolutely no obligation of any kind to ride back or forth with his brother, the defendant; that there was no particular hour for this plaintiff to be at the shop in the morning; that it was not the plaintiff who opened the store and there was no necessity for him to be there at the time it was opened; that the evidence is uncontradicted that his work did not begin until he had arrived at the store. It was very significant also that his wages ceased from the time he was hurt until he was able to resume work, or for a period of about nine weeks; also that during that entire period he had to pay board to his sister-in-law, which would strongly indicate that even the defendant himself did not consider that his brother had been injured in the course of his employment, for if he felt that if the plaintiff was in his employ at the time it is most likely,

being brothers, that he would have paid him during the period the plaintiff was unable to work.

Reference will hereafter be made in this brief to two general rules adopted by courts generally and certainly adopted by the courts of New Jersey, to determine whether or not a person injured on his way to work was injured in the course of his employment, and it is respectfully submitted that the foregoing evidence clearly shows that there is not *one single element* in this case to bring it within what is referred to as the second general rule, but on the other hand that the evidence being as it is the findings have always been in similar situations that it is a case which falls within the first general rule, or that it did *not* happen in the course of the employment.

THE LAW.

We respectfully submit that it is an impossibility, without learning the facts involved, for any one to answer the following question: "If an employee is injured on his way to or from his work, is he limited exclusively to his rights under the Workmen's Compensation Act, or has he an action at law against the employer who injured him?" This is proven by the fact that in one case the holding will be that the relationship of master and servant existed at the time, and therefore the plaintiff is remitted to his rights under the Workmen's Compensation Law, and in another case, decided by the same court, it will be held that the relationship of master and servant did not exist at that time, and that the injured plaintiff has his remedy at law.

In determining in the one case that the relationship of master and servant existed, and in the

other case that it did not exist, the courts have found it necessary to apply certain tests in order to reach a just conclusion, and these tests, originally applied in England, and thereafter adopted by many of the courts of this country, including our own courts, will be found later on in this brief when reference is made to our own case of *Fisher v. Tidewater Construction Co.*, and the Maryland case of *Harrison v. Central Construction Co.*, the reasoning in which our Supreme Court adopted in full, and the Supreme Court's opinion was thereafter affirmed by this Honorable Court.

It seems to be recognized that there are two general rules applicable to the question as to whether an injury sustained while going to or returning from work arose out of and in the course of the employment, and the first rule is that it did not happen in the course of the employment, and the second rule is that it did happen while the relationship of master and servant existed. Unfortunately for the plaintiff in this case almost every reported case decided in New Jersey to the present time comes under the second rule, namely, that the relationship of master and servant existed at the time, but that has been wholly due to the fact that the proof in each case not only justified those rulings, but made them imperative. Be that as it may, there is one New Jersey case where the facts brought it under the first general rule, namely, that the relationship of master and servant did not exist at that time, and we do feel that a reading of the testimony in the Gottfried case will clearly show that the relationship did not exist in this case, and that it is devoid of every element which is required to bring it under the terms of the second general rule.

Therefore, to advance the claim that in almost every reported case in New Jersey it has been held that the relationship of master and servant existed and therefore must have existed in this particular case, is to entirely overlook the very important fact that in each case so reported all the elements comprising what is known as the second general rule were present, and it by no means follows that in a case where not one of those elements are present that an employee injured while being driven to the place of business by his employer before the time for work began and purely as the result of a voluntary act on the employer's part, made that employee while so passively riding in the employer's car the servant of the latter at that time and place.

In *Matthison v. Payne, Director General etc.*, 98 N. J. L. 87, 118 Atl. 771, decided by the Supreme Court, Matthison was injured while being transported to work on the Lehigh Valley R. R., and it appeared that it was the general practice of the company to run a train known as the "Modoc" from its terminal in Jersey City for the purpose of gathering up its employees at various points and conveying them to or near their respective places of employment. On the day in question Matthison boarded the "Modoc" but that train had subsequently stopped under orders, and he thereupon boarded another engine with the consent of the crew thereof, and it was while being transported on this engine that he was injured, and the Supreme Court held that the relation of master and servant existed during the carriage of the servant to and from work when done by the master and *where the character of the service is beneficial to both*, but it is to be noted in this case that we are dealing with a situation where the employer made it a general practice of

providing transportation for all employees, and there was certainly an implied contract existing in that employment which covered the question of transportation, from the very nature of the work to be performed and the place where it was to be performed.

A somewhat similar situation exists in *Cicalese v. Lehigh Valley R. R. Co.*, 75 N. J. L. 897, 69 Atl. 166, decided by the Court of Errors and Appeals. In that case, at the close of work on August 8, 1925, the plaintiff, who was a trackman in the employ of the defendant, started to go home on a hand car in company with some other employees. This had been their custom for quite a period of time. The car was provided for just that use by the defendant company, and it was while using it that he was injured through the defendant's negligence. The trial court had been requested to charge by the defendant that as the injury happened after the work for the day had closed, and there being no evidence of any contract by the defendant to carry the plaintiff to and from his work, the relation of master and servant no longer existed. This court there held that it was not error to refuse that request to charge, because the relation of master and servant continues during the carriage of the servant to and from his work, when done by the master, or with his consent, *where from the character of the service such transportation is beneficial both to the master and servant*. The Court pointed out that the servant was working at different points along the railroad, and that it was the custom of the defendant to furnish a sufficient number of hand cars to take all of the men belonging to the gang to a destination convenient to their homes, and that the furnishing of such cars by the defendant and their use by the plain-

tiff for such purpose, being a custom availed of by both parties, it became an element of the employment, accepted and acted on by the parties as a part thereof.

This court relied very largely on the reasoning in *Bowles v. Ind. Ry. Co.*, 27 Ind. App. 672, 62 N. E. 94, where the plaintiff was a workman engaged in the construction of a trolley line and was transported to and from work in a wagon drawn by horses furnished by defendant. On one such trip he was injured, and on the question as to whether or not the relation of master and servant continued to exist during that conveyance, the Court said:

*"In view of the migratory character of the service, such transportation facilitated the prosecution of the work, and was beneficial to both employer and employees. It was by the conduct of the parties, if not by their express agreement, an ingredient and instrumentality of the employment. * * * It was arranged between the employer and employee that the latter would thus go and come with his fellowmen, thereby expediting the work with greater convenience for all concerned."* (The italics are mine.)

It will be observed, however, that the facts in both the Cicalese and the Bowles case are not analogous to those in the Gottfried case, because in each of the foregoing cases one of the principal elements consisted in the out and out furnishing of transportation, and had for its purpose the expediting of the master's work with greater convenience for the master and the servant. The transporting of Max Gottfried by Morris Gottfried never had for its purpose the expediting of the work of the master, because there is no evidence in this case whatsoever that Max Gottfried on any of the many occasions when he used other means of getting to his work was

ever late, nor was the act of his brother in frequently inviting Max to ride in to town with him at all analogous to the well established custom referred to in both the Cicalese and Bowles cases.

In the Cicalese case this court also referred to *Gillshannon v. Stony Brook R. R. Co.*, 10 Cush. (Mass.) 228, where the plaintiff rode each morning and evening with other members to and from work on a gravel train of the defendant with its consent *and for mutual convenience*. No compensation was paid by the laborers for passage, and the company was not under any contract to so convey them. On one such trip the plaintiff was injured and the court held that if there had been a contract between the master and the servant then the injury was received while the servant was engaged in the service for which he was employed, but that if it was not inferable from the evidence that the contract actually embraced transportation there was a permissive privilege granted to the plaintiff, of which he availed himself, *to facilitate his labor and service* and was connected with it, and the relation of master and servant existed.

It will be readily seen that the facts in the Cicalese case and those cases of outside jurisdiction which this court reviewed in the Cicalese case, in no way correspond with those in the Gottfried case, because in all of those cases the holding was based on the fact that "*from the character of the service such transportation is beneficial both to the master and servant.*"

It is also interesting to note that five justices of this court dissented from the opinion filed in the Cicalese case.

In 1919 this court had before it the case of *Depue, et al. v. George D. Salmon Co.*, 92 N. J. L. 550, 106 Atl. 379, and it again held, in view of the facts in that case that the relationship of master and servant existed while an employee was on his way home after his day's work, and while driving his employer's automobile, but the facts there were: The Salmon Company testified, by George D. Salmon, its manager, that at that time of year *their work was heavy, and this particular employee had to be there earlier than ordinary business hours, and that there was an arrangement between the company and the employee that the latter was entitled to take the firm's automobile to drive home at night and to drive to the place of business in the morning, and it was expressly testified to that the object of this arrangement was to enable the employee to reach his place of employment at an earlier hour than he otherwise could.* In other words, the very crux of that opinion is the benefit to be derived by both master and servant, as well as the express arrangement between the employer and employee for the use of this vehicle, and it hinges on a point which does not exist in the Gottfried case, and concerning which there is very positive testimony that it does not exist in the Gottfried case.

In the Depue case three of the justices of this court dissented from the opinion as filed.

In 1921, the Supreme Court had before it the case of *Fisher v. Tidewater Bldg. Co.*, 96 N. J. L. 103, 114 Atl. 150, which subsequently was affirmed by this court, 97 N. J. L. 324, 116 Atl. 924, and in that case it was held that an employee injured on his way home from work was entitled to compensation under the Workmen's Compensation Statute, but for reasons which certainly do

not exist in the Gottfried case. The facts were: Abraham Fisher was employed by the Building Company at Gloucester City, and to get to and from his work at the usual time he would have to make use of a train and a ferry, and it was while attempting to board the train after his day's work was finished that he was struck by another train on the same railroad and killed. In that case, however, the shuttle train which he was attempting to board, as the opinion points out, *had been provided for the employees by the employer*, in addition to which the company had given to Fisher tickets for his transportation upon the train, which tickets he and the other employees were to surrender to the conductor as fare, and, as the Supreme Court points out, Fisher paying nothing to the defendant, except his work, *which included the transportation*.

It will therefore be seen that there was an entirely different relationship existing between the employer and the employee in the Fisher case from that which existed between these two brothers who lived in the same house, in the Gottfried case, for in the Fisher case the furnishing of transportation was a part of the arrangement existing between that employer and his employees and that arrangement embraced the furnishing of transportation. Indeed, the Supreme Court recognized the fact that there are two general rules applicable to the question as to whether the injury arose out of and in the course of the employment, and points out that the first rule is that an employee who is on his way to work is not in the course of his employment; the second rule is that where a workman is employed to work at a certain place, *and as a part of his contract of employment there is an agreement that the employer shall furnish him free transporta-*

tion to or from his work, the period of service continues during the time of transportation, and if an injury occurs during the course of transportation, it is held to have arisen out of and in the course of the employment, and points out that this rule has the support of English and American cases, and, as before indicated, the opinion of the Supreme Court was subsequently affirmed by this court.

The Supreme Court stated in its opinion that in New Jersey at that time we had no case in our reports directly in point with those in the Fisher case, but stated that "there is in the Court of Appeals in Maryland a well considered case directly in point," and referred to *Harrison v. Central Construction Co.*, 135 Md. 170; 108 Atl. 874, in which case a construction company was engaged in work upon the Edgewood Arsenal at Magnolia, Md., and it furnished free transportation over the Pennsylvania Railroad lines on work trains to such of its employees as lived in Baltimore, giving to those employees identification buttons or identification cards, and the employees who were given free transportation were not paid by the construction company for the time engaged in making the run from Baltimore to Magnolia, but the pay began from the hours set for the beginning of the day's work. Harrison was injured while attempting to board that train, and it was held by the Maryland State Industrial Accident Commission that his was an injury which arose out of and in the course of the employment, which finding was affirmed by the Maryland Court of Appeals in the decision above referred to, and affirmed on re-hearing by the same court in 112 Atl. 627.

In addition to referring to the two rules applicable to the question as to whether an accident

arose out of and in the course of the employment, referred to by our own Supreme Court in the Fisher case, the Maryland court points out that the decisions of the English courts, which the Maryland court stated they considered to be in accordance with sound reason was, that the question depended upon whether the conveyance had been *provided by the employer* after the real beginning of the employment, *in compliance with one of the implied or express terms* of the contract of employment, *for the mere use of the employees*, and is one which the employees are required, or as a matter of right are permitted, to use by virtue of that contract.

The Court of Appeals of Maryland clearly recognizes the distinction which exists between the facts in cases such as *Harrison v. Central Construction Corporation*; *Cicalese v. Lehigh Valley*; *Depue v. Salmon, supra*, and *Soden v. P. S. Transportation Co., post*, because in the case of *Kendall Lumber Co. v. State*, 132 Md. 93, 103 Atl. 141, it distinctly held that an employee injured while on his way from work was *not* injured in the scope of his employment, and I would direct the attention of the Court to the fact that of the eight judges before whom *Harrison v. Central Construction Co.* was heard, four of those judges, including the Chief Justice, heard the *Kendall* case, which is an indication that they do recognize the distinction existing between the two rules which they themselves referred to in the *Harrison* case and which our Supreme Court adopted verbatim in the *Fisher* case. In the *Kendall* case the deceased was employed by the lumber company at a camp some few miles from where he lived. He and some other workmen owned a hand car, which they used daily in going to and from their work, using the tracks of the

lumber company's railroad along which to propel their car, with the full knowledge and consent of the company. On the evening in question the deceased and five other employees finished their work and started for home on this hand car, in the use of which the lumber company acquiesced for a long period of time. The hand car was struck by one of the company's locomotives, and at least two men were killed. The widow of one filed a petition with the Maryland State Industrial Accident Commission, which that body denied, on the ground that at the time the accident occurred the deceased was not an employee of the defendant, in the course of his employment, but was on his way home from work at the time of the accident. She thereupon brought the above action at law, at which time it was the defendant *lumber company* which claimed he was injured in the course of his employment, and that any action she had would be under the State compensation laws. The Court dismissed this contention by saying it was an erroneous assumption, for the proof showed that at the time it occurred *he had finished his day's work and was some distance from his place of employment and on his way to his home*. In other words, the case contained none of those elements which the same court in the Harrison case, pointed out are necessary to sustain the claim that the accident occurred in the course of the employment and while the relationship of master and servant was in force.

In 1926, our Supreme Court had before it the case of *Soden v. P. S. Transportation Co.*, 4 N. J. Misc. Rep. 817, 134 Atl. 560, but the facts being as they were in the Cicaless and Depue cases, it was there held that the relationship of master and servant existed at the time the deceased

met his death. In that case Soden was one of four drivers of Public Service busses *who were required to report to the night station master shortly before six o'clock each morning for duty*, and they were *then put into a touring car driven by another Public Service employee to be taken to the garage where their busses were waiting*. On the day in question the touring car started for the garage with these men, but on the way someone suggested that there was time enough to go on beyond the garage a mile or so further to look at the scene of an accident. The driver did this, and it was on the way back from viewing that accident that the touring car was struck by a train. It will therefore be seen that there could be no other ruling than to find that Soden met his death at a time when the relationship of master and servant existed, and that it arose in the course of his employment, and the facts can in no way be said to be analogous to those in the Gottfried case.

We recognize fully that there is and that there can be no hard and fast rule that an employee injured while on his way to or from work is or is not engaged in the scope of employment at that time, but that each case must stand squarely on the facts disclosed by the proof, and there surely can be no better illustration of this than the holdings in *Kendall Lumber Company* and the *Harrison* case in Maryland. Just as there was no case in New Jersey directly in point with the facts in *Fisher v. Tidewater Construction Co.*, at the time that was before our Supreme Court, there is no case in New Jersey at the present time where the facts are identical with those in the Gottfried case, and for that reason we are only able to point out to the Court the fact that the proof in the preceding New Jersey cases is entirely dif-

ferent from that in the Gottfried case, and to refer to cases from other jurisdictions where it has been held in cases where the facts were similar to those in the Gottfried case that the relationship of master and servant did *not* exist at the time of the injury. One such case was decided by our own Supreme Court in March of this year, namely, *Gruber v. Mercy*, 145 Atl. 106, in which case the claim was made that the accident was governed by the Workmen's Compensation Law, and that recovery could only be had thereunder. The plaintiff had been in the defendant's employ only a short time, and without any prior arrangement of any kind or without any understanding arising out of the terms of her employment, her employer apparently stopped at her house and invited her to get in his car, saying that he would take her down, in the course of which trip an accident occurred, and she was injured. The Supreme Court held that the relationship of master and servant did *not* exist, and that the act of the employer was simply one of courtesy wholly disconnected from the relation of master and servant, and we claim the same thing applies in the Gottfried case.

It should be remembered that the plaintiff and defendant in this case are brothers, living some little distance away from the defendant's butcher shop, and in all probability this defendant would just as frequently in the past have brought his brother into Newark in this car if the plaintiff had worked for any one else in the vicinity of the defendant's butcher shop, and the terms of employment had nothing whatsoever to do with the intermittent riding to and from the point where they lived to the point where they both worked. It was a natural courtesy extended by one brother who had a car to another brother

who did not have one, and while it was many times availed of by the plaintiff, it was just as many times declined and the plaintiff would go to his work by other means of locomotion. It was never the plaintiff who opened this store, but always the defendant, and there was no set time for the plaintiff to be at work, and there is no proof that he got to work any earlier on those occasions when he rode with his brother than he did when he came by bus or by means of another automobile. The positive and uncontradicted proof is that his salary never included transportation, that transportation was never mentioned between him and his brother, that he paid board at his brother's house the same way and at the same rate as a stranger would have done, and that he was only in the employ of his brother from the time he started to work at the shop until he had finished work at the shop, and it is respectfully submitted that there is absolutely nothing in the Gottfried case from which it can be claimed that the relationship of master and servant existed between these brothers until the shop was reached and work in the shop begun. This plaintiff was aware of the fact that he was not in his brother's employ until he actually began his work, and he certainly knows that the word transportation was never mentioned at the time he was engaged nor at any time thereafter, nor was it contemplated, nor was he compelled at any time to either come to his work or return from it in this automobile, and in fact there were a great many times when he did not accept his brother's invitations, and the proof being uncontradicted as it is we feel that weight should be given to his claim that at those times when he did come in with his brother it was solely as the result of an inquiry from his

brother as to whether or not he wanted to ride in with him that morning and had nothing whatever to do with any of the terms or conditions of his employment.

We feel that the situation in this case is somewhat analogous to that in *Hoimark v. Consolidated Traction Co.*, 60 N. J. L. 456; 38 Atl. 684, decided by this court. In that case one Lambertson was engaged in business with Hoimark. The evidence disclosed they were partners. At the time of the accident Lambertson was driving a horse and wagon along one of the streets in Newark and Hoimark sat on the seat beside him. The defendant had requested the trial court to charge that the contributory negligence of the driver was imputable to Hoimark. That the Court refused to do, but did charge:

"They were partners, and so far as partnership business is concerned, each partner is an agent of the other members of the firm. Whether they were engaged at that time in any partnership matters, or whether the journey through Broad street to Center Market was for the benefit solely of Lambertson, is a question of fact for you to determine."

It would, therefore, appear that here were two partners riding on the seat of a wagon which was being driven by one of the partners and apparently going to Center Market, Newark, when the accident occurred. There must have been some conflicting testimony as to whether or not at that time they were engaged in partnership business, else there would have been no justification for the defendant's request to charge, but in the face of any conflicting testimony there might have been the trial court refused to so charge but left it to the jury to say whether or not at that

time they were engaged in the business of the partnership.

In the Gottfried case there is no conflict of testimony, but all the testimony that there is negatives very strongly the idea that at the time this accident happened the plaintiff's employment had begun; in fact there is positive testimony that it had not begun and would not have commenced until the place of business was reached, and we feel that it was error on the part of the trial court to decide this question of fact and not leave it to the jury, just as was done in the Hoimark case, for in the latter case where the trial court had left it to the jury this Honorable Court affirmed his action.

Respectfully submitted,

PALMER & COOPER,
Attorneys of Plaintiff-Appellant.

JOHN W. PALMER,
Of Counsel.

