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SUMMONS.

(Filed August 31, 1922.)

THE STATE OF NEW JERSEY TO TRENTON AND MERCER  
COUNTY TRACTION CORPORATION:

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You are summoned to answer the annexed complaint of Martha Lambert, by (L. S.) her next friend, Louis Lambert, and Louis Lambert, individually, in an action at law in the Mercer County Court of Common Pleas. And take notice that unless you file your answer to said complaint with the clerk of the Mercer County Court of Common Pleas, at Trenton, within twenty days after service upon you of this writ and the annexed complaint, the plaintiff may proceed in the suit and judgment may be entered against you.

20

Witness, Erwin E. Marshall, Judge of the Court of Common Pleas of Mercer County, at Trenton, this thirtieth day of August, A. D. nineteen hundred and twenty-two.

HARRY A. HARTPENCE,  
*Clerk.*

MARTIN P. DEVLIN,  
*Attorney.*

30

## COMPLAINT.

MERCER COUNTY COURT OF COMMON  
PLEAS.

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10	MARTHA LAMBERT, by her next friend, LOUIS LAM- BERT, and LOUIS LAM- BERT, individually, <div style="text-align: right;"><i>Plaintiffs,</i></div>	} Action at Law. Complaint.
	v.	
	TRENTON AND MERCER COUNTY TRACTION COR- PORATION, <div style="text-align: right;"><i>Defendant.</i></div>	

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20

Plaintiff, Martha Lambert, being an infant under the age of twenty-one years, to wit; five years, by her father, Louis Lambert, residing at 553 North Clinton Avenue, City of Trenton, County of Mercer and State of New Jersey, who has been appointed her next friend, to prosecute this action in her behalf, and thereupon the said plaintiff, Martha Lambert, by her father, Louis Lambert, her next friend, complains and says:

30

1. That the defendant, the Trenton and Mercer County Traction Corporation, a corporation existing and acting under the laws of the State of New Jersey, is the owner and operator of a street car system consisting of tracks, cars, wires, poles and

other equipment located and operating in the various streets in the City of Trenton, and County of Mercer and State of New Jersey, and is engaged in carrying passengers for hire.

2. That on March 18, 1922, the plaintiff, while walking on, and crossing North Clinton Avenue, of the City of Trenton, County of Mercer and State of New Jersey, and while using all care and lawfully walking on and across said North Clinton Avenue in a northerly direction, and without any fault on her part, street car 204, owned and operated by the said defendant, through its servants, agents and employees, while traveling in a northwesterly direction on said North Clinton Avenue, did carelessly, negligently and recklessly, run into and collide with the said plaintiff, and did with great force, throw the said plaintiff to the said ground, and under the wheels of said car, thereby cutting, bruising and injuring the said plaintiff about the said head, body, arms and legs, and cutting off and amputating the left arm of the said plaintiff.

3. The negligence of the said defendant, by its servants, agents and employees consisted in that the said car was operated at a speed greater and higher than is consistent with the use of the highway by the plaintiff and others; and that the said defendant by its agents, servants and operators, failed to look in the direction in which the said car was traveling, so as to be able to observe the place and position of the plaintiff and others while using the said highway; and that the defendant, by its servants, agents and operators, failed to give a signal so as to warn said plaintiff and others of their approach, to the said plaintiff and others, who were using the said highway; and the said defendant, by its servants,

agents and operators, did operate the car at such a high rate of speed as to put the said car beyond a reasonable control, so as to protect the plaintiff and others against injury while using the said street and highway; and the failure of the said defendant, by its servants, agents and operators to have attached thereto guards and fenders, and to have the said fenders and guards in a reasonably safe and workable condition, so that the plaintiff could be protected from injury; and the failure of the defendant by its servants, agents and operators to have said fenders and guards in a state of repair so that they could operate to protect the plaintiff from being run over by the wheels of the said car of the said defendant.

4. By reason whereof the plaintiff has been damaged, in that from the said injuries she has suffered great pain and agony on her arms, body, head, legs, feet, hands and nerves, and was confined to the hospital for a period of about two months, and that she will in the future suffer great pain and agony on her arms, body, head, legs, feet, hands and nerves, and that she is permanently injured, in that her left arm has been amputated from the shoulder, and that she will endure pain and suffering permanently from the loss of said arm, and from the injury to her nervous system, and that she will be deprived in the future of being able to earn a livelihood, and will be unable to pursue the occupation and the life of a normal and well person, and will be compelled in the future to expend large sums of money for medicine, medical services and nurses, and will be compelled in the future to forego the occupations, the enjoyments, and the opportunities of a normal person, by reason of the fact that her nerves are permanently injured and her body and side are per-

manently injured and that her left arm has been amputated and thereby she has suffered great losses and damages to the amount of \$25,000.

5. Plaintiff demands, as damages, the sum of \$25,000.

The plaintiff, Louis Lambert, of 553 North Clinton Avenue, Trenton, N. J., father of Martha Lambert an infant, complains and says that:

1. That the defendant, the Trenton and Mercer County Traction Corporation, a corporation existing and acting under the laws of the State of New Jersey, is the owner and operator of a street car system consisting of tracks, cars, wires, poles and other equipment located and operating in the various streets in the City of Trenton, County of Mercer and State of New Jersey, and is engaged in carrying passengers for hire.

10

2. That on March 18th, 1922, the said Martha Lambert, infant daughter of the plaintiff, Louis Lambert, while walking on North Clinton Avenue, of the City of Trenton, County of Mercer and State of New Jersey, and while using all care and lawfully walking on and across said North Clinton Avenue, in a northerly direction, and without any fault on her part, street car No. 204, owned and operated by the said defendant, through its servants, agents and employees, while traveling in a northwesterly direction on said North Clinton Avenue, did carelessly, negligently and recklessly run into and collide with the said plaintiff and did with great force throw the said Martha Lambert, daughter of the said plaintiff, to the ground, and under the wheels of the said car, thereby cutting, bruising and injuring the said plain-

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30

tiff about the head, body, arms and legs, and cutting off and amputating the left arm of the said plaintiff.

3. The defendant, by its servants, agents and employees, was negligent, in that the said street car was operated at a speed greater and higher than is consistent with the use of the highway by the said Martha Lambert, daughter of the said plaintiff, and others; and that the said defendant, by its agents, 10 servants and operators, failed to look in the direction in which the said car was traveling, so as to be able to observe the place and position of the said Martha Lambert, daughter of the said plaintiff, and others, while using the said highway; and that the defendant, by its servants, agents and operators, failed to give a signal so as to warn the said Martha Lambert, the daughter of the said plaintiff, and others, of their approach, as the said Martha Lambert, daughter of the said plaintiff, and others, who 20 were using the said highway, and the said defendant, by its servants, agents and operators, did operate the car at such a high rate of speed as to put the said car beyond a reasonable control, so as to protect the rights of the said Martha Lambert, daughter of the said plaintiff, and others using the said street and highway; and the failure of the said defendant, by its servants, agents and operators to have attached thereto guards and fenders, and to have the said fenders and guards in a reasonably 30 safe and workable condition, so that the said Martha Lambert, daughter of the said plaintiff, could be protected from injury; and the failure of the defendant, by its servants, agents and operators to have said fenders and guards in a state of repair so that they could operate to protect the said Martha Lambert, daughter of the said plaintiff, from being run over by the wheels of the said car.

4. By reason whereof the plaintiff's daughter, Martha Lambert, has been damaged in that from the said injuries she has suffered great pain and agony on her arms, body, head, legs, feet, hands and nerves, and was confined to the hospital for a period of about two months, for which Louis Lambert, father of Martha Lambert, has been compelled to spend great sums of money for medical attention, nurses, medicine and hospital bills; and that she will in the future suffer great pain and agony on her arms, body, head, legs, feet, hands and nerves, and that she is permanently injured, in that her left arm has been amputated from the shoulder, and that she will endure pain and suffering from the loss of said arm, and from the permanent injury to her nervous system and side, and will be deprived in the future to pursue the occupation and the life of a normal and well person, and the plaintiff, Louis Lambert, father of Martha Lambert, will in the future be compelled to spend large sums of money for medicines, medical services and nurses, for his said infant daughter, Martha Lambert, and will in the future be deprived of the earnings and services of his said daughter for the reason that his said daughter is and will be unable to earn a livelihood and to pursue the life and occupation and means of earning a living and rendering the services of a normal and well person. All of which expense will continue up to and until the said Martha Lambert, daughter of the said plaintiff, reaches her majority and is emancipated, by means whereof the plaintiff has been greatly damaged.

Plaintiff claims damages in the sum of \$15,000.  
Plaintiff, Martha Lambert, by her next friend,

Louis Lambert, demands damages in the sum of \$25,000.

Plaintiff, Louis Lambert, individually, claims damages in the sum of \$15,000.

MARTIN P. DEVLIN,  
*Attorney of Plaintiffs.*

## ANSWER.

(Filed May 6, 1924.)

MERCER COUNTY COURT OF COMMON  
PLEAS.

MARTHA LAMBERT, by her  
next friend, LOUIS LAM-  
BERT, and LOUIS LAM-  
BERT, individually,

*Plaintiffs,*

v.

TRENTON AND MERCER  
COUNTY TRACTION COR-  
PORATION,

*Defendant.*

Action at Law.  
Answer.

Defendant, a New Jersey Corporation, having its principal office and place of business in the City of Trenton, in the County of Mercer and State of New Jersey, answering the complaint of the plaintiffs, says that:

ANSWER TO FIRST COUNT.

1. Paragraph 1 is admitted.
2. Paragraphs 2, 3 and 4 are denied.

ANSWER TO SECOND COUNT.

1. Paragraph 1 is admitted.
2. Paragraphs 2, 3 and 4 are denied. 10

FIRST SEPARATE DEFENSE.

Defendant, through its servants or agents, was guilty of no negligence resulting in injury and damage to the plaintiffs.

SECOND SEPARATE DEFENSE. 20

The plaintiffs are not entitled to recover in this action because the plaintiff, Martha Lambert, was guilty of contributory negligence at the time and place mentioned in the complaint in that she did not use due care for her own safety.

KATZENBACH & HUNT,  
*Attorneys of Defendant.*

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[ENDORSED]

Consent to the filing of the within answer as within time is hereby granted.

Martin P. Devlin,  
Attorney of Plaintiffs.

## CLERK'S DOCKET.

MERCER COUNTY COURT OF COMMON  
PLEAS.

10 Met on Tuesday, December 22, 1925, at 10.15  
o'clock A. M.

PRESENT:

HON. ERWIN E. MARSHALL.

20	MARTHA LAMBERT, by her next friend, LOUIS LAM- BERT, and LOUIS LAM- BERT, individually, <i>Plaintiffs,</i>	}	Common Pleas Issue No. 10. Action at Law. Martin P. Devlin, Atty. of Pltffs. Edward L. Katzen- bach, (George Gildea), Atty. of Dft. Edgar Brewer, Stenographer.
	v.		
	TRENTON AND MERCER COUNTY TRACTION COR- PORATION, <i>Defendant.</i>	}	

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Ordered that the sheriff return a panel whereupon  
the following jurors were called and severally  
sworn:

Augusta Fielder  
Joseph Jamieson

Charles L. Combs

Nicholas Marfino

Martin Redman

Samuel Kline

Elizabeth Harter

Don Kipperman

Jacob Blaugrund

Clifford S. Mohr

George Moser, Jr.

James M. Rogers

10

Mr. Devlin for plaintiffs called Dr. Raymond S. Seibert, S. Mrs. Theresa Lambert, S. Louis Lambert, S. Charles H. Wert, S. Hugh Caulfield, S. Florence M. Wert, S.

Recess taken until 2 o'clock P. M.

After recess at 2 o'clock P. M., called Thomas A. Culliton, S.

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ADJOURNED.

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MERCER COUNTY COURT OF COMMON  
PLEAS.

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Met on Wednesday, December 23, 1925, at 10.25  
o'clock A. M.

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PRESENT:  
HON. ERWIN E. MARSHALL.

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20	MARTHA LAMBERT, by her next friend, LOUIS LAM- BERT, and LOUIS LAMBERT, individually, <i>Plaintiffs,</i>	Common Pleas Issue No. 10. Action at Law.
	v.	
	TRENTON AND MERCER COUNTY TRACTION COR- PORATION, <i>Defendant.</i>	

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30

Case continued:  
Mr. Devlin for plaintiffs called Joseph G. Ben-  
nett, S.

PLAINTIFFS REST.

Mr. Gildea for defendant called Patrick McHugh, S. Joseph G. Bennett recalled for cross-examination. W. Earl Rochford, S. Edward B. Schneck, S.

DEFENDANT RESTS.

Recess taken until 2 o'clock P. M.

Court reconvened at 2 o'clock P. M.

After argument of counsel and charge by the Court, the jury retired to consider of their verdict, with "Barnes" and "Bozarth," court attendants, sworn to attend them and having agreed upon their verdict, come again unto Court and by their forelady say they find in favor of the plaintiff, Martha Lambert, and against the defendant for the sum of twenty-two thousand five hundred dollars and in favor of the plaintiff, Louis Lambert, and against the defendant for the sum of two thousand five hundred dollars and so say they all. 10 20

Whereupon, it is ordered that judgment final be entered in favor of the plaintiff, Martha Lambert, by her next friend, Louis Lambert, and against the defendant, Trenton and Mercer County Traction Corporation, for the sum of twenty-two thousand five hundred dollars (\$22,500) and in favor of the plaintiff, Louis Lambert, individually, and against the defendant, Trenton and Mercer County Traction Corporation, for the sum of two thousand five hundred dollars (\$2,500) besides costs of suit taxed, at sixty-seven dollars and twenty cents. 30

## TESTIMONY.

MERCER COUNTY COURT OF COMMON  
PLEAS.

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10 MARTHA LAMBERT, by her  
next friend, LOUIS LAM-  
BERT, and LOUIS LAM-  
BERT, individually,  
*Plaintiffs,*

v.

THE TRENTON AND MERCER  
COUNTY TRACTION COM-  
PANY, a Corporation,  
*Defendant.*

20

Action at Law.

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Transcript of stenographer's notes of testimony  
in the above entitled cause, taken before the Hon.  
Erwin E. Marshall, Common Pleas Judge, at the  
Mercer County Court of Common Pleas, Court  
House, Trenton, New Jersey, on the 22nd and 23rd  
days of December, A. D. 1925, at ten-thirty o'clock  
in the morning.

30

## APPEARANCES:

MARTIN P. DEVLIN, ESQ., FRANK I. CASEY, ESQ., At-  
torneys for the plaintiffs.

EDWARD L. KATZENBACH, ESQ., GEORGE GILDEA, ESQ.  
(Present). Attorney for the defendant.

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

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(Edgar D. Brewer, sworn as stenographer.)

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(Mr. Devlin opened the case to the jury for the 10 plaintiffs.)

(Mr. Gildea opened the case to the jury for the defendant.)

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DR. RAYMOND S. SEIBERT, a witness called on behalf of the plaintiffs, being duly sworn, testified as follows:

20

Direct examination.

By Mr. Devlin:

Q. You are a practicing physician in the city of Trenton?

A. I am.

Q. And have been for how many years?

A. You say how many?

Q. Yes.

30

A. Fourteen.

Q. And you know this little infant? (Indicating Martha Lambert.)

A. I do.

Q. Do you remember seeing her on March 18th, or 19th, 1922?

A. I do.

Q. Where did you see her?

A. McKinley Hospital.

Q. What did you do?

A. Amputated her left arm at the shoulder joint.

Q. Will you just show the jury what you did and why you had to do it?

A. (Plaintiff exhibits shoulder). She was brought to McKinley Hospital—

10

Mr. Devlin: Mrs. Lambert, will you stand back so the jury can see.

A. (Continuing). She was brought to McKinley Hospital with the left arm crushed, with about three and a half inches of bone remaining, with very little muscle and no skin covering it, and there was nothing to cover that very small stump, so there was an amputation at the shoulder joint performed, and  
20 also at the same time, at the shoulder joint, there was hardly enough skin to cover the wound complete, but it healed up.

Q. There is no joint now at all there?

A. No.

Q. How about an artificial arm; could she use one?

A. No.

Q. Couldn't use one?

A. No.

Q. Doctor, as a result of that—at the time the  
30 child was injured, did she wear glasses?

A. No.

Q. You saw the child some time later, about a year and a half ago?

A. Yes, I did.

Q. Was she wearing glasses then?

A. Not when I saw her.

Q. Did you find anything else wrong with the child besides that? Her condition, would you say?

A. I haven't found anything else.

Q. Haven't found anything else. And the shoulder joint, I understand, is off completely?

A. It is.

Q. How long have you attended the child?

A. Three months.

Q. Did you send any bill?

A. Not yet.

10

Q. What is your bill, doctor?

A. Two hundred dollars.

Q. Two hundred dollars for your work. Did the child at any time suffer very severe pain so far as you could observe?

A. She did.

Q. What have you got to say about this child suffering pain since that, and suffering pain in the future from that condition?

A. I cannot say.

20

Q. You could not say?

A. No.

Q. What do you say about the weather affecting that child so far as pain is concerned with that condition?

A. I cannot say that.

Q. Can you state whether or not weather does affect it?

A. No, I cannot say that.

Q. Can you state whether or not pain is likely yet to affect this child?

30

Mr. Gildea: I object to that. There should be a reasonable probability.

Q. I say, is pain—is it probable pain will affect this child?

18            *Dr. Raymond S. Seibert—Cross*  
              *Mrs. Theresa Lambert—Direct*

A. It is probable.

Q. It is probable. All of its life, at periods off and on?

A. I wouldn't say that.

Q. How long a period would you say, doctor?

A. I could not state any definite period.

Mr. Devlin: That is all.

10

Cross-examination.

By Mr. Gildea:

Q. You did not examine the young lady's eyes, did you, Doctor?

A. No, I did not.

Mr. Gildea: That is all.

20

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MRS. THERESA LAMBERT, a witness called on behalf of the plaintiffs, being duly sworn, testified as follows:

Direct examination.

By Mr. Devlin:

30

Q. Mrs. Lambert, where did you live on March 18th, 1922?

A. I lived at 553 South Clinton Avenue.

The Court: South Clinton or North?

The Witness: North Clinton Avenue.

Q. That is between what streets crossing Clinton?

A. Olden and Webster Streets.

Q. Is that on the right or left hand side going out east Trenton?

A. That is on the left hand side going out east Trenton.

Q. How old was this child?

A. She was four years old at the time.

Q. What date was she four?

A. She would be five April 21st; the next month. 10

Q. She was near five years old; a month away from five years old?

A. Yes.

Q. Had you any children besides this child?

A. Yes.

Q. How many?

A. I had two; I had three children altogether.

Q. At that time?

A. Two.

Q. You had two children? 20

A. Yes.

Q. What time about did this accident happen?

A. About eight o'clock.

Q. Where did they go?

A. Across the street.

Q. What to do?

A. I can't say—they went over after some collars.

Q. The little boy with her?

A. Yes. 30

The Court: How old was the boy?

The Witness: The boy, he was six years old.

Q. Now, you didn't see the accident, did you?

A. No, I did not.

Q. You did not. How long was the child in the hospital?

A. Three months.

Q. Did you receive any bill from the hospital?

A. No, I have not.

Q. You do not know what that bill is?

A. No, I do not.

Q. Has this child since the accident complained of pain in its arm?

10 A. Yes. When it is going to rain, she says it picks like her fingers; picks her fingers.

Q. What was the condition of this child's health before the accident?

A. She was in the best of health.

Q. Did she wear glasses?

A. No, sir.

Q. When did she start to wear glasses?

A. Here last year.

Q. What time?

20 A. I just couldn't say. Dr. Chenny has the date when I took her.

Q. About what month last year?

A. I can't say that, either.

Q. In the year of 1924?

A. Yes, I think that is it.

Mr. Devlin: Cross-examine.

Cross-examination.

30

By Mr. Gildea:

Q. You say the children went to get some collars?

A. Yes.

Q. Where did they have to go get the collars?

A. Across the street.

Q. About what time did the accident happen?

- A. Around eight o'clock; I can't say exact.  
Q. How old did you say the boy was, seven?  
A. Six.  
Q. Wasn't he seven?  
A. No.  
Q. And the little girl was almost five?  
A. Yes, April 21st she would have been five years old.

10

Re-direct examination.

By Mr. Devlin:

- Q. And that block where you lived—there are stores, aren't there?  
A. Yes.  
Q. This was a Saturday evening?  
A. Yes.  
Q. The stores were all lit up?  
A. Yes, all lit up.  
Q. And the electric lights at the corners?  
A. Yes.

20

Mr. Devlin: That is all.

---

LOUIS LAMBERT, a witness called on behalf of the plaintiffs, being duly sworn, testified as follows:

Direct examination.

30

By Mr. Devlin:

- Q. Mr. Lambert, you are the plaintiff in this suit—one of the plaintiffs, and speak a little louder, if you please. What do you work at?  
A. Painting.

Q. Painting by trade?

A. Yes, sir.

Q. Where did you live at the time of this accident?

A. 553 North Clinton Avenue.

Q. That is a built-up section of the city, isn't it?

A. It is.

Q. Houses close together?

A. Yes, sir.

Q. Less than two feet apart?

10

A. Yes, sir.

Q. Many stores there?

Mr. Gildea: Now, I object to the leading questions.

Q. Are there many stores there?

A. There is.

Q. Electric lights were there at the corner of Webster—

20

Mr. Gildea: I object to that as leading.

Q. Was there an electric light at the corner of Webster?

A. Yes, sir.

Q. And Olden Avenue also?

A. Yes, sir.

Q. Do you remember this Saturday evening?

A. I do.

30

Q. Saturday evening, wasn't it?

A. It was.

Q. Do you know if these lights were lit on that evening?

A. The lights in the stores?

Q. Yes.

A. Yes, sir.

Q. How about the street lights?

A. They were lit also.

Q. You didn't see the accident?

A. I did not.

Mr. Devlin: Cross-examine.

Cross-examination.

By Mr. Gildea:

10

Q. Where is your place of business, Mr. Lambert?

A. I have no place of business. I work for contractors.

Q. You say you are a painter?

A. Painter by trade, yes, sir.

Q. You weren't near your house at the time this accident happened, were you?

A. No, sir.

Q. How long after the accident did you get home?

A. How long?

Q. Yes.

A. Well, I can't say exactly. Maybe a half, three-quarters of an hour.

Q. You don't know what lights were lit there at the time of the accident, do you?

A. At the time of the accident? No.

Q. You don't know what lights were lit at the time of the accident, because you weren't there, were you?

A. I wasn't there, no sir. I cannot swear to that.

Mr. Gildea: That is all.

Re-direct examination.

By Mr. Devlin:

Q. Do you know Mr. Wheat, a witness in this case the last time?

A. Yes, sir.

Q. Do you know what his condition is now?

A. Yes, sir. He is confined in bed due to an operation.

Q. He is confined to bed, sick?

A. Yes, sir.

Q. You tried to get him as a witness?

A. Yes, sir.

Mr. Gildea: If counsel wants this witness here, we are willing to consent to an adjournment until he gets him here. I can't see the purpose of this.

20 Mr. Devlin: I expected you might raise some question by him not being here. I wanted to show you the reason he is not here. I just want to explain it.

Mr. Gildea: You are willing to try the case without him?

Mr. Devlin: Oh, yes. I only wanted to state the reason; that we were not benefiting by his absence.  
30 I will try the case without him.

CHARLES H. WERT, a witness called on behalf of the plaintiffs, being duly sworn, testified as follows:

Direct examination.

By Mr. Devlin:

Q. Mr. Wert, where do you live now?

A. On Summit Avenue. Out on the Pennington 10 Road.

Q. On March 18th, 1922, where did you live?

A. 644 North Clinton Avenue.

Q. That is, past Olden Avenue?

A. Yes, sir.

Q. Where did you work then?

A. Standard Oil Company.

Q. And you work there still now?

A. Yes, sir.

Q. Did you board a car on the Saturday evening 20 of March 18th?

A. Yes, sir.

Q. Where did you board it at?

A. North Clinton and Sherman.

Q. Sherman; that is past Olden Avenue going out?

A. One block.

Q. Who was with you?

A. My wife.

Q. What seat did you take in the street car?

A. We got on the front seat, back of the motor- 30 man, the left hand front seat.

Q. On the left hand side—

A. Of the car.

Q. Who sat next to the window?

A. My wife.

Q. You sat on the aisle?

A. Yes, sir.

- Q. And what kind of a car was it?  
A. What they term a one-man trolley car.  
Q. Operated by one man?  
A. Yes, sir.  
Q. And how many passengers were on the car?  
A. I didn't count them.  
Q. Was the car filled or half filled?  
A. Pretty well filled.  
Q. Was any one standing up?  
10 A. Not that I noticed.  
Q. Was there any one between you and the motorman?  
A. No, sir.  
Q. Any one but the motorman on the front platform?  
A. No, sir.  
Q. You were in the seat behind the motorman?  
A. Yes, sir.  
Q. Did any car pass your car?  
20 A. There had been a car just passed.  
Q. About what avenue was that?  
A. Just as we were leaving Olden, a car pulled up.  
Q. As you were leaving Olden a car pulled up.  
Was that the only car passed you?  
A. Yes, sir.  
Q. How about lights there in the street?  
A. The street was lit up. The lights in the stores and street lights were lit.  
Q. It was a Saturday evening?  
30 A. Yes, sir.  
Q. What was the first thing you heard unusual or called to your attention?  
A. A bump.  
Q. A what?  
A. A jar and bump.  
Q. What from?

A. Well, there was a scream, and the motorman kind of jumped and fell backwards like, and said, "My God, what have I done." I heard the scream and I jumped and the car stopped quick and threw me forward against the front of the car.

Q. When you got in front of the car, what did you see?

A. He opened the door, and I jumped out and saw the child lying under the wheel.

Q. Lying where?

10

A. On the track, on its back.

Q. Will you describe how the child was lying?

A. It was lying there on its back, with its head toward town.

Q. What shape were the arms in?

A. Spread out, and the left arm was spread out under the wheel.

Q. Which wheel?

A. Right hand front wheel.

Q. And you saw the head facing town?

20

A. I saw the head facing town.

Q. On its back?

A. Yes, sir.

Q. Do you identify that child as the little one hurt?

A. The little one is here, yes, sir.

Q. Now, what was done then, did you notice?

A. What was done?

Q. Yes, by anybody.

A. There was a big crowd gathered, and they wanted to hunt for jacks to jack the car up, and I said why couldn't we back the car off, and slide the child out.

30

Q. You backed the car up?

A. The motorman backed it. I watched him back it until it was clear of the child's arm, and some fellow got under the car and slid the child out.

Q. You say when you got a jolt that was the first thing you noticed. Did the jolt throw you in the car?

A. I made a jump and it threw me from the seat to the front.

Q. To the front?

A. To the front of the car.

Q. Did all the passengers get the same jolt?

A. They all got a jolt, sure.

10 Q. Did you hear any signals of bell or whistle?

A. No, sir.

Q. Was your hearing normal at that time?

A. Yes, sir.

Q. If any were given, would you have heard it?

A. Yes, sir.

Q. Did you notice anything the motorman was doing before?

20 A. He was standing right there as though he was looking ahead, like with his hands on the controllers.

Q. You couldn't see his face?

A. No, sir.

Q. What have you got to say about the speed of that car?

A. I would say it was running anywhere from twelve to eighteen miles.

Q. Between twelve and eighteen miles?

A. Twelve and eighteen miles.

30 Mr. Devlin: Cross-examine.

Cross-examination.

By Mr. Gildea:

Q. Do you drive an automobile yourself?

A. Yes, sir.

- Q. You do?
- A. Yes, sir.
- Q. How long have you been driving?
- A. I think since '17, 1917.
- Q. After you felt the jolt you say threw you forward, what did the car do?
- A. Stopped.
- Q. How did it stop?
- A. Very quick.
- Q. Can you tell us about how far the car went 10 from the time you felt the jolt until it stopped?
- A. I would say eight to ten feet.
- Q. Eight or ten feet?
- A. Eight or ten feet.
- Q. You know what caused the jolt, don't you?
- A. The brakes of the car.
- Q. When was it the motorman said, "My God, what have I done?"
- A. Just after he threw the brakes on.
- Q. That was after he put the brakes on? 20
- A. After he put the brakes on.
- Q. Did you see the children before the accident?
- A. No, sir, I didn't.

Re-direct examination.

By Mr. Devlin:

30

- Q. When you say the motorman said, "My God, what have I done," that was immediately as the brakes went on?
- A. Right immediately as the jar—just as—
- Q. Right together, one after the other?
- A. Yes, sir.

30 *Charles H. Wert—Re-cross—Re-direct*  
*Hugh Caufield—Direct*

Re-cross examination.

By Mr. Gildea:

Q. I understood you to say before, Mr. Lambert, it was after he put the brakes on he said, "My God, what have I done?"

A. After I felt the jolt.

10 Q. Not only the brakes had been put on, but after the brakes had taken a hold?

A. I didn't know anything was wrong until after the jolt. It was immediately after the jolt.

Re-direct examination.

By Mr. Devlin:

Q. It was a continuous set of action——

Mr. Gildea: Wait a minute, that is leading.

20 Q. Was it a continuous set of action?

A. I don't understand you.

Q. In other words, the brakes going on, the jolt and the call of the motorman, followed one right after the other?

A. Yes, sir.

Q. Right one after the other?

A. Yes.

---

30 HUGH CAUFIELD, a witness called on behalf of the plaintiffs, being duly sworn, testified as follows:

Direct examination.

By Mr. Devlin:

Q. Officer, you are a member of the Police Department?

A. Yes.

Q. And you remember the evening of March 18th, 1922?

A. I do.

Q. That was your post of duty out there?

A. Yes, sir.

Q. Did you see anything happen to a child and a street car out there?

A. After it happened.

Q. After it happened, I mean. Do you know how soon after it happened?

10

A. Very shortly, say a minute; less than a minute, I think.

Q. What did you find when you got there?

A. When I got there the child had been taken from under the car by Mr. Wheat, I think.

Q. Did you see the child before it was taken from under the car?

A. No, I didn't. They had it taken from under when I got there.

Q. Do you know who took it from under the car?

20

A. Mr. Wheat, I think.

Q. And did you do anything to assist in getting it from under?

A. No, I didn't. It was taken from under the car when I got there.

The Court: Before, you said?

The Witness: Yes. When I got there, the child had been taken out.

30

Q. Did you see any blood on the rail or anything?

A. Yes.

Q. Which rail?

A. On the right coming towards town.

Q. The right rail of the track coming toward town—facing toward town?

A. That is the rail on the side.

Q. How about the houses, they are close together, aren't they?

A. Yes, all close.

Q. And how about the stores, and that place being lighted up?

A. They were all fairly lighted.

Q. The stores quite close?

A. Yes, several stores along there. They are  
10 mostly all stores.

Q. Saturday evening, wasn't it?

A. Yes.

Mr. Devlin: That is all. Cross-examine.

Cross-examination.

By Mr. Gildea:

20 Q. Officer, do you know how many stores there are between Webster Street and Olden Avenue on the right hand side going out?

A. On the right hand side?

Q. Yes.

A. Well, the first—on the corner is a saloon, there is a shoe store and candy store—between Webster and Olden there is only four dwelling houses, all the rest is stores.

Q. Only four or five dwelling houses? What kind, big or little—

30 A. A candy store, shoe store, a little notion and dry goods store, on the corner is a fruit store.

Q. On which corner is the fruit store?

A. On the corner of Olden on the right hand side. Next to that is a shoe store and a jewelry store.

Q. Where did this accident happen, do you know, about?

A. Opposite 540 North Clinton.

The Court: Is that a candy store or tobacco store?

Q. Are you sure it wasn't 553, Officer?

A. That is where the child lived.

Q. Isn't that where the accident happened?

A. Opposite 540 the accident happened.

Q. Sure it didn't happen at 553? Have you got your report with you?

A. I have.

10

Q. Take a look at it. (Witness consults note book.)

Mr. Devlin: Read your report.

Q. The number of the house. Can you refresh your recollection what number?

A. This happened about 7:55 on March 18th.

Q. Near what house did it happen?

A. Yes, North Clinton Avenue, opposite 540. 20

Q. 540; all right.

Re-direct examination.

By Mr. Devlin:

Q. Is 540 nearer town than 553?

A. Yes, sir.

Q. Is 540 nearer the city than 553?

A. Yes, sir.

30

Mr. Devlin: That is all.

(Mr. Thomas Culliton called, but did not answer.)

MRS. FLORENCE MAY WERT, a witness called on behalf of the plaintiffs, being duly sworn, testified as follows:

Direct examination.

By Mr. Devlin:

10 Q. Mrs. Wert, you are the wife of Mr. Wert who was on the witness stand before?

A. Yes, sir.

Q. In 1922, where did you live, in March?

A. 644 North Clinton Avenue.

Q. Do you remember a Saturday evening of an accident happening to a child?

A. Yes, sir.

Q. Will you speak a little louder, please, because the last juror must hear you?

20 A. Yes, sir.

Q. Where were you that evening?

A. On a trolley car going down town.

Q. Where did you take the car at?

A. At Sherman and Clinton Avenue.

Q. That is how many blocks past Olden?

A. One.

Q. Were the lights on the street that evening?

A. Yes, sir.

30 Q. How about the stores on Clinton Avenue between that point and Webster Street?

A. They were all open.

Q. It was a Saturday evening?

A. Yes, sir.

Q. About what time?

A. About eight o'clock.

Q. As you and your husband entered the car; where did you take your seat?

- A. The first seat for passengers.
- Q. I didn't get your answer.
- A. The first seat for passengers.
- Q. The first seat. Which side of the car, left or right side?
- A. Left.
- Q. And did you sit near the glass or next to the side of the car, the glass?
- A. Next to the window.
- Q. Next to the window. Was there any seat between you and the motorman? 10
- A. No, sir.
- Q. Was any person standing between you and the motorman?
- A. No, sir.
- Q. Was there any person on the front platform?
- A. No, sir.
- Q. From the window that you sat, could you see outside?
- A. Yes, sir. 20
- Q. Did you see a street car pass you?
- A. Yes, sir.
- Q. About what point were you at when that car passed you?
- A. Right after we crossed Olden Avenue.
- Q. Olden Avenue. After that car no other car passed you before the accident, was there?
- A. No, sir.
- Q. What did you see out that window as the car rode along? 30
- A. I seen a little boy crossing the street.
- Q. From what side did he cross?
- A. The left.
- Q. Your left as you sat in the car. Where was he when you first saw him?
- A. He had just after left the curb.

Q. How near was he to the other rail, the other track?

A. About half way.

Q. Now, then, did you see him come on any farther?

A. Yes, he ran right up to the front of our car.

Q. Did you see this little girl before the accident?

A. No, sir.

10 Q. But you saw the boy? You saw a boy crossing the street?

A. Yes, sir.

Q. Where did you see that out of, the window? Your side of the window?

A. Yes, sir.

Q. Nothing between you and that boy, was there?

A. No, sir.

Q. What was the first thing you heard or saw about this accident?

20 A. Well, I felt the car jerk and stop, and a child scream.

Q. A scream. How near was the child to the car when that happened?

A. He was so close I couldn't see him. I thought the car struck him.

Q. He was so close you couldn't see him. Did you hear the motorman say anything or see him do anything?

A. Well, he applied the brakes.

30 Q. Well, did you hear him say anything?

A. He said, "Oh, my God, what have I done."

Q. As he said that, what did he do, did he stand up or sit down?

A. I think there is a little seat there—just as the car stopped he sat down.

Q. Fell back?

A. Yes.

Q. Now, between the time of the jolt and his saying that, did much time pass, or were they said together?

A. Well, I felt the jolt and the car stopped, and he sat down. It was all right together.

Q. All right together.

A. Yes.

Q. Is your hearing normal, Mrs. Wert?

A. Yes, sir.

Q. Did you hear any signals or bells? 10

A. No, sir.

Q. From the time you got in that car—I mean from Olden Avenue?

A. No, sir.

Q. Do you know the car stopped at Olden Avenue?

A. Yes, sir.

Q. After it left Olden Avenue did you hear any bells or signals?

A. No, sir. 20

Q. Do you know how many people got on at Olden Avenue?

A. No, sir.

Q. Was the car well filled or only partly filled?

A. It was filled, but it wasn't crowded up front, but I think there were some standing.

Q. But they weren't standing in front?

A. No.

Q. Standing back, the seats were filled?

A. Yes. (30

Q. Was it a one-man car?

A. Yes, sir.

Q. And the motorman was also the conductor?

A. Yes, sir.

Q. Did you see what he was doing before, or could you see what he was doing?

A. He was standing right in the front. I don't know what he was doing in front of him.

Q. You couldn't see his face, but you could see his back?

A. Yes.

Q. What have you got to say about the speed of the car, Mrs. Wert?

A. About fifteen miles an hour.

Q. Answer again.

10 A. About fifteen miles an hour.

Q. You thought it was.

Mr. Devlin: Cross-examine.

Cross-examination.

By Mr. Gildea:

Q. The motorman had his hands on the levers in  
20 front of the car?

A. He had his hands on something, I don't know what they were.

Q. The left on one thing, and the right on another?

A. He stood there as though he was operating the car.

Q. The boy that you saw running, was he running fast or slow?

A. About like a boy his size could run.

30 Q. About as fast as a boy his size could run?

A. Yes, sir.

Q. But you didn't see the little girl?

A. No, sir.

Q. You said you felt a jolt, I think?

A. Yes, sir.

Q. After you felt a jolt, how far did the car go before it stopped?

A. About 10 feet.

Q. About 10 feet?

A. As near as I can guess.

Q. Between the time you felt the jolt and the time the car stopped, is that right?

A. Yes, sir.

Q. Are you acquainted with the Lamberts?

A. Yes, sir.

Q. You know Mr. and Mrs. Lambert?

A. Yes, sir.

10

Q. And your husband knows them?

A. Yes, sir.

Q. How long have you been acquainted with them?

A. I have known him about eleven years.

Re-direct examination.

By Mr. Devlin:

Q. You were subpoenaed by the traction company 20  
as well as us in this case, weren't you?

A. Yes, sir.

Mr. Gildea: And you were also subpoenaed by  
the plaintiffs, weren't you?

Q. You say when you first saw the child, the child  
that wasn't hurt, that that child was between the  
track and the sidewalk coming across, is that right?

A. Yes, sir.

30

Q. And you saw it come across 'till it moved out  
of your sight?

A. Yes, sir.

Q. This all you saw before you had the jolt?

Mr. Gildea: I object to it as leading.

The Court: In that form it is rather leading.

Mr. Devlin: All right.

Q. Did you see all this happen before the jolt?

A. Yes, sir.

Re-cross examination.

10 By Mr. Gildea:

Q. Where was the little boy when you felt the jolt, could you still see him?

A. No. He was up close to the car.

The Court: Did you see the boy after the car stopped?

The Witness: No, sir.

20 The Court: You didn't see him?

The Witness: I didn't know whose boy it was.

The Court: You didn't see him after the car stopped?

The Witness: I supposed it was the boy that was hit.

30 By Mr. Devlin:

Q. Did you see the other child, the one that was hurt?

A. Yes. She was in some man's arms.

Q. Where was the child?

A. On some man's arms.

The Court: Did you get out of the car yourself?

The Witness: No, sir. I stood in the doorway.

(Mr. Bennett called by Mr. Devlin, but did not answer.)

The Court: Are these witnesses you are calling under subpoena?

Mr. Devlin: Everyone was subpoenaed last Saturday, excepting Wheat. I didn't subpoena him because he was ill. 10

The Court: Any other witnesses available at this time?

Mr. Devlin: No. There are two witnesses that have dreadfully disobeyed their subpoenas, because I know both were subpoenaed.

Mr. Gildea: Well, suppose we take an adjournment. 20

Mr. Devlin: Culliton and Bennett.

Mr. Gildea: We can take an adjournment.

The Court: The adjournment hour is 12:30, of course. Do you want to communicate with these witnesses, or do you want the Court to issue a bench warrant for them?

Mr. Devlin: Well, I won't ask the Court to do that yet. I may ask the Court this afternoon to do that. 30

The Court: I will allow you to communicate with them during recess.

(An adjournment was thereupon taken until 2:00 P. M.)

## AFTER RECESS.

2:00 P. M.

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Mr. Devlin: Our Mr. Culliton is here. I will go ahead with him if satisfactory.

10 The Court: All right.

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THOMAS A. CULLITON, a witness called on behalf of the plaintiffs, being duly sworn, testified as follows:

The Court: Mr. Culliton, how is it you didn't appear this morning?

20 The Witness: I got in just as court adjourned.

The Court: What time did your subpoena call for?

The Witness: Ten o'clock.

The Court: That is quite a bit after ten. Go ahead.

30 Direct examination.

By Mr. Devlin: .

Q. Mr. Culliton, where did you live in 1922, March 18th?

A. 565 North Clinton Avenue.

Q. North Clinton Avenue?

- A. Yes.
- Q. Were you in business there?
- A. Yes, sir.
- Q. What business were you in?
- A. Restaurant business.
- Q. Do you remember the evening of the 18th when  
a child was injured?
- A. Yes, I remember the child being injured.
- Q. What evening was that?
- A. What is that? 10
- Q. What evening was that?
- A. Saturday night.
- Q. Were you on North Clinton Avenue?
- A. Yes, sir.
- Q. What way were you going?
- A. I was going east.
- Q. That is toward your home?
- A. Yes, sir.
- Q. Going out? 20
- A. Yes, sir.
- Q. And did you see a street car or street cars?
- A. Yes, sir.
- Q. What did you see? Did you see a car going  
east and one going west?
- A. Yes, sir.
- Q. Where was the car that was going east, the  
same way you were going?
- A. The car that was going east?
- Q. Yes.
- A. That was—that passed me at a point about 30  
20 or 25 feet from where the accident occurred, east  
of where the accident occurred.
- Q. Where did the car going west pass you at?  
The car coming to town?
- A. Well, that had just immediately passed me.
- Q. After the other one passed you?
- A. Why, no. I would say that that car was pass-

ing me at about the time the other one was, or just a little previous.

Q. Well now, how far were you—had you passed Webster Street?

A. Yes.

Q. And how far were you past Webster Street when the car going to town passed you?

A. I was in front of about 555 North Clinton Avenue.

10 Q. 555?

A. Or 553.

Q. 553. Now, did the car going east then pass you or the one going west?

A. Yes.

Q. The car going east had passed you first?

A. No. The car going east was the last to pass me, because I was going east. That was about opposite me, I think, at the time of the accident, the car going east. The car going west had passed.

20

The Court: Had you gotten beyond the point the accident occurred when this other car passed you?

The Witness: Well—yes, I was beyond the point the accident occurred, about 20 foot beyond it at the time the car passed me, and that came along.

30 Q. As I understand your answer to the Court, you were beyond the point of the accident when the car coming to town passed you?

A. Yes.

The Court: No. I asked him about the car going east.

Q. Well then, when this accident happened, were you past it?

A. Yes.

Q. You had passed the point the accident happened?

A. Yes.

Q. How far had the car passed you when the accident happened?

A. Probably about 20 foot.

Q. Did you hear—what attracted your attention?

A. A child's scream.

Q. A child's scream. What speed was the car going at that passed you going toward town?

A. I don't know just what speed it had attained; it strikes me it was traveling pretty fast.

Q. Was traveling fast. Could you see the motorman, or did you observe the motorman?

A. No.

Q. When you heard the scream, what did you do then?

A. Run back to the scene of the accident.

Q. How far was that from you, how far did you run back before you reached the point of the accident, do you think?

A. Probably 50 foot.

Q. And when you got there, what did you see?

A. A child under the trucks of the—

Q. A child—

A. A child under the truck of the car.

Q. What position was it lying in?

A. That I am unable to say.

Q. Do you remember testifying at the last trial of this case?

A. I remember testifying, but I don't remember what my testimony was.

Q. You don't. Could you tell where the head of the child was? What way it was pointing?

A. The head of the child?

Q. Yes. Do you remember that? When you—

- A. The child's head was pointing west.
- Q. Do you mean that towards the city?
- A. Yes.
- Q. What way were the feet pointing?
- A. Toward east Trenton. I can't say about that, because I didn't get down and examine it minutely.
- Q. Could you tell the position the child was in?
- A. No, I can't.
- Q. Could you tell which wheel it was under?
- 10 A. Under the front wheel on the right hand side of the car.
- Q. Coming toward town?
- A. Coming down towards town.
- Q. Can you say whether you were nearer to Olden than to Webster?
- A. Yes; nearer to Olden.
- Q. And the accident happened behind you?
- A. Yes, sir.
- Q. You didn't see it happen?
- 20 A. No, sir.
- Q. Is your hearing normal? Was it then normal, your hearing? Mr. Wert, your hearing, was it all right then?
- A. I don't believe it has ever been quite normal.
- Q. Not quite normal. Do you hear me speaking to you now?
- A. Yes, I hear you.
- Q. Did you hear any signals from the street car?
- A. I don't recall any.
- 30 Q. Don't recall any.
- A. No.
- Q. How about the street? Do you know anything about it being lit?
- A. Yes. The street is pretty well lit.
- Q. Pretty well lit up?
- A. Yes.
- Q. Stores are there?

A. Yes.

Q. Electric lights at Webster Street and Olden Avenue?

A. Yes.

Q. And they were lit?

A. I think they were—they usually are, that is about all I know.

Mr. Devlin: Cross-examine.

10

Cross-examination.

By Mr. Gildea:

Q. Mr. Culliton, I understood you to say when this trolley car was going east, you were about 20 feet east of where the accident happened, is that right?

A. When the trolley car was passing me?

Q. Yes.

A. After the accident happened and I heard the 20 child scream, this trolley car was passing me then.

Q. Which trolley?

A. The one going east.

Q. Now, when the trolley car that was going west passed you, that was the one going down town, I understood you to say at that time you were about 20 feet east of where the accident happened, is that right?

A. When the trolley passed me——

Q. When the one going down town passed you, 30 didn't you say you were about 20 feet east of where the accident happened then?

A. In about there. I had about 50 foot to run back.

Q. That is what I want to find out. You had 50 feet to go back to the place of the accident. That was after you heard the scream?

A. Yes.

Q. About how far had you walked from the time that the trolley car passed you until you heard the scream?

A. Well, I had walked the difference, whatever that difference was.

Q. If it was 20 feet—if when you seen the trolley car pass you, you were within 20 feet east of where the accident happened, and then after the accident  
10 happened you had to walk back 50 feet, that means you walked 30 feet from the time the trolley car passed you until you heard the scream?

A. Of course, I didn't measure the thing exactly. I am giving you a—

Q. Did you walk some little distance?

A. Oh, yes.

Q. How many feet, if you can tell us?

A. I can't tell you that. The trolley cars are here, coming along about in this fashion (witness indicates), and they pass in that neighborhood, while I  
20 am walking along the sidewalk. At the time I heard the child scream there is a trolley car passing me here, the one going east.

Q. But you don't know how far you walked after the trolley going west passed you before you heard the scream?

A. Approximately.

Q. What?

A. Well, probably I would have gone the width  
30 of an ordinary building, maybe 25 to 30 foot.

Q. You think you walked as much as 25 feet?

A. After the trolley had passed me?

Q. After the trolley passed you and when you heard the scream?

A. Yes.

Q. Willing to put it at 25, are you?

A. Yes.

Q. All right. Now then, after you walked this 25 feet, then you had to go back 50 to the place of the accident?

A. Well, understand, that is approximately.

Q. About 50 feet.

A. Yes. At the time of the accident, it was the least thing I was thinking about, how many feet I was traveling.

Q. If you walked back 50 feet from where you were when you heard the scream, and you had walked 25 feet from the time the car passed you, then the trolley was going the same rate of speed you were going? 10

Mr. Devlin: I object. I think that is——

The Witness: What was the question?

The Court: I think that is argumentative. 20

Mr. Gildea: All right, that is all.

Mr. Devlin: That is all.

The Court: Certain complications having arisen which make it impossible to continue this case, we will adjourn until tomorrow at 10:00 o'clock A. M.

(An adjournment was thereupon taken until Wednesday, December 23, 1925 at 10:00 A. M.) 30

Wednesday, December 23, 1925.

APPEARANCES:

As before noted.

JOSEPH G. BENNETT, a witness called on behalf of  
10 the plaintiffs, being duly sworn, testified as follows:

Direct examination.

By Mr. Devlin:

Q. Mr. Bennett, where do you live?

A. At the present time I live on Ohio Avenue.

Q. Where did you live on March 18th, 1922, at  
the time of this accident?

20 A. On Lamberton Street.

Q. Do you remember being on North Clinton Ave-  
nue Saturday evening of March 18th, 1922?

A. Yes, sir.

Q. How did you get out there?

A. I went on the trolley car.

Q. To east Trenton?

A. Going out east Trenton.

Q. To what street?

A. I got off at Meade Street.

30 Q. You got off at Meade?

A. Yes, sir.

Q. And as you got off the car—the car you got  
off was going east?

A. The car was going on out east Trenton.

Q. Now, as you got off, did you see another car?

A. No, sir. I got off the car and crossed the  
street. The car I got off had gone on its way, but as

I was walking up the street I did notice another car coming in this direction.

Q. Did you see any children?

A. Yes, sir, I seen the two children.

Q. Where were they?

A. They were on the right-hand side of the street, practically about the next street above. I can't recall the name of the street; it is a little short street on the right-hand side.

Q. Was that Webster Street?

10

A. Webster Street.

Q. Where were those children, on the street?

A. Standing at the curb.

Q. Now, when again did you see the children?

A. Then I noticed the children again, the boy and this little girl here (indicating), this boy had the girl by the hand and they started across the street.

Q. How far was that car you saw coming away from you?

A. That car probably might be five or six lengths 20  
or seven lengths of the car.

Q. Now, the children—what position did they have between you and the car when you saw them on the street?

A. You mean position—where they were standing?

Q. How far were the children—

A. They were practically about half way from where the car was.

Q. In other words, half way between you and the 30  
car?

A. Yes, sir.

Q. Now, what else did you see?

A. Well, I noticed the man on the trolley—the car coming along—the car was not traveling fast, but I noticed he had his head down that way. (Indicating). I looked at the children, and by that time

the car was almost on the children. I think the boy jumped back out of the road, and there was a grinding noise and I knew there was an accident.

Q. Did you see the child after the car hit it?

A. No, I didn't see the car after that. I didn't go where the car was.

Q. Do you know what side of the car hit the child? Did you see that?

A. It must be on the side of the curb.

10

Mr. Gildea: I object to what it must be.

The Court: The question is: did you see?

The Witness: No, I only seen some people.

The Court: All right; strike it out if you didn't see.

20 Q. How far do you think that car was away from the child or children when you saw the motorman standing as if his head was down?

A. That car was about 100—125 feet.

Q. From the children, do you mean?

A. Yes, sir.

Q. When the accident happened, when it actually happened, had you passed the car or where was your position?

A. I was still going out North Clinton Avenue.

30 Q. That is, you had crossed the street?

A. Oh, yes, sir.

Q. And was on the—

A. Left hand side going out.

Q. Still going out?

A. Yes, sir.

Q. When you heard the grinding, did you see the motorman do anything after that or hear anything?

A. No, sir, only I heard there was a grinding like of the emergency on the car. I saw a couple or three people running from the sidewalk to the street so I knew somebody must have been hurt after that, but I didn't know until about six months after that that the child was really hurt.

(Answer read by the stenographer.)

Q. You didn't go back to the accident? 10

A. No, sir.

Q. You kept right on going?

A. No, sir. I was going on a visit, and I went right in this place and inquired after a certain party and they told me to go around to Mechanics Avenue where he lived, and after that I went to Mechanics Avenue.

Q. Was your hearing normal at that time?

A. My hearing is fairly good, sir.

Q. Did you hear any signals given by the car? 20

A. No, sir, there were no signals.

Q. Was there any wagon or automobile or street car between the street car and the child?

A. No, sir.

Mr. Devlin: Cross-examine.

Cross-examination.

By Mr. Gildea: 30

Q. Where did you say you were going that night, Mr. Bennett?

A. I was going out to a place called a hotel, Lavine's.

Q. Where was that?

A. On the left-hand side of the street.

Q. Of North Clinton Avenue?

A. North Clinton Avenue. I don't know whether it is there or not, now.

Q. Going to Lavine's Hotel?

A. I was going to see a man by the name of Mr. Burke, a painter.

Q. I understood you to say when this trolley car was about 120 or 125 feet from where the children were, you saw the motorman's head down?

10 A. Yes, sir.

Q. Will you stand up and show us just how the motorman's head was?

A. He was standing practically like that, (indicating), putting something in his hand.

Q. You won't say where his hands were?

A. No, sir.

Q. Were they on the brakes?

A. I could not say.

Q. You can't say where his hands were?

20 A. He looked as if his hands were in this position. (Indicating.)

Q. You don't know where his hands were?

A. No, sir.

Q. You could not tell where his eyes were?

A. No, sir. I didn't see his eyes. I only saw his head was down in the front.

Q. Show us exactly.

A. About this attitude, like that now. (Indicating.)

30 Q. Could you say whether there was anybody on the front platform?

A. Nobody on the front platform of the car.

Q. How far away were you from the motorman? How far from the trolley car?

A. I imagine about—I can't tell you positive—I would say about three or four lengths of the car.

Q. How long do you think one of those cars is?

A. Well, I can almost tell you. It is about 35 foot, aren't they?

Q. If you were three car lengths from the car, you would be about 105 feet, wouldn't you?

A. Probably that, yes, sir.

Q. Yes, I thought you said the trolley was 100 or 125 feet from the children.

A. I noticed this man coming towards me, I would figure about 125 or 130 feet.

Q. From you or the children?

10

A. Where the children were. Where the trolley was when I was——

Q. Where the trolley was when you were where?

A. The car was coming——

Q. You say now, you were about 125 or 130 feet from the trolley car, is that right?

A. Yes, sir.

Q. And the children were between you and the trolley car?

A. Yes, sir.

20

Q. Did you keep your eyes on the motorman?

A. No. When I seen the man's head was down like, I looked to see where the children were—on the curb—and the next thing, I seen them cross the street, and the car was coming this way. In other words, the car was coming this way and I was walking towards the trolley, and I seen the children cross the street.

Q. And yet you didn't see the accident?

A. I did not, no, sir. I couldn't see the accident 30 so far as it actually occurred.

Q. You couldn't see it?

A. No, sir.

Q. And yet you were only—you couldn't have been more than half of 130 feet, could you, from where the accident happened? You must have been about 65 feet from where the accident occurred, and you

were walking in the direction of the accident, and yet you didn't see the accident?

A. I seen the accident as far as its surroundings, but I didn't see it happen.

Q. You were only 65 feet away and going in that direction, weren't you?

A. Yes, sir, where I was going to.

Q. Oh, you had already passed the place?

A. No, sir.

10 Q. How close were you to the place you were going to?

A. About from here to the back door. (Indicating.)

Q. Well, then, the place you were going to was right where the accident happened?

A. No, sir, probably three or four doors above.

20 Q. You were going to a house within three or four doors of the place where this accident happened and looking up North Clinton Avenue you had to go almost to the place where the accident happened; you saw all this, and yet you didn't go to see it?

A. No, sir.

Q. Why?

A. It made me kind of sick to think about it.

Q. And that is why you didn't go over there?

A. Positively, yes, sir.

Q. I think you said the trolley car wasn't going fast?

A. Not what I call fast, no, sir.

30 Q. It wasn't going very fast?

A. No, sir.

Q. Were the lights lit on the trolley car?

A. Yes, sir.

Q. The headlight lit?

A. Yes, sir.

Q. It was?

A. Yes, sir.

Q. Which of these children was ahead? The little girl or boy?

A. The boy was walking first. He had a hold of the little girl's hand, but practically the boy was ahead.

Q. How do you account for the fact the little girl got ahead and the boy didn't?

A. Really, I can't tell you that.

Q. You don't know, do you?

A. No, sir, I do not.

10

Q. Do you recall testifying at the last trial?

A. Recall testifying?

Q. Yes.

A. Yes, sir.

Q. How many times did you see the motorman?

A. Twice.

Q. Saw him twice. What was he doing the second time?

A. The second time was when this accident happened.

20

Q. When was it he had his head down?

A. The second time.

Q. When was that?

A. I don't understand you.

Q. Had the accident happened then or not?

A. No, sir. It happened so quick—a few seconds time probably—most instantly it happened.

Q. It was the second time, you say, he had his head down, is that right?

A. Yes, sir.

30

Q. Do you recall being asked this question at the last trial? "As the car was coming to a stop—

Mr. Devlin: What page?

Q. Page 46, line 30. "As the car was coming to a stop, what was he doing?" You answered, "He was

looking down at the brakes." Now, that is the time you mean he was looking down?

A. Yes, sir.

Q. And that was as the car was coming to a stop?

A. No, the car wasn't coming to a stop.

Q. I will read you your testimony again: "As the car was coming to a stop, what was he doing?" You answer, "He was looking down at the brakes." Did you make that answer or didn't you?

10 A. What do you mean? As the car was coming to a stop?

Q. Yes.

A. No, sir, the car wasn't coming to a stop.

Q. Did you make this answer at the last trial?

A. If I made the answer—do you want me to say it again?

Q. Do you recall whether or not you said that?

A. I do not, no, sir.

Q. You do not?

20 A. No, sir.

Q. Would you say you didn't say it?

A. No, sir, I wouldn't, because I am under oath.

Q. Did you see the motorman jump back?

A. I didn't, no, sir.

Q. All right. Weren't you asked this question? Page 47, line 4. "Then the next thing you saw was him jump?" Answer, "I saw him jump backwards."

A. No, sir, I didn't see him jump backwards.

30 Q. You didn't say that?

A. No, sir.

Q. You deny that?

A. I didn't see the man jump backwards.

Q. You mean you might have said it and not meant it?

A. No, sir, I seen—

Q. I am asking you what you said. You said you

might have said this but if you did say this, you didn't mean it?

A. In that respect.

Q. Do you mean what you said today any more than what you said at the last trial?

A. Yes, sir.

Q. How long have you known the Lamberts?

A. For five or six years, about.

Q. Now, from the time that you got off this trolley car until the time this accident occurred, was there anything at all between you and these children? 10

A. Not to my notice, no, sir.

Q. How about the trolley car you got off of?

A. That went on out East Trenton.

Q. Wasn't that ever between you and these children?

A. No, sir, I crossed over the street, on the other side of the street.

Q. If you were walking up North Clinton on the left-hand side of the street, and these children were on the right-hand side of the street going to East Trenton, and that trolley passed you and went north, that trolley was at one time between you and the children? 20

A. That had already passed the children.

Q. When?

A. On the right-hand side going out—

Q. I said after the time you got off the trolley car, that trolley was sometime between you and the children. 30

A. Yes, sir, it had to be, sure.

Q. At the last trial, do you recall testifying about the motorman's hands as follows: page 47, line 34, speaking of the motorman still. "Could you see anything in front of him or around him?" And you

answered, "His two hands were extended similar to that on whatever he controls the car by."

A. I can't say positive I saw his hands.

Q. Didn't you say at the last trial—

Mr. Devlin: Let him finish the answer.

Mr. Gildea: I object to that, counsel has—

10 Mr. Devlin: Finish the answer. If you read a question and answer, I submit he should read the whole question and the whole answer.

Mr. Gildea: I don't have to read the whole answer. He made several statements.

Mr. Devlin: I submit he ought to get the whole question, and—

20 Mr. Gildea: All right, I will read the question and answer again: "Question. Could you see anything in front of him or around him? And your answer was this: "His two hands were extended similar to that on whatever he controls the car by, and he was standing up and there was a grinding sound to the wheels and as that happened he fell back into the seat." Did you say that?

A. I didn't see him fall back into the seat.

30 Q. Didn't you say he fell back into the seat?

A. No, sir.

Q. You deny you said that?

A. I do there.

Q. Didn't you say, "His two hands were extended similar to whatever he controls the car by?"

A. Yes, sir.

Q. You mean he had his hands on the levers?

Mr. Devlin: I object to that.

The Court: The answer speaks for itself.

Mr. Gildea: That is all right. I am cross-examining on his testimony of today also. He said today he couldn't see where his hands were. I can ask him what his testimony means.

Mr. Devlin: You asked him what he meant by 10 that.

Mr. Gildea: Today.

Mr. Devlin: All right, I will withdraw it.

Q. I understood you to say on direct examination a little while ago, when you saw the children the little boy was ahead?

A. The little boy had a hold of the little girl's 20 hand.

Q. He was ahead?

A. Probably.

Q. Just a step?

A. Yes, a step ahead.

Q. Weren't you asked this question at the last trial? Page 49, line 28, about. "How far ahead of the boy was the little girl?" And you answered, "About a couple or three feet." Did you make that answer?

A. Probably their hands were stretched out. 30

Q. At the last trial you said the little girl had the boy—

A. The boy had a hold of the girl's hand.

Q. Didn't you say at the last trial the girl was ahead of the boy?

A. I did not.

Q. Then you deny this testimony?

A. I deny that part of it, yes.

Q. When you got off the trolley car at Meade Street, and crossed the street, did you cross in front of the trolley car you got off, or behind?

A. In front of the trolley car.

Q. Now, was there any other passengers got off there?

A. Yes, one other party; I don't know whether  
10 it was a woman or man. It gave me a chance to cross in front of the car.

Q. As soon as you got across the track, the trolley started?

A. Before I got all the way over, yes, sir.

Q. Then you went to the left-hand side going toward East Trenton and started walking up North Clinton Avenue, is that right?

A. Yes, sir.

Q. How far had you walked from Meade Street  
20 when this accident happened?

A. Probably four or five doors up.

Q. About how wide are those houses?

A. I can't tell you.

Q. Can you give us an idea?

A. About 14 or 15 feet.

Q. Do you think they were ordinary along there?

A. Mostly uniform.

Q. Then you can tell us?

A. Yes, sir, but you want me to say accurate?

30 Q. I want you to give the best; not to the inch.

A. I will say about four or five doors up.

The Court: Up Meade Street?

The Witness: No, sir, on North Clinton Avenue.

The Court: From Meade Street?

The Witness: From Meade Street, yes, sir.

The Court: Where do you say your business took you?

The Witness: To Mr. Lavine's.

The Court: And where, with reference to Lavine's, were you when the accident took place?

10

The Witness: I would say just probably two or three doors up.

The Court: This side of Lavine's place?

The Witness: Yes, sir. Not where the accident happened, but where I saw the accident.

The Court: Where you saw it?

20

The Witness: Yes, sir.

The Court: And was the accident ahead of you when you saw it?

The Witness: Yes, sir. It was past Lavine's.

The Court: On the other side of Lavine's?

The Witness: Yes, sir.

30

The Court: Nearer to North Olden Avenue, is that right?

The Witness: Yes, sir.

The Court: And you walked on up to Lavine's and into the store, is that right, without going over to the accident?

The Witness: Yes, sir, I asked for Mr. Burke.

The Court: Do you happen to know the number of Lavine's place?

10 The Witness: No, sir, I do not.

The Court: You do not?

The Witness: No, sir.

The Court: Do you know where the number 540 North Clinton Avenue is?

The Witness: No, sir, I do not.

20 The Court: All right.

Q. Where did this accident happen, between Meade and Webster or between Webster and Olden Avenue?

A. Between Webster Street and Olden Avenue.

Q. How was it—nearer Webster Street than Olden or nearer Olden?

A. No, sir, nearer Webster Street.

30 Q. Do you know how far it was from Webster Street?

A. I really can't tell you that.

Q. Well, some considerable distance or very close to Webster Street?

A. I suppose, say maybe two or three doors.

The Court: From Webster Street?

The Witness. Webster Street going out towards Olden Avenue.

The Court: And yet you say it was the other side of Lavine's place?

The Witness: Yes, sir.

Q. Do you know how far it is from Meade Street to Webster Street?

10

A. No, sir, I do not.

Q. You say you have known the Lamberts for several years?

A. I know Mr. Lambert for about five or six years.

Q. Known Mr. Lambert?

A. Yes, sir. Of course, I became acquainted with his wife after that.

Q. Did you spend the night with him last night?

A. Did I spend the night with him last night?

Q. Yes.

20

A. Is that what you said?

Q. Yes.

A. No, sir, I was home last night.

Q. You weren't with him last night?

A. No, sir.

Mr. Gildea: That is all.

Mr. Devlin: That is all.

Mr. Gildea: I would like to have this witness kept in court for a few minutes; I may want to get some other information.

30

Mr. Devlin: We rest.

PETITIONERS REST.

## THE CASE FOR THE DEFENDANT.

PATRICK MCHUGH, a witness called on behalf of the defendant, being duly sworn, testified as follows:

Direct examination.

10 By Mr. Gildea:

Q. Mr. McHugh, where do you work?

A. Trenton and Mercer County Traction.

Mr. Devlin: Mr. McHugh, will you speak a little louder, if you please, the last juror must hear you.

Q. You work for the Trenton and Mercer County Traction Corporation?

20 A. Yes, sir.

Q. And did you work in the month of March, 1922, for the same company?

A. Same company.

Q. How long have you worked for the company?

A. I am going on the tenth year.

Q. How long?

A. Going on ten years, pretty close on ten years.

Q. And did you ever operate or drive a trolley car before you worked for this company?

30 A. Yes. I operated for ten years in Yonkers, New York.

Q. In Yonkers, New York. Do you recall the accident that happened on North Clinton Avenue?

A. Yes.

Q. You were driving the car that struck the Lambert girl?

A. I was driving the car.

Q. About where did the accident happen, if you can tell us?

A. Betwen Olden Avenue and Webster Avenue, right about center ways, as far as I could judge.

Q. About where?

A. About center ways between Olden and Webster. Webster is a short side street.

Q. Is Webster below Olden—closer to town or the other way?

A. It is closer to town than Olden Avenue. 10

Q. About what time did this accident happen?

A. I left East Trenton at ten minutes of eight. I think the accident happened about five minutes later; about five minutes of eight.

Q. Was it dark at the time?

A. Yes.

Q. Were the lights on the trolley lit?

A. Yes, sir.

Q. How about the head light?

A. That was lit. 20

Q. The lights inside of the car, were they lit, too?

A. The lights all lit in the trolley car.

Q. Did your car stop at Olden Avenue?

A. Yes, I stopped at Olden Avenue, and picked up—I can't say how many people—from eight to ten.

Mr. Devlin: Pardon me, Mr. McHugh, But I don't seem to hear you very well. 30

A. I stopped at Olden and picked up eight or ten people.

Mr. Devlin: The last juror must hear. Keep your voice up.

Q. Now, was there anybody standing on the front platform at the time this accident happened?

A. No, not a one.

Q. These passengers—

A. I collected all the fares; everybody had taken a seat at the time.

Q. As you were approaching the place where the accident happened, how fast were you going?

10 A. After leaving Olden Avenue a car on the other side was going the other way, I think pretty near on the same time—I go by the fire house about half speed, and about a car length this—

Q. What would half speed be?

A. About ten or twelve miles an hour.

Q. Well then—

20 A. After I had gone by the fire house I seen those children enter the east-bound track on a full force of run. I was going the same way they were coming, on a full force of run. The little girl was ahead—I at once reversed the car, and she just went—the little boy on the other side, he hollered, but she just went down in the front of the car, she just made the other rail, and went down this side of the trap, she just missed that and went down. After I had reversed, the car was almost to a stop and she just came up on her, and—

Mr. Devlin: Keep your voice up.

30 A. (Continuing) After she had gone down, the car had come up on her. The car broke within eight or ten feet.

Q. After you applied the brake?

A. After I applied the brake. The time I seen them I seen myself in a pinch.

Q. Why didn't you ring your bell?

A. I didn't give no attention to any bell. I gave attention to the brakes and everything. That was the whole thing. I seen myself in a pinch at the time.

Q. Where were they running?

A. Right across—right straight—right on the out-bound track.

Q. On the north-bound track?

A. On the north-bound track.

Q. How far ahead of your trolley car were they as they ran across the north-bound track? 10

A. I should judge about eight or ten feet, as far as I could judge.

Q. What did you do when you saw them running across the north-bound track?

A. I switched the reverse on, the first thing I did. I always use reverse on a pinch from my own experience on a quick check of a car, and I seen where I was in a pinch.

Q. Now, can you stop the car more quickly with the reverse than with the air? 20

A. I always check the car with the reverse. The reverse and everything is all close together.

Q. How did the car brake that night?

A. Good. I forgot whether I had two or three trips made at the time—the car was riding good, and the car did take the reverse.

Q. Did you have time to ring the bell?

Mr. Devlin: Objected to as leading. 30

A. No time to do anything.

Mr. Devlin: Mr. McHugh, when I object to a question, do not answer until the Court rules—or any objection is made.

Mr. Gildea: I think counsel should address his remarks to the Court and not to the person.

Mr. Devlin: I think I am addressing the proper person.

Q. Can you give any reason for your not ringing the bell?

10 Mr. Devlin: Objected to.

The Court: On what ground?

Mr. Devlin: Tell what he did, not his reasons for doing it.

Mr. Gildea: All right.

Mr. Devlin: It is for the jury to get the rea-  
20 sons.

Mr. Gildea: I will withdraw that question.

Q. With the situation you found in front of you, you operating your trolley car at the rate of ten or twelve miles an hour and some children suddenly running across the other track about eight or ten feet ahead of your car, would you have time before reaching those children to both ring the bell and  
30 apply the brakes?

A. No, I could not. The bell would be of no use.

Q. Now, Mr. McHugh, as you were coming down the street just before this accident, where were you looking?

A. I was looking right ahead.

Q. And where were your hands?

A. I had the hands—one on the air handle and the other on the controller, which I should have. The car would not go without.

Q. Were you doing anything with your money changer?

A. No. I had my money changed and everything before I left Olden Avenue, nothing in my mind, only the operation of the car.

Q. Will you stand up and show us how you stand as you operate the car? 10

A. I stand like that. (Witness stands in witness box and illustrates.)

Q. Where did you have your hands?

A. I had one on the controller and one on the air hose.

The Court: Mr. McHugh, I can't hear what you say at all.

A. (Answer read by the stenographer). (Contin- 20  
uing) I can see pretty well both sides of me. I generally look ahead.

Mr. Gildea: All right, sit down. Cross-examine.

The Court: You say you had passed the fire house on North Clinton Avenue before you saw these children?

The Witness: Yes. 30

The Court: How soon after you passed the fire house did you see the children?

The Witness: Well, I could not say how soon. I was——

A Juror: We cannot hear back here.

The Witness: I could not say how soon. I was past the fire house I know that. I can't say how far beyond the fire house I was at the time.

Mr. Gildea: Cross-examine.

Cross-examination.

10

By Mr. Devlin:

Q. Mr. McHugh, you stopped at Olden Avenue?

A. I stopped at Olden Avenue.

Q. The car going east passed you at Olden Avenue? Didn't it?

A. Yes.

Q. That is right? Passed you at Olden Avenue?

A. That is right.

20

Q. That is right. Then there was nothing between you and Webster Street, the way was clear, wasn't it? That right?

A. Yes.

Q. Will you please answer?

A. The way was clear.

Q. Both sides of the street were clear to you, both sides of that place? The stores were lit at night, that Saturday night, isn't that right?

A. Well, I think they were lit.

30

Q. And the electric lights on the street corners were lit?

A. There is a light at Olden Avenue. I think the next is Meade Street, and the one in the half or middle—

Q. Do you know there is a light at Webster Street too, a street light?

A. I cannot say.

Q. But there is, isn't there? And the stores were lit, isn't that right?

A. Yes.

Q. And the head light on your street car was lit, isn't that right?

A. That is right.

Q. And your car was brightly lit up, isn't that right?

A. That is right.

Q. And everything in your car was all right, wasn't it?

A. Everything was all right.

Q. Then you, in front of the car, had a full view of North Clinton Avenue as you rode along, didn't you?

A. Yes.

Q. You had a full view. Now, what speed do those cars go at, one-man car?

Mr. Gildea: That is objected to as irrelevant and incompetent how fast they will go. The question is— 20

Mr. Devlin: He said he was going half speed. I want to know what half speed is.

The Court: Do you still object?

Mr. Gildea: Yes.

Q. You said the car was going half speed. Tell us what the highest speed is that car will make. 30

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

The Court: Yes, I think that question should be overruled.

Mr. Devlin: May it please the Court, he said on direct examination, he was going half speed.

The Court: All right, he told you what he thought that speed was.

10 Mr. Devlin: What did he tell you?

The Court: He told you what that speed was.

Mr. Devlin: I want to know what whole speed was.

The Court: I will sustain that objection.

Mr. Devlin: I ask an exception.

20 The Court: You may have it.

(Exception noted for the plaintiffs.)

Q. What is the speed the car was going—half speed you were going?

A. I should say ten or twelve miles an hour, I think.

30 Q. Do you mean to tell this Court and jury that twenty miles is the highest speed a one-man car will make?

Mr. Gildea: That is objected to for the same reason.

Mr. Devlin: I ask that.

Mr. Gildea: It is a matter of argument.

Mr. Devlin: He said half speed, ten or twelve miles an hour. I am asking him does he mean to say the whole speed is twenty-four or twenty?

The Court: In the light of the situation, I don't see as there is any objection to that.

Mr. Devlin: You may answer that question. 10

Q. (Question read by the stenographer.) Please answer the question.

A. Well half power.

Q. I want half speed. You have told me half speed is between ten and twelve miles an hour. I ask you, do you mean to say the highest speed that these cars run is only twenty to twenty-four miles an hour? Answer yes or no.

A. I should judge thirty or thirty-five miles an hour. 20

A. I can't hear you.

(Answer read by the stenographer.)

Q. Thirty to thirty-five miles an hour, is that what you said?

The Court: That is what he said.

Q. Then, if you were going at half speed, you were going between seventeen and eighteen miles an hour? Isn't that right? 30

A. Well, we don't use half speed—

Q. What is that?

A. (Answer read by the stenographer) We don't use half speed, half power.

Q. What does half power mean?

A. That is the first machine.

Q. Please read the answer.

(Answer read by the stenographer.)

Q. Does that mean anything in speed?

A. The second machine takes up and makes more time.

Q. I am asking you what half power means in speed.

A. Well, the first machine goes, I think, from ten to twelve miles an hour.

10 Q. Well, I don't get that answer. To me it isn't understandable. I will ask another question. This car you were on that evening, what speed do you say that half power brought you?

A. About ten or twelve miles an hour.

Q. About ten or twelve miles. How long did it take you to get up that speed?

The Court: After starting.

20 Q. After leaving Olden Avenue.

A. Well, I had passed the fire house—I generally throw the power off passing the fire house—after leaving Olden Avenue then I put on half power.

Q. Do you know the distance from the point of Olden Avenue where you stopped to the point where this accident happened?

A. Know what?

30 Q. The distance between the point where you started at Olden Avenue and the point where this accident happened?

A. No, I can't say the exact distance.

Q. Isn't it about 300 feet?

A. I could not say.

Q. You can't say?

A. I can't say.

Q. You were here in the last trial, weren't you? You testified to the distance between Olden Avenue,

that point of the start of the car and the point of 553 as being 215 feet. The testimony is it happened around '54?

A. I disremember.

Mr. Gildea: Now, just a minute.

The Court: Yes, he said he hasn't any recollection.

Q. This was a one-man car? 10

A. Yes.

Q. And tell me what your duties are as a one-man car. What do you do?

A. Get my fares, give my transfers.

Q. Anything else?

A. Nothing.

Q. Do you keep an account?

A. Yes, at both ends of the line.

Q. In a book. And you do everything that two men used to do. A conductor and motorman, isn't that right? 20

A. Yes.

Q. And how many passengers did you take on at Olden Avenue?

A. I could not say how many.

Q. Do you know if any got any transfers?

A. I could not say.

Q. Don't you think you ought to remember what happened that evening besides the accident? 30

A. No.

Q. You don't think you ought to?

A. No.

Q. Do you think that you started your car and was handing out transfers and collecting fares?

A. No, I was not. Everybody had their change and their transfers and I had the fares received.

Q. Do you mean to say that you waited before you started your car until everybody paid their fare and got their transfer and were seated, before you started?

A. Everybody was seated.

Q. Then you collected your fares and gave whatever transfers you had before you started?

A. Yes.

Q. Then all you had to do was to run the car and  
10 look ahead?

A. That is right.

Q. Clinton Street at that point is about 34 feet from curbstone to curbstone, is that right?

A. Yes.

Q. These children came from your left-hand side, didn't they?

A. Yes, from the left-hand side.

Q. And they crossed the track that was going out East Trenton before they reached the track you were  
20 on, didn't they?

A. Before?

(Question read by the stenographer.)

A. They were entering into the track at the time I seen them.

Q. Which track?

A. The outbound track, the east——

Q. You mean going to East Trenton?

30 A. Going to East Trenton.

Q. When you saw them? Did you see them when they left the curbstone?

A. No, I did not. They were on a full run when——

Q. What do you call a full run?

A. As fast as ever a child could run.

Q. A full run?

A. A very fast run.

Q. Did you see them when they left the curbstone?

A. No, they were on the track.

Q. When you first saw them?

A. Yes, they were entering the south bound track.

Q. You heard it testified here they came from the left-hand side of the street, your left?

A. Yes.

Q. At this trial and the last?

A. That is the direction.

10

Q. The left-hand side. And they had to go a space of ground between the curb line and the east bound track, the track opposite yours, and they had to cross that track and the track is there about 4½ feet wide?

A. Yes, about.

Q. Now, will you explain to this Court why you did not see those children leaving the left-hand side of the street and crossing before they reached your track?

A. I am standing in front of the trolley car, both sides of the street is there (indicating); I may look that way and in the meantime they are on this north bound track, coming on a force of run right in front of me. I seen the danger right away. I didn't see them leave the sidewalk; I seen them running—entering the track.

Q. All right. Now, Mr. McHugh, the front of your trolley is all glass?

A. Yes.

Q. Which enables you to see all sides?

30

A. Yes.

Q. You started at Olden Avenue with nothing in front of you?

A. Nothing.

Q. You could see both sides of the street if you were looking. Can you explain why these children traveled a third of that street and on the track and

you didn't see them, if you were going slow and looking?

A. They must have—at the time I seen them, as I said, they were on a fast run. Of course, it appeared to me as if they left the sidewalk on a very fast run and they were in the north bound track.

Q. Why didn't you see them before they reached the track if you were looking?

A. I was looking.

Q. If you were looking—you have told us the glass  
10 of your car is all clear and the street is clear. If you were looking, why didn't you see the children before they reached the track at all?

A. I wasn't looking over on the sidewalk.

Q. What sidewalk were you looking on?

A. I wasn't looking on the left sidewalk, I wasn't looking around there. I was looking ahead.

Q. Do you mean to say that if you were looking  
in front of your car, embracing a street about 34  
20 feet wide, that you could not have seen those children no matter what side they came from? Couldn't you?

A. Well, a child can leave a curb very quick.

(Answer read by the stenographer.)

Q. Mr. McHugh, raise your voice. I am allowing for all that, but why didn't you see the curb if you were looking?

A. I don't think I could see them leave the curb;  
30 I wasn't looking that way (indicating), and my car going that way. I wasn't looking over to the curb at the left at the time I was operating the car. I seen them entering into the south bound track.

Q. I am standing in front of the car with the glass in front of me, doing my work. I can see both sides of the street ahead of me. Will you tell this Court

and jury why you didn't see these children leaving the curbstone if you were looking ahead of you as you ought to be?

Mr. Gildea: I think that question has been answered sufficiently. I think the witness has answered as well as he can.

The Court: He may answer the question if he can.

10

A. I seen those children enter the track, they was—enter the south bound track to my left—well, they was, I forget how many, about 8 or 10 feet from the curb—

Q. 8 or 10 feet. What I am asking you is: why you didn't see them before they entered the track.

A. I didn't see those children on the curb.

The Court: The question is: Why didn't you see them. Mr. Devlin's question is: Why didn't you see them if you were looking. If you cannot answer the question, all right, but say so.

20

A. I seen the children as soon as they entered the track.

Q. I am not asking you that question at all. I am asking you why you didn't see them, if you can answer it, when they left the curb and before they entered the track?

30

A. I couldn't see them before they left the curb.

Q. I asked you why you didn't see them when they left the curb and before they entered the track.

Mr. Gildea: I think we ought to be fair about this.

The Court: The question can be answered. It is a very plain and simple question; if he cannot answer he can say so.

Mr. Gildea: He did answer it once.

A. I have been looking ahead of me, as I said before, I cannot see both curbs, I cannot see that and see this; I have been looking ahead of me; I ain't  
10 looking at the sidewalk over here.

Q. Is that the best answer you can make?

A. That is the best answer.

Mr. Gildea: That is a pretty good one, I think.

Mr. Devlin: I don't wish any comments, please.

Q. Then do you mean to tell this jury when a man stands in front of his car where you stood, he can-  
20 not see both sides of the street and the center at the same time?

A. No, he cannot.

Q. Does the street car company supply a car so poorly constructed that a man cannot see both sides at one time?

A. A man could not see both sides of—

Q. Oh, they do construct them so poorly.

The Court: He didn't say that at all. He said  
30 he could not see both sides at once.

(Answer read by the stenographer.)

Q. I want to know if the street car you were on is so constructed that you, operating it, could not see the both sidewalks in front of you as you were going down the street? Is that true?

A. Yes.

Q. It is all glass in front of you? It is glass and it is half a circle, built like this? (Illustrating.)

A. Yes.

Q. How far was it from the fire house to the point of the accident?

A. Well, I cannot say how many feet; about two car lengths.

Q. Two car lengths. How long is a car? 40 feet?

A. About 40 feet, 45 feet.

10

Q. Well, that is 80 feet. It is about 40 feet—a car?

A. I think so.

Q. You say two car lengths after you passed the fire house you hit the child?

A. Pretty close.

Q. You testified to Mr. Gildea that you saw the children as you passed the fire-house, is that right?

A. After passing the fire house.

Q. As you passed the fire house? How far after, then?

20

A. I cannot say.

Q. Well, try and tell us.

Mr. Gildea: The witness says he cannot say, he ought not to be asked to tell.

Mr. Devlin: I object to Mr. Gildea's comments.

Mr. Gildea: You object to my objection?

The Court: I think he has a right to press his question.

30

Mr. Gildea: I made an objection; I addressed the Court.

Mr. Devlin: And I am addressing the Court, too. I am objecting to Mr. Gildea in his objection. He is making it so as to give the witness hints how to answer.

The Court: You may proceed with the examination.

10 Q. Can you find the answer to his question? He saw the children as he passed the fire house. Is that true or not?

A. After passing the fire house.

Q. No, your answer was you saw the children as you passed the fire house. Is that true or not?

The Court: If that is a material point, we will get it from the stenographer.

20 (Answer read as follows): "A. After I had gone by the fire house I seen those children enter the east bound track on a full force of run."

Q. Can you tell us how far you were past the fire house when you saw the children?

A. I cannot say how many feet.

Q. You had gone by the fire house? Do you know how far? Was it 10 feet?

A. I could not say—

Q. 20 feet? 30 feet? Which do you think?

30 A. I cannot exactly say.

Q. Why can't you say? You have guessed the length of the car, and you have also told me the accident happened two lengths of a car from the fire house. Why can't you tell me how far past the fire house you were?

Mr. Gildea: The witness says he cannot—

Mr. Devlin: I submit he should address his remarks to the Court.

The Court: He did address his remarks to the Court.

Mr. Devlin: If he wants to make an objection, I submit he has no right to address anyone. There was no objection to the question; the question was put; no objection to it; we are waiting the witness' answer, and he has no right to address the Court. 10

The Court: The Court will say whether he has a right or has not, Mr. Devlin.

Mr. Gildea: I was about to say I do not think it is material why the witness cannot give the distance. He said, "Why can't you tell us what this distance is?" He can't if he can't. 20

Mr. Devlin: I submit there was plenty of time between my question and the answer for that objection to be made. The only purpose of this objection in this manner is to try to assist the witness on cross-examination. That is the whole thing; that is all. My question stood here for two minutes without—

The Court: It was no such length of time at all.

Mr. Devlin: I think it did. 30

The Court: Your idea of minutes differs very much from the Court's idea of minutes if you say two minutes elapsed. Now, you may repeat that question.

(Question read by the stenographer.)

The Court: Can you answer that question?

A. 80 feet—40 feet the length of the car.

Mr. Devlin: Well, I submit that answer isn't responsive.

The Court: Yes, it is not responsive.

10 A. Well, I should say I was about two lengths—I judge about two lengths of the car.

Q. When the accident happened?

A. When the accident happened.

Q. Well, you told us that all right. I want you to tell how far past the fire house you were when you first saw the children.

The Court: Can you answer that question? If you can, do so.

20

A. About 80 feet or so.

Q. About 80 feet, is that right?

A. If the car is 40 feet long.

Q. If the car is 40 feet long. You have told us the accident happened two car lengths and you say you didn't see those children until the accident actually happened, is that right? Is that right?

A. Didn't see the children until the accident? Yes, I have seen the children, as I said, right in front of me.

30

Q. Which is correct? Did you see the children or didn't you see them till the accident happened? Which is correct?

A. I had seen the children enter on the north bound track.

Q. The track going to east Trenton. How far were you away when you saw them?

- A. I should judge about 10 or 12 feet.
- Q. Is that right? Sure of that?
- A. To the best of my opinion.
- Q. Do you know what speed your car was going at then?
- A. Half power I was using.
- Q. What time did you leave—where is the end of your route; Mulberry Street, isn't it?
- A. Yes, Mulberry Street.
- Q. Is that right? 10
- A. Yes, out East Trenton.
- Q. How long had you worked that route?
- A. Working on there for quite some time. I have been running back and forth on that particular run—
- Q. Did you hear me? I said—
- A. I think I have been running there about three years on that run. I have run previous to that since I have been on the road.
- Q. Did you run after that on that track, on that 20 route?
- A. Yes.
- Q. That takes you from Mulberry Street to the barn on Center Street?
- A. Down to the barn.
- Q. What time did you leave Mulberry Street?
- A. Ten minutes to eight.
- Q. What time were you due at the car barn?
- A. I could not say what running time we had at that time; I could not exactly say. 30
- Q. Do you remember the last trial; I asked you that question. Do you remember that?
- A. I disremember what you did ask me.
- Q. And you gave me the same answer, you couldn't say?
- A. No, I could not bring it to mind.

Q. The last time. Why didn't you refresh your memory between that trial and this trial? Why didn't you? Is there any reason?

A. No.

Q. Is it because you didn't want to say——

A. No, no——

Q. ——the time, so that this jury might see whether or not you were speeding?

10 Mr. Gildea: Just a moment. I object to that, if the Court please, as being highly improper.

The Court: I will sustain the objection.

Mr. Devlin: I ask an exception.

The Court: Take your exception.

(Exception noted for the plaintiffs.)

20 Q. Do you know how many miles it is from the end of Mulberry Street to Lalor Street, the end of your route, at that time?

A. No, I don't know. I don't know today.

Q. Never made it your business to inquire?

A. No.

Q. And you want us to understand that you don't know now what time you had to make from Mulberry Street to Lalor Street, is that right?

30 A. I had my time set, but I disremember. I don't know what time we did have, whether thirty or thirty-five minutes. I can't exactly say. But I do remember my time was ten minutes of eight, and I left on my time.

Q. And you can remember the time you started—can you tell us when you were due at Lalor Street?

A. We had two or three different schedules, and I disremember what schedule I was on at that time.

Q. Do you remember the last trial? Do you?

A. Yes, I remember the last trial.

Q. Are you able to tell us how many miles it is from Mulberry Street to Lalor Street?

A. No, I could not.

Q. Page 86, line 32 or 33, a question put to you by me: "Do you think you had to make that run in twenty minutes that night from Mulberry Street to the barn?" 10

A. Yes.

Q. The answer was, "The running time was twenty-eight minutes." Do you remember making that answer?

A. No, I do not.

Q. Do you want to say that is true or untrue?

A. I could not say just now, I disremember.

Q. Don't remember; or don't you want to remember, which? 20

Mr. Gildea: I object to that, if the Court please, as being a comment, and being irrelevant, incompetent and immaterial.

Mr. Devlin: It is a question.

Mr. Gildea: He has said he doesn't remember.

Mr. Devlin: Well, I am asking—

30

The Court: I don't sustain the objection.

Q. Why don't you remember?

A. Well, I don't remember. If I did, I would tell you.

Q. I am asking you why you don't. Can you give us a reason?

A. I don't remember. I have run on other lines and run different schedules.

Q. No use telling me that.

The Court: That is a proper answer.

10 A. I disremember all those schedules. I have run from ten, maybe to fifteen or twenty different schedules, and I could not bring them to mind.

Q. You testified in May, 1924, a year and a half ago, to the question and answer I have read, twenty<sup>1</sup> eight minutes? You say you could not remember?

A. No, I could not remember.

Q. And the reason is you have had so many schedules? There are so many schedules you cannot remember?

A. Well, that is about the reason.

20 Q. Would you say that answer of yours was wrong, twenty-eight minutes? Would you say it was wrong?

A. I wouldn't say, I forget, I disremember.

Q. You won't say it is wrong. How are the brakes on your car?

A. The brakes are all right.

Q. Had you tested them?

A. I had worked two or three trips, and my other man had worked it all right.

30 Q. What time did you take that car that day?

A. I think something around three or four o'clock; between three and four o'clock.

Q. Do you remember how many trips you made before the accident?

A. No, I could not say.

Q. The brakes worked all right, though?

A. Yes.

Q. And they were good?

A. The brakes worked all right.

Q. And you are sure your speed wasn't more than twelve miles an hour when this accident happened?

A. That is what I should judge.

Q. You are running trolley cars now enough to know something about speed, aren't you, about ten years?

A. Yes.

Q. Is that right? That is your business, isn't it, running trolley cars?

A. Yes.

Q. You didn't ring your bell when you left Olden Avenue, did you?

A. No, I did not.

Q. You did not. Did the car have a bell?

A. Yes.

Q. Are you sure about that?

A. Yes.

Q. Was it in working order?

A. The bell was in working order.

Q. Any other signals on the car besides the bell?

A. No, the bell is the only signal.

Q. You had to back the car off the child's arm, didn't you? Isn't that true?

A. Yes.

Q. How far did you have to back it?

A. Maybe a foot or half a foot.

Q. Foot or half-foot?

A. Whatever it was.

Q. Nobody was on the front platform, was there?

A. No.

Q. You had a clear platform?

A. Yes.

Q. Was your car filled inside, behind you, I mean?

A. There was quite some people on the car, I can say.

Q. In front of you was all clear?

The Court: He said that about three times now.

Q. Working for the trolley company still?

A. Yes.

Q. What are you doing?

10 A. Operating.

Q. Motorman?

A. Operating.

Q. You mean—

A. Motorman and conductor.

Q. Yes. On the same line?

A. Not on the same line.

Q. What line are you working on now?

A. West State and Hamilton Avenue.

20 Q. How is the bell rung on that car you were working that day?

A. What did you say?

Q. How is the bell rung on that car you were working that day?

A. With my foot.

Q. With your foot. Down this way with your heel, is that it? Did you see the child under the car?

A. Yes, when I got off of the car.

Q. Lying with its head toward the city?

A. I cannot say what position.

30 Q. But you backed the car up?

A. I backed it.

Q. Your right front wheel was on the child?

A. The right wheel was on the child.

Q. But you could not say the position of the child?

A. I could not say exactly the position of the child.

Q. When you hit the child you immediately called,

“Oh my God, what have I done,” didn’t you? Is that right?

A. I yelled.

Q. What did you yell out?

A. I yelled when I seen the child.

Q. What did you yell out? Did you say “Oh, my God, what have I done?”

A. Yes, I think that it what I did say when I seen the child was——

Q. No doubt about it, is there?

101

A. Yes, that is what I did say.

Q. Sure, no doubt about that. That is all.

Re-direct examination.

By Mr. Gildea:

Q. You are a married man?

A. Yes.

Q. Got any children of your own?

20

A. I have a child of my own.

Mr. Devlin: I object to that as not material.

Mr. Gildea: You are a little late; it is in now.

The Court: I don’t think it is material one way or the other.

Mr. Gildea: I think the Court and jury are entitled to know whether or not he is a man with responsibilities, that has some bearing on the case. 30

Mr. Devlin: I object to these comments. I think the Court has ruled on it.

The Court: Anything further?

Mr. Devlin: No, I haven't.

Mr. Gildea: I think I can finish with Mr. Bennett now, if the Court please.

The Court: All right.

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10 JOSEPH G. BENNETT, recalled.

The Court: Called as your witness?

Mr. Gildea: No, I wish to finish cross-examination; I wanted to find out something before I finished my examination.

Cross-examination.

20 (Continued by Mr. Gildea):

Q. Now, Mr. Bennett, you said you were going to Lavine's Hotel that night on North Clinton Avenue?

A. Yes, sir.

Q. And you said, I think, that was north of Meade Street?

A. Yes, sir.

Q. Between Meade Street and Olden Avenue?

30 A. It is a trifle past—is that Meade or Webster?

Q. Meade is where you got off?

A. Yes, sir. On the left hand side going out.

Q. I have the number 549.

A. I can't tell you the number of the place.

Q. How long is it since you have been there?

A. I haven't been to that neighborhood, only going past on the trolley car, since that time.

Q. Is Lavine's Hotel now where it was then?

A. I can't tell you sure, I don't know.

Q. Don't know?

A. No.

Q. Who was the proprietor of that hotel?

A. Lavine is, so far as I know.

Q. You said the accident happened north of Lavine's hotel?

A. Yes, sir.

10

Mr. Gildea: That is all.

Mr. Devlin: That is all. Are you through with this man?

Mr. Gildea: Yes, I am through with Mr. Bennett.

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W. EARLE ROCHFORD, a witness called on behalf of 20  
the defendant, being duly sworn, testified as follows:

Direct examination.

By Mr. Gildea:

Q. Mr. Rochford, what is your occupation or profession?

A. Civil engineer.

Mr. Gildea: Do you admit the witness' qualifications? 30

Mr. Devlin: We do. I will admit he is qualified to make any measurements you want to talk about. I guess he has been trained as a professional.

Q. Did you make any measurements on North Clinton Avenue?

A. Yes, sir.

Q. Between Meade and Olden Avenue?

A. Yes, sir.

Q. Have you a memorandum with you of your measurements?

A. I have, yes, sir. (Witness produces memorandum.)

10 Q. What is the distance from Meade Street to Olden Avenue?

A. From curb line to curb line on the westerly side of Clinton Avenue, 650 feet from Meade to Olden.

Mr. Devlin: From Meade to Olden?

Mr. Gildea: Yes, on the west side of the street.

20 Mr. Devlin: 650 feet on the west side.

Q. Do you know what that same distance would be on the east side? There would be some difference?

A. Meade doesn't run through, but from a prolongation of the curb, the line of Meade Street, it would be 35 feet less to the southerly curb line on the east side of Olden, it is further south, 35 feet less. Olden Avenue does not cross directly across Clinton Avenue.

30 Q. How far is it from the northerly curb of Webster Street to the southerly curb of Olden Avenue, on the east side?

A. From the northerly curb of Webster to the southerly curb of Olden on the east side?

Q. Yes.

A. 425 feet.

Mr. Devlin: I don't get you.

A. 452 feet.

Q. What is the width of Webster Street?

A. 60 feet from house line to house line; 36 from curb to curb.

Q. What is the width of North Clinton Avenue from curb to curb?

A. A trifle over 34 feet; 34.2 feet.

Q. Do you know what the gauge of the trolley 10 tracks is?

A. 5 foot 2 inches.

Q. Do you know what the—what do they call that space between the tracks?

A. The dummy.

Q. Yes.

A. About 4 foot, 5.

Q. That is the space between the two tracks?

A. Yes.

20

Mr. Devlin: You mean between the two tracks?

Mr. Gildea: Yes, that is what the witness said.

Mr. Devlin: I think there is a misunderstanding. You don't mean to tell me the distance between the two rails is 4 foot 5 inches?

Mr. Gildea: Is that what you say?

30

The Witness: Yes, sir.

Q. Did you measure it?

A. Yes, sir.

Mr. Devlin: Between the two rails?

The Witness: The gauge is 5 foot 2. The two rails the trolley runs on, and between the north bound and south bound track, the space in between there is 4 foot 5.

Q. Tell us how far would that make each track from the nearest curb—what the distance between the curb and the track would be.

A. That varies just a little. On which side of the  
10 street?

Q. The east side.

A. On the east side at Olden Avenue, the track is 10 feet away and down at Meade Street it is 9½ feet away, that is 6 inches in the length of the block, from 9½ to 10 feet.

The Court: Did you measure midway in the block?

The Witness: No, sir, I did not. The curb line  
20 is practically straight. There is a slight variation.

The Court: What were those figures again?

The Witness: 10 feet at Olden and 9½ at Meade; an average of about 9 foot 9.

Mr. Gildea: That is all.

Cross-examination.

30 By Mr. Devlin:

Q. Mr. Rochford, I just want to verify this. I don't say you are wrong, but it is rather surprising to me to find between the tracks you find 4 feet 5 inches of space.

A. 4 feet, 5 inches.

Mr. Devlin: I never thought it was that much.

The Court: Perhaps you are not very observing.

Mr. Devlin: Well, that may be true, but I never thought there was that much space between the two tracks, between the rails there is 5 feet 2 inches.

Q. Now, did you measure, Mr. Rochford, the distance between the curb line on the left hand side going in the way this car was going, between the curb line and the first rail of the outbound track? 10

A. Let me see if I understand you clearly—Clinton Avenue running north and south—going out Clinton it would be on the east between that curb line and the nearest rail?

Q. I speak of going out North Clinton, going out East Trenton, I don't know whether it runs north or south.

A. It isn't directly either. 20

Q. I mean on the track that is going out East Trenton, about in front of 548 or 540, that is about the point, about in front of there I would like to know how much space there was between the curb and the east bound track, the curb and the first rail of the track?

A. That would be just about 9 foot, 9 inches.

Q. Tell me how much is between that east bound track.

A. 5 feet 2. 30

Q. That is 14 feet, 8 inches; am I calculating right? 14 foot 11 inches. Now, 4 feet between the tracks—4 feet, 5 inches; that is 20 feet, 4 inches, am I right?

A. I don't think so—19.

Q. Well, the first space is 9 feet 9, am I right?

A. That is right.

Q. Between the rails, 5 feet?

A. 2; that is 14-11.

Q. Between the tracks, 4 foot 5.

A. That is 19 feet, 4 inches, is it not?

Q. I make 5 feet—19 feet how many inches?

A. 4.

Q. You are right. Give me the space between the next track.

A. 5 feet 2.

Q. To the other rail?

10 A. Yes.

Q. 5 feet 2. That makes 24 feet, 6 inches, is that right?

A. That is right.

Q. Then before walking across the street, at that point, before I could reach the far rail of the track coming to town, I would have to walk 24 feet 6 inches?

A. That is right.

Q. You have to cover that?

20 A. That is the distance in there, yes.

Q. Before I could reach the rail on the left coming toward town, I would have to travel 19 feet, 4 inches?

A. That is right.

Q. And Clinton Avenue at that point from curb line to curb line is 34 feet?

A. Just a trifle over.

Q. 34.2, I think.

A. That is correct.

30 Q. How big are the sidewalks?

A. I don't know the exact measurements of those; 12 to 13 feet.

Q. That would make altogether about 60 feet—about a 60-foot street from building to building?

A. Yes, about that.

Q. When did you make those measurements? Lately, was it?

A. May 7th, 1924.

Q. Say whether or not this is right: From the nearest point of the curb line of Webster Street to the nearest point on Olden Avenue, the curb along Clinton is 615 or 425?

A. 425.

Q. 425. That is from the nearest curb line of Webster to Olden?

A. 425.

Q. Did you give me the distance from Meade to 10 Olden, the nearest curb line?

A. 650.

Q. And then there is one 615, a short curb line?

A. Across the street, yes.

Q. Now, I think I have them. And Webster is 36 feet wide?

A. From curb to curb.

Q. Just about the same width as Clinton?

A. Just about; a little wider.

20

Mr. Devlin: That is all.

Mr. Gildea: That is all.

---

EDWARD B. SCHNECK, a witness called on behalf of the defendant, being duly sworn, testified as follows:

Direct examination.

30

By Mr. Gildea:

Q. Mr. Schneck, were you on the trolley car that was involved in this accident?

A. Yes, sir.

Q. Where were you sitting?

A. In the last seat, left-hand side.

Q. Do you recall the night the accident happened?

A. Yes, sir.

Q. What can you tell us about the speed of the trolley car?

A. Ten or twelve miles per hour.

Q. When did you first notice anything unusual happen?

10 A. I think I sort of observed a little bump, and I was jolted forward in my seat by the jamming on of the brakes.

Q. After the brakes were jammed on, did the car stop?

A. Yes, sir.

Q. After you felt the jolt the car stopped?

A. Yes, sir.

Q. Can you give us any idea about how far the trolley traveled after you felt the jolt until it stopped?

20 A. About 10 feet.

Q. Did you see these children before the accident?

A. No, sir.

Q. Did you see the little girl after the accident?

A. I just looked out of the window and seen them carrying her.

Q. You didn't get out of the car?

A. No, sir.

Mr. Gildea: Cross-examine.

30 Cross-examination.

By Mr. Devlin:

Q. Mr. Schneck, did I understand you to say you felt a bump and the brakes went on?

A. Yes, a sort of a soft bump.

Q. Sort of a soft bump and then the brakes went on?

A. Yes.

Q. But you felt the bump first?

A. Yes.

Q. And after the brakes went on you were pitched forward?

A. Yes, sir.

Q. And you are sure you felt that bump?

A. Yes, sir.

10

Q. You sat on the last seat on the left-hand side of the car?

A. Yes, sir.

Q. And there was no person standing up in the car that you could see?

A. No, sir.

Q. Front of the motorman was all clear?

A. Yes, sir.

Mr. Devlin: That is all.

20

Re-direct examination.

By Mr. Gildea:

Q. Do you know what caused the jar that you felt?

A. Why, the car hit something; that is what I thought.

Q. The car hit something?

A. Yes.

30

Q. Was that what caused you to be thrown forward in your seat?

A. Yes, sir; the jamming on of the brakes was what caused me to be thrown forward in my seat.

Mr. Gildea: That is all:

Mr. Devlin: That is all:

Mr. Gildea: The defendant rests.

The Court: Both sides rest?

Mr. Devlin: Yes.

Mr. Gildea: Yes.

10

(A recess was thereupon taken until 2:00 P. M.)

---

AFTER RECESS.

2:00 P. M.

20

Mr. Gildea: I said the defendant rested, but there were two things I omitted. I wanted to find out where Lavine's Hotel was; and I forgot to ask counsel whether he concedes the testimony we read go in.

Mr. Devlin: Yes.

Mr. Gildea: We will stipulate the portions of the record both you and I have read, were read correctly.

30

Mr. Devlin: Yes. I don't want the book to go in evidence.

Mr. Gildea: Just offer the parts we both read.

Mr. Devlin: Yes.

(Discussion off of the record.)

Mr. Devlin: What stipulation do you want to make?

Mr. Gildea: It is stipulated that Lavine's Hotel—

Mr. Devlin: Or saloon.

Mr. Gildea: —is number 549 North Clinton 10 Avenue. You agree to that?

Mr. Devlin: Yes. I want to stipulate that the box from which the motorman operates the car is on the left-hand side of the front of the car.

The Court: You mean the control?

Mr. Devlin: Yes. On the left-hand side of the front.

20

Mr. Gildea: Oh, Yes, we will agree to that.

Mr. Devlin: Of course, your company owns the car.

Mr. Gildea: Yes, of course, we own the car.

Mr. Devlin: That is stipulated.

The Court: All right.

30

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(Counsel thereupon summed up to the jury.)

## CHARGE OF THE COURT.

Ladies and gentlemen of the jury: The issue now being tried before you is an action brought by Martha Lambert, by her next friend, Louis Lambert, and also one by Louis Lambert, individually, as plaintiffs, against the Trenton and Mercer  
10 County Traction Corporation, defendant. In this suit the plaintiffs seek to recover from the defendant damages or compensation for injuries sustained by the girl, Martha Lambert, personal injuries on her part, and injuries sustained by the father as a result of her being run over by the wheels or wheel of one of the trolley cars of the defendant. Now, the foundation of this action, of course, is based upon negligence; negligence on the part of the defendant or its agent who was operating the car which caused  
20 the injury. Before the plaintiffs can recover in this case, they must prove to you by a preponderance of the evidence that there was negligence upon the part of the defendant or its motorman in the operation of this car. Negligence is the failure to exercise reasonable care or the omission to do something which a reasonably prudent person should or ought to have done under like circumstances.

The occurrence which is the basis of this suit, took place on the evening of Saturday, March 18th, 1922,  
30 on North Clinton Avenue in this city. The plaintiff, Martha Lambert, accompanied by her little brother, a year older than herself, according to the testimony, left the home of Mr. and Mrs. Lambert at number 553 North Clinton Avenue to cross the street to get some collars. The Lamberts at that time lived on the left-hand side of North Clinton Avenue, as I gather from the testimony, as you are

going toward East Trenton, and the children had evidently crossed the street to the opposite side, and when the accident took place they were recrossing the street apparently to the home of Mr. and Mrs. Lambert where these children lived with them. It appears from the testimony that the little boy, who also started across the street with his sister, turned back and was not injured, but that the little girl was struck by the car and thrown to the ground, and that the wheel of the car, right-hand front wheel, 10 passed over her left arm, or crushed the left arm so that it had to be later amputated at the shoulder joint. Witnesses who were present, and who were riding on the car, Mr. and Mrs. Wert, have appeared on the witness stand and have testified as to what they observed in connection with this accident; other witnesses have likewise told you of things that they saw and observed in connection with the accident, as has likewise the motorman who was operating the car. As I recall the testimony of Mr. Wert, he was 20 riding in the first seat in the car, directly back of the motorman. He says, and I think in that he was corroborated by his wife, that the front platform of the car was not occupied by anyone at the time this accident occurred except the motorman, who was standing at his place behind the controllers of the car which were located on the left hand side of the front of the car. As I recall his testimony, Mr. Wert says that the motorman was standing right there as if he were looking ahead with his hands on the 30 brakes or appliances controlling the car; that the first thing that attracted his attention was a sudden jarring or grating noise and the sudden stopping of the car with a force which was sufficient to throw him forward toward the front of the car. When he got out of the car he saw this child lying on the ground on her back with one arm under the front

wheel. Mrs. Wert's testimony is substantially to the same effect, although she said she did not get out of the car and see the child there, but she does say that just before she noticed the car was stopping, she looked out of the window and saw the boy crossing the street toward the car in which she was riding, but she didn't see the little girl; almost at the same time there came this sudden stopping of the car and a scream which she thought was the boy that was injured. Other witnesses, Mr. Bennett and Mr. Schneck have also testified to what they saw and observed with reference to this happening there that night. Then likewise the motorman, who, as I recall it, says he had left the terminal at the East Trenton end of the line, Mulberry Street, at ten minutes of eight, and had proceeded down Clinton Street, stopped at Olden Avenue taking on a number of passengers at that point, collecting all of the fares, and the passengers were all seated; and that then he proceeded on down North Clinton Avenue in the direction of the center of the town. He says that as he was passing the fire house he slowed down, and after he had passed, a distance not fixed very definitely, as I recall it, he saw these two children running from the opposite side of the street, that when he first saw them they were just entering the east bound track, as has been referred to here, on the opposite side, that he immediately applied his reverse brake and brought the car to a stop within a distance of ten or twelve feet. There has been some difference in the testimony, some different estimates as to the speed at which the car was going. The motorman says the car was being operated at what he terms half power, which in his judgment he said gave a speed of from ten to twelve miles an hour. Other witnesses have estimated the speed as high as eighteen miles, between

twelve and eighteen, and other witnesses have said it was going fast. I think Mr. Bennett's testimony was the car was not going very fast, he did not consider it fast, although Mr. Culliton's testimony was he thought it was going fast. Now, as I already stated in this case, the foundation upon which the plaintiffs claim for compensation or damages rests is the negligence of the operator of the car, and it is for you, after careful consideration of all of the evidence and all of the circumstances of the case, 10 to say whether or not the defendant company by its motorman was negligent in the operation of the car. If you find there was no negligence, then your verdict should be one of no cause of action. On the other hand, if you find after a careful consideration of all of the evidence and all of the surrounding circumstances, that there was negligence, then the next question for you to determine would be the amount of compensation or damages to be awarded to these plaintiffs. There are, as I say, 20 two claims or causes of action now before you. One is the claim of the child, Martha Lambert, for the injuries she has sustained, and if you find she is entitled to recover at all, then it will be for you to determine what amount in your judgment in dollars and cents, would compensate her for the injuries sustained, the pain and suffering that she has endured or may still endure, if you find she is still suffering pain, and for any loss of earning power and inconvenience which she will suffer as a direct 30 result of these injuries. The father, if entitled to recover at all, would be entitled to such amount as would compensate him for moneys that he may have expended or may hereafter be called upon to expend for this child for treatments. As I recall, the only item mentioned in dollars and cents was the bill of Dr. Seibert which was two hundred dollars. I

think that was the only item specifically mentioned as expense which the father had sustained or would be called upon to pay. Then there would be the question of the loss of services of this child up to the time of her attaining the age of twenty-one years, because it is a rule of law in this state, that the father is entitled to the earnings of his children until they attain their majority, but it rests upon the father to maintain, support and educate the children. In your consideration of this case, ladies and gentlemen of the jury, you will be controlled by and concern yourselves solely with the evidence which has been produced before you from the witness stand. Anything that may have been communicated to you on the outside, anything that you may have read in the newspapers or elsewhere, is not evidence in this case and should be entirely disregarded by you in your consideration of the evidence in the case.

20 Two requests to charge have been handed up by the defendant's counsel. I think I have already referred to them, but I charge them in the language requested.

First: Before the plaintiffs can recover in this action they must prove by a preponderance of the testimony that there was negligence upon the part of the defendant of its servants or agents. I charge that.

30 Second: Negligence is the failure to exercise reasonable care. Reasonable care is such care as a person of ordinary prudence would exercise under the circumstances. I charge that.

Mr. Devlin: I take an exception to the first and second requests of the defendant.

The Court: I will allow you an exception.

(Exception noted for the plaintiffs.)

After the Court had completed his charge, and before the jury retired, Mr. Gildea requested the Court to charge as follows: That for all future losses in any verdicts that are given for the plaintiffs, the verdict should include the present value of future losses and not the future value.

10

The Court: This request not having been submitted to the Court in writing and not having been submitted before the Court delivered its charge, I decline to charge as requested.

Mr. Gildea: I take an exception to the Court's refusal to charge the jury further as requested, and to the Court's failure to charge the jury in the first instance that future losses should be computed at their present value.

20

(Exception allowed for the defendant.)

30

## NOTICE OF APPEAL.

(Filed March 19, 1926.)

MERCER COUNTY COURT OF COMMON  
PLEAS.

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MARTHA LAMBERT, by her  
next friend, Louis Lam-  
bert, and LOUIS LAMBERT,  
individually,

*Plaintiffs,*

v.

TRENTON AND MERCER  
COUNTY TRACTION COR-  
PORATION,

20

*Defendant.*

Action at Law.  
Notice of Appeal.

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*To Martin P. Devlin, Esquire, Attorney for the above  
named plaintiffs:*

30 Take notice, that the defendant appeals to the  
New Jersey Supreme Court from the whole of the  
judgment entered in this cause in favor of the plain-  
tiff, Martha Lambert, by her next friend Louis Lam-  
bert, and from the whole of the judgment in favor  
of the plaintiff, Louis Lambert, individually.

EDWARD L. KATZENBACH,  
*Attorney for Defendant.*

Dated, March 12, 1926.

(ENDORSED)

Service of the within Notice of Appeal is hereby acknowledged this 12th day of March, 1926.

Martin P. Devlin,  
Attorney for Plaintiffs.

10

GROUNDS OF APPEAL.

NEW JERSEY SUPREME COURT.

(Filed April 1, 1926.)

20

MARTHA LAMBERT, by her  
next friend Louis Lam-  
bert, and LOUIS LAM-  
BERT, individually,  
*Plaintiffs-Respondents,*

v.

TRENTON AND MERCER  
COUNTY TRACTION COR-  
PORATION,  
*Defendant-Appellant.*

On Appeal.  
Grounds of Appeal.

30

The defendant-appellant, Trenton and Mercer County Traction Corporation, assigns the following grounds of appeal from the judgments of the Mer-

cer County Court of Common Pleas in favor of the plaintiffs in the above stated cause:

1. The said Court erred in that while the jury was charged that, if they found the defendant liable, they should compensate the plaintiffs for future losses, the jury was not charged that the future losses should be discounted to their present value.

10 2. The said Court erred in refusing to charge the jury, when requested to do so by defendant's counsel, at the close of the Court's charge and before the jury had retired, that in any verdicts given for the plaintiffs the future losses should be represented at their present value and not at their future value.

EDWARD L. KATZENBACH,  
*Attorney for Defendant-  
Appellant.*

Dated, March 30, 1926.

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(ENDORSED)

Service of the within Grounds of Appeal is hereby acknowledged this 31st day of March, 1926.

Martin P. Devlin,  
Attorney for Plaintiffs-Respondents.

30

NEW JERSEY SUPREME COURT

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MARTHA LAMBERT, by her next  
friend LOUIS LAMBERT, and  
LOUIS LAMBERT, individually,  
*Plaintiffs-Respondents,*

vs.

TRENTON & MERCER COUNTY  
TRACTION CORPORATION,  
*Defendant-Appellant.*

} On Appeal.

10

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NOTICE TO DISMISS THE SECOND  
REASON FOR APPEAL.

(Filed April 28, 1926)

To Edward L. Katzenbach, Esq., Attorney of Defendant-Appellant:

20

Sir: TAKE NOTICE, that I will make application to the Supreme Court, at the State House, Trenton, New Jersey, on Tuesday morning, the 4th day of May, 1926, at the hour of 10:30 o'clock in the morning, or as soon thereafter as counsel can be heard on the same, for on order to strike out the second ground of appeal which was assigned and served on plaintiff on the 31st day of March, 1926, and is as follows:

30

"2. The said Court erred in refusing to charge the jury, when requested to do so by defendant's counsel, at the close of the Court's charge and before the jury had retired, that in any verdicts given for the plaintiffs the future losses should be

represented at their present value and not at their future value."

for the following reasons:—

1. That no such request was made at any time to the the Judge of the Court of Common Pleas as is alleged by the said Second Ground of Appeal.
2. That the request made to the Judge of the Court of Common Pleas was in form, language and substance entirely different from that alleged in the Grounds of Appeal and served on the plaintiff-respondent.
3. That the said oral request made by the attorney of defendants below, and not assigned or served, as appears by the record of the case, p. 111, State of the Case, Lines 3 to 8 inclusive, is as follows:—

20

"After the Court had completed his charge, and before the jury retired, Mr. Gildea requested the Court to charge as follows: That for all future losses in any verdicts that are given for the plaintiffs, the verdict should include the present value of future losses and not the future value."

MARTIN P. DEVLIN,  
*Attorney of Plaintiffs-Respondents.*

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(ENDORSED)

- 30 Service of the within Notice is hereby acknowledged this 28th day of April, 1926.  
Edward L. Katzenbach,  
*Attorney of Defendant-Appellant.*

*Order Refusing to Dismiss Second Reason 117  
for Appeal*

NEW JERSEY SUPREME COURT

MARTHA LAMBERT, by her next  
friend LOUIS LAMBERT, and  
LOUIS LAMBERT, individually,  
*Plaintiffs-Respondents,*

vs.

TRENTON & MERCER COUNTY  
TRACTION CORPORATION,  
*Defendant-Appellant.*

} On Appeal.

10

ORDER REFUSING TO DISMISS THE  
SECOND REASON FOR APPEAL

(Filed December 20, 1926)

Due notice having been given on an application to be  
made at the opening of the May Term of Court, 1926, **20**  
for an order to strike out the second ground of appeal  
which was assigned and served on the plaintiff on the 31st  
day of March, 1926, in the above stated cause, which  
said ground of appeal is as follows:

“2. The said Court erred in refusing to charge  
the jury, when requested to do so by defendant’s  
counsel, at the close of the Court’s charge and  
before the jury had retired, that in any verdicts  
given for the plaintiffs the future losses should **30**  
be represented at their present value and not at  
their future value.”

The Court having heard the arguments of Martin P.  
Devlin, counsel for plaintiffs-respondents, and George  
Gildea, representing Edward L. Katzenbach, counsel for  
defendant-appellant, and the Court having reserved its  
decision on the same until the full case was argued at  
the said Term of Court, and the Court having considered

118 *Order Refusing to Dismiss Second Reason  
for Appeal*

the reasons given for the said motion and the arguments of the respective counsel on the same, and having decided the said motion and also the entire case on the 9th day of December, 1926:

It is thereupon on this 9th day of December, 1926, directed and ordered that the said application to strike the aforementioned second ground of appeal assigned and served on the plaintiff in the above stated cause be and  
10 the same is hereby dismissed.

Dated, December 17, 1926.

By the Court,

WM. S. GUMMERE, C. J.

Entered December 17, 1926.

On motion of

MARTIN P. DEVLIN,  
*Attorney of Plaintiffs-Respondents.*

20

I, Edward J. Kelleher, Clerk of the Supreme Court of the State of New Jersey, do certify that the foregoing is a true copy of the notice of appeal filed and also of two rules entered in the minutes of the Court in the above-stated cause.

30

[L. s.]

In testimony whereof I have set my hand and the seal of said Court at Trenton, this twenty-third day of December, A. D. nineteen hundred and twenty-six.

EDWARD J. KELLEHER,  
*Clerk.*

No. 54, May Term, 1926.

NEW JERSEY SUPREME COURT

MARTHA LAMBERT, by next friend, et al.,	} <i>Plff.-Respt.</i> ,	10
vs.		
TRENTON & MERCER COUNTY TRACTION COMPANY,	} <i>Deflt.-Applt.</i>	

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APPEAL FROM MERCER COMMON PLEAS.

(Filed December 9, 1926)

Argued May Term, 1926.

Decided October Term, 1926.

20

Martin P. Devlin, for plaintiff-respondent.

Edward L. Katzenbach, for defendant-appellant.

Argued before Chief Justice Trenchard and Minturn,  
J. J.

The opinion of the Court was delivered by Minturn.

The action was instituted for damages for personal injuries sustained by Martha Lambert, the five year old daughter of the co-plaintiff, Louis Lambert, who collided with the defendant's trolley car, in the City of Trenton, whereby she sustained injuries resulting in the amputation of her arm from the shoulder, and her father sustained damage of an incidental character resulting from the basic damage to the child. The trial resulted in a verdict for the child for \$22,500, and for \$2,500 for the father,

30

and from these verdicts an appeal has been taken by the defendant.

- Two grounds of appeal are specified; the first based upon an alleged error in the charge of the Court, and the second upon the claim that the Court illegally refused to charge an oral request, submitted by counsel for the defendant, after the Court's charge had been delivered. It must suffice to say in answer to the first specification that it is not legally before us, since no exception was
- 10** entered to the charge. The second ground of appeal, however, possesses the merit that it substantially states the law applicable to the situation which the trial court in its charge apparently overlooked. The Court had completed its charge, and before the jury retired counsel for the defendant requested the Court orally to charge, "That for all future losses in any verdicts that are given for the plaintiffs, the verdicts should include the present value of future losses, and not the future value." While this request was more or less legally involved, it however,
- 20** comprehended substantially a correct statement of the legal rule applicable to the present value of a verdict for damages accruing in future, and to which subject in its charge the Court had made no reference. The learned trial Court, however, raised no exception to the form of the request, but refused to entertain it because it was not submitted in writing, and because it had not been submitted before the Court delivered its charge, as required by the rules. The rule of procedure is settled that matters
- 30** of law which either party desired to have charged shall be submitted in writing to the Court before the charge is begun.

*Cannary v. W. J. S. R. R. Co.*, 78 N. J. L. 552.

Rules of Court, however, are devised as a method of facilitating the correct and orderly exposition of substantive law, and the proper administration of justice, and when for any reason they cease in actual practice to ac-

comply with that function, their efficacy as rules pro tanto cease, and such an equitable construction or application will be accorded them, as will effectuate the manifest design and purpose of their framers.

7 R. C. L. 1027.

*Vohlers v. E. H. Stafford Co.*, 171 Mich. 8.

*United States v. Breitling*, 15 U. S. 900.

*Eastman v. Amoskeag Co.*, 44 N. H. 143.

Counsel, therefore, might properly assume that the 10  
basic rules regulating the quantum of damages recoverable by each plaintiff would receive the attention of the Court as an essential portion of its charge, without suggestion from counsel, and acting upon that assumption be prepared for nothing further than to enter an exception to such portion of the charge as should fail to meet the legal requisites, as conceived by counsel. When, therefore, the Court entirely omitted from its charge a statement of the fundamental rule of law governing the assessment of damages by the jury, no other practicable 20  
course would seem to have been open to counsel than the one he adopted of calling the Court's attention to the omission, and requesting a statement to the jury, of the law upon the subject. We think that in the exigency, the learned trial court, realizing the omission, should have detained the jury sufficiently to state to them the rule of law governing the subject, or as an alternative, if deemed necessary, should have requested counsel to reduce his request in writing, and submit it for the Court's consideration before final submission of the case to the jury. 30

*Dunn v. Jersey City Gal. Co.*, 73 N. J. L. 586.

*Benz v. Central R. R. Co.*, 82 N. J. L. 197.

For this reason we think the judgment should be reversed, and a venire *do novo* ordered.

## NEW JERSEY SUPREME COURT

OCTOBER TERM, 1926

10	MARTHA LAMBERT, by her next friend, LOUIS LAMBERT, and LOUIS LAMBERT, individually, <i>Plaintiffs-Respondent,</i>	}	On Error to the Mercer County Court of Common Pleas.
	<i>vs.</i>		
	TRENTON & MERCER COUNTY TRACTION COMPANY, a cor- poration, <i>Defendant-Appellant.</i>		

## ORDER REVERSING JUDGMENT.

20 This judgment having been duly argued at the May Term, 1926, of this Court by Martin P. Devlin, of counsel for the plaintiffs-respondent in error, and Edward L. Katzenbach, of counsel for the defendant-appellant, and the Court having inspected the records and judgments below, and considered the causes assigned for error.

30 It is thereupon on this tenth day of December, 1926, ordered that the judgments in both cases of the said Mercer County Court of Common Pleas be in all things reversed, set aside and for nothing holden; and that the records and proceedings in both cases be remitted to the said Mercer County Court of Common Pleas to be proceeded with in accordance with these judgments and the practice of said Court.

Entered this 13th day of December, 1926.

On motion of

MARTIN P. DEVLIN,  
*Attorney of Plaintiffs-Respondent.*

NEW JERSEY SUPREME COURT

MARTHA LAMBERT, by her next friend, LOUIS LAMBERT, and LOUIS LAMBERT, individually, *Plaintiffs-Respondent,*

vs.

TRENTON & MERCER COUNTY TRACTION COMPANY, a corporation, *Defendant-Appellant.*

Action at Law.  
On Appeal.

10

NOTICE OF APPEAL AND REASONS.

(Filed December 20, 1926)

To Edward L. Katzenbach, Esq., Attorney for Trenton and Mercer County Traction Company, a corporation, Defendant-Appellant.

20

TAKE NOTICE, that the plaintiffs-respondent appeal to the Court of Errors and Appeals of the State of New Jersey from the whole of the judgment in the above-entitled cause upon the following reasons:

FIRST.

Because the Supreme Court on motion made on the opening day of the May Term refused to dismiss the second ground of appeal, which was assigned and served on the 31st day of March, 1926, and filed in the above-stated cause, which is as follows:

30

"2. The said Court erred in refusing to charge the jury, when requested to do so by defendant's counsel, at the close of the Court's charge and before the jury had retired, that in any verdicts

given for the plaintiffs the future losses should be represented at their present value and not at their future value."

SECOND.

10 Because the Supreme Court reversed the judgment on the refusal of a request to charge made by the defendant orally, which request was never assigned or served on the plaintiffs as a reason for appeal and which request is as follows:

"That for all future losses in any verdicts that are given for the plaintiffs, the verdict should include the present value of future losses and not the future value."

THIRD.

20 The Supreme Court erred in reversing the judgment under review and gave judgment for the defendant-appellant when it should have given judgment in favor of the plaintiffs-respondent.

Respectfully yours,

MARTIN P. DEVLIN,

*Attorney for Plaintiffs-Respondent.*

Dated, December 20, 1926.

30

(ENDORSED)

Service of the within Notice of Appeal and Reasons in the above stated cause is hereby acknowledged this 20th day of December, 1926.

Edward L. Katzenbach,  
*Attorney for Defendant-Appellant.*

# COURT OF ERRORS AND APPEALS

OF NEW JERSEY

MARTHA LAMBERT, by her next  
friend, Louis Lambert, and  
LOUIS LAMBERT, individu-  
ally,

*Plaintiffs-Appellant,*

vs.

TRENTON AND MERCER  
COUNTY TRACTION COR-  
PORATION,

*Defendant-Respondent.*

On Appeal from a  
Judgment of the  
Supreme Court re- 10  
versing a Judgment  
of the Court of Com-  
mon Pleas of Mercer  
County.

BRIEF OF PLAINTIFFS-APPELLANT. 20

## FACTS

The facts of the case are that plaintiff, an infant about five years of age, on March 18, 1922, was crossing the street known as North Clinton Avenue from the South to the North Side. The defendant, Trenton & Mercer County Traction Corporation, owns and operates cars on the said North Clinton Avenue, and on the evening in question was operating a car in a westerly direction. Plaintiff, Martha Lambert, was crossing the street, and was run down by a car near the north rail of the western track, and was knocked flat on her back with her arms spread, and the wheel of the car went over the left arm, and so 30

## FACTS

injured the arm up near the shoulder that it had to be amputated. The amputation took off the shoulder joint and left the arm flush with the body.

Two suits were commenced, one by the father, Louis Lambert, and the other by the child through its next friend Louis Lambert, its father. The case was tried on May 7, 1924. The jury returned a verdict of two thousand five hundred dollars (\$2,500) for the father, and  
 10 twelve thousand five hundred dollars (\$12,500) for the child. The defendant appealed to the Supreme Court. The Supreme Court reversed the case because of an instruction given by the Court as a result of a request submitted by counsel of the plaintiff. The opinion of the Supreme Court is found in N. J. Adv. Rep., Vol. 3, No. 9, p. 237, February 8, 1925.

The case was re-tried on the 22d and 23d days of December, 1925, and the jury returned a verdict of  
 20 \$22,500 for the child, and \$2,500 for the father. The case was argued May Term, 1926, and reversed October Term, 1926. The facts as recited by the witnesses are as follows:

### PLAINTIFF'S FACTS.

DR. RAYMOND S. SEIBERT, witness for the plaintiff (State of Case, p. 15), testified that he attended the plaintiff on March 18, 1922; that plaintiff came to the hospital without the arm, and was in the hospital until  
 30 May 16, 1922; that there was not enough skin to cover up the wound, and the arm had to be amputated at the shoulder socket.

THERESA LAMBERT, the mother of the child, testified (State of Case, p. 18), that the child would be five years old on April 21, 1922; that the child left home on the evening in question, and she thought that the child was in the front part of the house; that the child left the house with witness's other child, age seven years. She thought

## FACTS

both of them were in the front part of the house, and she was in the back of the house; said she lived at No. 553 North Clinton Avenue, Trenton, New Jersey, which is between Olden and Webster Streets.

CHARLES H. WERT, witness for the plaintiff (State of Case, p. 25), testified that he lived at No. 664 North Clinton Avenue, Trenton, New Jersey, at the time of the accident; that he was on the front seat of the trolley car on the left-hand side, and his wife sat on the same seat at his left, next to the window. There was nothing between the motorman and himself, and there were no passengers on the front platform; that the car traveled at a medium rate of speed, he thought between fifteen and eighteen miles an hour, and a trolley car had passed on the other track going in the opposite direction, before the accident happened. After that he felt a kind of jolt, and he and his wife were pitched forward. The motorman was standing, and when the car jolted, the motorman gave a jump, stopped the car very quickly, and called out "My God, what have I done"—while the child was screaming (State of Case, p. 27). He, the witness, got out of the car and saw the little girl lying under the car on her back, her head facing the same direction the car was traveling, with her left arm under the front right-hand wheel (State of Case, p. 27). Witness said his hearing was normal, and he heard no signal of any kind before the car jolted. Said (State of Case, p. 29), he thought the car went ten feet after it hit the child.

HUGH CAULFIELD, witness for the plaintiff (State of Case, p. 30), testified that he was an officer of the Police Department of the City of Trenton; that he arrived three or four seconds after the accident happened, and was attracted by screaming. Said the child was lying on the rail, on the north side and the car fender was up. Said the accident happened opposite No. 553 North Clinton Avenue, and he was at No. 512 North Clinton Avenue.

FLORENCE WERT, witness for the plaintiff (State of

## FACTS

Case, p. 34), said she was the wife of Charles H. Wert, and on the 18th day of March, 1922, she lived at No. 644 North Clinton Avenue, Trenton, New Jersey. She was on the street car with her husband, occupying the front seat, on the left-hand side of the car. She was sitting next to the window. She said a car had passed the car in which she was riding. The speed of the car she was riding in was about fifteen miles an hour. Said her hearing was normal, and there were no persons between herself and the motorman, and that no signal of any kind was given before the accident (State of Case, p. 35); said she saw a boy leave the curb on her left-hand side, going toward town. He was between the curb and the track opposite the track on which she was riding, and was coming toward their car. She saw him till he was halfway across between the curbstone on her left and the car track on which she was riding. No trolley, automobile or street car was in front of their car. Said she felt a jolt and was thrown across the bar in front of her. Saw the motorman apply the brakes. He jumped, and said "My God, what have I done." Her husband got off the car and the car was backed up. The time of this accident was about five minutes of eight o'clock in the evening. (State of Case, p. 34). Witness said the car traveled about ten feet after the jolt. Said the boy she saw (who was not the plaintiff) was running across the street toward the car in which she was riding, and when he came to the car the boy made a grab for something. The car did not strike him, and she did not see the car strike his little sister, the plaintiff. She testified she took the car at the corner of Sherman and Clinton Avenues (State of Case, p. 34). She said she did not see the boy and the plaintiff together. She saw only the boy, and she saw all this before the car jolted (State of Case, p. 35). She said the other trolley car which passed the car in which she was riding did not obstruct her view of the boy. She thought the car had hit the boy because

## FACTS

he was so close to the car (State of Case, p. 36) ; she saw the boy after the car going in the opposite direction had passed.

THOMAS CULLITON, witness for the plaintiff (State of Case, p. 42), said he owned a restaurant on North Clinton Avenue, and was walking east on North Clinton Avenue on the right-hand side of the car, which passed him going east. He saw the two cars pass, one going east and one going west. The car going west he said was going at a good rate of speed. A couple of seconds after it passed he heard the screaming of the child. He went to the point of the accident, and saw (State of Case, p. 43), the plaintiff, Martha Lambert, underneath the car, with her head toward town and her feet toward East Trenton, between the rails of the track running toward town. Said two cars had passed alongside of him. He walked about twenty feet after the cars had passed him when he heard the screams, which came from behind him (State of Case, p. 45).

JOSEPH G. BENNETT, witness for the plaintiff (State of Case, p. 50), said that on the 18th day of March, 1922, he lived at No. 11 Lamberton Street, Trenton, New Jersey. He went out East Trenton about seven-thirty or eight o'clock to see a man about some painting business. He got off the car at Meade Street and took a "cat-a-corner" path across the street to the other side. The car he got off started on. He noticed the car he got off pass by the children (State of Case, p. 51). There was a boy and a girl standing on the curb. He saw the other car coming towards town, and the children start crossing the street. Said the car coming toward town was about one hundred and fifty feet away when he saw the children. He saw the boy jump, but did not notice the little girl. He noticed that the motorman was standing up and looking down, and he looked as if he fell back when the car came to a stop. As the motorman reached the children his head was down. When his

## FACTS

head was down the children were probably twenty or twenty-five feet in front of the motorman. Witness heard no signals or bell of any kind. If any had been given he said he would have heard them (State of Case, p. 53). Said there was no other car on the street, or motor car between the trolley car that hit the plaintiff and the plaintiff herself. Said it was a one-man car.

- 10** Witness said the little girl was ahead of the boy, walking across the street as the car was coming. Said the girl was a couple or three feet ahead of the boy. (State of Case, p. 57). He said that the car that struck the children had a clear view, that there was no traffic in the street. He said that the oncoming car was about five or six lengths of the car away from the children as they were crossing the street. (State of Case, p. 55). He said the children were between him and the car that hit the plaintiff, and the car was three or four times its length from him, and the children were half-way between him and the car, and (State of Case, p. 55), he said the houses at that point on that street are close together. They are divided by two or three feet alleys.

## DEFENDANT'S FACTS.

EDWARD SCHENCK, witness for the defendant (State of Case, p. 101), said he was a passenger and sitting on the last seat of the car. He felt a bump and was then jolted forward by the jamming on of the brakes.

- 30** W. E. ROCHFORD, witness for the defendant (State of Case, p. 95), an engineer, gave the various measurements of the street. He said from the curb line on Meade Street and the curb line on Webster Street was about 154 feet, and from No. 553 Clinton Avenue to the southerly curb line of Webster Street is about 281 feet. Measurements from the doorway of No. 553 Clinton Avenue to the southerly curb of Olden Avenue on the west side of the street is 215 feet on one side and 180 or

## FACTS

190 feet on the other side. From Webster Street to Olden Avenue along Clinton is 496 feet. Clinton Avenue is 34 feet wide.

PATRICK MCCUE, witness for the defendant (State of Case, p. 66), the motorman who drove the car that injured the plaintiff, said he left the starting point at seven fifty-one P. M. schedule time. The accident happened between Olden Avenue and Meade Street. Said he stopped at Olden Avenue to pick up some passengers, and collected their fares. There was no one on the platform with him. He was looking straight ahead. Said he saw the two little ones on the centre line of the street. Both were running, the little girl ahead. He pulled the reverse. The girl got to the other side of the car and after she made the other side she went down. He saw her fall and said, "Oh, my God, what have I done." He backed the car off a foot from the line. He said that reversing the car was the quickest way to stop it. The car went ten feet after he applied the reverse. First saw the children on the northbound track, and he was on the southbound. Said his car was going ten or twelve miles an hour. He did not see the children leave the curb. Said his brakes were in good condition. He was looking ahead. He had been a motorman since 1907, and worked in Trenton since 1917. On cross-examination said it was a one-man car. The man who drives the car operates it, conducts it, collects fares, gives transfers, keeps record of collections and reports to his employer. Said he made no stop from the time he left Olden Avenue until the time of the accident. He had a clear running. Said the accident happened between Webster and Olden Avenues. (State of Case, p. 67). Said there was nothing between himself and the children, and the car going in the opposite direction passed him at Olden Avenue, and there was no car or vehicle between him and his view of the children, and the street was quite clear. Said the child went down (State of Case, p. 68), after

## FACTS

making the front of the car. He could not judge the distance in which the car stopped. The checking of the car and the braking of the car gave a poor chance for the child to get across. He admitted the cars get up speed fast when in full power, and with full power they can do 35 miles an hour. To stop quickly, no matter what speed, by the reverse method throws the people out of their seats. The car had a headlight, which was lit up, and was in good order, and there were lights along the street. (State of Case, p. 67). Witness admitted the stores in that section were lit up, and the electric lights at the various cross-streets, and the headlight of the car lit up the whole street. Said he did not know the length of his route, but it was down Clinton, Perry, Broad to Centre and down Centre Street. Forgot the schedule that was working on his line at the time. Had been running the route for a year. Admitted that the company had a schedule of time from one end of the route to the other. The night of the accident he denied he was behind time or trying to make up time to overcome the delay by traffic in the centre of the City (State of Case, p. 75). He was still working for the company. Admitted he never wrung his bell after he left Olden Avenue.

Before discussing the grounds of appeal it may be well to discuss the conduct of the defendant's counsel. On appeal from the first trial of this case he assigned, among other reasons (1st State of Case, p. 118, line 30), the following as his eighth reason of appeal:

"8. The said Court erred in that, while the jury was charged that, finding liability, they should compensate for future losses, the jury was not charged that they should find the present value of the future losses."

At the trial, now on appeal, of this case, he submitted two written requests at the end of the evidence, and before summation of the case. Neither request related to the question of damages, notwithstanding the fact that on the

## FACTS

first trial of this case he took the same exception to the court's charge on damages as he did on the second trial, although in his argument to the jury defendant's counsel made a lengthy discussion of the damages, stating that there should be about \$4,000.00 for the child, as she was not entitled to receive the money until she was twenty-one years old, and the money would be put out, and with compound interest it would make a large sum of money when she was twenty-one years old. 10

His conduct indicated that he was going to do his own charging on damages, and by this argument he expected to obtain a low verdict.

Counsel for the plaintiff summed the case up, answered the arguments of the defendant, and the Court then charged the jury, but after the constable was sworn, but before the jury retired, counsel for the defendant walked up to the bar and requested the Court orally to charge the request set out on page 111, State of Case. This the Court refused to do, giving as its reasons: 20

First, because the request was not in writing, and,  
Second, because it came late.

There seems no reason why the defendant's request should not have been presented at the proper time, with his other two requests, unless he expected and intended to do his own charging on damages, and after he was answered by counsel of the plaintiff possibly then concluded that the best thing he could do was to make the last impression to the jury. If this was not his intention, then his intention was to try to force the Court into a legal error. 30

The Judge in trying a case is entitled to have a fair opportunity to examine all requests that are handed to him, and the fair administration of justice demands that he should have that opportunity. This practice and its evils have been condemned in this Court by Justice Garrison in the case of *Bliss v. Schaeffer Brewing Co.*, 67 N. J. L. 29, New Jersey Supreme Court, and also by

## LAW

the Court of Errors and Appeals in the case of *Dunne v. Jersey City Galvanizing Co.*, 73 N. J. L. 586, and also in the case of *State v. Littman and Weinfeld*, 86 N. J. L. 453, New Jersey Supreme Court, in which the Court said on p. 460, relating to such practice:

107 "Instructions are intended to give to the jury a clear and concise statement of the law governing the case. That was done in this case. To duplicate and elaborate them might well tend to confuse, rather than to guide, the jury."

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## REASONS FILED IN THE COURT OF ERRORS AND APPEALS.

## FIRST.

20 Because the Supreme Court on motion made on the opening day of the May Term refused to dismiss the second ground of appeal, which was assigned and served on the 31st day of March, 1926, and filed in the above-stated cause, which is as follows:

30 "2. The said Court erred in refusing to charge the jury, when requested to do so by defendant's counsel, at the close of the Court's charge and before the jury had retired, that in any verdicts given for the plaintiffs the future losses should be represented at their present value and not at their future value."

## SECOND.

Because the Supreme Court reversed the judgment on the refusal of a request to charge made by the defendant orally, which request was never assigned or served on the

## LAW

plaintiffs as a reason for appeal and which request is as follows:

“That for all future losses in any verdicts that are given for the plaintiffs, the verdict should include the present value of future losses and not the future value.”

## THIRD.

10

The Supreme Court erred in reversing the judgment under review and gave judgment for the defendant-appellant when it should have given judgment in favor of the plaintiffs-respondent.

The defendant-respondent set out two reasons as grounds of appeal, in the Supreme Court, the second of which follows:

2. The said Court erred in refusing to charge the jury, when requested to do so by defendant's counsel, at the close of the Court's charge and before the jury had retired, that in any verdicts given for the plaintiffs the future losses should be represented at their present value and not at their future value. 20

Notice of a motion was given on the 4th day of May, 1926, the opening day of Court, to dismiss the second ground of appeal (see p. 114, State of the Case, line 20), for the reason that the ground of appeal assigned was different in form, language and substance from the exception taken to the Court's refusal to charge the oral request. 30

The Court deferred argument until the main case was argued, then heard the argument on it, and the main case together, and did not decide the question until the date of the opinion, when an order was entered by the Court refusing to dismiss the second ground of appeal (see p. 117, State of the Case, lines 15 to 31). I will quote the

## LAW

grounds of appeal as assigned and served, and the exception taken, but not assigned:

*Reason Assigned and Served.*

10 "2. The said Court erred in refusing to charge the jury, when requested to do so by defendant's counsel, at the close of the Court's charge and before the jury had retired, that in any verdicts given for the plaintiffs the future losses should be represented at their present value and not at their future  
20 value."

*Exception Taken and Not Assigned or Served.*

"After the Court had completed his charge, and before the jury retired, Mr. Gildea requested the Court to charge as follows: That for all future losses in any verdicts that are given for the plaintiffs, the verdict should include the present value of future losses and not the future value."

The Court, by an examination of the request assigned and served and the request as excepted to, will see that their language and meaning are entirely different.

When the Court delivered its opinion it did not decide on the reason as assigned, but decided it on the reason excepted to but never assigned or served on the plaintiffs.

30 On the day after its opinion application was made to the Court to have an order made disposing of the motion to dismiss the second ground of appeal as assigned and served in the cause, and the Court made an order refusing to dismiss the second reason for appeal (see p. 115, State of the Case, line 20).

So the position of the Court is they have refused to dismiss a reason of appeal that was not in truth and fact in the State of the Case, and decided the case on a reason that was in the case, but never assigned or served on plaintiffs.

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We submit the Court cannot do this. It is unfair to the plaintiffs in that they never had an opportunity to meet the reason on which the Court bases the reversing opinion. It is unfair to the Court below to decide the case on a question that was never assigned or served on the plaintiffs.

When the assignments of error are made, the appellant is bound by them. They are in the form of a declaration. Objection was made by the plaintiffs at the earliest opportunity afforded, and it was the duty of the Court to strike out the assignment when it was entirely different from the exception taken in the case. It is unfair to the trial Judge to except on one form of legal proposition, and then assign another on which he never had an opportunity to pass. It is just as unfair to the plaintiff to ask him to argue one legal proposition and then decide the question on a legal proposition of an entirely different language and form. **10**

We submit the Supreme Court should have dismissed the second ground of appeal as assigned and served, and the case should have been argued on the first ground of appeal only. **20**

*Trenton Banking Co. v. Rittenhouse*, 96 N. J. L. 451:

"2. Assignments of error—grounds of appeal under our present practice—are in the nature of a declaration, to which the respondent at common law might plead or demur." **30**

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The defendant took exception to the Judge's failure to charge, though not specially requested, and also took exception to the Court's refusal to charge an oral request after the Court had charged the jury, and assigned the following reasons:

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## REASONS ASSIGNED IN THE SUPREME COURT BY THE DEFENDANT.

10 "1. The said Court erred in that while the jury was charged that, if they found the defendant liable, they should compensate the plaintiffs for future losses, the jury was not charged that the future losses should be discounted to their present value.

20 "2. The said Court erred in refusing to charge the jury, when requested to do so by defendant's counsel, at the close of the Court's charge and before the jury had retired, that in any verdicts given for the plaintiffs the future losses should be represented at their present value and not at their future value."

The second reason assigned and served on me March 31st, 1926, is not correct, and is not the request made to the Court by the defendant, and which was refused by the Court. I quote from page 111, State of Case, the following:

30 "After the Court had completed his charge, and before the jury retired, Mr. Gildea requested the Court to charge as follows: 'That for all future losses in any verdicts that are given for the plaintiffs, the verdict should include the present value of future losses and not the future value.'"

A glance at the request to charge that was made to the Court, and the one assigned, is convincing that had it been handed up at the right time the Court would have erred in charging it, and to change any word in the request as put to the Court is a flat denial to the Court below of a truthful review of its action.

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We will now take up Reason No. 1:

“The said Court erred in that while the jury was charged that, if they found the defendant liable, they should compensate the plaintiffs for future losses, the jury was not charged that the future losses should be discounted to their present value.” 10

There was no special request at the proper time made to the Court on the question of damages. In the previous trial of the case there was no request made to charge on the question of damages, so in the present trial counsel of the defendant had notice that if he wanted the damages more elaborately charged it was his duty to send up a special request properly formulated at the proper time. 20

Omission to charge on any principle of law is not an error. Error must be found in misdirection of a jury, and not in non-direction.

*Cole v. Taylor*, 22 N. J. L. 59, New Jersey Supreme Court:

“2. It is not assignable for error, that the Court omitted or neglected to charge on a particular point of law in question in the cause, if no charge was requested on that point.”

And on p. 60 the Court said: 30

“But when no instructions are requested by either party, the charge to the jury, and the particular points to which the charge shall be directed, rest in the sound discretion of the Court. The omission to state any legal principle which may be pertinent or applicable to the case, or the omission to give any charge whatever, when no charge is requested, affords in itself no ground for a new trial, much less for reversal upon writ

## LAW

of error. *Folly v. Vantuyl*, 4 Halst. 153; *Calbreath v. Gracy*, 1 Wash. C. C. R. 198; *Pennock v. Dialogue*, 2 Peters 15."

*Hetfield v. Dow*, 27 N. J. L. 440, New Jersey Supreme Court:

10 "7. An omission of the judge to charge the jury on points material in the case is no ground of error, unless he is requested to charge on those points."

And on p. 447 the Court said:

20 "There is a further answer to each of the exceptions taken to the charge of the Court, admitting that in each particular the charges desired by the defendant would have been relevant and proper. *The matters complained of are mere omissions, and the judge was not requested upon the trial to charge as it is now insisted he ought to have done. The rule is well settled that such omission constituted no ground of error. If either party deems any point presented by the evidence to be omitted in the charge, it is competent for such party to require an opinion from the Court upon that point. If he does not, it is a waiver of it. Pennock v. Sellers, 2 Pet. 15.*"

*Mead v. The State*, 53 N. J. L. 601, Court of Errors and Appeals—crime of forgery:

30 "5. Omission of the trial judge to charge a pertinent legal principles is not error unless he shall have been specially requested to charge it."

And on p. 606 the Court said:

"It is next insisted that the trial judge committed error in his charge, in that he generally defined the crime of forgery, but failed to clearly explain to the jury how the forged endorsement could prejudice Erdman or any other person, and in that he failed to instruct the jury that the

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defendant was entitled to the benefit of reasonable doubt.

“It does not appear that the judge was requested to make the explanation or to give the instruction indicated. If he had been requested to do so, his neglect or refusal to comply would have been error. It is the duty of the Court, when required, to declare the law upon any point fairly involved in the consideration of the cause, and its refusal to do so is error. But when no instructions are requested, the charge to the jury and the selection of the points to which the charge shall be directed rests in the sound discretion of the Court, and the omission to state a pertinent legal principle is not error. It is competent for either party to require an expression of the Court’s opinion upon any point fairly involved in the case, through the instrumentality of a request to charge, and unless such request is made, error will not lie because the judge may have omitted to charge upon such point. *Cole v. Taylor*, 2 Zab. 59; *Wescott v. Danzenbaker*, 1 Halst. 132; *Folly v. Van-Tayl*, 4 Id. 153; *Hetfield v. Dow*, 3 Dutcher 440.”

*Camden and Atlantic R. R. Co. v. Williams*, 61 N. J. L. 646, Court of Errors and Appeals:

“Omission of a trial judge to instruct a jury on a particular point is not assignable as error unless such instruction be specially requested.”

*Dunne v. Jersey City Galvanizing Co.*, 73 N. J. L. 586, Court of Errors and Appeals:

3. To entitle a party presenting requests to charge, after the Court has concluded its charge, to have such requests considered and charged, or refused, it should appear that the requests presented have been made necessary by something

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the Court has already charged or omitted to charge."

And on p. 589 the Court said:

10

"These requests were handed to the trial judge after he had concluded his charge, and they were not alleged to be requests which the defendant deemed to be necessary because of something which the trial judge had said or omitted to say in his charge.

"The examination or charging of requests presented, under such circumstances, is a matter resting in the discretion of the trial judge, and a refusal to consider or charge them will not be reversed on error.

20

"Mr. Blashfield says: 'In order to entitle a party to insist that a proper instruction requested by him shall be given, his request must be presented to the Court in apt and proper time. It is a general rule that requests not made at the proper time may be refused.' *Blash. Inst. Jur.*, \*134, Note 33, and cases cited. The same learned author states that the rule prevailing in most jurisdictions requires the request to be made at or before the close of the evidence and before the beginning of the argument, and gives a large number of decisions in many states sustaining this statement. They will be found at the above reference, running from sections 134 to 136, both inclusive."

30

*Daggett v. North Jersey St. Ry. Co.*, 75 N. J. L. 630, Court of Errors and Appeals:

"7. The omission of a trial judge to instruct a jury on a particular point is not assignable as error unless such instruction be specially requested."

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And on p. 638 the Court said:

"The sixth assignment of error requiring consideration on behalf of the defendant Williams Company rests upon an exception to the charge of the Court, which exception is based upon an omission to charge.

"The omission of a trial judge to instruct a jury on a particular point is not assignable as error, unless such instruction be specially requested. *Camden and Atlantic Railroad Co. v. Williams*, 32 Vroom 646. 10

"There being no request to charge the matter in question, its omission is not reversible error."

*Chess v. Vochroth*, 75 N. J. L. 665, Court of Errors and Appeals:

"A mere omission to give a pertinent charge when not requested, or to state some legal principle applicable to the facts of the case, is no ground of error." 20

*Lange v. N. Y., S. & W. R. R. Co.*, 89 N. J. L. 604, Court of Errors and Appeals:

*Carmany v. West Jersey, &c., R. R. Co.*, 78 N. J. L. 552, Court of Errors and Appeals:

"3. It is not error for a trial judge to refuse to enlarge upon something he has already said in his charge to the jury, or to explain the meaning of an expression used by him.

"Now, it will be observed that the Court did practically charge in accordance with the request of the defendant that the railroad company's rights on the avenue are superior to plaintiff's rights; at the close of the charge, counsel requested the trial judge to enlarge upon the charge and say what he meant 'by the due regard to the rights of the public lawfully upon the highway.' This the trial court refused to do. This refusal is certainly not a ground upon which an assign- 30

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10 ment of error can be rested. If counsel was of the opinion that the rights of the railroad in this case were so peculiar as to require a specific charge, a specific request should have been submitted in proper time, which would have been at or before the close of the evidence, and before the beginning of the argument. *Dunne v. Jersey City Galvanizing Co.*, 44 Vroom 586; *Blash. Inst. Jur.*, \*134. The Court may be required to charge or refuse a certain request containing a legal proposition, if it is relevant; but a trial judge cannot be required by counsel to enlarge upon something which he has already said to the jury, or to explain the meaning of a particular expression used by him. This he may do if he so chooses, but his refusal is not error."

20 2 N. J. Misc. Rep., *Rubin v. Blau*, 615: At page 616, the Court said:

"Because the Court did not charge that if the jury believed the defendant and its witnesses as to the scale of compensation, the plaintiff's damages should be assessed at ten per cent. instead of forty per cent.; that, therefore, the jury was deprived of passing upon a proposition essential to defendant's defense. The complete answer to this contention is that the defendant's counsel made no request to this Court so to charge."

30 The counsel of the defendant has assigned as a reason for reversal a different request than is disclosed by the record of the case, see page 111, State of Case. This he has no right to do. It is unfair to the plaintiff and unfair to the Court below. He is appealing from the decision of the Court on one specific reason and wants his appeal argued on a reason entirely different from that on which he appealed. In effect he charges the Court below with one species of error and wants to review them on a

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charge not requested, and which the Court had no opportunity to consider.

The following is Reason No. 2 as assigned by the counsel of defendant, and served on the plaintiff on March 31st, 1926—the State of Case was served on plaintiff April 19th—fifteen days before Court opened—May 4th, 1926:

“2. The said Court erred in refusing to charge the jury, when requested to do so by defendant’s counsel, at the close of the Court’s charge and before the jury had retired, that in any verdicts given for the plaintiffs the future losses should be represented at their present value and not at their future value.” **10**

The request as made in the trial of the cause, but not assigned and served as a reason, is found on page 111, State of the Case, lines 3 to 10, inclusive: **20**

“After the Court had completed his charge, and before the jury retired, Mr. Gildea requested the Court to charge as follows: That for all future losses in any verdicts that are given for the plaintiffs, the verdict should include the present value of future losses and not the future value.” **30**

The defendant had no legal right to have either the request actually made, or the one assigned and served, charged by the Court.

In this State it is settled by the rules of the Circuit, and affirmed by the Supreme Court and the Court of Errors and Appeals, that if requests to charge are desired they must be formulated in writing and submitted to the

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Court at the close of the evidence and before the summation of the case by counsel.

**10** *Thibodeau v. Hamley*, 95 N. J. L. 180, Court of Errors and Appeals: In this case the appellants' counsel challenged the instruction of the Court, and the Court, on pages 182 to 184, discusses the duty of appellants' counsel to have submitted requests, and if such requests were not charged or were omitted, appellants' counsel should have taken exception to the same.

**20** In the case of *Bliss v. Schaeffer Brewing Co.*, 67 N. J. L. 29, New Jersey Supreme Court, the evil of holding up requests until after the Court has begun to charge the jury, and the reasons underlying that evil, are ably illustrated by the opinion in this case, in which the Court comments on the fact that requests in coming late are so liable to confuse the Court, and cause an erroneous instruction due to the Court not having sufficient time to consider them. The Court had to reverse this cause because of requests which were charged, but which came late and did not give the Court sufficient time to consider them.

"The Court had charged the jury when two requests to charge were handed up by the counsel of the plaintiff. According to the transcript of the stenographer's notes the following remarks were then made by the trial judge to the jury:

**30** "Plaintiff has handed me a request since I began to speak, and I will look at it.

"I think these two requests state the law, and, therefore, I will charge them.

"*First*. 'If the driver could have seen the boy by looking before turning the corner, and did not see him, then he is guilty of negligence.'

"This was clearly an erroneous instruction. The special fault is that it selected a single circumstance from the many that bore upon the question at issue and presented it to the jury as

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sufficient of itself to warrant a verdict for the plaintiff; its general vice was that it ignored the real issue, which was the lack of reasonable care on the part of the driver, and substituted for it a circumstance that might or might not have been the result of such culpable conduct. Coming in when it did as an isolated proposition, out of all setting with the rest of the charge, and purporting to state the law for the control of the jury, it must be deemed to have been given that weight by them in reaching their verdict. **10**

"The practice pursued in this case furnished a persuasive argument in favor of the rule that obtains at some of the Circuits, by which requests are required to be handed to the judge before he charges the jury."

*Engeman v. State*, 54 N. J. L. 247, New Jersey Supreme Court: **20**

"7. The Court has the right to settle what the practice shall be as to the time when requests to charge the jury shall be made, and parties must conform thereto.

And on p. 257 the Court said:

"The regulation of the practice in that respect is within the discretion of the trial court, and parties and their counsel must conform to it. No error can, therefore, be assigned upon the refusal to charge these requests." **30**

*Franklin v. Freihofer Baking Co.*, 71 N. J. L. 112, New Jersey Supreme Court:

"1. Where requests to charge upon points of law applicable to the cause are made prior to the commencement of the summing up of counsel upon the evidence in the cause, then it is the duty of the Court to charge, or refuse to charge, such requests."

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*Dalton v. Godfrey*, 97 N. J. L. 455, Court of Errors and Appeals. In this the Court said, commenting on request to charge. Request made after judge delivered charge:

10 "Besides, this request was preferred after the judge had delivered his charge, and, as it did not concern anything he had said or omitted to say to the jury, **the request was made too late to require the Court to regard it.**"

*Carmany v. West Jersey, &c., R. R. Co.*, 78 N. J. L. 552, Court of Errors and Appeals. The Court in discussing the time when a charge should have been submitted, said:

20 "If counsel was of the opinion that the rights of the railroad in this case were so peculiar as to require a specific charge, a specific request should have been submitted in proper time, which would have been at or before the close of the evidence, and before the beginning of the argument."

*State v. Littman and Weinfeld*, 86 N. J. L. 453, New Jersey Supreme Court, JJ. Trenchard and Bergen, affirmed C. of E. & A., 88 N. J. L. 392. Twenty-eight requests were made after the sum-up commenced and denied. Held not an abuse of discretion to refuse them. A criminal case:

30 "9. To entitle a party to insist that a proper instruction requested by him should be given, a timely presentation of **such request should be made to the Court at or before the close of the evidence, and before the argument**, unless the request presented has been made necessary by something the Court has already charged or omitted to charge."

And on p. 459 the Court said:

"Lastly, the defendants claim that the judgment should be reversed because of the refusal of the trial judge to charge twenty-eight requests.

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We think not. Timely notice was given counsel that requests to charge must be submitted before the argument began. They were not presented until near the close of the argument of counsel for the defendants which occupied a part of two different days. Whether, in such circumstances, the requests were to be charged was a matter resting within the discretion of the trial judge. The rule is, that to entitle a party to insist that a proper instruction requested by him should be given, a timely presentation of such request should be made to the Court at or before the close of the evidence, and before the beginning of the argument. 10

“But the defendants argue that such failure to charge the requests was an abuse of such discretion and resulted in manifest wrong and injury to the defendants. We think not. Some of the requests were improper, some were inapplicable to the case, and those that were applicable were charged in substance. Instructions are intended to give to the jury a clear and concise statement of the law governing the case. That was done in this case. To duplicate and elaborate them might well tend to confuse, rather than to guide, the jury.” 20

Some cases imply that a request might be made to a Court after the summation is made and the charge is delivered, if the Court had made an erroneous statement of law or omitted to say something to the jury. For instance, in the case of *Dalton v. Godfrey*, 97 N. J. L. 455, at p. 460, and in the case of *Benz v. C. R. of N. J.*, 82 N. J. L. 198, affirmed 83 N. J. L. 780, such an inference might be drawn. But this is an erroneous inference, and it is now settled that the word omit refers to an omission to charge a special request that has already 30

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been properly formulated and presented at the proper time.

*Leiferant v. Progressive Agency*, 98 N. J. L. 526, Court of Errors and Appeals, opinion by Justice Black, on p. 527 the Court said:

10           “The second ground of appeal is thus stated: Mr. Lum, ‘I except to the Court’s failure to charge that the burden of proof is upon the plaintiff.’ ‘Exception noted as ground of appeal.’ The settled and accepted rule of practice on this point is, unless there is a request to charge upon a particular point error is not assignable, because the trial judge may have omitted to charge upon such point. *Wescott v. Garrison*, 6 N. J. L. 132; *Folly v. Vantuyl*, 9 Id. 153; *Cole v. Taylor*, 22 Id. 59; *Hetfield v. Dow*, 27 Id. 440; *Farrell v. Colwell*, 30 Id. 123; *Meade v. State*, 53 Id. 601; *Camden, &c., Railroad Co. v. Williams*, 61 Id. 646; *Dunne v. Jersey City, &c., Co.*, 73 Id. 586, 590; *Daggett v. North Jersey Street Railway Co.*, 75 Id. 630, 638; *Chess v. Vockroth*, Id. 665; *Miller v. Delaware, &c., Co.*, 85 Id. 700, 703; *Lange v. New York, &c., Railroad Co.*, 89 Id. 604; *State v. Dichter*, 95 Id. 212. But in *Benz v. Central Railroad of New Jersey*, 82 Id. 198; affirmed, for the reasons expressed in the Supreme Court, 83 Id. 780, it was said, it was the duty of counsel to request the judge to charge, or at least to pray an *exception to the omission so to do*. In that case the words, the omission so to do, must be construed to mean an omission to charge a specific request and not an exception to an omission to charge when no specific request is made.”

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*Folly v. Vantuyl*, 9 N. J. L., p. 157:

"If in the opinion of counsel, a charge on particular legal points is necessary, such charge may be required, and its omission, or the manner of its performance may then become the subject of investigation. And, if the Court state any matter to the jury, without being so requested by counsel, exception may be taken to it. But unless the Court charge erroneously, or, BEING LEGALLY REQUIRED, OMIT OR REFUSE TO CHARGE AT ALL, OR ON SOME PARTICULAR POINT, there is no room for exception. In the case before us, according to these principles, I am of opinion there is no error in the charge of the Court." 10

To the same effect in *Kvedar v. Shapiro*, 98 N. J. L. 225, Court of Errors and Appeals. On p. 230 the Court said, opinion by J. Katzenbach:

"The remedy in such a situation is for counsel to present to the trial court a distinct request to charge upon the subject he desires covered by the Court's charge. If the Court refuses to charge the substance of the request an exception may be taken to the Court's refusal, and, under this exception, a reviewing court will consider whether or not the Court had erred in its refusal to charge as counsel has requested. A general objection on the ground of the insufficiency of a charge does not present a question which is reviewable in an appellate court. *Lieberman v. Brill*, 94 N. J. L. 387. *Exceptions to a charge must be confined to what the Court has said, or has refused to say, when requested to charge specific requests, and not to what counsel may feel the Court has omitted to say in its charge.*" 20 30

In point is the last expression of the Supreme Court on this question: *Kinsman v. Fisch House Furnishing Co.*,

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New Jersey Misc. Rep., Vol. 3, No. 51, Dec. 19, 1925, Supreme Court, p. 1252. Request to charge received after the summing up commenced. Sitting: Chief, JJ. *Justice* Kalisch and Campbell:

- 10 "The last ground upon which we are asked to make the rule absolute is based upon the refusal of the Court to charge certain requests submitted by counsel for the defendant. It appears from the record, however, that the requests were not submitted until after the summing up by counsel was well under way, and the Court refused to accept the requests or consider them because they had not been presented before the summing up was begun. We think this was a matter within the discretion of the trial judge. It is for him to say whether he will delay the progress of the cause while he reads and considers submitted requests, whether they be one or fifty in number, or whether he will refuse to accept them, and, where nothing appears except the refusal and the ground upon which it was rested, we cannot say that the judicial discretion was abused.
- 20

This definition of the word omit must be correct and is in accord with the law and applies to the failure of the Court to charge a specific request properly formulated at the close of the evidence, and before the summation for the following reasons:

- 30 *First.* The Court is not bound to charge any law at all, in any case unless requested. *Cole v. Taylor*, 22 N. J. L. 59; *Hetfield v. Dow*, 27 N. J. L. 440; *Mead v. State*, 53 N. J. L. 601; *Camden and Atlantic R. R. Co. v. Williams*, 61 N. J. L. 646; *Dunne v. Jersey City Galvanizing Co.*, 73 N. J. L. 586; *Daggett v. North Jersey St. Ry. Co.*, 75 N. J. L. 630; *Chess v. Vockroth*, 75 N. J. L. 665; *Folly v. Vantuyl*, 9 N. J. L. 153.

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*Second.* If requested, the request must be properly formulated in writing and presented to the Court at the close of the evidence, and before the summation of counsel. *Thibodeau v. Hamley*, 95 N. J. L. 180; *Bliss v. Schaeffer Brewing Co.*, 67 N. J. L. 29; *Engeman v. State*, 54 N. J. L. 247; *Franklin v. Freihofer Baking Co.*, 71 N. J. L. 112; *Dalton v. Godfrey*, 97 N. J. L. 455; *State v. Littman and Weinfeld*, 86 N. J. L. 453; *Kinsman v. Fisch House Furnishing Co.*, N. J. Misc. Rep., Vol. 3, No. 51, Dec. 19, 1925; *Kvedar v. Shapiro*, 98 N. J. L. 225. 10

*Third.* Error cannot be taken on a request to charge unless after the charge an exception is taken to the failure of the Court to charge the request or to charge as requested so as to give the Court the opportunity to see if it has omitted anything.

*Fourth.* The Court cannot omit any law unless there is a duty to charge it, and there can be no duty unless the Court is specially requested to charge the law, and a special request must be formulated in writing and presented to the Court at the close of the evidence and before the summation has commenced. When a request to charge is spoken of it must have the qualifications above expressed or it is not a request to charge. *Daggett v. North Jersey St. Ry. Co.*, 75 N. J. L. 630; *Carmany v. West Jersey, &c., R. R. Co.*, 78 N. J. L. 552; *Dunne v. Jersey City Galvanizing Co.*, 73 N. J. L. 586; *Dalton v. Godfrey*, 97 N. J. L. 455; *State v. Littman and Weinfeld*, 86 N. J. L. 453; *Folly v. Vantuyl*, 9 N. J. L. 157; *Kvedar v. Shapiro*, 98 N. J. L. 225; *Kinsman v. Fisch House Furnishing Co.*, N. J. Misc. Rep., Vol. 3, No. 51, p. 1252. 20

*Miller v. Del. River Trans. Co.*, 85 N. J. L. 700, Court of Errors and Appeals: 30

"2. The fact that requests to charge were presented to the Court, which the Court failed or re-

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fused to charge, will not make such failure or refusal the basis of an appeal, unless it further appears that the party presenting the requests, made, at the time, objection to the failure or refusal of the Court to charge each specific request.

- 10 "3. Where the Court charges a request in other terms than those embodied in the request, the party desiring to take advantage of this must object to the request as charged and to the refusal to charge as requested."

A review of the decisions under the respective heads shows conclusively that counsel has no right to have any request charged even though that request be ever so good, if that request be not presented properly formulated at the close of the evidence and before the sum-up of counsel.

- 2C This oral request coming after the case was summed up is a good example that a request should be properly formulated and in writing, and presented at the close of the evidence.

*Had the Court charged as Mr. Gildea requested* "that for all future losses in any verdicts that are given for the plaintiffs the verdict should include the present value of future losses and not the future value."

- 30 In the language of the oral request defendant's attorney said, "for all future losses in any verdicts given for the plaintiffs."

Language is for the purpose of conveying thought. The thought conveyed by this language is that we are suing on verdicts upon which we have future losses instead of suing for damages for personal injuries. Regardless of what the counsel for defendant intended, this is the thought this part of his charge expresses, and this thought is totally foreign to the question before the Court and jury.

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Then the request says "the verdict should include the present value of future losses and not the future value."

This language again conveys the thought that after the jury have reached a verdict, which means their complete and full decision of the case, then they include or add to that verdict the present value of future losses, and leave out the future value. Regardless of what thought counsel intended his language to convey, this is the only thought that can be gathered out of this language, and the thought is absurd and erroneous, and would only lead to the confusion of the jury. 10

If the true thought could ever have been extracted from the language, then it only embraced the present value of dollars to be earned in the future. It should have, but did not, embrace present pain and suffering, and future pain and suffering, present inconvenience and future inconvenience, present loss of enjoyment and future loss of enjoyment, present humiliation and future humiliation, present disappointments and handicaps and future disappointments and handicaps. These are elements of damage to which there is attached no present value of dollars, but for which a lump sum must be given, which is measured solely by the judgment of the jury. The request was made to interpret only one element of damages, that of pecuniary, money, or loss of earning power. This request, had it been offered at the proper time, and in writing, was wrong and should be refused. *Haeussler v. Consolidated Stone and Sand Co.*, N. J. Adv. Rep., Vol. 3, No. 8, p. 159; *De Palma v. Economy Auto Supply Co.*, N. J. Adv. Rep., Vol. 3, No. 36, p. 827. It is not error to refuse to enlarge upon something which has already been said to the jury or to explain the meaning of an expression used by the Court, and was too narrow and did not embrace all the facts and circumstances pertinent to the case, as the following cases illustrate. *Carmany v. West Jersey*, 20 30

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&c., *R. R. Co.*, 78 N. J. L. 552, Court of Errors and Appeals:

10 "Now it will be observed that the Court did practically charge in accordance with the request of the defendant that the railroad company's rights on the avenue are superior to plaintiff's rights; at the close of the charge, counsel requested the trial judge to enlarge upon the charge and say what he meant 'by the due regard to the rights of the public lawfully upon the highway.' This the trial court refused to do. This refusal is certainly not a ground upon which an assignment of error can be rested. If counsel was of the opinion that the rights of the railroad in this case were so peculiar as to require a specific charge, a specific request should have been submitted in proper time, which would have been at or before the close of the evidence, and before the beginning of the argument. *Dunne v. Jersey City Galvanizing Co.*, 44 Vroom 586; *Blash Inst. Jur.*, \*134. The Court may be required to charge or refuse a certain request containing a legal proposition, if it is relevant; but a trial judge cannot be required by counsel to enlarge upon something which he has already said to the jury, or to explain the meaning of a particular expression used by him. This he may do if he so chooses, but his refusal is not error."

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30 *Fox v. Great Atlantic & Pacific Tea Co.*, 84 N. J. L. 726, Court of Errors and Appeals:

"5. Where the subject-matter of the defendant's requests to charge did not include all the circumstances which should influence the conclusion of the jury, they were properly refused."

In this case, the request to charge which did not embrace all the propositions of law, the Court said (p. 730):

"The subject-matter of the requests which the

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Court refused to charge other than had been charged embraced facts postulated by the appellant's counsel which did not include all the circumstances which should influence the conclusion of the jury. There was no error in this. *Cons. Tract. Co. v. Chenowith*, 29 Vroom 416; 32 Id. 554; *Christensen v. Lambert*, 38 Id. 341."

*Dalton v. Godfrey*, 97 N. J. L. 455, Court of Errors and Appeals. The Court said, at p. 461, about the submission of a request to charge, opinion by Chancellor Walker:

"Assuming that the formula in which the request was couched is faultless as a proposition of law, still, as it did not include all the facts which should influence the jury to decide whether there was want of probable cause or malice, but only part of them, the judge was not obliged to charge the request. See *Fernetti v. West Jersey and Seashore Railroad Co.*, 87 N. J. L. 268, 272. Besides, this request was preferred after the Judge had delivered his charge, and, as it did not concern anything he had said or omitted to say to the jury, the request was made too late to require the Court to regard it. See *Carmany v. West Jersey and Seashore Railroad Co.*, 78 Id. 552, 555."

*Klie v. Hollstein*, 98 N. J. L. 473, Court of Errors and Appeals: 30

"7. A party wishing an instruction given must formulate it and state definitely and unequivocally what he desires to be given."

(P. 475). "1. Before they are entitled to a recovery, the plaintiffs must satisfy you by a fair preponderance of the evidence that plaintiff Oetling actually had an agreement to receive a commission for securing a tenant to lease the Hollstein Building; that the said plaintiffs Oetling and

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Klie were the efficient and procuring cause of the negotiation of the lease between the Hollstein Brothers and W. T. Grant Company; that the rental terms of said lease corresponded with the authority to secure a tenant if any, charged by the plaintiffs to have been conferred upon them by the defendants."

10

"2. If you are not satisfied by a fair preponderance of the evidence that plaintiffs were the efficient and procuring cause of the negotiation of the lease between the Hollstein Brothers and W. T. Grant Company, and you are satisfied that Herman Bauridell and Julius I. Kislak were also brokers, and were the efficient and procuring cause of the negotiation of said lease, then you must find your verdict for defendants."

20

"Both of these requests were defective and were properly denied, because they made the right of the plaintiffs to recover to depend, in any event, upon proof that they 'were the efficient and procuring cause of the negotiation of the lease,' ignoring the plaintiff's theory, which was supported by evidence, that they had an exclusive right to procure a lessee. The true rule is that a real estate broker who is given an exclusive right to negotiate a lease of property is entitled to the commission on the gross rentals, as provided for in his contract, if the owner makes a lease, either independently or through the efforts of another broker, within the time specified in the contract of employment, although the exclusive agent was not the efficient and procuring cause of the negotiation of the lease. See *Ettinger v. Loux*, 96 N. J. L. 522, where, in passing, an exclusive agency is distinguished from an exclusive right to sell (or lease)."

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(P. 477). "The next point is that the trial judge erred in declining to charge the defendants' third request. We think not. It was that the trial judge direct the jury to apply a 'principle' which it was stated was to be found on certain pages of a certain reported case, without saying what the principle or language was. It was properly refused. A party wishing an instruction given must formulate it, and state definitely and unequivocally what he desires to be given." 10

*Fernetti v. W. J. & S. R. R. Co.*, 87 N. J. L. 268, Court of Errors and Appeals. The Court said, on p. 272, about request to charge, opinion by Justice Kalisch:

"The first request practically asked the Court to charge that the plaintiff's decedent was guilty of negligence contributing to her injury for her failure to look and to see the locomotive engine approaching, irrespective of the fact whether or not the crossing bell was ringing or whether or not a notice was posted at the crossing that the electric crossing bell was out of order. This request, therefore, was properly refused." 20

"The second request was as follows: 'If the plaintiff's decedent ran into side of engine she is guilty of contributory negligence.' This request has the same defects as have already been pointed out exist in the first. And it may be further added that the trial court is not obliged, though specially so requested to do, to apply a legal principle, which it clearly states to the jury, to conditions of fact postulated by the defendant's counsel, particularly where such conditions do not include all the circumstances which should influence the conclusion of the jury. *Cons. Traction Co. v. Chenowith*, 61 N. J. L. 554." 30

*Daggett v. North Jersey St. Ry. Co.*, 75 N. J. L. 630, Court of Errors and Appeals:

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"1. A request to charge that would have required the jury to acquit the defendant railway company of negligence, even though the quick effort of the motorman to stop the car were made carelessly and negligently, was properly refused."

10 "That if the motorman of the car suddenly found himself, without any negligence on his part, in a dangerous position and exercised a quick effort to stop the car, thereby causing the plaintiff's head to be thrown back, the company would not be liable."

The Court held this request was properly refused because it was too narrow.

The next request in this case was "The vehicle reaching the point of crossing first, going at the rate of speed at which they were approaching the crossing, had the right of way." The Court held that this was properly  
20 denied because:

"The true rule is that the driver of the wagon would have had the right of way if, proceeding at a rate of speed which, under the circumstances of the time and locality, was reasonable, he should reach the point of crossing in time to safely go upon the tracks in advance of the approaching street car, the latter being sufficiently distant to be checked, and, if need be, stopped, before it should reach him."

30 *Carmany v. West Jersey, &c., R. R. Co.*, 78 N. J. L. 552, Court of Errors and Appeals. The Court charged:

"The engine of the defendant company, at the time of the accident, while upon Atlantic Avenue, was upon land included in its right of way, as part of its charter from the State. The dedication of Atlantic Avenue to public use was subsequent to the grant of the right of way of the railroad company. The right of way thereupon of the

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railroad company was superior to that of this plaintiff and the public while it was in the use of that portion of the avenue. But the plaintiff and the public also had a right to use this highway, and while the right of the railroad company was superior, it was the duty of the railroad company in using its right of way upon that avenue to use it with due regard to the rights of other people lawfully upon the highway." 10

**REPLY TO THE OPINION OF THE  
SUPREME COURT.**

The Supreme Court opinion says that counsel might assume the basic rules regulating the quantity of damages would receive the attention of the Court as a part of the charge without suggestion from counsel, and in effect there was nothing left for the defendant to do but make this request. The answer to this is: There is no duty of the Court to charge any law unless specially requested by counsel. 20

The Court must not lose sight of the fact that in a case of this kind the damages were discussed in the argument to the jury from every possible angle by counsel on both sides, and it is an unheard of doctrine in New Jersey for either plaintiff or defendant to assume the Court will charge any law, as there is no legal duty in the Court to do so nor is there a right in a litigant to demand that any law be charged unless the law is specially and legally requested to be charged. 30

If the defendant had a right to make this request in the form and manner he did, then it cannot be denied that the plaintiff had the same right, and if he exercised his right, the defendant again could exercise it, and the plaintiff again in reply could exercise it. When and where under this circumstance would the exercise of such rights end? In what position would a Court be in attempting

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to analyze propositions for charging? When would the case go to the jury, and when it did go to the jury, in what state would it be, after the Court had been pulled in one direction and then another with alternate requests by the plaintiff and the defendant? This unquestionably is an unheard of doctrine in New Jersey, and not one single case can be found in this State to support the position taken by the Court in the opinion in this case.

10

There is not anything that the Court says should have been done for this defendant but would have led to confusion and turmoil, and if this opinion on this question prevails it will leave a trial at the absolute mercy of every attorney who desires to advance any point of law relevant to his case at any time before the jury leaves the room.

*Manchester B. & L. Ass'n v. Alee*, 81 N. J. L. 610:

"If a modification of such language, however slight, is required in order to entitle the party, as matter of strict right, to have his request charged, it is not error to refuse to charge such request. The reversal of a judgment for the failure of the Court to so modify a request that it would be error not to charge it, is a thing yet to be heard of."

20

The Court in its opinion, p. 120, State of the Case, lines 8 and 9, says that no exception was taken to the first reason assigned, which was the omission of the charge, which was failure to charge that future losses should be computed at their present value. The fact is exception was taken, which will be found on page 111, State of the Case, line 17. The defendant abandoned this reason on the argument of the cause, but the Court in its opinion dismissed it because no exception was taken, and says in its opinion:

30

"The rule of procedure is settled that matters of law which either party desired to have charged shall be submitted in writing to the Court before

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the charge is begun. *Carmany v. W. J. S. R. R. Co.*, 78 N. J. L. 552."

Beyond question it is the law that an omission to charge when not requested is not error. This being so, what is the difference when counsel calls the attention of the Court to an omission, and when it submits an oral or a written request after the Court has charged? In the first instance he tells the court what he did not charge and the Court is informed; in the second instance he tells the Court what he did not charge and offers either the verbal language or the written language to charge. In both instances the law has been called to the attention of the Court. To hold that there is a difference between calling the Court's attention to what law it has omitted, and requesting it to charge the law omitted, is to make a distinction without a difference. 10

In the *Carmany* case, above quoted, in the opinion of the Court, page 120, State of the Case, line 33, after the charge counsel requested the judge to charge a matter of law, and the Court, on p. 551 of the opinion, said: 20

"This refusal is certainly not a ground upon which an assignment of error can be rested. If counsel was of the opinion that the rights of the railroad in this case were so peculiar as to require a specific charge, a specific request should have been submitted in proper time, which would have been at or before the close of the evidence, and before the beginning of the argument." 30

And the Court further said, on the same page, that a judge could not be compelled to enlarge upon something he already said or to explain his meaning. The Court could do so if it chose to, but its refusal is not error.

The Court in its opinion in the case at bar, at page 121, lines 31 and 32, quotes the case of *Dunne v. Jersey City Gal. Co.*, 73 N. J. L. 586, to sustain its position.

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The fact is that in this case, on p. 589, the Court of Appeals said:

10 "These requests were handed to the trial judge after he had concluded his charge, and they were not alleged to be requests which the defendant deemed to be necessary because of something which the trial judge had said or omitted to say in his charge.

"The examination or charging of requests presented, under such circumstances, is a matter resting in the discretion of the trial judge, and a refusal to consider or charge them will not be reversed on error."

20 The Court also quotes the case of *Benz v. Central R. Co.*, 82 N. J. L. 197, as authority for the proposition that law being omitted by the judge the attorney had a right to request its charge.

The Benz case is explained and defined to the contrary in the case of *Leiferant v. Progressive Agency*, 98 N. J. L. 526, at p. 527 of the opinion, where the Court, speaking of the Benz case, said:

30 "But in *Benz v. Central Railroad of New Jersey*, 82 Id. 198; affirmed, for the reasons expressed in the Supreme Court, 83 Id. 780, it was said, it was the duty of counsel to request the judge to charge, or at least to pray an *exception to the omission so to do*. In that case the words, the omission so to do, must be construed to mean an omission to charge a specific request and not an exception to an omission to charge when no specific request is made."

*its opinion in*  
In the State of the Case, page 120, line 34, the Court discusses the flexibility of rules of Court and that the

## LAW

proper administration of justice in this case the rule should have been relaxed.

The cases quoted by the Court do not sustain this position. 7 R. C. L., pages 1023 and 1027, discusses this question from Section 50 to Section 57, and Section 52 states that unless a statute directs the procedure, that the Court has the right to state the time and place and mode of doing any act that has to be done. In the annotations cited there is not a case parallel to the case at bar. 10

The following cases quoted by the Court do not support this point of the opinion. *Vohlers v. E. H. Stafford Co.*, 171 Mich, p. 8, ~~was~~ a case where a process was returnable on the 15th day after service and by rule of Court should have been answered on that day, but the 15th day having fallen on a Sunday, answer was made the day following. The Court sustained the rule and the upper Court reversed and held that the following day was the proper day for answering. 20

In the case of *Eastman v. Amoskeag Co.*, 44 N. H., ~~was a case~~ where the rules of Court denied the right of an attorney to testify in a case where he once was counsel. The attorneys in question happened to be the witnesses to a deed. The Court called upon the defendant to admit the execution; the defendant refused and the Court then allowed the attorneys, who were witnesses to the deed to testify to its execution.

We submit that this case has received two fair and meritorious trials, and no substantial error has been made that could in any manner have affected the merit of the case on any question. 30

Under Pamphlet Laws, 1912, p. 382, section 27:

27. "Reversal or new trial on merits. No judgment shall be reversed, or new trial granted, on the ground of misdirection, or the improper admission or exclusion of evidence, or for error

## LAW

as to matter of pleading or procedure, unless, after examination of the whole case, it shall appear that the error injuriously affected the substantial rights of a party.

I quote some New Jersey cases where this section is applied: *Wicks Bros. v. Lamp Co.*, 85 N. J. L. 322; *Murphy v. Marrone*, 86 N. J. L. 663; *Connolly v. Public Service Railway Co.*, 94 N. J. L. 157; *Maagget v. A. Braver Silk Co.*, 95 N. J. L. 72, New Jersey Supreme Court; *Bussy v. Hatch*, 95 N. J. L. 56, New Jersey Supreme Court.

We respectfully submit that the Supreme Court should be reversed and that the judgment of the Court of Common Pleas be affirmed.

MARTIN P. DEVLIN,

*Attorney and Counsel of Plaintiffs-Appellant.*

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## Court of Errors and Appeals of New Jersey

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MARTHA LAMBERT, by her  
next friend Louis Lambert, and  
LOUIS LAMBERT, individual-  
ly,

*Plaintiffs-Appellants,*

vs.

TRENTON AND MERCER  
COUNTY TRACTION COR-  
PORATION,

*Defendant-Respondent.*

ON APPEAL

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### BRIEF FOR RESPONDENT

This is an appeal from a judgment of the Supreme Court reversing a judgment of \$22,500.00 recovered by the appellant Martha Lambert and a judgment of \$2,500.00 recovered by the appellant Louis Lambert in the Mercer County Court of Common Pleas.

Martha Lambert, a child four years of age, was struck by a trolley car on the night of March 18, 1922, at about 8:00 o'clock, when she was running across North Clinton Avenue, in the City of Trenton, with her six-year old brother. It was Saturday night and the children had been sent on an errand (p. 19). The injury consisted of the loss of the child's left arm at the shoulder.

All of the witnesses who were in a position to know the distance which the trolley car traveled after the brakes were applied said that the car stopped within ten feet. The right front wheel of

the car came to rest on the child's arm. North Clinton Avenue at the point of the accident is thirty-four feet wide and there are two trolley tracks in the street. The children were running across the street from east to west and the car was traveling south. It was dark at the time.

The plaintiff's physician said that he found nothing wrong with the child aside from the loss of the arm at the shoulder.

Considerable space in his brief is devoted by appellants' counsel to stating parts of the testimony. He has however omitted many items of testimony which support the claim made by the respondent at the trial that its motorman was free from blame. We think the record shows that we clearly proved at the trial that the motorman was not guilty of the slightest negligence, but we can see no good reason for setting forth at length the statements of witnesses when the only question involved in this appeal is whether the trial judge should have charged the request of respondent's counsel, made at the close of the charge, that if the plaintiffs were entitled to recover, all future losses should be paid for at their present value and not their future value.

We find it necessary, however, to notice certain statements in appellants' brief, under the heading "Facts," which deal with the alleged conduct of counsel who tried the case for the respondent.

On page eight of appellants' brief it is suggested that as on the first trial of this case the judge neglected to instruct the jury to compensate for future losses at their present value, if at all, counsel should have remembered this, though the trials were more than a year and a half apart, and at the second trial should have presented a written request upon the

subject. The respondent's requests were prepared during the trial and without reference to the record in the former case. Comparison of the requests submitted at both trials will show that they do not resemble each other. If counsel had recalled, when preparing the requests which were submitted at the second trial, that at the first trial the court had not instructed the jury concerning the difference between the consideration to be given future losses and that to be given to past and present damages, an appropriate request would have been prepared. We think it is asking too much to require counsel to carry in their minds matters of this kind.

On page 9 of the appellants' brief still under the caption "Facts," we are credited with telling the jury "that there should be about \$4,000.00 for the child." This would indicate an admission of liability. Liability was denied. It is true that we told the jury that if they found the defendant negligent it would be unfair and ridiculous to award the damages plaintiffs' counsel would undoubtedly ask. A sum, perhaps \$4,000.00, was referred to and the amount it would earn at compound interest at the time the child reached the age of twenty-one years was mentioned. The jury was also told by counsel for the defendant that many years must pass before the child could go to work and even then she would not be entitled to her earnings until she reached the age of twenty-one years, unless sooner emancipated, and that as damages for future losses would be paid long before the losses could arise all these matters should be taken into consideration. But plaintiffs' counsel loudly denied the existence of such rules and not once but many times demanded between \$20,000.00 and \$25,000.00 for the "terrible

injury this trolley company has done to this little girl," and a large amount for the father. The jury gave the child \$22,500.00 and the father \$2,500.00.

The arguments of counsel should have lead the court to charge the proper rule and made it very important from the defendant's standpoint that it be charged. We fully expected it would be charged and the trial court in this case is the only court which in our experience has not charged the full rule in a case of this kind. The court would probably have charged the jury as requested had plaintiffs' counsel not objected.

### GROUNDS OF APPEAL

As we understand the practice, upon an appeal to this Court from a judgment of the Supreme Court affirming or reversing the judgment of a lower court, but one ground of appeal is available, namely, that the Supreme Court erred in affirming or reversing the judgment of the lower court, as the case may be. *Diamond, etc., Co. v. Leonard, etc., Co.*, 95 N. J. L. 540. The appellants' third ground of appeal is the only one that need be considered. It includes the first and second grounds in so far as they may be discussed in this Court.

Briefly, the appellants' first contention is that the Supreme Court should not have reversed the judgment of the Court of Common Pleas because the ground of appeal upon which the reversal was based did not quote exactly the language of the oral request to charge made at the trial. Great stress is laid upon the fact that in the ground of appeal the trial judge is said to have refused to charge that "in any verdicts given for the plaintiffs the future losses should be *represented* at their present value,"

whereas, the request made was "That for all future losses in any verdicts that are given for the plaintiffs, the verdict should *include* the present value of the future losses \* \* \*."

Appellants' counsel states, on page 12 of his brief, that the language and meaning of the ground of appeal and the request as made are entirely different, but he does not point out the difference. We take this to be an admission that he could not find any difference in meaning.

The ground of appeal correctly states the substance of the request to charge and, in the absence of a rule requiring more, was sufficient. No such rule is referred to by the appellants.

In the Supreme Court we offered to amend the ground of appeal if the Court thought that necessary. Upon a demurrer to an assignment of error, the Supreme Court held, in *Freeborn v. Denman*, 7 N. J. L. 190, that the assignment could be amended.

No harm was done to appellants by the form of this ground of appeal. They did not rest upon their motion but argued the case fully upon the merits. We might well invoke, at this juncture, Section 27 of the Practice Act of 1912, which is quoted on pages 41 and 42 of appellants' brief. This section provides that, "No judgment shall be reversed \* \* \* for error as to matter of pleading or procedure, unless \* \* \* it shall appear that the error injuriously affected the substantial rights of a party." We conceive that this salutary provision applies to the judgment of the Supreme Court now under review.

Counsel's statement on page 12 of his brief that, "When the court delivered its opinion it did not decide on the reason as assigned, but decided it on the reason excepted to but never assigned or served

on the plaintiffs," is merely his way of saying that the ground of appeal he criticizes is the one upon which the judgment was reversed.

The present respondent, when appellant in the Supreme Court, assigned two errors as grounds for reversal, namely: (1) That the trial court erred in omitting to charge that future losses should be discounted to their present value, and (2) that the court erred in refusing, when requested so to do by respondents' counsel at the conclusion of the charge, to charge further that in any verdicts given for the plaintiffs future losses should be represented at their present value and not their future value.

The first ground was not argued in the Supreme Court and will not be discussed in this brief because it is conceded that a mere omission to charge is not in itself assignable for error.

#### **APPELLANTS' CONTENTIONS**

We gather from the appellants' brief that they contend that the respondent was not entitled to have its oral request charged for the following reasons:

(a) The request was not submitted in writing before the arguments of counsel were made.

(b) The request was bad in substance because it did not correctly state a rule of law applicable to the facts of the case.

(c) The request was bad because it did not include the rules relating to past damages.

They also contend that no substantial right of the respondent was affected by the trial court's action.

We shall reply to these points in the order indicated.

**THE RESPONDENT'S REQUEST WAS PROPER  
BOTH AS TO FORM AND TIME OF MAKING,  
IN VIEW OF THE COURT'S CHARGE**

Speaking of damages the Court said in its charge:

"There are, as I say, two claims or causes of action now before you. One is the claim of the child, Martha Lambert, for the injuries she has sustained, and if you find she is entitled to recover at all, then it will be for you to determine what amount in your judgment in dollars and cents, would compensate her for the injuries sustained, the pain and suffering that she has endured or may still endure, if you find she is still suffering pain, and for any loss of earning power and inconvenience which she will suffer as a direct result of these injuries. The father, if entitled to recover at all, would be entitled to such amount as would compensate him for moneys that he may have expended or may hereafter be called upon to expend for this child for treatments. As I recall, the only item mentioned in dollars and cents was the bill of Dr. Seibert which was two hundred dollars. I think that was the only item specifically mentioned as expense which the father had sustained or would be called upon to pay. Then there would be the question of the loss of services of this child up to the time of her attaining the age of twenty-one years, because it is a rule of law in this state, that the father is entitled to the earnings of his children until they attain their majority, but it rests upon the father to maintain, support and educate the children." (p. 109, l. 20, et seq.).

It will be noted that nowhere in the charge was the jury instructed that if they found for the plain-

tiffs, the losses which would arise in the future should be compensated for at their present value or discounted value, because the compensation would be paid immediately.

The amount awarded the plaintiff Martha Lambert, \$22,500.00, would indicate that the jury entirely disregarded the child's age and the length of time which must elapse before she could earn money for herself or come into possession of her property. Placed at interest the amount awarded would double itself before this plaintiff arrives at the age of twenty-one years.

Perceiving this omission in the Court's charge, at the conclusion of the charge counsel for the defendant requested the Court to charge as follows:

"That for all future losses in any verdicts that are given for the plaintiffs, the verdict should include the present value of future losses and not the future value." (p. 111).

The Court declined to charge this rule, saying:

"This request not having been submitted to the Court in writing and not having been submitted before the Court delivered its charge, I decline to charge as requested." (p. 111, l. 11, et seq.).

Thereupon counsel said:

"I take an exception to the Court's refusal to charge the jury further as requested, and to the Court's failure to charge the jury in the first instance that future losses should be computed at their present value." (p. 111).

The Supreme Court held that the trial court should have charged as requested, and reversed the judgment because of the refusal to do so.

Many pages of appellants' brief are taken up with the citation of and quotation from cases which give

the rule that written requests must be submitted before counsel begin their arguments to the jury. This, of course, is the general rule. But there is an exception to the rule where impromptu requests are made necessary by some unusual statement in or omission from the court's charge. This exception is recognized in decisions of this Court and the Supreme Court.

In the case of *Hetfield v. Dow*, 27 N. J. L. 440, 447, the Supreme Court said:

"There is a further answer to each of the exceptions taken to the charge of the court, admitting that in each particular the charge desired by the defendant would have been relevant and proper. The matters complained of are mere omissions, and the judge was not requested, upon the trial, to charge as it is now insisted he ought to have done. The rule is well settled that such omission constitutes no ground of error. If either party deems any point presented by the evidence to be omitted in the charge, it is competent for such party to require an opinion from the court upon that point. If he does not, it is a waiver of it. *Pennock v. Sellers*, 2 Pet. 15."

In the case of *Newark Passenger Railway Co. v. Block*, 55 N. J. L. 605, the Supreme Court said in speaking of the insufficiency of an exception taken at a trial:

"If counsel conceived that a pertinent proposition of law had been omitted, he should have specifically requested the desired instruction and excepted to a refusal."

The case most frequently cited upon this point is the case of *Dunne v. Jersey City Galvanizing Co.*, 73 N. J. L. 586, in which this Court said:

“To entitle a party presenting requests to charge, after the court has concluded its charge, to have such requests considered and charged or refused, it should appear that the requests presented have been made necessary by something the court has already charged or omitted to charge.”

In *Benz v. Central Railroad of New Jersey*, 82 N. J. L. 197, the Supreme Court was asked to reverse the judgment because the trial judge did not tell the jury that they should take into consideration the expectancy of life of the widow and children who were the beneficiaries in the suit which was brought for the death of the husband and father. The Court said:

“Counsel’s failure to prefer a request covering this point may be explained by his supposing that it would be covered by the charge. When, however, counsel, having heard the charge, knew that the point was not covered, it was his duty, if he desired to have the point covered or to avail himself of its omission, to request the judge to charge it, or at least to pray an exception to the omission so to do.”

The Supreme Court again referred to the matter in *State v. Littman*, 86 N. J. L. 453, affirmed in 88 N. J. L. 392, saying:

“Lastly, the defendant claims that the judgment should be reversed because of the refusal of the trial judge to charge twenty-eight requests. We think not. Timely notice was given counsel that requests to charge must be submitted before the argument began. They were not presented until near the close of the argument of counsel for the defendants which occupied two different days. Whether, in such circumstances, the requests

were to be charged was a matter resting within the discretion of the trial judge. The rule is that to entitle a party to insist that a proper instruction requested by him should be given, a timely presentation of such request should be made to the court at or before the close of the evidence, and before the beginning of the argument, *unless the request presented has been made necessary by something the court has already charged or omitted to charge.*"

And, again in the case of *Lange v. N. Y., etc., R. Co.*, 89 N. J. L. 604, the Court of Errors and Appeals said:

"But if counsel conceived that a pertinent proposition of law had been omitted they should have requested the desired instruction, and that they did not do. They submitted no requests."

In *Dalton v. Godfrey*, 97 N. J. L. 455, 117 Atl. 635, the present Chancellor, speaking for this court, said of a request to charge submitted after the main charge was delivered:

"Besides, this request was preferred after the judge delivered his charge, and as it did not concern anything he had said or omitted to say to the jury, the request was made too late to require the court to regard it."

Appellants' counsel on pages 25 and 26 of his brief states that because of something said in the case of *Leiferant v. Progressive Agency*, 98 N. J. L. 526, the cases cited above do not give the right which the respondent claims it had to have the court charge as requested at the conclusion of the main charge. The following is the language to which counsel refers:

“But in *Benz v. Central Railroad of New Jersey*, 82 N. J. L. 198; affirmed, for the reasons expressed in the Supreme Court, 83 Id. 780, it was said, it was the duty of counsel to request the judge to charge, or at least to pray an exception to the omission so to do. In that case the words, ‘the omission so to do,’ must be construed to mean an omission to charge a specific request and not an exception to an omission to charge when no specific request is made.”

This, of course, is correct, but the construction which appellants’ counsel seeks to place upon it is incorrect. All that the court said was that the only omission to charge to which an exception can be taken is an omission to charge a request to charge. The court did not say or intimate that counsel, at the close of a charge from which a fundamental rule which he might well suppose would be charged has been omitted, cannot request that such rule be charged unless he had previously submitted a written request upon the subject. But that is the effect of counsel’s argument, for he seeks to place upon the word omission, as used in the many cases cited above as entitling counsel to request a further charge, the same construction as in the *Leiferant* case was placed upon omissions to which exceptions may be taken.

Many other authorities support the ruling of the Supreme Court in the case now under review.

The rule as stated in 38 *Cyc.* p. 1701, is that,

“While, as stated in a previous section, it is, in general, proper to refuse requests for instructions not presented in proper time, there are nevertheless some exceptions to the rule. Peculiar circumstances may exist which would render the enforcement of the

rule unjust to one of the parties and when this is so the court should disregard it and grant instructions requested, if correct, though asked too late under the rule. Thus the rule requiring requests for instructions to be presented before argument does not apply where the occasion for the instruction arises after the argument has commenced, as where the course of the argument makes an instruction necessary, nor is the rule operative when the cause is submitted without argument. So it has been held that a party may well assume that, without special request therefor, the judge will properly instruct the jury on the leading points of the case, and if at the close of the charge it appears that the judge has omitted to refer to important matters that should be explained or has instructed erroneously as to them, it is the duty of the court to entertain and grant proper requests for further instructions."

See *Thompson on Trials*, Vol. 2, p. 1627, citing 34 Hun 497; *Carey v. Chicago, etc, R. Co.*, 61 Wis. 71; *Billings v. McCoy* 5 Neb. 187.

In *Chapman v. McCormick* 86 N. Y. 479, the Court of Appeals of New York reversed a judgment because the trial court would not give counsel an opportunity to submit a request after the close of the main charge. The record in the case did not disclose what counsel was about to ask as he was not given an opportunity to speak.

In *Brick v. Bosworth*, 162 Mass. 334, the Supreme Court of Massachusetts said:

"It is contended that the request came too late, and that the plaintiff cannot now avail herself of it. It is true that, in order to be entitled as a matter of right to have instructions given upon a hypothetical state of facts

which might be found from the evidence, a party must seasonably present a request in writing to the judge, and the ordinary rule of practice which has been approved by this court is that such requests must be made before the arguments. But a party may well assume that, without special requests therefor, the judge will properly instruct the jury on the leading points of the case, and if at the close of the charge he observes that the judge has omitted to refer to important matters which ought to be explained to the jury, or thinks that he has instructed erroneously in regard to them, he may bring the omissions or errors to the attention of the court, and ask for proper instructions. This practice saves the judge from the necessity of dealing with elaborate, complicated prayers for rulings without an opportunity for reflection, and at the same time saves the parties their right to exceptions if the judge neglects or refuses to instruct upon the important questions in the case."

See also *Bradstreet v. Rich*, 74 Me. 303.

In *Commonwealth v. Hassan*, 235 Mass. 32, the Court said:

"The assumption may be indulged that the salient points of the case will be adequately covered by the charge; but if at its close substantial omissions or errors are observed, the attention of the judge may be drawn to them, and upon refusal or neglect to give correct and adequate instructions upon important factors in the case, the right to exceptions thus adequately protects the rights of parties."

In *Leydecker v. Brintall*, 158 Mass. 292, 33 N. E. 399, the Supreme Court of Massachusetts held that the proper time to present requests for instruc-

tions is before the general charge, and not after, unless it is necessary to call attention to an omission or error in the same.

In *Grippen v. Hope*, 38 Mich. 344, the Court said:

“Counsel should submit their requests to charge in time to allow them to be examined by the judge; but, if the charge as made omits anything essential, the judge should allow proper requests to be submitted at any time before the jury retires.”

In *Houston v. Dela. L. & W. R. R. Co.*, 274 Fed. 599, the Circuit Court of Appeals for the Third Circuit said:

“There is no written rule in the District of New Jersey as to when requests should be presented, but the custom is to present them before counsel begin to sum up to the jury. There are many reasons why they should be given to the trial judge then and not later, unless they are made necessary by the charge itself.”

In *Warner Sugar Refining Co. v. Metropolitan Wholesale Grocery Co.*, 125 Atl. 276, the Supreme Court of Rhode Island said:

“The objection which the defendant has suggested, that the justice failed to charge the jury with sufficient fullness upon the bearing which certain principles, involved in the statute of frauds, would have upon the jury’s consideration of the case, cannot be considered. If not satisfied with the charge in that respect, the defendant should have requested more specific instructions.”

The case of *Hammer v. Bloomingdale Bros.*, 213 N. Y. S. 743, 215 App. Div. 308 (1926), held that counsel deeming an instruction insufficient should

request such charge as he thinks more adequately presents the questions involved.

*Abbott's Civil Jury Trials* (4th Ed. 1922), at page 702, gives the rule in the following language:

"The courts generally have power, either by statute, rule of court, or under the practice settled by adjudicated cases, to require that instructions asked for be presented before argument is made to the jury, or before the general charge to the jury, and not later; and, in some states, there are statutes requiring them to be numbered and signed by the parties asking them, or their counsel.

"But, notwithstanding such a limit of time, counsel acting in good faith has a right, after the judge has instructed the jury and before they have retired, to request him to correct an error or supply a deficiency."

*Randall's Instructions To Juries* (1922) Vol. 1, p. 855, gives the rule as follows:

"In the majority of jurisdictions, however, requests for instructions should be presented before the general charge of the court. To entitle a party to have considered requests for instructions presented after the conclusion of the main charge of the court, it should appear that such requests were made necessary by something the court has already charged or omitted to charge." Citing *Leydecker v. Brintall*, 158 Mass. 292, 33 N. E. 399; *Dunne v. Jersey City Galvanizing Co.*, 73 N. J. L. 586, 64 Atl. 1076.

And at page 859 of the same book it is said:

"Such a regulation (one requiring requests to charge to be submitted before argument of counsel to the jury) is not applicable to a request for instructions the occasion for which arises after the expiration of the time prescribed, and where the court omits from its

charge matters which are of such a nature that a party may justly assume that they will be treated in the charge, he may present requests thereafter to supply such omissions, notwithstanding a rule requiring such presentation before the arguments of counsel or before the main charge."

The law of New York is stated in Vol. 2 of *Rumsey's Practice* at page 366, as follows:

"But all requests to charge cannot be presented before the charge is made; the court may omit to charge upon an essential matter as to which counsel have the right to assume instructions will be given." Citing *Malone v. Third Av. R. R. Co.*, 12 App. Div. 508. In this case the judgment was reversed because a request presented at the close of the charge, covering a matter omitted by the trial court, was not charged.

In *Chitty's General Practice*, Vol. 3, p. 911, the duty of counsel with respect to the charge of the court is given in the following language:

"The learned judge then proceeds to sum up (as it is termed) to the jury, which the leading counsel in particular is attentively to observe, as it may be necessary, whilst the judge proceeds, or at least at the conclusion of his summing up, to call his attention to any material omission or misstatement of facts or law that might mislead the jury and prejudice the client, and so afford the judge an opportunity of correcting his remarks before the jury have been directed to consider their verdict."

The appellants have cited no case which sustains their contention that, under the circumstances, respondent's request was offered too late or in an improper form.

In all the cases, such as *State v. Littman*, 86 N. J. L. 453, cited by appellants, where it is said the court may refuse, in its discretion, to charge requests handed up after the proper time, the requests were not made necessary by something the court had unexpectedly said or omitted, but were written requests which should have been submitted at the usual time and no good reason for the delay appears. This is a situation very different from that disclosed by the present case.

The Supreme Court could have rested its decision upon a narrower ground. The trial court had charged the jury that, if they found for the plaintiff, damages could be awarded for future losses, but the other part of the same rule, namely, that the future losses should be calculated at their present value, was not given. Surely it could justly be said that where a part of a rule favorable to the plaintiff is charged and that part which protects the defendant's rights is omitted, the defendant has a right to ask that the latter be charged.

If this case is reversed, to protect the rights of his client, counsel for each side must in every case write out a complete charge for the court. The judge would then be obliged to compare the suggested charges and decide how much, if any, of each charge he will give to the jury. The present practice of handing up requests on only the unusual features of a case and relying upon the court to charge the general rules without request, saving to a party the right to ask at the end of the charge that the court charge the whole or any part of a familiar rule which is omitted, is, we believe, a practice which conserves the time of the court and fully protects the rights of litigants.

**RESPONDENT'S REQUEST CORRECTLY  
STATED A RULE OF LAW APPLI-  
CABLE TO THE CASE**

Appellants contend that the court could not have been required to charge the respondent's request if the same had been submitted in writing before the argument commenced, because, as is said, the language of the request is meaningless and does not correctly state an applicable rule of law.

As stated above the court had charged the jury that, if they found the defendant liable, they should in their verdicts include losses which would arise in the future. He did not tell the jury that the verdicts should not include the aggregate of the future losses, but such aggregate discounted to its present value because of present payment. Not a word was said on that subject.

The court was asked to say to the jury,

"That for all future losses in any verdicts that are given for the plaintiffs, the verdict should include the present value of future losses and not the future value." (p. 111).

There should, of course, be a comma after the words "That for all future losses," and the word "verdict" should be "verdicts." At the trial counsel said, "verdicts should" and the reporter wrote "verdict should." The fact that one word ends with "s" and the other begins with the same letter easily accounts for this.

The Supreme Court said:

"While this request was more or less legally involved, it, however, comprehended substantially a correct statement of the legal rule applicable to the present value of a verdict for damages accruing in the future, and to

which subject in its charge the court had made no reference."

The language used by counsel at the trial resembles very closely that of the United States Supreme Court in the case of *Louisville & Nashville R. Co. v. Holloway*, 38 S. Ct. 379, 246 U. S. 525, 62 L. Ed. 867, where it was said:

"The company had, of course, the right to require that this general instruction be supplemented by one calling attention to the fact that, in estimating what amount would compensate the widow, *future benefits must be considered at their present value*. But it did not ask for any such instruction."

We think it is obvious that respondent's oral request correctly and succinctly stated a rule of law applicable to the case.

#### **NOTHING ESSENTIAL WAS OMITTED FROM RESPONDENT'S REQUEST TO CHARGE**

To support his contention that respondent's request to charge should have been refused as incomplete, appellants' counsel cites cases which hold that a judge is justified in refusing a request based upon a hypothetical state of facts which the jury may find but omitting some facts which appear in the evidence. Thus in *Fox v. Great Atlantic & Pacific Tea Co.*, 84 N. J. L. 726, this court said:

"The subject-matter of the requests which the Court refused to charge other than had been charged embraced facts postulated by the appellant's counsel which did not include all the circumstances which should influence the conclusion of the jury."

The purpose of a request determines what must be included in it. For instance, in a case in which

the issues of negligence and contributory negligence are raised by the pleadings and proofs, the court cannot be required to charge the jury that if they find from the evidence that the defendant was negligent they should give a verdict for the plaintiff. This would omit the element of contributory negligence.

But we conceive that when a request is directed to a particular point in a case it need include nothing which is not a part of that point. In the present case the request was directed to future losses and nothing else. Separating future losses from past damages was necessary because while past damages must be paid in the aggregate, those of the future should be discounted to their present value.

Counsel was careful not to preclude, by the language used, recovery for past damages. He did not say that the verdicts should be for the present value of future losses, but that they should *include* the present and not the future value of such losses.

As the respondent's request briefly but fully stated a rule of law applicable to the case it could not legally have been refused as incomplete. It was not refused on that ground. The trial court declined to charge it because it was not submitted in writing before the argument to the jury was begun.

#### **RESPONDENT'S RIGHTS WERE SUBSTANTIALLY AFFECTED**

Appellants contend, lastly, that, assuming the trial court erred in denying respondent's request, no harm resulted. No reason for this position is given by appellants' counsel.

In a case dealing with permanent injury to a child four years of age when hurt and eight years of age

at the time of the trial, it is particularly important that the jury be instructed that future losses be paid for at their present value instead of at their future aggregate value. Under our laws the child must remain in school for eight years, and for thirteen years she could earn no money to which she would be entitled, unless emancipated. The failure of the Court to charge the rule in question was undoubtedly responsible in part for the unusually large verdicts given in this case, the child's verdict, \$22,500.00 for the loss of an arm, being much larger than any verdict for a similar injury that we have ever heard of.

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

Respectfully submitted,

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GEORGE GILDEA,

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with Respondent.*



