INDEX.

NEW JERSEY SUPREME COURT

PASSAIC COUNTY

FLORENCE MISSELL, by
FRANK MISSELL, her
next friend,
(*Plaintiff*) Respondent,

vs.

J. ARTHUR HAYES, and
EDWARD R. HAYES,
(*Defendants*) Appellants.

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Filed January 19, 1914.

NOTICE OF APPEAL.

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To Fred G. Stickel, Esquire, Attorney for Plaintiff:

Take notice that the defendants appeal to the Court of Errors and Appeals from the whole of the judgment entered in this cause on the following grounds:

1. Because the defendant, J. Arthur Hayes was not before the Court and was never served with summons in the above entitled action. Service of said summons and complaint was attempted to be made upon said defendant, J. Arthur Hayes.

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2. A motion to set aside said service was denied, notwithstanding the fact that said defendant, J. Arthur Hayes had not been brought into Court.

3. There was error in denial of the motion to set aside service of summons which affected the substantial rights of the defendant, J. Arthur Hayes.

4. That the verdict was obtained against the said defendant. J. Arthur Hayes, without due process of law.

5. Upon conclusion of the plaintiff's case the Court refused to grant a non suit in favor of the defendant, Edward R. Hayes.

6. Upon the conclusions of the defendants' case the Court refused to direct a verdict in favor of the defendant, Edward R. Hayes.

7. Because the verdict was contrary to the charge of the Court in finding against the defendant, Edward R. Hayes.

8. Because the verdict was contrary to the charge of the Court in finding against the defendant, J. Arthur Hayes.

9. Because there was no proof of relationship of Master and Servant existig between the defendants.

10 10. Because there was no proof of negligence.

11. Because plaintiff, Florence Missell, was guilty of contributory negligence.

12. Because the verdict was contrary to the weight of evidence.

13. Because the verdict was contrary to law.

EDMUND A. HAYES,
Attorney for Appellants.

Filed Dec. 28, 1912.

20 JUDGMENT RECORD.

Complaint.

J. Arthur Hayes and Edward R. Hayes, the defendants in this cause, were summoned to answer unto Florence Missell, the plaintiff therein, in an action at law upon the following complaint:

"Plaintiff, Florence Missell, residing at Delawana, Passaic County, New Jersey, says that:

1. On the 21st day of October, 1912, an order was made
30 by the Chief Justice of the Supreme Court admitting Frank Missell to prosecute this suit for this plaintiff, Florence Missell, and said order was duly filed in the Supreme Court Clerk's Office.

2. On the 29th day of August, 1912, the said defendant Edward R. Hayes was the owner of a certain motor driven vehicle, known as an automobile, and said defendant J. Arthur Hayes was in control, charge and possession thereof, under the authority and as the duly authorized servant and operator of said defendant, Edward R. Hayes.

3. On said last date said defendant J. Arthur Hayes, as such servant was in possession of and driving said auto along

a certain public street or road known as River Road, in the Borough of Delawana, in the County of Passaic and State of New Jersey, and at or near the home of plaintiff, Florence Missell.

4. Plaintiff, Florence Missell, was then and there lawfully in, upon and about said road or highway, lawfully attempting to cross the same.

5. It thereupon became the duty of said defendant, Edward R. Hayes, by his agent, J. Arthur Hayes, and of said J. Arthur Hayes individually, to use due and proper care so as to control and operate said automobile as not to collide with persons lawfully and properly using said road, and to use due care in giving to such persons some adequate and proper warning or signal of the approach of said automobile, and to observe and avoid colliding with such persons.

6. It was also the duty of said defendant, Edward R. Hayes to use due care in the selection of his servant to so operate, drive and control said car.

7. The defendant Edward R. Hayes, however, did not use due care in the selection of his said servant, but carelessly chose an incompetent and improper servant and operator of said auto, and said defendant, Edward R. Hayes, and J. Arthur Hayes, not regarding their duty as set forth in paragraph five, carelessly, negligently and recklessly drove and operated said automobile and neglected to control the same so as to avoid colliding with persons lawfully and properly using the said road, and drove and propelled said automobile along said road at a very high, fast and excessive rate of speed, without in any way controlling or endeavoring to control said automobile and without observing or endeavoring to observe the presence of said Florence Missell in and upon said road, and did not in any wise warn or attempt to warn the said plaintiff of the approach of said automobile.

8. Whereby the said Florence Missell while lawfully and properly using said road and without any fault or negligence on her part, was struck and thrown aside and to the ground by said automobile and was greatly bruised and wounded and divers bones of her shoulder and body were broken, her head, arms, breast, abdomen, knee and limbs cut and bruised, and in other respects was permanently and temporarily injured and was confined to her bed and home for a long period of

time and suffered great pain, and loss of sleep and comfort, and paid out large sums of money in attending to such injuries.

9. Therefore, plaintiff by her next friend demands as damages the sum of Two Thousand Dollars.

FRED G. STICKEL, JR.,
Attorney for Plaintiff.

Filed Nov. 8, 1912.

Answer of Edward R. Hayes.

10 The Defendant, Edward R. Hayes, answered as follows:

"Defendant, Edward R. Hayes, residing at 42 Lewis Street, in the City of New Brunswick, Middlesex County, New Jersey, says that:

He denies the truth of the matters contained in the complaint.

EDWARD R. HAYES,
Defendant."

Filed Jan. 30, 1913.

Notice of Motion to Set Aside Summons.

The defendant, J. Arthur Hayes, gave the following notice
20 of a motion to strike out:

"TO FRED G. STICKEL, ESQ.,
Attorney for Plaintiff.

Sir:—Take notice, that I shall apply to his honor, James F. Minturn, Justice of the Supreme Court, as his residence, in the City of Hoboken, on Saturday, the 11th day of January, 1913, at ten o'clock in the forenoon, for an order to strike out the name of the defendant J. Arthur Hayes in the above stated cause, because of the irregular and defective service of pro-
30 cess upon him attempted to be made, by leaving a copy thereof at the residence of Edward R. Hayes, the other defendant in the above entitled action, who is the father of said J. Arthur Hayes, which said residence of Edward R. Hayes is not the usual place of abode of the defendant J. Arthur Hayes.

Respectfully,

EDMUND A. HAYES,
Attorney of Defendant."

Affidavits.

The following affidavits were produced by J. Arthur Hayes at the hearing upon the motion to strike out the name of defendant, J. Arthur Hayes.

State of New Jersey,
County of Middlesex, ss.

Edward R. Hayes, of full age, being duly sworn according to law on his oath says that he is the father of J. Arthur Hayes, named as co-defendant with deponent in the above entitled action; that his said son, J. Arthur Hayes, has not resided in the City of New Brunswick since the month of September, 1908, but that he has since said time resided continuously in the State of Maryland, except for short vacations at the house of deponent and elsewhere. 10

Deponent further says that his said son is pursuing a course of preparation for the Catholic priesthood which requires a period of about eleven years to complete and that to the best of deponents belief his said son will reside in the State of Maryland until his ordination, a period of six years hereafter.

Defendant further says that his said son, J. Arthur Hayes, has no residence or place of abode in the family of deponent or elsewhere in the State of New Jersey to the best of deponents knowledge and belief. 20

EDWARD R. HAYES.

Sworn and subscribed to before me this eighth day of January, A. D. 1913.

EDMUND A. HAYES,
Attorney at Law, of New Jersey.

State of New Jersey,
County of Middlesex, ss.

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Frank Cox, of full age, being duly sworn, according to law on his oath says that on the 27th day of December, 1912, as Special Deputy Sheriff of the County of Middlesex in the State of New Jersey, he endeavored to make service of process upon J. Arthur Hayes, one of the defendants mentioned in the above entitled action; that he was unable to find said J. Arthur Hayes within the County of Middlesex, or to learn that his usual place of abode was in said County, but that he endeavored to serve said process by leaving a copy of the summons and complaint in the above entitled action, at the house of Edward R. Hayes, father of J. Arthur Hayes.

Sworn and subscribed to before me this eighth day of January, 1913.

FRANK COX.

EDMUND A. HAYES,
Attorney at Law, of New Jersey.

State of New Jersey,
County of Middlesex, ss.

10 J. Arthur Hayes, of full age, being duly sworn according to law on his oath deposes and says that he resides at Emmitsburg in the State of Maryland, and has resided in the said State of Maryland for about four years last past; that in the middle of September, 1908, he left the State of New Jersey and entered upon a course of study in St. Charles College, in Howard County, Maryland, in preparation for his ordination as a Priest of the Roman Catholic Church, which involved the giving up of his residence in the City of New Brunswick, N. J., and that he then had no intention of returning to his former home in New Brunswick, except perhaps
20 for short visits to his family and friends remaining therein, and has no present intention of so returning, but expects to spend a further period of six years in said State of Maryland in completing his said course.

Deponent further says that in September, 1911, he entered Mt. St. Mary's College in the town of Emmitsburg, Maryland, in further preparation for the priesthood and has been continuously since then and is now pursuing his studies in said institution for this purpose.

Deponent further says that when he gave up his residence in
30 the City of New Brunswick in September, 1908, he was aware that his preparation for the priesthood demanded a course of study covering a period of eleven years or more, to be spent in the State of Maryland, and at that time it was his intention and still is to have his residence in the State of Maryland and that his place of abode should be in the Institution at which he is pursuing his studies.

Sworn and subscribed to before me this eighth day of January, 1913.

J. ARTHUR HAYES.

EDMUND A. HAYES,
Attorney at Law, of New Jersey.

The Sheriff's return of service upon J. Arthur Hayes, is as follows:

"Within summons and complaint served December 26, 1912, upon J. Arthur Hayes, by leaving true copies thereof at his residence, No. 42 Lewis Street, in New Brunswick, New Jersey.

A. BOLLSCHWEILER,
Sheriff.

By FRANK COX,
Special Deputy Sheriff."

AFFIDAVIT OF PLAINTIFF.

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The plaintiff, Florence Missell, produced the following affidavit at the hearing on the motion to strike out the name of J. Arthur Hayes, ~~but objected to the presentation of the face of affidavit, contending that depositions should be taken on notice establishing defendants claims so that plaintiff might have an opportunity to cross examine the witnesses of defendants~~

State of New Jersey,
County of Essex, ss.

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W. Stanley Naughright, of full age, being duly sworn according to law on his oath says that he is employed in the office of Fred G. Stickel, Jr., attorney of the plaintiff in this action; that on Thursday, December 26, 1912, this defendant went to New Brunswick arriving there about 10 o'clock A. M.; that after making inquiry of persons in the Court House at New Brunswick as to the whereabouts of J. Arthur Hayes, this deponent telephoned to the residence of Edward R. Hayes, at 42 Lewis Street, New Brunswick, the father of said J. Arthur Hayes; that the telephone ring was answered by a lady, whereupon this deponent asked if Arthur Hayes was in, to which the lady replied yes, when a gentleman came to the 'phone who upon being asked if this was Arthur Hayes answered yes; this deponent informed Arthur Hayes that he was Mr. Naughright, of Roseville, and desired to see said Arthur Hayes for which purpose he would come to his house; thereupon this deponent heard said Arthur Hayes say, "Why did you tell him I was here?" that in answer to an inquiry as to when this deponent could see said Arthur Hayes he was informed by Arthur Hayes that he, the said Arthur Hayes, would be home for dinner at one o'clock and could then see this deponent.

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Deponent further says that he went immediately to the office of the Sheriff of Middlesex County, where he saw Edward F. Houghton, Under Sheriff; that he informed said Under

Sheriff of the conversation had with Arthur Hayes and requested said Under Sheriff Houghton to serve summons then in his possession upon said Arthur Hayes; that this deponent went with said Under Sheriff to the aforesaid house of Arthur Hayes on Lewis Street, arriving there at about eleven twenty a. m.; that a lady answered the doorbell and in response to an inquiry by the Under Sheriff, remarked that Arthur Hayes was not in; whereupon she called Edward R. Hayes in from the yard, who suggested that his son, Arthur Hayes, might
10 be found at the Catholic Club Rooms, down town; that thereupon said Under Sheriff and this deponent went to the Catholic Club Rooms and from thence to the office of Edmund A. Hayes, a brother of said Arthur Hayes, at neither of which place could any infomation be obtained as to where Arthur Hayes might be found; that this deponent returned to the Hayes home on Lewis Street, arriving there at about twelve forty-five p. m., when he was informed that Arthur Hayes had not yet come in for dinner; that shortly after one o'clock said Edward R. Hayes and Edmund A. Hayes, father and
20 brother respectively of J. Arthur Hayes, came in and that said Edward R. Hayes remarked to this deponent that he had seen his son Arthur down town; that the son had remarked to his father that he was evading service of summons and that because of this he would not return home for dinner and would leave town.

Deponent further says that he returned to the Sheriff's office at about four p. m., and reported to said Houghton the result of the effort made to locate Arthur Hayes; that this deponent stated to said Under Sheriff Houghton his belief that said Arthur Hayes would return to said Hayes home for
30 dinner in the evening and to sleep there, and this deponent requested that a further effort be made by the said Under Sheriff to serve said Arthur Hayes; whereupon said Under Sheriff asked if Mr. Stickel would be willing to pay $2.50 or $3.00 to a man to watch the house, saying that he supposed it was the Sheriff's duty to get service if possible, but that he could not expect a man to do this for nothing, to which this deponent replied that if it were necessary Mr. Stickel would pay $3.00 to get service.

That said Under Sheriff thereupon called up on the 'phone some party whom he asked to watch the house during the evening, stating that the lawyer wanted to give him a "three

dollar bill;" that from that part of the conversation which this deponent heard he believed that the man had consented to act until when said Under Sheriff remarked that "it is Eddie Hayes' son Arthur" the party demurred and would not agree to attempt service; whereupon said Under Sheriff remarked to this deponent. "You see those fellows all know Eddie Hayes and they don't like to do it." Said Under Sheriff then called up another party who was not in and left word for him to call the Sheriff's office, after which said Under Sheriff Houghton stated to this deponent that he would get someone, and when this deponent returned to the Sheriff's [illegible] half hour later at about 5 p. m., there was in the

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Plaintiff's counsel in his brief on the motion to set aside service called attention to the practice as set out in Baldwin vs. Flagg, 43 N. J. L. 495, but did not object to the proceedure adopted in this case. Justice Minturn decided the motion on affidavits submitted by both sides and their briefs.

Sworn and subscribed before me this tenth day of January, 1913. at Newark, N. J.

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A. WILBERFORCE EGNER,
An Attorney at Law of New Jersey.

Filed February 8, 1913.

Order refusing to set aside service on J. Arthur Hayes.

"Application having been made to strike out the name of J. Arthur Hayes from the records in this case on the ground that process had not been properly served on him and counsel for plaintiff and defendant having been heard and the Court having made its decision, it is on this seventh day of February, 1913, ordered that the application of defendant be denied; that the service stand.

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Let this rule be entered.

JAMES F. MINTURN,
J. S. C."

Filed January 30, 1913.

OPINION SUSTAINING SERVICE OF SUMMONS.

The following opinion was filed in denying the motion to set aside service.

dollar bill;" that from that part of the conversation which this deponent heard he believed that the man had consented to act until when said Under Sheriff remarked that "it is Eddie Hayes' son Arthur" the party demurred and would not agree to attempt service; whereupon said Under Sheriff remarked to this deponent. "You see those fellows all know Eddie Hayes and they don't like to do it." Said Under Sheriff then called up another party who was not in and left word for him to call the Sheriff's office, after which said Under Sheriff Houghton stated to this deponent that he would get someone, and when this deponent returned to the Sheriff's office a half hour later, at about 5 p. m., there was in the Sheriff's office a gentleman whom the Under Sheriff said would go up to the house at about seven o'clock and again later; whereupon this deponent after requesting the Under Sheriff in case he could not secure personal service to leave the summons at the home of Edward R. Hayes the next day, and to send his bill to Mr. Stickel left the Sheriff's office.

W. STANLEY NAUGHRIGHT.

Sworn and subscribed before me this tenth day of January, 1913. at Newark, N. J.

A. WILBERFORCE EGNER,

An Attorney at Law of New Jersey.

Filed February 8, 1913.

Order refusing to set aside service on J. Arthur Hayes.

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Let this rule be entered.

JAMES F. MINTURN,

J. S. C."

Filed January 30, 1913.

OPINION SUSTAINING SERVICE OF SUMMONS.

The following opinion was filed in denying the motion to set aside service.

"Minturn, J.

The defendant, J. Arthur Hayes, moves to set aside the service of summons which was left at his father's home, in New Brunswick, by the Sheriff of Middlesex County, in an endeavor to serve the son by leaving the writ, in compliance with the language of the statute, at the defendants "usual place of abode."

J. Arthur Hayes, is, and for some time has been, a student at St. Charles College, Maryland, in preparation for the Ministry, and he insists that this course of preparation has resulted in compeling him to give up his abode in this State, except for occasional visits to his family and friends. At the time of the service of the summons he was in New Brunswick living at his father's home, and the Sheriff returned the summons as served "at the residence of J. Arthur Hayes."

He claims that when he leaves the seminary he may be assigned by his superior to any section of the State, and that for all practical purposes his residence at New Brunswick under the parental roof is at an end. His affidavit of non-residence does not disclose his last voting place, and so far as the annius revertendi is concerned it is by no means clear that when the vacation periods present themselves, he will not, as heretofore, make the parental home his usual abode.

The language of section 52 of the practice act provides, that in the absence of personal service upon a defendant the summons be served at "his usual place of abode." I take this language to mean his usual place of abode in this State if he have such a place.

It need not be his domicile or at his home in that sense of permanency in which those terms are applied in the divorce acts, the election law and the tax acts, but may be the place where he abides when in the State.

This construction of the Statute is consonant with the reasoning of the authorities wherever the question has been mooted. It is quite apparent that if his effects in New Brunswick were attached under process, he might quite properly claim that since summons could be served upon him in the statutory mode, process by attachment would not lie.

Cadwallader vs. Howell, 18 N. J. L. 138.
Brardred vs. Del Hoye, 20 N. J. L. 328.

In Clark vs. Likens, 26 N. J. L. 207, a hotel keeper at At-

lantic City whose permanent residence was in Philadelphia, was held for the purpose of vacating a writ of attachment to have his usual place of abode at Atlantic City, even after his hotel had been closed for the season.

So in City Bank vs. Merritt, 13 N. J. L. 131, a writ of attachment was vacated where it appeared that the defendant who had his permanent residence in New York City, went for a few weeks in the summer to avoid the heat to a nearby village in this State, where summons could be served upon him.

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The test invariably applied in all cases involving the regularity of the service of process of attachment, is whether a summons could be served upon the defendant in the statutory manner; in other words whether he had an abode in this State, at which some person may reside who is capable under the statute of accepting service of process.

In Harrison vs. Warington, 35 N. J. Eq. 4, the defendant a resident of New York, but when in this State resided with his mother, service of subpoena ad respondendum in Chancery was held to have been properly served upon him at the mother's home.

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The rationale of the cases in which the question has been considered in various forms of procedure lead to the conclusion that the legislative intent in this section of the practice act was to prescribe a method of service upon a defendant in lieu of personal service, by leaving the writ with some one complying with the statutory requirement, at the defendant's usual place of abode, if he have one in this State. The method of service here meets with this requirement, and the motion will therefore be denied."

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ANSWER OF J. ARTHUR HAYES.

Filed February 18, 1913.

The defendant, J. Arthur Hayes answered as follows:

"Defendant, J. Arthur Hayes, residing in Emmitsburg, in the State of Maryland, says that he denies the jurisdiction of the Court; denies that he has been properly brought into Court; denies that he should answer to this action, but enters this answer by compulsion only and under the order of the Court directing him to answer; and expressly denying that he has been properly served with process.

In filing this answer defendant does not waive any of his rights, but distinctly reserves the right to review the order of the Court holding that process was properly served upon him

1. He admits the first count in the complaint.

2. He denies that he was in charge of an automobile alleged to belong to Edward R. Hayes, on the 29th day of August, 1912, as the servant of the said Edward R. Hayes.

3. He denies that he was acting as such servant, but says that he was using said automobile for his own pleasure and on his own personal business.

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4. He denies the fourth count in the complaint.

5. He denies that he was acting as the agent of said Edward R. Hayes, and says that he did use due care in giving adequate and proper warning or signal of the approach of said automobile, and further says that it was impossible to avoid colliding with Florence Missell because she deliberately ran in front of the automobile in such a manner as to make a collision unavoidable.

6. As to the sixth count he says nothing.

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7. He denies that he did operate or drive said automobile carelessly, negligently or recklessly or at a very high, fast and excessive rate of speed, and also says that he did observe Florence Missell in and upon said road and did warn her of the approach of said automobile.

8. He says that it was the fault and negligence of Florence Missell that she was struck by the automobile and denies that she was greatly bruised and wounded, or that divers bones of her shoulder and body were broken, or that her head, arms, breast, abdomen, knee and limbs were cut and bruised, or that she was permanently and temporarily injured and confined to her bed, and denies that she paid any money for attendance to her.

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9. He says that the said Florence Missell suffered no damage through any fault of his, but such damage or injury to her was sustained wholly through her own fault and negligence.

10. The defendant says he is not guilty of any negligence.

11. The defendant says that the plaintiff, Florence Missell, was guilty of contributory negligence and her said contributory negligence was the cause of her injury if she sustained any.

EDMUND A. HAYES,
Attorney for Defendant.
J. ARTHUR HAYES."

Filed February 24, 1913.

The plaintiff, Florence Missell, replied to the answer of J. Arthur Hayes, as follows:

"1. Plaintiff denies so much of paragraph eight of the answer of the defendant. J. Arthur Hayes as states that Florence Missell was injured by her own fault and negligence.

2. Plaintiff denies so much of paragraph nine of said answer as charges that any damage or injury suffered by plaintiff was sustained wholly through her own fault and negligence.

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3. Plaintiff denies the allegations of paragraph eleven of said defendant's answer.

4. Plaintiff generally denies all allegations of said answer charging plaintiff with negligence.

FRED G. STICKEL, JR.,
Attorney of Plaintiff."

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NEW JERSEY SUPREME COURT

PASSAIC COUNTY

FLORENCE MISSELL, by FRANK MISSELL, her next friend, *Plaintiff,* vs. J. ARTHUR HAYES, and EDWARD R. HAYES, *Defendants.*	**APRIL TERM, 1913** **No. 9 in the List**

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Transcript of stenographer's notes of evidence taken in the above entitled cause, before Hon. Charles C. Black, Judge, and a Jury, at the Court House, in the City of Patterson, N. J., on the seventeenth day of June, A. D. 1913.

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APPEARANCES:

Fred G. Stickel, Jr., Esq., for the Plaintiff.

Edmund A. Hayes, Esq., for the Defendants.

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(A jury being empanelled and found satisfactory, they were sworn.)

(Mr. Stickel opens for the plaintiff.)

(Mr. Hayes opens for the defendants.)

It is admitted that the owner of the car in question is Edward Hayes one of the defendants in this case.

It is admitted that the driver of the car on the day in question was J. Arthur Hayes another one of the defendants in this case.

DR. LEO H. JOYCE, sworn as a witness on behalf of the plaintiff, testifies as follows:

Direct Examination by Mr. Stickel.

Q. You are a practicing physician? A. I am.

Q. Where? A. At Passaic.

Q. Are you a graduate of any college? A. Yes, sir.

Q. What college? A. Cornell.

Q. How long have you been practicing? A. Well I have had quite a little experience in thirteen years.

Q. Do you know Florence Missell the plaintiff in this case? A. I do.

Q. Did you attend her at any time? A. I did.

Q. When? A. In the latter part of August.

Q. Where did you attend her? A. On the Delawana road, Delawanna.

The Court: Just tell us what you found was the matter with her.

The Witness: She had a fractured clavicle or shoulder blade.

The Court: Which shoulder blade?

The Witness: The left.

The Court: Where abouts?

The Witness: Why, right by the spinus process.

The Court: Just indicate to the Jury where that is.

The Witness: (Showing) Right here, and a bruised nose, bruised abdomen, bruised elbows and this portion of the face right below the eye over the maler bone.

The Court: Which eye?

The Witness: Both were a little bruised and particular on the right side of the temple and the head.

Q. How long did you attend her? A. Four weeks, about four weeks.

Q. Has she any scars? A. She has a scar on the right side of the temple.

The Court: How did you leave her. what is her condition now?

The Witness: With the exception of the scar I left her all right.

The Court: Did this fractured shoulder blade heal?

The Witness: Completely.

The Court: So she is completely cured now?

The Witness: With the exception of the scar on her face.

The Court: You do not call that anything do you? How old is the girl about?

The Witness: Six and a half years I believe.

The Court: Well, that is not permanent, is it?

The Witness: Well, it might go away, I could not say it is not much of a scar.

Cross Examination by Mr. Hayes.

Q. That scar you speak of, is that in such a position that it can be seen when the girl's hair is combed?

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The Court: We will have the girl here, that is better than the doctor's testimony.

Mr. Stickel: We admit, if your Honor please, that she is completely well now.

FRANK VERNIERO, sworn as a witness on behalf of the Plaintiff, testifies, as follows:

Direct Examination by Mr. Stickel.

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Q. Where do you live? A. On the Delawanna road.

Q. Do you know Frank Missell? A. Well, I want an interpreter because I don't understand pretty good English.

Q. You want an interpreter? A. Yes, sir.

Q. What language do you speak? A. I speak Italian.

The Witness is withdrawn.

MARTIN VERNIERO, sworn as a witness on behalf of the Plaintiff, testifies as follows:

Direct Examination by Mr. Stickel.

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Q. Where do you live? A. At Delawanna.

Q. Where is that with reference to the home of Frank Missell? Where is your home with reference to the home of Frank Missell? A. Right next door.

Q. On what road is it? A. The river road.

Q. Do you know Frank Missell? A. Yes, sir.

Q. Do you know his daughter, Florence Missell? A. Yes, sir.

Q. Have you any knowledge of the collision with an automobile in which she was struck? A. Yes, sir.

Q. Tell us what you know about it.

The Court: When was this?

The Witness: I don't remember the date.

The Court: Do you remember the day of the week?

The Witness: No.

The Court: Was it last August?

The Witness: I am not sure. I don't remember.

Q. Was it last Summer? A. Yes, sir.

The Court: What time of the day was it?

The Witness: In the afternoon, I guess.

The Court: Tell us what you saw?

Mr. Hayes: Is it clear enough that that is the same accident on which the suit is based? 10

The Court: It may not be but we have got it as near as we can get it from him. They have got to connect it of course.

The Court: Tell us what you saw.

The Witness: Well, I was working in front of my house, I was laying a concrete sidewalk and I heard a woman holler in an automobile so I happened to turn around and I saw the girl was just getting hit with the automobile and when the girl got hit the automobile stopped about seventy-five or eighty feet away. 20

Q. Which way was the automobile going? A. The automobile was coming towards Passiac.

Q. Where was the girl when she was struck? A. Opposite her home.

Q. How far did the car go after the automobile struck her? A. About seventy-five or eighty feet.

The Court: What part of the car struck her?

The Witness: The front part.

The Court: Which side, the right or the left?

The Witness: Well, less to the right. 30

The Court: What was the girl doing?

The Witness: She was trying to get across to go to her house.

The Court: Was it light or dark?

The Witness: It was light.

The Court: How far were you from the girl?

The Witness: About seventy-five or eighty feet.

The Court: How far was the girl from the automobile when you first saw the automobile?

The Witness: She was about one hundred and fifty to two hundred feet away.

The Court: And did you see the automobile and the girl at that time?

The Witness: Yes, sir.

The Court: How fast was the automoblie running?

The Witness: I could not tell exactly how many miles it was going an hour.

The Court: Was it going fast or slow?

The Witness: It was going fast.

The Court: What if anything was there that obstructed the
10 view of the driver of the automobile between the automobile and the girl?

The Witness: What is it?

The Court: Was there any obstruction between the automobile and the girl to prevent the driver of the automobile from seeing the girl?

The Witness: Well, of course——

The Court: Did you see anything?

The Witness: Yes, sir.

The Court: What was it?

20 The Witness: The girl was trying to cross.

The Court: Was there anything between the girl and the automobile so that the driver could not see the girl?

The Witness: No, sir.

Q. What was done with the girl after the accident?

A. I don't know.

Cross Examination by Mr. Hayes.

Q. You say at the time you saw the girl and the automobile, the girl was about two hundred feet away from the auto-
30 mobile. isn't that what you said? A. Yes, sir, one hundred and fifty feet to two hundred feet.

Q. Are you sure it was two hundred feet? A. Yes, sir.

Q. At that time what was the girl doing? A. She was trying to go cross to go to her home.

Q. How far across the road had she gotten at that time? A. Well, she was about the centre, most to the right though.

Q. Then she was coming back toward her house? A. Yes, sir.

Q. And the automobile was two hundred feet up the road away from her? A. Yes, sir.

Q. What part of the road was she on when the automobile struck her? A. What part of the road?

Q. Was she doing any moving at all? A. Well, she was coming across.

Q. She was walking across all that time? A. Yes, sir.

Q. How wide is the road right there? A. Around seventy-five or eighty feet from one end of the field to the fence.

Q. How about the road, the traveled part of the road, how wide is that? A. Around sixty-five I guess.

The Court: Sixty-five what, feet? 10

The Witness: Yes, sir.

Q. How far from the right hand edge of the traveled road was the girl when you saw the automobile two hundred feet away from her? You say at the time you saw the girl she was a little more to the right and the automobile was two hundred feet up the road. You know where the girl was, she was a little more to the right of the road, wasn't she? A. When getting hit?

Q. You say you were laying concrete sidewalk in front of your house? A. Yes, sir. 20

Q. And you heard the woman scream? A. Yes, sir.

Q. Had you seen the car before that? A. Yes, sir.

Q. How much before that had you seen this automobile that struck Florence Missell? A. One hundred and fifty to two hundred feet away before the automobile struck the girl.

Q. Why is it you say in direct examination that your attention was called by hearing a woman scream? A. Well, I heard her screaming and I saw that they were wo hundred feet away just when the woman was hollering.

Q. That is when the woman screamed she was two hundred feet away from the girl? A. Yes, sir. 30

MARY MISSELL, sworn as a witness on behalf of the Plaintiff, testifies as follows:

Direct Examination by Mr. Stickel.

Q. You are the mother of Florence Missell the plaintiff in this case? A. Yes, sir.

Q. Did your daughter have an accident in August, 1912? A. Yes, sir, the twenty-ninth of August.

The Court: What day of the week was that?

The Witness: Thursday.

Q. Where did the accident happen? A. On the River road, Delawanna.

Q. Where is that with respect to your home? A. Just past it, right past my home, right on the River road.

Q. Did you see the automobile hit your daughter? A. No, I did not see it.

Q. When did you first see the automobile? A. I saw it when it was about three hundred feet away, I guess.

Q. About three hundred feet away from your home, when you first saw the automobile? A. Yes, sir.

Q. Where were you? A. In the back yard taking clothes off the line.

Q. How was the antomobile running at that time? A. It was running at quite a good rate at that time.

Q. How many people were there in the automobile? A. I think there were two ladies and two or three men, I am not sure.

Q. Did you see anything unusual happen with the automobile? A. I saw one of the ladies get up in the automobile, scream and throw her hands up.

Q. Where with respect to your house was the automobile at that time? A. Three hundred feet I should say.

Q. Do you understand my question, I asked you where the automobile was with respect to your house at that time?

Mr. Hayes: She said three hundred feet away.

The Witness: No, not when she stood up and screamed.

Q. That is what I asked where the automobile was when she stood up and screamed? A. I guess about one hundred and fifty feet.

The Court: Did you see Florence then?

The Witness: No, I could not see from where I was. I could not see who was in the street at all.

Q. Where did you say the automobile was at that time? A. Maybe a hundred and fifty feet away something like that.

Q. What did you do? A. I was in the back yard of the house and I ran around in the front to see who was out in the street or what was happening.

Q. What did you see? A. By the time I got around there I saw a young man pick her up in the street.

Q. You saw him picking your daughter up in the street they were picking your daughter up? A. The young man

was picking her up in the street by the time I got around to the front of the house.

Q. Did you see the automobile? A. Yes, it was up the road a little ways at Verniero's house.

Q. Would you recognize any of the people who were in the car if you saw them? A. There is one young man who picked her up I could recognize. I was too excited to notice the other ones.

Q. What was the matter with Florence?

The Court: I guess there is not any dispute about that. 10

Mr. Hayes: I do not think there is any dispute about it.

The Court: She has gotten well hasn't she?

The Witness: She is well now, only her eyes always bother her.

The Court: Her collar bone has gotten all right?

The Witness: Yes, sir.

The Court: She is all right as far as you can see? Isn't that right.

The Witness: Only a couple of scars that is all.

Q. She was home from school as a result of this accident? 20
A. She was home for a long while.

Q. How long? A. School had just started and she did not go for a couple of months, I guess three months.

Q. Was she confined to her bed? A. Yes. sir.

Q. How long? A. Two weeks we had to stay up with her, take turns staying up at night.

Q. That is took turns staying up with her at night for two weeks? A. Yes, sir.

Q. Did you have a doctor? A. Yes, sir we had Dr. Joyce.

Q. Did he render a bill? 30

Mr. Hayes: That is objected to, it is not recoverable in this suit.

Objection sustained.

Cross Examination by Mr. Hayes.

Q. Where is the yard that you were speaking of where you were hanging up clothes? A. Right in the back of my house.

Q. How wide is your house? A. I could not say, I guess seventy feet, something like that.

Q. Does your yard run all across the back of your house? A. Yes, the back yard.

Q. Which side of your house do you go into your entrance or gateway the right or left hand side facing the house? A. The right.

Q. How far away from the gate were you when you first saw the automobile? A. It was away down the road about three hundred feet maybe more.

Q. No, when you first saw the automobile? A. Over
10 three hundred feet.

Q. How far away from the path that leads in along side of your house were you when you first saw the automobile? A. When I saw the lady scream.

Q. How far were you from the path leading into the side of the house? A. Oh, maybe five hundred feet.

Q. In which direction? A. Way in the back of the house.

Q. How many automobiles pass your house in a day? A. They go past there all day long.

Q. How many of them about? A. I don't know.

20 Q. So many that you could not keep track? A. So many goes past the river road, they come from all over, Passaic, Newark and all over.

Q. Do you make it a habit to look and see the automobiles that pass? A. No, sir.

Q. How is it you happened to look at this one? A. I just happened to be looking towards the road, the line was towards that way and the clothes were on the line and I saw the lady stand up in the automobile, throw her hands up and scream.

30 The Court: There is not any dispute really but what the child was struck by the automobile is there?

Mr. Hayes: No, not that, but this lady testified she saw the automobile three hundred feet away, and now she tells you the reason she saw it was the lady screamed.

The Court: There is not anything in her testimony which attaches any liability.

The Witness: I say three hundred feet away. That is what made me come out front to see what was the trouble, when I saw the lady standing up in the automobile.

FLORENCE MISSELL, the Plaintiff was brought to the witness chair and shown to the Jury but owing to her youthful appearance the Court directed that she be not sworn.

Examined by Mr. Stickel.

Q. Were you hit by an automobile? A. Yes, sir.

Q. What were you trying to do when you were hit by the automobile? A. Trying to cross the street.

Q. What did you do before you went to cross the street? A. I looked and saw a big truck——

Mr. Hayes: Does Florence forget the rest of it?

Q. Just tell us what happened when you looked and saw a big truck and what else? A. And I looked and I did not see any more and I went across and I got hit.

Q. You did not see any more and you looked and went across and you got hit? A. Yes, sir.

Q. Are you all well now? A. Yes, sir.

Examined by Mr. Hayes.

Q. When was it you saw the truck, which way were you going when you saw the truck, do you remember? A. Going to cross the street.

Q. Going from your house over the other way? A. Yes, sir.

Q. Is that the time you were hit when you were going to cross in that direction? A. (No answer.)

Q. You came out of your yard didn't you? A. Yes, sir.

Q. And you went to cross the road? A. Yes, sir.

Q. Is that the time you saw the truck when you were going across? A. Yes, sir.

Q. You waited for the truck to pass? A. Yes, sir.

Q. Then, did you get across all right that time? A. Then I went across. I looked and did not see anything more.

Q. You got across all right that time did you? A. Yes, sir.

Q. And was it when you were coming back that you got hit? You were going across from your house to the other side of the road and you got across all right is that correct?

Mr. Stickel: She said she got across as I understand it.

The Court: It is necessarily inaccurate but I will let her tell her story.

Q. I would like to have you tell your story just how you

did. Tell how you went across, you saw a big truck and waited for it to go past? (No answer.)

How old are you? A. Seven.

Q. Do you go to school? A. Yes, sir.

Q. Do you go to church? A. Yes, sir.

Q. What church do you go to? A. Protestant.

Q. Do you know what it is to tell a story, what would happen to you if you told a bad story, do you know what it is to tell a lie? A. Yes, sir.

10 Q. What does it mean? Where would you go if you told a lie? A. (No answer.)

Q. Just tell me what happened when you got out of your gate? Did you have anything in your hand? A. No, sir.

Q. Were you carrying anything in your hand at all? A. No, sir.

Q. What were you going across the road for? A. To call on Amy Geochel.

Q. Did you see anything? A. No.

Q. Did you get across? Did you get all the way across?

20 A. No, sir.

Q. Why didn't you? A. (No answer.)

Mr. Stickel: Why didn't you get all the way across? Why didn't you get all the way across to see Amy Goechel? Do you know? A. (The child shakes her head, "No.")

FRANK MISSELL, the Plaintiff, sworn as a witness on his own behalf, testifies as follows:

Direct Examination by Mr. Stickel.

30 Q. You are the father of Florence Missell? A. Yes, sir.

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

Q. Where were you when it happened? A. In the yard.

Q. In your yard? A. Yes, sir.

Q. When did you first learn of the accident? A. By the wife running in the yard and saying to me. "Hurry out someone has killed Florence."

Q. What did you do? A. Why I did not know who killed her, I grabbed the gun and ran out with the gun.

Q. Did you see the automobile? A. I saw it probably seventy-five or a hundred feet away from my house.

Q. Did you get the number of the automobile? A. Yes, sir.

Q. What is it? A. 22600.

Q. Did you see any of the people in the car? A. I saw one young gentleman carrying the girl in, he said to me he did not do it, "I did not do it."

Q. Do you recognize anybody here in the Court Room who was in the car? A. I see one lady here I recognize, yes.

Q. Did you have a doctor for Florence? A. Yes. sir.

Q. What is the frontage of your house? A. The frontage of the building itself or the property.

Q. Yes, of the building? A. Probably twenty-two feet.

Q. What is your entire frontage including the fence? A. Including the fence about three hundred and sixty feet. 10

Q. I mean the frontage on river road? A. On river road yes, three hundred and sixty feet.

Q. The house is twenty-two feet? A. About twenty-two feet.

The Court: Who was it that carried the child in do you know? A. I do not know the gentleman's name but I think he is sitting over there.

The Court: Where?

The Witness: The centre one. 20

The Court: (The man indicated is asked to stand up.)

The Court: Is that the one?

The Witness: I could almost swear to it.

The Court: (Addressing the man who stood up.) Were you the man who drove the automobile?

The man: No, I carried the child in.

The Court: What is your name?

The Man: James A. Harkens.

The Court: (To the witness.) The child has gotten entirely well now hasn't she? 30

The Witness: As far as I know, yes sir, only she complained last Winter that it pained her in her eyes that is the only thing.

The Court: You cannot see anything the matter with her looking at her?

The Witness: No, only there is a little bit of a scar there. I have never examined the child since she went to school again.

Plaintiff rests.

The Court: You haven't proven who the Defendants are.

Mr. Stickel: I think they will be admitted.

It is admitted that J. Arthur Hayes was the driver of the automobile and Edward R. Hayes was the owner.

Plaintiff rests.

Mr. Hayes: I desire to move for a non-suit in favor of Edward R. Hayes. It is shown that Arthur Hayes was the driver and Edward R. Hayes was the owner of the car but the mere fact that there is an admission that he was the owner of the car does not make him liable for a tort, the car was in the hands of someone other than the owner and will not bind the owner.

The Court: But that is a substitute defence. The only liability in the case now is that one of these witnesses, Martin Verniero, saw the car coming at a rapid rate of speed in broad daylight and there was nothing to intervene between the driver and the girl and that he could see her, now that is some evidence from which the Jury might infer negligence. Now it is admitted that one of them is the owner and the other one is the driver and if the driver was not on the business of the owner that is something to be shown.

Mr. Hayes: That is not for the defendant to show.

The Court: I think there is enough to go to the Jury and I deny the motion on the gronud that there is a question of fact involved.

Motion denied: Defendant excepts.

E.C. Black J.

EDWARD R. HAYES, the defendant, sworn as a witness on his own behalf, testifies as follows:

Direct Examination by Mr. Hayes.

Q. Where do you live? A. New Brunswick, New Jersey.

Q. On August twenty-ninth——

The Court: It is already admitted that he is the owner of the car.

Q. On August twenty-ninth was the automobile owned by you taken with your express permission from the garage? A. No.

Q. Did you know it was taken that day? A. Not positively.

Q. When did you first learn that the car had been taken out? A. When I came back from Court that day.

Q. At that time did you know who had taken it? A. Not until I was told.

The Court: Who had it out that day?

The Witness: My son.

The Court: J. Arthur Hayes?

The Witness: Yes, sir.

The Court: Had he been accustomed to take this machine out from time to time? 10

The Witness: Yes, sir.

The Court: With your permission?

The Witness: Sometimes with it and sometimes without it.

The Court: Did you know that he had been accustomed to taking it out?

The Witness: Yes, sir.

The Court: When did he take it out the time before this?

The Witness: Oh, possibly that same week. 20

The Court: And that was done with your consent?

The Witness: Well, I did not refuse him.

The Court: You knew that he had it?

The Witness: Yes, sir.

Q. Was he on your business that day? A. No, sir.

Cross Examination by Mr. Stickel.

Q. Did you know who he had in the car that day? A. Not until they returned. 30

Q. Do you know now? A. Yes, sir.

Q. Who did he have in the car?

Mr. Hayes: Objected to as improper. He says he knew when he returned if it is heresy evidence I object to it.

The Witness: I did not see them in the car.

The Court: Do you know anything about it except what somebody told you?

The Witness: Only what my son told me; I did not see them going or coming.

Q. Where is your garage? A. In my yard.

MARY I. HAYES, sworn as a witness on behalf of the Defendant, testifies, as follows:

Direct Examination by Mr. Hayes.

Q. Are you the wife of Edward R. Hayes the previous witness? A. Yes, sir.

Q. Where do you live? A. New Brunswick, N. J.

Q. On August twenty-ninth or on the day on which this accident occurred how did you happen to become a passenger in the automobile? A. Well, Arthur was going——

10

The Court: Who is Arthur?

The Witness: J. Arthur Hayes the driver, my son.

The Court: Is he your son?

The Witness: He is my son.

The Court: Edward R. Hayes's son? A. Yes, sir.

The Court: He was driving the car?

The Witness: Yes, he wanted to go down to Passaic to see a friend and asked me how I would like to go with him I said, I would be delighted and so we made arrangements to go.

20

Q. What time that day did you leave your house? A. We left anytime between half past ten and a quarter to eleven.

Q. What time was it when the accident happened? A. Why I should judge between quarter past two and half past two, I do not know just the time because I did not have any time at the time.

Q. Had you made any stops between New Brunswick and the place of the accident? A. Yes, we stopped about fifteen minutes at Newark just outside of the City of Newark, it was just one o'clock.

30

Q. How far was that from the scene of the accident? A. I do not know, I do not think it was very far.

The Court: This was not a pleasure ride was it?

The Witness: Well, he was going on a visit and he wanted us to go with him.

Q. Who else was in the car? A. My daughter and a friend of hers and this young man a friend of his.

The Court: What part of the car were you sitting in, the front or the behind?

The Witness: I was sitting in the back on the left hand side.

The Court: Did you see this occurrence?

The Witness: I did not until after, no, I saw a little girl

standing in the road and I judged she was going to stand there till we passed but just as we got up to her she went to pick up something and when she picked it up she went to one side and we knocked the little girl down.

The Court: How far were you from her when you first saw her?

The Witness: I could not say, about twenty-five feet I should say.

The Court: How fast was the car running then?

The Witness: We were going about eight miles, going very slow because there is a bad turn and you generally slow down at every turn. 10

The Court: You do not know what Florence was doing after you first saw her until the time the car struck her?

The Witness: She stooped down for something and when she picked it up she sort of made a move to go to the right.

The Court: Which part of the car hit her?

The Witness: The right hand side in front.

The Court: In reference to the centre of the road where was she? 20

The Witness: She was on the right hand side.

The Court: About how far from the centre?

The Witness: I could not say because I did not take any particular notice, we were busy talking and I did not take any particular notice, I did not dream of such a thing.

The Court: And your son was driving then?

The Witness: My son was driving the car, yes.

Q. At the time you last saw Florence was she directly in front of the automobile? A. No, she was not.

Q. How was she? A. She was on the side and she went to pick up something and then made a move to the side. 30

Q. At the time, how far were you away from her? A. I should think from about here to the door, I could not tell you she was on the right side of the car.

Q. If Florence had stayed where she was and the car had continued on a straight line how far would the car come from her? A. Five or six feet I should think, probably more.

Q. She was five or six feet to the right of the car? A. Yes.

Q. When did you first know that you had struck Florence? A. Not until Arthur told me, we were busy talking and then I screamed.

Q. What did he say? A. He said, "Ma I have struck a girl."

Q. Did he say it nice and quietly? A. No, he did not, of course he did not.

Q. How far did the car go, did you feel any jar in the car? A. No, I could not say I did, I do not know.

Q. But you did not see the girl and the car actually come together? A. No, I did not.

Q. Was the car going or stopped when he said that? A. It was stopped, we stopped immediately. It went, well, I should say about ten feet and we stopped when we hit the girl.

Q. Was it directly in front of her house? A. Well, Yes.

Q. Do you know where she lives? A. Yes, sir.

Q. Was she directly in front of that? A. No, I think she was about five feet to the other side five or ten feet.

Q. Did the car remain there all that time or was it moved? A. It was moved.

Q. By who if you know? A. No, I do not know, it was moved down further.

Q. Did you get out of the car immediately? A. Immediately, yes, sir.

Q. Where did you go? A. I was going to see what I could do for the little girl, but a gun was pointed toward me and I did not go any further.

Q. Did you attempt to go into the house? A. Not after that.

Q. Well, before that? A. Yes I did, I opened the gate, I was going in and I said to the man, I asked him, I said, "Is the little girl hurt," and he made a dive at me with his gun so that I returned, he said that he would shoot all of us, it did not make any difference, I tried to talk with the man and reason with him but he did not listen to me, if a automobile would not have come we would have been killed.

Q. Did he point the gun at you? A. He certainly did, he pointed it at me and he has made me a wreck ever since.

Q. Is that the man there? A. Yes, sir.

Cross Examination by Mr. Stickel.

Q. Did you say anything to Mr. Missell? A. I certainly pleaded with Mr. Missell to keep patient and I would see what could be done with the girl but he did not, he said he would shoot me and would shoot the whole party.

Q. Did you say you would furnish a doctor? A. No, I did not say that, I said I would see what was the matter with the little girl and see whether anything else could be done.

Q. When you saw this little girl in the street did you blow your horn? A. I did not, the driver did.

Q. Did you hear him blow the horn? A. Yes, sir.

Q. How far away would you say you were at that time? A. I would judge from here to the door when the little girl was standing there when I first noticed her. 10

Q. Were you in front of the Missell house at that time? A. No, not in front she was opposite her own house.

Q. Where were you with reference to the Missell house at the time you saw the girl? A. We were about twenty five feet off or maybe further I have not any idea I can not judge.

Q. Twenty-five feet? A. Probably or maybe fifty I could not say to the right, when she past.

Q. Did you at that time stand up in the car and scream? A. I did not, not until I was informed she was hit. 20

Q. Have you ever been out driving with your son before? A. I have.

Q. Has your husband been along? A. Sometimes. No. I do not believe we have ever been out together, I don't know. I don't remember.

Q. Have you ever been out in the car with J. Arthur Hayes when he was driving it and you and your husband have been passengers? A. No, sir. 30

Re-direct Examination by Mr. Hayes.

Q. Who else in the family drives that car besides J. Arthur Hayes.

Mr. Stickel: When now or then?

Q. At that time? A. At that time him and Francis.

Q. Anyone else besides Arthur? A. And Arthur's other brother Francis and you.

Q. Does your husband drive it? A. Yes, my husband.

MARGARETTA MCGOVERN, sworn as a witness on behalf of the Defendant, testifies as follows:

Direct Examination by Mr. Hayes.

Q. Where do you live? A. New Brunswick, N. J.

Q. Do you recollect being on a auto trip in August last? A. Yes sir, I do.

Q. At whose invitation were you present? A. Miss Melitta Hayes.

10 Q. Who else was in the car? A. Mrs. Hayes, J. Arthur Hayes and Mr. Harkens.

Q. What time did you leave New Brunswick? A. The party called for me shortly after half past ten.

Q. Do you recollect this occurrence of little Florence Missell being hit? A. As far as——

The Court: Do you recollect it?

The Witness: Well, I recollect it, some of it yes, I did not see the child hit.

The Court: What part of the car were you sitting in?

20 The Witness: I was sitting in the back on the right hand side.

The Court: Tell us what you saw?

The Witness: We were coming up the road just after crossing the railroad trestle and of course the car was going slow at the time on account of crossing the tracks, as we approached I saw a little girl but I did not see her coming out of the gate but I saw her cross the road with a bundle of papers which she deposited in the gulley beside the road.

The Court: How far was the machine from her when she crossed the road?

30 The Witness: I am not a judge of distance but I should judge as far as the width of this room, this way.

The Court: How far would you gauge that?

The Witness: I do not like to say because I am not a judge.

The Court: Would Counsel say one hundred and fifty feet.

Mr. Stickel: About two hundred or two hundred and fifty feet.

The Court: Then you gauge the width of the room about two hundred feet.

Q. When she crossed the road? A. When she crossed the road to the gulley she started back and on her way across she dropped a paper and she started back and stooped to pick up

the paper at that time we were about fifty feet from her when she stooped and she was clear of the car? A. I saw nothing else. We were talking. I did not dream of an accident and I did not see what Florence did.

Q. Was the horn sounded on the car before the accident? A. Yes it was sounded when she started to cross the road.

Q. How far were you away from her at that time? A. I should judge about fifty feet.

Q. That was about the time she stopped to pick up the paper that she dropped? A. Yes, sir.

10

The Court: How far did the car run after it struck her?

The Witness: A very short distance.

Q. What is your idea of a very short distance in feet? The length of this room? A. No, we stopped shorter than that.

Q. From where you are sitting to the railing? A. Not quite. The first rail. I should not say that but up to the desk here where Counsel is sitting.

The Court: Say fifteen or twenty feet.

Mr. Stickel: Twenty or twenty-five feet.

20

The Court: Say about twenty feet.

Cross Examination by Mr. Stickel.

Q. That trestle you spoke of that is quite a distance from the Missell house, isn't it? A. I cannot say just how far, I know we had crossed and we were talking at the time and I did not really notice how fast we were going. I know we crossed the trestle and there was a decided turn in the road just a short distance ahead.

Q. What do you call a short distance? A. I will have to repeat it again, the width of this room or probably the width and half again.

30

Q. The turn you speak of was about the width of this room away from the trestle? A. No, from where we were at the time of the accident.

Q. How far from the point of the accident was the trestle that you speak of? A. Well quite a considerable distance back.

Q. About the same distance, about the distance of this room? A. No, I think it was further back than that.

Q. You saw the child crossing the road? A. Yes, sir.

Q. Was she coming from her house or going towards it?

A. I saw her coming from her house, I saw her go cross and back again towards her house, both times.

Q. When you saw her then you say she was struck as she was going back to her house? A. I presume she was, I saw her stoop, I did not see her struck.

Q. At the time you saw her she was turned toward her house? A. Yes, but stooped to pick something up, to pick the paper up.

Q. Facing her home? A. Yes, sir.

10 Q. You did not see her coming from her house toward the road? A. Yes. I did not see her coming out of the gate but I saw her cross the road first.

Q. She went entirely across? A. Yes, sir.

Q. And then came back? A. Then she came back.

Q. And it was on the backward journey you saw her hit? A. Yes. I did not see her hit however I saw her stoop on the backward journey.

Q. It was on her backward journey that you saw her? A. Yes, sir.

20 Q. And at that time you were how many feet away from her? A. I should judge about fifty feet when I saw her stoop.

Q. And she had her back to the automobile? A. I guess she had.

Re-Direct Examination by Mr. Hayes.

Q. At the time she stooped was she directly in front of the automobile? A. No, she was not, she was entirely clear of the automobile. That is why I did not pay any further attention to her, we were busy talking in the back and I did not dream of the car coming in contact with the child.

30

Q. Had the driver given warning that the car was coming? A. Yes, he sounded the horn.

Re-Cross Examination by Mr. Stickel.

Q. Prior to that? A. Prior to that, yes.

JAMES A. HARKENS, sworn as a witness on behalf of the Defendant, testifies as follows:

Direct Examination by Mr. Hayes.

Q. Where do you live? A. New Brunswick, N. J.

Q. In August last do you remember being party in an automobile trip? A. Yes, sir.

Q. Who was present in that trip with you? A. Mrs. Hayes, her daughter, Miss McGovern, Mr. Hayes, Arthur Hayes.

Q. By whose invitation were you present? A. Mr. Arthur Hayes.

Q. At the time he invited you did he say where he was going? A. He told me he was going on a visit.

Q. Did he tell you who? A. Yes, he told me who. 10

Q. Who did he say? A. His sister in Passaic.

Q. What time did you leave New Brunswick? A. I should judge about half past ten or eleven o'clock.

Q. What time did the accident happen? A. About between two and half past.

Q. How far is it from New Brunswick down to the scene of the accident about? A. I don't know I could not tell you that.

Q. How far is it from New Brunswick to Newark? A. I don't know. 20

Q. Did you notice Florence Missell in the road pror to the accident? A. No, I did not.

Q. When did you first see her in the road? A. I did not see the child until we were within five yards of her at least.

Q. What was she doing then? A. She was picking up some paper.

The Court: What part of the car were you sitting in?

The Witness: I was sitting next to the driver on the left hand side of the car.

Q. Front or back? A. Front seat. 30

The Court: And you say you saw the child before she was struck?

The Witness: I saw the child before she was struck.

Q. How far away from the car was the child when you first saw her? A. On the ground before she was struck.

The Court: Yes?

The Witness: About five yards.

Q. How fast was the car running then? A. Not faster than eight miles.

Q. What part of the car struck her? A. Why, the mud guard you call it, I guess.

Q. Right or left?

The Court: You are the one the witness referred to as having picked the child up?

The Witness: Yes, sir.

Q. When you were five yards away from her what was she doing? A. She was stooping to pick up a pieces of paper.

Q. Was she in front of the car? A. No, she was not she was on the side of the road.

Q. What did she do then? A. Why she stood up and I looked out and I thought as if the child was going to wait until the car would go by and she kind of walked in front of the car trying to get to the other side as far as I remember,

Q. Did she know the car was coming?

Mr. Stickel: Objected to.

Question withdrawn.

Q. Did she turn around and look at it or not? A. I don't remember.

Q. Was a warning sounded to her? A. I don't remember.

Q. At the time you struck her how far did the car go? A. Well, I really don't remember because I jumped right out of the car.

Q. When did you jump? A. I jumped immediately when we hit her. I did not even open the door, I jumped over the side of the door right over the car and ran back.

Q. You did not fall or anything? A. I did not fall no.

Q. What did you do then when you jumped off the left hand side? A. What did I do? I ran right back.

Q. In front of the car or back of the car? A. I ran around the back of the car, down the side and then down the road.

Q. When you picked her up was she under the car yet? A. Why, the car had already gone by.

Q. How far? A. I don't remember, I did not look back.

Cross Examination by Mr. Stickel.

Q. Did you say when you first saw Florence Missell she was in the road about five yards away? A. Yes, from me.

Q. And you were seated alongside of the driver? A. Yes, sir.

Q. What side of the car was she on? A. She was on the right hand side of the road.

Q. And in the direction you were going? A. And in the direction we were going, yes sir.

Q. So that she was on your side of the car? A. No, that would be on the left hand side.

Q. What did you see her do? A. I saw her pick up a piece of paper and just as soon as she picked up the paper she stood up, looked at the car and the next moment she dashed in front of the car and that is as far as I can remember, the car hit her and I jumped off on the side.

Q. How far was the car by this time while these events were happening, how far was the car going, what distance did it cover? A. Why, between the time I saw the child and she was hit?

Q. Yes? A. About twenty-five feet, five yards.

MOLETTA HAYES, sworn as a witness on behalf of the Defendant, testifies as follows:

Direct Examination by Mr. Hayes.

Q. Where do you live? A. New Brunswick, N. J.

Q. Were you present in this automobile trip in August last? A. Yes, sir.

Q. By whose invitation? A. My brother's.

Q. That is J. Arthur Hayes? A. Yes, sir.

Q. Did he say where he was going? A. He did.

Q. Where? A. To Passaic to visit a friend.

The Court: What part of the car were you sitting in?

The Witness: In back in the centre.

Q. Did you see Florence Missell in the road before you struck her? A. I saw her when she came out of her gate and she waited for a truck car to pass, a big automobile truck and when that passed she crossed over the road and threw the paper in the gulley and on the way over she had dropped a paper and she started back to pick it up.

The Court: How far was the auto from Florence when you first saw her about your best judgment?

The Witness: I should judge from one corner of the room to the other.

The Court: The width of the room?

The Witness: From corner to corner.

Mr. Hayes: That is more than the width then?

The Witness: Yes, sir.

The Court: They agreed the width of the room was two hundred feet, that would be three hundred feet from corner to corner of the room, three hundred feet.

Mr. Stickel: I should say so.

The Court: How fast was the machine running at that time?

The Witness: Eight miles an hour about that.

10 The Court: From that time on up to the time the car struck Florence was the horn sounded?

The Witness: Yes, my brother sounded the horn.

The Court: How many times?

The Witness: I just don't remember, I remember hearing him sound it once or twice.

Q. What part of the car struck Florence? A. I did not see what part of the car struck her, I just saw her bend down to pick up the paper.

The Court: Was it the right or the left hand side of the 20 car?

The Witness: It was the right hand side of of the car.

Q. When did you see her last? A. I saw her when she stooped to pick up the paper.

Q. How far were you away then? A. About from here to Counsel.

It is agreed that the distance indicated is twenty feet.

Q. At that time how fast were you riding? A. About 30 eight miles an hour.

Q. Had you ridden out at that time in the automoblie very much? A. Several times, yes.

Q. Can you estimate the speed of a car going about eight miles an hour? A. I can.

The Court: You have ridden in the auto many times haven't you? A. Yes, I have driven the automobile.

Q. For how long? A. How long did I drive it?

The Court: Yes, I mean how many years?

The Witness: Well, I started to drive it last year when we got our machine.

Cross Examination by Mr. Stickel.

Q. You saw Florence Missell bend down in the road? A. Yes, sir.

Q. Which way was she facing at that time? A. She was facing her home.

Q. And you were how many feet away? A. I should say here to you away.

It is agreed that the distance indicated is twenty feet.

Q. Was your horn tooted thereafter? A. Well, I don't just remember when he tooted it but I know he tooted it when she was on the road there. 10

Q. What did she do after you saw her bending over in that way? A. She looked toward home, when we blew our horn she looked toward us.

Q. How far did your car go after it struck the girl? A. I think about five feet.

Q. Where were you when you first saw her? A. When I first saw her I saw her coming out of her gate.

Q. Where was the car at that time? A. Well, between two hundred and three hundred feet away. 20

Q. Did you watch her from that time? A. No, I did not pay any attention to her. I noticed her standing to wait until this automobile truck passed but further than that I didn't pay any attention until I noticed her stooping down.

Q. Did you see her cross the road? A. I saw her cross with the papers.

Q. How far away from her were you at that time? A. I said I was about two hundred to three hundred feet.

Q. How far away from her were you when she had finished crossing the road? A. I didn't pay any attention to her then, after she had crossed the road. 30

Q. You saw her cross the road didn't you? A. Yes, sir.

Q. You saw her get across the road didn't you? A. Yes, sir.

Q. How far away from her were you at that time? A. About one hundred and fifty feet.

Q. Did you see her start back? A. I saw her stoop to pick up the paper.

Q. Did you see her start back to cross the road again? A. No, she had started back to pick up the paper because she had dropped it there but I saw her stoop to pick up the paper.

Q. You did not see her when she started? A. No, sir.

Q. You say the next time you saw her she was in the middle of the road? A. No, I did not say that. She was on the right hand side of the road clear of the automobile.

Q. And your car was then twenty feet away? A. About that.

Q. Where were you going this day in this trip? A. To Passaic.

Q. Who were you going to see? A. A friend of my
10 brother's, J. Arthur Hayes.

Q. Haven't you got a sister in Passaic? A. No, I have not.

Q. Who invited you to go? A. My brother.

Q. Had you been out with your brother that week before? A. Yes, I had.

Q. Have you ever been out when your brother and father were along? A. I think I have.

Q. Had you been out with your brother that week before? A. I don't remember.

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Re-Direct Examination by Mr. Hayes.

Q. Who would drive the car when you were out with your brother and father? A. Why, I do not know.

Q. You don't know who would customarily drive the car? A. No, sometimes one, sometimes the other.

JOHN A. HAYES, the Defendant, sworn as a witness on his own behalf, testifies as follows:

30 *Direct Examination by Mr. Hayes.*

Q. You are one of the defendants in this action? A. Yes, sir.

Q. In August last were you driving the automobile that ran into Florence Missell? A. I was.

Q. Where were you going? A. I was going to see a friend in Passaic.

Q. Did you consult your father, Edward R. Hayes the owner of the car as to whether you could take the car or not? A. I had not.

Q. Did he know you were going that day? A. I don't know, I don't think he did.

Q. Did you tell him you were? A. I did not.

The Court: And you were out on a pleasure ride of your own?

The Witness: It was altogether for my pleasure, yes sir.

The Court: You were driving the car?

The Witness: I was driving the car.

The Court: Just tell us what you saw and how this happened to this little girl? You were sitting on the right hand side of the car?

The Witness: The drive wheel is on the right hand side. 10

The Court: Now tell the Jury when you first saw the child and what you did?

The Witness: When I first saw the child I was about I should judge one hundred and fifty feet away from her and she had gone to the right hand side of the road and I saw her stoop, I don't know what she did, I saw her stoop and I turned a little to the left to give her plenty of room.

Q. At the time she stooped was she in front of you? A. No, she was not in front of me, she was over to the right but in order to play it safe I turned to the left to give her plenty 20 of room and just as we went along the road that is she was about twenty-five or fifty feet away when I did that and when we got within four or five feet of her she jumped this way.

The Court: Jumped this way referring to what?

The Witness: To the left in front.

The Court: This way to the left, was that in the direction of the car?

The Witness: In the direction in which I had turned the car.

The Court: She jumped this way which was the direction 30 in which you turned the car, is that right?

The Witness: Yes, sir, and when I seen what she did I immediately threw on my brakes and turned the car to the left.

The Court: That was in the opposite direction from which the child came was it?

The Witness: That was in the opposite direction from which the child was but as I turned she kept running that way, ran directly in the path of the car and I stopped the car as soon as I found that I had hit her, stopped within four or five feet.

The Court: What part of the car did you hit her with?

The Witness: The right of the car. If she had stayed

directly where I saw her she would not have been hit.

The Court: From the time you first saw her until she was hit, what warning if any did you give?

The Witness: I sounded the horn and I was driving with the muffler that is the cut-out was out and that sounds just as loud as any horn they have on the cars.

The Court: In reference to the centre of the road where was Florence Missell when she was struck?

The Witness: In reference to the centre of the road when
10 she was struck?

The Court: Yes.

The Witness: I should say, why say if you divide the road into two where the cars would go, I should say that when she was struck she was about at the right wheel of the car. If you were going to pass another car, say if we were going to pass a car that was going the other way and I turned to the left to pass the car, she was about on the right by the right wheel of the car that I would pass, that is giving her plenty of room on the right hand side.

20 The Court: So that compared with the centre how far was she from the centre about?

The Witness: When she was struck?

The Court: Yes.

The Witness: Well, I should judge that she was just a foot or two to the left hand side of the centre. I do not say exactly but that is what I should judge about one or two feet to the left of the centre.

Q. And you say when you struck her you brought your car to a stop within four or five feet? A. I brought the car
30 to a stop within four or five feet and Mr. Harkens in the meantime had jumped out and I allowed the passengers to get out and then took the car to the side of the road and I remember it was facing towards a lamp post there that is it was taking up the left hand side of the road.

Q. When was it doing that? A. After the accident.

Q. Then where did you bring it to? A. That is where I brought it to that was about twenty-five feet further on than the accident and maybe more.

Q. That was after the other passengers had gotten out? A. After the other passengers had alighted I took the car over to the side.

Cross Examination by Mr. Stickel.

Q. You saw the child when your car was one hundred and fifty feet away? A. I did.

Q. And she was then on the right hand side of the road? A. One hundred and fifty feet away.

Q. Yes? A. She was crossing the road I think I said.

Q. Crossing at that time? A. Yes, sir.

Q. Where was your car when she had completed her course across the road? A. Well, somewhere about approximately one hundred feet. 10

Q. And then what did she do? A. Why, when she had been clear of the path of the car she stooped to pick up something.

Q. This was done on her journey across? A. That is when I saw her.

Q. Had she got completely across the road and deposited some paper? A. I think she threw something in the gulley across the street.

Q. And then she turned around and started back? A. Yes, sir. 20

Q. And where was your car when she started back? A. Why, we had been going along in a rather slow gait and I cannot tell exactly the exact number of feet that we were from the child at that time.

Q. You say you were one hundred and fifty feet away from her when you first saw her when she started across the road, you say you were one hundred feet away when she had gotten almost across the road, now where was your car when she started back? A. Well, say about half that distance. 30

Q. Was she running or walking? A. She done just like a child ordinarily does, half a skip.

Q. And where was it she stooped down to pick up the paper? A. Why, about thirty feet the other side of the right wheel of the car, that is the path.

Q. Where with respect to the centre of the road? A. Why, that is about, I don't know exactly the width of the road but allow——

Q. Was she on the right of the centre or the left of the centre? A. She was away to the right of the centre.

Q. Which way was she facing? A. She was facing her house.

Q. When next did you see her? A. As she was in the path—, when next did I see her?

Q. Yes, did you watch her all along? A. I watched her.

Q. What did she do then? A. She stooped and just as we were a short distance away from her she started to the left again.

Q. Did she continue walking? A. When we were just about to strike her she was running and as fast as I would turn to the left she would keep on going that way. If she had turned to the right again I would not have struck her, because the right of the car struck her and if she had moved six inches to the right she would not have been struck.

Q. Had you a motor license at that time? A. I did.

Mr. Hayes: I object to that as an improper method of proving it.

The Court: The Court has held that it is not material as bearing on the question of negligence.

Mr. Stickel: I think it might bear on the question of competency.

The Court: No, I don't see how it could have any bearing on the competency but he has answered and said he did.

Q. Had you ever taken this car out before? A. I had.

Q. With the consent of your father? A. Why, sometimes with the consent of my father and sometimes without it.

Q. You had permission to take out the car whenever you wished? A. I don't know that I did.

Q. Was there another car, did your father have another car? A. No, he did not.

Q. Where did you learn to drive the car, where did you learn to drive an automobile?

Mr. Hayes: Is this material?

Mr. Stickel: I think if he did learn to drive the car and it was not this car, it is quite material.

Objection sustained.

Defendant Rests.

FRANK MISSEL, recalled for the Plaintiff rebuttal.

The COURT: How old was Florence on the twenty-ninth of August last?

The Witness: She was about six years and ten months, she was not quite seven years yet.

The Court: On August twenty-ninth?

The Witness: Yes, sir.

Testimony closed.

Mr. Hayes: I desire to move for a non suit as to the defendant, Edward R. Hayes, on the authority of the Doran case 71 Atl., 296. 10

The Court: I am familiar with the case of Doran vs. Thompson.

Mr. Hayes: The basis of the motion being the fact that they have not shown any relationship of master and servant existing. In New Hampshire it has been decided in a recent case that the owner of the car is not liable for negligence merely because he is the owner.

The Court: That is what the Doran case holds.

Mr. Hayes: Yes, in one sense it does but it does not say that the owner is not liable for the negligence or tort of the child unless it is connected in some other manner than through relationship. The burden of proof in this case is on the Plaintiff to show the relationship of master and servant existing between the two defendants. They joined the defendants in this case because one is the owner and the other is the driver, now the burden of proof is on them to sustain some other relationship stronger than that in order to hold the owner of the car. They have not done that. Now it has been denied all through and they have not made any attempt whatever to show us any relationship existing between them of master and servant and therefore where the plaintiff fails to sustain that affirmative proof the motion of non suit as to the defendant here, they endeavor to show to be the master, I think that is proper. 20 30

Mr. Stickel: I think the Doran case is readily distinguished. The proof in this case is that the son had the privilege of taking the car as the father testifies and had actually been out with the father in the car and Miss Moletta Hayes says sometimes the son drove it on those occasions and sometimes the father drove it.

The Court: That is not the test. The test is whether the driver is on the business of the master. I think the Jury

should be permitted to draw inference whether the relationship existed. I am inclined to think that is a circumstance the Jury can consider that the wife and the daughter and the sister was in the car and whether or not it was a car maintained for the family and therefore for the pleasure of the family. Any way I think I shall deny the motion and let the Jury consider it.

Motion denied. Defendants Excepts. C. C. Black Judge

Mr. Hayes: I move for the direction of a verdict in favor of the Defendant, Edward R. Hayes, on the same grounds and on the further ground that it has not been shown that the Defendant, J. Arthur Hayes was acting as his servant and the only proof in the case regarding the relationship of master and servant on this particular ride is, that the Defendant, J. Arthur Hayes was on his own business.

The Court: I say the testimony is very slight as to the connection with the father and as Mr. Stickel says the fact that the mother and sister were in the car may be some evidence There is very little evidence as to the connection of the father but what there is I will let the Jury consider it and on the ground that it involves a question of fact, I will deny the motion.

Motion Denied. Defendant Excepts. C. C. Black Judge

The Court then took a recess until two o'clock this day.

After recess.

(Mr. Hayes sums up for the defendant.)

(Mr. Stickel sums up for the plaintiff.)

The Court then charged the Jury as follows:

The Court: Gentlemen of the Jury, Florence Missell brings this suit by her father and next friend to recover damages for an alleged injury to her, and as you have gathered from the testimony it is shown that on Thursday, August twenty-ninth, while Florence Missell was on the River road in the Borough of Delawanna, this County, who was struck by an automobile owned by one of the defendants, Edward R. Hayes, and driven by his son, J. Arthur Hayes, and the plaintiff says that the occurrence was such that you should draw from the testimony the conclusion that he was responsible for the negligence of the driver, J. Arthur Hayes.

Now if you find for the plaintiff, then you should say by your verdict whether or not you find both defendants guilty or only one of them, and that results from the rule of law which I will give you to be applied to the facts when you find them; whether or not if you find one of them guilty of negligence; they both should be included in the verdict.

The testimony shows that Edward R. Hayes was the father and the owner of the automobile and J. Arthur Hayes was the son and the driver and it is insisted by the defendant that even though the son, J. Arthur Hayes was negligent it does not follow that the father should be charged and that you cannot charge him merely from the fact that he was the owner of the automobile.

Before you can find Edward R. Hayes guilty of negligence you must find from the evidence that the relation of master and servant existed between them. That the son was on the business of the father. And the rule to be applied is that laid down by our Court of Appeals in the case of Doran vs. Thompson reported in 47 Vr., page 575; and the Court there said that to constitute the relation of master and servant as to third persons it is not essential that any actual contract should subsist between the parties or that compensation should be expected by the servant. While the relation of master and servant in its full sense invariably and only arises out of a contract between the servant and the master, yet such contract may be either expressed or implied. The real test as to third persons is whether the act is done by one for another with the knowledge of the person sought to be charged as master, with his assent expressed or implied even though there was no request on his part to the other to do the act in question.

Therefore, Gentlemen you are called upon to say in case you find for the plaintiff, and you find that Edward R. Hayes is liable, you must find the son was on the business of his father.

The doctrine of respondent superior applies only when the relation of master and servant is shown to exist between the wrongdoer and the person sought to be charged for the result of such neglect or wrong at the time and in respect to the very transaction out of which the injury arose.

So that if you find a verdict for the plaintiff you must find before you can find against Edward R. Hayes, the owner,

that the son was on the business of the father, that the relation of master and servant existed between them in the very transaction out which this injury grew, and you will say by your verdict in case you find for the plaintiff which defendant or both the verdict is against.

But before you can find a verdict at all for the plaintiff you must square this testimony by some other rules of law.

Of course if you reach the conclusion of fact that the driver and son, J. Arthur Hayes was not negligent, that he did not by some negligent act of his cause this injury, why, then, of course, your verdict must be in favor of both defendant's.

The rule of law is well settled that to entitle the plaintiff to successfully maintain an action it is necessary for the plaintiff by a fair prepondrance of evidence to establish, first, the proposition that the injury which is complained of was the result of the negligence of the defendant, J. Arthur Hayes, in this case; and second, it is necessary for you to be satisfied from all the evidence that Florence Missell was not guilty of what is called in the law contributary negligence or of action or conduct which contributed to the injury. That is, that she did not bring the injury upon herself by lack of care and prudence on her part, but that she took proper precautions to take care of herself.

But, in considering whether or not this little girl was guilty of contributary negligence, you will consider her age which the father said at the time of the injury was six years and ten months, you have seen her before you, you will also consider her years of discretion. Those are circumstances to be taken into consideration by the Jury, in determining whether or not she was guilty of contributary negligence. The fact that she was on the road is not in itself evidence on which you can convict her of contributary negligence. She had a right to be there. The public streets and public roads are for all. The use of those public roads by the automobile driver was lawful. But such use though lawful is subordinate to the duty on the part of the driver to exercise reasonable care that those having an equal right in the road may not receive injury, and in defining the degree of care to be observed in such cases, the cardinal doctrine of the law is that where there is a common right to a common use the care required depends upon the circumstances of the particular user.

And the driver of this automobile, J. Arthur Hayes was

bound in the exercise of his right on that public road to exercise reasonable care not only to avoid injury to himself but to avoid doing injury to others who had a right to be on the public street. Is that clear to you Gentlemen.

Now, of course, if you find that this injury to the girl was not the result of any negligent act of this driver, J. Arthur Hayes then your verdict must be for the defendants.

If you find that the relation of master and servant did not exist between the owner of the automobile and the driver of the automobile then your verdict must be in favor of the defendant, Edward R. Hayes. 10

If you find however that there was the relation of master and servant under the rule which I have given you and that this accident was caused by a negligent act of the driver, then you may find a verdict in favor of the plaintiff; and if you do, then you must know the rule under which to give damages and the rule is compensation, and compensation only.

Now the testimony shows that this little girl, Florence Missell, as said by the doctor, was injured by having her left shoulder blade fractured, that she had bruises on her nose, abdomen, elbows and eyes and the doctor says that she has completely recovered; and you saw her on the stand and the father also said that she had completely recovered. 20

Now then Gentlemen in applying the rule of damages to a case of a young child like this you must exercise, you ought to exercise, and you are called here for the purpose of exercising sound common sense and cautious judgment.

An injury of this kind to a child such as this while it may be a misfortune and while I doubt whether anybody could be more sorry for it than the people in the automobile when this happened, yet they are here in a law suit and if you assess damages it is your duty to exercise a good, careful, cautious judgment and to give her only such sum of money as will compensate her for the injury, the suffering and the pain whatever it was. The cost of her cure, the doctor's bill if any, and the loss of her services, she is too young to render services, are circumstances which you cannot consider in this case. She is to have if she is to have anything, compensation only and that must be measured by twelve sensible men using careful, cautious judgment. 30

I have been requested by both sides to give a series of requests to you, which I will treat as follows:

The Plaintiff's Requests:

1. This I have given to you in the exact language as requested as taken from the case in the Court of Appeals but I will give it as follows:

1. The test as to whether the relation of master and servant exists, as to third persons, is whether the act is done by one for another, however trivial, with the knowledge of the person sought to be charged as master with his assent expressed or implied, even though there was a request on his part to the other to do the act in question.

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I so charge you.

2. It is not essential in this case to hold the defendant, Edward R. Hayes liable, to show that an actual contract of service subsisted between the said defendant and the defendant J. Arthur Hayes, or that compensation should be expected by the said J. Arthur Hayes from the defendant Edward R. Hayes.

I so charge you.

3. The presence in the car of the wife and daughter of the defendant Edward R. Hayes is a fact from which you may consider with all the evidence in the case that the driver of the machine was the servant of Edward R. Hayes.

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I so charge you.

4. The presence of the plaintiff, Florence Missell, in the roadway picking up papers is not itself contributary negligence.

I so charge you.

The Defendant's Requests.

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1. That the burden of proof is on the plaintiff to show negligence.

I so charge you.

2. That the negligence cannot be inferred, it must be proved.

I so charge you.

3. That the plaintiff must prove the relationship of master and servant between Edward R. Hayes and J. Arthur Hayes.

I so charge you.

4. That if J. Arthur Hayes was not using the automobile in

his father's business on the day of the accident he was not his father's servant.

I so charge you.

5. That the relationship of master and servant cannot be inferred because Edward R. Hayes is the father of J. Arthur Hayes.

I so charge you.

6. If the Jury believes that J. Arthur Hayes was on his own business on the day of the accident, the Jury must find a verdict in favor of the defendant, Edward R. Hayes. 10

I so charge you.

7. That if the Jury believes that the defendant, J. Arthur Hayes was not negligent they must find a verdict for the defendant, J. Arthur Hayes.

I so charge you.

8. That if the Jury believes that the plaintiff, Florence Missell was guilty of contributary negligence and such contributary negligence was the approximate cause of the accident then the Jury must find a verdict in favor of the defendant, J. Arthur Hayes. 20

I so charge you.

But in considering whether or not as I have said that this little girl was guilty of contributary negligence, you should consider her age and her years of discretion as bearing upon the question of her contributary negligence. 30

Take the case, Gentlemen, and decide it according to the facts and rules of law which I have given you.

Are there no exceptions on either side?

Mr. Stickel: No.

Mr. Hayes: No.

(The Jury then retire.)

The Postea. Filed June 24, 1913.

"This case was tried before Judge Charles C. Black, with a jury of the Passaic Circuit on June seventeenth, nineteen hundred and thirteen. The same having been referred for trial to the Circuit Court by the Justice of the Supreme Court presiding in said Court.

The Jury rendered a verdict against each of the defendants, J. Arthur Hayes and Edward R. Hayes, and in favor of the plaintiff for One Hundred and Fifty Dollars ($150.00).

CHARLES C. BLACK,
Judge."

"I, William C. Gebhardt, Clerk of the Supreme Court of the State of New Jersey, do certify that the foregoing is a true transcript of the pleadings in the above stated cause as the same remain on file in my office.

In Testimony Whereof, I have set my hand and the seal of said Court at Trenton, this tenth day of June, A. D. 1913.

(SEAL.) WM. C. GEBHARDT, Clk."

NEW JERSEY COURT OF ERRORS AND APPEALS

FLORENCE MISSELL, by FRANK MISSELL, her next friend, (*Plaintiff*) Respondent, **vs.** J. ARTHUR HAYES, and EDWARD R. HAYES, (*Defendants*) Appellants.	On Appeal from New Jersey Supreme Court.

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BRIEF FOR APPELLANTS.

STATEMENT.

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This is an appeal from the Passaic Circuit of the Supreme Court. Plaintiff recovered a verdict of One Hundred and Fifty Dollars for injuries received by coming in contact with an automobile driven by J.Arthur Hayes, on August 29th, 1912. The judgment is against J. Arthur Hayes and Edward R. Hayes.

Previous to the trial of the action a motion was made to set aside the service of summons on the defendant, J. Arthur Hayes. The motion was denied by Mr. Justice Minturn, 85 Atl. Rep. 818.

30

GROUNDS OF APPEALS.

1. Because the defendant J. Arthur Hayes was not before the Court and was never served with summons in the above entitled action. Service of said summons and complaint was attempted to be made upon said defendant J. Arthur Hayes.

2. A motion to set aside said service was denied, notwithstanding the fact that said defendant J. Arthur Hayes had not been brought into Court.

3. There was error in the denial of the motion to set aside service of summons which affected the substantial rights of

the defendant, J. Arthur Hayes.

4. That the verdict was obtained against the said defendant, J. Arthur Hayes, without due process of law.

5. Upon the conclusion of the plaintiff's case the Court refused to grant a non suit in favor of the defendant, Edward R. Hayes.

6. Upon the conclusion of the defendant's case the Court refused to direct a verdict in favor of the defendant, Edward R. Hayes.

10 7. Because the verdict was contrary to the charge of the Court in finding against the defendant, Edward R. Hayes.

8. Because the verdict was contrary to the charge of the Court in finding against the defendant, J. Arthur Hayes.

9. Because there was no proof of relationship of Master and Servant existing between the defendants.

10. Because there was no proof of negligence.

11. Because plaintiff Florence Missell was guilty of contributory negligence.

12. Because the verdict was contrary to the weight of evi-
20 dence.

13. Because the verdict was contrary to law.

MATTERS ADMITTED AND PROVED AT THE TRIAL.

1. That the defendant Edward R. Hayes is the owner of the car that ran into plaintiff, and is the father of defendant J. Arthur Hayes.

2. That the driver of the car was the defendant J. Arthur
30 Hayes.

3. That J. Arthur Hayes was not acting in the furtherence of his father's business, but in the performance of some definite design of his own at the time of the injury complained of. (Pp. 27-28-32-35-37-40 of case.)

4. Plaintiff was injured by running in front of the automobile so driven by J. Arthur Hayes. (Pps. 36-41 of case.)

5. That service was attempted to be made upon J. Arthur Hayes, by leaving summons and complaint at his former residence (pp. 5-6-7 of case).

6. That J. Arthur Hayes has not resided in the City of New Brunswick since September, 1908. (Affidavit of Edward R. Hayes. pp. 5 of case, and affidavit of J. Arthur Hayes, p. 6 of case.)

7. That J. Arthur Hayes has no "usual place of abode" in New Jersey. (p. 5 of case.)

8. J. Arthur Hayes is a resident of Maryland and his "usual place of abode" is in the Town of Emmitsburg, Maryland. (pp. 5 and 6 of case.)

ARGUMENT.

I.

J. ARTHUR HAYES WAS NEVER SERVED WITH SUMMONS.

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Section 52 of the Practice Act of 1903, as amended in 1912, page 469, provides that summons "shall be served on the defendant in person, or left at his usual place of abode." The Sheriff returned the summons as having been left at the "residence" of J. Arthur Hayes; he does not certify that defendant was served personally or by leaving same at his "usual place of abode." The Sheriff's return shows that the service was not due process of law.

20

On the motion to set aside the summons affidavits were submitted on both sides. (Pp. 5-6-7-8-9.)

There is no proof that the place where summons was left for J. Arthur Hayes was "his usual place of abode;" it is not shown that J. Arthur Hayes ever stayed at the place where summons was left, at the time it was left there. The affidavit produced on behalf of plaintiff in opposition to the motion to strike out the name of J. Arthur Hayes contained no legal proof as to the "usual place of abode" of J. Arthur Hayes and the statement therein contained regarding the telephone conversation with the party at the residence of Edward R. Hayes was improper evidence and should not have been noticed by the Court in rendering decision, until the deponent, in said affidavit, had first shown that he was familiar with the voice of J. Arthur Hayes and that the voice he heard over the telephone was that of J. Arthur Hayes.

30

On the contrary the affidavits show that the place of service was not the residence or "usual place of abode" of J. Arthur Hayes. Mr. Edward R. Hayes swears that J. Arthur Hayes has not resided there since 1908, and that it was not his "usual place of abode." (P. 5 of case.)

J. Arthur Hayes testified that he resides in Maryland; has resided there for four years and that the place of service was not his residence or "usual place of abode" and that he had abandoned that place as a residence and abode. (P. 6 of case.)

Whenever the question of service of process has come before the Courts of this State, and elsewhere, they have held that an absolutely strict compliance with the Statute was necessary in order to properly bring defendant into Court.

In Penny vs. Harrison, 14 N. J. L. 24, the Chief Justice says "the act of the legislature must be strictly construed;" also that the court has no authority to proceed unless it appear that the summons was duly served. Ford, J., in the same case says: "I concur with the Chief Justice. The summons must be served as the act directs."

In Polhemus vs. Perkins, 15 N. J. L. 435. where the return of the constable was that he served the summons "by reading it to a *white* person over the age of fourteen and left a copy with her at the place of abode" and the statute required (Rev. Laws 630, s. 6) that "if the defendant is not found, the summons shall be served by leaving a copy thereof, at his house or place of abode, in the presence of some *free* person of the family, of the age of fourteen years, who shall be informed of the contents thereof," the Court held that the service was not a strict compliance of the statute and reversed the judgment.

Rogers vs. Jarman, 3 N. J. L., 117, reverses a judgment because the language of the statute concerning service at that time was not strictly complied with, and in Boylan and Nesbit vs. Hooper, 2 N. J. L. 88, Kirkpatrick, C. J. ordered a reversal where the constable returns the summons *lawfully served*, because the return did not justify a proceeding.

In Layton vs. Cooper, 2 N. J. L. 59, judgment was reversed because service of summons was not made in accordance with the words or the intention of the act.

In Ross vs. Ward, 16 N. J. L. 23, the court went so far as to say that even where the constable's return showed that he had read the summons to defendant, the judgment must be reversed because it was not served in the words of the statute.

It appears by the affidavits that defendant's "usual place of abode" is in Maryland. (Pp. 5 and 6 of case.)

Defendant cannot have two "usual places of abode" at one and the same time. (Mygatt vs. Coe, 63 N. J. L. 510.)

In Hennings vs. Cunningham, 59 Atl. Rep. p. 19, it was held that where a person has a "usual place of abode" in another State, he could not be served while on a visit in New Jersey, by having summons left at his host's house.

10

Defendant's affidavits further show that it was his intention when he left New Jersey in 1908, to establish a residence and have his "usual place of abode" in Maryland for an indefinite time, and that he did establish such residence and his "usual place of abode" in that State.

In Hervey vs. Hervey, 59 N. J. E. 166, where the defendant had left the State to be gone some years, and after his departure subpœna was served by leaving copies at his former residence, the residence of his father; the Court held that his "father's" residence was not at the time of the service the "usual place of abode" of the defendant, for the reason that he had left the State with the intention of remaining out of it for an indefinite time, and that his father's residence after his departure ceased to be legally within the statute, "his usual place of abode." The Court further said that the house at which he last resided is not his "usual place of abode."

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It will be borne in mind that J. Arthur Hayes left the place where service was attempted to be made, in 1908, and so far as it appears before this Court that was the last time he was there.

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From the cases cited above it can be seen that the Sheriff must certify that service was made, unless personal, in strict accordance with the language of the statute, or such service is not due process of law. It is a constitutional right of a citizen to be duly served with process and due process can only be had in the manner prescribed by the legislature.

"Nor shall any State deprive any person of life, liberty or property without due process of law," etc. 14th Amendment, Sec. 1, U. S. Constitution.

Service at a man's residence is not necessarily service at his "usual place of abode;" he may maintain a residence in the State for the purpose of voting, etc., and still it might be a very unusual thing for him to abide there. This is not even so in this case; J. Arthur Hayes shows conclusively that he gave up his residence in this State in 1908 and established one in Maryland, and that he has since continuously resided, and has his "usual place of abode" in Maryland. (Pps. 5 and 6 of the case.)

10 The statute (1912, p. 469) provides that summons may be left at the "usual place of abode" of defendant.

The word "usual" means customary, regular,—71 Ill. App., 152, 153. "Usual" does not mean "unusual," "casual," or "temporary."

"Usual place of abode" must be construed to mean defendant's present place of abode.

Earle vs. McVeigh, 91 U. S. 503.

The rule ordering service at the "usual place of abode"
20 does not permit service by leaving a copy at the *last* place of abode of the defendant.

Hyslop vs. Hopila, 12 Fed. Case 1139.

In the construction of statutes the term "usual place of abode" when applied to the service of any process, shall be construed to mean the place usually occupied by the person. G. S. Kan. 1901, No. 7342.

In Madison Co. Bank vs. Suman's Admr., 79 Mo. 527, it is said that "usual place of abode" as used in R. S. No. 3489, authorizing substituted service of summons by leaving a copy at defendants "usual place of
30 abode" must be construed to require the summons to be left at defendant's present usual place of abode. And hence a return that summons was left at defendant's *last usual place of abode* did not show service since such return could be true and yet the defendant reside and have his "usual place of abode" in another county or jurisdiction.

There are three methods whereby a person can be summoned, (1) personal service; (2) by leaving at the "usual place of abode" and (3) by attachment. If a return is made

in the second method shown above it must be in the language of the statute, in other words it must be prima facie proof of a service within the statute and to be this it must be in the language of the statute, and when the sheriff makes a return showing service at "residence" it is not the language of the statute and therefore no service at all.

Mr. Justice Minturn in his opinion denying the motion to strike out the name of J. Arthur Hayes, 85 Atl. Rep. 818. says "at the time of the service of summons he was in New Brunswick living at his father's home, and the Sheriff returned the summons as served 'at the residence of J. Arthur Hayes.' " This statement is purely conjectural on the part of the Justice; the only proof before the Court as to where J. Arthur Hayes was living was that his residence was in Maryland and that he had resided there continuously for four years. (Pp. 5 and 6 of case.)

Justice Minturn reasoning on the ground that J. Arthur Hayes was in New Brunswick says further "If his effects in New Brunswick were attached under process, he might properly claim that said summons could be served upon him in the statutory mode and process by attachment would not lie." There was error in this statement because there was no proof that he had any effects in New Brunswick. The only statutory mode by which process could be served on J. Arthur Hayes was "personal service." Even if it was shown (which it was not) that J. Arthur Hayes was in the City of New Brunswick on the date of service and also that he was at his father's residence (where summons was left) it would not be good service, for it still remains to be shown that such residence of his father is the "usual place of abode of J. Arthur Hayes."

Justice Minturn rightfully states that "the test invariably applied in all cases involving the regularity of the service of process of attachment is whether a summons could be served upon the defendant in the statutory manner; in other words whether he had an abode in this State, at which some person may reside who is capable under the statute of accepting ser-

vice of process, "but there is error in his interpretation of the cases cited by him, viz.:

Cadwallader vs. Howell, 18 N. J. L. 138.
Brardred vs. Del Hoye, 20 N. J. L. 328.
Clark vs. Likens, 26 N. J. L. 207.
City Bank vs. Merritt, 13 N. J. L. 131.
Harrison vs. Farrington, 35 N. J. Eq. 4.

We respectfully submit that Mr. Justice Minturn's construction of the statute and cases goes farther than the reasoning of the cases warrants, and does violence to the constitutional provision regarding "due process of law."

Justice Minturn also assumes facts which did not appear in the proof. If the service upon J. Arthur Hayes was good, then service upon the clerk of a hotel where a defendant stayed for a few days would be good, for the Justice says that he takes "usual place of abode" "to mean his usual place of abode in this State if he have such a place." The *only proof* in this case was that J. Arthur Hayes *did not* have a "usual place of abode" in the State of New Jersey.

As to the animus revertendi defendant's affidavits clearly state "that he had no intention of returning to his former home in New Brunswick" and that he gave up his residence in New Brunswick in 1908. He was a casual visitor at the place where service was made, as any week-end visitor (not a relative) might be at some one else's home.

Justice Minturn cites Clark vs. Lukens, 26 N. J. L. 207, to sustain him. As we read the case it does just the contrary. In that case it appears clearly that the defendant's residence was in Atlantic City and that he had never changed his residence and hence Atlantic City was his residence and the hotel where he lived the day before and intended to return the next day was undoubtedly his "usual place of abode."

He cites Harrison vs. Farrington, 35 N. J. Eq. 6. In that case defendant admitted that the place of service was his home and his "usual place of abode" in the summer, and that he had a like home and place of abode in the winter in New York, and of course the service was good.

II.

THERE WAS ERROR IN THE REFUSAL OF THE COURT TO GRANT A NON SUIT IN FAVOR OF EDWARD R. HAYES.

The only manner in which Edward R. Hayes was connected with the accident complained of was that he was the owner of the car which collided with Florence Missell. Plaintiff offered no proof that Edward R. Hayes was the master or principal and that J. Arthur Hayes was the servant or agent; he merely relied upon the fact that Edward R. Hayes was the owner of the automobile and that J. Arthur Hayes, the driver, was his son.

> In Lindsberg vs. Central R. R. Co., 46 Ga., 447, it is said "The relation of master and servant must first be established by competent evidence."

It was conceded by the common law that in no event was the parent liable for the tortious act of his *adult* child, merely because of parental relationship; and he was not liable for the tortious act of his *minor* child unless it appeared that the parent directed or counseled the wrongful act, or that the minor, at the time of commiting the tort, was acting as the agent or servant of the parent, and the wrongful act was within the scope of employment.

> Palm vs Ivorson, 117 Ill. App. 535;
> Swanson vs. Crandall, 2 Pa. Super. Ct. 85;
> Evers vs. Krouse, 70 N. J. L. 653.
> 7 Harvard Law Review, 348.
> 2 N. J. L. 86.

J. Arthur Hayes is over the age of twenty-one years.

The Court said in Smith vs. Jordan, 211 Mass. 269, "A father is not liable for the torts of his minor child, simply because of paternity," also that "if the act is not done in furtherance of the father's business but in performance of some independent design of his own, the father is not liable."

J. Arthur Hayes was not engaged in the performance of his father's business at the time of the accident complained of, but on his own personal business (pp. 27-28-32-35-37-41-44).

It may be true that the father is liable where he purchases an automobile for the pleasure of his family and his child is

the only one who drives the car, but this is not the case here; the car was not purchased for the pleasure of the family of Edward R. Hayes, but for his own private business; the son. J. Arthur Hayes, was not on his father's business, but engaged in his own work.

> In Maher vs. Benedict, 123 App. Div. 579, 108 N. Y. Supp. 228, the Court said "Liability cannot be cast upon the defendant because he owned the car, or because he permitted his son to drive the car whenever he wished to do so, or because the driver was his son. Liability arises from the relation of master and servant, and it must be determined by the inquiry whether the driving at the time was with the authority of the master, in the execution of his orders or in the doing of his work.

This question was inquired into. The plaintiff made no attempt to show that the car was being used in the execution of Edward R. Hayes' orders or in the doing of his work, but the defendants produced witnesses showing that the automobile was not engaged that day in the performance of any duty for Edward R. Hayes. (Pp. 27-28-32-35-37-41-44 of case.)

> The owner of an automobile is not liable on the theory that it is a dangerous machine. Hartley vs. Miller, 165 Mich. 115; 130 N. W. 336.
>
> Where there are no facts from which negligence may be inferred, a non suit should be granted. Met. Ry. Co. vs. Jackson, L. R. 3 App. Cas. 193.

If from the facts in evidence two inferences or conclusions can be reasonably deduced one favorable to the plaintiff and the other against him, a question then is presented which calls for the opinion. Two inferences relative to the liability of Edward R. Hayes could not be drawn, because the plaintiff proved nothing regarding him, nor in fact did she attempt to prove anything; the only evidence before the Court whereby an inference might be deduced concrning Edward R. Hayes' liability was that the car was owned by him, but was not engaged in his business on the day of the accident and was in the charge and control of another and being used upon that other person's business, and that other person was not the servant of Edward R. Hayes. There was nothing calling for an opinion of the jury.

P. R. R. Co. vs. Matthews. 7 Vr., 531.
Bahr vs. Lombard, 24 Vr., 233.
Battle vs. Camden & Atlantic R. R. Co. 26 Vr., 615; 627.

Where the only evidence tending toward the liability of a defendant is evidence produced in his favor, that surely negatives an inference against him.
Kelly and McAlinden vs. Central R.R. Co. 70 N.J.L. 190
Wilson vs. P. R. R. Co. 63 N. J. L. 385.

10

"If the plaintiff fails to prove the cause of action alleged in his declaration, a non suit is not erroneous."
Case vs. Central R. R. Co., 59 N. J. L. 471.

The substance of the complaint now before the Court is as follows: That J. Arthur Hayes was in control, charge and possession of the automobile owned by Edward R. Hayes, under the authority and as the duly authorized servant and operator of said Edward R. Hayes; that the said Edward R. Hayes did not use due care in the selection of his said servant, but recklessly chose an incompetent and improper servant and operator of said automobile.

20

This complaint is not sustained.

"A plaintiff is properly non suited if his proof fail to establish an essential part of the agreement upon which he has declared."
U. S. Fideliy & Guaranty Co. vs. Donnelly, 68 N. J. L. 654.

Plaintiff has failed to establish the most essential part of his complaint in order to place liability on Edward R. Hayes and should be non suited.

30

Where upon the uncontroverted facts, a plaintiff is not entitled to recover and a verdict in his favor would be set aside, it is the duty of the Court to non suit.
Central R. R. Co. vs. Moore, 4 Zab. 824.
Aycrigg vs. N. Y. & E. R. R. Co., 1 Vr. 460.

"Although motion to non suit be improperly reused, yet if the defect in the evidence be subsequently supplied, the judgment will not be reversed."
Perth Amboy Mfg. Co. vs. Condict, 21 N. J. L. 659.

But if the defect *is not* subsequently supplied the judgment must be reversed.

The New York Law Journal contained an editorial which was reprinted in Vol. 36 of the New Jersey Law Journal at page 45, wherein the liability of an owner of an automobile for the tortious acts of a member of his family while driving said automobile was discussed pro and con. The case of Stowe vs. Morris, Kentucky case, was taken as a principal, and it favored the liability of the parent for the acts of his son, as did a Massachusetts case of Smith vs. Jordon, while Maher vs. Benedict, 108 N. Y. S. 228, was cited as upholding the contention that the father is not liable. Our own case of Dorn vs. Thompsen, 76 N. J. L. 754 is also cited as being adverse to the liability of the father, and in conclusion it is said: "The controlling question in all of these cases should be whether the child was actually using the machine for his own purpose or for a family purpose for which the father was legitimately responsible, and it would seem that the principal case (Stowe vs. Morris) strains the logic of the situation, and the view of the New Jersey and New York Courts is to be preferred."

McNeil vs. McKaire, 112 Pac. 742 (Okla.) and Daily vs. Maxwell, 133 S. W. 351 (Mo.) also uphold the view of the New Jersey and New York Courts. The holding of the New York and New Jersey Courts in consonant with the authorities on the subject from the earliest time. Lord Cockburn in Rourke vs. White Moss Colliery Co. L. R. 2 C. P. Div. 205 said as follows:

> "When one person lends his servant to another for a particular employment, the servant, for anything done in that particular employment must be dealt with as the servant of the man to whom he is lent, although he remains the general servant of the person who lent him."

So it will be seen that the decisions in this State are based upon the proposition of competent proof as to relationship of master and servant exsting between the parent and child at the time the act emplained of is committed.

III.

COURT SHOULD HAVE DIRECTED A VERDICT IN FAVOR OF EDWARD R. HAYES.

Even if a non suit is properly refused there was error in refusing to direct a verdict at the close of defendant's case.

In Vrooman vs. North Jersey Ry. Co. 70 N. J. L. 818, it is said: "If the real facts have not been established by the evidence he must submit them to the jury." 10

Of course, therefore, if the *real facts have been established* and they show no liability on part of defendant, the jury must be directed to find in favor of said defendant.

The rule is well settled that "A jury should be controlled in its verdict by a peremptory instruction where the testimony is of such a conclusive character as would compel the Court, in the exercise of a sound legal discretion, to set aside a verdict if one were returned in opposition to such testimony. 20

Baldwin vs. Thomas, 14 Vr. 596.
Crue vs. Caldwell. 23 Vr. 215.
D. L. & W Ry. Co. vs. Shelton, 26 Vr. 342.
Hawes vs. Morris Trust Co., 27 Vr. 312.

Even if at the close of plaintiff's case there was any doubt in the mind of the Court as to the nature of the business upon which the car was engaged at the time of the accident, this doubt was surely dispelled at the close of defendant's case, because the only testimony throughout the trial as to what J. 30 Arthur Hayes was doing with the car that day was that he was engaged in his own private business; that his father had nothing to do with his taking the car, and in fact, did not know he had taken the car.

In McCormick vs. Standard Oil Co., 60 N. J. L. the Court said where no inference of defendant's liability was possible, a verdict for defendant was rightfully directed.

"Where the facts are clear and undisputed and conclusively show lack of authority in an agent, the ques-

tion as to his authority in a given particular, being a matter in issue, it is the duty of the Court to determine the issue by peremptory instruction to the Jury."

Amer. Law Co. vs. Nat. Bank of Trenton, 60 N. J. L. 417.

Where a matter is "proved by the defence and not controverted by the plaintiff" it is the duty of the trial court to direct a verdict for the defendant.

10 Lippincott vs. Royal Arcanum, 64 N. J. L. 309.

There can be no inference that J. Arthur Hayes was the agent of Edward R. Hayes where the only evidence touching on the question, is the proof that the relationship of Master and Servant *did not* exist between Edward R. Hayes and J. Arthur Hayes.

IV.

20 THE EVIDENCE DID NOT WARRANT THE VERDICT AGAINST THE DEFENDANT.

Negligence cannot be presumed on the part of a driver of an automobile from the mere fact that he runs down and injures a pedestrian on a public street. Millsaps vs. Bradgan, 134 S. W. 632.

It is a well known rule that a mere happening of an injury, with nothing else shown does not raise a presumption of negligence. The plaintiff produced one witness who testified as to the injury, in the following words:

30

The Court: "Tell us what you saw."

The Witness: "Well, I was working in front of my house; I was laying a concrete sidewalk and I heard a woman holler in an automobile so I happened to turn around, and I saw the girl was just getting hit with the automobile and when the girl got hit, the automobile stopped about seventy-five or eighty feet away. (pg. 17 of case.)

The plaintiff states that she was "trying to cross the street" when she was struck. (pg. 23 of case.)

In Stone vs. Forest City Express Co. 74 Atl. 23, it was said "where one working on a highway was struck by a horse and wagon and the only witness for the plaintiff who was able to make any statement, testified that he heard the driver cry 'look out' and saw the plaintiff struck to the ground the doctrine of Res ipsa loquitur does not apply and negligence will not be presumed against the defendant." This is exactly the same state of affairs as the case now before the Court. One witness was produced by the plaintiff who testified that he "heard a woman holler in an automobile" and the doctrine of Res ipsa loquitur cannot apply, nor can negligence be presumed because of the happening of the injury. 10

The fact that an automobile hits a pedestrian is not sufficient proof of the negligence of the driver thereof to sustain a verdict for plaintiff. Dudley vs. Raymond, 133 N. Y. S. 17.

The testimony of Martin Veniro produced on behalf of the plaintiff (pg. 17 of case) most certainly shows no negligence, and negligence cannot be presumed. The *only* testimony produced regarding negligence was the testimony of the witnesses for the defendants. 20

James A. Harkins (pg. 36 of case) testified as follows:

Q. "Was she in front of the car?

A. "No, she was not, she was on the side of the road.

Q. "What did she do then?

A. "Why, she stood up and I looked out and I thought as if the child was going to wait until the car would go by, and she kind of walked in front of the car, trying to get to the other side, as far as I remember." 30

J. Arthur Hayes, the driver of the automobile, testified as follows (pg. 41 of case).

"When I first saw the child, I was about, I should judge, one hundred and fifty feet away from her and she had gone to the right hand side of the road and I saw her stoop, and I don't know what she did, I saw her stoop and I turned a little to the left to give her plenty of room.

Q. "At the time she stooped was she in front of you?

A. "No, she was not in front of me, she was over to the right, but in order to play it safe I turned to the left

to give her plenty of room, and just as we went along the road, that is, she was about twenty-five or fifty feet away when I did that and when we got within four or five feet of her she jumped this way."

O. "Jumeped this way referring to what?

The Witness: "To the left in front."

The Court: "This way to the left, was that in the direction of the car "

The Witness: "In the direction in which I had turned the car."

10

The Court: "She jumped this way which was the direction in which you turned the car, is that right?

The Witness: "Yes sir, and when I saw what she did I immediately threw my brakes and turned the car to the left."

In Goble vs. Delaware, etc. R. R. Co., 3 N. J. L. 176, the Court says: "It is a persons duty to think, and if he fails to use his efforts or takes the precaution which an ordinary prudent man would employ in like circumstances, he is guilty of Negligence." Hence, if a man does think and takes precaution and still there is an accident, he is not negligent. J. Arthur Hayes did think and did take precaution which an ordinary prudent man would have taken.

20

In Kaufman vs. Busch, 69 N. J. L. 645, it is said the "age of plaintiff does not per se alter the rule by which the negligence of the defendant is to be gauged. If an accident is unavoidable, as was this, no negligence can be inferred or presumed or shown.

30

V.

THERE WAS ERROR IN ALLOWING CASE TO GO TO JURY BECAUSE IT WAS SHOWN PLAINTIFF'S NEGLIGENCE CONTRIBUTED TO THE ACCIDENT.

The mother of plaintiff testified as follows: (page 22 of case)

"Q. How many automobiles pass your house in a day?"
A. They go past there all day long.
Q. How many of them about?
A. I don't know.
Q. So many that you could not keep track?
A. So many goes past the River road, they come from all over, Passaic, Newark, and all over."

This testimony brings home to plaintiff the knowledge that the street she attempted to cross was one greatly traversed by automobiles and it is stated in 55 N. J. L.

> "The rule requiring one exercising his lawful rights in a place where the exercise of lawful rights by others may put him in peril, to use such precaution and care for his safety as a reasonably prudent man would use under the circumstances, is the measure of duty for one who crosses a public highway on foot. He must use his powers of observation to discover approaching vehicles, and his judgment when and how to cross without collision."

It may be true that Florence Missell was not bound to use such precaution as an adult would, but she nevertheless owed a duty to the travelling public while she was upon the roadway which she knew to be a much used automobile highway.

When J. Arthur Hayes sounded his horn he was about three hundred feet away from the child who looked toward the automobile (P. 39 of case.) Both J. Arthur Hayes and Florence Missell owed a duty to each other; J. Arthur Hayes to avoid running into Florence Missell, and she was duty bound to be precautious in crossing the road. It is shown that J. Arthur Hayes took the precautions of an ordinary prudent man by sounding his horn and otherwise calling to plaintiff's attention the fact that the automobile was approaching. (Pp. 31-34-36-38-42 of case.)

The manner in which plaintiff suffered her injury is shown in No. 4 of "Matters admitted and proved at the trial."

The accident happened in broad day light on a public highway. J. Arthur Hayes admits seeing plaintiff a distance of about one hundred and fifty feet ahead of him and he was

driving the car at not more than eight miles an hour. Page 41 of case.)

It is a well known rule of law that where the negligence of one person, no matter what the age, places another in a position of peril, the failure of such person to exercise the best judgment cannot be considered as negligence on his part.

52 N. J. L. 265.

It is shown that J. Arthur Hayes attempted to avoid the accident, but that Florence Missell did "jump" in front of the automobile in an attempt to cross the street, although at the time she started to cross the street she knew it was unwise to attempt to do so and her action was so sudden that the driver of the automobile was unable to avoid running into her.

All of which is respectfully submitted.

EDMUND A. HAYES,
GEORGE S. SILZER,
Attorney of and Counsel for Appellants.

BRIEF OF APPELLANTS IN ANSWER TO RESPONDENT.

Respondent has raised the point that motion to set aside summons should have been upon testimony and not upon affidavits. The proceedure however was the same as was adopted in Baldwin vs. Flagg, 43 N. J. L. 495, where Justice Depue said "both parties having used ex parte affidavits without objection, the case will be disposed of as it has been presented." Such was the case here, both parties presented affidavits and submitted the case to Justice Minturn for his decision. The decision of the Justice does not indicate that any objection was made and it must be assumed that none was made or Justice Minturn would have disposed of it. Plaintiff cannot at this late time, after submitting to the decision of Justice Minturn deprive the appellants of the right to raise this important question.

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New Jersey Court of Errors and Appeals

FLORENCE MISSELL by FRANK MISSELL, her next friend, *Plaintiff-Respondent,* *vs.* J. ARTHUR HAYES and EDWARD R. HAYES, *Defendants-Appellants.*	*On Appeal from New Jersey Supreme Court.*

Brief of Respondent.

This is an appeal from a judgment of the Supreme Court against the above defendants and in favor of plaintiff entered upon a verdict of a jury rendered at the Passaic Circuit, June 17th, 1913, for one hundred and fifty dollars ($150.).

Plaintiff claimed damages for injuries sustained by her on August 29th, 1912, when she was struck by an automobile owned by Edward R. Hayes, father, and driven by J. Arthur Hayes, his son, above defendants.

A motion made prior to the trial to set aside the service of the summons on the defendant, J. Arthur Hayes, was denied by Mr. Justice Minturn. See opinion, 85 Atl. Rep., 818.

Defendants set forth thirteen grounds of appeal.

The first four grounds involve practically the same objection, viz., that the defendant J. Arthur Hayes was not properly served and that Justice Minturn erred in sustaining the service made. I will therefore discuss them together.

This Branch of the Case is not properly before this Court.

On the opening day of the April Term of the Passaic Circuit, defendant's attorney moved to set aside service of summons as against defendant, J. Arthur Hayes, and Justice Minturn directed that defendant's attorney give notice of such application before him at some future day. Thereupon the notice was given which appears on page 4 of the state of case. Attached thereto were copies of the affidavits set forth on pages 5 and 6 of the state of case. These affidavits were also used on the return day of the notice before Justice Minturn. They are all *ex parte* affidavits taken without notice to plaintiff and without granting plaintiff an opportunity to cross examine. No proof appears in the state of case, that plaintiff consented to the disposal of the motion in question on *ex parte* affidavits or that the facts were agreed upon. On the contrary the record shows that plaintiff objected to this method of disposing of this motion, although submitting on the return day of said notice an affidavit as to the facts leading up to the service of the writ. (See page 7), "*ex parte* affidavits may be used for the purpose of obtaining a rule to show cause, but are not competent to prove facts necessary to support a motion not of course, or to be read on the hearing of a rule to show cause, depending on facts extrinsic the record. Such facts can only be brought before the court by depositions taken on notice." *Baldwin* vs. *Flagg*, 14 Vr., 495-496-497, and cases cited. The proper practice is set forth in this case and more fully in the case of *Peer* vs. *Bloxham*, 81 Atl., 659. The wisdom of the method of practice prescribed by these cases is strongly illustrated by these affidavits all taken before the attorney of defendants.

There being no competent evidence or proof of facts necessary to a proper judicial determination of the

questions raised by these grounds of appeal no reversal of the judgment as to J. Arthur Hayes, should be granted on these grounds.

But there is a further reasons why these grounds of appeal should not avail defendant. After Justice Minturn had upheld the service of the writ on defendant, J. Arthur Hayes, this defendant filed his answer. (See page 11 and 12 of state of case), denying the jurisdiction of the court, denying that he had been properly served and stating that his residence was in Maryland. No objection to the jurisdiction of the court was made at the trial, no offer made to prove the statements of defendant's answer as to residence and jurisdiction, although both defendants testified. Defendant by thus proceeding to trial without challenging the jurisdiction of the court over the defendant, J. Arthur Hayes and without proving or offering to prove his denial of the jurisdiction of the court set up in his answer must be held to have waived his objections and cannot now urge them as a ground of reversal. *Levinson* vs. *Godfrey, et al.*, 79 N. J. L., 212.

Assuming, however, that this court can consider these grounds of appeal there is no merit in them or either of them and the decision of Justice Minturn is correct.

About October twenty-eighth, nineteen hundred and twelve, summons and complaint was issued in the above entitled matter and service obtained by the sheriff of Middlesex County on Edward R. Hayes. He failed to serve J. Arthur Hayes, giving as a reason that he understood from the father of defendant that said person was living in Baltimore. Plaintiff was fearful that the son's authority to operate the car might be denied (and this fear was verified later, when plaintiff served upon the defendant, Edward R. Hayes, a notice to admit the authority of the son), and therefore urged sheriff to attempt to serve said J. Arthur Hayes at vacation time. The day after Christ-

mas, a clerk of plaintiff's attorney went to New Brunswick and found J. Arthur Hayes. A detailed account of his efforts is contained in the affidavit submitted by plaintiff. Suffice it to say that J. Arthur Hayes successfully evaded personal service and the sheriff pursuant to instructions left the summons and complaint for the defendant, J. Arthur Hayes, at the home of the defendant, Edward R. Hayes, on December twenty-sixth, nineteen twelve. The attorney for said defendants then moved to strike out of the case the name of J. Arthur Hayes, or in effect moved to set aside the service on the ground that the process was not left at the "usual place of abode" of said defendant. To establish his contention he submitted affidavits from Edward R. Hayes, the co-defendant, owner of car and father and J. Arthur Hayes, son and driver of car. Both affidavits have been taken before the son and brother, respectively of said defendants in the State of New Jersey, County of Middlesex, on January 8th, 1913, twelve or thirteen days after the service.

The question to be determined, therefore, is whether the service of this process by leaving it at the home of Edward R. Hayes, the father of defendant, J. Arthur Hayes, is a valid service of process.

The practice act, Section 52, as amended Laws, 1912, provides that "process in personal actions * * * shall be a summons, a copy whereof shall be served on the defendant in person, or left at his usual place of abode." No claim is made that personal service has been made and the parties agree I think that service was attempted to be made by leaving the process at defendant's usual place of abode.

The sheriff's return showing service is presumptive proof of the facts recited therein. *Hotovitsky* vs. *Little Russian Greek Catholic, &c Church*, 78 N. J. Eq., 576. It is therefore, incumbent upon defendant

to prove that the service was bad. On him rests the burden of proof.

A domicile, once existing, continues until another is acquired. *Cadwalader* vs. *Howell,* 18 N. J. L., 138; *Guggenheim* vs. *City of Long Branch,* 76 Atl., 338.

A domicile is "a residence at a particular place, accompanied with positive or presumptive proof of continuing there for an *unlimited time.*" *States, ex rel. Beckett* vs. *Coll'r of Bordentown,* 32 N. J. L., 192.

The actual intention of the person whose domicile is in dispute is in most cases a fact of great importance, but the best and most trustworthy evidence of it is found, as a general rule, in his acts rather than in his declarations. *Firth* vs. *Firth,* 50 N. J. Eq., 157; *Guggenheim* vs. *Long Branch, supra.*

How does the defendant sustain the burden of proof imposed upon him? He shows that up until September, nineteen hundred and eight, his home was with his father, at the place at which process was served, and that at about that time he left New Jersey to enter a college in Maryland, which he states involved the giving up of his residence in New Brunswick.

He further states that he "then had no intention of returning to his former home in New Brunswick, except perhaps for a short visit to his family and friends remaining therein, and has no present intention of so returning, *but expects to spend a further period of six years in said State of Maryland in completing his said course.*"

He further states that when he left New Jersey "he was aware that his preparation for the priesthood demanded a course of study covering a period of eleven years or more to be spent in the State of Maryland." His father corroborates the fact that the course of study is eleven years and that his son has still six years more to go.

I respectfully submit that these affidavits are not positive or presumptive proof that defendant has tak-

en up a residence at Baltimore with the intention of remaining there for an unlimited time. On the contrary they clearly show that there was no intention of remaining away an unlimited time. He says he intended to remain away during the length of time his course of study required, viz., eleven years and that he has still six years to go to complete the course. There is no proof that he has voted in Maryland or that he pays taxes there, and I submit that his own affidavits clearly show that his case is the familiar one of a student leaving his father's house to complete a course of study at college, which certainly does not entail the giving up of one's residence. Defendant has not acquired a domicile or residence in Maryland and still retains the one in his father's home.

Defendant then, having a residence in this state and a usual place of abode, as claimed, outside of the state can it be successfully maintained that service could not be made on defendant at his residence? I think not. Where defendant has a residence in the state and a usual place of abode out of it, the term "usual place of abode" under the practice act must be synomous with residence or domicile. Furthermore, if defendant had a residence in one state and a usual place of abode, as distinguished from residence, in this state he might be served with process in this state at his usual place of abode, provided he was actually living there at the time of service.

Furthermore, if defendant had a residence or domicile in another state and two places of abode in this state or two residences in this state to serve him properly he must be served at the place where he was actually living at the time of service.

But where he actually lives in another state a great part of the year and has a legal residence or domicile in this state that residence is his usual place of abode within the statute, the "usual" place he lives at when he does come into the state.

Certainly his property in this state could not be attached as that of a non-resident debtor under the decisions of our state, because process of summons could be served.

A debtor who is established in business in another state or country, but whose legal residence or domicile is in this state, and upon whom in contemplation of law, the process of summons can be served, is not subject to attachment as a non-resident debtor. *Brundred* ads *Del Heyo*, 20 N. J. L., 328; *Cadwalader* vs. *Howell & Moore*, 18 N. J. L., 138.

In *Clark, &c.* vs. *Liens*, 26 N. J. L., 207, defendant, who had previously been an attorney at law in Philadelphia, purchased a hotel in Atlantic City and gave up his business in Philadelphia and took up his residence in Atlantic City with the intention of making it his permanent residence. He kept the hotel open all summer and September 1st, closed it and left for Philadelphia. The attachment was issued on the 2nd, defendant boarded or kept house in Philadelphia. A servant was left in charge of the hotel. Held, that he was not a non-resident and could be served at the hotel "the same then being his usual place of abode." Mere inconvenience in the service of summons, * * ** furnishes no reason why an attachment should issue against one as a non-resident debtor. Temporary absences for business or pleasure are not an abandonment of one's abode or place of residence. *Stafford* vs. *Mills*, 57 N. J. L., 570. No more are defendant's temporary absences, or his absences punctuated by trips or vacations at home an abandonment of his residence or abode.

In *City Bank* vs. *Merrit*, 13 N. J. L., 131-133, defendant in attachment had his domicile in New York, but for about two weeks he resided on his farm at Secaucus, New Jersey. He was frequently absent, perhaps more than half the time, but was "open in all his movements, going, staying and returning, whereso-

ever his business called him, openly and publicly." He went to New Jersey to avoid the heat. The court held that defendant was not a non-resident, because he had an abode in this state at which process could have been served. Chief Justice Ewing says page 134: "It is only when the creditor cannot employ the latter (ordinary process), that he is permitted to resort to the former (extraordinary process). An actual residence is the predicament contemplated by the statute, *and no distinction is made between a temporary and a permanent character, between a residence for a summer or for life.*" In other words the court says that if a man has a permanent or temporary residence in the state he is amenable to process of summons and not to attachment. Defendant in this case not only had a legal domicile here, a legal residence here, but he was actually residing and spending his Christmas vacation, a period of about two weeks, at that legal residence and was still in the state and in the presence of his brother, his attorney on January 8th, 1913. This case has been uniformly followed and cited:

See also,

Perrine vs. *Evans,* 35 N. J. L., 221.
Baldwin vs. *Flagg,* 43 N. J. L., 495.
Coles vs. *Blythe,* 69 N. J. L., 203.

There have been but few decisions under the section of the practice act under construction, but those that have been rendered uphold the construction contended for in this case.

In *Camden Safe Deposit & Co.* vs. *Barbour,* 37 Vr., 103, the court decided according to the syllabus that "where a person has several residences which he permanently maintains, occupying one at one period of the year and another at another period, a summons must be served on him at the dwelling house in which he is living at the time of the service. It does not affect the legality of the service that he is temporarily

away from such dwelling while his family remains in it.

In *Mygatt* vs. *Coe.*, 63 N. J. L., 510, the defendant was not at his residence in New Jersey at the time of the service as in this case and the court therefore held the service bad, but had defendant been living even temporarily at the house the service would have been good. None of defendant's family in that case were in New Jersey.

Counsel for defendant refers, in his brief, to the case of *Hervey* vs. *Hervey,* 59 N. J. Eq., 166, as sustaining his contention that service was not properly effected on J. Arthur Hayes. The portion of the opinion quoted by him, however, shows that the court found that defendant in that case had left the state "with the intention of remaining out of it for an indefinite time." The affidavits of defendant in this case negative such an intention on the part of J. Arthur Hayes.

In *Harrison* vs. *Farrington,* 35 N. J. Eq., 4, the syllabus reads as follows:

> "Defendant was residing with his family in the house of his mother, in this state for the summer. His own house, in New York City, was open during the summer and in charge of a servant. He returned to New York with his family in October. Held, that leaving a copy of a subpoena *ad respondendum* for him, at his mother's house, in September, was a good service, it being 'his dwelling house or usual place of abode.' "

The case of *Guggenheim* vs. *Long Branch,* 76 Atl., 338 is instructive on this question and the facts in this present case, it seems to me, warrant the same conclusion that the court arrived at in that case, viz., that "our consideration of the prosecutor's testimony has not resulted in causing us to dissent from the conclusion reached by the state board, for in no part of his testimony do we find a positive and affirmative

declaration by him satisfactory to us that in the year 1906, he resided elsewhere than in this state." See also the quotation from *Harral* vs. *Harral,* on page 339.

In conclusion, I respectfully submit,

1. That defendant has not sustained the burden of proof or met the *prima facie* case of service made out by the service at the house of defendant's father.

2. That he has not shown, even by declarations, that he has fixed his habitation in Maryland with the intention of making it his home.

3. That he has shown that he has fixed his habitation there for a temporary or special purpose—that of completing his course for the priesthood.

4. That there is not proof sufficient to indicate the gaining of a new residence, and there is ample proof showing that the residence at which the process was served continued and has continued to date.

5. That process served on a member of defendant's family as in this case at his place of domicile or legal residence is a good and valid service, but in this case the additional element is present of actual residence and "no distinction is made between a temporary and permanent" residence, the length of stay at the home of his father not altering the fact that he was served while at his residence in the State of New Jersey and thus at his "usual place of abode" in New Jersey.

Counsel for defendant, J. Arthur Hayes, also devote some time in their brief in attempting to show that the return of the sheriff of service is defective and that being defective defendant is not properly in court. The notice to plaintiff (page 4), does not specify this as a ground of objection and the point was not raised in the argument before Justice Minturn. The simple question presented to Justice Minturn was whether the process had been served at the "usual place of abode" of defendant. But assuming that the

question was raised before Justice Minturn and can now be passed upon the return is at best irregular.

The Statute, Laws 1912, chapter 264, provides that "when the sheriff or other officer shall return the same (process) 'served' the party shall be considered as in court, and be proceeded against accordingly * * *" The process was returned "served" and whatever else the sheriff has added, if incorrect, may be rejected as surplusage. *Norton* vs. *Berlin Iron Bridge Co.*, 51 N. J. L., 442.

The Trial Court was correct in refusing to Non-Suit as to Defendant, Edward R. Hayes.

The next ground of appeal is that the trial court refused to grant a non-suit as to defendant, Edward R. Hayes, page 1—ground of appeal No. 5.

No application was made to the court for a non-suit as to J. Arthur Hayes. A non-suit "in favor of Edward R. Hayes" was the request made (page 26).

The court properly declined to non-suit.

Defendant's counsel based his application for a non-suit on the ground that proof that defendant, Edward R. Hayes was the owner of the automobile and that the other defendant, J. Arthur Hayes was driving it was not sufficient to make Edward R. Hayes liable for the negligence of J. Arthur Hayes (page 26). The court tersely stated the law. "Now, it is admitted that one of them (the defendants) is the owner and the other one is the driver and if the driver was not on the business of the owner that is something to be shown" (page 26).

Defendants admitted that Edward R. Hayes owned the auto, driven by J. Arthur Hayes, which struck he plaintiff (page 26 and page 14). This proof was *prima facie* evidence that J. Arthur Hayes was the serv-

ant of defendant, Edward R. Hayes and cast the burden on defendant of proving it was otherwise.

Edgeworth vs. *Wood,* 29 Vr., 463-468.

Joyce vs. *Capel,* 8 Car. & P., 370.

Fort Wayne & Chicago Railway Co. vs. *Callaghan,* 41 N. E. Rep., 909.

Schulte vs. *Holliday,* 19 N. W. Rep., 752.

In *Norris* vs. *Kohler,* 41 N. Y., 42. The court said:

"On the second point, whether the driver of the wagon was the servant of the defendant, the evidence consisted first, of the fact of ownership. The property being proved to belong to the defendant, it is urged that a presumption arises that it was in use for his benefit, and on his own account. This argument, I think, is a sound one. The ownership of personal property draws to it the possession. The owner is entitled to have and to keep possession, and no other person can justly obtain possession until some act of authority from the owner is proved. Ownership implies possession, and possession is in subordination to title. No proof was given in the present case, separating the ownership from the possession, and the presumption of law is that the wagon and horses of the defendant were in use in his service, and on his account."

And in *Dennery* vs. *Great Atlantic & Pacific Co.,* 81 Atl. Rep., page 862, the law of our state on this point is clearly set forth.

(2, 3) The other point raised by the refusal of non-suit assignment of error; viz., that ownership in the defendant was not proved in the plaintiff's case, is without merit, for two reasons:

First. It was proved that the defendant's name appeared conspicuously on the wagon, and we approve the doctrine as laid down by the Supreme Court in *Edgeworth* vs. *Wood,* 58 N. J. L., 463, 33 Atl., 940, following Lord Denman's ruling in *Joyce* vs. *Capel,* 8

Car. & P., 370, that "evidence that the wagon which ran over plaintiff was marked with defendant's name was sufficient to justify the inference that defendant was its owner, that such inference established *prima facie* that defendant was in possession and control of the wagon by the driver, its servant.

Second. "The proof of defendant's ownership was clearly established in defendant's own case. This court has held that the refusal of a non-suit for failure of proofs is not ground for reversal if the defect was afterward supplied by evidence taken in the progress of the trial. *Del., Lack. & West. R. R. Co.* vs. *Dailey,* 37 N. J. L., 526; *Hibernia Mutual Fire Ins. Co.* vs. *Meyer,* 39 N. J. L., 482. The history of this practice is fully stated in the opinion of the Supreme Court in *Bostwick* vs. *Willett,* 72 N. J. L., 21, 60 Atl., 398 W.

The proof of Edward R. Hayes' ownership was not denied, was admitted and was proven in defendant's case.

As I have above stated the only reason offered by defendant's counsel in support of his application for non-suit was that plaintiff's proof of ownership of the auto was not sufficient to bind Edward R. Hayes, the owner for the negligent acts of the driver, J. Arthur Hayes. No question of insufficient proof of negligence or of contributory negligence was raised and those questions cannot therefore be raised at this time. *Yetter* vs. *Gloucester Ferry Co.,* 47 Vr., 249, and cases cited. But if this court finds that these questions or either of them were advanced as reasons to support the application for a non-suit, the trial judge was nevertheless correct in refusing to non-suit for these reasons as there was ample evidence to go to the jury on both points.

Martin Verniero, a witness of the plaintiff testified that when he first saw the auto it was about 150 or 200 feet away from the child plaintiff (page 17, lines

37-40), that the auto was going fast (page 18, line 8), that the girl was trying to cross at that time and was about in the centre of the road (page 18, lines 32-35, inc.) that there was nothing between the girl and the automobile that would prevent the driver from seeing her (page 18, lines 21-23), that a woman occupant of the car screamed when the car was 150 or 200 feet away from the girl and thus attracted his attention (page 19, lines 27-31), and that the automobile travelled about 75 or 80 feet after striking the plaintiff (page 17, lines 25 & 26).

Certainly this testimony permits of an inference that the defendant driver did not have his car under control or did not exercise due care in approaching the plaintiff, or else he would have stopped it before covering the 150 or 200 feet between him and the child at the time one of the occupants of the car screamed.

Plaintiff was not guilty of contributory negligence in crossing the road and her testimony shows that she looked and saw a big truck and let it pass, that she then looked again, saw nothing, started to cross and was hit (page 23, lines 5-16, inc.).

Is this such evidence of contributory negligence on the part of a child six years and ten month old? I submit it is evidence of unusual caution for a child of that age.

See *Kaufman* vs. *Busch*, 40 Vr., 645.

The brief of defendants in arguing the question of the correctness of the trial judge's refusal to non-suit refers almost entirely to testimony given by the defense on its case. The testimony was of course not before the court when the motion to non-suit was made and could have no bearing upon his refusal to non-suit. The brief also states that defendant J. Arthur Hayes is over the age of twenty-one years. I assume that what is meant is that he was over the age of twenty-one at the time of the accident but there is no testimony whatsoever in the case as to the age of J. Arthur Hayes.

The refusal of the Trial Court to direct a verdict for defendants or either of them was proper.

In the first place it is to be noted that the only reason alleged in support of the application for a direction was the alleged failure of plaintiff to prove the relationship of master and servant between Edward R. Hayes and J. Arthur Hayes. No statement or even suggestion was made that negligence had not been established or that plaintiff had been contributorily negligent (pages 45 and 46).

The rule of law set forth in *Yetter* vs. *Gloucester Ferry Co.,* 76 N. J. L., 249-251 should be strictly applied.

> "But it is entirely settled that reasons in support of a non-suit or of a motion to direct a verdict, which were not brought to the attention of the lower tribunal, are not open for consideration in a court of review."
>
> *Yetter* vs. *Gloucester Ferry Co., supra.*

Furthermore this contention of defendants, as to the negligence phase of the case at least, is not based upon any objection to a ruling upon the evidence or a charge or a refusal to charge a request submitted, and therefore cannot be here considered (88 Atl., 1068).

If the court finds, however, that no negligence and contributory negligence were reasons urged in support of the application for a direction, the trial court was nevertheless right in declining to direct a verdict for these reasons.

The test to be applied in determining whether or not to direct is whether on any view of the evidence plaintiff can recover; whether the evidence has left the facts in dispute; whether fair minds may draw different conclusions. *Wilkins* vs. *Standard Oil,* 78 N. J. L., 524; *Rand* vs. *Armm,* 74 N. J. L., 704.

I have already quoted the pertinent portions of Martin Verniero's testimony and that of the plaintiff. In addition to that testimony we have the evidence of Mary Missell. She was in the rear of her home, in the back yard taking clothes off the line (page 20, lines 11 & 12) she first saw the automobile when it was about 300 feet away from her home (page 20, lines 7-10, inc.). It was running at a good rate at that time (page 20, lines 13-14, inc.). When the car was about 150 feet from her home one of the lady occupants of the car stood up in the automobile screamed and threw up her hands (page 20, lines 18-20, inc.). When she saw this she ran around to the front of the house to see what was happening and saw a young man picking up her daughter, the plaintiff herein (page 20, lines 34-38, inc.). Frank Missell, father of plaintiff, testified that his house is twenty-two feet front on the river road (page 25, lines 13 & 14) and that he saw his daughter being carried in and that the automobile was seventy-five or one hundred feet away from his house (page 24, lines 36 & 37 and page 25, lines 1-3, inc.). Martin Verniero says the child was struck opposite her home (page 17, lines 23 & 24). We thus have, in addition to the direct proof of Martin Verniero as to the speed of the automobile and as to its distance from the plaintiff when she was in the middle of the road, the indirect proof of the speed of the car and the direct corroboration of Verniero as to the screaming of an occupant of the car and the approximate distance away at that time of the automobile. At what speed must that car have been going to have traveled 150 or 200 feet and struck plaintiff before a frightened and fearful mother could run twenty-two feet along the rear of her house and probably forty feet along the side of her house to the road, for when she arrived on the road they were carrying the plaintiff in the house. Have the defendants met this testimony so conclusively, as to entirely remove any doubt

as to who was to blame for the occurrence? Have they adduced testimony so strong and convincing as to completely negative negligence on their part and as to effectually prevent the drawing of two inferences by fair minded men from the facts? Let us see.

Mary I. Hayes, the wife of Edward R. Hayes and mother of J. Arthur Hayes did not know that plaintiff had been struck until defendant J. Arthur Hayes told her (page 29, lines 39 & 40). She saw the child, however, before she was struck and the auto was then about twenty-five or fifty feet from the Missell house (page 31, lines 12-14, inc.). The car must then have been seventy-five feet or more from the girl as the Missell house is twenty-two feet wide and the girl was struck five or ten feet the other side of the house (page 30, lines 14 & 15). Driver blew the horn (page 31, lines 4-6). She did not scream until informed that child had been hit (page 31, lines 19 & 20). Car traveled about ten feet after striking girl (page 30, lines 9-11, inc.). Witness was in the back of the car and on the left. He says that plaintiff "stooped down for something and when she picked it up she sort of made a move to go to the right" (page 29, lines 14 & 15). She did not take particular notice as they were busy talking "and I did not take any particular notice * * *" (page 29, lines 23-25). The car was traveling about eight miles an hour (page 29, lines 10-12).

Margaretta McGovern, another occupant of the car, was sitting in the back and on the right hand side of the car (page 32, lines 20 & 21). The occupants of the car were talking and she did not notice how fast they were going (page 33, lines 1-4). She saw plaintiff cross the road and deposit a bundle of papers in a gully besides the road (page 32, lines 23-28, inc.) and the auto was then about 200 feet away from the child (page 32, lines 30-37, inc.). On the way back she stooped to pick up a paper, the auto was then about

fifty feet away and plaintiff had her back to it (page 34, lines 10-24, inc.) but was not directly in front of the car (page 34, lines 27-31, inc.). Witness did not see the auto strike plaintiff (page 32, lines 17 & 18). The horn was sounded when plaintiff started to return and when the car was about fifty feet from plaintiff (page 33, lines 5-8, inc.).

James A. Harkness, another occupant of the car, testified that he did not notice plaintiff in the road until the car was within at least five yards of her (page 35, lines 23 & 24) and she was then stooping to pick up a piece of paper (page 35, lines 25 & 26). She was not directly in front of the car (page 36, lines 6 & 7). Harkness was sitting in the front of the car next to the driver on the left hand side (page 35, lines 28-30, inc.). Right mud guard struck the child (page 35, lines 38-40, inc.). The car was traveling not faster than eight miles (page 35, lines 36 & 37). He says "Why, she stood up and I looked out and I thought as if the child was going to wait until the car would go by and she kind of walked in front of the car trying to get to the other side as I remember" (page 36, lines 8-11, inc.). Witness didn't remember how far car went after striking plaintiff (page 36, lines 33-35, inc.) but he ran down the side of the car and around the back and down the road. Plaintiff was not under the car (page 36, lines 28-32, inc.). From the time witness saw plaintiff stoop to pick up the paper until the time she was struck the car had traveled twenty-five feet (page 37, lines 12-15, inc.).

Melitta Hayes, the sister of one defendant and the daughter of the other, was in the back seat of the car and in the center (page 37, lines 29 & 30). She corroborates plaintiff's story for she says "I saw her (plaintiff) when she came out of her gate and she waited for a truck to pass, a big automobile truck and when that passed she crossed over the road and threw the paper in the gully and on the way over she had

dropped a paper and she started back to pick it up" (page 37, lines 30-36, inc.). Auto was about 300 feet away when witness first saw the child (page 37, lines 34-40, inc.; page 38, lines 1-5, inc.) and 150 feet away when child completed her journey across the road (page 39, lines 34-36, inc.). It was running about eight miles an hour. Horn was sounded once or twice after this (page 38, lines 10-15, inc.). Auto was about twenty feet away when plaintiff stooped to pick up the paper (page 38, lines 22-26, inc.). She was facing her home. Doesn't remember whether horn was tooted thereafter or not (page 39, lines 8-10, inc.). Car went about five feet after collision (page 39, lines 14 & 15).

John A. Hayes, defendant, was driving the automobile and was sitting on right hand side of car (page 41, lines 7-10, inc.). He saw the child when she was 150 feet away. She was then crossing the road (page 43, lines 2 & 3). When the child had crossed the road the car was 100 feet away (page 43, lines 9-11, inc.) and when she started back the car was about fifty feet away (page 43, lines 26-30, inc.). She was twenty-five or fifty feet away when she stooped (page 41, lines 18-23, inc.). Witness says he sounded the horn and was using the cut-out (page 42, lines 2-6, inc.). Stopped his car in four or five feet and later brought it about twenty-five feet up further from the accident (page 42 lines 27-33, inc.). Plaintiff when car got to about four or five feet from her jumped toward the car and kept running that way and was struck by the right side of the car (page 41, lines 30-38, inc.). Car going at rather a slow gait (page 43, lines 22-25, inc.).

There is no complete contradiction of the statement of plaintiff's witnesses, that an occupant of the automobile stood up in the car and screamed. Mrs. Hayes says she screamed when the child was hit. None of the other ladies in the car deny the testimony of plaintiff's witnesses on this point. All of

the witnesses for defense agree, however, that they saw the child when she was 150 feet or more away from the auto and that she was then crossing or about to cross the road. The driver saw her 150 feet away when she started to cross and 100 feet away when she had completed her crossing of the road; he saw her about fifty feet away stooping down. So did the other occupants and yet so little care was taken to control this auto that when the child stood up with the paper in her hand, which she had stooped over to pick up, this auto had traveled almost fifty feet and loomed up dangerously close to her. Harkens saw her when she was twenty-five feet away, Melitta Hayes when she was twenty feet away and the child was stooping over not looking at the approaching car. Mrs. Hayes and Miss Hayes say the car was traveling at a speed of eight miles an hour. John A. Hayes says it was going at a rather slow gait. No testimony was given that the speed of the car was decreased or any precaution taken in approaching the stooping child. The witnesses of the defense, other than Harkens, testify that the car traveled about five or ten feet after striking the girl; Hayes says he stopped the car in four or five feet. Harkens, however, says he ran down the side of the car, across the back and down the road and picked up the child. An automobile carrying five people must have been at least six or eight feet in length and if Hayes is correct the girl must have been under the automobile or alongside of it when she was picked up. But Harkens who picked her up says she was not under the car and that it had already gone by (page 36, lines 33-35, inc.).

Can it be said under these circumstances, and taking into account the testimony of the witnesses of the plaintiff, that as a matter of law the defendant driver was not guilty of negligence, or that as a matter of law the plaintiff was guilty of contributory

negligence? Can it be said that the jury could not draw two inferences from these facts, could not rightly find defendant negligent? Can it be said that as a matter of law eight miles an hour was a proper speed under the circumstances in this case and considering the age of the child? Can it be said that there is no conflict in the testimony, that there is no room for debate? Can it be said that fair minded men would not and could not differ on the inferences to be drawn as to negligence from the above circumstances and that they could not find defendant negligent?

A child six years of age is not chargeable with contributory negligence. *Schneider* vs. *Winkler*, 45 Vr., 71. Plaintiff was six years and ten months at the time of the accident (page 45, lines 2-6, inc.). The child was under seven and there is nothing special in the case that alters the general rule that a child under seven is not chargeable with contributory negligence. Therefore it was defendant's duty to have his car, especially under the circumstances, under such control that even if the child were careless he could stop his car if necessary to avoid striking her. But looking at the matter in the most favorable light for defendant, he, having seen the child 150 or 200 feet away, having watched her cross the road, having observed her 100 feet away after completing her crossing, having noticed her stoop to pick up a paper in the road when the car was twenty-five or fifty feet away and when she was facing away from the car and when the car was going eight miles an hour, it was his duty to decrease his speed and have his car under such reasonable control, as would enable him to stop if necessary in order not to run against the child and the jury were entitled to infer from the facts that defendant did not have his car under such control and that having reached the child, he aware of her presence, but she not of his, he had frightened

her and in acting in the emergency and danger created by defendant she was injured and to further determine whether plaintiff was *sui juris* or not, whether under the circumstances and her age defendant was liable for her injuries.

Ritscher vs. *O. & P. N. Ry. Co.,* 50 Vroom, 462, is somewhat like this case and the court left the question of negligence and contributory negligence to the jury. This case is even stronger than that case in that the car in the Ritscher case was on tracks and could not deviate from its course. The syllabus is as follows:

Plaintiff, a boy six years and ten months of age, while returning home from school and while running in order to escape being struck by a stone, which he expected a pursuing boy to throw at him, ran across the defendant's street railway track and was injured by an approaching car. The accident happened in the neighborhood of the school and while the car, according to the plaintiff's case, was proceeding at a high rate of speed, and without giving any warning of its approach. Held, that the question whether the plaintiff was guilty of contributory negligence was for the jury, as was also the question whether upon a denial of these facts the defendant was guilty of negligence.

See also,

Turner vs. *Hall,* 64 Atl., 1060.
Kathmeyer vs. *Mehl,* 60 Atl., 40.

Furthermore, defendant put the child in a situation which to the child must certainly have been a sudden peril, and her acts in the emergency are not contributory negligence, if she was of an age that could be chargeable with such negligence, and defendant is responsible, therefore, for the consequences of his action.

There is no question of *res ipsa loquitur* in this case as counsel for defendant states, for the proof of plaintiff established negligence, and the evidence of defend-

ant's witnesses did not disprove but on the contrary proved negligence.

Grounds of appeal 10 and 11, are thus answered if they can be considered on this appeal as is ground 12 as to the negligence phase of the case if that ground of appeal is a proper one to be considered by this court.

The only reason offered to support the application for a direction of verdict remains to be considered under ground of appeal six. I will dispose of ground 9 and ground 12, so far as they are applicable, at the same time, as they involve practically the same facts, considerations and principles.

Plaintiff having proven ownership by one defendant and possession by the other a *prima facie* case was made out that car was driven by the owner's servant and the burden was cast on defendants of proving that the car was otherwise controlled.

I submit that they have not sustained the burden so completely and conclusively as to exclude all but inferences favorable to defendants.

The proof establishes that this car was a family car, all the sons drove it and so did the father (page 31, lines 34-40, inc.). The mother and daughter were dependent upon the sons and father for rides in the car. The defendant son had taken the car out before and with the owner's knowledge and sometimes with and sometimes without his permission (page 27, lines 11-15, inc.; page 44, lines 26 & 27) had taken it out to owner's knowledge the same week the plaintiff was injured (page 27, lines 19 & 20) had driven his sister out in the car that week (page 40, lines 14 & 15), and had driven her and her father on different occasions before the occurrence in question (page 40, lines 16 & 17) had taken his mother out driving before (page 31, lines 21 & 22). The garage was in the yard of defendant Edward R. Hayes (page 27, line 40). Do not these facts warrant and justify an inference that this de-

fendant son was on the day in question acting as a servant of the defendant, Edward R. Hayes, in taking his mother and sister out for a drive? It is not essential to constitute the relation of master and servant as to third parties that any actual contract should subsist between the parties, or that compensation should be expected by the servant. *Doran* vs. *Thomsen,* 71 Atl., 296. The real test as to third persons * * * "is whether the act is done by one for another, *however trivial* with the knowledge of the person sought to be charged as master with his assent express or implied, *even though there was no request on his part to the other to do the act in question.*" *Doran* vs. *Thomsen.* Can we say that there is absolutely no evidence in the case from which a fairminded man could infer an act, however, trivial, done by the defendant son for the defendant father? I submit we cannot say there is absolutely no such evidence.

True defendant, J. Arthur Hayes, states that he did not consult his father about this particular ride but the proof amply shows that he had general permission to use the car and did so, driving his father himself on some occasions and his mother and sister on others. And the defendant owner himself only testifies that as to this particular ride the son did not have his *"express permission"* and that he did not know positively that the car was taken out that day (page 26, lines 38-40). It is also true that the defendant son states the trip was altogether a pleasure trip for him (page 41, lines 2-4, inc.), that he was going to Passaic to see a friend, that his mother states he invited her to go out with him (page 28, lines 17-20, inc.), that Melitta Hayes testified her brother invited her (page 37, lines 23-26, inc.), and that James A. Harkens says he was invited by the defendant driver. But are these facts inconsistent with an inference that the son with the implied assent of and for his father was taking out his mother and sister for a ride and to get the

air? Defendant may have intended visiting his friend but that would not militate against acting as his father's chauffeur in taking out his mother and sister. Would not a fairminded man be warranted in infering that this defendant was under general and implied instructions to take out his mother and sister in the car in exchange for the use of it on occasions for himself alone? I think so. And this view is not weakened by the testimony that he asked mother and daughter to go. It did not differ greatly from the deferential suggestion of one's coachman to madame, that possibly she would like to take a ride.

And this view is strengthened by the testimony of Margaretta McGovern to the effect that defendant's sister invited her on the trip. Defendant did not invite her. His sister did. None of the occupants of the car so far as the testimony shows knew the friend the defendant proposed to visit. They went out for the ride and he gave them the ride while also carrying out his own personal purpose, visiting the friend in Passaic.

The case differs from the case of *Doran* vs. *Thomsen,* 71 Atl., 296. The essential lacking in that case is present in this, the doing of an act for another. In that case the court found that the daughter was using the car solely for her own pleasure in driving her own personal friends and Justice Voorhees in his opinion said, "No member of the family was with her; so that the machine was then being run by the daughter upon no errand of the father." And later in his opinion the justice says:

> "It will be noticed that the act must be done by the one for the other. That was not so in the case at bar, and so there was no evidence upon which to find the existence of the relation if the daughter was not doing an act for her father. *She was not even driving other members of the family.* She was using the machine as a means of recrea-

tion and pleasure for herself and her own friends, and it would seem impossible to draw the conclusion that she could be regarded as the agent or servant of her father upon that occasion."

Defendant in this case was driving other members of the family, he was not using the machine solely as a means of recreation and pleasure for himself and his own friends, and it is quite possible, therefore, to draw the conclusion that the defendant was the agent or servant of the father upon that occasion.

And again the court says, "We have seen that there was no express authority for the daughter to take the vehicle on the occasion of the accident, nor can we perceive that, by necessary implication, her use of it for her own purposes was within the line of her duty under the assumed implied employment." But would not the use of this vehicle have been by necessary implication within the line of her duty under her assumed implied employment if she had driven other members of the family in the car? I think so, and I do not believe that the mere fact that a personal purpose of the servant was also being served in driving out the other members of the family destroys such implication. Counsel for defendant in his brief admits that if the father had purchased the car for the pleasure of the family and the defendant son had been the sole driver that then in this case the father would be liable, but contends that the car was not purchased for the pleasure of Edward R. Hayes' family but for his own private business and that the son was engaged in his own work and was not on his father's business when plaintiff was injured. This statement is begging the question. If true, the defendant father would probably not be liable. But there is no proof in the case that the car was for the private business of Edward R. Hayes. He did not so testify nor did any of the other witnesses of the defense. Nor is there any direct testimony that the car was not purchased

for the pleasure of the family. On the contrary the probable inference from the testimony is that it was purchased for the pleasure of the family. It is true that the testimony shows that the defendant son was engaged in his own pleasure at the time of the occurrence in question but the testimony referred to in defendant's brief is not conclusive proof that defendant driver was not on the business of his father. On the contrary the inference from the testimony is that the defendant son was acting as a chauffeur of the father in taking the wife and daughter of father out for a pleasure ride. Defendant rightly says that if two inferences or conclusions can be reasonably deduced from the evidence one favorable to plaintiff and one against him a question is then presented which calls for the opinion of a jury. And I believe I have shown that an inference favorable to plaintiff can reasonably and naturally be deduced from the evidence.

The article in the *New Jersey Law Journal* referred to in defendant's brief groups the latest authorities *pro* and *con* on the question of the family use of the automobile. The general principle is conceded by all the decisions there cited, namely, that a father is not liable for the torts of his son committed without his knowledge or authority express or implied. The difference in the cases lies in applying the principle to the facts. In the Kentucky case *Stowe* vs. *Morris* 144 S. W., 52, the father was held liable where without the express permission of the father, but under his implied authority to use a machine which had been purchased for the joint pleasure of the family, the minor son took the car out and with his sister and friends, as his invited guests, and while running the car injured a twelve-year old boy.

The ground of the court's decision was "that at the time of the accident, the son was engaged in carrying out the general purpose for which the machine was bought and kept; and that, as he took it out at the time

in pursuance of general authority from his father to take it when he pleased, for the pleasure of the family and himself as a member of it—the purpose for which it had been bought—he was engaged in the execution of his father's business, *i. e.,* the supplying of recreation to the members of the father's family."

Doran vs. *Thomsen,* 76 N. J. L., 754, in passing upon a very similar charge to the jury by the trial judge held "that the charge was erroneous in that it based the creation of the relation of master and servant upon the purpose which the parent had in mind in acquiring ownership of the vehicle and its permissive use by the child, ignoring an essential element in the creation of that status as to third persons, that such use must be in furtherance of and not apart from the master's service and control." The Kentucky case declares that the New Jersey case is in direct conflict with its decision. Both courts agree upon the principles involved in the two cases, but the Kentucky court found that the use of a family pleasure automobile by a minor son for his own pleasure and that of his sister and friends in obtaining recreation for themselves was an execution of the father's business. The New Jersey court could not agree that the use of a pleasure car by a minor daughter for her own pleasure was an execution of the father's business. But the New Jersey court did not hold that in a case where a son under a general permission took his mother out in the car and his sister that an inference could not be drawn therefrom by a jury that the son was on the business of the father.

In *Smith* vs. *Jordan,* 97 N. E., 761, the facts are similar to the facts in this case.

There an automobile was purchased by the defendant father, for general use of the family. His minor son was the only member of the family licensed to operate it. The wife had permission to use the automobile, whenever she desired and requested the son to

drive her out. The father was held liable for injuries sustained by a plaintiff in a collision with the father's auto, driven by the son.

Chief Justice Rugg, of the Massachusetts Supreme Judicial Court, in his opinion, said:

> "The boy was not running it for any purpose of his own, but for the convenience of his mother and by her express direction, for whose use, in common with the rest of the family, it had been purchased by his father. If the father had employed a chauffeur outside the family at a stated compensation it could not be contended seriously that taking the wife out for an afternoon call was not the business for which he had been employed. If, instead of hiring a stranger, the father chose to have the same work performed by his minor son, to whose time and services he was entitled as a matter of law, it could not be ruled as a matter of law that a jury might not find the business to be that of the father * * * .

The relation of husband and wife is such that when the former has purchased an automobile for family use, a ride by the wife in it with his general permission is not as matter of law the business of the wife, but may be found to be that of the husband. *Bourne* vs. *Whitman*, 209 Mass., 155, 95 N. E., 404; *Hunt* vs. *Rhodes Bros. Co.*, 207 Mass., 30, 92 N. E., 1001."

In *Daily* vs. *Maxwell, et al.*, 152 Mo. App., 415, 133 S. W., 351, the court in holding the father liable for the tort of his minor son said: "Had Ernest been taking his mother for a pleasure ride, instead of taking some of his young friends, no one would contend that he was not on his father's business."

And so in this case, defendant son was taking his mother out for a pleasure ride and at the same time carrying out a purpose of his own and in thus taking out his mother he was acting as his father's servant. Upon defendant rests the burden of proving that the

machine at the time of the accident was controlled otherwise than by his servant, and it has not been done. The proof as to the relationship between father and son was wholly in the knowledge of the defendants and the defense. And they have not rebutted the *prima facie* case of plaintiff. No proof was offered by the defense that the car was not a pleasure car of the family, nor that there was no implied right in the defendant son to use the car when he pleased nor that he was supposed to take out his mother when she wished to, nor that his pleasure was the sole purpose of the ride. The proof at the close of case was such as to permit two inferences to be reasonably drawn by fair-minded men as to the question of whether the defendant son was the servant of the defendant father and on the business of the master at the time plaintiff was injured and therefore was rightly submitted to the jury. And there is evidence from which the jury might have reasonably found that the defendant, J. Arthur Hayes, was the servant of the defendant, Edward R. Hayes, and engaged in his business at the time the plaintiff was injured and there being such evidence the verdict of the jury should not be disturbed.

Waldron vs. *Wells,* 86 Atl., 362.

Spargo vs. *Central R. R. Co.,* 86 Atl., 385.

Kelly vs. *Board of Police, &c.,* 88 Atl., 621.

Grounds of Appeal 7 and 8 are not discussed, it seems, in the brief of counsel for defendant, but in any event even if there is merit in them, which I deny, these grounds are not the proper subject of appeal and should not be considered.

In conclusion, I respectfully submit that there is no harmful error in the proceedings of the trial court, and no error in the decision of Justice Minturn upholding the service of summons on defendant, J. Arthur Hayes and that the judgment of the trial court should be affirmed.

Respectfully submitted,

FRED G. STICKEL, JR.