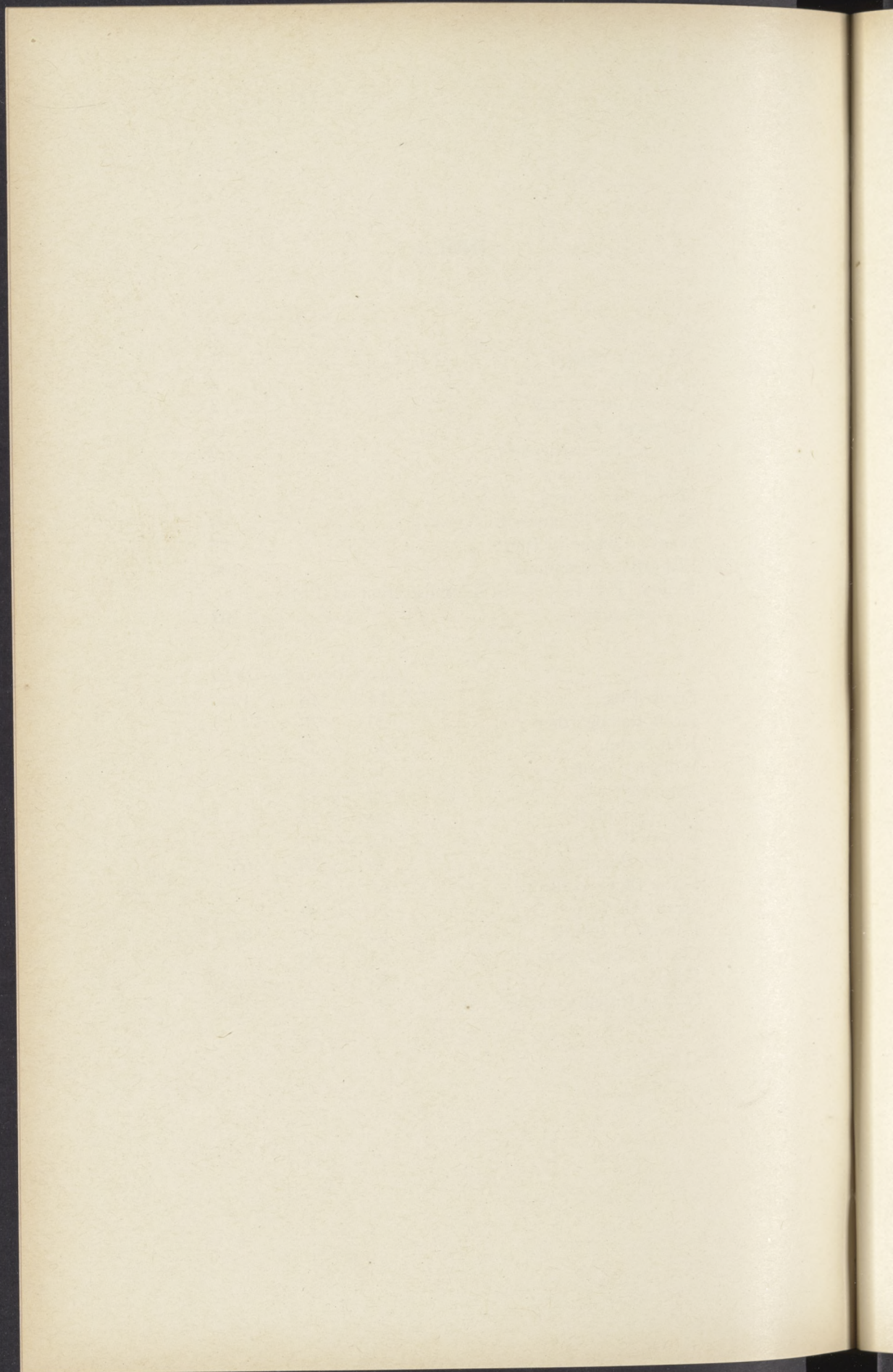


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Notice of Appeal

New Jersey Supreme Court

MIDDLESEX COUNTY.

(Served September 19, 1929) 10

(Filed September 21, 1929)

ISIDORA BENNING, Administratrix ad prosequendum of the Estate of Richard Benning, deceased, Plaintiff,	} Action at Law. Notice of Appeal.	20
vs. CHARLES H. HERBERT and DANIEL HERBERT, Defendants.		

To Charles Stockdell Gray, Attorney of Defendants, or
to whom it may concern:

TAKE NOTICE, that the plaintiff in the above entitled
cause, appeals to the Court of Errors and Appeals in the
last resort in all causes in New Jersey, from the whole of
the judgment entered in this cause. 30

THEODORE STRONG & SON,
Attorneys of Plaintiff.

Stipulation

NEW JERSEY COURT OF ERRORS
AND APPEALS.

(Filed October 22, 1929)

10

ISIDORA BENNING, Administratrix ad prosequendum of the Estate of Richard Benning, deceased, Plaintiff-Appellant, vs. CHARLES H. HERBERT and DANIEL HERBERT, Defendants-Respondents.	}	Action at Law on Appeal, etc. Stipulation.
--	---	--

20

It is, on this 18th day of October, 1929, stipulated by and between the Attorneys of record of the plaintiff-appellant, and defendants-respondents, that the plaintiff-appellant, have fifteen days additional time in which to file her grounds of appeal.

THEODORE STRONG & SON,
Attorneys of Plaintiff-Appellant.

30

CHAS. STOCKDELL GRAY,
Attorney of Defendants-Respondents.

40

Grounds of Appeal

NEW JERSEY COURT OF ERRORS AND APPEALS.

(Served October 31, 1929)

(Filed November 2, 1929)

ISIDORA BENNING, Administratrix ad prosequendum of the Estate of Richard Benning, deceased, Plaintiff-Appellant, vs. CHARLES H. HERBERT and DANIEL HERBERT, Defendants-Respondents.	}	Action at law on Appeal from New Jersey Supreme Court. Grounds of Appeal.	10
--	---	--	----

The plaintiff, appellant, states the following grounds
of appeal:

20

1. The Court charged the jury, "so here in this case if you found that Blue was guilty of contributory negligence in such a way that without it this accident would not have happened, then, if the dead man, Benning, asked for the ride, and he was driving Benning for his benefit or pleasure, and was so driving at the request of Benning that contributory negligence would be attributable to Benning."

2. The Court charged the jury, "Was this young man there that night in that car at the time of the accident as the guest, as the invitee of Blue? I am leaving that question as to whether or not he was there as an invitee or whether he was there simply as the licensee in the respect that he had asked for the ride and was there at his own request and solicitation and not as an invitee at the time of the accident [to you]."

30

THEODORE STRONG & SON,
Attorneys of Plaintiff-Appellant.

40

Judgment Record

NEW JERSEY SUPREME COURT

10	ISIDORA BENNING, Administratrix ad prosequendum of the Estate of Richard Benning, deceased, <p style="text-align: right;">Plaintiff,</p>	}	Judgment Record.
	vs.		
	CHARLES H. HERBERT and DANIEL HERBERT, <p style="text-align: right;">Defendants.</p>	}	Action at Law On Postea.

20 Charles H. Herbert and Daniel Herbert, the defendants in this cause were summoned to answer unto Isidora Benning, Administratrix ad prosequendum of the estate of Richard Benning, deceased, the plaintiff therein, in an action at law upon the following complaint:
 Summons issued November 23, 1927.

Plaintiff, Isidora Benning, Administratrix ad prosequendum of the Estate of Richard Benning, late of the City of New Brunswick, in the County of Middlesex, in the State of New Jersey, deceased, who resides in the said City of New Brunswick, says:

FIRST COUNT.

30 1. That letters of administration ad prosequendum of Richard Benning, deceased, were issued to her by the Surrogate of the County of Middlesex on the Tenth day of November, 1927, which she now brings into Court here.

40 2. On the Lincoln Highway between the City of New Brunswick and the Borough of Metuchen, and in the Township of Raritan, in said County and State, on or about the Tenth day of September, nineteen hundred and twenty-seven, the said Richard Benning was in an automobile then and there being driven and operated by one Frank Blue, in the direction of said Borough of Metuchen.

Judgment Record

3. At the time and place aforesaid an automobile truck, the property of the said Charles H. Herbert, in the custody, charge and control of the said Daniel Herbert, then and there being the servant, agent and employe of the said Charles H. Herbert, was standing on the same side of said highway upon which the said automobile was being driven and operated as aforesaid, at an angle with the traveled concrete roadway laid thereon, and partly on said concrete roadway, and without any sufficient, visible or other warning of its presence there, although it was then and there dark, and where it had been placed by the said Daniel Herbert as such agent, servant and employe of the said Charles H. Herbert. 10

4. In consequence of the negligence of the said defendants Charles H. Herbert and Daniel Herbert in thus placing said automobile truck upon said highway and in permitting it to remain there without sufficient, visible or other warning of its presence there to others traveling in motor vehicles upon said highway, said automobile then and there collided with said automobile truck. 20

5. By said collision said Richard Benning was then and there killed.

6. The said Richard Benning left him surviving his mother Isidora Benning, who as such administratrix, brings this action, his father Adam Benning, his sisters Wilhemina Benning and Alida Benning, and a brother Leonard Benning, who have suffered pecuniary injury because of his death. 30

7. Plaintiff's action against the said defendants was commenced within two years from the date of the death of the said Richard Benning.

Plaintiff demands \$50,000.00 damages against the defendants. 40

Judgment Record

SECOND COUNT.

1. Plaintiff repeats paragraph 1 and 2 of the First Count.

10 2. At the time and place aforesaid an automobile truck was then and there in the custody, charge and control of the said Daniel Herbert and was standing on the same side of said highway upon which the said automobile was being driven and operated as aforesaid, at an angle with the traveled concrete roadway, and partly on said concrete roadway and without any sufficient visible or other warning of its presence there, although it was then and there dark, and where it had been placed by the said Daniel Herbert.

20 3. In consequence of the negligence of the said defendant Daniel Herbert in thus placing said automobile truck upon the said highway and in permitting it to remain there without sufficient, visible or other warning of its presence there to others traveling in motor vehicles upon said highway, said automobile then and there collided with said automobile truck.

4. Plaintiff repeats paragraphs 5, 6 and 7 of the First Count.

30 Plaintiff demands \$50,000.00 damages against the defendant Daniel Herbert.

THEODORE STRONG & SON,
Attorneys for Plaintiff.

The defendants answered as follows:

40 The defendants residing in the City of New Brunswick, County of Middlesex and State of New Jersey, in answer to the Complaint filed in the above entitled action say that:

Judgment Record

FIRST COUNT.

1. The defendants deny each and every allegation contained in paragraphs No. 3 and No. 4 of the first count.

2. The defendants have not sufficient knowledge or information to form an opinion as to the allegations contained in paragraphs No. 5 and No. 6 of the first count and leave the plaintiff to her proof, but aver if the same were true it was not the fault of the defendants. 10

DEFENSES.

1. The defendants were free from any and all negligence.

2. The alleged accident was caused by the sole negligence of an independent agency over whom the defendants had no control. 20

3. The plaintiff intestate was engaged in a joint and common enterprise with the driver of the car in which he was riding at the time of the alleged accident, thereby any negligence on the part of the driver of said car in which the plaintiff intestate was riding at the time of the alleged accident is imputed to the said plaintiff intestate.

SECOND COUNT. 30

1. The defendants deny each and every allegation contained in paragraphs No. 2 and No. 3 of the second count.

2. The defendants repeat and re-allege their answers to paragraphs No. 5, No. 6 and No. 7 of the first count and make them part of this count as though fully set forth herein.

DEFENSES.

1. The defendants repeat and re-allege the defenses to 40

Judgment Record

the first count and make them part of this count as though fully set forth herein.

CHARLES STOCKDELL GRAY,
Attorney for Defendants.

10

The plaintiff replied as follows:

Plaintiff denies each and every allegation in the answer.

THEODORE STRONG & SON.
Attorneys for Plaintiff.

20 This action was tried before Judge Peter F. Daly with a jury at the Middlesex Circuit on September 26, 1928.

The jury rendered a general verdict of no cause of action against the plaintiff in favor of the defendants.

Whereupon it is adjudged that the complaint of the plaintiff be dismissed without costs.

Judgment signed and entered October 8, 1928,

30

WILLIAM S. GUMMERE,
C. J.

40

Demand for Particulars

NEW JERSEY SUPREME COURT,
MIDDLESEX COUNTY.

ISIDORA BENNING, Administratrix ad prosequendum of the Estate of Richard Benning, deceased, <div style="text-align: right; margin-right: 20px;">Plaintiff,</div>	}	10
vs.		
CHARLES H. HERBERT and DANIEL HERBERT, <div style="text-align: right; margin-right: 20px;">Defendants.</div>	}	Action at Law. Demand for Particulars.

To:

Theodore Strong & Son,	20
National Bank of N. J. Bldg.,	
New Brunswick, New Jersey.	

Sirs:

YOU WILL PLEASE TAKE NOTICE that the de-
 fendants, Charles H. Herbert and Daniel Herbert, require
 answers from the plaintiff to the following particulars
 within ten days after date of service thereof upon you. 30

1. Enumerate the injuries that plaintiff intestate sus-
 tained as a result of the accident referred to in complaint
 filed in this cause.

2. Give the date of decease of the said Richard Benning.

3. Give his age at the time of his death.

4. Name the next of kin and their relationship to said
 deceased.

40

Demand for Particulars

5. Give the ages of said next of kin.
6. State whether deceased was employed at the time of his death.
- 10 7. If so, give name and address of employer.
8. What was the nature of his duties?
9. What were his earnings per week?
10. Were all of said next of kin residing in the same household at the time of deceased's death?
11. What sum or sums, if any, did said deceased contribute to the support and maintenance of said next of kin?
- 20 12. Mention what pecuniary loss said next of kin suffered as a result of the death of said Richard Benning.

CHAS. STOCKDELL GRAY,
Attorney for Defendants.

30

40

Bill of Particulars

NEW JERSEY SUPREME COURT,

MIDDLESEX COUNTY.

ISIDORA BENNING, Administratrix ad prosequendum of the Estate of Richard Benning, deceased, <div style="text-align: right; margin-right: 20px;">Plaintiff,</div>	}	10
vs.		
CHARLES H. HERBERT and DANIEL HERBERT, <div style="text-align: right; margin-right: 20px;">Defendants.</div>	}	Action at Law. Bill of Particulars.

Please take notice that the following is a bill of particulars of the claim of the plaintiff set forth in the complaint, in response to the demand of the defendants, through their attorney Charles Stockdell Gray, Esq. 20

1. Plaintiff's intestate's jugular vein was severed, and he then and there died.

2. Richard Benning died November 10, 1927.

3. The age of the said Richard Benning at the time of his death was nineteen years and nine months. 30

4. Isidora Benning, mother; Adam Benning, father; Wilhelmine Benning and Alida Benning, sisters, and Leonard Benning, brother, were the next of kin of said Richard Benning.

5. The ages of the next of kin aforesaid are: Isidora Benning, 43 years; Adam Benning, 53 years; Wilhelmina Benning, 21 years; Alida Benning, 16 years; Leonard Benning, 15 years. 40

Bill of Particulars

6. The said Richard Benning was employed at the time of his death.

10 7. The said Richard Benning was working in Hoboken for an employer whose name and address are unknown to plaintiff.

8. The nature of the duties of the said Richard Benning was driving a truck from Hoboken to Boston every other day.

9. The earning of said Richard Benning in such employment were \$40.00 per week.

20 10. All of the next of kin did not reside in the same household at the time of deceased's death.

11. \$40.00 a week which has not been paid; he had obtained this employment about a week before his death. For some time prior thereto he had been employed at the Raritan Arsenal, earning \$25.00 to \$30.00 per week, all of which he had contributed to his mother, the said Isidora Benning.

30 12. The loss of his financial contributions aforesaid and the loss of his earnings which he would have contributed had he lived.

THEODORE STRONG & SON,
Attorneys for Plaintiff.

Testimony

NEW JERSEY SUPREME COURT,
MIDDLESEX COUNTY CIRCUIT,
September Term, 1928.

ISIDORA BENNING, administratrix of RICHARD BENNING	10
vs.	
CHARELS H. HERBERT and DANIEL HERBERT.	

Transcript of stenographer's notes of evidence in the above entitled cause, taken before HON. PETER F. DALY, Circuit Court Judge, and a Jury, at the Middlesex County Courthouse, in the City of New Brunswick, New Jersey, on the twenty-sixth day of September, A. D. 1928. 20

Appearances:

MESSRS. THEODORE STRONG & SON,
THEODORE STRONG, Esq., (Present)
Attorneys for the Plaintiff.

CHARLES STOCKDELL GRAY, Esq.,
Attorney for the Defendants. 30

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

(Mr. Strong opens the case for the Plaintiff.)

(Mr. Gray opens the case for the Defendants.)

Mr. Strong: You admit the ownership and the driving of the truck of the other defendant as alleged in the complaint? 40

Frank Blue—Direct

Mr. Gray: Yes, it is admitted in the complaint.

Mr. Strong: We offer the letters ad prosequendum.

Mr. Gray: I have no objection.

10 (Letters of administration ad prosequendum entered in evidence and marked "Exhibit P-1.")

FRANK BLUE, a witness produced on behalf of the Plaintiff, being duly sworn according to law, on his oath, saith:

Direct Examination by Mr. Strong:

20

Q. Mr. Blue, you knew the plaintiff's intestate Richard Benning? A. Yes, sir.

Q. Was he with you on the night of September 10, 1927? A. Yes, sir.

Q. And in an automobile? A. Yes, sir.

Q. Belonging to you? A. Yes, sir.

Q. That night you were driving that automobile? A. Yes, sir.

Q. In the direction of Metuchen? A. Yes, sir.

30

Q. On the Lincoln Highway? A. Yes, sir.

Q. East of New Brunswick? A. Yes, sir.

Q. Was Richard Benning killed that night? A. Yes, sir.

Q. Tell us about it. A. Why, we were driving on the highway on the extreme right of the road and we was—

Q. Extreme right on the concrete? A. On the concrete.

Q. Why were you driving on the extreme right? A. Because of a heavy traffic and we let the cars pass.

40 Q. At what speed were you proceeding? A. We were going between twenty-five and thirty miles an hour.

Frank Blue—Direct

Q. Go ahead. A. And we were riding along the right-hand side of the road and the lights blinded me on an approaching car, and all of a sudden Dick Benning hollered, "Look out," and I swung the wheels to the left side of the road, but it was too late and we smashed into the rear of the truck.

10

Q. On which side of the car were you? A. On the left-hand side.

Q. What make of car was it? A. Ford.

Q. Did you see any red lights on that truck? A. No, sir.

Q. If there had been a red light visible—

Mr. Gray: I object to that.

The Court: Yes.

Mr. Strong: I propose to ask the witness if he would have seen the red light on that truck—

20

The Court: It is improper.

Mr. Strong: Will your Honor allow me an exception?

The Court: Yes.

By Mr. Strong:

Q. Did you see any red light on that truck?

30

Mr. Gray: I object to that. He has already answered that he didn't see it.

The Court: He can answer it again. He has already answered that he saw no light on the truck. Answer the question.

A. I did not see any light on the truck.

40

Frank Blue—Cross

By Mr. Strong:

Q. The automobile driven by you ran into this truck?
A. Yes, sir.

10 Q. Then what happened? A. Well, after we ran into the truck—

Q. What happened to you? A. I was thrown to the dash board between the steering rod and the left-hand side of the car under the dash board. I wasn't unconscious; I got up and the bus driver opened the door; I got out of the car and ran around and helped the other fellows out of the car.

Q. Who were the other fellows in the car? A. Mr. Crenner, Mr. Sutton, and Dick Benning, and myself.

20 Q. What was Benning's condition? A. Benning's condition, he was dead when we carried him out of the car.

Q. Did you notice the position of the truck on the highway? A. No, sir.

Q. Thinking of other matters? A. I was thinking of other matters.

Q. Then what did you do? A. They called up the ambulance and the ambulance didn't come and Mr. Morgan of Plainfield drove us to the hospital, three of us.

Q. Which hospital? A. St. Peter's.

30 A. I didn't see any police around there until when we left for the hospital.

Q. About how long afterward was that? A. Well, it was at least ten or fifteen minutes anyhow.

Mr. Strong: Cross-examine.

Cross-examination by Mr. Gray:

40 Q. Mr. Blue, how long had you had that car? A. I had the car just a month.

Frank Blue—Cross

Q. Was it a new car? A. No, sir.

Q. What time of night did this accident happen, Mr. Blue? A. Well, it was between twelve o'clock and twelve-thirty.

Q. Where had you been that night? A. Well, we had been to Metuchen before we met Mr. Benning, and we went to Mr. Benning's house, and from his house we was going to a friend's of his on Highland avenue, and going there we had a flat tire, and changing the tire I ripped my breeches and we went to this friend's house, and I didn't want to stay there on account of my breeches being tore, so I asked Dick if he had an extra pair of breeches home that I could use; so from there we went back to Richard Benning's house and he gave me a blue suit, and from Benning's house we went to the Lincoln Diner in Highland Park and there he called up his girl and said he would not meet her that night, that he was going out with us. So we went to this friend's house of his again, and around between twelve o'clock and twelve-thirty we was coming home and we come out of Highland avenue on the highway and we was riding on the extreme right of the road to let the cars pass, on account it was a hill and the car I had would not pull very good on a hill, and we smashed into the truck.

Q. You were over on the extreme right of the highway? A. Yes, on the concrete.

Q. About how far from this truck were you when you saw it? A. Well, two or three foot, I think.

Q. There were lights on Mr. Baumgarten's stand there. A. Why, there was a light in the store. That is the only one I noticed.

Q. The part of the automobile that you were in didn't strike the truck at all, did it? A. Why, no.

Q. You were able to clear that because you were on the side nearest the center of the road, weren't you? A. Yes, sir.

Q. And Dick Benning, he was on the side nearest the side of the road. A. Yes, sir.

Q. And that part of it didn't clear the truck, did it? A. No, sir.

Q. Did you have good lights on your car? A. Yes, sir.

10 Q. You say you had it a month? A. Yes, sir.

Q. What model car? Is it a new car? A. Why, it was a twenty-two model Ford sedan.

Q. 1922 Model T sedan? A. Yes, sir.

Q. And you had had it about a month? A. Yes, sir.

Q. Had you had any experience driving before that? A. Yes, sir, I had been driving three years.

Q. What kind of a truck was it, did you notice? A. I didn't notice.

20 Q. Well, now, after the accident, how was the position of your car as compared with the position of the truck? Was it up under it or anything of that kind? A. That I didn't notice.

Q. You left your car there? A. Left the car there.

Q. How long did you stay around before you left after the accident and were taken to the hospital? A. Oh, it was ten or fifteen minutes before Mr. Morgan of Plainfield took us to the hospital.

30 Q. Mr. Morgan was the first person to come along who stopped? A. No, sir, there was a crowd around there before Mr. Morgan came.

Q. And when Mr. Morgan got there, there were a lot of cars around, and the accident had happened about fifteen minutes before, is that right? A. Yes, sir.

Q. And he volunteered to take you? A. To St. Peter's Hospital.

Q. Did you know him before? A. No, sir.

40 Q. Now, you say you didn't get to Benning's girl's house that night. Where did she live? A. She lived on—I don't remember the street, but it was the second block on Second avenue to your left.

Frank Blue—Re-Direct

Q. As a matter of fact, Benning was engaged to this young lady, wasn't he? A. Yes, sir.

Q. They were going to get married the following week?
A. Yes, sir.

Q. Well, when did you first look to see if there were any trucks or anything ahead of you? A. I didn't notice. 10

Q. The lights blinded you? A. The Lights blinded me. I couldn't see the truck until I was two or three feet ahead of it.

Q. Couldn't see anything at all ahead of you, could you?
A. No, sir.

Q. And you were going how fast? A. Twenty-five or thirty miles an hour.

Q. And you didn't slow down when the lights started to blind you or anything? A. Yes. I applied the brakes and slowed up to a short distance from the truck. You could not apply them very much. 20

Q. That is, when you first saw the truck you were only two or three feet away from it? A. Yes, sir.

Q. And then you didn't have time to apply your brakes or to swing out? A. No, sir.

Mr. Gray: I think that is all.

Redirect Examination by Mr. Strong: 30

Q. Was there much traffic on the Lincoln Highway that night? A. Yes, sir.

Q. Is it or not a much travelled highway at all times?
A. Yes, sir, at all times.

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

Mr. Strong: That is all. 40

Jacob Baumgartner—Direct

JACOB BAUMGARTNER, a witness produced on behalf of the Plaintiff, being duly sworn according to law, on his oath, saith :

Direct Examination by Mr. Strong :

10

Q. Mr. Baumgartner, were you in the truck of the defendant Daniel Herbert? A. Sitting on the rear end of the truck.

Q. On the night of September 10, 1927? A. Yes, sir.

Q. When the automobile driven by Frank Blue— A. Yes, sir.

Q. (Continuing.)—ran into it? A. Yes, sir.

20

Q. Were you in that truck? A. I was sitting on the rear end of the tailboard. Well, it didn't have no tailboard on. We just took one basket of peaches out, we took that out on top and I sit on there with my feet hanging out.

30

Q. When and where did you first get into that truck? What was the arrangement? A. Well, Mr. Herbert came over for me and asked me if I wanted to buy a load of peaches. The following Sunday the wife up there, she has a road stand up there. I told him yes. So we went up to his home and got a load of peaches. So he suggested being there was three he said someone ought to sit in the back, so no one could jump onto the rear end, so I told him if he took a basket out I would sit there, so he turns around and takes a rope, it was a rack truck, and he takes a rope and ties it around so that the rope would go across my waist so I would not fall off.

Q. That was at Mr. Herbert's home, was it? A. Yes, sir.

Q. That you were tied onto the truck? A. Yes, sir.

The Court : Did he say he was tied onto the truck?

40

Mr. Strong : Or tied into the truck?

A. Well, tied in the truck that I would not fall out. I wasn't tied in. The rope just came around here from rack to rack.

Q. There was a rope across the rear of the truck? A. Yes, it was holding the peaches on and holding me on with the peaches.

10

Q. About how many baskets of peaches, do you know, roughly speaking? A. I don't know. Thirty-five or forty, I think.

Q. All consigned to you? All purchased by you? A. Yes, sir.

Q. And what sort of a truck was that? A. Well, I don't remember the name of it, but I do know it was a rack truck.

Q. A rack truck? A. Yes, sir.

Q. Did it have any special rack on it that night? A. No. Because that was the truck that Mr. Herbert was using to go back and forth to the market with.

20

Q. About how far back of the wheels did that rack extend, as near as you can state? A. Well, the rack extended flush with the body of the truck. It extended over the rear wheels, I should judge, well, eight or ten feet.

Q. You had been driven from Mr. Herbert's residence to where the accident happened? A. Yes, sir.

Q. And did you see this car approaching? A. Yes, sir, I seen it coming.

30

Q. Now, tell us how the accident happened? A. Why, I seen these two headlights coming up the road extreme to the right going toward Metuchen, going west, and when we pulled up—before that when we pulled up in front of our gas tank I told the wife to get off—

Mr. Gray: I object.

Q. In consequence of what you told your wife. A. I told her to go in and put the lights on the signs.

40

Jacob Baumgartner—Direct

Mr. Strong: I will withdraw the question and answer anyway if you want it out.

Mr. Gray: Go ahead.

A. And she got off the truck, she put the lights on.

10 Q. Lights in your store? A. Yes, sir, so that the signs were lit. The signs were overhanging all the gas tanks and the signs were all lit and there was one light lit inside, and I seen these two lights coming up the road, and it seemed to me that the two right wheels of the Ford was off the hard pavement.

Q. What? A. Off the hard pavement.

20 Q. Are you sure of that? A. Well, it seems to me in the position where I was sitting—I couldn't get off because I called for Mr. Herbert to untie the rope, the knot was on the side, and I was sitting—well, if this was the truck and I was facing you, I was sitting on the left-hand corner of the truck. I was on the end and Mr. Herbert got off the truck and he pulled the knot and when he pulled the knot I pushed the rope away from me, and I fell on the ground, and then she hit. But it did not hit on the rear of the truck. The truck was hit on the rack. The rear of the truck wasn't touched.

Q. The rear of the truck wasn't touched? A. Not that I seen. It was the rack.

30 Q. It was the rack that was hit? A. It was the rack that was hit.

Q. When the collision happened then what did you do?
A. Well, I picked myself up and I asked Herbert, when I seen the wreck—

Mr. Gray: I object to any conversation here.

A. I just asked him to pull up.

40 Q. What is that? A. The rack of the truck was inside

of the Ford sedan and I seen this fellow, hanging that way.

Q. Who is this fellow, the dead boy? A. Mr. Benning. I never knew any of them before that, none of them. I told him I couldn't get him out. And the front part— well, the right-hand side of the Ford was just practically cut in two but the rack was in there so I asked Herbert to pull up a little bit and Herbert gets on the truck and he pulls up the rack to get it out of the Ford sedan where it was locked. 10

Q. For what purpose? A. Well, we couldn't get the fellow out. So I opened the latch of the door and the door fell off. And this fellow fell right over to me and I laid him on my walk and I opened up his shirt and I felt his heart and I told the folks around there that the boy was dead. I took a newspaper and I covered his face up. The wife, in the meantime, she called up St. Peter's Hospital. She called the coroner and the police department at the same time. 20

Q. How long was it before the police arrived? A. Well, I should judge about around fifteen minutes it was. I am not certain.

Q. Just at the time of the accident what was the position of that truck with reference to the concrete? A. Well, the truck was on an angle up to our curb, up to where our concrete goes up as far as the gas tank. 30

Q. A little louder. A. If this is the highway the truck was turned in so that the rear of the left of the truck extended a few feet on the hard pavement of the highway.

Q. Extended on the highway? A. Yes.

Q. About how many feet, could you guess? A. Well, I should judge a couple of feet. Was no more than that, I don't believe.

Q. What is that? A. A few feet; I don't know exact.

Q. And was the front of the truck on the highway or off? A. Off the highway. 40

Jacob Baumgartner—Direct

Q. About how far? A. Well, I should judge about easily ten or twelve feet.

Q. How is that? A. Easily ten or twelve feet because the front was further in than the rear.

10 Q. Do you mean ten or twelve feet of the length of that truck was off the highway? A. Well, the front. The front side of the truck, the front right-hand side was extreme off the highway, but the tail end was just a little on an angle about, I should judge, no more than three feet on the highway, the rear of the truck.

By the Court:

20 Q. When you talk about the highway, you mean the paved part of the road? A. Yes, Judge.

By Mr. Strong:

Q. The concrete, is that right? A. Yes, sir.

The Court: He said he meant the paved part of the road.

30 By Mr. Strong:

Q. After this accident did you observe whether there was any light on the rear of that truck?

Mr. Gray: I object to that. The conditions after the accident. It has been proven they smashed together. What was the condition after the accident may be no indication of what they were before.

40 The Court: That is a matter of argument. I will allow it.

Jacob Baumgartner—Direct

A. Why, after the accident Mr. Taylor, Frank Taylor of Taylor's Garage was called—

The Court: Never mind about that. You were simply asked whether or not you saw a light on that truck immediately after the accident.

10

A. A light was lit but that was faced down to the ground.

Q. What color? A. Couldn't see no light.

Q. State whether or not the Ford driven by Blue could have hit that light.

Mr. Gray: I object to that.

By Mr. Strong:

Q. Or else give the reason why it couldn't.

20

The Court: You cannot put a question that is conditional that way.

Mr. Strong: Or else will he give his reason for it

The Court: Objection sustained.

Mr. Strong: Allow me an exception.

By Mr. Strong:

30

Q. Where were you with reference to that light and the approaching Ford? A. What do you mean, when the Ford was coming up?

Q. The Ford, when it was coming up where were you?

A. I was sitting on the rear end of the truck facing the car coming to me. I was sitting on the left-hand side of the truck because on the right-hand side they hit.

Q. Right-hand side of which hit? A. Well, from where I was sitting.

40

Jacob Baumgartner—Direct

Q. Which side of the truck were you sitting on? A. I was sitting on the left.

Q. Toward the highway? A. Yes, surely. No, no. Towards the inside.

10 Q. Then you were sitting on the right of the truck, were you not? A. Yes, if you take it that way.

The Court: He said he sat on the left side of the tuck in the rear.

By the Court:

Q. You were nearest the property line, weren't you? A. Yes, sir.

20 By Mr. Strong:

Q. And the truck, as I understand it, was facing toward Metuchen, is that right? A. Yes, sir.

Q. Where was the light on the truck, what side of the truck? A. Well, the light was pretty well in the center of the truck underneath. Underneath the body of the truck.

Q. Now, at the angle that machine was to the highway would the light have been visible to an approaching automobile?

30

Mr. Gray: I object to that.

The Court: Objection sustained.

Mr. Strong: Allow me an exception.

The Court: Why do you put such questions? Why do you take up the time with such exceptions? That is a matter of conclusion for the jury. This witness can give the physical facts and that is all he can give. The jury can draw their own conclusions as to whether or not the car coming from the rear could see it.

40

By Mr. Strong:

Q. State whether or not that Ford could have hit the tail light without first hitting you.

Mr. Gray: I object to that. 10

The Court: Objection sustained.

Mr. Strong: Allow me an exception.

By Mr. Strong:

Q. Did it hit the tail light?

Mr. Gray: I object to that.

The Court: Why? 20

Mr. Gray: I will withdraw the objection.

The Court: It is very, very leading but I will allow it.

A. No, it could not.

By the Court:

Q. You were not asked whether it could or could not. 30
You were asked whether it did. A. Whether the Ford hit the tail light?

Q. Yes. A. I don't know.

Mr. Strong: He just said a moment ago it didn't.

The Court: He said it couldn't.

A. Well, it couldn't have hit it where the light was. I didn't see it hit.

40

By Mr. Strong:

Q. What? A. I didn't see it at that time.

Q. You said it couldn't have hit it where the light was,
is that right?

10

Mr. Gray: I object to that. That is not the question he was asked.

By Mr. Strong:

Q. Now, how far under the end of the rack or truck was that tail light? A. Well, I should judge no more than about five feet, under the body of the truck.

Q. And how many inches below the body of the truck?

20 A. About fourteen or sixteen inches from the ground.

Q. I asked you how much below the body of the truck.

A. Oh, below the body? Well, I should judge no more about—well, just about fourteen or sixteen inches right from the body of the truck.

Q. Below the body of the truck? A. Yes, sir.

Mr. Strong: Cross-examine.

30 Cross-examination by Mr. Gray:

Q. Mr. Baumgartner, you didn't measure the distance which the light was under the truck. A. No, sir, I did not.

Q. You are just estimating the five feet? A. Yes, sir.

Q. In the beginning you estimated eight feet, as I remember. A. No, sir.

40 Q. Weren't you asked that question? A. No, sir, I didn't say anything. The rack of the truck, the extension of the body of the truck from the rear wheels I said was about eight feet.

Jacob Baumgartner—Cross

Q. You don't know what kind of a truck this was, do you? A. A rack truck, that is all I know.

Q. I mean what make truck. A. No, sir, I do not.

Q. This estimate of fourteen inches from the ground and fourteen inches from the truck, that is only an estimate too. A. That is all. Didn't measure nothing.

10

Q. And did you measure the distance or estimate the distance from the rack—the floor of the truck to the ground? A. No, sir. I did not measure nothing.

Q. Do you think that is about twenty-eight inches, the distance from the ground up to the floor of the truck is only twenty-eight inches? A. Yes, sir, I think it was.

Q. How high do you estimate this table is from the floor (indicating)? A. Well, it is pretty near three foot.

Q. And you think that the floor of the truck was much nearer the ground than this table?

20

The Court: He didn't say it was much nearer.

Mr. Gray: He said that the light was fourteen inches from the ground.

The Court: Well, somebody else might have a different view that the difference between twenty-eight inches and three feet was very much.

Mr. Gray: I am just estimating.

The Court: You asked him if it was very much different. Ask him if there was eight inches' difference.

30

By Mr. Gray:

Q. You had gotten off the truck when this accident happened? A. You tell the world I got off the truck, yes, sir.

Q. You are quite sure you were still on the truck? A. I got off the truck.

40

- Q. Were you on the truck when the accident happened?
A. I was on the truck when I seen it coming and I called Mr. Herbert to untie the rope to let me off and just as I—
- Q. Then at the time you saw this car approaching you called to Mr. Herbert to untie the rope and let you off?
- 10 A. Yes, sir.
- Q. Mr. Herbert did untie the rope and let you off?
A. Yes, sir.
- Q. And all the time you were doing that the lights on this approaching car were visible to you? A. Yes, sir.
- Q. Did it have bright lights? A. Yes, sir.
- Q. Were the peaches still in the— A. Yes, in the truck.
- Q. In the truck? A. Yes, sir.
- Q. And there were how many baskets? A. To tell the truth I don't remember. Around thirty-five or forty.
- 20 Q. And they were stacked up pretty high, were they?
A. Well, they were stacked up, yes.
- Q. And all across the truck? A. Yes, sir, on the floor of the truck.
- Q. And they presented—How wide was this truck?
A. I have no idea.
- Q. You haven't any idea at all of the width of the truck?
A. No, sir, I don't remember ever seeing the truck after that. I don't know.
- 30 Q. Had you ever seen it before? A. Well, I seen it a few times before when Mr. Herbert stopped at the stand. I didn't take quite notice of it though.
- Q. You had come all the way from Mr. Herbert's place of business on the truck, hadn't you? A. Yes, sir.
- Q. Had you gone over on that truck, too? A. Yes, sir.
- Q. Was it night when you started over? A. Yes, sir.
- Q. Did you stay there while they loaded it? A. Yes, sir. I helped load it.
- Q. Helped load it? A. Yes, sir.
- 40 Q. Did you take any notice at any of those times whether the tail light was burning? A. No, sir, I did not.

Q. Take any notice whether it was bent down, or anything of that kind? A. No, sir, I did not.

Q. And when you sat on the back of that truck all the way over you didn't notice whether the light was burning or not. A. No, sir, I did not.

Q. The first time you noticed the light was after the accident? A. Yes, sir. 10

Q. The first time you noticed the light was after the accident? A. Yes, sir.

Q. And you got down and then you saw it was bent? A. Downward.

Q. So that the light shone towards the ground? A. Yes, sir.

Q. What part of it shone towards the ground? A. Well, it was the red part and the whole bracket was bent in and threw the light down on the ground. 20

Q. Was the glass only on one part of this light? A. Well, there is glass in the front and they usually have celluloid for the white.

Q. Was the celluloid here? A. No, sir.

Q. Just one plain red light? A. Well, it is plain red from that back and it is white on the side to signify the license number.

Q. Then it had three sides, the red and two whites? A. Yes, sir.

Q. It was an electric light? A. Yes, sir. 30

Q. How many lights did you have on your stand that night? A. Well, the top sign that has about twelve bulbs into it. And then there is one light lit in the store.

Q. Any lights at the gas tank? A. No, sir, we did not have them lit.

Q. Did you ever say that you were standing alongside of the truck when this accident happened? A. No, sir, I did not.

Q. Did you ever tell anybody that you saw the lights burning on the back of the truck before the accident? A. 40

I didn't look at the truck right afterwards. I took care of the injured, the man that was dead, and I didn't see the truck until it was pulled away over on the side of my street, on Belmont avenue, and Mr. Taylor come up to get the truck.

10 Q. How long after the accident was this that you saw it then? A. I should judge fully twenty-five minutes, because I was sworn in as a special police officer in Raritan Township and I was doing traffic duty to keep the traffic moving. We had a congestion over there until the local police came over.

Q. Did your local police come over before you looked at it? A. I don't remember.

20 Q. What was your occasion for going over to look at it if the local police had already looked at it? A. That was when the Ford sedan was pulled off the road and Taylor's wrecker was getting ready for the truck, but the truck didn't have to be towed, except the Ford sedan.

Q. Then the first time you looked at this light was after the wrecker had come along and had pulled this Ford out from underneath the truck? A. Yes, sir.

Q. And the truck itself had been moved around the other street? A. Yes, sir.

30 Q. And you don't know what the condition of this light was immediately after the accident at all, do you. A. No, I do not, sir.

Mr. Gray: I think that is all.

By the Court:

40 Q. How far away, according to your best estimate, was this car when you first saw it? A. Just about one full block because I noticed there is a culvert on every block down that way, there is no sidewalks, and I noticed the car, it seemed to me, just about a block away, Judge, be-

cause he had bright headlights on, and he made no effort to turn over and that is what made me call to Mr. Herbert to untie me to get me off the truck. Just about one block.

Q. Well, where was Herbert? A. He was sitting in the front of the truck.

Q. And you were in the rear? A. Yes, sir; I was sitting in the rear. 10

Q. And when you asked him to unloose you what did he have to do in order to reach the rope? A. He had to get off the truck to pull the knot of the rope.

Q. Well, how far did he have to walk from where he was sitting there? A. Well, you see the wife was the first one off the truck, and another man was sitting there, and when I hollered this man gets off the truck and in a hurry he pulls the rope and I pushed the rope away from me and I fell on the ground. 20

Q. In other words, Herbert got off the truck and came from the front of the truck? A. Yes, sir.

Q. Came to the rear? A. Yes, sir.

Q. And unloosened the rope? A. Yes, sir, he pulled a knot.

Q. And during all that time—it took all of that time for this oncoming car to go a distance which you say was about a block? A. Well, just about a block it seems to me because it happened all so quickly that I didn't even take the time—I thought it was a block away from me I seen this car coming to me. 30

Q. What measure of time your best estimate between the time that your wife put the lights on and the time of the collision? A. Well, it was no more than a couple of minutes.

Q. A couple of minutes? A. Well, she got off the truck; she unlocked the front door.

Q. Did you see this oncoming car before or after your wife had turned the lights on? A. Well, I seen it coming after she had turned the lights on. 40

Jacob Baumgartner—Cross

Q. And from the time that she turned the lights on until the time of the collision you say you estimate that to be two minutes? A. Well, I know she got off the truck, she had to find the key in her pocketbook for the front door and she had to unlock the door, and then she had to walk behind the counter to get to the switch box for the lights because I wanted the signs lit.

10

Q. How wide is that paved part of the road there? A. Supposed to be forty feet. About that.

Q. Lincoln Highway twenty feet? No, it is thirty-five or forty feet. It is paved.

Q. What is there to the side of the paved part of the road, is it paved right up to the ditch? A. No.

Q. Or gutter? A. Well, of course—no. It is about—the shoulder of the road before you come to the ditch or gutter I should judge about three or four feet.

20

Q. Well, now, this truck that was carrying the peaches, the truck that you were on— A. Yes, sir.

Q. (Continuing)—was that upon the dirt shoulder or was it upon the concrete leading into your station, your oil station. A. Well, the way the truck was facing towards Metuchen the right side of the truck where I was sitting on, that was on the shoulder of the road, that was right under our sign. But the other side of the truck, that was—

Q. The right side of the truck where you were sitting? A. Well, now, which way do you want it? I was facing towards Highland Park.

30

Q. You have repeatedly said you were sitting on the left-hand side. A. On the left-hand side. Well, I was sitting on the left-hand side facing toward—

Q. Were you on the side of the truck when it was standing—at the time of the accident were you on the side that was nearest your property or farther away from it? A. No, sir, I was sitting nearest to my property.

Q. Then you were on the left-hand side of the truck

40

as you were looking back to New Brunswick, weren't you?

A. That is the idea, yes, Judge.

Q. Now, then, where was the truck standing with relation to this shoulder of the road that you speak about?

A. Where I was sitting that position of the truck was off the hard pavement of the road entirely. 10

Q. Was it on the dirt or was it on the concrete? A. On the dirt.

Q. You said something about concrete leading up to your oil station. A. That is a shoulder there, and we always keep on filling that in with gravel. That is practically dirt. Well, we was on the dirt part. The other part was, I should—Well, there was no more than about a foot or two on the hard road because the truck was a little in on an angle.

Q. What part of the chassis of the truck had the lantern attached to it, or the light attached to it? A. The electric light. Why the electric light was on the bracket, on the license bracket underneath the truck and was pretty well in the middle. 20

Q. Then this frame work extended, you say, about ten feet in the rear of the body of the truck? A. No. The rack was flush with the body of the truck, it extended over the rear wheels about eight or ten feet.

Q. Well, was the light fastened in back of the rear wheels or in front of the rear wheels? A. Right behind the rear wheels. 30

Q. How far behind the rear wheels? A. I didn't measure it. About the rear of the truck, I should judge, about five or six feet.

Q. Then the rack was from four to six feet farther in the rear than where the light was placed, is that right?

A. Yes, yes. You see the rack was flush with the body of the truck. The rack did not extend over the body.

The Court: That is all I have.

40

John Sutton—Direct

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

Direct Examination by Mr. Strong:

10

Q. Mr. Sutton, were you in the Ford sedan at the time it collided with Mr. Herbert's truck? A. Yes, sir.

Q. You were in the car in which the deceased Richard Benning was riding? A. Yes, sir.

Q. And you were on the rear seat? A. The rear seat, the right-hand side.

Q. And as you approached the truck did you or not see any light on it? A. I didn't notice any light at all.

20 Q. What side of the road was the Ford sedan in which you were riding. A. The right-hand side going toward Metuchen.

Q. Was it or not on the concrete? A. To the best of my knowledge it was on the concrete because it was riding smooth. It must have been.

Q. What is that? A. It was riding smooth. It must have been.

Q. And about how rapidly were you going? A. Between twenty-five and thirty.

Q. And were you injured in the collision? A. Yes, sir.

30 Q. How? A. Well, I was in the hospital for three days, and laid up for about five weeks with my leg and my face.

Q. Were you rendered unconscious? A. Yes, sir.

Q. By the collision? A. By the collision.

40 Q. When and where did you come to? A. Well, the first time I came to I was sitting in front of Baumgartner's place and I came to for a few moments and I saw this Dick Benning take his last breath, and I was unconscious again and when I arrived in the hospital I came to and I heard one of the other fellows ask where Jack was. Then I went unconscious until Sunday morning again.

John Sutton—Cross

Q. Did you or not notice anything about the position of the truck with reference to the highway? A. Well, when I heard Dick Benning say "look out" I looked up and noticed part of the truck, when we were swerving around I noticed the corner of it. That was all.

Q. The corner of it? A. The corner of the truck so it must have been protruding out or we would never have noticed it. 10

Q. Protruding out how? A. On the pavement, the rear end of the truck.

Mr. Strong: Cross-examine.

Cross-examination by Mr. Gray:

Q. Mr. Sutton, what side of the car were you sitting? A. On the right-hand side in back of the fellow that was killed. 20

Q. Right in back of Benning? A. Yes, sir.

Q. How long had you been in the car that evening? A. Well, I started out with the party.

Q. You had known Benning for sometime, hadn't you? A. Well, no, not intimately. I knew him enough to say hello to.

Q. You heard Mr. Blue tell where you had been and where you had gone that evening. That was about right. 30

A. I had been there.

Q. You didn't go to Benning's girl that night. A. No.

Q. Did you know her? A. Well, I knew her to see, and I used to talk with her on the street. That was all.

Q. And you knew they were to get married the following week? A. Knew they were to get married.

Q. Now, as you were going along the Lincoln Highway were you looking in front of you? A. No, I was sitting in the back of the car talking to the fellow I was with.

Q. You were talking to Crenner? A. Yes. I didn't 40

notice anything until I heard Dick holler "Look out" and I sat up.

Q. The first thing you heard was Benning holler "Look out"? A. "Look out."

Q. Did you look up when he hollered? A. I looked up.

10 Q. Did you see the truck then? A. I saw the truck.

Q. And about how far away from it were you? A. Well, I surmise we were about no more than four feet because I just had time to slump down again.

Q. Had Blue started to swerve? A. Started to swerve. That threw me over on the other fellow.

Q. Did he swerve before Benning hollered "Look out"? A. About simultaneously, I believe.

By Mr. Strong:

20 Q. What is that? A. The same time.

By Mr. Gray:

Q. And what part of the Ford struck the what part of the truck? A. Well, it was the rear end, the best I could say the truck was more or less like this and we were coming up and the Ford ran right into this.

30 Q. You ran into the right-hand corner of the truck?
A. No.

Mr. Strong: I object. He did not say that.

A. No. It was the left-hand corner. The left-hand corner with the right-hand side of our car.

Q. Did you run into the corner of the truck that was nearest the center of the road or nearest the curb? A. Nearest the center of the road.

40 Q. That is the part that you struck. Did you notice the position of the cars afterwards? A. Well, I remember

when they were taking me out the back window— No. I really didn't notice. Afterward when they were taking me out the back window I heard the motor of the truck moving away so they could get Mr. Benning out of the car.

Q. Well, the truck and the Ford were together, weren't they? Jambled in together and one had to be moved before the other could. A. Well, I suppose they could be moved if they wanted to pull them apart without moving the truck. 10

Q. But the Ford was jambled into the truck, wasn't it? When the front of it smashed? A. Yes. Not the front of the truck wasn't completely smashed. The front of the car was.

Q. What part of the truck was? A. Well, just where the car ran into it. From what I suppose it was just below the window in the sedan. 20

By Mr. Strong:

Q. Below what? A. Below the window or rather the windshield that went through and hit Mr. Benning in the chest.

By Mr. Gray:

Q. That was the tail of the truck that hit that? A. No, there was no tail of the truck, but the rear end of the truck. 30

Q. I mean the body of the truck. A. Yes.

By the Court:

Q. What kind of a night was this? A. Well, it was rather stormy, Judge.

Q. What time was it? A. Well, the party, I surmise, broke up about twelve o'clock. It was for an old woman who was going abroad, and broke up at twelve, and we 40

William Crenner—Direct

were just taking Mr. Benning home so it must have been between a quarter after and half-past, I believe.

Q. Twelve? A. I believe so.

Q. And was it raining? A. No. But it was foggy.

10 Q. What did you mean by a stormy night? A. Well, what I mean I think it rained the following Sunday. It looked as if rain were coming on.

Q. How much of a fog was there? A. Well, there wasn't very much but just enough if you were looking out a window and saw a light coming along it would blur your eyesight. Nothing very heavy.

Q. Where is this point of collision on this road? A. Well, it is just below Sutton's Lane, I believe, or above, I just don't know the exact point. It is the low part of the Lincoln Highway between New Brunswick and Metuchen.

20

The Court: That is all.

Mr. Gray: That is all.

WILLIAM CRENNER, a witness produced on behalf of the Plaintiff, being duly sworn according to law, on his oath, saith:

Direct examination by Mr. Strong:

30 Q. You are a son by adoption and also go by the name of Myers? A. I am not adopted.

Q. But you also go by the name of Myers? A. I go by the name of Myers too.

Q. How does that come about? A. Well, Mrs. Crenner brought me up ever since I have been a child and I used her name sometimes, and sometimes I used my own.

Q. Were you in the Ford sedan in which Richard Benning was riding at the time he was killed? A. Yes, sir.

40 Q. Whereabouts were you? A. I was sitting behind Frank Blue, the driver.

Q. And as you approached that truck did you see any light on it? A. I wasn't looking out the front of the car.

Q. And at about what speed were you proceeding? A. About between twenty-five and thirty.

Q. What? A. Between twenty-five and thirty.

Q. State whether or not your automobile was fully on the concrete. A. Well, I believe it was. 10

Q. Why do you believe that? A. Well, we were riding pretty smooth. If it was on the side I think it would be rather bumpy.

Q. What did you say? A. If it was on the side I believe it would be bumpy.

Q. It was riding pretty smooth, you say. A. Yes, sir.

Q. Was there much traffic on that highway that night? A. There was quite a little, yes.

Q. Were you injured in the collision? A. Yes, sir, I was. 20

Q. To what extent? A. Why, I had a cut on my chin and I had a few bruises on my leg. That was about all.

Q. Were you rendered unconscious? A. No.

Q. And when the accident happened what did you do? A. I got out of the car and someone grabbed me and sat me down in a chair and started throwing water on my face because I was all blood.

Q. Did you notice the position of the truck with reference to the concrete on the highway? A. No, sir, I did not. 30

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

Cross-examination by Mr. Gray:

Q. You say you were not noticing a thing along the road at all. What were you doing? A. I was talking to Mr. Sutton. 40

John Mehl—Direct

Q. You were not paying attention to what was going on ahead at all. A. No.

Q. And you don't know anything about what happened, is that right? A. No, sir.

10 By the Court:

Q. Were you paying any attention as to how fast you were going? A. Well, no.

Q. Do you drive a car yourself? A. No, sir.

The Court: That is all.

By Mr. Strong:

20 Q. What makes you think you were going about twenty-five or thirty miles an hour? A. I knew we wasn't riding very fast.

Mr. Strong: That is all.

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

30 Direct examination by Mr. Strong:

Q. Mr. Mehl, where do you live. A. Plainfield.

Q. And what is your occupation? A. Salesman.

Q. For whom? A. Plainfield Lumber & Supply.

Q. Were you on the Lincoln Highway on the night at the time that Richard Benning was killed, the night he was killed? A. I was.

40 Q. What was your first knowledge of the accident? A. Why, the first knowledge of the accident was seeing the cars there, that is, seeing there had been a colision. By

that I mean I looked out and there was quite a crowd around and traffic was rather heavy, and we had just passed this spot about four or five minutes before, and we stopped the car and I got out.

Q. How did you happen to turn back? A. Why, we were following another car from Plainfield, that is, it was from Dunellen, because we came over Bound Brook Road and we had sort of lost the car, they had gotten ahead of us, we stopped for gas, and I knew the street pretty well we were supposed to turn on, but I just kind of missed it, so I said to Mr. Morgan, well, he didn't know where the street was, and I said, "Well, I guess we have passed it, we had better turn around." And we went down to Stelton Road, which is about a half a mile, perhaps not that, and turned around and we came back and we saw the crowd. There had been no crowd there when we went down before, and when we came back, of course, we saw this crowd and we stopped. 10 20

Q. Did you ever know any of the parties to this suit before this happened. A. No, I did not.

Q. When you reached the scene of the accident what did you observe? A. Why, we got out of the car, well, that is, I got out of the car and walked across the street and I saw several people standing around a truck and a Ford sedan, and the first thing I did was walk up to the front of the stand to see what had happened. 30

Q. Did you notice the position of the truck with reference to the highway? A. Yes, I did.

Q. As to the concrete?

Mr. Gray: I object unless there is some proof that it was in the same position then as it was at the time of the accident. This man said by the time he got there all the crowd was there and everything. There has been no testimony.

Mr. Strong: There is no presumption of any 40

change except that the position of the truck was bettered by being drawn to release the body.

The Court: I will allow it. It is not a question of presumption.

- 10 Q. What was the position of the truck with reference to the concrete highway when you reached there? A. Why, it was about a couple of feet ahead of where it had been when we went down.

By the Court:

Q. Was it standing when you went down? A. Yes, sir.

By Mr. Strong:

- 20 Q. State whether or not any part of that truck was on the concrete. A. Looking at the truck toward Metuchen the left-hand side of the rear was about three and one-half feet on the concrete.

By the Court:

Q. When you first saw it? A. When I first saw it, do you mean going toward—

- 30 Q. When you saw it standing first. A. Towards Metuchen?

Q. Yes. A. As we were going up before the accident, you mean?

Q. Yes. A. Well, it was about four feet and as I say, when I went over I noticed it wasn't there. At first I thought it must have been from the impact of the accident but I didn't know anything about it having been moved.

By Mr. Strong:

- 40 Q. When you got there, when you arrived at the scene

of the accident and it had been moved then about what was the position of the right front wheel of the truck?

Mr. Gray: I object to that, the part that it had been moved.

Mr. Strong: Well, he said that. 10

The Court: Well, he could not say it had.

Mr. Strong: I will withdraw the question and frame it a little differently.

Q. When you went back to the scene of the accident what was the position of the front wheel of the truck with reference to the concrete? A. I did not notice the front wheel.

Q. Did you notice that part? A. No, sir.

Q. State whether or not the truck was at an angle with the concrete. A. It did. 20

Q. It was. A. It did have an angle.

Q. With the concrete? A. Yes. I didn't look at the front of the truck, but from the back.

Q. You could see that it was at an angle. A. Well, yes, because one part of the back was sort of out. The other was in further.

Q. Who was with you in the car that you were riding in? A. My wife and Mr. Morgan.

Q. Did you and he take the dead boy to the hospital? A. No, sir; we did not. We took the three fellows that were injured. 30

Mr. Strong: Cross-examine.

Cross-examination by Mr. Gray:

Q. The left-hand rear wheels of this truck were where when you came back? A. By the left-hand—you mean as I looked at the back of the truck? 40

Q. Yes. As the truck was facing the one nearest the edge of the road. A. Do you mean the back wheel that was nearest the middle of the road?

Q. No. Nearest the edge of the road first. A. Oh, the one that was nearest the edge of the road? Why, that was
10 off the concrete.

Q. Off the concrete. A. Yes, sir.

Q. About how wide is this truck? A. Why, I should judge the truck—that is the top with the body and all was about six feet. That is the top, it was like that to the best of my knowledge.

Q. About how wide—what do you think the wheel base, one wheel to the other, how wide do you think it is? A. Why, about three and one-half or four feet.

Q. You think that the two wheels are only about three
20 and one-half to four feet apart? A. Well, about four feet.

Q. And how far on the concrete was the one that was nearest the center of the road? A. Why, I would say it was about three feet, maybe a little more. The other one was off the concrete. Might have been six inches or might have been a foot. I didn't particularly notice.

Q. Well, why did you notice particularly? A. Well, when anybody stops at an accident like that it is natural to look at it and say, "Well, I wonder whose fault it was."

Q. Then you looked at it and you thought about three
30 and one-half to four feet wide wheel base and that one wheel was off on the dirt, that is right, isn't it? A. Yes, one wheel.

Mr. Gray: I think that is all.

By the Court:

Q. What kind of a night was this? A. Why, it was
40 what I call a nasty night. It was cloudy and sort of cold. It wasn't cold, but it was pretty chilly.

Q. Was it foggy. A. Not foggy. There might have been sort of a haze as you go down a hill or up a hill.

Q. What, if anything, was there that was the cause of you taking attention to just where this truck was parked on that road as you were coming towards New Brunswick?

A. I was looking for a road and I always knew that place, this road stand, as Jack's place. That was my impression, it was called Jack's place, and someone had said something to me about it a couple of times before and I said—I have often, if I had been riding I would say, "Well, that is Jack's place." And this road that this party lives on, this other car was going to, is right near there. 10

Q. Which other car was going to? A. The car we were following. Now, as we went along I kept looking to the right for the road, because I was going to tell Mr. Morgan when we came to it. He didn't know it. So consequently as I looked along I looked in Jack's. 20

Q. Was it already lighted? A. Why, it was lighted but I wouldn't say brightly. There were lights there.

Q. There were lights there were there? A. There were lights.

Q. And the truck was standing, was it? A. Yes, sir.

Q. How far down the road did you get before you made your turn? A. We went down to Stelton Road. Coming up today—

Q. What made you turn? A. Because when I had gotten to Jack's, this place called Jack's, I realized that the road was nearer New Brunswick that we were to turn on, so I said to Mr. Morgan, we had better turn around, so when we got to Stelton Road, it is a wide space, we turned around. 30

Q. Then it wasn't the accident that caused you to turn back. A. Oh, no, it was not.

Q. And you say that as you passed this standing truck that it was about four and one-half feet on the concrete, the side of the truck. A. Well, when I say four and one- 40

half feet I mean counting the furthestmost edge of the truck. I don't mean on the wheel base. I mean the top of the truck.

10 Q. You mean the frame of the body of the truck was four and one-half feet over. A. Well, yes, sir. The way I arrive at that I figure, well, it is about four and one-half feet, four feet, five feet, that was sticking out in the road and we were out near the middle, near the white line. So as I say I was looking along for this road, and when we came to this Jack's place, I said to myself, "Well, I know this road is back of that, we must have passed it"; so I said to Mr. Morgan, "Better turn around."

Q. Do you remember passing this car of Benning's? A. No, I do not.

20 Q. You do not? A. No, sir. I don't remember passing it.

Q. Do you remember passing any car after you passed this standing truck? A. I didn't take notice, no. I don't think we did.

Q. Well, you had to, didn't you? A. No.

Q. Why not? A. Because we started to slow down to turn around and come back.

30 Q. I know but if there was the truck standing there, and between the time that you passed that standing truck and the time you got back, there had been an accident, between that and another car going toward Metuchen? A. Yes.

Q. Then you must have passed it, isn't that true? You were going towards New Brunswick, weren't you? A. Coming back.

Q. Well, when you passed the truck which way were you going? A. The first time we passed the truck we were going toward Metuchen.

Q. Oh, you were? A. Yes, sir.

40 Q. Then you came back? A. Yes, sir; we went to Stelton Road and turned around and came back, and there was

a lot of traffic so we pulled over to the side of the road and came over.

Q. Then you would not have to pass it? A. No. We might have gone a foot past it.

Q. What time of the night was it? A. I can't say positively. About between twelve and one. 10

The Court: That is all.

By Mr. Strong:

Q. You spoke, in your testimony, of a mist, I think.

The Court: He did not. He said there was a haze in hollows.

A. I said perhaps there was a haze. I didn't notice particularly. 20

Mr. Strong: "I thought in one portion of his testimony he spoke of a mist.

By the Court:

Q. Could you see clearly? A. Yes, you could see clearly. There wasn't anything to mar the vision of a driver. It wasn't nothing to affect the vision. 30

By Mr. Gray:

Q. You were not driving any car, were you? A. No, sir.

Q. You noticed this truck particularly as you went past? A. Well, not particularly. But I noticed it. I looked in at the stand and I saw a lot of peaches on it.

Q. It was plainly visible, wasn't it? A. Well, the rea- 40

Leon Campbell—Direct

son it was plainly visible I was looking at the stand and that is why.

Q. And you could see there were peaches on it? A. I saw, as we got alongside of it. I didn't know if it was peaches or what until we got alongside of it. I saw there
10 was fruit in it.

Q. You are not certain about this maze or haze or mist. You just remember it? A. Oh, I remember it was a nasty night.

LEON CAMPBELL, a witness produced on behalf of the Plaintiff, being duly sworn according to law, on his oath, saith:

Direct examination by Mr. Strong:

20 Q. Mr. Campbell, what is your occupation? A. Light insurance salesman.

Q. What company? A. Provident Mutual and others.

Q. Of Philadelphia? A. Yes.

Q. One of the best known, is it not? A. Absolutely.

Q. Have you in your possession the life expectancy tables used by life insurance companies? A. I have.

Q. Are they standard ones? A. Used by practically all life insurance companies in the United States.

30 Q. Please turn to it and state what it shows to be the life expectancy of a youth nineteen years of age.

40 Mr. Gray: I object to this. The life expectancy is not the measure of damages, if any. This is a minor and they are only entitled, if anything, to the pecuniary loss, if anything, between the time of his death and the time he became of age, and not as long as he would live, and, therefore, I do not think that the mortality tables are proper in the situation of that kind. I therefore object to them.

Leon Campbell—Direct

The Court: Have you any authority for that?

Mr. Gray: No, but it seems to me the rule of law—

The Court: If you have not any authority for that proposition—

Mr. Gray: I am just advancing that as my theory of the law. 10

The Court: Your objection is overruled. You may take an exception.

Mr. Gray: I object further unless we are going to have the testimony of the expectancy of the life of the mother.

The Court: It will be stricken out unless the life expectancies of all are proven.

A. I have the book right here. I can tell you that. Do you want to have me read it from the book? 20

Q. Yes.

Mr. Strong: I think perhaps I had better put Mrs. Benning on the stand.

The Court: No. Let us finish with this.

A. The life expectancy of a youth nineteen years of age is 42.87 years.

Q. Also in a similar manner give us the life expectancy of a man in good health, fifty-nine years of age. A. The life expectancy is 14.74 years for a man of fifty-nine years of age. 30

Q. And similarly the life expectancy of a woman fifty-three years of age. A. That is 18.79 years.

Q. And similarly the life expectancy of a girl seventeen years of age. A. At seventeen the life expectancy is 44.19 years.

Q. And similarly the life expectancy of a girl twenty years of age. A. That is 42.2 years. 40

Q. Similarly a boy fifteen. A. Age fifteen life expectancy is 45.5 years.

Cross-Examination by Mr. Gray:

10 Q. Have you the figure the joint expectancy of these various individuals? A. The joint expectancy? I have not.

Q. Do you know what I mean by the joint expectancy? A. You mean averaging them up to see what the average age would be for the two.

Q. What did you say your business was? A. Life insurance.

Q. Actuary or what? A. I am not an actuary.

20 Q. What do you do in the insurance company? A. I sell life insurance.

The Court: Why take up the time?

Mr. Gray: I want to know if he knows—

The Court: How much attention does the jury pay to this kind of evidence anyhow?

Q. You have not the joint expectancy? A. No.

30 Mr. Gray: I ask it be stricken out unless we have the joint expectancy.

The Court: That is denied.

Mr. Gray: I pray an exception. That is all.

Mr. Strong: That is all.

ROBERT B. MORGAN, a witness produced on behalf of the Plaintiff, being duly sworn according to law, on his oath, saith:

Direct Examination by Mr. Strong:

40 Q. Mr. Morgan, where do you live? A. Plainfield.

Q. What is your occupation? A. Brokerage.

Q. Broker? A. Yes, sir.

Q. In business where? A. I am not in business now. Formerly 42 Broadway.

Q. New York City? A. Yes, sir.

Q. Were you in the car with Mr. Mehl, the witness who has testified here, on the night that Richard Benning was killed? A. Yes. 10

Q. Were you driving that car? A. Yes, sir.

Q. What was your first knowledge of the accident? A. When we came back and saw the cars parked.

Q. State what was the position of the truck with which the Ford had collided, what was the position of the truck with respect to the concrete roadway? A. Well, it was at an angle.

Q. At an angle? A. Yes, sir.

Q. State whether or not any part of the truck was on the roadway. A. Yes, I would say the left rear wheel was on, and the right rear was off. 20

Q. How far was the left wheel on about? A. Oh, I would say about three feet, two and one-half.

Q. Did you notice the position of the front wheels of the truck? A. No, sir.

Q. State whether or not the rear right wheel of the truck was on or off the concrete. A. It was off the concrete. 30

By the Court:

Q. How far? A. Say about a foot, sir.

Cross-examination by Mr. Gray:

Q. You didn't look at the front wheels at all- A. No, sir.

Q. When you saw this was when you came back? A. Yes, sir.

Q. You don't know what the situation was at the time 40

Robert B. Morgan—Cross

of the accident at all. A. Do you mean when we stopped did we know what was the matter?

Q. No. How the truck was standing at the time of the accident. A. No.

Q. You don't know anything about that. A. No.

10 Q. Did you notice whether the front wheels were up towards the stand at all, up against the stand or anything of that kind? A. No. I mean the truck was, I would say, almost opposite the stand as I remember it.

Q. Were there bright lights on the stand? A. Well, I would not call them bright, no. There were lights there; yes, sir.

Q. And the truck was plainly visible in the lights?

Mr. Strong: He did not say that.

20

Mr. Gray: I am asking him.

Q. Was the truck plainly visible in the lights of the stand? A. Why, yes, it was visible.

Q. And you drove past it before that, didn't you? A. I don't remember that. I was driving along in the middle of the road looking for another car and I paid no attention going by.

Q. How was the traffic that night? A. Pretty heavy.

30 Q. Well, you were not driving in the middle of the road, were you? You were driving on the right-hand side? A. Well, I was not directly in the middle, but I was quite a ways out from the side.

Q. But still you were on your right-hand side of the road. A. Oh, yes.

Q. And you had no difficulty passing this car or anything of that kind when you went up before. A. Well, I was nearer—I mean I must have had a good space on the other side.

40 Q. What is that? A. There must have been quite a good space between me and the truck.

Q. How near did you come to the car when you passed it? Did you notice?

Mr. Strong: He said he did not notice the car.

A. The truck? 10

Q. Yes. A. I didn't notice it going down.

Q. Then you didn't come near any truck a minute or two before when you were going past this place, did you?

The Court: He said he did not notice the truck as he passed it.

Mr. Gray: I want to know if he passed close to any truck.

The Court: We are interested in this truck. 20

A. I might even have turned out for that truck and not remember it.

By the Court:

Q. How far did you get away from this oil station where you subsequently found these two parked cars before you made your turn? A. Why, we turned at Stelton Road. I imagine that is about a half mile. I could not say for sure. 30

Q. When you were coming back how far were you away from these two parked cars before you saw them, when you were coming back. A. Oh, we were almost on top of them.

Q. Well, how far away? A. About fifty feet, I might say.

Q. And you didn't see them until you were within fifty feet of them? A. No, sir, because there were other cars coming along passing them going around like that. 40

Isidora Benning—Direct

Q. There were other cars passing around them? A. Yes, sir.

Q. So you didn't know that there had been an accident, a collision, until you had actually gotten up to the cars?

A. Until we got right to them.

10 Q. You could not see them because of these cars that were turning around them. A. Yes, sir.

By Mr. Strong:

Q. What sort of a night was it? A. Well, it was a hazy night, you might say. Visible. I think it was clear enough. I had no trouble in seeing.

Q. You took some of the injured to the hospital? A. Yes, sir.

20

The Court: That is all.

ISIDORA BENNING, one of the Plaintiffs, being duly sworn, according to law, on her oath, saith:

Direct Examination by Mr. Strong:

30 Q. You are the mother, Mrs. Benning, of Richard Benning the boy who was killed in this automobile accident? A. Yes, sir.

Q. How old are you? A. Fifty-three.

Q. How many children have you? A. Three

Q. What are their names? A. The oldest is Billy.

Q. Billy is a slang name isn't it? A. Yes.

Q. What is her real name? A. Wilhemina.

Q. Whilhemina is how old? A. Twenty.

Q. The next oldest. A. Sally.

Q. How old is Sally? A. Sixteen at the present time.

40 Q. Sixteen or seventeen? A. She is going on seventeen.

Isidora Benning—Direct

- Q. Have you a son Leonard? A. Son Leonard.
- Q. How old is he? A. Fifteen.
- Q. Is your husband living? A. Yes, sir.
- Q. He is living? A. He is living, yes.
- Q. How old is he? A. I think he is about fifty-nine,
something like that. 10
- Q. About fifty-nine? A. Yes. I am not positive though.
- Q. Your husband and children are all in good health,
are they? A. Yes, they are all in good health.
- Q. And is your husband living with you? A. No, he
is not.
- Q. Does he support you at all? A. He never supported
me.
- Q. When did he stop living with you? A. He stop
living with me about fifteen years ago.
- Q. No. But I mean when did he stop living in the same
house with you? A. Since— 20
- Q. With reference to your boy's death. A. The begin-
ning of March, first week of March.
- Q. With reference to the death of Richard when did
your husband stop living with you? A. Oh, he throw us
out of the house the night the boy got killed.
- Q. Drove who out of the house? A. My two children
and myself.
- Q. How do you support yourself? A. At the present
time my girl and I we are working. 30
- Q. Your daughter? A. And I.
- Q. Which daughter? A. Sally.
- Q. Is she in court here? A. She is right there.
- Q. What do you work at? A. We was working—I am
not working at the present time but I was work all the
while.
- Q. Why did you stop working? A. Because my health,
my eyes gave way on me.
- Q. Your eyes bother you? A. Yes. 40

Isidora Benning—Cross

Q. At the time your boy Richard, your son Richard, was killed how old was he? A. Nineteen years old.

Q. Nineteen years old? A. Yes.

Q. And what sort of a boy was he? A. He was a good boy.

10 Q. Was he or not in good health. A. He was in perfect health.

Q. What was he like physically, big or little, or strong or weak? A. He was a big, tall, strong boy.

Q. And at the time he was killed was he working at the time? A. He was working.

Q. And what was he earning a week? A. The average was forty-five dollars.

Q. Forty-five dollars a week? A. Yes.

20 Q. How long had he been working? How old was he when he first went to work, about, or nearly as you can tell? How many years before he was killed? A. How many years was he working before he was killed?

Q. How many years was he working before he was killed? A. From the time he was thirteen years old.

Q. What did he do with the money that he earned? A. He always hand it to me.

Q. He always gave it to you? A. Yes, he always hand me his pay envelope.

30 Q. Did your husband support you- A. Not for the last fifteen years.

Q. This money that Richard gave to you which he earned, what did you do with it? A. Take it to support me and the two children.

Q. Was your husband living in the same house at the time? A. Yes, he was.

Q. Did any of it go to your husband's support also? A. He supported himself. He bought his own meals separate.

Cross-examination by Mr. Gray:

40 Q. Mrs. Benning, at the time of the death of your son

Isidora Benning—Cross

your husband was living in the same house with you and had been all the time since you were married, practically, hadn't he? A. Why, no, not all the time.

Q. Well, for some time previous to the death he had been living in the house with you. A. He was living in the same house, yes. 10

Q. Do you own the house? A. We bought it, yes.

Q. You owned the house? A. Yes.

Q. Your husband bought the house, didn't he? A. No. My oldest son and I.

Q. How long had you had the house? A. Four years.

Q. Whose name was it in? A. In Dickey's and mine.

Q. But your husband lived there, didn't he? A. Yes.

Q. Occupied part of the house. A. Yes, he did.

Q. What did he do for a living? A. I think, but I am not sure, I think he is working in the Raritan Arsenal. 20

Q. Dickey worked in the Raritan Arsenal up to about a week before his death? A. Yes, he did.

Q. What was he getting in the Raritan Arsenal? A. Well, he was working piece work. Some weeks he brought home forty dollars, some weeks he brought home forty-five dollars, and sometimes fifty dollars, according to how much work he did, you know, it was piece work he was doing.

Q. Have you got any envelopes he brought home or anything? A. No.

Q. Did you tell your attorney Mr. Strong how much Richard earned? A. I did. 30

Q. What did you tell him? A. I told him the average was forty to forty-five dollars, sometimes less, sometimes more.

Q. Richard wasn't working at the Raritan Arsenal at the time he was killed, was he? A. No, he quit the week before that. He got a different job.

Q. How much was he going to get to that job? A. He was going to get started at forty dollars.

Mr. Gray: I want to offer in evidence the answer 40

Isidora Benning—Cross

10 to the bill of particulars signed by counsel for the plaintiff which indicates answer "As to earnings forty dollars a week which has not been paid; he had obtained this employment about a week before his death. For sometimes prior thereto he had been employed at the Raritan Arsenal earning twenty-five to thirty dollars every week, all of which he had contributed to his mother, the said Isidora Benning."

Q. Is that right? A. No, that is not right.

Mr. Gray: I offer this in evidence.

Mr. Strong: I have no objection to it going in evidence. I did the best I could with your interrogatories.

20 (Bill of particulars entered in evidence and marked "Exhibit D-1.")

Q. What did the oldest daughter do, Wilhemina? A. She was in New York. She was supporting herself there.

Q. Therefore Richard didn't give anything towards her support at all, did he? A. Well, at that time she was in New York supporting herself, yes.

Q. How long had she been working? A. About a year.

30 Q. And the other sister, what is her name? Her real name is Elita, isn't it? A. Yes.

Q. How old was she? A. When Dick got killed? She was fifteen then.

Q. Was she working? A. No. She was home.

Q. Is she working now? A. She is not working now.

Q. What is she doing now? A. Staying home with me.

Q. And the boy, he was going to school? A. Yes.

Q. Are you working now? A. No, not now, not at the present time.

40 Q. Is your husband working now? A. I think he is. I don't know. I don't know nothing about him.

Sally Benning—Direct

Q. Then there is no money coming in the house at all now? A. None whatsoever.

Q. Have you made any effort to have your husband contribute to your support, gone to court or anything of that kind? A. I did, yes.

Q. And still he does not give you any money? A. No. 10

Q. How long has it been since nothing has been coming in the house. A. For the last six months.

Q. You worked up until that time, did you? A. Yes.

Q. Doing what? A. I was working in a clothing factory, sewing.

Q. Did you work at all before Richard's death? A. No.

Q. Did you know this girl of Richard's these boys were going to see this night? A. Just slightly. Don't know nothing about her.

Q. Do you have a building loan on the house, or mortgage? A. I was paying it so long Dick was living. After Dick's death hasn't been paid a cent on it. 20

Q. Nothing has been paid on it since then? A. No.

Q. Any foreclosure or anything of that kind? A. No.

Q. How much did you pay for the house? A. \$5,500.

Q. How much mortgage have you got on it? A. And I paid \$200 down when I got the place and I been pay right along up to the time Dickey got killed.

30

SALLY BENNING, a witness produced on behalf of the Plaintiff, being duly sworn according to law, on her oath, saith:

Q. You were a sister of Richard Benning who was killed on the night of September last? A. Yes, sir.

Q. How old are you? A. Seventeen. That is, I will be seventeen in January.

Q. Do you know whether Richard was working or employed at the time of his death? A. Yes, he was. 40

Q. Do you know how much he was earning?

10 Mr. Gray: I object to that. I think they are bound by their answers to the pleadings in the case. It is set forth there he was making twenty-five to thirty dollars per week. That is just a week before the accident he had gotten a job at forty dollars, which had not been paid.

Mr. Strong: It is a difficult case. I did the best I could to get the facts. It says, "The earnings were forty dollars a week."

Mr. Gray: About a week before his death, which had not been paid. For some time prior thereto he had been employed at the Raritan Arsenal earning twenty-five to thirty dollars a week.

20 Mr. Strong: Yes. It is the future earnings, as I understand it.

The Court: I will allow this examination. Of course, there is nothing in the examination that is different from what is in your answer, that the jury can recognize. They have to go by the answers. You are concluded by them.

Mr. Strong: Surely. I am entirely satisfied they go in. The inference he is drawing from them that the witness had been—

30

The Court: Go on with your questioning.

(Question repeated by reporter.) A. Yes.

Q. How much was that? A. Oh, he was employed at the position he was at, at the time of his death, for forty dollars a week.

Q. He had been working for several years before his death, had he not? A. Yes.

Q. Do you know what he did with the money he earned?

40 A. Gave it all to my mother.

Sally Benning—Cross

Q. How did you know that? A. Because I saw him give it to her.

Mr. Strong: Cross-examine.

Cross-Examination by Mr. Gray:

10

Q. Out of this money which you say you saw him give your mother did he get any of it back? A. Well, he got money for his clothing that he needed, and his allowance for spending money.

Q. He had to get out of that money, he got some back from your mother for his clothes, for his spending money, and the mother paid for his meals out of that? A. Yes.

Q. His meals all came out of that. And his share of the house, he had a room to himself, did he not, in the house? A. He had a room that he shared with my other brother.

20

Q. That all came out of this money? A. Yes.

Q. Now, your father occupied a room in that house, did he not? A. Yes.

Q. And that house, as I understand, belonged to your brother, did it? A. And my mother.

Q. And part of the money that came in went towards paying for that house, part of it for him, did it not? A. Yes.

30

Q. Your oldest sister, she is working? A. She is not at present.

Q. She is not home, is she? A. She is home but she has been very ill for the past year and is not able to work.

Q. She was working at the time of the accident, wasn't she? A. Yes.

Q. And your father was working at that time. A. Yes.

Q. And had worked steadily before that? A. Yes.

Q. And still you say he contributed nothing to the household? A. Absolutely nothing.

40

Sally Benning—Cross

- Q. Did he contribute anything to you? A. No.
- Q. Did you ever ask him for money? A. No, because I knew it would not do me any good to ask him for it.
- Q. How did you live before Richard went to work?
- 10 A. Well, at that time we were going to school and my mother was working.
- Q. Your mother was working? A. Yes.
- Q. When did she stop working? A. Well, she had never stopped until she was unable to work.
- Q. Then at the time of Richard's death she was working? A. No, she was not working.
- Q. How long before that had she stopped working?
- A. Well, she had been to the shore all summer and worked as cook there and she just came home that same week that Richard was killed.
- 20 Q. And that was in November when the shore season was over, wasn't it? A. In September.
- Q. And all that summer up to the week before Richard was killed your mother had been working, hadn't she, and supporting herself? A. Yes.
- Q. Do you know what her wages were as cook? A. No. She never told me anything about it.
- Q. What is that. A. She didn't tell me.
- Q. Did she live home when she was working down at the shore cooking? A. No.
- 30 Q. How do you know that Richard gave her the money if she wasn't home for you to see it? A. Because he went to the shore every week end and I went with him and saw him give it to her.
- Q. How did you get down, in the car? A. Yes.
- Q. Who had the car? A. A friend of ours.
- Q. Who paid the bills at the home when your mother was down at the shore? A. My brother.
- Q. Did he give the money to his mother and then get it back to go pay the bills? A. Yes, she gave him whatever
- 40 was needed while she wasn't home.

Sally Benning—Re-Direct

Mr. Gray: That is all.

Re-Direct Examination by Mr. Strong:

Q. As between your father and mother whose part did Richard take? A. Well, naturally he took my mother's part. 10

Q. And the night he died your father drove you all out of the house?

Mr. Gray: I object to that.

The Court: What has that to do with this case?

Mr. Strong: I think it shows, for one thing, the relationship of—

The Court: It may show a mistrial. It has nothing to do with this case at all. The relationship between the husband and the wife, so far as their feeling toward one another is concerned. 20

Mr. Gray: I think really, your Honor, I ought to have a mistrial.

The Court: What are you talking about?

Mr. Gray: I do. I think he put it in knowing it had no business, but only for a question of sympathy.

The Court: I do not want any more talk along this line. Go on with your case. 30

By Mr. Strong:

Q. Do you mean to say Richard paid for his room in the house? A. Well, there was never anything in our house—my mother never demanded board because she didn't believe in that. She believed in the family that everything is just the same. My mother never demanded board.

Q. She never what? A. Never demanded board from 40

Motion for Nonsuit

either of us, if we were working, but my brother, it is his own mother, and he gave it to her out of his respect for her.

Q. What sort of work did you say your mother did before Richard was killed? A. Well, that summer she worked for about a month, probably two months, she did cooking at the shore.

Q. For whom? For some family? A. Yes.

Q. Did she or not work for anybody else before that time? Who supported your mother, how was your mother supported?

Mr. Gray: I think that is a conclusion.

Mr. Strong: I think that is right to straighten this matter out.

The Court: We have covered the whole of it.

20

A. By my brother.

30

Mr. Strong: That is all. There is only one feature of the case, it does not seem to be very important. If it is, in your Honor's opinion, I would like to correct the age—I would like to offer further proof of the life expectancy by introducing the insurance witness here to show Sally's age was seventeen, instead of sixteen. That could be done, I suppose, at almost any stage of the case.

The Court: Anything else?

Mr. Strong: We rest.

Motion for Nonsuit

40

Mr. Gray: I respectfully move for a nonsuit. There has been absolutely no proof of any negligence on the part of the defendants here.

Frank Blue—Recalled

The testimony was that the parked car was parked partly on the concrete and partly off, and no violation of any law or no negligence whatsoever. They could park entirely on the concrete and still be within the law as long as they pulled it to the edge of the road. 10

Testimony of their own witness was that this truck was plainly visible, they had no difficulty in seeing; the driver of the other car says that he didn't see it until he was two or three feet in back of it, that his lights were bright.

It seems to me clearly that the negligence is there on the part of the driver of the other car which we have pleaded; we have pleaded a joint enterprise, that the boys were all out on this trip together and therefore any negligence on the part of the driver is attributable to this deceased. That is the second ground. The first ground being that there is no proof of any negligence whatsoever. 20

The Court: I will hear your.

(Mr. Strong replies in opposition to the motion.)

Mr. Strong: Citing case *Sussex*, 142 *Atlantic*, page 437 in an action for damages. (Reading.) 30

FRANK BLUE, recalled.

By the Court:

Q. You were the owner of this car you have testified to? A. Yes, sir.

Q. How was it that you were all in this car at the time of the accident? A. Well, I went down to visit some friends in Metuchen. 40

Frank Blue—Recalled

Q. Who was with you when you went there? A. Mr. Sutton and Mr. Crenner.

Q. Mr. Sutton and Mr. Crenner were with you? A. Yes, sir.

10 Q. So that you started out that night with Mr. Sutton and Mr. Crenner. A. Yes, sir.

Q. And went to Metuchen? A. Yes, sir.

Q. Why did you go to Metuchen? A. I went there to visit a friend of mine there and he wasn't home so we came back.

Q. You came back and went where? A. To Benning's house.

20 Q. Why did you go to Benning's house? A. Because we heard Dick was home. I heard Dick was home, over in town, and I heard his mother was home from the shore so I went over to visit him because they were real good friends of mine and while we were over there Dick said he wanted to go down and meet his girl.

30 Q. Yes. A. So I said I would take him down. So on the way down we had a flat tire and I tore my breeches and we went to this place first of his friend's, his friend's house where they was having this farewell party for his mother, and I didn't want to stay around there with my breeches tore, so I came back. I asked Dick if he had an extra pair of pants at home that I could wear until I got my own fixed. And he said yes. So from there we went back to his house and he loaned me a blue suit of his own, and from there we went to the Lincoln Diner in Highland Park. That is right at the point of the road there. And from there—he decided it was five minutes to eleven or was near eleven o'clock, and his girl gets out at eleven o'clock, and figuring by the time he got over there she would be out and gone, so he called up just in time to tell her that he wasn't going over to meet her that he was going over to these here people's house to bid his mother good-

40 bye and everything. So we went back to this house and

Frank Blue—Recalled

we stayed there until twelve or a quarter after twelve, I don't know exactly what time it was.

Q. Is that the same house that he asked you to bring him to in the first place? A. Yes, sir. And we stayed there until it broke up, and we was coming home and we come out of his road—

10

Q. That is all right. I wanted to know how you were together or why you were together. Then, as I understand it, you started out this night with two other men. A. Yes, sir.

Q. To see somebody in Metuchen and you werent able to see them and you went to see your friend Benning. A. Yes, sir.

Q. You had heard his mother who had been working along the shore had returned home and you wanted to see her also because you were good friends. A. Yes, sir.

20

Q. And that when you met him you were asked by Benning to bring him over to see his girl. A. No. He said he had to go down to meet his girl and I said I would take him down. He wanted to go down.

Q. I thought you said when I called you back here that he asked you to take him there. A. Well, no. He just said that he was going down to see his girl and I asked him if he wanted me to take him there and he said yes. So instead of going down right to see his girl he went over to these friend's house first.

30

Q. Why, A. Well, I don't why.

Q. Who changed that? A. He did.

Q. How? A. I dont' know that.

Q. Why did you go over there? A. Because I was driving the car and he was in my car.

Q. Why did you go over there? A. Because he asked me to.

Q. And then at the time of the accident you were going back to the same place that he had asked you to bring him

40

Frank Blue—Recalled

to in the first place, is that right? A. Why, no. We were going home at the time of the accident.

Q. You lived where? A. He lived in Stelton and we was taking him home.

10 The Court: That is all.

Mr. Strong: They were going—they were taking—

The Court: What is the argument about now? Have you any questions to ask this witness?

By Mr. Strong:

Q. State whether or not you had offered to take Richard home. A. Why, no.

20 Q. You were taking him home at the time? A. Yes, sir, at the time of the accident.

Q. Whatever you had started to do earlier in the evening you were at the time of the accident taking him to his home, is that right? A. Yes, sir.

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

Mr. Strong: I submit there is no evidence of any joint enterprise.

30

By Mr. Gray:

Q. You were taking him home from a place where you had asked him to take him.

The Court: You are repeating something that has been said.

Mr. Strong: I would like to submit some authorities on the question of joint enterprise this afternoon after recess.

40

Daniel Herbert—Direct

The Court: It is not a case of joint enterprise, Senator. It is worse so far as your side is concerned. This young man was the servant and agent of your client. He was taking him at your own client's request. Your client was not an invitee in that car. His friend the driver and owner of the car was bringing him around to just where he had requested him to bring him. 10

ADJOURNED UNTIL 2:00 P. M.

AFTERNOON SESSION 2:00 P. M.

The Court: The motion for a nonsuit is denied. You may take an exception. 20

DEFENDANT'S CASE

DANIEL HERBERT, one of the Defendants, being duly sworn according to law, on his oath, saith:

Direct Examination by Mr. Gray:

Q. Mr. Herbert, you were the operator of this truck on the night of this accident, were you not? A. Yes, sir. 30

Q. And you are a son of Mr. Herbert who owned the truck? A. Yes, sir.

Q. What kind of a truck was this, Mr. Herbert? A. Clinton.

Q. Is it a rack truck or a closed truck? A. Yes, it is a rack body.

Q. Just what do you mean by a rack body? A. Well, it has a rack on each side and there is no front, there is no tailboard onto it of any kind. 40

Daniel Herbert—Direct

Q. Now, with reference to the floor of the body of the truck, is that perfectly level and parallel with the street or does it bend down a little? A. It is level.

Q. Now, what system of lights do you have on the truck? A. Regular electric.

10

Mr. Strong: I object. What lights were on it at the time of this accident.

The Court: That is what is meant.

A. Regular electric light equipment.

Q. How do you put on the tail light on this truck?

Mr. Strong: I object. It should be confined to the condition of the truck at the time of the accident.

20

The Court: Objection is overruled. He asked how it is done. He is asked the explanation of the mechanism as of the time of the accident.

A. With the light switch. It all works on one. The head and tail light works together.

Q. That switch that you put on the lights with is located where on your car? A. Right on the dash board.

Q. Where is the tail light on this car? A. It sets about not quite two foot under the rear of the body.

30

Q. That is, you mean from the end of the body in to where the tail light is? A. it is not quite two foot.

Q. And how far below the body of the truck is this light placed? A. About sixteen inches.

Q. And it is attached to the truck in what way? A. Well, the light sits on an "L" iron. The iron is fastened to the chassis and runs down and over and also the license plate sits on the same "L" iron.

40

Q. What part of the body with reference to the left side or the center or the right is this light? A. Sits to the left.

Q. Do you know how far it is from the extreme left-hand side of the body? A. Not exactly. About eighteen inches.

Q. How long had you had this truck at the time of the accident? A. About two years.

Q. The night this accident occurred where did you go, first with this truck? A. Where was I? 10

Q. Yes. A. I was to Metuchen with a load of peaches, just the other side of the bridge in Metuchen.

Q. What time did you start to Metuchen with this load of peaches? A. About six o'clock.

Q. What did you do at that time with reference to your lights? A. Why, at that time the lights were all right, they all lit and was all right.

Q. Now, when you got to Metuchen did you notice whether your tail light and your front lights were burning? A. They were all burning. 20

Q. Did you unload the peaches yourself in Metuchen? A. Yes, sir.

Q. What time was that that you unloaded them? A. That was about between 9:30 and 10:00 when I was unloading.

Q. And as you unloaded these peaches did you take them from the rear of the truck? A. Yes, sir

Q. Did you have occasion at that time as you were taking these peaches from the rear of the truck to notice whether the tail light was burning? A. Not at that present time. I was on the truck. 30

Q. Did you notice while you were in Metuchen at all whether your lights were burning, your tail light? A. They were burning when I got off to untie the load, yes, sir.

Q. After you came back from Metuchen what did you do? A. I stopped at Mr. Baumgartner's, he had the peaches ordered, and we had made arrangements for him to ride out with me and help load them. 40

Daniel Herbert—Direct

Q. Did you at that time notice whether your tail light was burning or not? A. Not at that present time.

Q. Then where did you go after you got Mr. Baumgartner? A. I went out to the farm.

Q. When you got out to the farm what did you do?
10 A. Well, I handed the peaches on to Mr. Baumgartner and he loaded them.

Q. That is you were on the ground in back of the truck? A. Right in back.

Q. And Mr. Baumgartner was up in the truck receiving the peaches. A. Yes, sir.

Q. Well, did you have occasion while you were doing that to notice whether your tail light was burning? A. The tail light was burning in its proper position.

Q. Did you notice the position of it? A. Why, it was
20 set so anybody could see it coming from the rear.

Mr. Strong: One minute. I object to that. He cannot say whether anybody could see it or not.

The Court: Just tell us how it was set.

Q. How was it set at that time? A. It was set so—well the iron things was sprung on it and there was no bends in it in any way.

Q. The light was shining in what direction? A. To-
30 wards the rear of the truck.

Q. When you got to Baumgartner's did you have occasion then to look at the tail light before this accident happened? A. No, I did not.

Q. Well, had you had any accidents or anything of that kind before you got to Baumgartner's? A. No, sir.

Q. Put out your light or bend the bracket? A. No, sir, never had a word about the lights.

Q. After you got to Baumgartner's what did you do with reference to your truck? A. I untied the rope.

40 Q. Well, now, first, what did you do with your truck?

A. Why, I pulled up along about halfway off of the war-
ranite road.

Q. Why did you only pull halfway up? A. Well, there
was a little washout about ten or fifteen feet below his
place and I was afraid of upsetting the peaches if I
pulled in any sooner. 10

Q. You did pull up as close as you could with the
truck, did you, to the stand? A. As close as I could get
in there from that distance, yes sir.

Q. On account of the ditch? A. That is it.

Q. Was Mrs. Baumgartner out to the farm with you?
A. Yes, sir.

Q. Where did she set on the truck as you came in?
A. She was on the front seat with her small child.

By the Court:

20

Q. With a small child. A. Yes.

By Mr. Gray:

Q. What did you do after you got there? Did Mrs.
Baumgartner get off? A. I don't think she did. She sat
on the seat.

Q. What is that? A. She was on the seat while we
loaded the peaches. 30

Q. I mean after you got to Baumgartner's. A. Oh, she
went inside and lit the lights.

Q. What lights were there at Baumgartner's stand?
A. There was a light inside, and there was a lot of lights
along the gas tank, along in front of the stand.

Q. On the sign? A. On the sign.

Q. And these were electric lights? A. Electric lights.

Mr. Strong: I object to leading. There was some
testimony as to oil lights. He is leading this wit- 40

ness all the time and I don't like to object because it wastes time.

By Mr. Gray:

- 10 Q. How many lights would you say were there? A. I would say between twelve and fifteen good bright lights.
- Q. And how long had you been there when the accident happened? A. Between five and ten minutes.
- Q. Where was Mr. Baumgartner on the way over from the farm? A. Sitting on the rear of the truck.
- Q. Had he gotten off the truck when the accident happened? A. Yes, sir.
- Q. Do you know how long he had been off? A. Well, long enough to open the door where he intended to put the peaches.
- 20 Q. Had you gotten off the truck? A. I was. Had it all untied.
- Q. Did you have to untie the rope so that Baumgartner could get off? A. He was tied—the rope was tied around the outside of him to hold the other baskets.
- Q. Where were you standing at the time of the accident? A. About ten foot from the—about eight foot from the rear on the right-hand side of the back of the truck.
- 30 Q. Were you in back of the truck or were you alongside of the truck or where? A. I was right in back of it about ten feet away from it, eight or ten.
- Q. Did you notice whether the tail light was burning at that time or not? A. I didn't notice at that present time.
- Q. Did you notice at all while you were at Baumgartner's whether the light was burning. A. At Baumgartner's?
- Q. Yes.

Daniel Herbert—Direct

Mr. Strong: He said he didn't He said he didn't look at the tail light again.

The Court: At that time he said.

Mr. Strong: This is shamefully leading all the time.

10

A. The light was lit when I left home and when I got to Baumgartner's I did not notice it but as soon as the accident occurred I seen it still burning.

Q. Did you see this Ford before it came in contact with your car? A. Yes, I did. I seen the lights.

Q. About how far away did you notice it? A. Well, possibly four or five hundred yards.

Q. Coming towards your car? A. Going the same direction as I was standing.

Q. Well, now, did you watch it until it came in contact with your car? A. I didn't take any particular notice of it.

20

Q. Well, did you see the actual impact between the Ford and your truck? A. Yes, as soon as it hit.

Q. Were you looking at it at the time or was your attention attracted at the time? A. No. I was watching Mr. Baumgartner at the present time, and when I heard the noise, heard that drew my attention.

Q. And when your attention was drawn, Mr. Herbert, what did you see? A. I couldn't see nothing but smoke for a few seconds, or dust, rather, I imagine.

30

Q. After the dust cleared away what did you see? A. I seen this Ford tied up under the rear of the truck.

Q. Well, now, explain what you mean by this Ford tied up under the rear of the truck. A. Well, it ran right into the wheel, the headlights and the chassis of the frame were right in between the chassis and the wheel of the truck, and was in there up past the back wheel. Jambled in past the back wheel right underneath it.

Q. Was this under all the truck or under one side of it

40

Daniel Herbert—Direct

or what? A. It was under the left-hand side of the truck.

Q. Is that the side where the light was? A. Yes, sir.

Q. Did you notice whether or not any portion of the Ford was near the light bracket? A. Why, it was.

10 Mr Strong: There is a leading question again. I object.

The Court: You are leading.

Mr. Gray: I am sorry, your Honor. I will try to avoid it.

A. The Ford was right up under the light, the light bracket rather.

20 Q. Did you notice the condition of the light bracket after the accident? A. Yes. It was bent. The bracket was bent so it shone toward the ground. Not extremely on the ground but it was bent quite a little.

Q. What was the condition of the light? Was it burning or was it not burning? A. Still burning.

Q. And how soon after the accident did you notice it? A. Immediately.

Q. And was the Ford still entangled with your car at that time? A. Yes, sir.

30 Q. Well, then, what happened? Did any police officers or anybody come along then or any mechanics or what? A. It was only a very short time when the police were there and they got Mr. Taylor to tow the wreck out from under the truck.

Q. What police officers were there? A. Why there was two from Raritan Township on the scene and later a state trooper came.

Q. Were there any marks on the underneath part of the Ford other than those already described? A. The underneath part of the Ford?

40 Q. Of your truck I mean. A. Why, there is marks

that still show on the chassis and on the irons that run under there—

Mr. Strong: I object.

A. (Continuing)—right where the— 10

Mr. Strong: I object. The truck itself is the best evidence of what shows now on it.

Mr. Gray: I have it out in front if your Honor and the jury would like to examine it. It was brought down for that purpose.

The Court: He is being asked what was the condition of the truck after the accident, and if he knows it is perfectly competent for him to testify. 20

By Mr. Gray:

Q. How long did you stay there, Mr. Herbert? A. Why, I stayed there until the wreck was gone and then I pulled my truck around off of the street and alongside of Mr. Baumgartner's dog coops, I believe it is, and from there I went—I was taken rather to the Raritan Township Police Headquarters.

Q. What garage man took the cars apart? A. Mr. Taylor. 30

Q. Were you there? A. Yes, sir.

Q. How soon after the accident was this? A. Why, probably fifteen to twenty minutes.

Q. Had the cars been moved at all between the time of the accident and the time the garage man got there? A. Very little.

Q. In what way had they been moved? A. Well, mostly from the jar of the accident.

Q. Well, I mean after they once settled from the time 40

of the accident were they moved? A. About four foot after the officers had told me to go ahead.

Q. Now, between the time of the accident and the time the officers got there had either of the cars been moved? A. No, sir.

10 Q. Is the car in the same condition today as it was then, the lights in the same relative position? A. Same equipment of everything. There has nothing been put on new.

Mr. Gray: That is all.

Cross-Examination by Mr. Strong:

20 Q. Why did you immediately look at the light? A. Well, I thought it would be a benefit to me if the light was still burning.

Q. Well, you looked at it at your home. A. Yes, absolutely. I couldn't very well help it. I was handing the peaches right on from the back of the truck and there was a light bright enough that it was noticeable.

Q. Did you look at the boy that had been injured at all? A. What is that? I seen him laying on the sidewalk.

30 Q. Your first thought was of the tail light? A. I noticed that tail light burning before he was even moved from the wreck.

Q. That was the first thing you looked at, the tail light? A. As soon as I glanced up and the dust was gone I noticed the tail light was burning.

Q. The minute the dust cleared away you glanced at the tail light? A. Yes, sir.

Mr. Strong: That is all.

40 Q. You said after you had stopped at Baumgartner's you saw that the light was burning? A. Not until after

the accident. I didn't notice the light. I noticed it at home when I was loading up, handing them on from the rear of the truck I seen that light was burning and was there in its right position.

Q. And you didn't see it again until after the accident?

A. Not until after the accident I did not notice it. 10

Q. What do you say about the assertion of Baumgartner that one of the reasons why the rope was on the rear of the truck was so that it would secure his safety in sitting in the rear of the truck? A. Well, he had a very small place to sit, and another reason that I couldn't have very well tied the back tier of baskets unless I drew it around the outside of him.

Q. Where was this light located so far as the width of the truck was concerned? A. Why, about eighteen inches from the left side. 20

Q. Left-hand side as you are going? A. Yes.

Q. How far off the concrete were you parked? A. About center way of the truck.

Q. About how wide is your truck? A. It is five feet ten over all.

Q. And you were about halfway on the concrete and halfway on the dirt shoulder, is it? A. Yes, it was a dirt shoulder at that time.

Q. How were you parked with reference to the side of the road? A. I was parked very nearly straight within line of the road. 30

Q. Very nearly parallel with the street? A. Wasn't over an inch or two difference at the most from the front to the rear of the truck.

The Court: That is all.

By Mr. Strong:

Q. I thought you said awhile ago that your truck stood 40

Edward J. Minew—Direct

at an angle with the concrete. A. I didn't say that. I don't remember saying it was at an angle.

Q. You don't remember saying that? A. No, I do not.

Q. You say now, do you—

10 The Court: He says he never said anything different before.

EDWARD J. MINEW, a witness produced on behalf of the defendants, being duly sworn according to law, on his oath, saith:

Q. Officer, what is your occupation? A. Patrolman.

20 Direct Examination by Mr. Gray:

Q. What municipality? A. Raritan Township.

Q. Do you remember the night of this accident, Officer?
A. Yes, sir.

Q. Were you called to the scene of the accident? A.
Yes, sir.

30 Q. Do you know how you happened to be there? A.
Yes, I was called by 'phone at the Metuchen headquarters that there had been an accident in front of Jack Baumgartner's.

Q. And you went right down there? A. Yes.

Q. Now, Officer, when you got there what did you find? A. I found that a Ford sedan had smashed into the rear end of a truck.

Q. Did you notice what kind of a truck it was? A.
Yes, sir; a Clinton make.

Q. Was there anybody hurt? A. Yes, sir.

40 Q. Well, what did you do when you got there and found it? A. Why, Officer Grandjean was with me at the time, we both got there as quick as possible, and we got out of

the car and we both went to the front of this store, and I was informed at the time that one man was dead, and Officer Grandpean said to me, he said—

Mr. Strong: I object to what was said.

The Court: Not what was said, Officer.

10

Q. What did you do? A. Why I ordered the car of Mr. Morgan with the three injured and went to the hospital.

Q. When you got there where was the truck with reference to this Jack Baumgartner's stand? A. In front of Jack Baumgartner's store.

Q. Did you notice what the lighting conditions were at that time? A. No, I didn't.

Q. I mean, on the stand at all. A. Yes, the stand was lit up fully.

20

Q. You paid no attention to the lights of the truck, you say? A. No.

Q. Why not? A. Because I was—Officer Grandjean said he would take care of one part and I would take care of the injured.

By the Court:

Q. When you got there what was the relation of the truck to the Ford automobile? A. Why, the Ford was jambed under the left rear of the truck.

30

Q. Were they still fastened together. A. Yes, sir.

Q. And what was the position of the Ford truck with reference to the side of the road? A. Ford truck?

Q. Yes. A. Do you mean the Clinton truck?

Q. I mean the Clinton truck. A. The truck was practically—the two right wheels, the right front and rear was off the pavement about half and the truck was diagonally straight with the pavement.

40

Q. Do you mean parallel? A. Or parallel, I should say.

Q. Almost parallel? A. Yes, sir, positively.

By Mr. Gray:

10 Q. How far up under the truck was the Ford sedan?

A. Why, it was on a diagonal like that, I should judge it cut right under the body of the truck and came out right alongside of the wheel going into the body.

Q. On the left-hand side or the right-hand side or what?

A. Right-hand side striking the left rear of the truck.

Q. Striking the left side of the truck.

Mr. Gray: I think that is all.

20 Cross-Examination by Mr. Strong:

Q. What part did you say the truck was on? It extended over onto the pavement? A. I should judge about half. Half off the shoulder of the road.

Q. What was the width of the truck? A. Why, between, I should say, it about five to six foot.

Q. Have you not stated that the truck was off the pavement with the exception of about fifteen inches? A.

30 Did I make that assertion? I don't believe so.

Mr. Strong: That is all.

Re-Direct Examination by Mr. Gray:

Q. Officer, did you take particular notice of the weather that night? A. Yes, clear. Stars were shining.

Q. And visibility was good? A. Yes, sir.

40 Mr. Strong: There is a leading question.

Charles Grandjean—Direct

- Q. Did you make any report of the weather conditions?
 A. I did.
 Q. Have you got that report with you? A. Yes, sir.
 Q. Can you remember what you said without referring
 to the report? A. Yes, sir.
 Q. What did you say in the report? 10

Mr. Strong: I object.

The Court: Objection sustained. He says it was
 a clear night, visibility good, stars shining.

Mr. Gray: That is all.

CHARLES GRANDJEAN, a witness produced on be-
 half of the Defendants, being duly sworn according to law,
 on his oath, saith: 20

Direct Examination by Mr. Gray:

- Q. You are a police officer? A. Yes, sir.
 Q. Where? A. Raritan Township.
 Q. Were you at the scene of this accident on the night
 of the accident? A. Yes, sir.
 Q. In company with whom? A. Officer Minew.
 Q. How did you happen to be there? A. Metuchen
 headquarters, when the call come in there was an acci- 30
 dent in front of Baumgartner's stand there.
 Q. And you went down there? A. Yes, sir.
 Q. How did you go down? A. In the police car.
 Q. About how far away from the scene of the accident
 is Metuchen headquarters? A. I should judge about two
 and one-half miles.
 Q. Have you any idea how long it took you to get there
 after the telephone message came in? A. Between five
 and ten minutes.
 Q. Now, when you got there what did you find? A. 40

Charles Grandjean—Direct

Found the Ford sedan run under the rear end of the truck.

Q. Were there any lights on the stand? A. What stand have you reference to?

Q. The Baumgartner stand. A. Yes, sir.

Q. What lights were there? A. Electric lights.

10 Q. Have you any idea how many? A. I haven't the slightest idea.

Q. Did you notice the position of the Ford sedan and the truck? A. I did.

Q. Now, what were they with relation to each other? A. Why the right front of the Ford sedan was under the left rear of the truck.

Q. How far under the truck was the Ford sedan? A. Up to the windshield of the Ford sedan.

20 Q. And how far would that take it under the truck up to the chassis? A. It was beyond the end of the chassis. It was diagonally across in that manner.

Q. Did you notice on the truck whether there was a light, electric light, or light of any kind? A. Yes, sir.

Q. Where was this light attached to the truck, if you noticed it? A. On the end of the chassis.

Q. Can you explain how it is attached to the end of the chassis? A. No more than whether it is well out, I don't know.

30 Q. Well, is it right on the chassis itself, or fastened onto the chassis? A. It is fastened right on the end of the chassis. The chassis is approximately four inches thick and it is fastened onto the chassis.

Q. The light itself? A. The light and plates is fastened there.

Q. Any brackets or anything on the light? A. There was a small arm bracket.

Q. Did you notice whether that light was burning when you were there or not? A. It was.

40 Q. Did you notice whether the bracket was bent or not? A. Slightly tilted from the bottom in, in that manner.

Charles Grandjean—Direct

Q. And was the Ford anywheres near any part of this bracket? A. I didn't examine it that close.

Q. Were there any marks on the chassis or any other part of the truck anywheres near the light?

Mr. Strong: I think it is all wrong to lead the witness that way. I do not like to object. 10

The Court: He can be asked what was the condition.

Q. What was the condition of the chassis with reference to any marks that might have been around the back there?

The Court: That is just as bad as a leading question. 20

By the Court:

Q. What did you see about the condition, Officer? A. Of the truck?

Q. Yes. A. The truck was scraped and the spokes of the wheels was broke.

Q. What part was scraped? A. The chassis and the body of the truck underneath.

Q. This truck had a rack body, didn't it? A. Rack body. 30

Q. How far did the rear of the rack extend beyond the wheels? A. I can't quite understand.

Q. What was the overhang of the rear as compared with the wheels? A. Well, the chassis extends beyond the wheel and the body extends beyond the chassis again.

Q. Well, how far did the body or rack extend beyond the chassis? A. I should judge about two feet.

Q. And that was how far from the wheel, in the rear of the wheel? A. The chassis from the wheels? 40

Charles Grandjean—Cross

Q. No. That rack, the part that is a part of the body, how far was the farthest part of the body away from the nearest part of the rear wheels? A. Well, I should judge about two and one-half to three foot.

10 By Mr. Gray:

Q. What was the condition of the weather that night?
A. Clear.

Q. Did you stay there while the automobiles were taken apart, separated? A. Yes, sir.

Q. What was the condition of the Ford? A. It was, I would say, completely smashed up, the front.

Q. Do you know who separated the truck and the Ford?
A. Taylor's garage, well, Taylor himself with the assistance of one or two other people around there.

20 Q. Do you know how he happened to come there? A. Why, he was called up. By whom I don't just recall.

Q. You say that this bracket was slightly tilted. Was the light still burning? A. Yes, sir.

Q. Was it visible from the back? A. Yes, sir.

Q. How was the truck standing with relation to the concrete? A. Parallel with the road, half on the dirt shoulder and half on the concrete.

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Mr. Gray: That is all.

Cross-Examination by Mr. Strong:

Q. How long after the accident did you say you got there? A. I should say between five and ten minutes.

Q. How far were you away? A. At Metuchen, between two and two and one-half miles.

40 Q. Have you ever said that you got there about fifteen minutes after the accident? A. Well, I may have said

Frank Taylor—Direct

that. I am very sure I didn't say any specified time. The exact time I don't know. I didn't time myself.

Mr. Strong: That is all.

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FRANK TAYLOR, a witness produced on behalf of the Defendants, being duly sworn according to law, on his oath, saith:

Direct Examination by Mr. Gray:

Q. Mr. Taylor, what is your occupation? A. Garage proprietor.

Q. How long have you been a garage proprietor? A. About twelve years. 20.

Q. Where were you located September, 1927? A. Lincoln Highway and Duclos Lane, Raritan Township.

Q. Were you called to the scene of an accident in front of Jack Baumgartners stand one night in September last? A. Yes, sir.

Q. Do you know how you happened to go there? A. How I happened to go there?

Q. Yes. Who made the call? A. Mr. Baumgartner called me. 30

Q. How far from the scene of the accident is your place of business? A. Quarter of a mile.

Q. And you went up there in your car? A. Yes, sir.

Q. When you got there what did you find, Mr. Taylor? A. Found a Ford sedan run under the back of a truck.

Q. What kind of a truck was it? A. Clinton.

Q. Did you separate the two cars? A. I did, yes, sir.

Q. Did you have to get underneath the truck to— A. Why, I undertook to pull the Ford away from the truck but it was fast so that it would not go, so I asked the 40

driver to pull ahead, and I held the Ford, and then it naturally broke.

Q. Well, now, did you notice the condition of the light on the truck when you got there? A. I couldn't say. The Ford sedan was into it.

10 Q. Now, when you pulled the Ford sedan away from it what did you see? A. Mr. Herbert asked me if I had a bar to bend the light back in shape, and I helped him to do it.

Q. What condition was the light in? A. Bent down towards the ground.

Q. Completely, or partially, or what? A. Well, it was bent down, so that we bent it back, why we noticed the light was there.

20 By the Court:

Q. Do you mean the lighted light? A. The light was lit; yes, sir.

Q. Still lit? A. I made the remark of it being lit.

By Mr. Gray:

Q. Will you describe how the light was attached to this truck? A. Why, the light is bolted to the chasis in the back with an "L" iron about six inches long.

30 Q. What did you have to bend back? A. The bracket, the "L" iron.

Q. Did that give any indication of having been struck by anything recently? A. Well, that I don't know.

Mr. Strong: One minute. I object. I think that is all wrong. It is not cured by changing the question either. The witness knows what is wanted now.

40 The Court: Go on.

Frank Taylor—Direct

A. The Ford run under the side the light was on, and the light was bent. Now, whether the Ford done it or not I couldn't tell you.

Q. The Ford was under it on the side where the light was? A. The Ford was under.

Q. How far under it was the Ford? A. Until it hit the body. The whole chassis went under it. 10

Q. And the light was nearer the Ford than the body, wasn't it?

Mr. Strong: I object.

The Court: Objection sustained. Now, stop that.

Q. Where was the light with reference to the chassis and the Ford as the Ford approached it? A. I don't quite understand you. 20

Mr. Gray: I will withdraw the question.

Q. Did you examine any part of the truck immediately after the accident? A. Yes. Mr. Herbert asked me would I lend him a bar to bend the light bracket, and I got a bar out of the service car and helped him do it.

Q. What, if anything, did you find with reference to the condition of the rear of the truck immediately after the accident? A. Why, the left-hand side of the rack body was broke, and to tell you the truth, it was dark, I didn't examine underneath, but the left-hand side of the rack body was broke. 30

Q. What was the condition of the Ford? A. Total wreck.

Q. Did you notice the weather conditions? A. Clear.

Q. Did you notice the condition of the truck with reference to the concrete? A. Well, the front of the truck was half on and half off, but the back was pushed out a little 40

bit, a very little. You would hardly notice it unless you took particular notice of it.

Mr. Gray: I think that is all.

10 Cross-examination by Mr. Strong:

Q. You are a friend of the defendant, I think. A. No, sir, I am not.

Q. Your wife is? A. Not as I know of.

Q. Not acquainted with them either? A. I don't know who her friends is, or anything about it.

Q. What? A. I don't know who her friends is. You don't either.

20 Q. You never said to anybody that she was there. A. Not that I know. Do I know them? Know them from seeing them being around the garage at different times.

Q. Did you ever say your wife was a friend of these defendants, Messrs. Herbert? A. She probably is, as far as I know. I don't remember ever calling on them.

Q. Did you say to anyone since the accident that you saw this Ford in back of your garage and the motor was ripped out and apparently not damaged. A. Did I say?

Q. Yes. A. After the car was in back of the garage?

Q. Yes. A. Yes, sir.

30 Q. That it was not bent or broken?

The Court: What was not bent or broken?

Mr. Strong: The motor. The Ford car, I should say.

A. Well, as far as running condition, the motor would run, but the chassis in which the motor was setting in was beyond repair.

40 Q. Did you say that the Ford car was not broken? A. I said it was a total wreck.

George Russell Conover—Direct

Q. Did you say the motor was not bent or broken? A. I said the car was such a wreck that Mr. Blue come in there and said "You can have it."

The Court: The question is not complete. You did not say when, where, or to whom, if you are basing it for a contradiction. 10

Mr. Strong: I will withdraw the question.

Q. Did you say that Baumgartner had to jump from the rear end to escape being hit?

Mr. Gray: I object.

The Court: To whom, and where, and when?

Mr. Strong: I will withdraw that. That is all.

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GEORGE RUSSELL CONOVER, a witness produced on behalf of the Defendants, being duly sworn according to law, on his oath, saith:

Direct examination by Mr. Gray:

Q. What is your business? A. Blacksmith and body builder.

Q. Did you, at my request, take some measurements of the Clinton truck belonging to Mr. Herbert? A. Yes, sir. 30

Q. Will you tell me the width of the truck over all? A. Five foot ten.

Q. Will you tell me the distance from the end of the body to the light? A. I just measured from the end of the wheel to the end of the body. That is forty-four inches.

Q. What is the distance from the wheel to the light, do you know? A. No, I didn't measure that.

Q. Then you measured from the end of the body up to the hub? A. Yes. 40

Motion for Direction of a Verdict

Q. And that is what distance? A. Forty-four inches.

Q. Is the chassis in back of the hub? A. Yes, sir.

Q. Have you any idea how much? A. I should judge about twenty-six inches. I didn't measure it.

Q. Did you notice where this light was attached. A.
10 Yes. It is attached underneath the body on a bracket.

Q. On a bracket? A. Yes.

Q. And how far from the left-hand side is that light?
A. Oh, it is about sixteen or eighteen inches, I should judge.

Q. Did you measure the distance from the end of the chassis to the end of the body? A. No. Just from the tail light.

Q. What was the distance from the tail light to the body? A. Forty-four inches.

Q. From the tail light? A. I didn't measure it. I just
20 measured from the wheel. That is all.

Q. You didn't measure the distance from the tail light out to the end of the truck at all? A. No, sir.

Q. Did you say how far it was from the wheel to the tail light?

Q. Yes. A. I didn't measure that.

Mr. Gray: I think that is all.

Mr. Strong: That is all.

30 Mr. Gray: That is the Defendants' case.

Motion for Direction of a Verdict

Mr. Gray: I think we are entitled to a direction of a verdict on the testimony as it is now.

The Court: Motion denied. You may have an exception.

(Mr. Gray sums up the case for the Defendants.)

40 (Mr. Strong sums up the case for the Plaintiff.)

Court's Charge to Jury

NEW JERSEY SUPREME COURT,

MIDDLESEX COUNTY CIRCUIT,

September Term, 1928.

ISIDORA BENNING, administratrix of	}	10
Richard Benning		
vs.		
CHARLES H. HERBERT and DANIEL	}	
HERBERT.		

Court's charge to the jury by Honorable Peter F. Daly,
Circuit Court Judge, as follows:

Members of the Jury: Our statute provides that in case
a human being comes to his death as the result of the neg- 20
ligence of another, then the next of kin of the person so
killed have a right to look to a jury for a verdict that will
compensate such next of kin for the deprivation of the
reasonable anticipation of pecuniary advantage from the
continuance of the life of the deceased. In other words, if
one is negligently killed, be it a son, a father, a brother, or
the like, and is killed through the negligence of another,
that other is responsible to the next of kin of the deceased
in such amount as will compensate them for the monetary 30
advantage which they could reasonably have expected to
come from the deceased if his life had not been so snuffed
out. In estimating the verdict in such a case as that, if
there should be a verdict at all, a jury have as difficult a
mental problem as can be presented to the mind of any per-
son, because there are so many considerations that the jury
must give thought to. Take this case: The deceased, at
the time of his death, was about nineteen years of age;
he had been making for some time before his death twen-
ty-five or thirty dollars a week, according to some of the 40

Court's Charge to Jury

evidence in the case, and for about a week or so immediately preceding his death, he had been in a new job and his mother testifies that he was making from thirty-five to forty dollars a week, sometimes forty-five dollars a week, depending upon the time engaged. What was his home life, and what was his relationship with the next of kin, his next of kin? He had a father who was living in an unhappy state, presumably, from the evidence of the wife; they were not living as ordinary man and woman do in the marriage relationship, and he was the kind of a man who was not bringing anything in to his wife or his children, according to their evidence. The mother herself had been working out to help support the family, and this young man, according to the mother, turned over all the wages he had been earning to her, and she used those wages for what purpose? For her own support, to a certain extent at least, beyond what she had gotten through her own labors, and for the support of the other children, and also for the support of the young man and for his spending money, his clothes, his room and the like. So you see that you figure about what this young man was netting to his next of kin. Not that that is at all conclusive, but it is one of the elements to be considered in order to arrive at an intelligent financial result, in case you have that duty to do. But, I have told you it was a deprivation of a reasonable anticipation of what was going to happen in the future, in case this boy had lived. How long would he have lived? Something has been said about tables in this case, that is mortality tables, which are what? They are tables that are gotten up as a result of experience, and they take an average person, in average health, and through statistics, and the experiences of the past, conclude about what would be the average life of a man in average health at such an age. Those tables are properly evidential, but they are not conclusive on the jury; they are simply put in to the jury so as to assist in the determination, in an

Court's Charge to Jury

intelligent way, of a problem like this. There are so many other things to consider. You have to consider, for example, that if this young man had not met his death that night, he might have been taken with a chronic illness in a time to come along; he might have met with another accident and become a helpless cripple; he might have met his death sometime in the future, not at the end of this estimated period, according to the mortality table. You cannot tell when those happenings might have been. It might have been that he would take sick and become a burden on his next of kin, instead of a benefit. Yet, on the contrary, say he was getting twenty-five or thirty dollars a week, and then had that increased to forty dollars a week, those wages might have increased, and the amount of money coming in to the mother and the next of kin might have increased. Then again you might consider this, he might have married. When would he have married? And after he had married he would be under the legal obligation of supporting his wife and any children who might come along. How far would that reduce the benefit that the mother would otherwise have gotten in the future? There are all those things to be considered, on the one side, which might tend to increase the amount that they probably would get; and on the other side, those considerations that might reduce the conditions that existed from a financial standpoint of benefit to them at the time of his death. You have to take all those things into consideration. And then after you have done that, if you do reach a conclusion that the plaintiff is entitled to a verdict, you must remember always in a case like this, that whatever you do give, you give in a lump sum, and you give right away, and that must be considered. For example, whatever this mother and his brothers and sisters, if anything, would have received from this boy, if his life had continued, they would have gotten from week to week, or semi-monthly, or monthly, just as his wages came in;

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Court's Charge to Jury

whereas, if you feel they are entitled to a verdict, you are giving it to them all at once, and you must take that into consideration in figuring what is the fair compensation.

10 I have treated this question of damages, not because I have reached a conclusion that it is your duty to give damages in this case. That is entirely within your domain, as to whether or not the plaintiff in this case is entitled to a verdict. Anything that I may say along that line is not conclusive upon you, and it is only said for the purpose of assisting and guiding you in your very, very serious duty to properly determine the facts. For when it comes to the domain of fact, you jurors are sole sovereigns, you are the arbiters, you are the judges, and the solemn obligation is upon you to pass upon questions of fact. When it comes to the law, that is within my province, and it is your
20 solemn obligation to recognize the law as the Court gives it to you, and apply the facts to the law as you find those facts to be, from the preponderance of the evidence in the case.

Considerable argument has been made in this case along the line as to what the relationship was, the legal relationship was between Mr. Blue, the young man who was driving this car that night, and Mr. Benning, the young man who unfortunately met his death. Whether Mr. Blue,
30 at that time, was the servant and agent of Mr. Benning, or whether they were engaged in what is known as a joint enterprise; or whether Mr. Benning was the invitee, or guest, in that car that night, of Mr. Blue, the driver and the owner of the car. And the reason why so much thought was given to that, I assume, upon the part of the attorneys in this case is because it is very, very important on the question of whether or not, if you found that the defendant was guilty of negligence, that was the proximate cause of the injury, and also found, however, that the
40 driver of the car was contributorily negligent, whether

Court's Charge to Jury

that contributory negligence, if you so found, whether that contributory negligence of the driver was imputable to the boys who were in the car with him that night. To roughly illustrate, suppose one of you jurors is driving an automobile along the road, and someone is on the road, and he halloes to you and asks you to give him a ride and you stop your car and let him in. He has asked for that ride. What is your duty towards him? Your duty towards him is to refrain from wanton recklessness, wanton negligence, so far as such a passenger as that is concerned, and if you should unfortunately meet with an accident, unless they could show that you were wantonly negligent, you would not be responsible for any damages that might come to such a passenger as that from such an accident. Suppose, on the contrary, however, that you are going along the road and you see someone on the road and you stop and ask that someone to come into your car; then he is an invitee and you are charged with conducting that car, while he is in there, with the ordinary intelligence, prudence, and vigilance, and thought, and care that the ordinary person would exercise in driving that car, and if you fail, in ordinary prudence, in driving your car, and an accident and injury comes to such a passenger whom you have invited to take the ride, then you would be responsible for that. So here in this case if you found that Blue was guilty of contributory negligence in such a way that without it this accident would not have happened, then, if the dead man, Benning, asked for the ride, and he was driving Benning for his benefit or pleasure, and was so driving at the request of Benning that contributory negligence would be attributable to Benning; or if they had gotten together and as a matter of mutual agreement, for the mutual benefit of all, and as a matter of a mutual agreement for a common purpose; for a common benefit, for a common enterprise, they were together engaged in riding that night, then, also, the contributory neg-

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Court's Charge to Jury

10 ligence of Blue would be imputable to all who were in the car. But, if the man who is dead, young Benning, was the mere guest of Blue on that night, then, even though you found that Blue was contributorily negligent, such negligence as that would not bar the plaintiff in this case from recovering a verdict, if the defendant's negligence was a proximate cause of the accident.

20 What are the facts in this case? I am not going to detail them. Besides that, anything I might say along the line of evidence would not be conclusive upon you, and if I erroneously quoted the testimony, it would be your duty to follow the testimony as you know it to be. Blue had two other men, Sutton and Crenner, and they had gone to Metuchen, and I believe did not find whom they were looking for there, and then Blue said, or words substantially to this effect, "Let us go to my friend Benning's house; I also heard that his mother is back from the shore." She had been down along the shore working, as she testified to on the stand. He said they were both close friends, good friends of his; and he went there; and that after he got there Benning said he would like to see his girl, who lived, I believe, in Metuchen, and then in one part of his testimony, that is Blue's testimony, he substantially said to
30 Benning, well, I will take you over there. That was an invitation, wasn't it, if that is true, if that is the situation? Was this young man there that night in that car at the time of the accident, as the guest, as the invitee of Blue? I am leaving that question as to whether or not he was there as an invitee, or whether he was there simply as a licensee in the respect that he had asked for the ride and was there at his own request and solicitation, and not as an invitee at the time of the accident, or whether they were engaged in a common enterprise, simply on the question
40 of this contributory negligence, if you reach that far.

Court's Charge to Jury

Now, however, before you are troubled with that question, before you will be troubled with the question of damages, you have to first find, from the preponderance of the evidence in this case, that this accident was the result of the proximate negligence of the driver of the defendant's car. In order to determine whether or not there is negligence you must first, in your own mind, determine what was the duty of the defendant under the time, place, and circumstances.

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Negligence is the failure to observe, in the interests of the protection of another, that degree of care, caution, and prudence which the circumstances justly demand, and from which failure injury results to another.

What was the duty of Mr. Herbert, the man who was driving the truck? What was his right, as far as the road was concerned? What does our statute say in respect to stopping a car, and in respect to the lighting of a car? So far as equipment, our motor vehicle act says this, for example: "That every automobile shall exhibit a red light visible from the rear"—that is, in the nighttime, and this was in the nighttime, between twelve and one o'clock—"the rays of such rear lamp or red light shall shine upon the number plate carried on the rear of such vehicle in such a manner as to render the numerals thereof visible for at least fifty feet in the direction from which the motor vehicle is proceeding." Now, then, did Mr. Herbert have such a light on this night? He says that when he left Metuchen that he had such a light, it was electrically lighted, it was firmly fixed upon an arm or bracket, it was in the rear of the chassis, and it was more to the left-hand side of the rear than to the right-hand side; that when he got to Baumgarten's place to unload the peaches, he did not look at it that time, but that after the accident he looked at it and found that it was still

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Court's Charge to Jury

lighted, but that that arm, which had been properly on there, according to his testimony, before he started out, had been bent. Now, what is the testimony along that line as to that light? These two young men, I think they were from Plainfield, who were driving the car, one of them testified that he looked as to the light, and the other said he did not look as to the light, as I remember his testimony; but, when he looked he found there was this light, and that that to which it was attached was so bent that it was showing on the ground alone. That is undisputed that it was showing on the ground at that time. The officers come along and they say the same thing, but they also testify that it was so lighted, as I remember their testimony; you will have to remember that. Now, when was it bent? Of course you might have a light on the rear of an automobile, or an automobile truck, and if it cannot be seen, you are not living up to the statutory regulation in that respect. But, when was it bent? Was it bent through this accident? What kind of an accident was this, so far as the physical effects upon the machines themselves were concerned? It is undisputed that this Ford sedan went under the body of the standing automobile truck. How far did it go under, and did it reach the arm of this light, and did it bend that, or the contact of that Ford sedan bend that arm? Those are questions for you to pass upon. Was it lighted? Did he have the light as required by the statute? That is one of the questions that is in dispute in this case.

Now, then, as to the location of the truck on the road. What kind of a road, in the first place, was this? It is Lincoln Highway, familiar to all of us, it is such a prominent thoroughfare. What is the evidence? The evidence is that there is a hard pavement of from thirty-eight to forty feet in width; the evidence is undisputed, even if it is not a matter of common knowledge, which I think it is,

Court's Charge to Jury

that this is one of the most heavily trafficed highways in the state of New Jersey, the Lincoln Highway between New Brunswick and Metuchen; you have the width, and you have the character of the pavement; they say it was concrete about from thirty-eight to forty feet wide. Had that truck a right to stop there, under our statute? What does the statute say? "No vehicle shall be stopped on any road or street except such vehicle be drawn to the side, and when such road or street has a curbing, then such vehicle shall be drawn close to such curb. Provided, however, that nothing in this section shall prevent a vehicle stopping in any emergency, in order to avoid accident, or allow the right-of-way to vehicles or pedestrians as provided in this act." There is nothing said about a curbing here. It did not occur in a city. Did Herbert bring his car to the side of the road? Did Herbert have a red light, such a red light as I have read to you was required by the statute on that night? If he did, did he fully do his duty under the time, place and circumstances, judged by what an ordinarily prudent person would have done under the time, place, and circumstances? If you find that he did his full duty, so far as the travelling public was concerned, based from the standpoint of the ordinarily prudent person under the time, place and circumstances, then no matter how much your sympathy may be for this very deserving fellow, you would be false to your oaths as jurors if you simply gave the next of kin a verdict simply because of that.

On the contrary, if you find that there was such negligence upon the part of Mr. Herbert in the handling of this car that night, or in the lack of equipment that an ordinarily prudent person would not have been guilty of, then this plaintiff is entitled to a verdict. In conclusion, if you find that Mr. Herbert was guilty of negligence that was the proximate or effective cause of this accident, and

Plaintiff's Exceptions

that there was no such contributory negligence upon the part of the driver that could be imputable to the boy who is now dead, then the plaintiff is entitled to a verdict. Otherwise the plaintiff is not entitled to a verdict.

10 Mr. Strong: I desire to except to your Honor's charge that the jury might determine whether Blue was the servant of plaintiff's intestate.

 Mr. Strong: I except to your Honor's charge that the jury might determine that Blue was the agent of the plaintiff's intestate.

 Mr. Strong: I except to your Honor's charge that the Jury might determine whether Blue was the invitee of plaintiff's intestate.

20 Mr. Strong: I except to your Honor's charge that the jury might determine whether contributory negligence should be imputed to plaintiff's intestate.

 Mr. Strong: I except to your Honor's charge as to an automobile driver's, that is to say, Blue's obligation to an invitee.

30 Mr. Strong: I except to your Honor's charge that if Blue was guilty of contributory negligence, then if the plaintiff's intestate asked for a ride, then Blue's negligence might be attributed to plaintiff's intestate.

 Mr. Strong: I except to your Honor's charge that if there was a mutual agreement between plaintiff's intestate and the driver of the Ford, that the negligence of the driver could be attributed to plaintiff's intestate.

40 Mr. Strong: I except to your Honor's Charge that if the plaintiff's intestate and the driver of the automobile were engaged in a common enterprise at the time plaintiff's intestate was killed, and the driver was guilty of negligence which contrib-

Plaintiff's Exceptions

uted to cause the accident, that negligence could be imputed to all in the car.

Mr. Strong: I except to your Honor's charge defining the duty resting on the driver of the truck with respect to parking his car.

Mr. Strong: I except to your Honor's charge that the jury might determine whether Mr. Herbert's car was carrying a light in compliance with the New Jersey statute. 10

Mr. Strong: I except to your Honor's charge that Mr. Herbert had testified that he had on his car, or on his truck, a light complying with the New Jersey statute.

Mr. Strong: I except to your Honor's leaving it to the jury to determine whether there was a tail light on the car—a rear light on the car as required by the New Jersey statute. 20

Mr. Strong: I except to your Honor's leaving it to the jury to determine whether Herbert brought his car to the side of the road in compliance with the requirements of the New Jersey statute.

Mr. Strong: I except to your Honor's charge that the jury might determine whether the defendant Herbert had a red light on his car as required by the statute.

Mr. Strong: I except to your Honor's charge that if the Jury should find that the plaintiff's intestate was a licensee, then the negligence of Blue might be imputed to plaintiff's intestate. 30

The Court: Was not that a question?

Mr. Strong: It seemed to me that the proofs did not present that question whether he was a servant at all. There was no evidence that he was a servant.

The Court: I said servant or agent, and certainly if Benning asked him to give him that ride, then 40

Plaintiff's Exceptions

he was the servant or agent, and that was one of the questions.

Mr. Strong: It seems to me, your Honor, that would not be the case. Your Honor and I differ as to the law as to that.

10 The Court: How do you differ as to the law? Suppose he asked for that ride, then would not Blue have been a servant or agent?

Mr. Strong: No, I think not.

The Court: Then what would he be?

Mr. Strong: He would not be a servant or agent at all unless the plaintiff's intestate was in control of the car.

20 The Court: What is the difference between that, and if I hire a car and get a friend and say, "Will you drive me down," isn't he my agent to carry out my request? However, go on.

Mr. Strong: It is not a question in any disagreeable way.

The Court: There is absolutely no sense in that. If he asked for the ride then the driver of the car was his agent to carry out his request. And that was one of the questions left to the jury.

Mr. Strong: There is where your Honor and I disagree.

30 The Court: Read to me the second exception, and the following ones.

(Second exception read by stenographer.)

The Court: I did not say anything of the kind. I said it was their duty to determine that. I did not say they might do it.

Mr. Strong: It was their duty to determine—

The Court: You said there they might do it. I said it was their duty to pass on that question.

40 Mr. Strong: I would like to amend my exception accordingly.

Plaintiff's Exceptions

(Third exception read by stenographer.)

The Court: I never said anything of the kind. I said it was their duty to pass on that on a question of fact.

Mr. Strong: Then I would like to amend that exception according to what your Honor did say. 10

(Fourth exception read by stenographer.)

The Court: I never said anything of the kind.

Mr. Strong: I would like to get your Honor's statement as to what you said.

The Court: I never said anything on that subject.

(Fifth exception read by stenographer.)

The Court: I do not understand it.

(Sixth exception read by stenographer.)

The Court: I did not say "might." It will be a question of fact for the jury to pass upon. 20

(Seventh exception read by stenographer.)

The Court: I did not say—I did not narrow it to any such language as that. I said if there was a mutual agreement between them, or a common enterprise.

(Eighth exception read by stenographer.)

The Court: I did not say that.

(Ninth exception read by stenographer.)

The Court: That is not a good exception because it does not say wherein you claim I was wrong. I claim that is vague and uncertain and does not specify wherein the Court's explanation of the duty was wrong. 30

(Tenth exception read by stenographer.)

The Court: That is also a worthless exception because it does not say wherein my explanation is wrong, or wherein it is faulty and gives no help to the Court in case the Court was wrong, so as to rectify it. It is simply general. 40

Plaintiff's Exceptions

(Eleventh exception read by stenographer.)

The Court: I did not use the word "might." I said it was up to the jury as one of the questions of fact to say whether or not he was complying with the Motor Vehicle Act as to the kind of a light that he was carrying.

10

Mr. Strong: I except to that language.

(Twelfth exception read by stenographer.)

The Court: I do not remember having said that.

(Thirteenth exception read by stenographer.)

The Court: Was not that a question for the jury?

Mr. Strong: I think not, your Honor.

The Court: All right. One of the vital questions of fact in the case.

20

Mr. Strong: The state requires a little further evidence as to the nature of the light on the car and its brilliancy.

The Court: What is that?

Mr. Strong: The law, as read by your Honor, required a light of sufficient brilliancy to distinguish numerals.

The Court: What has that to do with the kind of an exception you made?

30

Mr. Strong: Then if it has not, there is no harm.

The Court: You have no right to make exceptions that are absurd. It was one of the questions as to whether or not the Motor Vehicle Act had been complied with in this case, and that is just what I said.

(Fourteenth exception read by stenographer.)

The Court: I did not use the word "might" at all. The other, of course, was a question as to whether or not he had a light as required by the statute.

40

Exhibit P-1

The Court: I did not use the word "might." I said that was one of the questions of fact to be passed upon.

Mr. Strong: I except to that language of your Honor.

10

EXHIBIT P-1

STATE OF NEW JERSEY

MIDDLESEX COUNTY SURROGATE'S COURT

I, Charles Forman, Surrogate of the County of Middlesex, do certify that on the tenth day of November, in the year of our Lord one thousand nine hundred and twenty-seven, Administration ad Prosequendum was granted by me to Isidora Benning, of New Brunswick, New Jersey, for the purpose of enabling her to prosecute an alleged claim of the next of kin of Richard Benning, against Charles H. Herbert and Daniel Herbert, of East Brunswick Township, Middlesex County, New Jersey, and such other person or persons as may be deemed advisable to sue for the cause of action aforesaid, who is alleged caused the death of the said Richard Benning by their wrongful act, neglect or default.

20

30

Witness my hand and Seal of Office, the tenth day of November, in the year of our Lord one thousand nine hundred and twenty-seven (1927).

CHARLES FORMAN,
Surrogate.

40

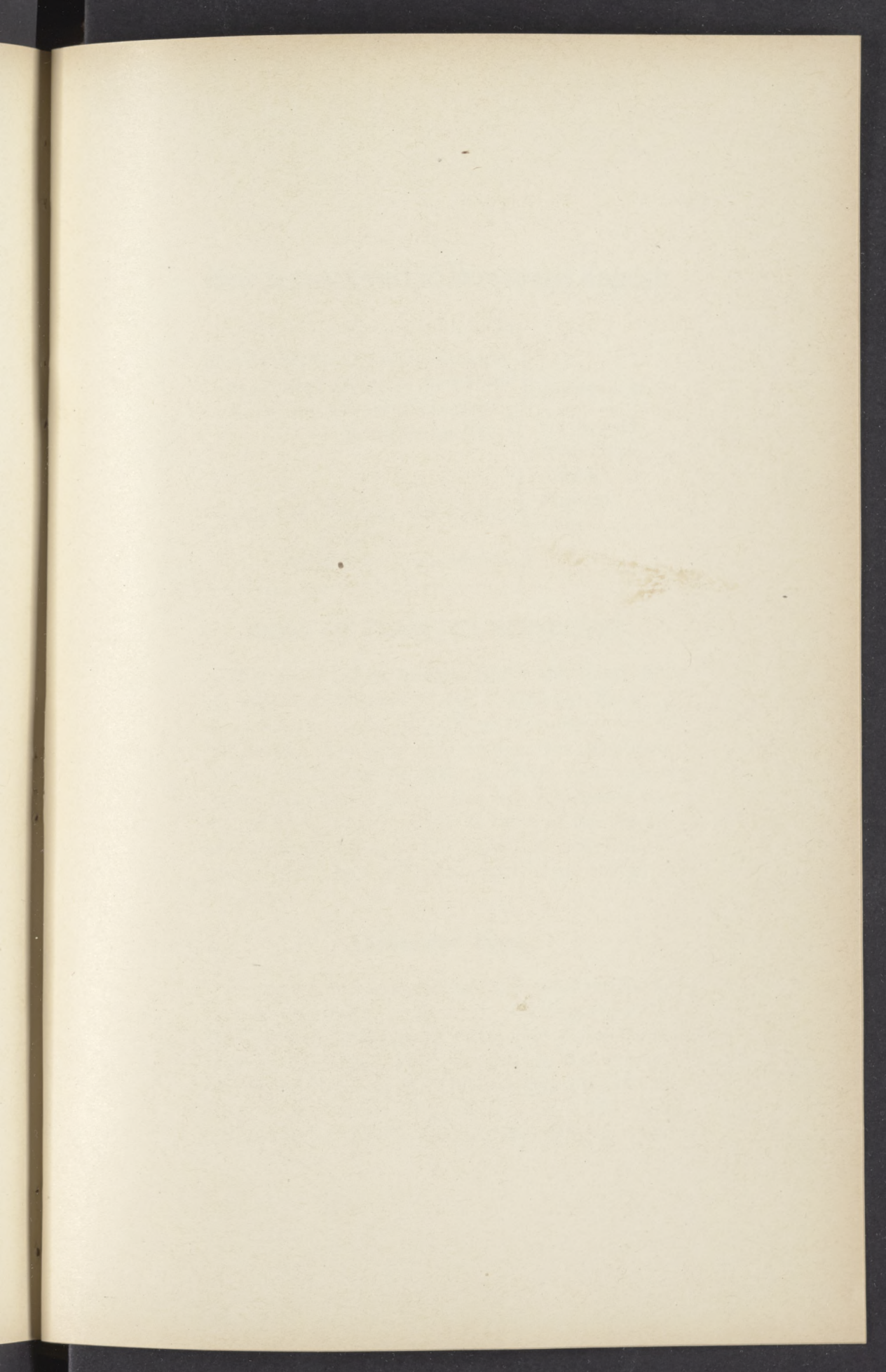
NOTICE

These letters of administration do not authorize the administrator hereby appointed to receive any moneys in settlement of any claim for damages, either before or after suit, or to collect claims against the estate of her intestate or to receive assets of said estate; but are issued for the sole purpose of enabling the said administrator to prosecute a claim for damages alleged to have been sustained by reason of her intestate's death, having been caused by the wrongful act, neglect or default of the person herein named. See P. L. 1917—Chapter 180.

20

30

40



(7)

New Jersey Court of Errors and Appeals

ISIDORA BENNING, Administratrix
ad prosequendum of the Estate
of Richard Benning, deceased,
Plaintiff-Appellant,

v.

CHARLES H. HERBERT and DANIEL
HERBERT,
Defendants-Respondents.

Action at Law.

On Appeal
from New
Jersey
Supreme
Court.

BRIEF OF PLAINTIFF-APPELLANT.

This is an action brought under the Death Act on behalf of the next of kin of Richard Benning, deceased, for damages suffered in consequence of his death. The case was tried at the Middlesex Circuit on September 26th and 27th, 1928, before Judge Daly and a jury. The jury returned a verdict of no cause for action in favor of the defendants-respondents and this appeal is made on the ground that the trial judge erred in his charge to the jury.

Undisputed Facts.

Plaintiff's decedent was nineteen years old at the time of his death (p. 58, l. 1). On September 10, 1927, he was riding in an automobile of one Frank Blue (p. 14, l. 23). Blue was driving that automobile in the direction of Metuchen from New Brunswick on the Lincoln Highway (p. 14, l. 26). The automobile ran into a truck parked along the high-

way (p. 16, l. 1) and as a result of this accident, plaintiff's intestate was killed (p. 16, l. 20). There was evidence that defendants-respondents truck was unlighted at the time of the accident (p. 15, l. 38) and that the truck was parked partly on and partly off of the pavement or in other words, at an angle to the pavement (p. 24, l. 10). This evidence was disputed by defendants-respondents and it consequently became a question for the jury to determine. Similarly there was evidence from which the jury could have found that Frank Blue the driver of the car in which plaintiff's intestate was riding was guilty of negligence that contributed to cause the accident. This was also left to the jury to determine.

POINT 1.

The court charged the jury: "So here in this case if you found that Blue was guilty of contributory negligence in such a way that without it this accident would not have happened, then, if the dead man, Benning, asked for the ride, and he was driving Benning for his benefit or pleasure, and was so driving at the request of Benning that contributory negligence would be attributable to Benning" (p. 99, l. 29).

Exception to this portion of the charge was duly taken as follows:

"Mr. Strong: 'I except to your Honor's charge that if Blue was guilty of contributory negligence, then if the plaintiff's intestate asked for a ride, then Blue's negligence might be attributed to plaintiff's intestate'" (p. 104, l. 26).

Subsequently before the jury had retired the trial judge ordered plaintiff's exception to be re-read to him and he thereupon made certain comments. To this language excepted to and just quoted, he added the following:

"I did not say 'might.' It will be a question of fact for the jury to pass upon" (p. 107, l. 19).

Blue, the driver of the car in which plaintiff's decedent was riding at the time he met his death testified as follows, on examination by the court:

"Q. Why did you go to Benning's house? A. Because we heard Dick was home. I heard Dick was home, over in town, and I heard his mother was home from the shore so I went over to visit him because they were real good friend of mine and while we were over there Dick said he wanted to go down and meet his girl.

"Q. Yes. A. So I said I would take him down. So on the way down we had a flat tire and I tore my breeches and we went to this place first of his friend's, his friend's house where they was having this farewell party for his mother, and I didn't want to stay around there with my breeches tore, so I came back. I asked Dick if he had an extra pair of pants at home that I could wear until I got my own fixed. And he said yes. So from there we went back to his house and he loaned me a blue suit of his own, and from there we went to the Lincoln Diner in Highland Park. That is right at the point of the road there. And from there—he decided it was five minutes to eleven or was near eleven o'clock and his girl gets out at eleven o'clock, and figuring by the time

he got over there she would be out and gone, so he called up just in time to tell her that he wasn't going over to meet her that he was going over to these here people's house to bid his mother goodbye and everything. So we went back to this house and we stayed there until twelve or a quarter after twelve, I don't know exactly what time it was.

"Q. Is that the same house that he asked you to bring him to in the first place? A. Yes, sir. And we stayed there until it broke up, and we was coming home and we come out of his road.

"Q. That is all right. I wanted to know how you were together or why you were together. Then, as I understand it, you started out this night with two other men. A. Yes, sir.

"Q. To see somebody in Metuchen and you weren't able to see them and you went to see your friend Benning. A. Yes, sir.

"Q. You had heard his mother who had been working along the shore had returned home and you wanted to see her also because you were good friends. A. Yes, sir.

"Q. And that when you met him you were asked by Benning to bring him over to see his girl. A. No. He said he had to go down to meet his girl and I said I would take him down. He wanted to go down.

"Q. I thought you said when I called you back here that he asked you to take him there. A. Well, no. He just said that he was going down to see his girl and I asked him if he wanted me to take him there and he said yes. So instead of going down right to see his girl he went over to these friend's house first.

"Q. Why? A. Well, I don't know why.

"Q. Who changed that? A. He did.

"Q. How? A. I don't know that.

"Q. Why did you go over there? A. Because I was driving the car and he was in my car.

"Q. Why did you go over there? A. Because he asked me to.

"Q. And then at the time of the accident you were going back to the same place that he had asked you to bring him to in the first place, is that right? A. Why, no. We were going home at the time of the accident.

"Q. You lived where? A. He lived in Stelton and we was taking him home" (p. 68, l. 17).

We submit that there was no relationship established here of master and servant or principal and agent upon which the negligence of Blue, if any, could be imputable to the decedent. The case falls within that of *End, et al. v. Zola*, 147 Atl. 725 (not yet officially reported). There a mother asked her son to take her to make a call upon friends and the court held that as a matter of law, those facts, if the jury so found them, were not enough to impute the son's negligence to the mother.

To quote the opinion "*There is no suggestion that the mother selected the route or participated either by act or suggestion in the control or management of the car.*" (Italics ours.)

In that case, the charge of the trial judge was found to be so erroneous as to justify the Supreme Court in making absolute plaintiff's rule to show cause.

The ~~portion~~^{portion} of the trial judge's charge held to be erroneous was as follows:

“Now as to the mother, she was riding as I recall the testimony, in the rear of the car and asleep at the time. The son, as I recall it, said that at the request of the mother he had taken her to meet some friend in Newark and was bringing her back. He was, of course, not a public taxi driver, but nevertheless, if the mother requested him to take her to Newark on this occasion and bring her back, then he became her agent or servant in the law and if he were guilty of contributory negligence on that occasion then his negligence would be attributable to his mother which would make her responsible for any contributory negligence on his part.”

The Supreme Court ~~found~~ said:

“There is no evidence that he was subject to the command or control of his mother.”

We submit that the facts in that case and in this case are practically identical and that the charge in the End case, supra, found to be erroneous and harmful is practically identical to the charge complained of under this point.

In that case (the End case), the Supreme Court said further:

“The mere request by the mother of the son was not enough to cause that relationship to arise as a matter of law.”

In the case of *Tronto v. Reo Motor Co.*, 92 N. J. L. 595, cited with approval in *End v. Zola*, supra, the court found the facts to be that the deceased, desirous of visiting a friend in Plainfield, induced his brother, the owner of the car, to drive him there

and while driving on West Front Street near Grand Avenue, in that City, collided with defendant's truck.

Here, likewise, the court held that this in itself did not sufficiently establish, as a matter of law, a relationship whereby the negligence of the driver of the car could be imputed to his passenger.

The Supreme Court further said, in the Toronto case:

"The rule of law is too well settled at this time to be seriously controverted, that the *status of the occupant of the car being established as that of a passenger, the contributory negligence of the driver of the vehicle cannot be attributed to him, whatever posture that character of negligence of the driver may assume.*" (Italics ours.)

And again:

"The test is not as appellant argues, whether the business was that of deceased, *but whether at the time he exercised control of the car, or occupied the status of a passenger or invitee.*" (Italics ours.)

We submit here that the evidence of the status of plaintiff's decedent in Blue's car at the time of the accident went no further than to show possibly that Blue was driving the car on business of the deceased. The Toronto case holds that this is immaterial and that the true rule is whether or not deceased exercised control of the car.

We submit that, as the End case said, Blue, was not subject to the command or the control of the deceased, there was no suggestion that the deceased selected the route or participated, either by act or suggestion in the control or management of the car.

We call the court's attention to the colloquy between the trial judge and counsel for the plaintiff-respondent.

Before the jury was permitted to retire, the trial judge said in their presence and in their hearing the following:

“There is absolutely no sense in that. *If he asked for the ride then the driver of the car was his agent to carry out his request.* And that was one of the questions left to the jury” (p. 106, l. 24). (Italics ours.)

This was a part of the charge. The jury had a right to follow these words. And they are in direct contrast with *End v. Zola*, supra, and *Tronto v. Reo Motor Co.*, supra.

We submit further that under the authority of these two cases, the charge of the court assigned as error under this point was erroneous and so prejudicial to plaintiff as to require a reversal and a *venire de novo*.

POINT 2.

The court charged the jury: “Was this young man there that night in that car at the time of the accident, as the guest, as the invitee, of Blue? I am leaving that question as to whether or not he was there as an invitee, or whether he was there simply as a licensee in the respect that he had asked for the ride and was there at his own request and solicitation, and not as an invitee at the time of the accident ~~to you~~” (p. 100, l. 32).

Exception was duly taken to this portion of the trial judge's charge: “Mr. Strong: ‘I except to

your Honor's charge that if the jury should find that the plaintiff's intestate was a licensee, then the negligence of Blue might be imputed to plaintiff's intestate' " (p. 105, l. 30). To this exception the court replied: "Was not that a question?" (p. 105, l. 35).

We call the attention of this court to the following portion of the trial judge's charge:

"To roughly illustrate, suppose one of you jurors is driving an automobile along the road, and someone is on the road, and he halloes to you and asks you to give him a ride and you stop your car and let him in. He has asked for that ride. What is your duty towards him? Your duty towards him is to refrain from wanton recklessness, wanton negligence, so far as such a passenger as that is concerned, and if you should unfortunately meet with an accident, unless they could show that you were wantonly negligent, you would not be responsible for any damages that might come to such a passenger as that from such an accident. Suppose, on the contrary, however, that you are going along the road and you see someone on the road and you stop and ask that someone to come into your car; then he is an invitee and you are charged with conducting that car, while he is in there, with the ordinary intelligence, prudence, and vigilance, and thought, and care that the ordinary person would exercise in driving that car, and if you fail, in ordinary prudence, in driving your car, and an accident and injury comes to such a passenger whom you have invited to take the ride, then you would be responsible for that."

These words just preceded the point of the charge which constitutes our first ground of appeal.

It is true that this is not made a ground of appeal. It is, perhaps, true that in itself it would not be a good reason for reversal. We quote to show the trend of the court's charge. Here the trial judge charged on a subject *absolutely foreign to the issue of the case* (p. 99, l. 3).

This was directly in contrast with the settled law of this State. It has been held many times that in such a case as this, negligence of the driver may be imputed or attributed to his passenger only when one of the following three relationships existed between the two, viz: (a) master and servant, (b) principal and agent, (c) mutual responsibility in a common enterprise. *Jacobson v. Bentley Morrison Corp.*, 103 N. J. L. 16. *Lange v. N. Y. S. and W. R. R. Co.*, 89 N. J. L. 604. *Mittelsdorfer v. West Jersey, etc., R. R. Co.*, 77 N. J. L. 698.

The portion cited above should be read with that portion of the charge assigned as error under Point 2, and that portion of the charge assigned as error under Point 1.

The case of *Jacobson v. Bentley Morrison Corp.*, 103 N. J. L. 16, is we believe, on all fours with this case. There the facts were that plaintiff was injured in a collision between an automobile in which she was riding, driven by her nephew and a car owned by the defendant and driven by one of its employees. At the time of the accident, plaintiff was being conveyed by her nephew from the railroad station to the nephew's home. There, there was even stronger evidence of a relationship which would call forth the imputation of the driver's negligence to his passenger than in this case.

Justice Trenchard for the Supreme Court said in the Jacobson case, *supra*:

“The plaintiff contends and we think rightly that there was prejudicial error in the charge. The trial judge instructed the jury that if the plaintiff was an invitee in the automobile in which she was being driven at the time of the accident, the contributory negligence of the driver of the automobile was not imputable to her, but that, if she was a mere licensee in the automobile, the contributory negligence of the driver thereof was imputable to her, and the judge left it to the jury to determine, among other things, whether the plaintiff was an invitee or a licensee, and whether the driver of the automobile was guilty of contributory negligence.”

On this error, the Supreme Court made absolute plaintiff's rule to show cause.

The opinion went further to say:

“The true rule deducible from our own cases, and supported by the great weight of authority by courts of other jurisdiction, is that, where a person, personally in the exercise of that degree of care which common prudence requires under all the attending circumstances, is injured through the negligence of some third person, and the concurring negligence of one with whom the plaintiff is riding as guest or companion, whether as an invitee or as a mere licensee, between whom and the plaintiff the relation of master and servant, or principal and agent, or mutual responsibility in a common enterprise, does not, in fact, exist, the

plaintiff being at the time in no position to exercise authority or control over the driver, then the negligence of the driver is not imputable to the injured person, but the latter is entitled to recover against the third person through whose wrong his injuries were sustained." See also, the cases cited therein.

As in that case, so in this case, it was open to the jury to find that the plaintiff was a mere licensee.

Justice Trenchard further said in the Jacobson case:

"Assuming, without deciding, that under the evidence it was open to the jury to find that the plaintiff was a mere licensee, and not an invitee, we think that the instruction to the effect that, if the accident occurred through the joint negligence of the driver of the defendant's car and of the plaintiff's nephew, then the plaintiff could not recover, unless she was an invitee, and not a mere licensee, was erroneous, and prejudicial to the plaintiff."

There may be, perhaps, some doubt as to whether or not this charge left it squarely to the jury to find that Blue's negligence could be imputed to the deceased. We think it does.

But the trial judge certainly brought it squarely before the jury in his colloquy with counsel for plaintiff-appellant before the jury was permitted to retire, as follows:

"Mr. Strong: I except to your Honor's charge that if the jury should find that the plaintiff's intestate was a licensee, then the negligence of Blue might be imputed to plaintiff's intestate.

"The Court: Was not that a question" (p. 105, l. 30).

The jury was present and heard all this. The judge did not deny in fact that he had so charged. And this was a re-affirmation or re-charge of that point. It was, in fact, actually a part of his charge.

We respectfully submit that all this constituted an error for which the judgment should be reversed and a *venire de novo* granted.

Conclusion.

It was not our intention to submit an extended brief. We feel that the two errors complained of are apparent and that there can be no question but that they are material to the case and so prejudicial to plaintiff as to require a reversal and a *venire de novo*.

This was a simple case of injury to a passenger in an automobile through the negligence of a third person and possibly the negligence of the driver of the car. There was nothing at all to show control of the car by plaintiff's decedent. There was nothing to call forth the long discussion of the court starting on page 99 line 3. There was nothing to call forth anything approaching the charge assigned as error under Point 1 and the question of whether or not deceased was a licensee or invitee was absolutely immaterial.

We make no bare assertions of these matters. We have submitted to the court authorities chosen with care which we feel directly sustain our points.

We call the attention of this court to the colloquy which took place between the trial judge and counsel for the plaintiff-appellant before the jury had retired.

"Mr. Strong: It seemed to me that the proofs did not present the question whether he was a servant at all. There was no evidence that he was a servant.

The Court: I said servant or agent, and certainly if Benning asked him to give him that ride, then he was the servant or agent, and that was one of the questions.

Mr. Strong: It seems to me, your Honor, that would not be the case. Your Honor and I differ as to the law as to that.

The Court: How do you differ as to the law? *Suppose he asked for that ride, then would not Blue have been a servant or agent?"* (Italics ours.)

"Mr. Strong: No, I think not.

The Court: Then what would he be?

Mr. Strong: He would not be a servant or agent at all unless the plaintiff's intestate was in control of the car.

The Court: What is the difference between that, and if I hire a car and get a friend and say, 'Will you drive me down,' isn't he my agent to carry out my request? However, go on.

Mr. Strong: It is not a question in any disagreeable way.

The Court: There is absolutely no sense in that. If he asked for the ride then the driver of the car was his agent to carry out his request. And that was one of the questions left to the jury. (*Underlining ours.*)

Mr. Strong: There is where your Honor and I disagree" (p. 105, l. 36).

All this took place in the jury's presence. The court several times re-affirmed and re-stated what

the above authorities have held to be erroneous. It was a part of the judge's charge to the jury which the jury heard as well as the rest of the charge.

Plaintiff's counsel stated to the judge the correct law, but was told flatly that he was in error. What more could counsel do?

We respectfully submit that for the reasons set forth above the judgment should be reversed and a *venire de novo* awarded.

THEODORE STRONG & SON,
Attorneys of Plaintiff-Appellant.

THEODORE STRONG, Jr.,
of Counsel with Plaintiff-Appellant.

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New Jersey Court of Errors and Appeals

ISIDORA BENNING, administra-
trix *ad prosequendum* of the
Estate of Richard Benning,
deceased,

Plaintiff-Appellant,

vs.

CHARLES H. HERBERT and DAN-
IEL HERBERT,

Defendants-Respondents.

BRIEF FOR THE DEFENDANTS-RESPONDENTS.

This is an appeal on the verdict of a jury of no cause of action in a trial held in the Middlesex Circuit on September 26th and 27th, 1928, Judge Daly presiding.

Facts.

The defendant, Charles H. Herbert, was the operator of a truck owned by Daniel Herbert. It was a common ordinary Rack truck with racks on each side and in front and with no tail board (p. 71, ll. 38-40), with a regular system of electric lights (p. 72, ll. 5-8), the headlights and tail lights working together from a switch on the dash board, and the light being attached to the rear of the body by an "L" iron which was fastened to the chassis and runs down and over the license plate on the left side of the body (p. 72). The evidence was uncontradicted that from 6 o'clock on the tail light was burning in a proper position, shining towards the rear of the truck (pp. 73-74, ll. 14-16; p. 74, l.

30). The truck was pulled half way off the war-ranite road (p. 75, l. 1), and there were 12 to 15 good bright electric lights where the truck had stopped (p. 75, l. 38; p. 76, ll. 10-11). The truck had been standing between five and ten minutes (p. 76, ll. 12-13), when the car in which the plaintiff was riding crashed into the truck, driving the front of the Ford car under the left-hand side of the truck (p. 77, l. 38; p. 78, l. 1), right up under the light bracket (p. 78, l. 12), and the bracket was bent so that the light shone towards the ground and was still burning (p. 78, ll. 20-23). The position of the truck and the lights and the fact that it was struck where the light was attached is all confirmed by the police officers and the garage men (p. 83, ll. 12-40; p. 84, ll. 18-20; p. 86, ll. 15-20; p. 86, ll. 20-30; pp. 90 and 91).

The deceased, at his request, had been taken to a friend's house and had asked the operator of the car to take him both to the house of a friend and from there to take him home, all this being done at his especial request and for his sole benefit (p. 69, ll. 32-34; p. 70, ll. 19-22).

POINT ONE.

The Judge's Charge was proper,

The appellant picks out a small portion of the judge's very complete charge and attempts with this small portion to develop an impropriety rather than considering the charge as an entirety. He uses the clause, "So here in this case if you found that Blue was guilty of contributory negligence in such a way that without it this accident would not have happened, then, if the dead man, Benning, asked for the ride, and he was driving Benning for his benefit or

pleasure, and was so driving at the request of Benning that contributory negligence would be attributable to Benning." As stated before this was only a very small portion of the charge, and does not even finish the sentence, because the judge continues in the same sentence, "or if they had gotten together and as a matter of mutual agreement, for the mutual benefit of all, and as a matter of a mutual agreement for a common purpose; for a common benefit, for a common enterprise, they were together engaged in riding that night, then, also, the contributory negligence of Blue would be imputable to all who were in the car. But, if the man who is dead, young Benning, was the mere guest of Blue on that night, then, even though you found that Blue was contributorily negligent, such negligence as that would not bar the plaintiff in this case from recovering a verdict, if the defendant's negligence was a proximate cause of the accident." He then proceeds to review the facts in the case, and concludes that feature of the case by saying, "I am leaving that question as to whether or not he was there as an invitee, or whether he was there simply as a licensee in the respect that he had asked for the ride and was there at his own request and solicitation, and not as an invitee at the time of the accident, or whether they were engaged in a common enterprise, simply on the question of this contributory negligence, if you reach that far," making it, therefore, a pure question of fact for the jury to determine, after he had explained every possible situation with reference to the presence of the deceased in the car.

The appellant relies upon the case of *End v. Zola*, 147 Atl. 725, not yet officially reported, and the headnote in that case is as follows:

2. MOTHER'S REQUEST THAT SON TAKE HER FOR VISIT IN HIS AUTOMOBILE DID NOT ESTABLISH MASTER AND SERVANT RELATIONSHIP AS MATTER OF LAW, BUT QUESTION WAS FOR JURY.

The decision recites, "A portion of the charge argued by the appellants to be objectionable is as follows: "Now, as to the mother. She was riding, as I recall the testimony, in the rear of the car, and asleep at the time. The son, as I recall it, says that at the request of the mother he had taken her to meet some friend in Newark and was bringing her back. He was, of course, not a public taxicab driver, but nevertheless, if the mother requested him to take her to Newark on this occasion and bring her back, then he became her agent or servant in the law, and if he were guilty of contributory negligence on that occasion, then his negligence would be attributable to his mother, which would make her responsible for any contributory negligence on his part. * * *" And the Court in *End v. Zola*, *supra*, referring to the excerpt above says, "We think that, in the instant case, it should have been left to the jury to determine whether the relationship of master and servant had been established, that the mere request by the mother of the son was not enough to cause that relationship to arise as a matter of law."

The Court in the present case took exactly the stand of the Supreme Court in *End v. Zola*, and left the matter to the jury to determine whether such situation did exist, and it is interesting to note that in *End v. Zola*, *supra*, the situation was very much different. The testimony is, as quoted in the decision: Question, "You

did it for your mother, of course?" Answer, "Well, she wanted to visit this party and wanted me to go well, alright, I went with her." And, as a matter of fact, the mother was asleep on the back seat when the accident occurred, and therefore it seems quite apparent that as both of them wanted to go, the son was as much interested in going as was the mother. In the case under consideration the testimony shows quite clearly that the trip was entirely for the benefit of the deceased. After explaining some of the surrounding circumstances the witness was asked by the Court why the plans were changed in the following form:

Question, "Who changed that?" Answer, "He (Benning) did." Question, "How?" Answer, "I don't know that." Question, "Why did you go over there?" Answer, "Because I was driving the car and he (Benning) was in my car." Question, "Why did you go over there?" Answer, "Because he (Benning) asked me to," and previous to that, on the same page, in answer to the Court's question: Question, "Is that the same house that he (Benning), asked you to bring him to in the first place?" Answer, "Yes, sir, and we stayed there until it broke up and we was coming home and we come out of his road—."

It seems, therefore, that this trip was entirely for the benefit of Benning at Benning's request, and that he seemed to plan and control the whole evening's trip after the car had reached his house. This is indicated clearly by the change of plans about going to see his girl, about going to the lunch-room, going to visit the friend's house whom the driver of the car did not know, the spending of the evening there and then taking Benning to other places as illustrated by the testimony, and the law is too well settled in this state to need citations that if the

driver is the agent or servant of the injured, or if it is a joint enterprise, the negligence of the operator can be attributed to the injured.

The appellant also seems to rely on the case of *Tronto v. Reo Motor Co.*, 92 N. J. L. 595. In that case, as in the present case, the Court left the matter to the jury, and our Court of Errors and Appeals says on page 596, “* * * and the Court left it to the jury to determine whether the deceased was riding as invitee or passenger with his brother, and charged that if he was, the doctrine of contributory negligence did not apply to him, and refused to disturb the verdict under that charge,” which is exactly the same as the charge in the present case, and undoubtedly the Court in the case *sub judice* was familiar with the decision in the *Tronto* case and had it in mind as well as other cases, which indicates that this was a pure jury question, and, as indicated above, detailed the various situations of invitee, licensee, joint enterprise, master and servant, and presented the question fairly and squarely to the jury on the facts, after detailing the various situations that might exist, and left it for them to determine what situation did actually exist.

To further illustrate the situation, the appellant cites in his second point, all of which can be treated under this point, the case of *Jacobson v. Bentley Morrison Corporation*, 103 N. J. L. 16, and this is of particular interest because the judge sitting in the case *sub judice* was the judge who presided in *Jacobson v. Bentley Morrison Corporation*, and therefore was thoroughly familiar with the situation; and the Court says, in the case of *Jacobson v. Bentley Morrison Corporation*: “The true rule deducible from our own cases, and supported by the great weight of authority by courts of other jurisdictions is

that, where a person, personally in the exercise of that degree of care which common prudence requires under all the attending circumstances, is injured through the negligence of some third person, and the concurring negligence of one with whom the plaintiff is riding as guest or companion, whether as an invitee or as a mere licensee, between whom and the plaintiff the relation of master and servant, or principal and agent, or mutual responsibility in a common enterprise, *does not*, in fact, exist, the plaintiff being at the time in no position to exercise authority or control over the driver, then the negligence of the driver is not imputable to the injured person * * *." It seems to me that the Court, in the above quotation, where they specifically use the words "*does not in fact exist*," indicates clearly that if the relation of master and servant, or principal and agent, or mutual responsibility in a common enterprise "*does*" in fact exist, that the plaintiff cannot recover, and where the judge recites the facts, and explains the various relationships in detail, as was done in the present case, it is the only course left open to explain to the jury the law and allow them to fit them to the facts, as they did in the present case.

On pages 12, 13 and 14, the attorney for the appellant cites certain colloquy between counsel and the judge, stating that the jury was present and all was heard by the jury, but the writer was present at the situation and feels quite certain that the jury had retired and that no portion of this colloquy was heard by the jury but was all at the side bar when the attorney for the plaintiff was taking his exceptions to the judge's charge, and the jury did not and could not have heard it, and did not and could not have been in any

way affected by the colloquy between counsel and the judge.

POINT TWO.

The appellant was in no way prejudiced by the full and complete discussion of the various elements involved in the case, and the instruction that they apply the facts as they found them in conformity with the Charge of the Court.

It was only with the full knowledge of the rules of law applying to the various relationships that the jury could with reason determine what situation did as a matter of fact exist, and, having found that, determine the liability between the parties. As a matter of fact it would seem that the present case is controlled by the case of *Mary Garino, John Garino and Joseph Garino v. Edward C. Walker*, in 7 N. J. Misc., page 903, where the Court, commenting upon a request to charge, which was refused, as follows:

“1. If the negligence of Joseph Garino was the sole proximate cause of the accident, then the plaintiffs cannot recover and your verdict must be for the defendant.

“2. If you find as a fact, that the accident was unavoidable, then I charge you that the verdict must be in favor of the defendant.”

Held that they were proper requests.

The facts of the present case show without any question that there was no negligence whatsoever on the part of the defendants, because the driver of the truck testified that the truck was equipped with a regular system of electric lights, with a tail light, all of which works on the dash board; that the tail light was 16" below the body of the

truck, attached to an "L" iron that runs down and over the license plate, about 18" from the extreme left edge (p. 72 and top of p. 73). That he examined his lights at 6 o'clock and that they were all burning and all right (p. 73, ll. 12-14). That he examined them shortly before, when he was at Metuchen (p. 73, ll. 35-36) and it was all right; and again, shortly before the accident occurred he was in back of the truck and the light was in proper position and burning so that anyone could see it, and that the light was shining towards the rear of the truck (p. 74, ll. 14-30). That he pulled up as close to the side as he could (p. 75, ll. 10-14). That there were 12 to 15 good bright lights, showing the truck, from the stand (p. 76, ll. 10-14), and that immediately after the accident the light was still burning (p. 77, l. 12). That the Ford ran under the left-hand side rear of the truck where the light was (p. 78, ll. 2-12), and again that the light was burning immediately after the accident (p. 78, ll. 22-28). The story of the defendant was further corroborated by a police officer who immediately came to the scene of the accident and said the stand was lit up fully (p. 83, l. 20), that the truck was practically off the pavement (p. 83, l. 40), that it was a clear night and visibility was good (p. 84, ll. 38-40). That the Ford sedan struck the left rear of the truck (p. 84, l. 16), and police officer Grandjean further confirms that electric lights were burning at the stand (p. 86, l. 10). That the Ford sedan was under the rear of the truck up to the windshield of the Ford. That the defendant's truck had a light on the end of the chassis, attached to a bracket, which was still burning (p. 86 and again on p. 88, l. 22), and further by the witness, Taylor, a garage man, that the Ford was into the light (p. 90, l. 8). That the light was bent down towards the ground

and was still burning (p. 90, ll. 10-20). It would seem, therefore, that on a clear night, with a car parked off the road in accordance with the law, with the lights burning, according to the uncontradicted testimony, both before the accident and after, and shining in a proper direction, and being bent by the car in which the plaintiff was riding, that there was no negligence established on the part of the defendant, and that therefore the jury must have found that there was no negligence on the part of the defendant, because there was no testimony on which they could have found that the defendant was negligent. Therefore, the case came within the rule that the operator of the car was the sole and proximate cause of the accident, the plaintiff could not recover, and the verdict must be for the defendant (*Mary Garino, John Garino and Joseph Garino v. Walker*, 7 Misc. 903).

POINT THREE.

The verdict should be sustained.

CHARLES STOCKDELL GRAY,
Counsel for Defendants-Respondents.

