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Notice of Appeal.

NOTICE OF APPEAL.

Filed March 22, 1927.

To Messrs. Feinberg & Feinberg, attorneys of
plaintiff:

TAKE NOTICE that the defendant Abram Malayf- 10
sky appeals to the New Jersey Supreme Court
from the whole of the judgment entered in this
cause against him on the twenty-fifth day of
February, 1927.

HOBART & MINARD,
Attorneys of Defendant Abram Malayfsky.

Service of the within notice of appeal is here-
by acknowledged this 18th day of March, 1927. 20

FEINBERG & FEINBERG,
Attorneys for Plaintiff.

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Grounds of Appeal.

GROUNDS OF APPEAL.

Filed April 19, 1927.

The appellant, Abram Malayfsky, states the following grounds of appeal:

10 1. The trial court erroneously refused to grant the motion for a mistrial made on behalf of the defendant, Abram Malayfsky, when the attorney for the plaintiff in his opening, referring to said defendant, said: "We will show that the driver of this car (referring to said defendant) had no driver's license."

20 2. The trial court erroneously permitted the defendant, Jacob Ackenbout, when called as a witness on behalf of the plaintiff, to testify as to a self-serving declaration by said witness and as to the conduct of the defendant, Abram Malayfsky, and as to alleged admissions made by him shortly after the accident, to wit, in answer to the question, "Did you see Mr. Malayfsky?" the Court permitted the following answer to stand:

30 "I walked over to his car and said, 'Where in H. are you going, to a fire?' I says, 'Let's see your driver's license.' He put up his hands like that. (Witness threw both hands up in the air in front of him),"

and in answer to the question:

"When you asked about the driver's license what was said; what did he say?"

permitted the following answer to stand:

"He said he ain't got any."

3. The trial court erroneously charged the jury as follows:

40 "There are two defendants and there are two rules of law which apply to one of the

Grounds of Appeal.

defendants. The rule I will lay down to you may apply to them both, and it will apply to both of the defendants.)

10 ("Jacob Ackenbout and Abram Malayfsky providing you find that as a matter of fact Abram Malayfsky invited this old lady, the plaintiff, to go riding with him. If he invited her to come riding in his car, then he owed to her the duty of using all reasonable care to protect her from harm or injury, and if he failed to use such ordinary and reasonable care, and if that failure to do so resulted in injury to her then, in that case, he would be liable to her, if these facts have been established to your satisfaction.

20 "If, on the other hand, Abram Malayfsky merely took the plaintiff, this old lady, riding because she asked him to do so—to take her to her cousin's or uncle's, or some other relative, or to take her riding, then, if you believe that is the fact, that she asked him and that is why she was riding in his car, then he only owed to her the duty of not wantonly and wilfully injuring her. * * * So you, in considering this case, will consider that rule as applying to Malayfsky, and I so charge.

30 "As to Malayfsky there are two rules that will apply to him as to damage, depending on whether he asked her or whether she asked to go with him."

4. The trial court erroneously refused to charge the following request to charge which was submitted on behalf of the defendant, Abram Malayfsky:

"2. Unless you find that the defendant, Malayfsky, was guilty of negligence in the manner charged in the complaint, you must find for the defendant, Abraham Malayfsky."

5. The trial court erroneously refused to charge the following request to charge which was

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Grounds of Appeal.

submitted on behalf of the defendant, Abram Malayfsky:

10 "3. If you find that the defendant, Malayfsky, was negligent, but that his negligence was not the proximate cause of the accident, then you must find for the defendant, Abraham Malayfsky. To permit a recovery by the plaintiff against the defendant, Malayfsky, it is not only necessary that you find that Malayfsky was negligent, but you must also find that such negligence was the proximate cause of the accident."

6. The trial court erroneously refused to charge the following request to charge which was submitted on behalf of the defendant, Abram Malayfsky:

20 "4. Unless you find that the defendant, Abraham Malayfsky, invited Mrs. Levine to ride with him, your verdict must be for the defendant, Abraham Malayfsky."

7. The trial court erroneously refused to charge the following request to charge which was submitted on behalf of the defendant, Abram Malayfsky:

30 "5. If you find that the defendant, Malayfsky, did not invite Mrs. Levine, the plaintiff, to ride with him, but that she asked him to take her for a ride or to let her ride with him, then I charge you your verdict must be for the defendant, Abraham Malayfsky."

HOBART & MINARD,
Attorneys for Defendant-Appellant,
Abraham Malayfsky.

Complaint.

COMPLAINT.

Served February 7, 1925.

Hudson County Court of Common Pleas

10 Plaintiff, residing in the City of Bayonne, County of Hudson and State of New Jersey, says that:

FIRST COUNT.

1. On November 16th, 1924, defendant, Jacob Ackenbout, was operating an automobile along the public highway known as the Paterson Plankroad, in the City of Jersey City, County of Hudson and State of New Jersey, in a northerly direction. 20

2. On that day, plaintiff was a passenger in another automobile operated by the other defendant, Abram Malayfsky, on a public highway known as Hague street, at the corner of Central avenue, in the City of Jersey City, aforesaid, which said automobile was then moving in a westerly direction.

3. On that day, the defendant, Jacob Ackenbout, while operating said automobile, as aforesaid, negligently and carelessly ran into and against the automobile in which the plaintiff was riding. 30

4. The negligence of the said defendant, Jacob Ackenbout, consisted in this: that he operated the said automobile at an excessive rate of speed; that he operated the said automobile on the wrong side of the street; that he was so careless and reckless in the operation of said 40

Complaint.

automobile, that he lost control thereof, and he had no regard for the safety of others using the said highway.

10 5. By means of which premises, the said automobile in which plaintiff was riding was hit with such force, as to throw the plaintiff violently to the ground, and as a result thereof, plaintiff became and was sick, sore, lame and disabled, and so remained and continued for a long space of time, to wit, from thence hitherto and indefinitely in the future, and she was so severely injured in and about her head, face and mouth, and was precipitated to the ground with such force that she was rendered unconscious and removed to the North Hudson Hospital, where she remained for a long space of time, and she has
20 been seriously and permanently affected in her hearing, sustained a concussion of the brain, and she has been disfigured for life and she has been otherwise severely and permanently injured and her nervous system has been shattered, so that she has suffered and in the future will suffer great pain and she has been and in the future will be obliged to expend divers sums of money in and about attempting to effect a cure for her said injuries.

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SECOND COUNT.

1. All the paragraphs of the first count are herein repeated and made part of this count.

2. While the plaintiff was riding in the automobile of the defendant, Abram Malayfsky, along the highway as aforesaid, the said defendant, Abram Malayfsky, negligently operated the said automobile along the said Hague street so
40 as to cause his said automobile to come into con-

Complaint.

tact with the automobile being driven by the defendant, Jacob Ackenbout, along the public highway known as Paterson Plankroad.

3. By means of which premises, the said automobile in which plaintiff was riding was hit with such force, as to throw the plaintiff violently to the ground, and as a result thereof, plaintiff became and was sick, sore, lame and disabled, and so remained and continued for a long space of time, to wit, from thence hitherto and indefinitely in the future, and she was so severely injured in and about her head, face and mouth, and was precipitated to the ground with such force that she was rendered unconscious and removed to the North Hudson Hospital, where she remained for a long space of time, and she has
10 been seriously and permanently affected in her hearing, sustained a concussion of the brain, and she has been disfigured for life and she has been otherwise severely and permanently injured and her nervous system has been shattered, so that she has suffered and in the future will suffer great pain and she has been and in the future will be obliged to expend divers sums of money in and about attempting to effect a cure for her said injuries.

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Plaintiff demands as damages on either the first or second count or both counts, the sum of \$15,000.00.

FEINBERG & FEINBERG,
Attorneys of Plaintiff.

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Answer of Defendant Jacob Ackenbout.

**ANSWER OF DEFENDANT
JACOB ACKENBOUT.**

Filed February 24, 1925.

The defendant, Jacob Ackenbout, says:

10 1. That he admits the allegations and facts set forth and contained in paragraph 1 of the First Count of the complaint filed herein.

2. He has no knowledge of the allegations and facts set forth and contained in paragraph 2 of the said count of said complaint except that an automobile operated by Abram Malayfsky was operated along Hague street in a westerly direction.

20 3. He denies the allegations and facts set forth and contained in paragraphs 3, 4 and 5 of said count of said complaint.

ANSWER TO SECOND COUNT.

1. The defendant repeats the answers to the allegations of the first count.

2. He admits the allegations and facts set forth and contained in paragraph 2 of the second count of said complaint.

30 3. He denies the allegations and facts set forth and contained in paragraph 3 of said count of said complaint.

DEFENSES.

1. That the happening of the alleged accident set forth in the complaint filed herein was caused solely by the negligence of Abram Malayfsky in that he drove his automobile in a westerly direction along Hague street in the City of

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Answer of Defendant Jacob Ackenbout.

Jersey City, at or near the intersection of the Paterson Plank Road in said city, at an excessive and unlawful rate of speed without giving any signal or warning of the approach thereof and so carelessly and negligently drove and operated said automobile that he turned suddenly into Paterson Plank Road at a sharp turn, negligently and carelessly crossing directly in the path of the automobile operated by Jacob Ackenbout, the said Malayfsky operating his said automobile at the time of said collision on the left-hand side of the highway, and although the said Jacob Ackenbout was operating an automobile at the same time along the Paterson Plank Road in a careful and prudent manner and at a lawful rate of speed, his said automobile was struck by the defendant, Malayfsky, with great force and violence.

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2. The defendant repeats the allegations and facts set forth in paragraph 1 of the defenses herein and says that the plaintiff, at the time of the happening of the said accident, was guilty of contributory negligence.

AUTENREITH & GANNON,
Attorneys for Defendant, Jacob Ackenbout.

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Reply to Answer of Ackenbout.

REPLY TO ANSWER OF ACKENBOUT.

Filed February 27, 1925.

Plaintiff, replying to answer of defendant, Jacob Ackenbout, says:

- 10 1. Plaintiff joins issue with the defendant, Jacob Ackenbout, in his answer to the first count.
2. Plaintiff joins issue with the defendant, Jacob Ackenbout, in his answer to the second count.
3. Plaintiff denies the allegations of the defendant, Jacob Ackenbout, as set up in the separate defenses of said answer.

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FEINBERG & FEINBERG,
Attorneys of Plaintiff.

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Answer of Defendant Abraham Malayfsky.

**ANSWER OF DEFENDANT
ABRAHAM MALAYFSKY.**

Filed May 28, 1925.

Defendant, Abraham Malayfsky, residing at 213 Monroe street, Hoboken, New Jersey, for answer to plaintiff's complaint, says that: 10

1. As to the allegations contained in paragraphs one, two, three, four and five, first count, and paragraph one, second count, he has no knowledge or information thereof sufficient to form a belief, except that he admits that plaintiff was an occupant of his car at the time the accident occurred.

2. He denies each and every allegation contained in paragraph two, second count. 20

3. As to the allegations contained in paragraph three, second count, he has no knowledge or information thereof sufficient to form a belief.

FIRST DEFENSE.

He avers that the accident was caused through the sole negligence of the defendant, Jacob Ackenbout, and that said Jacob Ackenbout was negligent in this, that: 30

(a) He operated the automobile at an unlawful and dangerous rate of speed;

(b) He operated the said automobile in such a negligent and careless manner as to lose control thereof;

(c) He operated the automobile in such a manner as to disregard the rights of others upon the highway; 40

Answer of Defendant Abraham Malayfsky.

(d) The defendant, Jacob Ackenbout, negligently and carelessly ran into the defendant, Abraham Malayfsky's automobile, when by the exercise of reasonable care and skill he could have prevented the collision;

10 (e) The defendant, Jacob Ackenbout, drove his automobile on the wrong side of the road and into the automobile of the defendant, Abraham Malayfsky.

SECOND DEFENSE.

He avers that the plaintiff was guilty of contributory negligence in that she failed to make the necessary observations for her own safety, or, if she did make such observations, failed to communicate the results of same to the defendant, Abraham Malayfsky, so as to warn him of the impending danger in time to avoid the accident.

THIRD DEFENSE.

He states that plaintiff and defendant, Abraham Malayfsky, were engaged in a joint enterprise at the time this accident occurred, so that the negligence of said defendant, if any, is attributable to plaintiff, so as to bar her right to recover against him.

FOURTH DEFENSE.

He avers that plaintiff was a mere licensee to whom he owed only the duty to refrain from inflicting wanton or willful harm.

FIFTH DEFENSE.

40 He denies that he was guilty of the negligence charged against him in said complaint.

Reply to Answer of Malayfsky.

SIXTH DEFENSE.

He denies that he was guilty of any negligence whatsoever.

HOBART & MINARD,
Attorneys of Defendant, Abraham Malayfsky.

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We consent to the filing of the within answer as of time.

FEINBERG & FEINBERG,
Attorneys of Plaintiff.

REPLY TO ANSWER OF MALAYFSKY.

Filed May 29, 1925.

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Plaintiff replying to answer of the defendant, Abraham Malayfsky, says that:

1. She joins issue on the allegations of the defendant's answer.

2. She denies the allegations contained in the first, second, third, fourth, fifth and sixth defenses of said answer.

FEINBERG & FEINBERG,
Attorneys of Plaintiff.

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Rule for Judgment.

RULE FOR JUDGMENT.

This action was tried before Judge Harry E. Newman with a jury at the Hudson County Court of Common Pleas on February 24, 1927.

10 The cause having been heard and submitted to the jury they returned their verdict as follows: They find in favor of the plaintiff, Rose Levine, and against the defendants, Jacob Ackenbout and Abram Malayfsky, and said Rose Levine's damages are assessed at the sum of Three thousand dollars (\$3,000).

20 Whereupon it is ordered that judgment final be entered against the defendants, Jacob Ackenbout and Abram Malayfsky, and in favor of the plaintiff, Rose Levine, for the sum of Three thousand dollars (\$3,000) with costs to be taxed.

HARRY E. NEWMAN,
Judge.

FEINBERG & FEINBERG,
Attorneys for Plaintiff.

Rule actually entered Feb. 25, 1927.

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Judgment.

JUDGMENT.

Judgment entered February 25, 1927.

Debt	\$3,000.00	
Costs	66.46	
Total	3,066.46	10

Feinberg & Feinberg, attorneys.

Judgment on verdict in the above entitled cause was entered in this Court on the twenty-fifth day of February in the year of our Lord one thousand nine hundred and twenty-seven in favor of the plaintiff, Rose Levine, and against the defendant, Jacob Ackenbout and Abram Malayfsky, in a plea of action at law for the sum of Three thousand dollars, damages, and Sixty-six dollars and forty-six cents, cost of 20 suit.

Judgment entered and signed this 25th day of February, 1927.

HARRY E. NEWMAN,
Judge.

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Order.

ORDER.

Filed March 14, 1927.

On due application of the defendant, Abram Malayfsky:

10 It is on the 14th day of March, 1927, ORDERED that the time within which said defendant, Abram Malayfsky, may file such recognizance as by law is required be extended to March 16, 1927;

And it is further ordered that on the filing of said recognizance the issuing of execution as against the said defendant, Abram Malayfsky, be and the same hereby is stayed.

HARRY E. NEWMAN,
Judge.

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Opening.

HUDSON COUNTY COURT OF COMMON PLEAS.

ROSE LEVINE,

Plaintiff,

vs.

JACOB ACKENBOUT and ABRAM MALAYFSKY,

Defendants.

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Before: Hon. Harry E. Newman, Judge, and a jury.

Jersey City, N. J., February 18, 1927.

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Appearances:

Feinberg & Feinberg, Esqs. (by Mr. J. Feinberg), for the plaintiff.

Autenreith, Gannon & Wortendyke, Esqs. (by Mr. Wortendyke), for defendant Ackenbout.

Hobart & Minard, Esqs. (by Mr. Dorgeval), for defendant Malayfsky.

A jury was impanelled and sworn.

Mr. Feinberg during his opening said:

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We will show that the driver of this car had no driver's license.

Mr. Dorgeval: I ask for a mistrial because of that reference to a driver's license.

Mr. Wortendyke: In answer to that I am constrained to take the position of being opposed to that on the ground that it is not material.

Mr. Feinberg: I certainly oppose that motion, because I think that we can prove to the Court and jury that there was a violation of the

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Rose Levine, for Plaintiff, direct.

traffic act, and the jury should take these facts into consideration as to whether there was negligence. If we can prove that there was no license, we shall prove that this driver was not fit to operate a car. That is for the jury's determination.

10 Mr. Dorgeval: In the first place, this is argument, and it is highly improper to refer to that. His reference to that is not admissible and is highly improper. If there was a violation of the traffic act of course it is proper to refer to that.

The Court: I agree with you. I will deny your motion for a mistrial.

Mr. Dorgeval: I ask for an exception.

20 ROSE LEVINE, the plaintiff, sworn.

(The testimony of this witness was taken through the Jewish interpreter.)

Mr. Feinberg: It is conceded that she is the woman who was injured—that she is the plaintiff in this case.

Mr. Wortendyke: Yes.

Direct examination by Mr. Feinberg.

30 Q On November 16, 1924, were you riding in Mr. Malayfsky's automobile? Just answer yes or no? A Yes, sir.

Q Who asked you to go in the automobile? A Malayfsky asked me to go with him.

Q Did he tell you where he was going? A No, only for a ride.

40 Q He asked you to go for a ride, that is what he said, go for a ride? A (The interpreter): She said that.

Rose Levine, for Plaintiff, direct.

Mr. Dorgeval: (I object to that. That is leading.

Q Where did you go? A In the street.

Q Was the car that you were riding in in an accident that day? A Yes, sir, sure.

Q Where were you sitting in the automobile? 10
A In the back.

Q Who was sitting in the front with Mr. Malayfsky? A Mr. Malayfsky and some girls.

Mr. Feinberg: Mr. Interpreter, she didn't say "some girls."

The Interpreter: Girls.

Q Whose girls? A Malayfsky's.

Q About the time that the accident happened 20
what was Malayfsky doing? A I don't know.

Q Who was driving the car? A Malayfsky.

Q Was he talking to his daughter?

Mr. Dorgeval: I object to that. Mr. Feinberg knows better than that.

The Court: It is leading.

Q What was he doing in the car besides driving, 30
if anything? A He was driving.

To the Interpreter: Can you ask that in Jewish?

Mr. Dorgeval: I object. The first answer was not satisfactory and he is trying to improve on it.

Q Was anybody in the automobile talking?
A The girl.

Q To whom? A To the father. 40

Rose Levine, for Plaintiff, direct.

Q Did the father do anything when she talked to him? A Sure.

Q What did the father do, the man driving the car, when the daughter talked to him? A He was riding.

10 Mr. Interpreter, when you interrupted, did she say anything to you when she said that she saw the girl talk to the father, what did he do to her?

A Nothing.

Q What, if anything, did the father do? A He did anything.

Q He was talking? A He and his daughter.

Q You said that before, didn't you? A Yes.

20 Q About the time that this conversation was going on is that the time that the accident was happening?

Mr. Dorgeval: I object to that as leading.

Q With relation to the time the accident happened when did this conversation take place? A I don't know when the accident occurred.

Q You don't know very much about this accident, do you? A No, I don't know anything.

30 Q Do you remember when the two cars got together? A No, I do not; I do not know.

Q Did the two cars get together? A I didn't see anything.

Q What happened to you? A My head was crushed.

Q What happened to your head? A Contusions on the head.

Q Mr. Interpreter, did she say "contusions"?

40 The Interpreter: Yes, lacerations.

Rose Levine, for Plaintiff, direct.

Q Was there anything else the matter with you? A Head crushed.

Mr. Feinberg: What did she say about "schpalten"?

The Interpreter: She says her head was split. 10

Q Did they do anything to your head? A I was to the doctor.

Q Were you in the North Hudson Hospital? A Yes.

Q For how long? A Three weeks.

Q Did you get any paper from the hospital? A Yes.

Mr. Feinberg: I offer this in evidence. 20

The Court: I will admit it.

Received and marked P. 1 of this date.

Q The bill was for \$44? A Yes, for three weeks.

Q How long were you there? A Three weeks.

Q Who treated you when you went home? A Dr. Weiss.

Q Has he been in constant attendance of you since you left the hospital? A Yes, sure. 30

Mr. Feinberg: Bring the lady down here and I will have Dr. Weiss point out the marks on her head to the jury.

Take your hat off so that you can show your head to the jury.

Dr. Weiss: The outer angle of the left eye and all the way back here on the center of the scalp. It started here and went all the 40

Rose Levine, for Plaintiff, cross.

way up to here and through here. That is the extent of the laceration.

By Mr. Feinberg.

Q How old are you? A Sixty-six years old.

10 Q During the time you were in the hospital did you have any pains? A Sure.

Q Just tell us where it pained you, where it hurt you? A In the back.

Q Where else? A In the head.

Q Any place else? A I don't know all the places; I couldn't say.

Q Was there anything the matter with your ears? A Sure.

Q Do you hear all right now? A No.

20 Q Your ears were all right before the accident? A Sure.

Q What is the matter now? A I don't know what is the matter.

Q You can't hear so good? A Sure not.

Mr. Feinberg: Take the witness.

Cross examination by Mr. Wortendyke.

Q Can you hear me? A (No answer.)

30 Q (Counsel stepping closer to the witness.) Can you hear me now? A A little bit.

Q Where did you get in Mr. Malayfsky's car this day? A Home.

Q Where was your home? A I forgot the number—Hopkins avenue.

Q Humphrey? A Yes.

40 Q How far would you say your home was on Humphrey avenue over to this place that you had the accident? A That is away in another place altogether.

Rose Levine, for Plaintiff, cross.

Q Did you live on Humphrey avenue in November, 1924? A Sure.

Q Is Humphrey avenue in Jersey City? A No.

Q Where is it? A In Bayonne.

Q Is that where you got on the Malayfsky car? A We had been there. 10

Q Confine yourself to November 16, 1924. On that day did you leave Humphrey avenue, Bayonne? A I was at that time in Jersey.

Q On what street? A Summit avenue.

Q How far away was your home from the Paterson Plankroad and Hague street? A That is altogether another place.

Q Is it a long distance? A Yes, sure.

Q What time of the day was it when you got in the Malayfsky car at your home on November 16, 1924? A After dinner we started from Mr. Malayfsky's. 20

Q What time did you have dinner? A I can't tell you—one or two o'clock in the afternoon.

Q What time was it that you had the accident? A I couldn't tell you.

Q Was it an hour later? A Yes, an hour later.

Q Did the Malayfsky car stop between your home and the place where you had the accident? A I was in Malayfsky's house, and he told me I should come along with him. 30

RECESS TILL 2 P. M.

Rose Levine, for Plaintiff, cross.

Afternoon session, 2 P. M., trial resumed pursuant to adjournment.

Cross examination by Mr. Wortendyke, resumed.

Q Where was Malayfsky's house? A In
10 Jersey City.

Q Did Malayfsky's car stop between his house and the place where the accident took place? A No.

Q Where were you sitting in the car? A In the back.

Q On which side, the right-hand side or the left-hand side? A On the right side.

Q Who was driving? A Malayfsky.

Q Which side did he sit on? A In the front,
20 indicating the left side.

The Court: On the left.

Q Was there anybody else in front? A The girls.

Q How many? A Two.

Q The two girls were in the front seat? A Yes.

Q How many in the back? A One girl.

Q Besides yourself? A Yes.

Q Were there one or two people, including
30 yourself, in the back? A The girls were sitting with me.

The Interpreter: First she said there was nobody sitting there, and now she says three.

Q There were five altogether? A Four.

Q Three in the back? A Three in the back.

Q How many in the front? A Nobody else
40 but me and the two girls.

Rose Levine, for Plaintiff, cross.

Q Who was in the front? A In the back with me were the girls and I.

Q Who was sitting in the front besides Malayfsky? A There were only two seats, one in the front and one in the back, the back one and one in the front.

Q Was there anybody else besides Malayfsky
10 in the front? A No.

Q He was there alone in the front? A Yes.

Q Do you know Hague street? A I don't know.

Q Do you know where Paterson Plankroad is? A No, I do not know.

Q Did this collision take place where two streets come together? A I can't tell you; I don't know.

Q How long had you been living on Grace street? A Three or four weeks.

Q Where did you live before that? A With my son.

Q Where? A In Bayonne.

Q Before you came to where this accident took place did you notice what Malayfsky was doing? A No.

Q Where were you looking? A I didn't look; I was sitting in the car; I didn't look at
30 all.

Q You didn't look anywhere? A No.

Q Do you know what Malayfsky did just before he reached Harrison Plankroad? A I don't know.

Q Do you know what Malayfsky did when he left his house with his car? A No.

Q Did you know what Malayfsky did at any time after he left his house? A We were in the car until the accident—no.
40

Rose Levine, for Plaintiff, cross.

Cross examination by Mr. Dorgeval.

Q Did I understand you to say that Mr. Malayfsky was sitting in the front seat alone? A Sure, I can't tell you. (In English.)

10 Q Don't you know whether Malayfsky was sitting in the front seat alone or not? A Sure—there is another front seat where you need to ride.

Q You said, did you not, that Mr. Malayfsky was sitting in the front seat alone? A I can't tell you now.

Q Just now, when this gentleman asked you some questions, you told him that Mr. Malayfsky was sitting in the front seat alone, didn't you? A (The witness nodded her head.)

20 Q Are you sure of that? A I don't know.

Q Mrs. Levine, are you certain that Mr. Malayfsky was sitting alone at the time the accident occurred? A He didn't sit in the front seat; he was sitting in the back seat.

Mr. Feinberg: She didn't say anything of the kind.

30 Mr. Dorgeval: I object to Feinberg's remarks; I presume that the interpreter is competent. He is the official interpreter here.

40 Mr. Feinberg: Unfortunately we have no other interpreter. This interpreter only understands German; not Yiddish. There are half a dozen Jewish people in the court room, and they will tell you the same thing. This man, the interpreter, is not giving the questions properly; he is speaking half German. She is not German; she is Jewish. I told that to Mr. Dorgeval in a whisper just a short time ago.

Rose Levine, for Plaintiff, cross.

Mr. Dorgeval: I must object to Mr. Feinberg's objections to the witness' answers.

The Interpreter: May I answer Mr. Feinberg's remarks, your Honor, please?

The Court: Yes.

10 The Interpreter: If your Honor please, I am a Civil Service man. I passed the Civil Service examination in the Jewish language. I haven't only Mr. Feinberg's cases here, but lots of cases, and nobody has complained about me. It is the second time that Mr. Feinberg has complained about me.

The Court: He is the official interpreter here given us for this witness.

Cross examination by Mr. Dorgeval, resumed.

20 Q Mrs. Levine, you remember that Mr. Malayfsky sat on the front seat, don't you? A With the wheel.

The Court: Driving.

Q He was driving the car? A Yes.

Q In the front seat? A I don't know whether you call it the front or the back.

30 Q We call the seat where Mr. Malayfsky sat the front seat. Was anybody sitting alongside of Mr. Malayfsky? A I can't tell you; I don't know.

Q Don't you know whether anybody was sitting on the right hand side in the front seat? A No.

Q Who was seated in the back seat with you? A The girls.

Q How many girls? A Two girls.

40

Rose Levine, for Plaintiff, cross.

Q Do you know how many girls Mr. Malayfsky has? A Three.

Q And only two were with him? A I don't remember; I can't remember sometimes.

10 Q Mrs. Levine, just tell me, if you please, how you came to go on this ride; that is, what did he say? A He ask if I wanted to go for a ride; I said yes.

Q Just what did Mr. Malayfsky say to you?

Mr. Feinberg: She has already answered that.

Mr. Wortendyke: I object.

20 Q Can you recall what were his words; just what he did say? A He said, "You come along with me,"—come with them.

Q Did he say anything else? A No, I can't remember.

Q Did he say anything else that you can remember? A No.

Q You do remember positively that he said to you, "Come along with me"? A That is right.

30 Q What did you say to him? A I said, "All right, I will go."

Q You said to Mr. Feinberg that Mr. Malayfsky was talking with some one? A The girl.

Q Talking with the girl? One of the little girls? A The big girl.

Q Where was the big girl sitting? A With me.

Q The big girl was with you in the back seat? A Yes.

40 Q One of the little girls was in the back seat with you? A Yes.

Rose Levine, for Plaintiff, cross.

Q Then you said you did not make any stop?

A No.

Q Mrs. Levine, you have a nephew named Louis Levine? A Yes.

Q Did you ask Mr. Malayfsky to stop at your nephew's house? A No.

10 Q Did you ask Mr. Malayfsky at his house to take you for a ride? A No, sir, I didn't ask him.

Q Are you sure of that? A Positive, I didn't ask him.

Q You remember now—this happened over two years ago—you are not certain of many things, are you? A I can't tell you.

Q You are not certain of many things connected with the accident, are you? You don't remember all of what happened, do you? A 20 No, I don't remember at all.

Q You don't know anything about what happened, do you? A No.

Q Except that Mr. Malayfsky asked you to come with him; you remember that? A Yes.

Q You also remember that no one was sitting alongside of Mr. Malayfsky? A I don't remember that.

30 Q The only thing you remember connected with this accident is the fact that Mr. Malayfsky asked you to come with him, is that right? A Yes, sir.

Q You are positive that no stop was made? A No.

Q You remember that, too? A Sure.

Q Have you talked to any one about this case? A No.

Q Not a soul? A No.

40 Q You understand me? You haven't talked with anybody about this accident? A Only after the case was— 40

Rose Levine, for Plaintiff, re-cross.

Q Have you talked with anybody about this case? A No.

Q Not a soul, no one? A No.

Re-cross examination by Mr. Wortendyke.

10 Q But you are sure, Mrs. Levine, Mr. Malayfsky when he was going along Hague street, was talking to the big girl seated in the back of the car? A Before the accident happened she talked with him, after that I don't know anything at all.

Q Before the accident? A Yes.

Q As he was going toward Paterson Plankroad? A I can't tell you.

20 Q But you do know that during the course of your progress in the car, up to the time of the accident, that Mr. Malayfsky was talking to the big girl in the back, is that right? A Sure.

Re-cross examination by Mr. Dorgeval.

Q Where was the automobile when this conversation took place between Mr. Malayfsky and his big daughter? A On the run home.

30 Q And you just told this gentleman that Mr. Malayfsky was talking with his big daughter in the automobile, that is right? A Yes, sir.

Q Where was the automobile when he was doing that? A Riding.

Q Where was it riding? A I don't know.

Q How long before the accident? A I can't tell how long before.

Q Mrs. Levine, at the time that the accident occurred where were you living? A I lived by my sister-in-law.

40 Q What is her name? A Levine.

Rose Levine, for Plaintiff, re-cross.

Q Mrs. Levine? A Yes.

Q And at the time of the accident you were living with Mrs. Levine? A Yes.

Q How long had you been living with Mrs. Levine? A Four weeks.

Q Mrs. Levine is what relation to you? A 10 Sister-in-law.

Q Before you were living with Mrs. Levine where were you living? A With my son.

Q This man who is here now? A Yes.

Q How long did you live with him? A A long time.

Q You have several daughters and sons? A Only one son.

Q How many daughters? A Three daughters. 20

Q Have you been living with your son since the accident? A Sure.

Q All the time? A Yes.

Q Is your son taking pretty good care of you?

Mr. Feinberg: I object to that.

The Witness: I can't tell you.

Q Did your son take good care of you before 30 the accident?

Mr. Feinberg: I object to that.

Mr. Dorgeval: I want to show in the course of this case the relationship that existed between these parties.

Mr. Feinberg: This is not an adoption case; this is a negligence case.

The Court: I don't think that point is worth much. Why this extended argument? 40

Samuel Levine, for Plaintiff, direct.

Re-direct examination by Mr. Feinberg.

Q You said your sister-in-law has only two boys? A No.

10 SAMUEL LEVINE, sworn for the plaintiff.

Direct examination by Mr. Feinberg:

Q Mr. Levine, the last witness on the stand is your mother? A Yes.

Q She lives with you? A Yes.

Q On November 16, 1924, she was living with you? A She was living there with me; she only went out to see a friend.

20 Q How long did she stay? A She don't remember. She went over to see my sister.

Q Sometimes she stayed there? A Yes, a little while.

Q Before this accident what kind of a woman was she? You could see? A She was well. She moved fine, and everything.

Q She was active? A An active woman, yes.

30 Q Did she ever talk? A She talked, and was happy, and would make you laugh, and everything.

Q Since the accident she has changed? A Yes, changed altogether. You can talk to her now, and she don't say anything.

Q What does she do? A Talks to herself.

Q She is active now? A Not at all.

40 Q She lives with you? A She lives with me.

Samuel Levine, for Plaintiff, cross.

Cross examination by Mr. Dorgeval.

Q Why did your mother go down to Mr. Malayfsky's house at the time of the accident?

Mr. Feinberg: I object. I limited him to one question. 10

The Court: You brought that up.

Mr. Feinberg: No, before and after the accident.

The Witness: She had some friends out there.

Q Do you know who they were? A Cousins, or something like that.

Q She went there frequently? A Just to visit for the day. 20

Q Didn't she go there often? A She didn't go often.

Mr. Wortendyke: I object to that. He can ask on this particular day only.

The Court: Yes.

Q Didn't she, at that time, go over to Malayfsky's house frequently, for a meal? 30

Mr. Wortendyke: I object to that.

The Court: Where is the materiality of that?

Mr. Dorgeval: I withdraw the question.

Q Did your mother not go over to Mr. Malayfsky's house on the day of this accident to have dinner? A No, she didn't go for dinner; she was invited to dinner when she came there. 40

Jacob Ackenbout, for Plaintiff, direct.

Q Do you know if she had dinner there or not? A I can't say.

Q Did she have it with you? A She was in Jersey, and I live in Bayonne.

Q Did she have dinner with you? A No.

10 Q Do you know where she had dinner on that day? A No.

JACOB ACKENBOUT, one of the defendants, called by the plaintiff, and sworn.

Mr. Dorgeval: It is admitted that the defendant is the owner of the car?

Mr. Wortendyke: Ownership is admitted.

20 *Direct examination by Mr. Feinberg.*

Q On November 16, 1924, were you operating an automobile on the Paterson Plankroad, Jersey City? A I was.

Q What kind of an automobile was it? A A Cadillac limousine.

Q What time of the day were you driving that car on the Paterson Plankroad when something happened? A Two o'clock.

30 Q You met with an accident that day? A I did.

Q Where did it happen? A Hague street and the Paterson Plankroad, at Union City.

Q You were going over south to north? A I was.

Q You had an accident occur, near Hague street? A I did.

40 Q The car coming west at Hague street, in the Paterson Plankroad? A That sketch of Hague street is not quite right.

Jacob Ackenbout, for Plaintiff, direct.

Q What would you say? A She runs on an angle.

Q Slanting down like this? A No, the other way.

Q That is your idea of Hague street, is it? A Yes.

10 Q Tell the Court and jury in your own way how this accident happened. A I was going north on Paterson Plankroad. I had struck almost the corner when a car shot out of Hague street.

Q When you say a car shot out of Hague street, did it make a long turn or a short turn? A It came right around the corner—a short turn.

Q Had you reached the corner yet? A I did not.

20 Q What happened? A We had a collision.

Q How fast was the car coming out that hit you—coming out of Hague street? A Like a shot out of a gun.

Q How fast in your opinion? A That I couldn't very well say how fast.

Q Was it going fast? A It was.

30 Q Will you go down here and give us an idea how this car made the turn from Hague street into Paterson Plankroad, and where the accident happened? A I was coming north on the Plankroad. My car was about here (indicating). His car came around the corner here. This is my car (indicating).

Q Just describe your car and the other fellow's car? A This is my car—this is north, this is the Paterson Plankroad, and this other man's car came west.

40 Q This is where you were when the accident happened? A About there.

Jacob Ackenbout, for Plaintiff, direct.

Q How far from there? A Not over five or six feet before we came to a stop.

Q Did you get out of the car after the accident? A I did.

Q Did you see Mr. Malayfsky? A I walked over to his car and said, "Where in H. are you going, to a fire?" I says, "Let's see your driver's license." He put up his hands like that (Witness threw both hands up in the air in front of him).

Mr. Dorgeval: I object to all of that.

Mr. Wortendyke: I think it is very material.

Mr. Dorgeval: I object to his making his own evidence. He could have said he had gone mad or crazy; that is inadmissible against us.

Mr. Feinberg: He may say what he saw.

The Court: What he found is also admissible.

Mr. Dorgeval: If he wants to say something that is damaging against us, something that we said or did, that would be competent, but for him to testify to things that were said by him against us I think is highly improper.

Mr. Wortendyke: May I say in response to that that I think it is completely competent at this point. The admissions sought to be shown are practically tacit admissions, this throwing of his hands as illustrated on the stand. I contend that is competent.

The Court: I will permit it.

Mr. Dorgeval: It is a self-serving declaration.

Jacob Ackenbout, for Plaintiff, direct.

The Court: Proceed; don't argue among yourselves.

Mr. Dorgeval: Your Honor permits this?

The Court: Yes.

Mr. Dorgeval: I ask for an exception.

Mr. Feinberg: Go ahead from where we interrupted you.

A I got the height of abuse from his daughter.

Q When you asked about the driver's license what was said; what did he say? A He said he ain't got any.

Q What else?

Mr. Dorgeval: That is improper. Does your Honor permit this?

The Court: Yes.

Mr. Dorgeval: I ask for an exception.

Mr. Feinberg: Go ahead from where we interrupted you.

A I got the height of abuse from his daughter.

Q When you asked about the driver's license what was said? A He said he ain't got any.

Q What else?

Mr. Dorgeval: That is improper.

The Court: It is improper whether he had a driver's license or not. I am of that opinion whether or not he had a license. That is the ruling.

Mr. Wortendyke: Exception.

Mr. Feinberg: I want to offer the same objection as that offered by Mr. Wortendyke.

Jacob Ackenbout, for Plaintiff, cross.

Will your Honor hold that what he actually said himself is stricken out?

The Court: Strike it out.

Mr. Feinberg: If he did not have a license?

10 The Court: Yes.

Mr. Feinberg: Exception.

Q Then what did you do? A I ran over and telephoned—called the West Hoboken police department.

Mr. Feinberg: Take the witness.

Cross examination by Mr. Wortendyke.

20 Q Mr. Ackenbout, do you own this car you were driving? A I do not.

Q In what business were you employed at the time? A Private auto renting.

Q Where were you at the time of the collision? A Columbia avenue, North Bergen.

Q How far away from the point at which this collision took place is that destination that you speak of? A About seven blocks.

30 Q What time of the day did it take place? A Two o'clock.

Q What time were you due at this destination? A Two-fifteen.

Q As you were coming north on the Paterson Plankroad just before you reached the junction at Hague street how fast were you going? A Oh, about twelve or fifteen miles an hour.

40 Q How long before that had you been driving automobiles? A About eighteen years.

Jacob Ackenbout, for Plaintiff, cross.

Q Were you a licensed driver of the State of New Jersey on that day? A I was.

Q Are there trolley tracks on the Paterson Plankroad? A Yes.

Q How did they lie with respect to the curb? A In the center. 10

Q Two sets of tracks? A Two sets.

Q How were you proceeding just before you reached that corner, with respect to the easterly trolley rail, and the easterly curb line of Paterson Plankroad? A The left front and rear wheel were in between the two rails.

Q As you approached this corner did you make any signal? A I did.

Q On what? A I sounded on the horn.

Q What kind of a horn have you on the car? A A Klaxon. 20

Q Have you ever had occasion to hear that particular horn blown on your car when you were out of the car and somebody else was in it? A Why, yes.

Mr. Dorgeval: I don't see what the purpose of this is.

Mr. Wortendyke: As to the audibility of the horn and the average distance the horn sound carried. 30

Q Can you form an opinion as to how far the horn sound will carry? A Oh, I should say a block and a half.

Q As you approached this intersection were there any other vehicles on Paterson Plankroad or Hague street? A Just what was behind me.

Q How many? A Two other limousines.

Q In the same job you were? A They were. 40

Jacob Ackenbout, for Plaintiff, cross.

Q Did you do anything else other than blow your horn? A I just blew my horn, and then I saw the car coming out.

Q Will you describe the configuration of that particular corner, as to whether it has buildings on it, and if so how close they lie to the curb?

10 A On Hague street and Paterson Plankroad they have what they call the Flatiron building; right on the corner is a telegraph pole.

Q Where does the telegraph pole lie with respect to the curb line? A Two feet from the extreme corner.

Q This point (indicating). The Flatiron building lies in a direction corresponding to the point of the corner—how far from the corner?

A About six feet.

20 Q You say as you were approaching a position of six feet from the extreme corner of the curb line you had blown your horn and this car shot out? A Yes.

Q And then what happened? A I jammed on the brakes, and he struck me in the left front.

Q Of your car? A Yes.

Q By the left front of your car you specify what point? A The bumper and the front gooseneck of the chassis.

30 Q What kind of a bumper is it, straight across? A Yes.

Q Curved at the ends or straight? A Straight.

Q Was it damaged? A Nothing left of it.

Q Was the left front wheel of your car damaged? A It was, the left gooseneck and the motor base were bent back.

Q What is the gooseneck? A The two sides of the chassis that come down.

40 Q Where the left front end joins the left front spring? A Yes, sir.

Jacob Ackenbout, for Plaintiff, cross.

Q Did you observe how the Malayfsky car was occupied? A I just saw that Malayfsky was driving the car. I looked in the back and saw that the old lady was bleeding.

Q Were there any other occupants? A There were, but how many I could not say.

Q You say you sighted the elderly lady bleeding? A The elderly lady bleeding. 10

Q That was what caused you to call the police? A Yes.

Q What kind of a car was this? A A sedan.

Q How many passengers? A It looked to me to be a seven passenger, a large one.

Q Do you know whether it had a motor vehicle registration number on it? A It did.

Q Do you remember what that was?

Mr. Dorgeval: Are you proving that it was our car? 20

Mr. Wortendyke: Yes.

Mr. Dorgeval: We admit ownership.

The Witness: Not by heart any more.

Q Did you take a note of the number? A No, not exactly.

Q What were the weather conditions that day? A Very good. 30

Q It was daylight? A Yes, sir.

Q What day of the week? A Sunday.

Q Immediately before you blew your horn on approaching this corner, or from the time you blew your horn until the collision, did you hear any other horn blown in the vicinity? A I did not.

Q Have you windows around the driver's seat or is it closed in? A Open in the front.

Mr. Wortendyke: That is all. 40

Jacob Ackenbout, for Plaintiff, cross.

Cross examination by Mr. Dorgeval.

Q What do you mean by open front? A A limousine has no windows in the front by the driver.

10 Q It has windows by the windshield? A Yes, but not on the side; in the front.

Q It is open on the side? A Yes.

Q As you were driving along, or before the accident—north of the Plank Road, before the accident, how fast were you going? A Twelve or fifteen miles an hour.

Q Where had you started from? A 213 Monroe street, Hoboken.

Q You were going to a place about seven blocks from the accident? A Yes.

20 Q What time did you leave Hoboken? A About fifteen or twenty minutes of two.

Q What was the time of the accident? A About two o'clock.

Q How far is it from the place of the accident to your place in Hoboken? A I should judge about two miles.

Q Did you drive two miles in fifteen or twenty minutes—correct me if I am wrong? A Yes.

30 Q In fifteen or twenty minutes? A Fifteen or twenty minutes.

Q You don't often go fifteen miles an hour—something less than that? A We were blocked at the railroad crossing at the end of First street.

Q How long were you waiting there? A I couldn't say how long—enough to let a freight train pass by.

40 Q Were you driving over twelve or fifteen miles an hour up there? A No, it is a very rough road—the Plank Road.

Jacob Ackenbout, for Plaintiff, cross.

Q Do you ever drive faster than twelve or fifteen miles an hour?

Mr. Feinberg: I object to that.

The Court: Sustained.

Mr. Dorgeval: I think it is a proper question. 10

The Court: On what ground?

Mr. Dorgeval: To show this man's usual habits.

Q What is your business? A Private renting.

Q You carry passengers for hire? A Yes.

Q How long have you been doing that? A Almost all my life. 20

Q You have driven a car for eighteen years? A From horses up.

Q You came up here at twelve or fifteen miles an hour. What part of the road were you in? A The car was half-way in between the two rails.

Q What do you mean by that? A The left front and the rear wheel, were in between the two rails going north.

Q The northbound trolley track? A Yes. 30

Q How far to the right-hand side of your car was the curb? A I should judge four feet.

Q You had two or three cars, didn't you? A I did.

Q As you approached Hague street you blew your horn? A I did.

Q Where were you when you first blew your horn? A On the Paterson Plank Road.

Q How near Hague street? A Oh, I should judge three building lots. 40

Jacob Ackenbout, for Plaintiff, cross.

Q What is that, a hundred and fifty to a hundred and seventy-five feet? A Hard to say—the Flatiron building is there—I don't know how many a building makes.

Q How far were you from Hague street when you started your horn? A Three buildings.

10 Q Just tell me in feet. How much is that building? A Some are twenty-five and some are thirty-five.

Q Then, was it about 75 feet? A About that, yes.

Q Seventy-five to a hundred feet? A I should think so.

Q When you first blew your horn? A Yes, I did.

20 Q Did you blow it again? A I blew it quite a few times.

Q How many times did you blow it? A Three or four times.

Q You started seventy-five to one hundred feet from the corner to blow your horn? A Yes.

Q When was the last time? A About four feet away from the corner.

Q Did you give little toots or did you hold it down? A One long blast.

30 Q A good long blast? A Yes.

Q Did you hold your button down? A The fraction of a minute or a couple of seconds.

Q The last time you sounded it was about four feet from the corner? A Yes, sir.

Q How wide did you say the Plankroad is? A About 20 or 25 feet from curb to curb.

Q Just where was our car when you first saw it? A When it struck me.

40 Q That was the first you saw of it? A Yes, sir.

Jacob Ackenbout, for Plaintiff, cross.

Q You didn't see it at all before then? A I did not.

Q Just where were you when you were struck? A Right near the corner.

Q How far from the corner? A I couldn't say; I don't recollect that.

10 Q As you were approaching Hague street you sounded your horn—did you do anything else? A No.

Q Did you slow down at all then? A I don't know; I couldn't even say; I don't remember.

Q Didn't you slow down? A I might have pulled down to ten or twelve miles an hour.

Q I am asking you what you did do? A I might have; I don't remember.

Q Then you don't remember whether you slowed up or not? A Right.

20 Q Within what distance could you have stopped at the speed you were going? A Ten feet.

Q How do you know that? A An automobile going at the rate of twenty-five miles an hour can stop easily in a car's length.

Q I am asking you how you could tell me that you could stop in ten feet? A I had very good brakes.

30 Q Examined recently? A Relined four or five days just previous to the accident.

Q Had you tested them when you got them back? A I do all my own repair work.

Q Had you tested your car at all since it was repaired? A I was doing that every day. In regards to what? We don't take it out for a special test. If you go out on a job you can easily tell whether the brakes are all right.

40 Q Did you put the brake lining in yourself? A Yes.

Jacob Ackenbout, for Plaintiff, re-cross.

By the Court.

Q Did you put the brakes in yourself? A Yes, sir, I did.

Q Did you test them to see if they worked? A I did.

10 *Re-cross examination by Mr. Dorgeval.*

Q When did you test them? A Saturday afternoon.

Q And this accident happened Sunday? A Yes.

Q How long after you last sounded your horn did the accident happen? A Oh, a few minutes—seconds, or a minute.

20 Q You don't mean a minute—seconds? A It happened so quick that—

Q How many seconds after you last blew your horn did the accident happen? A I can't say.

Q About? A I can't even "about" it; it all happened so quick.

Q I want to know did it happen five seconds after you last blew your horn? A I can't answer that.

30 Q Was it more or less than five seconds? A I can't answer that.

By the Court.

Q Do you know how long five seconds is? A No, I do not.

Q Just a slow count—one, two, three, four.

By Mr. Dorgeval.

Q Did the accident happen after you last sounded your horn? A It did.

40

Jacob Ackenbout, for Plaintiff, re-cross.

Q Can you tell me now how many seconds, as near as you can recollect it happened after you last sounded your horn? A No, sir, I cannot.

Q The Court told you that seconds are measured by a slow beat. Can you tell me how many seconds it happened after you last blew your horn? A I cannot.

10

The Court: He is not expecting you to tell exactly—one, two, three.

The Witness: It was ten seconds, if you figure that way—from five to ten seconds.

Q Have you ever seen a boxing bout? A No, I am not interested in them at all.

Q From five to ten seconds after you last blew your horn the accident occurred, is that right? A Yes.

20

Q How far was the front of your car from the corner of Hague street when you hit? A About even up.

Q The front of your car was even with his when you hit? A Just this side of the curb.

Q Didn't you say on direct examination that you were five or six feet from the corner when you were hit, when Mr. Feinberg or Mr. Wortendyke asked you that? A When the car came to a stop it was even up with the corner.

30

Q You say you didn't see our car until you were hit? A I did not.

Q Just tell us exactly what was happening when you first saw our car? A It was right in front of me—and then the bang.

Q Just an instant, and you were hit? A Just came right in front of me.

Q Where were you then? A Why, behind the driver's wheel.

40

Jacob Ackenbout, for Plaintiff, re-cross.

Q Where was the car? A On Paterson Plankroad.

Q Where was the front of your car with reference to Hague street? A I would say three or four feet from the edge of the Hague street curb.

10 Q How close were you to your right curb? A About four feet.

Q At that time did our car hit you or did it hit you afterwards—when you were four feet from the right curb of Paterson Plankroad, and I thought you said four feet from Hague street—is that when you were hit? A Yes.

Q It hit you in the left front? A Left front.

Q You didn't see us at all before we hit you? A No.

20 Q What part of the car hit you? A Right at the front runningboard—right behind the left front mudguard.

Q Our left front mudguard hit your left front? A The left front hood.

Q The hood of our car hit the hood of your car? A Yes.

Q What happened to your car then? A It came to a standstill and I got out.

Q Where? A On the trolley tracks.

30 Q Which? A The ones going north. Mr. Malayfsky's car was across the two tracks, across the northbound tracks when he came to a standstill.

Q Heading in which direction? A Heading just about where I have the chalkmark, southwest.

Q Where was your car then? A My car was heading north.

40 Q Where was it, in contact with Malayfsky's car? A Close up.

Jacob Ackenbout, for Plaintiff, re-cross.

Q Jammed together? A Not jammed together.

Q Touching each other? A I believe they were.

Q What part of your car touched the Malayfsky car? A The left front wheel.

10 Q What part of Malayfsky's car was touching your car? A The left runningboard.

Q You said your horn could be heard a block and a half away? A It can.

Q Why? A I have a special Klaxon horn put on.

Q Mr. Wortendyke asked you about the distance you could hear it, standing off from it. A I could leave the car in front of my house, and no matter what anybody wanted me for if they would blow the horn I could always hear it.

20 Q While the car was standing in front of your house? A Yes.

Q Did you ever have anybody sound the horn while you walked off? A Yes. I have seen myself a block and a half away when the kid would blow the horn.

Q How did you know this horn on this car? A It has a funny sound to it—a Klaxon.

30 Q You noticed that a block and a half away you could hear it? A Yes.

Q Where was the car then? A Standing in front of the house.

Q You said you called up the police department after the accident? A I did.

Q You say you saw the people were injured? A I did.

40 Q Why not call the hospital or a doctor? A You can't get a hospital as quick as a police station. It is up to the police station to inform the hospital.

Jacob Ackenbout, for Plaintiff, re-cross.

Q The police came? A They did.

Q And locked you up? A Yes.

Mr. Wortendyke: I object.

Q As you came up to Hague street the building, the Flatiron building is on the corner? A Yes.

Q You can see into Hague street some distance, can't you? A A couple of feet.

Q You can see as you come up the Plankroad looking into Hague street—see two feet? A As soon as we strike the corner.

Q As you strike the corner of Hague street and the Paterson Plankroad you can see a few feet? A Yes.

20 Q How many feet? A Two or three feet.

Q You can't see two or three feet into Hague street until you get where? A The corner of Paterson Plankroad? You can't see through the building line and the telephone line.

Q How near to Hague street must you be to look down Hague street? A To look down Hague street probably you must get to the corner—it runs on an angle.

30 Q You said a few feet—two or three feet, the same distance exists when you get to the corner? A When you get to the corner.

Q Before you get to the corner—say when you were about four feet from the corner, can you see into Hague street? A No.

Q It is an absolutely blind alley? A Central avenue you can look up.

Q But not into Hague street when you are four or five feet from it? A No, sir, you cannot.

40

Jacob Ackenbout, for Plaintiff, re-cross.

By the Court.

Q Is there a sidewalk on the south side of Hague street? A There is.

Q How far from the curb line? A About four feet.

Q Then, of course, when you get in line with the building line you can see down Hague street a little distance? A Yes.

Q From the curb line all the way down? A You have to get to the curb line. She runs off at an angle.

Q That Flatiron building, what sort of a building is that? A An apartment house.

Q It comes right down to the corner, and intersects two sidewalks? A There is a stoop entrance to the corner. The stoop comes about four feet away from the trolley tracks, the door.

Q The telegraph pole is where with respect to the curb? A Two feet away from the corner.

By Mr. Dorgeval.

Q How far is this building set back from the corner? A From the telegraph pole, four feet.

Q You told the Court that as you approached Hague street you came up to the building, and you could see behind you? A Yes, sir.

Mr. Dorgeval: The witness has testified in reference to these things in a rather unusual way. I have tried to make my questions clear. The witness is giving rather odd answers; I can't do any more than I am doing.

The Court: I don't think he is trying to be unfair about it.

40

Jacob Ackenbout, for Plaintiff, re-cross.

Q Will you tell me how far from the corner of Hague street, when on the Plankroad going toward Hague street, how far from Hague street have you a view down Hague street? A On the Plankroad?

10 Q Yes. A You must come even with Hague street to look down it. The north side of Hague street is further than the south side, and Central avenue extends over Paterson Plankroad. This is old West Bergen, now known as Union City. That brings Hague street in at an angle.

The Court: He has testified that it is an acute angle. I should judge at 35 degrees.

Mr. Wortendyke: I am willing to stipulate that street is at an angle.

20 Q You said our car shot out? A It did.

Q From Hague street? A Yes.

Q Did you say it shot out when it hit you? A It did.

Q How far after our car hit you did it go before it stopped? A My left front was up against the middle door.

30 Q How far after we hit your car, as you say, did our car stop? A I could not say.

Q How many feet, about? A It came to a stop, like that (indicating)—I did.

Q What did you do? A I jammed on the brakes.

Q Both brakes? A I did.

Q How far did the car go after you were hit until it came to a stop? A The front of my car was up against his rear.

40 Q Did it stop as soon as the collision occurred? A No, sir.

Jacob Ackenbout, for Plaintiff, re-cross.

Q When away from the front of your car to the rear—that was about seven feet. When you stopped the cars were up against each other, but not locked? A Yes, sir.

Q What was the damage your car sustained? A Junk.

10 Q How much? A The left front mudguard, the left front springs, the gooseneck, the radiator and the motor.

Q All jammed back? A The radiator and the base of the motor was broken right off.

Q Towards the rear of the car? A The whole base of the motor.

Q Shoved toward the rear? A No, the motor was not.

20 Q What was shoved to the rear? A Just the radiator.

Q How often have you been past this corner before—you were familiar with it? A Yes, sir.

Q You have been passing frequently? A Since I was fifteen years old.

Q Did you regard it as a dangerous or ordinary corner? A Ordinary corner.

Q You remember that you brought suit against Mr. Malayfsky, don't you?

30 Mr. Feinberg: I object to that. There are several cases pending; that has nothing to do with it.

Mr. Wortendyke: There are other cases but they are not between the same parties. These are the parties and this is not material.

Mr. Dorgeval: I am not going to say what the verdict was.

40 Mr. Feinberg: That remark was unfair. He is making insinuations and I object.

Jacob Ackenbout, for Plaintiff, re-cross.

The Court: Sustained.

Mr. Wortendyke: I ask that the Court hear this application privately. I object to his injecting elements into the case that are not proper.

10 Mr. Feinberg: I will join you.

Mr. Wortendyke: I have subpoenaed these witnesses here at the start of the trial to testify as to what they found after an examination of the records of the Motor Vehicle Department. This young lady has found no record of a license. If the Court rules adversely this woman will not have to come back from Trenton.

20

Jersey City, N. J., Monday, February 21, 1927.

Trial resumed pursuant to adjournment.

Mr. Dorgeval: If your Honor please, my reference to the testimony taken in the previous suit was made because I was present at that trial, and I know what he said there, and what he said then is different from what he said here.

30

Mr. Wortendyke: I submit that whatever testimony was adduced in this other suit where other parties were concerned is improper.

The Court: Upon what theory do you think it was improper?

Mr. Wortendyke: It is improper because it is immaterial. Whatever was said by this witness in another action which was between different parties is not competent in this

40

Jacob Ackenbout, for Plaintiff, re-cross.

action. That is a well-established law as I understand it.

The Court: That would not necessarily follow; if he testified to a different set of facts at another trial we want to know it.

Mr. Feinberg: The parties in this suit are not the same, and therefore how can it be material? 10

Mr. Wortendyke: I take an exception.

By Mr. Dorgeval.

Q Mr. Ackenbout, you testified in the previous suit growing out of this accident, didn't you? A I did.

The Court: Direct his attention to the time and place, so that there will be no question about it. 20

Q The place was in Judge Kinkead's court room in this building, was it not? A Yes.

Q Last October, the 4th or 5th, about that? A I do not remember.

Q It was last fall? A I should think so.

The Court: You remember the occasion, do you? 30

The Witness: I do.

The Court: All right; go ahead.

Q Do you remember saying at that time, Mr. Ackenbout, that you knew this particular crossing to be a very dangerous one? A I don't recollect saying that.

Q Do you think you might have said that? A I could have. 40

Jacob Ackenbout, for Plaintiff, re-cross.

Q I want to ask you further about this corner. Did you make any observation at all as you were coming into Hague street? A You can't see.

Q Did you?

10 The Court: Obviously you can't.

Q Did you look to your right and left? A Always.

Q Did you do that on this occasion? A I always do.

Q I am asking you, did you make observation into Hague street on this occasion? A You can't look into Hague street.

Q Not at all? A No, sir.

20 Q How fast was our car going when it hit you, about? A I couldn't say, about.

Q Can't you give us some idea as to its speed? A Very fast.

Q Can you be more definite than that—thirty miles an hour? A On that I can't say.

Q More or less? A More or less.

Q Was it more than thirty or less than thirty? A That I cannot say.

Q Was it going forty? A I can't say.

30 Q Was it going twenty-five miles an hour? A That I cannot say.

Q Haven't you any idea as to how fast it was going? A Not when a car swings around a corner—you can't judge a man's speed then.

Q I understand now, as far as you remember you were going twelve or fifteen miles an hour? A The whole trip about twelve.

Q You didn't slow up that you remember at this corner? A I slackened up, that is about all.

40 Q You did slacken up? A Yes.

Jacob Ackenbout, for Plaintiff, re-cross.

Q What did you slacken to? A That I can't even say.

Q Do you remember slackening? A Yes.

Q Last Friday when I asked you, you didn't remember whether you slackened or not. You said positively "I don't know." A Possibly.

10 Q You are not certain whether you said that or not? A No.

Q You don't remember? A I do not.

Q What do you say now? Did you slacken up? A Possibly I did.

Q I want to know what you remember about that. Do you remember slackening up? A No, I do not.

Q As far as you remember, you were going twelve or fifteen miles an hour at the corner when the accident occurred? A On the whole trip.

20 Q Don't you usually slow up at a corner?

Mr. Feinburg: I object to what he usually does.

The Court: I think he covered the answer to that already.

Q Was there any other traffic on the road? A None.

30 Q Some cars were behind you, of course? A Yes.

Q Two cars were behind you, were there? A There was.

Q Were there any cars ahead of you at all? No.

Q Did you hear a horn? A I did not.

Q Would you say a horn was not blown? A If I didn't hear one I suppose it was not blown.

40

Jacob Ackenbout, for Plaintiff, re-cross.

Q Would you positively say that a horn was not blown?

Mr. Feinberg: I object.

The Court: He said he did not hear it.

10 Mr. Dorgeval: I want to go into this man's credibility. I want to know positively if a horn was not blown, or that he did not hear it.

The Court: He says he can't say. This is futile cross examination.

Mr. Dorgeval: It goes to his credibility.

By Mr. Dorgeval.

Q Who owned this car that you were driving?

20 A My wife.

Q Did you buy it in her name? A I did. I gave it to her for a Christmas present.

Q It had an omnibus license? A It did.

Q How did you know you were going twelve or fifteen miles an hour all during that trip? A The road there is about—

30 Q How do you know your speed was twelve or fifteen? A Coming up the Plankroad, below Palisade avenue, I happened to glance at the speedometer; it was less than twelve at that time.

Q How far from the accident? A About four or five blocks.

Q Did you look at your speedometer after that? A I did not.

Q Do you remember testifying at the last trial that you had glanced at your speedometer just before the accident? A No, I don't remember.

40 Q Do you think you might have said that? A Possibly.

Jacob Ackenbout, for Plaintiff, re-cross.

Q Do you remember at the last trial, when, on cross examination, you were asked how long you had been driving your car, to get at the value of your car, I asked you how far your car had been driven, and do you remember telling me that the speedometer was out of order? A I don't recollect. 10

Q Do you think you might have said that? A Possibly.

Q After the accident what direction was your car heading? A North.

Q Due north on the Plankroad? A On the Plankroad.

Q Parallel to the east curb line of the Plankroad? A Yes.

Q How far was it from the curb line of the Plankroad? A About four feet. 20

Q Was any part of the car nearer to the curb than any other part of the car? A Not that I remember.

Q Just about exactly parallel? A Yes, sir.

Q And the damage to your car was in the front? A It was, left front.

Q Did you notice the damage done to our car? A I did.

Q What was it? A After the accident I did. 30

Mr. Wortendyke: I object to that. There is no claim for damages in this suit.

The Court: For what purpose?

Mr. Dorgeval: As to how it occurred.

The Court: I think it is necessary—the position of the car; where the cars were when struck, if they were struck.

Mr. Wortendyke: I submit that the objective appearance of Malayfsky's car is 40

Jacob Ackenbout, for Plaintiff, re-cross.

certainly not more indicative of how this accident happened than the damages to the defendant Ackenbout's car.

The Court: No, not involving that, but the appearance of the car, tending possibly to prove how the accident occurred.

10 Mr. Wortendyke: The position of the cars, but the condition?

The Court: If hit in the rear, front, or side, all of that.

Mr. Wortendyke: That is too speculative, too remote, to form any adequate evidence as to how the cars came together.

The Court: It might be vitally material. I overrule the objection.

20 Mr. Wortendyke: Exception.

By Mr. Dorgeval.

Q What was it? A I noticed the left front wheel of the other car was marked up—the hub cap, the front left runningboard was dented in, and the front left door.

Q How about the left front mudguard? A Scratched, running from the front to the rear of the car; also dented in the rear door.

30 Q How about the left front mudguard? A It wasn't dented at all, that I noticed.

Q How about the rear wheels? A The rear wheel was broke.

Q Which one—or both? A I don't know whether it was both or what; I don't recollect.

Q Do you remember testifying at the last trial, Mr. Ackenbout, that both rear wheels were broken—I mean the spokes and so on were broken? A That could have been; I am not
40 positive.

Jacob Ackenbout, for Plaintiff, re-cross.

Q Was there any other damage that you noticed? A The right rear window was broken. I took notice at the time the photographs were taken.

Q You were driving a seven-passenger sedan? A No, sir; limousine.

Q A seven-passenger limousine? A Yes, sir. 10

Q A Cadillac? A Cadillac.

Q Cadillac is a pretty heavy car? A Not so very heavy.

Q About how heavy, if you know? A About three thousand pounds.

Q That is a heavier car than Malayfsky's car? A No, Malayfsky's car is about the same.

Q What was his? A Sutton, seven-passenger sedan. That is as large as a Cadillac sedan. 20

Q What is the distance, in your judgment, between the northbound tracks and the east-bound curb, in feet? A About four to six feet—about six feet.

Q You say you can't see into Hague street till you get there? A No.

Q Not until the driver gets there? A Till the driver gets there.

Q That is, in the car, have you a clear view then into the intersection? A Yes, sir. 30

Q Do you know anything about the condition of Hague street? A Fairly well.

Q What was its condition at that time? A A fair street.

Q Did you tell me that the Flatiron building is six feet from the corner? A About that.

Q Six feet from the pole? A Not six feet from the pole; from the corner.

Q The impact shoved our car around a little bit, did it not? A It did. 40

Jacob Ackenbout, for Plaintiff, re-cross.

Q About how far? A After the collision both cars were—the other car was laying across the two tracks. I was laying on the northbound track.

Q Our car was on the southbound track? A Both cars were right across.

10 Q Some of our car was on the southbound track? A Yes.

Q How much of our car was on the southbound track? A That I can't say.

Q Some of our car was on the southbound tracks, I suppose? A Yes.

Q Your car was on the northbound track? A Yes, sir.

Q It was the left front of your car that was struck? A Yes.

20 Q Just what part—the gooseneck? A From the gooseneck back.

Q The mudguard? A The gooseneck, mudguard and headlight.

Q How far was the left side of your car from the curb just before the accident occurred? How far was that part of your car that was struck from the east curb? A About eight feet.

30 Q Have you agreed upon a settlement in this case?

Mr. Feinberg: I object to that.

Mr. Wortendyke: I object to that. There is no such thing in this case.

The Court: It is improper.

Mr. Wortendyke: It would be ground for a mistrial.

40 Mr. Feinberg: Let's get these ideas so the jury won't hear them. I object to this unless it is done in chambers.

Jacob Ackenbout, for Plaintiff, re-cross.

The Court: This ought not to be mentioned in the presence of the jury.

Mr. Dorgeval: I am not going to mention anything improper, I am sure. There is just legal basis for this question. The legal basis is, if a settlement has been arranged, then of course this case is finished; if it has not the case goes on.

The Court: If it has been settled this case should not be here.

Mr. Wortendyke: If a general release has been made the case is over.

Mr. Feinberg: I will take the stand.

The Court: Why not ask him if it is. Produce the release if there is such a thing.

Mr. Dorgeval: You mean that I should do such a thing? If this case has been settled it has been settled between Mr. Wortendyke and Mr. Feinberg.

Mr. Feinberg: I will take the witness stand, if you want.

Mr. Wortendyke: I am surprised that this thing has happened. It puts me in a peculiar light before the Court and this jury. I think the question is one that in the first instance should be reproved by the Court. I don't like to go into court with these insinuations cast at me, whether inferential or direct.

The Court: The Court and jury do not get those insinuations that you might, because of your familiarity with the case. If there is such a thing as a release in existence that would be the proper way to prove it—to call for that. You can make a demand on the

Jacob Ackenbout, for Plaintiff, re-cross.

person having custody of it, for him to produce it as secondary evidence.

Mr. Dorgeval: May I ask a question like that?

The Court: You may ask if he executed a release.

10

By Mr. Dorgeval.

Q Have you executed a release? A I have not.

Mr. Dorgeval: I withdraw that question.

Mr. Feinberg: He answered that. Ask him if he got a release.

The Court: Yes.

20

Mr. Dorgeval: If he had agreed upon a settlement and I wanted to ask him further—

The Court: You should not ask that in the presence of the jury.

Mr. Dorgeval: I am simply getting at some facts.

The Court: Don't tell me what you are going to ask.

Q Has this case, to your knowledge, been settled by any one in your belief? A It has not.

30

Q You would not know if it had been?

Mr. Feinberg: I object to that and all the other insinuations that he is making.

The Court: Is there any further examination?

40

Jacob Ackenbout, for Plaintiff, re-cross.

By Mr. Dorgeval.

Q When the car stopped after the collision where were you with reference to the south curb line of Hague street? A About even.

Q You talked over this case with Mr. Feinberg? A I don't know the man.

10

Q You don't know Mr. Feinberg? A No.

Q You never talked with him? A I just bid him the time of day in court.

Q You never talked this case over with him? A No.

Q You had no other conversation with him other than to say "How do you do?" A No.

Q You don't remember talking with him in the corridor around the rotunda, up against the railing at 11:15 on Friday morning? A I wasn't talking to him, but to another gentleman; that is the only way I know Feinberg.

20

Q Just before this came up for trial you don't remember talking to him in the corridor? A No, sir.

Q You have no recollection of that?

Mr. Feinberg: I will testify. It is not proper cross examination.

Mr. Dorgeval: I think it is highly proper.

30

Mr. Feinberg: If counsel wants to insinuate that I told this witness what to say—that is an unfair insinuation against me and the witness. I have seen him talk to all the witnesses in the case.

Mr. Dorgeval: Mr. Feinberg and this witness were engaged in an animated conversation at 11:15 in the corridor Friday morning.

Mr. Feinberg: That is not true.

40

Jacob Ackenbout, for Plaintiff, cross.

Mr. Dorgeval: I saw him myself.

The Court: Suppose they were. What of it?

10 Mr. Dorgeval: I think it is an unusual circumstance for plaintiff's attorney to be in conference with the other defendant's witnesses.

Mr. Feinberg: Yes, it is so unusual that your client came to my office and I chased him out.

By Mr. Dorgeval.

Q Did you have any conversation with Mr. Feinberg at that time? A None at all.

20 Q Do you remember his standing next to you? A He was talking to some other gentleman at that time. I don't know.

Q A police officer was standing there? A I was talking to the police officer.

Q There were just the three of you, weren't there? A That I couldn't say; I cannot recollect.

Mr. Dorgeval: I guess that is all.

30 *Cross examination by Mr. Wortendyke.*

Q You testified that you had following you two automobiles coming up Paterson Plankroad. Did you and the drivers of these cars start out together on that trip? A Yes.

Q Where from? A 213 Monroe street, Hoboken.

40 Q Did you have a mirror on your car? A On the mudguard.

Jacob Ackenbout, for Plaintiff, cross.

Q Did you have occasion any time coming up Hague street and the Paterson Plankroad to notice if the cars were still behind you? A Yes.

Q How many times? A Always; they were keeping together. They didn't know where to go.

10 Q Were you leading the group? A I was the boss of the outfit.

Q Will you specify what part of your car was damaged by this collision? A All of the left-hand side; nothing on the right-hand side.

Q What parts? A The bumper, gooseneck, headlight, and the mudguard.

Q Do you know what part of Malayfsky's car came in contact with your car? A The left front hub cap—the left front wheel.

20 Q Are you sure that the two cars came to a stop after the accident—that they were at a point directly at the corner of Hague street and the Paterson Plankroad? A When I came out from telephoning they had already backed my car up against the curb.

Q Where were you before you got out of the car, immediately after the accident? Indicate on this diagram exactly where they were. A About even with the Hague street curb line.

30 Q This one? A Yes.

The Court: Indicating the southeast curb.

The Witness: The southeast curb.

40 Q Were they between that corner formed by the end of the curb line and the trolley track when they came to a stop directly southeast of the curb line in the space between the easterly curb line of the Plankroad and the trolley tracks? A No.

Jacob Ackenbout, for Plaintiff, re-cross.

Mr. Feinberg: I object.

Q Indicate on the blackboard. A The other car was laying this way (indicating), and I was here (indicating)—the other car was here across the two tracks.

10 Q Do you recall on your cross examination by Mr. Dorgeval that you testified that the impact caused your car to go ahead—the two cars to go right ahead somewhat? A The impact could have threw the other car.

Q I don't want you to draw conclusions in reference to this. I want you to testify as to whether you said on cross examination by Mr. Dorgeval that as a result of the impact the car slid forward. Did you or did you not say that?

20 A No, I did not.

Mr. Wortendyke: That is all.

Re-cross examination by Mr. Dorgeval.

Q You told me that your car shoved our car around it? A I didn't say anything of the kind; the impact threw it.

30 Q I asked you if it shoved you around and you said it did.

The Court: I don't remember it.

Mr. Wortendyke: I except as to whether the two cars were shoved forward in the direction in which this witness was proceeding. The previous question was that the other car was caused to be shoved over; what I was trying to find out was just how far back. There is quite a distinction there.

40

Annie Malayfsky, for Plaintiff, direct—cross.

ANNIE MALAYFSKY, sworn for the plaintiff.

Direct examination by Mr. Feinberg.

Q Your father is one of the defendants in this case; he is being sued? A Yes.

Q On November 16, 1924, you were in his automobile on the Paterson Plankroad at Hague street when the accident happened? A Yes. 10

Q Tell the Court and jury how it happened. A We were coming out of Hague street and I happened to look to the left and I saw a car about nearly a block away. My father turned the corner, around the turn, and when we were on the track, we were going south, the other car hit us.

Q When you came out of the corner the other car was a block away? A When? 20

Q Your father started making the turn and before he made the turn he came out and was hit? Is that your story? A Yes.

Mr. Feinberg: Take the witness.

Cross examination by Mr. Wortendyke.

Q Do you live anywheres near the intersection of Hague street and the Paterson Plankroad? A Yes. 30

Q Where? A 38 Grace street.

Q How far away is that from the intersection, the cross street? A Two blocks south.

Q Two blocks toward Hoboken? A Towards Jersey City.

Q And is that down from the heights? A Yes.

Q How long have you lived around there? A I have lived around there seven years. 40

Annie Malayfsky, for Plaintiff, cross.

Q How old are you? A Fifteen years.

Q You go to school in that vicinity? A The Dickinson High School.

Q How do you go from your home to the Dickinson High School?

10 Mr. Feinberg: I object. I called this witness to tell how this accident happened. I object to questions as to how she goes to school.

The Court: I gather that this is to show that she is familiar with the streets at this place; that is the sole purpose?

Mr. Wortendyke: The sole purpose.

By Mr. Dorgeval.

20 Q Are you thoroughly acquainted with this intersection of the two street, Hague street and Paterson Plankroad? A I wouldn't say thoroughly. I know it quite well.

By the Court.

30 Q How many years have you known it? A I have lived at my present home about seven years, but I don't pass there very often, but I know it quite well.

By Mr. Wortendyke.

Q Where were you living, two blocks away? A Yes.

Q What kind of a building is there on the southeast corner of Hague street and Paterson Plankroad? A Will you please point it out?

40 Mr. Wortendyke: Indicating the southeast corner.

Annie Malayfsky, for Plaintiff, cross.

A A large Flatiron building, I think they call it.

Q How high is it? A I don't know.

Q You don't know how many stories? A I never noticed.

10 Q Do you know how far south of Paterson Plankroad it extends? A I think it extends nearly a whole block.

Q How far east of Hague street does it extend? A I don't know.

Q Would you say it extended approximately the same distance on Hague street as it does on Paterson Plankroad? A No, I would not.

20 Q Assuming that for the purpose of location, this is the southerly side of Hague street, and that here is that Flatiron building. What is next to it on Hague street? A I don't know.

Q You would not say what kind of a building it is?

Mr. Dorgeval: Your Honor, I don't see the purpose of this examination.

By Mr. Wortendyke.

30 Q You don't remember what is next east of the Flatiron building on Hague street? A No, sir.

Q Where were you sitting in this automobile? A In the front seat next to my father.

Q On the right-hand side? A Yes, sir.

Q Your father was on the left-hand side? A Yes, sir.

Q Was it an open or closed car? A Closed car.

40 The Court: Speak up so the jury can hear you.

Annie Malayfsky, for Plaintiff, cross.

By Mr. Wortendyke.

Q Was it a cold or warm day; what kind of a day was it? A I really don't remember.

Q Do you remember whether the windows on the car were closed or open? A In the back, I don't remember, but in the front I know the windows were open.

Q Both windows were open? A Yes, sir.

Q Miss Malayfsky, do you remember anything about the buildings on the northeast side of Hague street? A Right across the way?

Q Yes. A There is a little harness store.

Q A harness store on the corner? A Yes.

Q Then what? A A row of wooden houses.

Q Do you know anybody living in this house? A Yes, I know one man.

Q Where does he live? A He lives in one of the rows of houses.

Q Have you any idea how many houses back from the corner it is? A No, I do not.

Q As you were approaching that intersection did you see that friend of yours in the house? A Yes, I saw him at the window.

Q How high, do you know? A That I couldn't say.

Q He is a friend of the family? A He works for my uncle.

Q Do you know him or does your father, or do both of you know him? A I think both have a passing acquaintance with him.

Q What window in the building was he at? A At the front window.

Q On what floor? A I don't know.

Q How did you happen to notice him as you went by? A I looked to my right.

Q And your father knows him, do you know?

A I don't know.

Annie Malayfsky, for Plaintiff, cross.

Q Did he give any sign as to whether he noticed him or not? A I don't remember that.

Q You don't remember how many houses back from the corner that this house was that your friend was in the window? A No, I do not remember.

Q Where were you with respect to this house at which your friend was at the window when you saw the Ackenbout car nearly a block away, as you put it? A We were past the street.

Q You had passed? A Yes.

Q How far past, if you can recall? A I cannot recall.

Q You had not reached the corner yet? A Yes, we had when I saw Mr. Ackenbout's car.

Q A whole block away? A Yes.

Q Will you step up here and indicate on the diagram where your car was when you saw the Ackenbout car almost a block away.

(The witness indicated on the map.)

Q You testified that your friend's house was on the northeast side? A Yes.

Q Will you locate the point at which your car was when you first saw Ackenbout's car almost a block away? A It must have been—

Q Don't say that. A I cannot place it exactly.

Q As nearly as you can. A Is this Hague street?

Q Yes. The Flatiron building is on the corner. A We were down here (indicating).

Mr. Wortendyke: Indicating a point just east of the prolongation of the easterly side of Paterson Plankroad.

Annie Malayfsky, for Plaintiff, cross.

Q Is that it? A We were right across from the Flatiron building.

Q You don't know of your own knowledge whether your father saw this other car, do you?

A I think—

10 Q Do you or do you not? A I do not.

Q So that when you were opposite from the Flatiron building at Hague street, or at a point that you designated you saw the Ackenbout car almost a block away, is that it? A That is all.

By the Court.

Q Were you sitting in the back or front seat?

A The front seat right opposite my father.

20 *Cross examination by Mr. Dorgeval.*

Q Alongside your father? A Yes, sir.

Q How fast was your car going before you got hit? A I couldn't say, but much too slow to suit me.

Q I want to know was it fast or slow; how was it? A Very slow.

Q When you made a turn what kind of a turn was it, a sharp turn? A A round turn.

30 Q How fast were you going on that turn? Had your father increased or decreased that speed, or was the speed the same? A Very slow.

Q This other car that struck you, was it going fast or slow? A Quite fast.

Q Where was your car on the Plankroad when it was struck? A On the tracks going south.

40 Q How was it headed, your car, when it was struck? A That I couldn't say.

Annie Malayfsky, for Plaintiff, cross.

Q West, southwest, southeast—your father turned to go south? A Yes.

Q What part of your car was struck? A The left side of the car.

Q Towards the front, rear, center, or where? A Towards the center, I think.

10 Q What part of the other car struck you? A The front.

Q What happened to your car then? A Whirled around so it stood straight on the tracks.

Q What happened to the people inside, the physical reaction upon them—what happened to you? A All I had was a bruised knee.

Q Did you stay in your seat? A I was knocked against the side of the car on the right-hand side.

Q What happened to your father?

Mr. Feinberg: This is not proper cross examination.

The Court: I think it is proper.

The Witness: My father, at the time I don't know what happened to him.

30 Q You didn't see what happened to him at the time of the accident? A No, my little sister's face was bleeding.

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

The Court: That part we do not want. Just what happened; not the injury; the speed of the cars and that.

Mr. Dorgeval: No, I wasn't asking for that.

Annie Malayfsky, for Plaintiff, re-cross.

Q Who was sitting in the rear of the car? A Mrs. Levine and my two sisters.

Q What happened to them in the back of the car? A You mean injuries?

Q Just what happened to them; were they thrown about; did they hold their seats; were they perfectly all right? A My sister, Sylvia, was knocked to the floor of the car; Mrs. Levine, I believe, was jerked back, and my little sister was jerked back also, because the glass fell on her face.

Cross-examination by Mr. Wortendyke.

Q Where was the other sister sitting? A In the back.

Q Did you actually see them thrown forward? A When I got out of the car my sister was on the floor; Mrs. Levine was thrown back, and my little sister, I should judge that happened—

Q That is your inference? A Yes.

Q As a result of the collision the car in which you were riding swung around; is that right? A Yes.

Re-cross examination by Mr. Dorgeval.

Q After the accident what was the position of the cars on the Plankroad when everything stopped? A Our car was straight south, pointing south, the front of the car was into the left side of our car.

Q Up against the side of your car? A Yes.

Q What part of their car was up against your car? A The front.

Q What part of your car? A The side of the car.

40 Mr. Feinberg: The plaintiff rests.

Ernest Ehling, for Defendant Ackenbout, direct.

ERNEST EHLING, sworn for the defendant Ackenbout.

Direct examination by Mr. Wortendyke.

Q Are you, Mr. Ehling, an officer in the Jersey City Police Department? A Yes, sir. 10

Q How long have you been in the Jersey City Police Department? A Two years.

Q What was your business before you went on the force? A Chauffeur.

Q Were you at or near the intersection of Hague street and Paterson Plankroad on or about November 16, 1924? A Yes, sir.

Q Did you see anything unusual happen around two o'clock that day? A No, nothing except an accident that I could say. 20

Q Will you tell the Court and jury what you know about the accident? A As we were proceeding on the Plankroad, going south, this other car came out of Hague street.

Q Do you recognize on the diagram on the board as indicating the layout of those streets? A Yes, sir.

Q Will you indicate on that diagram the direction in which you were going at the time? A Yes, sir. 30

Q This diagram shows the south at the top, the north at the foot, this is Hague street running into the Plankroad? A We were coming down in this direction on the Paterson Plankroad; this other car was coming out of Hague street.

Q What speed was it going?

Mr. Wortendyke: I might say for the purpose of the record that the diagram as 40

Ernest Ehling, for Defendant Ackenbout, direct.

used by this witness shows the course in which the cars were proceeding from south to north, and not north to south.

Q How fast were you going? A Fifteen miles an hour.

10 Q By whom were you employed at the time?
A Henry Mack.

Q Where were you going? A Going to Columbia avenue, I think, in North Bergen.

Q For what? A A wedding.

Q Was there anybody else with you? A Yes, sir, two cars in front.

Q Who? A Mr. Ackenbout's and Mr. Bryant's cars.

20 Q Those two were ahead of you? A Yes, sir.

Q How long had you been following them?
A Been following them, I should judge, from the time we left Mr. Ackenbout's home.

Q How far from the car immediately ahead of you were you during that time? A About a car length.

Q Had that distance varied or remained the same from the time you started to this point?

30 A Remained almost the same.

Q How fast were you going throughout? A About fifteen miles an hour.

Q How fast was this car going that you said came out of Hague street? A I don't know.

Q Was it going fast, slow, or otherwise, do you know? A Going fast enough.

Q Did you see the collision between this car and Mr. Ackenbout's car? A I didn't get a good view, being the third car. The other cars
40 blocked my view.

Ernest Ehling, for Defendant Ackenbout, cross.

Q How much did you see of it? A After the accident happened naturally I got out and looked.

Q What did you see when you got out? A I saw the people who were hurt in the car.

Q Did you note the condition of the cars? A
10 No, I don't recollect that.

Q How were the cars located when you got out and saw them with respect to the easterly side of the Plankroad and the easterly set of car tracks? A I don't remember that either.

Q What kind of a car were you driving? A A Cadillac limousine.

Q Has a limousine windows on the side of the driver? A Yes.

Q Had you had occasion to hear the horn of
20 Mr. Ackenbout's car on the way up from Hoboken? A Yes, sir, I heard it.

Q Did you hear the horn blown as the cars were approaching Hague street? A Yes, sir.

Q Within a moment before the impact did you have occasion to change the speed of your car?
A No, sir.

Mr. Wortendyke: Take the witness.

Cross examination by Mr. Dorgeval. 30

Q Mr. Ehling, you drove along Paterson Plankroad. What part of the road were you driving on? I mean to say by that, how far from the right curb? A I don't know how far.

Q Your car was how far from the right curb?
A I don't remember.

Q Haven't you any idea as to the distance to the right curb? A No, this happened quite
40 a while ago.

Ernest Ehling, for Defendant Ackenbout, cross.

Q You remembered some other things, I thought you might remember this. Were you driving between the curb and the car tracks?

A About on the car tracks; it might have been a little more to the right.

Q What part of the car was on the car track?

10 A Going north.

Q What part of your car was on the car track? A The northbound.

Q What part of your car? A I don't remember that.

Q Was any part of your car on the car track? A I really don't recall.

Q Were you on the right-hand side of the road? A Yes.

Q You are sure? A Yes.

20 Q In the center of the road? A No.

Q But you don't know where you were outside of that, that you were not in the center? A I know we were on the right-hand side of the road. I don't know if we were between the car tracks or over to the right a little.

Q You were right behind one another? A Yes.

Q You were the third car? A Yes.

30 Q How far behind the car ahead of you? A About a car length.

Q Where was our car when you first saw it?

A I didn't see the car at all.

Q You did not see our car at all before the accident? A No; I was driving the third car and the other two cars blocked my view.

Q You didn't see our car? A No.

Q When you said our car was going fast enough— A Yes.

40 Q What do you base that on when you didn't see our car? A I saw it when it came out of Hague street, and then the accident happened.

Ernest Ehling, for Defendant Ackenbout, cross.

Q You did see it? A When it came out, and then the accident happened.

Q I thought you said you did not see it? A I didn't see the approach, but when it came out of Hague street.

Q Where was our car when you first saw it?

A After the accident was the only time I saw 10 the car.

Q Am I right; the first time you saw our car was after the accident? A After the accident.

Q When you said our car was going fast enough you base that entirely on what you saw after the accident? A No, it came out of the street so suddenly that it—

Q How do you know that? A I can't possibly imagine where it came out of. 20

Q I want to know what you know. Did you see our car come out of Hague street? A I don't recollect.

Q Did you see our car come out of Hague street? You told me a little while ago that you didn't see it before the accident? A No, not at the—

Q Not before the collision? A No.

Q When you saw the car the first time where was it? A I don't remember except where it 30 was placed after.

Q Both were stopped then? A Yes.

Q You first saw our car when it was stopped? A Yes.

Q When you saw our car going fast enough—you are saying that without having seen our car at all? A It came out of the street suddenly.

Q You didn't see it? A It must have come out of some place. 40

Ernest Ehling, for Defendant Ackenbout, cross.

Q You are testifying from a conclusion? A No, the accident was no conclusion.

By the Court.

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

10 Q And therefore, as he says, you don't know whether it was going slow or fast? A I do not, your Honor.

Q As far as you know— A I didn't see the car come out of the street.

By Mr. Dorgeval.

Q Just what did you do when this collision occurred? A I got out of my car, and naturally looked to see who was injured.

20 Q Did you say you were going fifteen miles an hour? A About that—fifteen miles an hour.

Q What did the car ahead of you do? A He stopped, too.

Q Where? A I guess in back of Mr. Ackenbout; I don't remember.

Q Do you remember where he stopped, the car ahead of you? A I guess he must have stopped.

30 Q Do you remember, can you recall to your mind this accident? A No, I can't recall it.

Q Can you recall where you stopped? A I believe I stopped behind the second car.

Q Do you remember telling me at the last trial that you swerved slightly to your right, and turned a little into Hague street and stopped? Do you remember telling me that?

Mr. Feinberg: I note an objection.

40 The Court: Overruled, and I give you an exception.

Ernest Ehling, for Defendant Ackenbout, cross.

The Witness: I don't remember saying that.

Q Do you think you might have said it? A I am thinking nothing.

Q Do you remember where you stopped? A Yes, I remember where I stopped. 10

Q Where did you stop? A I remember I stopped behind the second car, but where I don't remember.

Q Isn't it a fact that second car went into Hague street and went completely into Hague street? A I don't remember.

Q You do remember that you stopped behind the second car? A Yes.

Q When you saw the cars afterwards, you say you think— A Yes, I saw them after the accident. 20

Q How far across Hague street were you when you saw them? A I don't remember.

Q Do you remember telling me at the last trial that when the car stopped after the accident that you were about half way across Hague street? A I don't remember.

Q Do you think you might have told me that? A I don't remember. 30

By the Court.

Q You saw the cars after the accident, didn't you? A Yes, sir, but I don't remember the position of the cars.

Q You don't remember where they were? A I just don't know the position of them.

Q Were they on the Plankroad? A I believe they were; I am not sure, though. This happened over two years ago. 40

Ernest Ehling, for Defendant Ackenbout, cross.

By Mr. Dorgeval.

Q Do you remember the cars, whether they were on the north or southbound tracks? A I don't remember that, either.

10 Q You don't remember anything about their position? A No—at the last trial I told you that I didn't remember about the position.

Q At the last trial you told me they were half way across Hague street.

Mr. Feinberg: There is no evidence as to that. The mere fact that he says that does not mean anything.

20 Q Did you notice anything about the condition of the people in the cars? A I remember seeing that old lady on the floor of the car.

Q Did you notice anything of the condition of the other people? A I noticed a small child cut on the face.

Q Pretty badly cut, too? A Yes, she was.

Mr. Wortendyke: I object to this testimony.

30 Q What else did you notice about the condition of the cars? A Nothing.

Q Did you notice the part of the cars that were damaged? A No, sir.

Mr. Dorgeval: That is all.

Cross examination by Mr. Feinberg.

40 Q You remember there was a crash? A Yes.

Ernest Ehling, for Defendant Ackenbout, re-cross.

Q Ackenbout had not reached the corner when that crash happened, had he? A I don't recall.

Q He hadn't got to the corner when the crash first happened—just think a minute? A I am trying to. I really wouldn't say. 10

Q You know at the time that the accident happened that your car was not going faster than fifteen miles an hour? A No, sir.

Q At the time of the accident you got some distance away from the car ahead of you? A Yes.

Q There was some distance between you? A Yes.

Q Did you hear the Klaxon horn? A Yes.

Q You heard it before you got to the corner? A Yes. 20

Re-cross examination by Mr. Dorgeval:

Q How did you notice that horn? A I can tell a Cadillac horn because they are almost all alike.

Q You just happened to notice that before the accident? A The sound came from that direction.

Q You don't know if it is Ackenbout's horn? A No, it was not the other car, that is a different sound. The Sutton has a different sound of horn. 30

Q There was no other horn in the vicinity? A No other cars were there.

Q You are sure it was Ackenbout's horn? A I think it was.

Q As to your speed, how did you know how fast you were going that time? A I just judged it. 40

Frank Brandle, for Defendant Ackenbout, direct.

Q You didn't look at your speedometer? A There was no need of looking at it; it was not in operation at the time.

Mr. Dorgeval: That is all.

10

FRANK BRANDLE, sworn for the defendant, Ackenbout.

Direct examination by Mr. Wortendyke.

Q By whom are you employed? A The Public Service Railway.

Q How long have you been employed by the Public Service Railroad? A Three years and a month.

Q Where were you working November 16, 1924? A I was a chauffeur.

Q Were you at the intersection of Hague street and Paterson Plankroad about two o'clock that day? A Yes.

Q Was anybody else? A Two cars, Ackenbout, and the—I forget his name—the officer, the police officer. He was driving one car.

Q The witness who was last on the stand? A Yes.

Q What street were you driving on? A Paterson Plankroad.

Q In what direction? A Going north.

Q How were you proceeding with respect to Mr. Ehling's car and Ackenbout's car? A Following Ackenbout.

Q How far behind? A About fifteen feet.

Q Where did you come from at about two o'clock that day? A Mr. Ackenbout's home.

Q Where were you going? A Going to Columbia street, I believe.

40

Frank Brandle, for Defendant Ackenbout, direct.

Q Was any one of you three leading the way? A Mr. Ackenbout was leading the way.

Q How was your car proceeding on the Paterson Plankroad as far as the easterly curb and the easterly set of tracks was concerned?

A The front part was between the tracks and the other near the curb.

10

Q In line? A Yes, sir.

Q Did you see anything unusual happen at the intersection of Hague street and the Paterson Plankroad? A An accident.

Q Describe it. A As I came up Mr. Ackenbout was in front of me, as he generally goes—as we generally go to weddings—always blowing the horn. That is the usual thing. When we came to Hague street Mr. Malayfsky came around the bend.

20

Q Did you see the car Malayfsky had? A A Stevens.

Q How fast were the three of you going approaching Hague street? A About fifteen miles an hour.

Q Were you keeping the same distance behind Mr. Ackenbout as you had been before that? A Yes.

Q How fast did this Malayfsky car approach you, if you know? A About twenty-five miles an hour.

30

Q I refer you to the diagram on the blackboard, and wish you would indicate the course you say this Malayfsky car took around the corner.

Mr. Dorgeval: Don't you think these lines should be erased?

Mr. Feinberg: No; one witness has already testified according to them.

40

Frank Brandle, for Defendant Ackenbout, cross.

The Witness: Coming around Hague street here (indicating) was Mr. Ackenbout, right in front of me.

Q How close was the Malayfsky car as he passed to that corner as he turned? A About
10 four feet.

Q Have you any idea about how wide Hague street is there? A About twelve.

Mr. Wortendyke: That is all.

Cross examination by Mr. Dorgeval.

Q The crossing of Malayfsky's car was just like that line on the board, that is exactly right?
A Yes, sir.

20 Q How fast did you say you were going?
A About fifteen miles an hour.

Q How do you know that? A Because Mr. Ackenbout was going the same rate of speed.

Q How do you know it now—you mean Mr. Ackenbout told you? A No, that isn't it; that is the usual speed going to a wedding or funeral, or anything like that.

30 Q You say you were going fifteen miles on hour, the usual speed to every wedding, because that speed is the usual speed you go at? A When going to weddings.

Mr. Feinberg: I object.

The Witness: That is the speed we were going on that day.

40 Q How do you know you were going fifteen miles an hour on that day? A Because the car coming out of Hague street was going faster than we were.

Frank Brandle, for Defendant Ackenbout, cross.

By the Court.

Q How long had you been driving cars? A Eight years.

Q As a chauffeur? A Yes, sir.

Q You were able to judge, were you, the speed of cars—your car and that of others? A
10 Yes, you can tell the speed of a car.

By Mr. Dorgeval.

Q On this occasion you judged the speed by the speed of the other car that was coming out of Hague street? A I said he was going faster than us.

Q How do you know he was going fifteen?
A I couldn't explain that to you, the way I know he was going fifteen, because that is the
20 usual speed going out.

Q How far were you behind Ackenbout? A About fifteen feet.

Q Where was our car when you first saw it?
A When it came out of Hague street.

Q Was it in Hague street still? A No, out of Hague street already.

Q How much out of Hague street when you saw it? A When it came to the building line, then it shot out and I didn't see it any more.

30 Q You could see it before? A Not I, when it came even with the building line I could.

Q You saw him? A Yes.

Q Did you see the front of his car when he first came out? A Yes.

Q And he was even with the building line?
A Yes.

Q Where were you? A Behind Mr. Ackenbout.

40 Q How far were you from Hague street at that time? A I should judge eleven feet.

Frank Brandle, for Defendant Ackenbout, cross.

Q You were about eleven feet from Hague street at the time you saw our car come out from the building line on Hague street? Our car was still on Hague street when you saw it?
A No, out, I told you.

10 Q Past the curb? A The building is not so far from the curb. I saw him; he was on the Paterson Plankroad when I saw him.

Q You testified when he came from behind the building line? A Even with the building line.

Q You saw him even with the building line?
A Yes.

Q He was still in Hague street, wasn't he?
A As far as I could see on the Paterson Plankroad. There is a slanting building line there,
20 and he was out of Hague street already.

Q When you first saw our car was it outside of the curb line on the Plankroad? A He was coming around the corner there.

Q When you first saw him? A Yes.

Q How far past the corner had he got—half past? A No.

Q All of it? A No, sir.

Q How much of our car had got past the east curb of Plankroad when you first saw it?
30 A It was not across the east line at all.

Q It was still in Hague street? A That would not make it Hague street; the intersection of Hague street and the Paterson Plankroad and Central avenue. He had come out of Hague street into Central avenue, I am positive of that.

Q Come down here and show us the place where our car was when you first saw it.

40 The Court: He is showing us where Hague street is. He is considering that

Frank Brandle, for Defendant Ackenbout, cross.

Hague street is where Central avenue begins.

Mr. Feinberg: The plaza.

The Witness: Yes, sir, the east curb line—Hague street and Central avenue.

Q Just show us where our car was. A He 10 was about here (indicating).

Q Here is the curb line? A Yes.

Q How many feet from the east curb line?
A A couple of feet—it must have been about three.

Q You were at that time eleven feet? A Behind Mr. Ackenbout.

Q From Hague street, weren't you? A No, from that corner there; from the Flatiron building corner. 20

Q This is Hague street? A Yes.

Q When you first saw our car you were eleven feet from this corner? A Yes.

Q When you first saw our car where was it, on the left-hand side or the right-hand side? A The left-hand side.

Q How fast was it going? A About twenty-five.

Q How far did you see it travel, our car? A Until I couldn't see it any more; it got in front 30 of Mr. Ackenbout's car.

Q How far in feet would you suppose? A I believe—I couldn't just say.

Q How far did you see it travel? A I didn't measure it; I couldn't say.

The Court: Was it ten feet?

The Witness: I couldn't say.

Q Twenty feet, more or less? A No. 40

Frank Brandle, for Defendant Ackenbout, cross.

Q Was it fifteen feet? A I just couldn't say.

Q Have you any idea? A I have no idea.

Q But you judged the speed at twenty-five miles an hour, nevertheless? A Yes, sir.

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

10 Q Just what did you do? A When I heard the collision I tried to come to a stop.

Q Where did you come to a stop? A On the Plankroad.

Q Where with reference to Mr. Ackenbout's car? A What do you mean?

Q Did you turn into Hague street at all? A No.

20 Q How much room was there between the right-hand side of the car and the right curb, as you drove along? A I should judge three or four feet.

Q When you came to a stop how far were you from Ackenbout's car? A I should judge four or five feet.

Q What parts of the cars came together, do you remember? A When I got out I looked at them.

30 Q At what? A Mr. Malayfsky's car had the mudguard damaged, and the side of the body, I am not sure—I didn't look too close, I had to go on with the job, but the left front of Mr. Ackenbout's car was damaged.

Q What wheel of Mr. Malayfsky's car was damaged? A I think the left front wheel.

Q How was it damaged, were the spokes smashed? A The hub caps were pushed off it, and I think one of the rear wheels was busted.

Q And do you remember which one? A No.

40 Q Was the front mudguard broken at all on the left of the Malayfsky car? A I don't remember, it is so long ago.

Frank Brandle, for Defendant Ackenbout, cross.

Q Did you notice any damage to the Malayfsky car? A I think the panel was dented a little.

Q Where was the damage to Mr. Ackenbout's car, in the front? A I believe there was.

10 Q Do you remember telling me at the last trial on cross examination that you turned into Hague street and stopped? A No, sir.

Q That is to say when Mr. Ackenbout's car stopped suddenly in front of you that you pulled into Hague street? A No.

Q Do you remember? A No, I don't think I said that. I think I stopped right in back of him.

20 Q Where, with reference to the south curb line of Hague street did the collision take place? A Right on the car track.

Q Was the point where the collision took place north or south of the south curb line of Hague street? A Right there in the center of the street on the Plankroad were the car tracks going north.

Q Was the place where they came together north of this curb line on Hague street? This is where it was? A I don't get what you mean.

30 Q The cars came together on the Plankroad? A Yes.

Q Was the point where they came together north of the south curb of Hague street, south of it, or where? A When Malayfsky's car came along Hague street the accident occurred here on the northbound car tracks.

Q At which point? A Right here on the car tracks (indicating).

40 Q About even with the curb line, the south curb line? A I should judge, but I don't know just where it is.

Frank Brandle, for Defendant Ackenbout, cross.

Q How much time elapsed, do you suppose, between the time you first saw the car and the collision? A I should judge not much time.

Q A matter of seconds? A I just couldn't say.

10 Q Within what distance could you have stopped your car at the speed you were going at that time? A I did stop within four feet of Mr. Ackenbout.

Q Within four feet of his car? A Yes.

Q How many feet did you take to stop in? A I couldn't say.

Q You have no idea? A No, sir.

Q Do you remember telling me at the last trial that the collision took place at a point half way across Hague street? A No, sir.

20 Q Do you also remember telling me that our car, when you saw it, came out on the right-hand side? A No, sir.

Q Is it possible that you did tell me that?

Mr. Feinberg: I object on the ground that it is not proper.

The Court: I suppose your question should be—"Did you not testify"—

Mr. Feinberg: And he said "No."

30 The Court: Direct his attention to the matter of the last trial, with reference to what the witness testified to before. Lay the foundation.

Mr. Dorgeval: That is all.

Cross examination by Mr. Feinberg.

Q You say you stopped your car about four feet behind Ackenbout's car? A Yes, sir.

40 Q And the accident happened about here? A Yes.

Frank Brandle, for Defendant Ackenbout, cross.

Q Ackenbout's car did not reach the corner when the accident happened? A No.

Q About how many feet from this corner? A I couldn't judge.

Q Not very far? A No.

Q You were four feet behind him when you stopped? A Yes. 10

Q How long is the car that Ackenbout had? A I should judge about eight feet long.

Q And you were four feet behind him? A Yes.

Q Did you hear his horn? A Yes.

Q You are sure of that? A Yes.

Q Do you know his horn? A Yes.

Q You were all going on the job together? A Yes.

Q Who owned the car that the policeman was driving? A Henry Mack. 20

Q You were driving on this job individually? A No.

Q Not connected together? A No, we were just hired.

Q You were not interested in Ehling's car? A (No answer.)

Q You are now employed by the Public Service Railway? A Yes.

Q For how long? A Eight years. 30

Mr. Wortendyke: The defendant Ackenbout rests.

Louis Sittler, for Defendant Malayfsky, direct.

LOUIS SITTLER, sworn for the defendant, Malayfsky.

Direct examination by Mr. Dorgeval.

10 Q Did you at my request make a map of the scene of this accident? A Yes, sir.

Q Is this it? A Absolutely.

Q Did you make it yourself? A Positively.

Q Where did you make it? A At the location drawn here.

Q Did you make those measurements yourself? A Absolutely, with a steel tape.

Mr. Dorgeval: Is there any objection to my using this?

20 Mr. Wortendyke: I don't know that he is a qualified surveyor.

Q What is your business? A Construction.

Q What? A Plumbing business.

Q What kind of plumbing? A Any kind.

Q Building work? A Building construction—pump work.

Q A journeyman? A A foreman journeyman.

30 Q By whom were you employed? A Charles Bach, Hoboken.

Q I don't think you are a competent expert surveyor or photographer? A I am not.

Mr. Wortendyke: I don't think therefore, that this map should be offered in evidence; I understand you are offering it in evidence.

Mr. Dorgeval: I want to use it for our testimony.

40 Mr. Dorgeval: He is not a surveyor.

Louis Sittler, for Defendant Malayfsky, direct.

The Court: It has to go in by consent.

Mr. Feinberg: This man is a plumber journeyman; he has never drawn before.

The Court: It would not be permissible unless it is drawn to scale actually by one competent to do that. I cannot admit it unless it was done by a competent person and drawn to scale. The testimony shows that there actually was an angle there. 10

Mr. Dorgeval: Will you permit our putting this map on the other side of the blackboard?

Mr. Feinberg: Why show that to the jury if it is not admissible?

Mr. Dorgeval: I am not.

The Witness: I will just duplicate that scene; there is no use doing anything else. 20

Mr. Feinberg: I do not think it should be erased; we referred to that for the jury, and all our witnesses have testified according to that.

Mr. Wortendyke: I don't think it is competent as evidence. Our witnesses testified from this original drawing, and this was shown to the jury, and the jury should keep that entire testimony in their minds from this original drawing. 30

Mr. Feinberg: Miss Malayfsky testified from that.

The Court: If he is a surveyor in his business and this was drawn to scale it is material, but not otherwise.

Mr. Feinberg: I have no objection to his putting that sketch up there if Mr. Wortendyke consents to it, but I want the original left there. 40

Louis Sittler, for Defendant Malayfsky, direct.

Mr. Wortendyke: I consent only when this man can be qualified as an expert.

10 Mr. Feinberg: I consent to this man giving his conception, but not Malayfsky's. This witness said that he was going to give his testimony from this map; I don't want to be confused with the other map. You probably have gone over this map with all of your witnesses. I have no objection to this witness using it if it is held to that extent only. He drew this map, but I object to Malayfsky testifying from it.

The Court: We are only dealing with this witness.

20 Mr. Dorgeval: I am introducing this map for my witnesses.

The Court: No, it is not in. I want a map that we understand. Why anticipate any other witness?

Mr. Dorgeval: I want to put another witness on and have him testify from our map.

Mr. Wortendyke: Then I consent simply to this gentleman taking a piece of chalk and drawing on the board.

30 Mr. Dorgeval: I want this map for my witnesses; I want the board for another picture.

By Mr. Dorgeval.

Q You did not see this accident, did you?
A No.

Q What attracted your attention to it? A
The noise of the collision.

40 Q And what did you do then? A I proceeded on to it immediately.

Louis Sittler, for Defendant Malayfsky, direct.

Q What did you find? A Two cars interlocked on the south side of the tracks, and found the injured in the car.

Q What parts of the cars came in contact?
A The front of one car and the rear of the other.

Q The front of which car? A The front of the Cadillac car. 10

Q The front of the Cadillac was up against—
A The rear of the other car; I don't recall whose.

Q What was the position of the cars on the track? A Both cars obstructed the right-hand side of the car track going south.

Q The southbound track? A Yes.

Q What was the condition of the occupants inside— 20

Mr. Wortendyke: That is immaterial; there is no claim for damages of the Malayfsky car.

Mr. Dorgeval: I am just going into the force of the impact, and if they were injured or not.

The Court: All right.

30 The Witness: I found a little girl and the elderly woman injured, and bleeding quite freely.

Q What did Mr. Malayfsky, the driver of that car do? A I believe he was behind the wheel.

Q Was he injured? A I couldn't tell you; I made no investigation.

Q Had the cars been moved to your knowledge? A Not at the time of my arrival. 40

Louis Sittler, for Defendant Malayfsky, direct.

By the Court.

Q How soon after the accident did you get there—thirty seconds? A At the most.

By Mr. Dorgeval.

10 Q You heard the crash and drove right up?
A Absolutely, that drew my attention.

Q And you noticed what parts of the cars damaged? A After the accident I returned and seen what parts were damaged, not at the time of my arrival; I didn't see it then.

Q What did you go away for? A I took the occupants of the car to the hospital, who were injured.

20 Q After you came back what did you find?
Mr. Wortendyke: I object.

The Court: The cars were in the same position?

Mr. Wortendyke: I think that the time between his leaving and return—

The Court: The cars were in the same position?

30 The Witness: No, one car was on the right-hand side of the street.

The Court: In the same position?

The Witness: No.

Mr. Dorgeval: They had been pulled apart and the people taken to the hospital. He came back; I will connect him up on the others' evidence. It is proper evidence to be submitted to the jury.

40 Mr. Wortendyke: I am not so sure that that should go in. We have no idea as to

Louis Sittler, for Defendant Malayfsky, direct.

what time elapsed from the time he left until the time he came back.

The Witness: Immediately.

By Mr. Dorgeval.

Q How long a time elapsed? A The difference between driving to the hospital and the scene of the accident. 10

Q How long? A Twenty minutes as a maximum.

Mr. Wortendyke: My objection is withdrawn.

Q What damage was done to the car that you found? A The car happened to be stored the following day in the same garage that mine is, and being curious-like I investigated the car. 20

Q What did you find?

Mr. Feinberg: This is objectionable as to what he found the following day in the garage. We don't know what a mechanic might have done to it. It certainly is not proper.

Q What part was damaged? A The front part of the Cadillac car. 30

Q What part of their car was damaged? A The rear end toward the rear wheel.

Q Did you notice the damage? A Wheels smashed.

The Court: What wheel was smashed?

The Witness: You will have to give me time to account for that—the right-hand wheel in the rear, I believe. 40

Louis Sittler, for Defendant Malayfsky, direct.

Q When you saw the cars after the impact were they on the east or west side of the Plankroad? A On the west side of the Plankroad going south.

Q The right-hand side of the Plankroad driving south? A Positively, on the right-hand side of the Plankroad driving south.

Q I show you a picture and ask you what that is? A That is the location of the accident.

Q Can you tell us which streets are which there? A Yes, sir, this is Central avenue, and the intersection at an angle. The Plankroad has an angle there, and Hague street is on the opposite corner. You look at an angle there. This is a square here (indicating).

Mr. Feinberg: Do you want this in evidence?

Mr. Dorgeval: Yes. I want to offer all of these pictures.

Mr. Wortendyke: These I have no objection to but the others you will have to prove.

The Court: Four are accepted by consent, and the others you will have to prove.

(The photographs are received in evidence, and marked D-1 to D-4 inclusive, of this date.)

RECESS UNTIL 2 P. M.

Louis Sittler, for Defendant Malayfsky, direct.

AFTERNOON SESSION, 2 P. M.

Trial resumed.

Direct examination by Mr. Dorgeval, resumed.

Q I show you a picture, and ask you what it is? A That is a picture of the car that was in the accident the day I arrived.

Q Is that the way it looked? A Absolutely, as far as I could recollect. That is where it was struck (indicating).

Q Just as it was? A Just exactly.

By the Court.

Q Where was the picture taken? A I don't know. I was asked of the condition.

Mr. Dorgeval: I offer that in evidence.

Mr. Wortendyke: I object to this picture going in evidence. It was taken as far back as October 19, 1925. Fully a year, or almost a year after the accident. The picture illustrates the car in an open lot or field.

Mr. Dorgeval: The picture was taken at our request.

The Court: Do you recognize that car as one of the cars that was in the accident?

A I do, yes, sir.

Q You saw the car immediately after the accident? A Yes, sir.

Q That is the condition of the car in this picture as it was immediately after the accident?

A I am unable to say—it appears to be the condition of when I saw it.

Louis Sittler, for Defendant Malayfsky, direct.

Q Are you sure? A I am unable to say that, but I seen it.

The Court: I sustain the objection.

By Mr. Dorgeval.

10 Q Did you say that it looked the same?

Mr. Feinberg: I object.

Q Let's go down to this map. Just point out certain things for me. That map you drew at my request? A Yes.

Q Did you measure the street? A Yes.

Q How? A With a steel tape.

Q You made all your measurements with a steel tape? A Yes.

20 Q How wide is Hague street? A It is just 32 feet.

Q You measured the Plankroad? A Yes.

Q How wide is that? A 36 feet.

Q Did you measure in front of the Flatiron building? A Yes.

Q How wide is that? A A fraction over 22 feet.

Q Did you measure from the Flatiron building to the east curb of the Plankroad? A Yes, that is 9 feet.

30 Q Did you measure the distance from the corner to the Flatiron building? A Yes, that is 22 feet.

Q And from the Flatiron building to the east curb? A That is 12 feet.

Q From the Flatiron building to Hague street is what? A 9 feet.

Q You made all measurements? A Absolutely.

40

Louis Sittler, for Defendant Malayfsky, direct.

Q I would like to have you explain this picture to the jury. You have identified it. Are you familiar with this particular locality? A Yes, sir.

Q Explain this to the jury.

Mr. Feinberg: If the Court please, this man is not a photographer, and he did not take the pictures, and I don't know when they were taken. I object to this. 10

The Court: I think it is just as well if the counsel explains that.

Mr. Wortendyke: The pictures in evidence speak for themselves.

Mr. Dorgeval: I don't know how many of the gentlemen know where the Plankroad and Hague street are. An explanation would not clear that unless it was pointed out. 20

The Court: I think that is a very good description.

Mr. Wortendyke: I think they speak for themselves.

Mr. Dorgeval: May I point out to the jury?

The Court: Pass them around and let them read the endorsements on the back. 30

By Mr. Dorgeval.

Q Did you on Friday morning see Mr. Feinberg and Mr. Ackenbout in conference out in the corridor, or did you not? A Yes, sir.

Q Were you with me at the time? A Yes, you called my attention to it.

40

Louis Sittler, for Defendant Malayfsky, cross.

Cross examination by Mr. Wortendyke.

Q You are a friend of the Malayfskys, are you? A No, except at the scene of the accident; I know his cousins.

Q Where did you first meet his cousin? A
10 When examined in court here the first time.

Q You didn't know him before that? A Absolutely not; I had heard of it.

Q You had heard? A Previous to the accident I never knew him.

Q You are an old resident in that vicinity? A Thirty-eight years.

Q You are a journeyman plumber? A Yes, for twenty-two years.

Q You didn't use any compass to ascertain the bearing of the street, A No.
20

Q What does the north side indicate? A As far as I can describe it is a rectangle. I used a steel tape.

Q You identified these pictures, didn't you, as properly indicating the various buildings in this vicinity, and the streets? A Yes.

Q I show you Exhibit D. 2, and refer to the building on the right of the picture. Is that the Flatiron building that you spoke of? A Yes, sir.
30

Q Is that appearance as shown in that picture as it was the day of the accident? A I cannot recall the building the same as today as when it was put up. As far as the trimming I don't believe the awning was there then.

Q You believe that because of the season? A I believe the store was vacant for some time.

Q Is that pole there? A Yes.

Q The picture shows the pole in the vicinity of the sewer. Is that right up against it? A No.
40

Louis Sittler, for Defendant Malayfsky, cross.

Q What is it? A The pole leans in.

Q Isn't it a fact that there is a sewer basin on the corner? A No, I am positive it is not.

Q Do you know the situation thoroughly? A Very good; I constructed the building you are speaking about.

Q You not only know the building at the time it was constructed but at the time of the accident? A Yes.
10

Q You are prepared to say if there was a sewer basin or not there at the time? A No, sir; I am not in the street sewer department.

Q Am I to gather that because you are not connected with the sewer department that you do know that there is a sewer basin there? A If I have to look for—

Q You are thoroughly familiar with this locality? A Absolutely, yes.
20

Q Yet, you can't tell from that picture whether there is a sewer basin at that corner? A I can't say positively whether there is or is not.

Q You say you heard the noise of the collision? A Yes, sir.

Q Where were you at the time you heard the noise? A About two hundred feet away.

Q In what direction, and what street? A Traveling in a southerly direction on the Plankroad.
30

Q You were in an automobile? A Yes, my own car.

Q Do I understand then, that you were two hundred feet north of the intersection in your own automobile when you heard the crash? A About two hundred feet.

Q Were there any other vehicles in the vicinity? A I didn't take any particular notice; I always look for a clear road ahead for myself.
40

Louis Sittler, for Defendant Malayfsky, cross.

Q You won't say there were not? A I won't say there were not, no, sir.

Q You have a clear mental picture of this—a clear recollection of the crash and the distance you were away from the collision when you heard it? A I say about the distance I said; I also have a clear recollection as to the scene of the accident when I came upon it.

Q Yet you have no recollection, a clear recollection of the entire happening there at the time of the accident? A At the time of the collision I had been looking ahead on the road, and the noise of the collision as they came together drew my attention.

Q You didn't see the collision? A Absolutely not; I didn't see it. I was attracted to the scene of the accident by the actual noise of the collision.

Q When you heard the noise of the collision, where were you looking? A Right straight ahead.

Q You didn't see it? A No, I had a car of my own and I was watching for pedestrians.

Q Was there anything between you and the cars? A Just the cars when I got there.

Q You made a close examination of the occupants of the cars, to determine if they were injured? A I made a hurried examination in case they needed attention.

Q You stated on direct examination that you can't tell now whether Malayfsky was injured or not? A I couldn't tell at all if he was injured; he was still in back of the wheel.

Q You know there were other people injured? A Positively.

Q You went to the hospital, didn't you? A Yes, sir.

Louis Sittler, for Defendant Malayfsky, cross.

Q In your car? A Yes, sir.

Q And you took with you what people? A A small child, and a grown-up girl; at that time they were total strangers to me.

Q Where was that hospital? A Christ Hospital on Palisade avenue.

Q How far from the scene of the collision is Christ Hospital located, where you took the people? A A mile and a half at the longest.

Q What did you do when you got there? A I went into the room and made a report that I had an emergency case to the clerk in the office, and that I had a case that needed immediate medical attention. They took them to the head nurse; I don't know what they did with the child.

Q Did you give a report? A I had to leave a report while delivering the patients.

Q How long were you at the hospital? A Four or five minutes.

Q At that time you gave your report and got back to your car? A Positively.

Q Then you returned to the scene of the accident? A Yes, sir.

Q For what purpose? A No purpose at all; I live in that section, and I was on my way home at the time of the collision.

Q When you came down Paterson Plankroad you heard a crash, where were you bound for then? A There happened to be a fire; I was up there on the north of the Boulevard. The fire burned; I don't recollect, but I think it was the Erie docks, and I was going down to see where the fire was.

Q So, when you heard the collision you were on the way to the fire? A Yes.

Louis Sittler, for Defendant Malayfsky, cross.

Q Then you took these people to the hospital? A That is it exactly.

Q And you went back to the scene of the accident because you wanted to go home? A Positively.

10 Q If I recall correctly you stated on your direct examination you didn't recall which part of Malayfsky's car was damaged? A I didn't say I didn't recall; I was asked if I did, and I recollect that I stated that I believed it was the right wheel on the Malayfsky car that had been wrecked.

Q Can you describe what it was like, what condition it was in? A Smashed like—you know when a thing is smashed.

20 Q Was it doubled up like that (indicating)? A Yes, as a cave in, I suppose.

Q Who went with you when you made the examination of the street layout on the Friday or Saturday? At whose request? A Mr. Dorgeval's request.

Q Did anybody help you make it? A I was alone—I had a boy hold the steel tape.

Q He held that? A Yes—by a stranger, a strange boy; he asked to hold it.

30 Q Did you make a sketch of the ground after you came back? A On the ground?

Q When did you make the sketch? A I made the sketch when I got home.

Q Yesterday? A Saturday.

Q You don't work on Saturday? A No, I am a union man.

40 Q You said on your direct examination that you returned to the scene of the accident from the hospital because you were curious—curious about what? A Anything; if I see a vehicle traveling fast, speeding, that would make me

Louis Sittler, for Defendant Malayfsky, cross.

curious. I get a thrill because of some unusual happening.

Q Were you paid to make this sketch? A Absolutely, I received no compensation.

Q You made no charges for it? A Absolutely not.

10

Mr. Wortendyke: That is all.

Cross examination by Mr. Feinberg.

Q You are not interested in this case? A Only that I have been subpoenaed as a witness.

Q You were subpoenaed to come here and tell what you saw and heard? A Absolutely.

Q You talked to me about this? A Yes.

Q You talked to Mr. Dorgeval? A Yes.

20

Q And Mr. Wortendyke? A Yes.

Q Nobody suggested anything improper, did they? A Not that I recall.

Q You have been in court half a dozen times and the case was not reached? A Positively so.

Q Each time you got here you received a check from that young man at the door? A I received a day's pay for the loss of wages.

Q This man gave you a check every day? A Not every time.

30

Mr. Dorgeval: I object to this. I think it is highly improper.

Mr. Wortendyke: It has to do with his credibility.

The Court: He is trying to show the interest of this witness, if he has any. I think he has already answered that. He seems to be a voluntary witness. You can attack his credibility on that.

40

Louis Sittler, for Defendant Malayfsky, cross.

By Mr. Feinberg.

Q You got your day's pay? A My day's pay, but I haven't got it yet.

Q When did you take that tape measure to measure the street? A Saturday.

10 Q When? A In the afternoon.

Q How long did it take you? A I can't recollect; it didn't take long.

Q You didn't have any interest in the case; didn't expect any compensation—you don't expect to be paid? You just did it for nothing? A No, at the request of the attorney in the case.

Q For no pay? You have no interest in this case? A No, except that on Saturday
20 when I was here—

Q This accident happened about what time? A I haven't got the slightest idea as to the time.

Q At the time this thing happened you were on your way to see another curious thing—a fire? A Yes.

Q Instead of seeing the fire you had your curiosity satisfied with an accident? A I suppose so.

Q You went to the hospital with somebody
30 and came back, and that satisfied your curiosity? A No, sir; on my way home.

Q Didn't you say you went back because you were curious? A On my way I stopped, as a curious person would.

Q Didn't you say you came back because you were curious? A Positively.

Q Where is the hospital? A On Palisade avenue.

Q Where do you live? A On Sixth street
40 at the present time, Hoboken.

Louis Sittler, for Defendant Malayfsky, cross.

Q You had to go back to the street? A Yes, positively.

Q You were toward— A I live at Central avenue and Sixth street.

Q You were going home? A Positively.

Q Tell us whether you were going home or
10 to a fire? A I just said home.

Q You just told me that you were going home, before you answered Mr. Wortendyke that you were going to a fire. Which were you going to, home or a fire? A I was travelling to see the fire; during the time I was travelling toward the fire this accident happened.

Q You were travelling to see the fire? A Yes.

Q You were not going home? A Not at
20 that time; after I went to the hospital I was.

Q When I asked you and you said you were going home, you were mistaken?

Mr. Dorgeval: I object to that; that is a distortion of the evidence.

The Court: Going to a fire, and then going home he passed the accident.

Q How fast were you going? A You mean
30 to the hospital with the injured?

Q Yes. A Possibly twenty-five or thirty miles an hour.

Q How fast before the accident happened? A The usual rate—about fifteen.

Q You said you heard of Mr. Malayfsky before? A No, I happen to be in the same line that he is in, the building supplies that I handle—I met several of them.

Q Malayfsky is in the lumber business, is he not? A Yes.
40

Louis Sittler, for Defendant Malayfsky, re-cross.

Q And you are in the plumbing line? A Yes.

Q You bought some of his stuff? A Yes.

Q You have heard of him? A Positively.

Q How? A Because I am in that business; I am in that for twenty years.

10 Q Where does he live? A I don't know.

Q You know where his place of business is? A Yes.

Q You have lived around there for twenty years? A Yes.

Q You never heard of it? A No.

Q You have talked to Mr. Malayfsky since this case started? A Yes.

20 *Re-cross examination by Mr. Wortendyke.*

Q You say you were going about fifteen miles an hour to the fire? A No, previous to the accident.

Q Previous to the accident. You didn't testify you were going to the fire? A I said the usual rate of driving was fifteen miles.

Q I believe you said you were going to the fire at about fifteen miles an hour? A Yes, I believe less than that because of traffic at times.

30 Q It snowed Saturday? A No, I don't think it did, because it was a good day. I had every curtain off the car. If it had been a nasty day—

Q You are sure it was Saturday? A Absolutely, yes.

Q You made arrangements and drew in the snow? A Positively, and got wet in doing it.

Q You are not going to get paid for it? A 40 No, sir.

Abram Malayfsky, for Defendant Malayfsky, direct.

Re-direct examination by Mr. Dorgeval.

Q These checks that were talked about, what were they for? A For loss of wages, loss of time.

Q Anything else? A Absolutely nothing else. I received about twelve dollars. 10

Juror No. 1. How many have you gotten?

The Witness: I haven't received it yet.

Q You are getting another when you are through here today? A I guess so.

ABRAM MALAYFSKY, one of the defendants, 20 sworn.

Direct examination by Mr. Dorgeval.

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

Q You were driving a car just before this accident happened on Hague street. Now, about this map. I am not to use it? 30

Mr. Feinberg: What a ridiculous question.

My friend seems to be helpless; he don't know where he is at. The Court ruled on that.

The Court: Do you consent that he does that? Suppose you turn that holder around and use the other side.

Mr. Dorgeval: I want this map because it correctly shows the scene of the accident. 40

Abram Malayfsky, for Defendant Malayfsky, direct.

I don't want to tie my case on this map; it is not correct.

Mr. Feinberg: The jury got their testimony from the sketch and the pictures.

10 The Court: We have not assumed that for any purpose—only as a possible assistance to one witness and the jury. I think that has not been properly proved and it cannot be used except by consent of counsel.

Mr. Dorgeval: This is a proper map of the scene of the accident. I ask that a board be brought in and a drawing of the scene be made for our case.

20 Mr. Wortendyke: I can't see how this witness can point out where there is a difference; that is his opinion.

Mr. Dorgeval: The use of this sketch casts a burden upon us to correct the variations.

The Court: I thought you had agreed to have a sketch drawn that would be satisfactory, before the trial began?

By Mr. Dorgeval.

30 Q. You were driving your car in Hague street? A Yes, sir.

Q How fast were you going before the accident? A About eight miles an hour.

Q What kind of a road is that? A A very tough road.

Q How was the paving? A Cobblestones like—

Q What condition was it in? A A bad road.

40 Q What part of the road were you on, the right, the left or the center? A The right side.

Abram Malayfsky, for Defendant Malayfsky, direct.

Q Who were in the car with you? A It was my three daughters and Mrs. Levine.

Q How were the people seated—was there anybody sitting in the front with you? A My older girl was alongside of me.

Q The one who testified here? A Yes.

Q And the other two little girls were where? 10
A With Mrs. Levine.

Q Sitting in the back? A In the back of the car.

Q As you came to the Plankroad, what, if anything, did you do? A I blowed the horn and looked the both sides—that is a very bad corner there.

Q Did you do anything else? A Well, I held my hand out through the window, the left hand window for a signal. 20

Q Just go on and tell us what else you did? A I continued to go and made a very wide turn.

Q Did you see the other car on that highway? A I saw approximately two hundred feet away the other car—might be less than that.

Q On which side, the left or the right? A The car was going about the middle, between the tracks.

Q Coming from your left or your right? A 30
I couldn't tell you that, because when I was in the third track I received a smash.

Q Where were you when you first saw the other car? A When up from the corner.

Q From Hague street? A From Hague street.

Q Where was the car, to your left or your right as you looked and saw it in about the middle of the street? A In the middle about the car tracks. 40

Abram Malayfsky, for Defendant Malayfsky, direct.

Q What I want to know, was it to your left or right as you came out, driving your car from Hague street? When you looked from your left or your right where was the car coming from, your left or right? A The car was coming north.

10 Q After you looked and saw this car, I think you said two hundred feet away; what did you do then? A I blowed the horn.

Q And made a left turn? A And made a left turn going south.

Q And about how fast were you going when you made the turn? A About eight miles an hour.

Q What gear were you in, by the way? A Second gear.

20 Q Then just tell us what happened? A When I turned in I got unexpectedly a smash; after that I don't know what happened.

Q Where was your car when you got this unexpected smash? A I don't know.

Q Do you know whether you were on the northbound track? A I was on the third car track.

30 Q This is Hague street as you were coming out, and here is where you were coming. This is the south (indicating). This is the direction you turned, and this is the north, and this is the Paterson Plankroad.

Mr. Dorgeval: Is there any objection to my rubbing out this line?

Mr. Feinberg: Yes, I object to it.

The Court: He means that dotted one.

40 Mr. Dorgeval: I don't think this line should be here.

Abram Malayfsky, for Defendant Malayfsky, direct.

Mr. Feinberg: He is afraid this witness might find out something.

By Mr. Dorgeval.

Q As you came out of there what kind of a turn did you make, a sharp turn? A I made a very wide turn. 10

Q A sharp turn like this line shows? A No.

Q What kind of a turn? A I made a wide turn. I had plenty of room to make it.

The Court: Do you want him to make a mark on the diagram to show where he went?

Mr. Feinberg: Surely, make a mark.

The Witness: I went this way (indicating). Hague street is up here (indicating). I was back there and then I had the smash on this third car track. 20

By Mr. Dorgeval.

Q Just point out where it was? A (Witness made a mark on the diagram.)

Q Do you remember what part of your car was struck? A I don't remember. When I had the smash I was out; I don't know anything. 30

Q What happened to you? A I was unconscious.

Q You sustained injuries? A Oh, yes; I had a broken kneecap.

Mr. Feinberg: I object to that.

The Witness: After I was injured I told you what happened to me; after that I don't know anything, but after I find out. 40

Abram Malayfsky, for Defendant Malayfsky, direct.

Mr. Feinberg: I object to that; if you are looking for the jury's sympathy pass the hat around.

By Mr. Dorgeval.

10 Q You had a broken kneecap? A Yes.

Q Anything else? A A broken kneecap, that is all.

Q Do you know what part of the other car hit you? A I remember the smash; I don't remember what part hit me.

Q You don't know what position the cars were in after the accident? A Nothing at all.

Q Just tell us, please, after the accident what part of your car was damaged? A I didn't see it; I was taken to the hospital.

20 Q After you got back from the hospital—

Mr. Wortendyke: I object to that, we can't compare that condition with the subsequent condition.

By the Court.

Q How soon after did you see your car? A About eight weeks.

30 The Court: Certainly you should have some other witness on that.

Mr. Dorgeval: There are other witnesses.

The Court: He has no claim for damages. That is immaterial if he did not see it until eight weeks after. You would have to connect it up with some other witness.

40 Mr. Wortendyke: I don't see how he can testify as to how it was eight weeks after the accident; he can't testify to that.

Abram Malayfsky, for Defendant Malayfsky, direct.

The Court: It might get a bump every day for eight weeks, that is the reason.

Mr. Dorgeval: I will connect it up, and show that it was in the same condition as it was previously.

Mr. Wortendyke: That is putting the cart before the horse. 10

Mr. Feinberg: I object to it as incompetent.

The Court: It is incompetent unless you can show that the same condition existed eight weeks after the accident as immediately before the accident.

By Mr. Dorgeval.

Q Did your car, as far as you know, have any other accident? A I didn't use it—she was not used. 20

Mr. Feinberg: I object. The man was in the hospital. How could he tell? That is ridiculous.

Mr. Dorgeval: I have a right to ask him about the entire accident.

Mr. Feinberg: He was in the hospital.

The Court: Let some other witness do that. 30

By Mr. Dorgeval.

Q Did your car have an accident? A That car was smashed—can't be used.

The Court: Strike that out.

The Court: Did you have any other accident?

The Witness: No, sir. 40

Abram Malayfsky, for Defendant Malayfsky, direct.

Q Where is this car now? A In the yard.

Q Have you had it repaired? A No, sir.

Q Have you used it since? A No, sir.

Q Has there been any change in your car from the time you first saw it after the accident until September 19, 1925, at the time these pictures were taken? A No, sir.

Q The car is in the same condition as it was then? A The same condition as it is now.

The Court: Where is it now?

The Witness: In my yard.

Q It has been there ever since you first saw it after the accident? A Yes, sir.

Q I show you a picture and ask you what it shows? A There is the way it is.

Q Is that your car? A Yes.

Q Is that the way it looked the first time you saw it after the accident? A Yes, the first time, and that is the way it is now.

Q Where were you going the day you were taking this drive? A I was going for a ride.

Q This was a Sunday afternoon? A Yes, sir.

Q How did Mrs. Levine happen to go with you? A Mrs. Levine is a relative of my wife.

Q Just tell me how she happened to go with you? A She wants to see her children and she came to my wife and told this. My wife told her—

Mr. Feinberg: I object to that.

The Court: Don't tell any conversation.

Q Tell us how Mrs. Levine came to go riding with you? A She didn't have a thing—

Abram Malayfsky, for Defendant Malayfsky, direct.

The Court: She came just at the time the riding began or before that?

The Witness: She came in and she asked—she said she wants to go to see her nephew, to see Louis Levine.

Q When she asked you this where was she? 10

A She was outside.

Q In your house or outside the house? A She was in my house.

Q Was this outside in front of your house?

A Outside in front of my house.

Q Not in front of her house? A No.

Q Had she been at your place before that day? A Yes.

Q What for that particular day? A She used to come every day.

Q For what? 20

Mr. Feinberg: I object to that as immaterial. If she went there for liquor, that is all right. This is not an adoption case. This is an invitation case.

By the Court.

Q What was she there for that day? A This was outside from the house. 30

Q She had come to visit you? A She had come to visit me.

Q For what purpose? A To eat.

Q Did she eat? A Yes, sir.

By Mr. Dorgeval.

Q Did she come to your house frequently to eat, or not? A Purposely to eat, yes, sir.

Q She was a first cousin of your wife's? A Yes, sir. 40

Abram Malayfsky, for Defendant Malayfsky, cross.

Q And she asked you to take her over to her nephew? A Yes, sir.

Q Can you remember her exact language? A She said it in Jewish.

Q What did she say? A "Please, I want to go to my nephew's."

10 Q What did you say to her? A Well, I took her.

Q Do you remember saying to her "Come along and take a ride," or something like that? A No, sir.

Q Did you hear any horn sounded by the other automobile? A No, sir.

Q Did you you have a license at the time you were driving this car? A Yes, sir.

20 Mr. Wortendyke: I object to that question as immaterial. The Court has ruled in respect to this license proposition, that it is not evidential, the question here is mainly that of the negligence involved. Inasmuch as the Court has taken the position and ruled that this could not be brought out by the defendant Ackenbout this other defendant cannot be heard on that proposition.

30 Mr. Feinberg: If this man had a license I think it—I am satisfied to have both of it go in. I think he has a certificate.

Mr. Wortendyke: That is not proper proof.

The Court: Let me see what you have.

(After looking at a paper.) It is immaterial.

Cross examination by Mr. Wortendyke.

Q Where did you live, November 16, 1924?

40 A 38 Grace street, Jersey City.

Abram Malayfsky, for Defendant Malayfsky, cross.

Q You heard your daughter testify where Grace street is? A Yes.

Q A couple of blocks away from this accident? A About two blocks.

Q What kind of a car were you driving? A Stevens sedan.

Q You are sure it was not a Dort? A I had 10 a Dort before.

Q Did you have the same license on the Stevens as that which you had on the Dort? A I couldn't tell you.

Q You did not have it? A What?

Q The same license on the Dort as that on the Stevens? A I couldn't remember.

Q You didn't change them yourself? A When I got them I went to the Hudson Dispatch and changed them. 20

Q You knew these streets pretty well? A Where?

Q In this vicinity? A Yes.

Q How long have you been living there? A About ten or twelve years.

Q You are an old resident there? A In Grace street?

Q Yes. A Seven or eight years.

Q You are in business there? A I am in business. 30

Q You have been a citizen of that township quite a while? A Jersey City.

Q Do you know that vicinity pretty well? A Yes.

Q You testified that as you were driving toward Paterson Plankroad on Hague street that there is a very bad corner there? A Yes.

Q Referring to Exhibit D. 2, as you look at that picture you were coming in the direction toward us as we look at it? A I went this way, see(indicating). 40

Abram Malayfsky, for Defendant Malayfsky, cross.

Q Across towards you and me (indicating)?
A Yes, that way.

Mr. Wortendyke: Indicating the direction of northwest.

10 Q Who was this friend of yours that lived on your right hand side as you came along Hague street? A He is working for my brother.

Q Your brother works with you? A No, sir.

Q You saw him that day, did you? A No, I didn't see him that day.

Q You didn't see your daughter wave to him? A I can't remember if she waved or not.

20 Q Would you say that she did not wave? A I couldn't tell you yes or no.

Q Did she say "There is your friend so and so?" A I can't say.

Q But you do know that as you approached Paterson Plankroad you saw the car of the defendant Ackenbout two hundred feet away? A About, maybe less than that—about that.

30 Q Will you take D. 2 and point out on that picture, holding it up so that the jury can see, where your car was when you saw Ackenbout's car two hundred feet away? A On that corner. When I went out to this little house I saw that car there (indicating).

Mr. Wortendyke: Indicating the north-east corner.

Q What did you do when you got to the corner? A I blowed the horn.

40 Q Did you stop? A I did not.

Abram Malayfsky, for Defendant Malayfsky, cross.

Q Did you see any of your friends on the corner? A No, sir, I didn't see any friends.

Q How far, if you can say, on this portrait, is that two hundred feet? A About two hundred feet—I don't know exactly.

Q Have you any idea how long this court room is? A Well, a little further than the building—I mean the back wall. 10

Q So you say that you believe the car was a little farther than the wall? A A little farther.

Q You are in the lumber business? A Yes, sir.

Q You measure lumber by feet, don't you? A I measure lumber by feet.

Q You say that is about two hundred feet? A Approximately; I cannot say. Lumber is not a hundred feet long. 20

Q You know what ten feet of lumber is, don't you? A I do.

Q You know twenty times that length, don't you? A Not extra.

Q You came out of this street and got to the corner and were going over the crossing— A Certainly I did.

Q Only eight miles an hour? A Couldn't go any faster. 30

Q Wouldn't your car run any faster? A Very bad street there.

Q I show you Exhibit D 2; this picture shows the condition of Hague street on the day of the accident, as far as the pavement is concerned? A The pavement is about the same—you can see the pavement in the picture.

Q Is it the same as the day of the accident? A I couldn't tell you now. 40

Abram Malayfsky, for Defendant Malayfsky, cross.

Q You remember some things? A I remember from before.

Q You remembered eight miles an hour. Did you form that opinion from what your speedometer showed? A No, sir; I just—you know, I couldn't go no faster because it is bulky there
10 —you know, a very bad street.

Q Does D. 2 show the condition of the street as it was there? A The Paterson Plankroad is all right; I was in the habit of using that street.

Q Do you say that the condition of the pavement on Hague street in November, 1924, was the same as shown there? A About the same.

Q You were going for a ride? A Yes, sir.

Q It was a Sunday afternoon? A Yes.

Q You very frequently go for a ride on a Sunday afternoon? A Yes.
20

Q Every Sunday? A Not every Sunday, but you know—

Q You had with you in that car Mrs. Levine, your two younger daughters, and the elder daughter and yourself? A Yes.

Q Coming down Hague street didn't you see your friend up in the window? A I don't remember if I saw him or not.

Q You remember going eight miles an hour? A I don't remember if I saw him; I remember eight miles an hour.
30

Q You came to the corner, and as you pointed out you were going eight miles an hour? A Yes.

Q Then you saw the car of the defendant Ackenbout about two hundred feet away? A Yes, about.

Q Where did you blow the horn? A Before I went out, and after I went out on the street.
40

Abram Malayfsky, for Defendant Malayfsky, cross.

Q Before and after? A Yes, I blowed it a couple of times.

Q Where were you when you first blew it—look at D. 2? A I blowed it here and here (indicating for the first point the second house back from the corner on the easterly side of Hague street, and the second time at Hague street and
10 the Paterson Plankroad).

Q Did you see this car of Ackenbout when you first blew your horn? A Not the first time.

Q You were right at the corner? A Yes.

Q There is a store right at that corner? A I don't remember if there is a store or not; I can't remember that.

Q Do you remember the pavement? A Yes, but if there is a store there that don't interest me.
20

Q You know it was right at that time that you blew your horn? A Yes.

Q Then you saw the defendant Ackenbout's car two hundred feet away? A Yes, about.

Q And then what? A Then I blew my horn.

Q And then what did you do? A I made the turn (indicating).

Q You made the turn going across the Paterson Plankroad? A Yes, sir.

Q Did you go straight across? A No, made
30 the turn.

Q There are at least two turns; did you go this way along this way? A I made a long turn.

Q You said on direct examination that you did not know where you were when this collision took place. A The collision was, I don't know after that, but before I do know.

Q Did you know after that for the eight weeks? A No, sir, after the eight weeks I was taken to the hospital.
40

Abram Malayfsky, for Defendant Malayfsky, cross.

Q Didn't you know anything? A After the accident I didn't know.

Q Why did you stick your hand out? A That is what I usually do.

Q The ordinary driver does that? A Yes.

Q To signal the cars behind? A I don't
10 know. I don't care; I always do that; when I drive I put my hand out, if they are there or not.

Q Don't you remember whether you saw your friend up in the window there at Hague street?
A I don't remember.

Q But you do remember the pavement and the speed you were going, and you remember when you blew your horn? A Yes.

Q You remember that Ackenbout's car was
20 there? A Yes, sir, I do remember that.

Q Do you remember the other, do you? A I don't remember if he waved to me or not.

Q You went for a ride this afternoon? A I went for a ride. I was to bring up Mrs. Levine to her nephew, after going back.

Q For the ride first? A Yes.

Q On the return trip you were going to the nephew's? A Yes.

Q You have talked this case over with your
30 attorney? A Yes.

Q Every client talks his case over with his attorney? A Yes.

Q Have you talked this case over with anybody else? A Nobody else except my lawyer.

Q Have you spoken to Mr. Feinberg about this case? A I went to his place but I didn't find him there.

Q What happened when you went to Feinberg's? A I went to see him.

40 Q What happened there? A Nothing.

Abram Malayfsky, for Defendant Malayfsky, cross.

Cross examination by Mr. Feinberg.

Q How long had you been driving when this accident happened? A About an hour.

Q Then the accident happened? A Yes.

Q You talked to your lawyer several times?
A Yes. 10

Q You know the law that if you invite somebody in your automobile you owed a big duty to them, and if that somebody asked you you did not owe that duty—you know that? A No, sir.

Q Nobody told you about that? A Nobody told me.

Q Nobody told you that if you asked her to ride that you did not owe her the same duty that you did if she asked you for the ride? A No. 20

Q Do you know that man sitting over there—he is your cousin? A Yes.

Q You wanted me to put all the blame on Ackenbout, didn't you? A No.

Q You know the stenographer in our office, don't you? A Yes.

Q You never had a conversation with her in my office? A No.

Q You came to my office and said you wanted me to go easy on you and to put the blame on
the other man? A No. 30

Q I didn't consent to that, did I? A No.

Q Didn't they come to my office? A No.

Q You were out riding for an hour? A Yes.

Q This woman was so poor that you had to feed her, and if you didn't feed her she would go without it? A She came down—

Q Your lawyer suggested that you went for a ride and that you took your children, and then he suggested to you to say that she asked
40

Abram Malayfsky, for Defendant Malayfsky, cross.

that you take her to her nephew, Louis Levine's?

A It was that way.

Q That is where you went, to Louis Levine's?

A For her.

Q You were going to take her for a ride?

A Yes.

10 Q I believe you said you didn't want to go there? A Yes.

Q But you took her? A Yes.

Q At the time of the accident you had taken your children out for a ride at the time? A She asked me; I would not have taken her if she had not done that.

Q You would let her sit here at your house all the time? A Going to the sister-in-law.

Q Did you ever take her for a ride before?

20 A Never.

Q She had not asked you if you would let her stay there? A No, she was going to the sister-in-law's.

Q You would make her walk to the sister-in-law's? A She walked all the time.

Q If she hadn't asked you you would let her stay there? A She didn't have to stay—she was going to the sister-in-law's.

30 Mr. Feinberg: I object to that and ask that it be stricken out as argumentative.

The Court: I think the question is immaterial.

By Mr. Feinberg.

Q If she had not asked for the ride you would not have taken her? A No.

Q But you took her? A I took her.

40 Mr. Feinberg: I object.

Abram Malayfsky, for Defendant Malayfsky, cross.

The Court: Objection sustained.

Mr. Feinberg: On the ground that if she hadn't asked her he said he wouldn't have taken her.

The Court: That is all right.

By Mr. Feinberg.

10

Q You said that if she had not asked you you would not have taken her? A Absolutely not.

Q Because she did ask you that is how you took her? A Yes, sir.

Q You talked this whole case over with your lawyer a couple of times? A No, sir.

Q Did you talk this case over with anybody? A About some other things—not this.

20

Q You talked this case over, didn't you? A No, sir.

Q Do you mean to say that you talked to your lawyer and that you didn't talk to him about this case? A I was talking about the case.

Q When you say you talked about other things that was not true? A It was true.

Mr. Dorgeval: I object to that.

The Court: That is not what he said the first time.

30

By Mr. Feinberg.

Q You were out riding one hour? A Yes, sir.

Q During that time you talked to nobody? A No, sir.

Q Didn't you talk to your daughter alongside of you? A No, sir.

40

Abram Malayfsky, for Defendant Malayfsky, cross.

Q For one whole hour you didn't say anything to your three daughters and Mrs. Levine while they were in the car? A No, sir.

Q You say this was Sunday. About what time? A In the afternoon.

10 Q What was the time of the accident? A Between two and three—I can't tell exactly.

Q Was it between one and two? A Around two.

Q It happened at two? A Not two; after two o'clock; I don't know exactly the time.

Q It was Sunday about two? A About.

Q It happened about an hour later? A About an hour later.

20 Q From two o'clock to three o'clock you had been riding for one hour, and you didn't say a single, blessed word to anybody in that car? A I might have to my daughter but nobody else.

Q Maybe to your daughter? A Not to anybody else.

Q When you said positively no that wasn't the truth? A I couldn't tell you if it was true or not.

Q You said something about the condition of Hague street at that time? A Absolutely.

30 Q In 1924 this street was not used as much as it is used at the present time—there are more trucks using it since 1924? A Not on Hague street. Some do, but not like on the Paterson Plankroad.

Q Did I ask you about the trucks on the Paterson Plankroad? Some trucks were on it since 1924? A I suppose so; I didn't watch them.

40 Q Would you say there was no traffic on Hague street since 1924? A No, no traffic.

Abram Malayfsky, for Defendant Malayfsky, cross.

Q At the time that the accident happened, before you came out on this street here (indicating)—this is your line, very close to the curb. You were not over close to the curb? A Absolutely not.

Q You were very close to the right-hand side? A Not so close. 10

Q There was enough room for the wheels to turn? A Yes.

Q Then you went out and started to turn? A Yes.

Q And then when you got here you got hit? A Yes.

Q Did you start to turn when you were hit? A I wasn't turning at that time.

Q You were partly turned? A I don't remember how much was turned. 20

Q Did you reach this track when you got hit (indicating)? A When I was by the third track I got hit.

Q Do you know how wide the Paterson Plankroad is? A Paterson Plankroad is between thirty-five and forty feet wide.

Q Did you look this paper, this map, over? A I did.

Q You and the other witnesses studied this thing over before coming to court? A Yes, sir. 30

Q You and your lawyer and all these witnesses went over the dimensions on this street before coming here? A Before coming here?

Q Yes. A I did not.

Q Before the witnesses got on the stand, didn't you look this over? A I do not know.

Q Now do you want to tell this jury that Mr. Louis Sittler, the man who made that examination, went on the stand and didn't see that map? A Absolutely not. 40

Abram Malayfsky, for Defendant Malayfsky, cross.

Q Mr. Sittler didn't look this map over?

A No, sir.

Q Before he got on the witness stand? A Yes.

Q When? A Before he got on the witness stand.

10 Q When? A After Mr. Sittler was on the stand.

Q During the dinner hour? A Yes.

Q You and all the witnesses were studying this map? A I was looking at it.

Q You and the four witnesses were arguing about it to one side there, and when I came in you all separated? A I saw you; I wasn't afraid.

20 Q The others beat it? A Yes.

Q You have a mirror in your car? A Yes.

Q Before you make a turn you generally look through your mirror to see if there is any one behind you? A I didn't see anything behind me.

Q Did you look in the mirror? A I did not look in the mirror.

Q You have a habit of looking in the mirror to see if there is anything behind you? A Sometimes I do.

30 Q If you see something speeding behind you wouldn't you turn? A I didn't see anybody behind.

Q Did you look through the mirror? A I don't remember.

Q Do you know if there was anything behind you? A No.

Q It don't make any difference to you whether there is any one behind you or not, you just stick your hand out? A Yes.

40 Q Have you a stop light? A Yes.

Abram Malayfsky, for Defendant Malayfsky, cross.

Q When you sit down the door of the sedan comes up to here (indicating)? A Yes.

Q And in order to stick your hand out you have to stick it out like this over the door opening? A Yes.

Q This was a cold day in November? A Not so very. 10

Q It was cold? A Not so very.

Q It was cold, wasn't it? A Not cold enough for me.

Q You had a very old lady in your car? A She was in the back.

Q You have heat in the back? A Yes.

Q That is a different compartment? A There is a window opening, and I use my hand to signal if it is cold or not.

Q Whether it rains or shines these windows are open? A It is not cold for them. 20

Q You are sure that the window was not closed? A Absolutely not closed.

Q You slackened up to eight miles an hour? A Yes.

Q That is a very dangerous corner, that is right? A Yes, that is right.

Q When you got out even with this street you looked up and saw the car two hundred feet away? A About that. 30

Q Going slow? A Who?

Q The other car? A I couldn't tell you if it was slow or fast; I only know I had a smash.

Q You saw the car? A Yes.

Q When you saw the car coming it was coming nice and slow? A I don't know.

Q If the car was going you wouldn't have had enough time? A I thought I will make it.

Q If the car was going down slow you had time to pass? A Yes. 40

Abram Malayfsky, for Defendant Malayfsky, cross.

Q If it was going fast you did not have time to pass? A No.

Mr. Dorgeval: I object to that.

10 Q When you started to cross didn't you know if you were going fast or slow when you saw this car two hundred feet away? A I thought I will make it.

Q You stated to me a minute ago that this car was two hundred feet away when you first saw it coming slow, and that you had lots of time to pass, and the next answer was that you didn't have time to pass it? A I didn't say that.

20 The Court: Yes, you did.

The Witness: I didn't mean it.

Q If this car that you saw two hundred feet away from this corner was coming down here fast then you wouldn't have time enough to cross? A I would have time to make it if I seen him two hundred feet away—I would make it, about.

30 Q If the car came down here very fast would you have time enough to make the turn, to pass without being hit? Yes or no? A Yes.

Q Then it came down fast and you hit it later? A Yes.

Q How did you get hit if you say he was coming fast, or "I thought I would make it"? How did you get hit? A When I was on the third track I got hit.

40 Q You said before that if he was going fast or slow you had plenty of time to pass? A You don't go on the right-hand side of the street.

Abram Malayfsky, for Defendant Malayfsky, cross.

Q He went over to you on your side of the highway? A Yes, sir.

Q And the front of your car was in the third track? A The front.

Q What about the back? A Half of the car—

10 Q When you got hit the front of your car was past the both tracks? A Yes, sir.

Q When you say the third track, you mean the first rail? A What?

Q When this accident happened the front of your car had passed the track and you were like this (indicating). Is that right? The front of your car had passed and the back was out here? A Can I say to the jury?

Q Yes. Come down here.

20 Q Where was the front of your car? A Back in the middle.

Q Up here, about here? A The witness marks the diagram.

Q The front of your car was over the track here to the back? A Not the back; the middle of the car was over the track on the street line.

Q This is your own drawing? A Yes.

30 Q When your car was nearly up to this curb—and this is your drawing, the front of your car was at this curb when you got hit? A Yes, sir.

Q Going at eight miles an hour—you are sure of that? A Absolutely.

Q And you sounded your horn? A Yes.

Q When you sounded your horn, didn't you see any automobile just as you were about the corner? Didn't you see any automobile? A No, sir.

40 Q You sounded your horn? A Yes.

Abram Malayfsky, for Defendant Malayfsky, cross.

Q When you stuck your hand out, did you see any automobile? A Yes.

Q When you got to the corner you saw the car two hundred feet away, as you indicate, and you didn't slacken? A I was in second gear.

Q And you shifted to third? A No.

10 Q When you were crossing the street you didn't slow down or go faster? A Somewhat.

Q I want you to tell me, if, during that hour, you spoke to anybody on the car? A I don't remember.

Q Don't you generally speak to anybody in your car? A If I did I spoke to my daughter alongside of me.

20 Q Mrs. Levine said to you for you to take her to your daughter's, is that right? A My daughter she might have said it to, but not to me.

Q You said that maybe you talked to your daughter? A But I never said anything to somebody in the back of me.

Q All the time you were driving the automobile you never in your life spoke to anybody in the back of you? A No, sir.

Q Maybe you did talk to your daughter alongside of you? A Maybe.

30 Q But you wouldn't say for sure? A I wouldn't say yes or no.

Q You had a Dort car? A Yes.

Q You took the plates off and put them on this car? A Yes.

Q You didn't have a right to do that? A No.

Q You were at the corner when you blew your horn the second time? A No, not at the time when I saw the car.

40 Q When you were two hundred feet away? A About; I didn't measure it.

Abram Malayfsky, for Defendant Malayfsky, cross.

Q You were about at the crossing? A Yes.

Q Did you step on it; did you give it all you had? A I was in second gear; I couldn't make much.

Q You were in second gear? A Yes.

Q You have a foot accelerator? A I don't know what you mean. 10

Q You know how you speed up a motor, don't you? A Yes, with the gas.

Q Do you use your foot to speed up your motor? A You use the foot to make more speed, but it is too fast; everybody knows it.

Q Did you have your foot on the accelerator or were you in second gear? A Yes, everybody knows that.

Q You moved your foot down? A I don't know—the foot was on the accelerator. 20

Q You tried to beat this car across? A I thought I had time; I thought I could beat him; he was far away.

Q What did you try to do? A I tried to cross in my direction.

Q And you had your foot on the accelerator all the time? A Otherwise the car wouldn't go.

Q And he was two hundred feet away? A Might be a hundred and seventy-five; might be two hundred feet; I didn't measure it—I just think. 30

Q How wide is the Paterson Plankroad at that point? A Between thirty-five and forty feet.

Cross examination by Mr. Wortendyke.

Q Did you make any stop on that trip? A Yes, sir.

Q Where did you make the stop? A At Mr. Levine's. 40

Abram Malayfsky, for Defendant Malayfsky, cross.

Q For what purpose? A I wanted to leave Mrs. Levine there.

Q At whose request did you make that stop?

A Because she asked me going back that I should leave her down there.

Q Who, Mrs. Levine? A Yes.

10 Q And you did that? A I did.

Q You went to see Mr. Feinberg, this gentleman here, with Mr. Levine? A Yes.

Q Is he any relation to you? A To my wife.

Q Why did you go to Feinberg's office? A I never expected Mr. Levine or the son to visit me in the hospital. He said he would not shoot me.

20 Mr. Feinberg: I object to that, that is not binding on us.

The Court: You will have to do that in some other way; strike out that answer.

By Mr. Dorgeval.

Q Why did you go to Mr. Feinberg's office?

A I went to Mr. Feinberg's office so that he would not press the charge against me.

Q Why did you go; for what purpose? A I never thought she was going to do that.

30 Q Have your relatives been friendly with her before that? A All the time.

Mr. Feinberg: I object to that.

The Court: I sustain the objection.

Q Did you see Mr. Feinberg? A No, sir.

Q Were you thrown out of his office? A No, sir.

40 Q Did anybody tell you to get out of the office? A No, sir.

Abram Malayfsky, for Defendant Malayfsky, re-cross.

Q Did you talk to anybody about the case?

A I didn't talk—Mr. Levine, the friend of mine, talked.

Q Whom did he speak to—the stenographer?

A He might have talked some words.

Q Did you talk with any one in Mr. Feinberg's office about this case? A Only with the girl. 10

Q Did you speak to her? A I believe I spoke to her.

Q Do you remember what the conversation was? A I don't remember exactly.

Q Did you see Mr. Feinberg talking to Ackenbout out in the hall Friday, before this case went on? A Yes.

Re-cross examination by Mr. Feinberg. 20

Q You did go to my office for the purpose of seeing if I would not press this charge against you? A That is true, yes.

Q That is what you were talking to me about out there? Yes or no. You said you wanted to see me? A That is why I went; I didn't tell her what I wanted to tell you.

Q What did you tell her? A I said I wanted to see Mr. Feinberg. 30

Q What did you say about the case? A Nothing. Mr. Levine was speaking to her.

Q You heard what he said? A Yes.

Q Didn't you hear him say that he didn't want to press this case against you? A Yes.

Q You heard that? A Yes.

Q That is what you came to see me about? A Yes.

Q You sent over to me in the hall for some purpose? A Yes. 40

Abram Malayfsky, for Defendant Malayfsky, re-direct.

Q You said that you had already stopped at Levine's house? A Yes.

Q As far as Mrs. Levine was concerned you were not on an errand for her; she had already been taken to her nephew; she had already seen her nephew? A He wasn't home—Mr. Levine.

10 Q You had already made a stop? A Yes, I had already made the stop.

Q As far as she was concerned you were not taking her any particular place then? A At the time I went in my direction, but not far from her home.

Q At the time of this accident you had already made the stop at the nephew's house? A Yes.

20 Q Not being home you were through with your business in the nephew's house? A Yes.

Q You proceeded to take your little ride; you were on your way home? A She was too far away from home.

Q You were on your way to your home? A (No answer.)

Q Up to Grace street—you tried to make this trip to Grace street? A Yes.

Q You turned to the curb, you turned all the way out, away? A Yes.

30 Q You had almost reached the curb when this car came along and hit you? A Yes.

Re-direct examination by Mr. Dorgeval.

Q Just why did you go to Mr. Feinberg's?

Mr. Feinberg: I object to that; he has already answered that twice.

The Court: Yes.

40 Mr. Dorgeval: I withdraw the question.

Gertrude Malayfsky, for Defendant Malayfsky, direct.

Q Did you have any other reason for going to Mr. Feinberg's office other than to ask him not to press the case as you have already said?

A No.

Adjourned to Thursday, February 23rd, at 10 A. M.

10

Jersey City, N. J., Thursday, February 23, 1927, 10 A. M. Trial resumed pursuant to adjournment.

GERTRUDE MALAYFSKY, sworn for the defendant, Malayfsky.

Direct examination by Mr. Dorgeval.

20 Q Mrs. Malayfsky, you are the wife of Abram Malayfsky, one of the defendants in this case?

A Yes, sir.

Q Will you tell us how Mrs. Levine happened to be with you the day this accident occurred?

A She always came into my house; she is my first cousin. That happened the second week in October; she came into the house and told me that she was down from Wilmington. She was one year in a home. She stays with the sister-in-law now. The sister-in-law has a place for her to sleep but no place for her to eat. She is there with me ever since that day. Always come, always comes.

30

Q For how long? A Every four or five weeks.

Q Did you or did you not see Mr. Ackenbout and Mr. Feinberg talking out in the hall? A Last Friday I saw them talking together.

Mr. Dorgeval: That is all.

40

Gertrude Malayfsky, for Defendant Malayfsky, cross.

Cross examination by Mr. Feinberg.

Q She told you that she was in the home for a year? A Yes.

Q You didn't know that until she told you? A No.

10 Q She is your cousin, and you didn't know anything about it? —A—We didn't correspond together. She was away, and didn't tell even her own children—they didn't know.

Q You are so kind that you fed her? A I wanted to feed her; she wasn't wanted by her children—that is why I fed her.

Q You took her in? A Not to stay; I gave her a meal. You would have done the same thing.

20 Q You took her in out of pity? A That is it.

Q You heard your husband testify that if she didn't ask him for a ride that he wouldn't take her? A Indeed not.

Q He didn't have much pity? A He didn't have much pity, because we were not far from home; could go home.

Q You had so much pity on her that you took her in and gave her a meal, and you were so sorry for her that you didn't know that she was confined for a year in a home? A The son
30 didn't even know it, the brother didn't know.

Mr. Feinberg: You know what the son knows. That is all.

Louis Levine, for Defendant Malayfsky, direct.

LOUIS LEVINE, sworn for the defendant Malayfsky.

Direct examination by Mr. Dorgeval.

Q Are you related to Mrs. Rose Levine, the plaintiff in this case? A Yes, she is my aunt. 10

Q You are the man who went with Mr. Malayfsky to Mr. Feinberg's office? A Yes.

Q Will you please tell us what happened there? A Mr. Malayfsky came around to my yard and said "That is your family"—

Mr. Feinberg: I object to that; that is not competent on me.

Q Just tell us what happened in Feinberg's office? A I went with Malayfsky to prove to Mr. Feinberg about the suit, about the two of them in one— 20

Q How did you come to go to Mr. Feinberg's office? A Mr. Malayfsky used to kick because they always set the case on him.

Q At whose suggestion did you go? A At my suggestion we went to Feinberg's. He said it was the two of them, not one.

Q Did you have any conversation with Ackenbout, the other defendant in this case, about the accident? A Yes, the other day when I went for dinner. 30

Q What did he say to you? A He says "We were lucky; if he had the Loco car all would be killed."

Q When he said that; who? A If Ackenbout was driving the Loco we would have been all killed.

Q Ackenbout said that? A Yes. 40

Louis Levine, for Defendant Malayfsky, cross.

Q When? A When we went out from court at dinner time.

Cross examination by Mr. Wortendyke.

Q You are a nephew of Mrs. Levine's? A
10 Yes, I am a nephew of hers.

Q Was it your suggestion that you went to the office of Mr. Feinberg? A I went to Malayfsky and then we went to Feinberg's office.

Q It was your suggestion? A Yes, mine.

Q Why this suggestion? A Because Malayfsky was speaking about making the charge against him; he also said he was innocent, but now they were using the guilty one against him. I said it couldn't possibly be.

20 Q You told Mr. Malayfsky that in your opinion he was innocent? A No, no. I said, "Malayfsky, that can't possibly be." He said the two of them. I said, "Come down to Feinberg's office and prove it." We didn't find Feinberg; we found the girl. The girl said the two of them—

Mr. Dorgeval: I object to that.

The Court: Yes.

30 Q It was your suggestion that you went to Feinberg's office? A Yes.

Q Are you interested in this case on behalf of your aunt? A No, but she is my aunt.

Q Have you any expectation of sharing in this case? A No.

Q Why are you interested in Malayfsky? A It is a family affair—he is an ex-partner.

40 Q What relation are you to Malayfsky? A He is my wife's second cousin; I am a cousin

Louis Levine, for Defendant Malayfsky, cross.

and a half. My father is a regular cousin to his father.

Q Where do you live? A 14 Fourth street, Union City.

Q How long have you lived there? A Three years.

Q You lived there in 1924? A Yes, sir. 10

Q I suppose you were a frequent visitor at Malayfsky's house? A No, come in very seldom.

Q Were you at that time a cousin and a half of his wife? A Yes, sir.

Mr. Wortendyke: That is all.

Cross examination by Mr. Feinberg.

20 Q Mrs. Levine is a widow—her husband is dead? A Yes.

Q How long has he been dead? A Oh, must be over thirty years.

Q You are as friendly to one as to the other? A Just exactly.

Q You have been in court two weeks altogether in this case? A No.

Q Then how many times—at different times off and on? A No, this is the third day. 30

Q Do you remember seeing me two weeks ago out in the hall? A No, I wasn't here.

Q You called with Malayfsky to talk to me and I said I didn't want to talk to him? A Three days ago.

Q You wanted me to fix it with Malayfsky out in the hall? A I can't tell you.

Mr. Feinberg: That calls for a yes or no answer. 40

Louis Levine, for Defendant Malayfsky, cross.

The Court: It might properly call for a yes or no.

The Witness: Not wanted to fix it up.

Q What? A I just wanted to find out the reason for pressing the case against Malayfsky.

10 Q That is what you wanted to find out? A Yes.

Q You wanted Malayfsky to talk to me? A No, you wanted to talk to me.

Q You wanted me to push this case against Ackenbout? A No, not push it—there was some mistake.

Q Didn't you say that? A You asked what I wanted.

20 Q Didn't you say to me to put the blame on Ackenbout? A No, I didn't say to put the blame on Ackenbout.

Q When you went to my office you and Malayfsky weren't sure that somebody else was being sued? A Yes.

Q How long has Malayfsky been in this country? A About twenty-five years.

Q You know when this case was started that he was served with a summons and complaint?

30 A I don't know that.

Q You have been in court before, haven't you? A Yes.

Q You know that before a man is sued he must be served with papers? A I suppose so.

Q And on the papers it says who is being sued in court? A Yes.

40 Q You want to tell the Court and jury that he has been served with papers, and that the only reason for coming to my office was to see if Ackenbout was being sued, too? A Positively.

Louis Levine, for Defendant Malayfsky, re-cross.

Q Did you say to my girl in my office that you wanted me to put the blame on Ackenbout?

A No.

Q Did you or Malayfsky say that in court?

A No, nothing of the kind; I didn't see Malayfsky.

10 Q You were in court when Malayfsky got on the witness stand? A Yes, sir.

Q And the only reason you came to my office in Bayonne was to see if Ackenbout was being sued? A Yes.

Q Did you ever ask your own lawyer about that? A This morning the lawyer asked me what I know about it.

20 Q Do you know why Malayfsky didn't ask why he was being sued with Ackenbout? A I don't know.

Q You don't know of any other reason for going to Bayonne to see me? A Yes.

Q Where do you live? A 14 Fourth street, Union City.

Q Where does he live? A Hague street.

Q You went from Union City to Bayonne to see if a man was being sued? A Yes.

Q Who is paying you for your time? A Nobody. Who should pay me?

30 Q You are doing this for nothing to help Mrs. Levine and Malayfsky? A Positively.

Q I never asked you to stay here? A No.

Q What business are you in? A The lumber business.

Mr. Feinberg: That is all.

Re-cross examination by Mr. Wortendyke.

40 Q The lumber business? A Yes.

Louis Levine, for Defendant Malayfsky, re-direct.

Q For yourself, or are you employed? A Myself and a partner—a corporation.

Q The lumber business is what Malayfsky is in? A No, a different one.

10 Q Isn't it a fact, Mr. Levine, that you have been present in court every day since the hearing of this trial? A The first time—this is the third day at this day.

Q You were here on Monday? A I don't know how many days. About two times; I was here the third day.

Q You were here on Monday? A From Monday I was here—the third day.

Q Were you here last Monday? A When the case started I was here.

20 Q You were here Friday? A No.

Q So you came in on Monday; you are here today? A Yes.

Q You have not received any compensation for your attendance? A No, sir.

Re-direct examination by Mr. Dorgeval.

Q When did you first meet me? A I guess here in court.

30 Q Since this trial was on? A This morning I had the first conversation.

Q When was this trip to Mr. Feinberg's office, about? A On the next day after the day that the trial was started—the next day.

Q Since this trial started? A Yes.

Q Within the last few days you were down there? A Yes.

Q Do you remember what day it was—either Saturday or Friday? A I can't remember.

40 Mr. Dorgeval: That is all.

Louis Levine, for Defendant Malayfsky, re-direct.

Re-cross examination by Mr. Feinberg.

Q After this case started you and Malayfsky came to my office in Bayonne to find out if any other man was being sued? A Yes.

Q You were here when the case started? A Not the first time. 10

Q Malayfsky was here? A Yes.

Q And this case had started before the jury and you and Malayfsky came to Bayonne for the one reason to find out if Malayfsky was being sued? A Yes.

Q You didn't say that to the lawyers just now, did you? A No.

Q You and Malayfsky were so interested that you talked to one of the lawyers? A I didn't see him; I have less interest in the case than you have. I am here to tell not lies that I don't know. 20

Re-direct examination by Mr. Dorgeval.

Q Do you remember the day you went to Feinberg's office? A No.

Q Was it this week or last? A Last week.

Q What day last week? A I can't remember. 30

Q Was it Monday?

Mr. Feinberg: I object.

The Court: He can't remember.

Q Was it the end of the week or the first part of the week?

Mr. Feinberg: I object to counsel leading this witness. 40

Samuel Liskovsky, for Defendant Malayfsky, direct.

The Witness: It was after the case started.

Q Last Saturday? A Maybe it was last Saturday; I can't tell you; the case started Friday; it must be on the next day.

10 Q That you went down? A No, not Saturday.

Q How long has the case been on altogether?

The Court: What difference does that make?

Mr. Dorgeval: It makes a difference to me.

Mr. Feinberg: It makes no difference what difference it makes to you.

20 The Witness: After the trial started I wouldn't know anything about—

Q Was it last Saturday? A No.

Q Last Friday? A It could have been Friday. I don't know; I can't tell you what I don't remember. I wouldn't tell.

30 SAMUEL LISKOVSKY, sworn for the defendant Malayfsky.

Direct examination by Mr. Dorgeval.

Q You didn't see this accident, did you? A No.

Q Where do you live? A 86 Central avenue, the corner of Hague street.

40 Q How far from the intersection of Hague street and the Plankroad? A Fifty feet.

Samuel Liskovsky, for Defendant Malayfsky, direct.

Q Is your home shown in any of these pictures? A Yes, this one (indicating D. 4).

Q Show them where you live. A I live here, in this house here (indicating).

Q Which house did you live in at the time the accident happened? A This one.

Q The first one or the second one? A This one (indicating). 10

Mr. Dorgeval: He pointed to D. 4, and to the building which has on the side "Rome Furniture" on the side. Is that it?

A Yes.

Q Is that the building you were in? A Yes, that is the building and that is the window. It has a sign on there now; it is all painted up. 20

Q You say you were in this building which you indicated, and that it had "Rome Furniture" on it at the time of the accident? A Yes, sir.

Q What attracted your attention? A I had finished eating dinner and was sitting at the table with the wife and family when I heard all of a sudden a crash. I didn't know what it was and I looked out of the window and seen two machines together. 30

Q And what did you do then? A It was a sunny day, but cold. I came down and saw one, the Cadillac was—

Mr. Feinberg: I object to that. The time is not fixed at the time he got there, and it is speculative as to what he found.

Mr. Dorgeval: I am trying to offer evidence of course subject to be connected up. If not it can be stricken out. 40

Samuel Liskovsky, for Defendant Malayfsky, direct.

The Court: Connect it up first.

The Court: How soon were you on the scene of the crash you heard? A It didn't take long; ten or twelve minutes.

10 Mr. Feinberg: I certainly press my objection.

The Witness: There may be a couple of minutes or less.

By the Court.

Q What did you do when you went out after the crash? A I dressed myself, I put on a sweater, and then I walked down. I was looking first from the window with the wife and children, and to tell the truth I didn't want to go down for fear of being a witness. After I saw that 20 they were hurt I got my machine and took them to the hospital. I didn't want—

Mr. Wortendyke: I desire to second the objection of the plaintiff for the record, on the same ground. The time between this man hearing the crash and his reaching the scene is too remote.

30 Mr. Dorgeval: I will promise to connect it up.

Mr. Feinberg: That is no way to do.

Mr. Dorgeval: I will withdraw the witness for the time being.

James Johnson, for Defendant Malayfsky, direct.

JAMES JOHNSON, sworn for the defendant Malayfsky.

Direct examination by Mr. Dorgeval.

Q Where were you when the accident occurred? A I was in my backyard painting a 10 chair. I was going out of my yard—coming up the seven steps from the cellar to the sidewalk. I was on the second step when I seen the car passing my door at a rapid speed. As soon as I got to the top of the stairs I looked up and the two cars smashed together.

Q Did you see what occurred? A That is what drew my attention.

Q Will you show us where you live? A 20 Right here in the Flatiron building.

The Court: Indicating on Exhibit D. 3.

The Court: Whereabouts?

The Witness: Here.

The Court: Indicating the door of what is known as the Flatiron building. He says he was coming up out of the cellar.

Q You said you saw the car going by fast? 30 A Speeding. I said to myself, "He must be going to a fire."

Mr. Wortendyke: I object to that.

The Court: Strike it out.

Q Which car was it that you saw speeding by? A Ackenbout's car.

Q What attracted your attention to this car? 40 A When I was coming up from the cellar?

James Johnson, for Defendant Malayfsky, direct.

Q Yes. A I happened to turn my head as the car was passing and the car was going fast and he had the side curtains down.

Q Where did the cars come together? A Hague street and the Paterson Plankroad.

10 Q Will you step down here to the map? This is Hague street. Malayfsky's car was coming this way on the Plankroad. This is the direction that Ackenbout was coming in, and here is the corner with the Flatiron building. Where you located the point shows where he was speeding down? A Yes, on the Paterson Plankroad.

Q Past your door? A Yes, and here is the Flatiron building that he passed. I looked around and when I got to the corner the two cars—the Malayfsky car was away over here 20 (indicating) and Ackenbout's car was bumped into the center here (indicating). I was there to the end and helped get the two cars apart, and helped to push the other one back.

Q Is that where the two cars came together where your finger is? A Yes.

Mr. Dorgeval: Indicating a point a little west of the southbound car tracks on the Plankroad.

30 Q What part of Malayfsky's car and the other car came together? A Malayfsky's car was in the middle.

Q What part of the other car was hit here (indicating)? A On his mudguard; it was smashed in as if an iron bar had smashed it in.

Q Which one? A Ackenbout's.

Q What part of Ackenbout's car was struck, the side or the back? A The left front wheel. The left front wheel—coming up the right-hand 40 side of the street—coming up.

James Johnson, for Defendant Malayfsky, direct.

Q After the collision what did you do? A As soon as I got to the collision I helped to take Malayfsky and the little girl out of the car—I helped, too.

Q What was the condition of Malayfsky and the others in the car? A The little girl was bloody, Malayfsky's leg was broke. I got him 10 and helped take him into the automobile.

Q After the collision were the cars against each other or apart? A After the collision we got Malayfsky out and took the little girl to Christ Hospital. I made room for a car going north. He went down and made room to pass, and we took the child to the hospital.

Q After the accident when you ran over to the cars the cars were against each other or at a distance? A Both were clinched together— 20 the cars were all stopped.

Q You helped to move the cars? A Yes, I helped push Ackenbout's car.

Q Did you see Liskovsky at the scene of the accident? A Yes, I was talking to him. He said, "Hello, Mr. Johnson," and I said, "Hello."

Q Did he arrive before the cars were moved? A About five minutes after.

Q After what? A The two cars were together. 30

Q When you saw Liskovsky was Malayfsky's car in the same position as after the accident, or had it been moved? A It had not been moved yet.

Q I show you a picture and ask you what it shows, if you know? A That is the way the car looked.

Q Whose car? A Abie Malayfsky's.

Q Is that the way the car looked? A Yes, a car came along and went to work and pulled it up along Central avenue to Paterson street. 40

James Johnson, for Defendant Malayfsky, cross.

Q Does that picture show the Malayfsky car the way it was after the accident? A Yes, I can see that is the way the car looked when it was hooked up in the back and taken away.

Mr. Dorgeval: I offer this in evidence.

10 Mr. Wortendyke: I desire to cross examine on this, if your Honor please.

The Court: Yes.

By Mr. Wortendyke.

Q Referring to D. 5 for identification, do you remember what the license number on that car was? A No, I do not.

20 Q You did not take particular notice? A No, sir.

Q Do you remember how many panes of glass were broken in that car? A The two sides, and one in the back—the left-hand side.

Q Which do you mean, the doors in the side? A One side only. I didn't see the other side, but the windows on the left and the one in the back were broken.

Q The two on the left? A Yes.

30 Q Which ones? A The one by the door where the little girl was sitting was all smashed.

Q Where was the girl? A On the left-hand side in the back.

Q You say the left-hand door window was also smashed? A Yes, sir.

Q You are sure of that? A Yes.

Q Do you know anything about the wheels—what was wrong with them? A Yes, sir.

Q What? A The two hind wheels were smashed.

40 Q You are sure? A Yes, in bad condition.

James Johnson, for Defendant Malayfsky, cross.

Mr. Wortendyke: If the Court please, I object to the use of these pictures for the reason that this witness does not know anything about them with respect to the glass and the hind wheels—at least the left wheel was in good condition. The presentation of these pictures is not proper. 10

Mr. Feinberg: I object to them because they were taken a year after the accident. The testimony in the case is that the car was out in the back yard exposed to the elements.

Mr. Wortendyke: I want to renew my objection with respect to that also.

The Court: Do you say that these pictures are true pictures of the condition of that car immediately after the accident? 20
A Yes, sir.

The Court: You are sure of that?

The Witness: Yes, sir.

The Court: You don't know if there is any change in the condition of that car?

The Witness: I didn't see the car since the car was hitched up in the back and pulled out and down the street.

The Court: You mean you saw the car immediately after the accident and you have never seen the car since? A No, sir. 30

The Court: But still you say that this is its exact condition?

The Witness: The exact condition when they drew the car away—the wrecking man.

The Court: I will admit it.

James Johnson, for Defendant Malayfsky, cross.

Mr. Wortendyke: I pray an exception if the Court please.

Pictures admitted and marked D. 5 and D. 6, inclusive, of this date.

By Mr. Dorgeval.

10 Q Did you hear any horn sounded by a car going by? A No, sir, no horn.

Q Did you notice Mr. Malayfsky's car before the accident? A No, sir.

Q You didn't see how fast he was going? A No, sir.

Q How close were the cars to the west curb of the Plankroad—that is this side of the Plankroad, after the accident? A Malayfsky's car was toward the car tracks on the west, half way
20 between the sidewalk and the first track going south.

Mr. Dorgeval: That is all.

Cross examination by Mr. Wortendyke.

Q Tell us how this accident happened. A I was in the backyard painting chairs. I was coming out of the cellar and was up those steps
30 out of the cellar when I saw this car coming at a very rapid gait. I said to myself, "He must be going to a fire." The two cars were then together at Hague street and the Paterson Plankroad.

Q How many times have you told this story? A The second time.

Q Did you say anything about painting chairs? A Yes, sir.

Q And you told it to me now, the same
40 story? A Yes.

James Johnson, for Defendant Malayfsky, cross.

Q And these are the only two times that you told this story? A Yes.

Q You have been in court every day during this trial? A Yes, sir.

Q And you are not related to Malayfsky? A No, sir; I don't know him at all.

Q You are not a cousin and a half of his? 10
A No.

Q How long have you lived at this place on the Paterson Plankroad? A Eighteen years.

Q You pointed to D. 3 as the point where you came out of the cellar? A That is at 66 Paterson Plankroad—64—68 is here, a grocery store.

Q Referring to the middle there—the telegraph poles run along Paterson Plankroad. How near are they to the cellar from which you came? 20
A I figure about seventy-five feet.

Q South or north of that pole? A South.

Q The backyard of that, that is the back of the Flatiron building? A Used in the back, yes.

Q Can you see anything of Paterson Plankroad from the backyard? A No, sir.

Q You were painting chairs? A Yes, sir.

Q What were you doing—what was it, this painting of chairs? A I took them there about quarter to one—I took them down there and I
30 painted the chairs, and I was coming up with the chairs about a quarter after two.

Q How many chairs had you painted in an hour and a half? A Two.

Q How long from the time you stopped painting the chairs was it that you came out of the cellar in front? A I was coming right out but I was still in the cellar.

Q What were you coming out of the cellar for? A I was coming upstairs to get dressed to
40 go out.

James Johnson, for Defendant Malayfsky, cross.

Q Is that the way you get upstairs from the cellar? A Yes, and then to the door on the first floor.

Q What is your business? A Shipping clerk.

Q By whom employed? A Koos & Company, 229 Thirty-sixth street, New York.

10 Q You are still employed there? A Yes.

Q And at the time of the accident? A Yes, for twenty-eight years I have been working there.

Q You are being compensated for your testimony and attendance here, are you? A No.

Q No? A I am here just to tell what I seen.

Q You are not getting paid for it? A I am paid my expenses; yes, sir.

20 *Cross examination by Mr. Feinberg.*

Q And every day that you have been here you got a check from that fellow sitting at the table there? A Yes, sir.

Q You used to work for Malayfsky? A No, I didn't know the man at all until his wife came into my house with Sam. That was the Sunday after.

Q Sam who? A I don't know.

30 Q When this Sam arrived on the scene he said, "Hello, Mr. Johnson," and you said, "Hello, Sam"? A Yes.

Q And he and you have lived in that neighborhood for some time? A Yes.

Q Malayfsky lives up the street from you two blocks? A Yes, he does. I knew him for about ten years. My son worked for him.

Q You just told this jury that you didn't know Malayfsky? A No.

40 Q You don't know Malayfsky? A No, Sam—only Sam.

James Johnson, for Defendant Malayfsky, cross.

Q You never knew this man until this accident? A No.

Q Do you know how you come to let slip out under your breath the name "Abie"? His name is "Abie"? A I can't pronounce his name.

Q How did you say "Abie"? A I did say "Abie." 10

Q You don't know the man? A Only by coming down in this case.

Q That is how you call him "Abie"? A Yes.

Q You were in court before? A Yes, sir.

Q And you saw this lawyer in court before, did you? A Yes, sir.

Q And this lawyer here before? A Yes.

Q That is as true as everything else that you said? A I don't recollect.

Q If I showed you a photograph of this man you would not be positive? A No. 20

Q Do you know Sam Harber? You know Malayfsky's first lawyer? A No, sir.

Q He was in court before?

Mr. Dorgeval: I object.

The Court: That is proper.

Mr. Dorgeval: Exception.

By Mr. Feinberg. 30

Q You had been in court before and testified for Malayfsky? A Yes, sir.

Q You are sure? A Yes.

Q And you went over the story before with the witnesses on the stand? A No, sir, I knew all about it.

Q You knew it by heart? A Yes, sir.

Q You never missed a sentence? A No, sir.

Q When court was holding across the hall, this paper map was up on the wall, and you were 40

James Johnson, for Defendant Malayfsky, cross.

one of the fellows looking at that map? A No, sir; I was reading a paper. I saw you watching me. I didn't look two minutes at that paper.

Q Did you look two minutes or one minute at that map? A I just gazed at it.

Q When you saw me you read the newspaper?

10 A I was reading when you came over to me.

Q When I came over you just gazed at it?

A They were talking about the map.

Q You talked there with him? A No.

Q You closed your mouth tight, you didn't talk? A I didn't say a word.

Q You shut your ears? A No, sir.

Q You heard what they said? A No.

Q You live in this Flatiron building—toward the rear of it? A Yes.

20 Q It is quite a big building? A Yes, about a hundred feet.

Q A hundred feet deep? A Yes, sir.

Q Your cellar is down past that third step?

A Yes.

Q Half a block from there is the corner? A There is another store there.

Q That store is down at the next corner? A Yes, sir.

30 Q You went to the next corner after coming up the steps? A Yes, sir.

Q About the second or third or fourth step from the top? A The bottom.

Q How many steps are there? A Seven.

Q When you were five steps from the top you saw the automobile pass by fast? A No, two steps coming out of the cellar, and I looked about over the wall.

40 Q And when on the second step and you had five steps to go you looked over the walk and only saw the wheels? A I couldn't see the wheels with the curtain on.

James Johnson, for Defendant Malayfsky, cross.

Q While on the fifth step from the top you could see the car passing your house? A Yes, sir.

Q These are the ordinary steps? A Yes, about as high as this (indicating).

10 Q The five steps are a little higher than each one of these, and you had to go up five of them, yet while on the fifth step from the top you could see an automobile going to a fire? A Yes, at a rapid gait.

Q You were in the cellar? A Yes, five more steps to go up.

Q Then you got up and started to walk up and this car passed your house? A Yes, sir.

Q When you got up the other four steps the car was out of your sight? A It passed me.

20 Q From the third step you couldn't see, and from the second step it was dark, and the first thing you knew there was a smash? A That drew my attention to the two cars there.

Q You didn't see the accident? The first thing you knew you told the judge that you heard a crash but that you didn't see the accident? A I went right up there.

30 Q You heard a crash and that is what happened? A I don't know which way they came, but I know they were coming at a rapid gait when they crashed together, and I went up there.

Q You didn't see the accident? A I saw them together.

Q Did you see them hit one another? A No, sir.

Q You didn't see the actual happening of this accident? A Only what I am telling you now.

40 Q You didn't see the actual accident until after you heard the noise? A That is right.

James Johnson, for Defendant Malayfsky, cross.

Q And then you went up there? A I ran right there.

Q Sam came out a couple of minutes later, and you said, "Hello, Sam," and he said, "Hello, Johnson"? A Yes.

10 Q You never worked for Malayfsky? A No.

Q He is in the lumber business? A I knew he used to live three blocks from me.

Q You never knew him? A I will swear that on the Bible.

Q A man three blocks from you in the lumber business—you knew it, but you never knew him? A Never did.

Q You talked this whole case over with somebody? A No.

20 Q You didn't talk it over with anybody? A The lawyer, yes.

Q He don't count for anybody? A He is the only one.

Q When you said a minute ago that you did not, you made a mistake? A Yes.

Q You did talk it over with Mrs. Malayfsky? A When she came to my house.

30 Q You are sure it wasn't a young man? A She came to my house a week after. I didn't want to go into this case until Sam—

Q You did talk to Mrs. Malayfsky? A When she came to my house.

Q When you said that you didn't talk to anybody about the case you were not telling the truth—you said to her and this man? A A week after.

Q I didn't ask you when; I asked you did you talk to anybody, and you said nobody. That is not the truth? A That is the only one I told.

40 Q That was true? A No.

James Johnson, for Defendant Malayfsky, re-direct.

Q When you said that you hadn't spoken to anybody that was not true? A No, it was not.

Q You did talk to Mrs. Malayfsky and to this lawyer and to Abie? Of course, you talked to Abie? A I didn't speak to Abie at all.

10 Q You have been in court five days. You have looked this map over. You didn't talk to anybody and you only glanced at the map, and then you were reading a paper? You never talked to Abie? A No, sir.

Q Nobody else? A No, sir.

Cross examination by Mr. Wortendyke.

Q You didn't see Abie's car coming out at the ordinary speed, coming out of Hague street, east? A I don't know.

20 Q You only saw the car going to a fire? A It was speeding by as I came out of the cellar. I went up and helped them put the girl into the car.

Re-direct examination by Mr. Dorgeval

30 Q Have you been paid anything more than your expenses for attendance? A No, sir, only for coming down here. I had a subpoena handed me by the lawyer there.

Q This expense money has not influenced your testimony in any way? A No.

Mr. Feinberg: I object to that as improper.

The Court: I sustain the objection.

Mr. Dorgeval: There has been some mud throwing here.

40 Mr. Feinberg: You have been throwing a little mud yourself, my friend.

Samuel Liskovsky, for Defendant Malayfsky, direct.

Re-cross examination by Mr. Feinberg.

Q You said you did not receive any more than your salary? A No.

Q And you expect to get another check when you get off the witness stand? A When I get
10 home.

Mr. Feinberg: That is all.

SAMUEL LISKOVSKY, recalled for the defendant Malayfsky.

Direct examination by Mr. Dorgeval.

20 Q You heard the crash and ran out? A Yes.

Q Will you show us on the map where you saw the cars when you came out? A Malayfsky's car was on the right-hand side, on the far corner of Hague street, near this part here, coming this way (indicating). Mr. Ackenbout's car was on the right side, the south corner of Hague street coming toward Jersey City.

Q On the right side, going south. Malayfsky's car was out here (indicating)? A His car
30 was right here on the right-hand side (indicating), on the Jersey City side. On the Paterson Plankroad side, not your side. He was—

Mr. Feinberg: I ask that that be stricken out.

The Court: Yes.

Q Was Mr. Ackenbout's car on its left-hand side or the right-hand side of the road? A The
40 right-hand side going to Jersey City.

Samuel Liskovsky, for Defendant Malayfsky, direct.

Q Was it on the car tracks at all? A There, like on the right-hand side, past the car tracks. The Cadillac car was taking all of the tracks, not the other car.

Q The cars were against each other when you arrived? A Yes, and I rushed—

Q What part of Mr. Malayfsky's car was the Cadillac in contact with? A The Cadillac car
10 was more to the front—more to the center—hit in the middle.

Q Malayfsky's car was hit in the middle? A Yes.

Q What part of Malayfsky's car was hit?

Mr. Feinberg: I object to that.

Mr. Dorgeval: The question is withdrawn.

Q What part of the Cadillac car was in contact with the Malayfsky car? A His front was
20 in the middle—the Malayfsky car.

Q The Cadillac, you mean? A Yes, in the middle of the Malayfsky car.

Q Were they there for some little time? A I was there until everybody went away; I was staying there.

Q Did you see the Malayfsky car after the accident? A I was there and then they took
30 her away to the garage—pulled it away.

Q Did you see the Malayfsky car after the accident? A No, she was there in the next block after the accident, but I never saw it.

Q When you went out to where the accident occurred you did see the Malayfsky car? A Yes.

Q I show you a picture and ask you if that is a true picture of the way the car looked at that time? A The Cadillac's front was in here.
40

Samuel Liskovsky, for Defendant Malayfsky, direct.

Q Is that a good picture of the Malayfsky car? A Exactly the same—the window broken, and the kid sitting in the back was bleeding.

Q Is that a true picture—this one? A Yes, exactly the same.

10 Q Do you know Mr. Malayfsky? A Yes; I was never at his office, but I know him from walking on the street.

Q You are acquainted? A No; just see him walking from his office. I was in that house sixteen years, but I had no business with him.

Q Do you happen to know how Mr. Malayfsky got hold of Johnson, the witness in this case? A After the accident happened the daughter came up and asked me—

20 Mr. Feinberg: I object to that.

Mr. Dorgeval: And there has been some innuendo as to why he is here as a witness.

The Court: That would not justify hearsay evidence.

Q Did you note Mr. Johnson down there at the scene of the accident? A When I came down I seen Johnson there and I said to him—

30 Q The hurt people were still in the car when you arrived? A Yes, when I came, yes, and we took them out of the car, too.

Q What was the condition of the people in the car? A Mr. Malayfsky was sitting there with a broken foot. I said, "Do you want any—"

Q How about Mrs. Levine? A Yes, she was there, sitting there bleeding from the front of the face.

Q Where was she when you arrived—in Mr. Malayfsky's car or out of it? A Out of the car.

40 Q Where? A Waiting for the ambulance.

Samuel Liskovsky, for Defendant Malayfsky, cross.

Q Was she conscious? A No. The ambulance came and they took Malayfsky in the car. She walked into the car. I asked the chief of police if he wanted to take them in an ambulance and I did telephone. In a minute a cop came with an ambulance, and they took them away to Christ Hospital. 10

Q Are you familiar with the condition of Hague street? A Yes.

Q What condition was it in at the time of the accident? A Hague street is a bad street for sixteen years; that is all I remember. It is a bad place to go with machines, and I know that many times they break trucks there. You can't go.

Mr. Feinberg: I object to that. 20

Cross examination by Mr. Wortendyke.

Q You have known Malayfsky for sixteen years? A Yes, sir.

Q You are related to him? A No.

Q Is your wife? A No.

Q Your wife is related to his wife? A No, sir.

Q You have known him in a business way or a social way? A I saw him there after I heard 30 the crash. I seen him down there.

Q You recognized him immediately as an old friend, or not? A What do you mean, an old friend? You are a friend speaking to me—I don't know him.

Q But you have known him for sixteen years—fourteen years? A Fourteen years—I don't remember.

Q You recognized him? A I didn't recognize him—I saw him with a broken leg. 40

Samuel Liskovsky, for Defendant Malayfsky, cross.

Q You recognized him as an old friend? A Sure, why not.

Q Did you say, "How do you do" to him?

A No.

10 Q What? A Nothing—at first I didn't talk to him—I saw him talking to the other fellows, and I said, "How did it happen; did you see that?" and he said, "Yes."

Q You knew that Malayfsky had a broken foot? A When in the ambulance; I saw them taking him in.

Q You did see him talking to everybody? A I was on the other side; I was helping push the cars away.

20 Q You were having dinner in your apartment? A No, after.

Q How many clothes did you have on? A What do you mean? I didn't have an overcoat on.

Q You said that you had put a sweater on, that it was cold? A I put it on.

Q Did you have your shirt off? A No, I didn't say anything about a shirt.

30 Q You have designated on D. 4, Central avenue, as bearing the address of the "Rome Furniture"—what window were you at in that building? A Right close to the sign.

Q What floor? A There is only one floor.

Q You mean above the store? A That is right.

Q The first window is back of the sign? A Yes.

Q How far from the front of the building? A Maybe five, six or eight foot.

40 Q What room in that house is that window in? A What do you mean?

Samuel Liskovsky, for Defendant Malayfsky, cross.

Q What room, the parlor, dining-room or bedroom? A Where we were eating?

Q This window you were looking out? A Where we were eating?

Q The front room? A No, there are six more rooms.

10 Q What room is in the front, the dining-room, out of which you were looking? A The kitchen and dining-room were made twelve years ago, and we made one big room; we cook and everything there. There is a total from the partition to the window of maybe not less than six inches.

Q There is no room between your dining-room and the front of the house? A The room didn't go—

20 Q Are there any other rooms, or just the dining-room and the front room? A Parlor.

Q How big is that? A I didn't measure it.

Q You know the dining-room? A I said we made three rooms from one—we made one big room, I mean.

Q Did you throw the parlor in? A No.

Q How about the room in front? A That is the music room.

30 Q How far is it from the front to the rear? A That is in the front of the building.

Q And the dining-room? A That is on the corner of the house. You can see any place you want.

Q The dining-room is back of the parlor? A In front of the parlor.

Q And the dining-room is in the front of the house? A When you go in you walk right into the dining-room.

40 Q The dining-room is in the front of the house? A What do you mean?

Samuel Liskovsky, for Defendant Malayfsky, cross.

Q It is the first room on Central avenue? A The first on Central avenue. The parlor, music room, dining-room and kitchen, and next are the bedrooms.

10 Q There is the front wall on Central avenue, the parlor, music room, dining-room. When did you first talk to Malayfsky about the accident? A With him?

Q With him. A I didn't see him—I think it was before last Friday—last year some time, some time ago. I don't remember the month.

Q You didn't see him again? A No—yes, I did. Some time a year ago. I asked him how he was setting along and he said—

Mr. Feinberg: I object.

20 Q Are you still a friend of Malayfsky? A Not a friend.

Q You have known him for sixteen years? A Maybe eighteen; I don't remember.

Cross examination by Mr. Feinberg.

Q You have told this story before? A What story? I am answering what he asks.

30 Q Have you ever told this story before anywhere? A Where?

Q Any place? A Only in court. He asked me that and I answered that. Do you think I talk about the case?

Q Did you ever tell this story before? A Where?

Q Any place? A Never.

40 Q This is the first time you told this story? A Here in court before; I was here last year and I said the same story.

Samuel Liskovsky, for Defendant Malayfsky, cross.

Q You told the same story? A I was subpoenaed, yes.

Q You wrote a statement out? A I wrote a statement.

Q Did you ever sign a statement about this case? A Never.

10 Q Is that the fellow? A No—that fellow came to see me and I told him he had better let me alone.

Q You don't know him? A No, but two weeks ago he came up.

Q Do you know him? A I do not know him.

Mr. Dorgeval: I object to that.

Q You just said before when I asked you what part of the building you were at, you said 20 that you owned all of this house, and that you lived on that floor? A Yes.

Q On what floor did you live on? A The first floor, over the store.

Q Right here (indicating)? A Yes.

Q I said, "Do you live here?" and you said, "It is all one building." This is one building? A Yes, sir.

Q Where you said "Rome Furniture"—that is all one building? A Over the store. 30

Q That is all one building? A Yes.

Q This and this (indicating) is all one building? A Yes, sir.

Q So the jury may see it, you say that this and this is one building? A No.

Q There are a couple of stores in between? A No.

Q In other words, your building is farther away from the corner? A My building from the corner is thirty-five or forty feet. 40

Samuel Liskovsky, for Defendant Malayfsky, re-direct.

Q You were at the next corner? A Let me see; I want to ask for time.

Q You don't know without the picture? A That is my building (indicating).

10 The Court: Again indicating the "Rome Furniture" building.

Q How about the building in back of that? That is your building, too? Where you say you live on the first floor? A Yes.

Q That is on the corner, isn't it?

Mr. Dorgeval: What difference does that make?

20 The Court: Indicating this building here. Is that on the corner?

The Witness: The corner wasn't belonging to me—that is the corner place.

Q You didn't talk to anybody about this case? A No.

Q You are positive? A Positive.

Re-direct examination by Mr. Dorgeval.

30 Q You testified in the other trial, didn't you? A Yes.

Q Do you remember how that trial came out?

Mr. Feinberg: I object to that.

Mr. Wortendyke: I object to that.

The Court: Are there any further questions?

Mr. Dorgeval: No.

Angelo Monette, for Defendant Malayfsky, direct.

ANGELO MONETTE, sworn for the defendant Malayfsky.

Direct examination by Mr. Dorgeval.

Q Where do you live? A 3 Hague street, Jersey City. 10

Q Your home does not appear on any of these pictures, does it? A No.

Q Did you see this accident? A Yes.

Q Where were you when you saw the accident? A By the door.

Q By the door of what? A My house door.

Q Where is your house located? A On Hague street.

Q Will you come down here to the blackboard, please, and show me where your house is located? Here is where Mr. Ackenbout came up, and this is Hague street and the way Mr. Ackenbout was going. Where did you live at that time? A On this side of Hague street (indicating). 20

Mr. Wortendyke: The witness is not to becloud the record. State the time.

The Court: Yes, you might be describing some other accident. 30

By Mr. Dorgeval.

Q Did you see an accident between Mr. Ackenbout's car and Mr. Malayfsky's car on November 16, 1924, at the intersection of the Plankroad and Hague street, Jersey City, New Jersey? A Yes.

Q Did you see Mr. Ackenbout's car before the accident? A It was the first car that I saw. 40

Angelo Monette, for Defendant Malayfsky, direct.

Q Where was Mr. Malayfsky's car when you first saw it? A Coming into Hague street.

Q When you first saw Mr. Malayfsky's car was it on Hague street or the Plankroad? A On Hague street.

Q Was it to the left, the right or the center of Hague street when you first saw it? A To the right.

Q Was it going fast or slow? A Very slow.

Q Did you see the cars come together? A Yes.

Q Where on the Plankroad was Mr. Malayfsky's car when they came together—the crash? A On the right of the Plankroad.

Q When you say on the right of the Plankroad, do you mean the side of the Plankroad nearer you or farther away from you? A To my right.

Q Do you mean by that that part of the Paterson Plankroad that is nearer or farther away from you? A Nearer to my home.

Q What parts of the cars came together? A The left of the other man's car—I don't know his name—Ackenbout, it may be.

Mr. Dorgeval: I withdraw the question.

Q Just tell us what happened—tell us about the collision? A Mr. Malayfsky was coming into Hague street and turned in order to be to his right, and the other car was going over fast on the Plankroad and it struck the other car in the rear.

Q Which car was struck in the rear? A Mr. Malayfsky's car.

Q What part of the other car struck Mr. Malayfsky's car in the rear? A The left rear wheel.

Angelo Monette, for Defendant Malayfsky, cross.

Q Left rear wheel of the other car struck Mr. Malayfsky's car; is that what you mean? A The left front wheel.

Q What kind of a collision was it, a hard one, a soft one, or what? A It was a very big one—very hard.

Q When Mr. Malayfsky made the turn from Hague street into the Plankroad did he make a sharp or a wide turn? A A slow turn.

Q Was it a sharp cut to the left or a wide turn? A It was a rather wide turn.

Q Did you go to the scene of the accident after it happened? A I went in the house first, and a little while after I went out to the scene of the accident.

Q Was the car that ran into Malayfsky's car going fast or slow? A When coming from the Plankroad?

Q Yes, the car that was coming up the Plankroad that ran into Malayfsky's car? A It was going very fast.

Mr. Dorgeval: That is all.

Cross examination by Mr. Wortendyke.

Q You remember testifying at the other trial, don't you? You remember testifying at the last trial? A I do not speak English.

Mr. Wortendyke: If the Court please, he spoke English at the last trial.

Mr. Dorgeval: He did not. I conducted the last trial, and I had an interpreter. I don't see any possible basis for this slur.

Mr. Wortendyke: I have reason to say that he can speak English.

Angelo Monette, for Defendant Malayfsky, cross.

By the Court: How long have you been in this country? When did you come to America?

A I don't know.

Q Where do you live now? A Hague street.

10 Q What number? A Three.

Q How long have you lived there? A No answer.

The Court: I guess we better use the interpreter.

(The interpreter was used for the remainder of this witness' testimony.)

By Mr. Wortendyke.

20 Q At what number on Hague street do you live? A Three.

Q Where do the numbers on Hague street start? A I don't know where they start; I know that my number is 3, the house I live in.

Q How long have you lived there? A Seven years.

Q Where did you live before that? A On Bergenline avenue.

30 Q How long have you lived on Bergenline avenue? A Three years.

Q Where did you live before that? A In New York.

Q What street in New York? A Oak street.

Q How long did you live on Oak street in New York? A One year.

Q Where did you live before that? A In Italy.

40 Q So that you have lived in America eleven years, have you? A Eleven or twelve years.

Angelo Monette, for Defendant Malayfsky, cross.

Q And you can't speak English? A Not much; I know some words.

By the Court.

Q What is your business? A Baker.

By Mr. Wortendyke.

Q You are in business for yourself? A For myself.

Q How long have you been in the bakery business for yourself in America? A Ten years.

Q You lived at No. 3 Hague street at the time of the accident, November 16, 1924, didn't you? A Yes, and I live there yet.

Q What is the number on the left of your house? A Seven. 20

Mr. Dorgeval: I object to that.

The Court: The question has been answered.

Q How many houses are between your house and the corner of Hague street and Paterson Plankroad? A Just one—an empty lot there.

Q Is that the intersection of Hague street and Paterson Plankroad to the left of your house, or is it to the right of your house? A What do you mean by the left? 30

Mr. Wortendyke: Question withdrawn.

Q Step up to this map, this diagram, and indicate where your house was on November 16, 1924? A Where the house is now. I don't know the map. 40

Angelo Monette, for Defendant Malayfsky, cross.

Q This indicates the Paterson Plankroad and this is Hague street? A I don't know—it is here or here (indicating). I may go wrong.

Q Where is your house? A I can't explain because I don't know anything about this map.

Q Who owns that house? A I do.

10 Q Do you own any other property? A No.

Q Did you own any property in New York before that? A No.

Q Do you know Mr. Malayfsky? A Yes.

Q How long have you known him? A Since I am at Hague street.

Q How many years is that? A Seven years.

Q He is one of your customers? A No.

Mr. Wortendyke: That is all.

20 *Cross examination by Mr. Feinberg.*

Q You have talked with Mr. Malayfsky about this case, haven't you? A No.

Q You talked with Mrs. Malayfsky about the case, have you? A No.

Q You talked to the lawyer over there about the case, haven't you? A Yes.

Q He don't understand Italian, does he? A No.

30 Q But he understood you, didn't he? A No.

Mr. Dorgeval: I don't get this; I used an interpreter.

Mr. Feinberg: I saw him talking to him in the hall.

By Mr. Feinberg.

Q You talked to him directly, haven't you? A The lawyer, yes.

40 Mr. Feinberg: That is all.

Angelo Monette, for Defendant Malayfsky, re-cross.

Re-direct examination by Mr. Dorgeval.

Q When I talked with you did I use an interpreter or not?

Mr. Feinberg: I object to that; that is certainly leading. 10

The Court: That is all right; I will allow it.

The Witness: Yes.

Q What interpreter did we use?

The Interpreter: Me.

Re-cross examination by Mr. Feinberg.

Q How many days have you been in court? 20
A Five days.

Q How many times have you used him out in the hall? A Once.

Q And the other four days you didn't use this interpreter, did you? A No, because no one said anything to me.

Q You didn't speak to Malayfsky, did you? A No.

Q You didn't speak to any of the witnesses here? A No. 30

Q And the other one time you did talk to the lawyer? A Yes.

Q Do you know that man sitting at the table in the gray suit? A Yes.

Q You talked to him, didn't you? A No.

Q He gave you a check, didn't he? A Yes.

Q He didn't talk to you, and you didn't talk to him, and still he gave you a check? A Yes, he gave me a check. 40

Bernard Vena, for Defendant Malayfsky, direct—cross.

Q You didn't talk to him and he didn't talk to you, but he gave you a check each day that you were here? A I asked him "What is this for?" and he said "For expenses."

Q You didn't ask for a check—he just gave you the check in your hand and said: "That is for expenses?" A Yes.

Mr. Feinberg: That is all.

BERNARD VENA, sworn for the defendant Malayfsky.

Direct examination by Mr. Dorgeval.

20 Q Did I examine Mr. Monette out in the hall through you or not? A Yes.

Q Were all the questions I asked you repeated to him by you? A Yes, sir.

Cross examination by Mr. Feinberg.

Q That was once? A I believe a week ago today.

30 Q Once? A Yes.

Q Since last Friday was there any other day that you acted as his interpreter? A No.

Q If he spoke any to this man through anybody else you do not know? A I do not know.

Abram Malayfsky, for Defendant Malayfsky, direct.

ABRAM MALAYFSKY, recalled.

Direct examination by Mr. Dorgeval.

Q This call that you made upon Mr. Feinberg, when was that, last week?

Mr. Feinberg: I object to that; that is not proper rebuttal.

The Court: Yes.

Q When was that, last week? A I couldn't recall the date.

Q Was it before this trial started or after?

A The day after the trial started.

Q Between the time the accident occurred and the taking of the picture of the automobile, where was it? A In the garage.

Q In whose garage? A public or private one?

A First was—I don't know—he told me he took it up in another garage; after it was taken to my own garage.

Q When the car got to your garage that was how long after the accident? A I don't know that. When I came home the car was in my garage.

Q Between the time he came to you and the time the pictures were taken where was your car?

A The repair man.

Q When you returned from the hospital it was in your garage? A In my garage.

Q How long was it there? A Standing all the time.

Q It is still there? A No, I had some fire there and I took it from the garage.

Q How long ago did you take it out of the garage? A It must be three or four weeks ago.

Abram Malayfsky, for Defendant Malayfsky, cross.

Q All the rest of the time it was in your garage? A Yes.

Cross examination by Mr. Wortendyke.

10 Q You had a fire in your garage? A No, it was a false alarm.

Q You took the car out on the false alarm?
A The fire department told me to take it out.

Q You were asked whether from the time you got back from the hospital to the present time it remained in your garage, and you answered yes. A When I came from the hospital I found my car in the garage.

Q Did you see it there? A I wasn't able to walk.

20 Q When did you see it first? A Maybe eight or ten weeks later when I was able to walk; when I went out on crutches to see it.

Q From the time you got home from the hospital, for a period of ten weeks you did not go near your garage? A I couldn't walk.

Q Is it in the garage today? A No, sir.

Q Where is it? A In the yard.

Q For how long? A I can't say; I can't remember—you can find by the record.

30 Q How long was it in your yard? A Three or four weeks.

Q In your yard? A Yes.

Q It has been there for three or four weeks?
A Yes.

Q And before that? A It was in my garage.

Q These pictures were taken in September, 1925? A Yes.

Q In your yard? A My yard, absolutely.

40 Q It has a fence around it? A A fence there, sure.

Abram Malayfsky, for Defendant Malayfsky, cross.

Q Is it open as indicated? A Yes, in the yard there was grass at that time.

Q It was in the yard when the picture was taken? A I suppose that car was not in the garage when they were taking the picture.

Q Do you remember testifying on Monday, or Friday, that this car had been in your yard ever since the accident? A Maybe; I don't remember. 10

Q So that if you did you were wrong? A Yes.

Cross examination by Mr. Feinberg.

Q Do you know this neighborhood where the accident happened? A Yes.

Q Are the houses twenty-five feet away from each other, or are they right next to each other? A I didn't measure them. 20

Mr. Dorgeval: This is not proper cross examination.

Mr. Feinberg: I withdraw the question.

Q Does counsel contend now that the houses were less than twenty-five feet apart, or more? 30

Mr. Dorgeval: That is a jury question.

Mr. Feinberg: This is for the speed laws.

Mr. Dorgeval: They were less than one hundred feet apart.

Mr. Wortendyke: Yes, less than one hundred feet.

By Mr. Feinberg.

Q You said you didn't talk to anybody except the lawyer about this case? 40

Edward Seidel, for Defendant Malayfsky, direct.

Mr. Dorgeval: I object.

The Court: That is all right, in the nature of an omitted question.

The Witness: I talked with my friend.

10 Q Did you say that last Friday was the only time you talked to your lawyer? A I don't recall.

Q Is this your lawyer? A Yes.

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

Q Your lawyer, Mr. Harber, told you the story first? A I know Mr. Harber, absolutely.

Q He is your lawyer? A Yes.

Q You wrote out a statement as to how this accident happened? A No.

20 Q You signed a statement? A I can't recall if I did or not.

EDWARD SEIDEL, sworn for the defendant Malayfsky.

Direct examination by Mr. Dorgeval.

30 Q Where did you live at the time that the accident occurred? A 621 Hague street.

Q Will you show us the place on these pictures where that place is—show the Court and jury. A (The witness showed the Court the pictures.)

The Court: He indicates on Exhibit D. 4 a point in the right hand building.

Mr. Dorgeval: Almost the extreme right of the picture?

40 The Court: Yes.

Edward Seidel, for Defendant Malayfsky, direct.

The Witness: Yes, sir; it is all changed here now.

By Mr. Dorgeval.

10 Indicating the second door shown on D. 2, indicating the window past the second door on the north side of Hague street.

Q Did you see the accident on November 16, 1924, between the automobile owned by Malayfsky and the one owned by Ackenbout at the corner of Hague street and the Paterson Plankroad? A I did.

Q Where were you when the accident occurred? A I was sitting right at the window; I had a sick child in my arms.

Q How old was the baby? A The baby was 20 then two years old, not quite.

Q You were at the front window? A I had the front window open, giving the child some air; the other one was sleeping on the couch.

Q Where did you see Malayfsky first? A He passed the house, and as he passed he blew his horn, and that drew my attention to Malayfsky, and I waved my hand.

Q Did you notice Malayfsky wave at you? A 30 No, that I didn't take notice of.

Q As he passed your house which side of the street was he on, the right, center or the left? A About four feet from the curb off probably from the center of the road.

Q When you say four feet from the right curb— A Where I live, on the right hand side.

Q What is the condition of the street, concrete or what? A It has not been fixed in twenty-eight years, because I worked on that street with a dump cart when it was fixed. 40

Edward Seidel, for Defendant Malayfsky, direct.

Q You lived there? A Yes.

Q What was the condition of that street at that time? A Bad—the same as at the present date.

Q When Mr. Malayfsky went by was he going fast or slow? A Slow.

10 Q What happened? A As he rode past my house he blew as he was going by the harness place shown on the photograph, and then he blew again and turned the corner. He went past the house and was struck at the corner like a shot from a cannon—a terrible shot. Then the two of them crashed together. That is all I seen.

Q Where was the Malayfsky car when this other car shot out at the corner? A Crossing the third rail.

20 Q Facing where? A Hoboken.

Q Did you notice what kind of a turn he made, whether it was a sharp turn, a round turn, or a medium turn? A He was half way around.

Q A wide turn or a short turn? A A wide turn.

Q Was he going fast or slow as he turned? A Slow; if he went fast he would have went through the fence there.

30 Q Did you notice which part of the cars came together? A All I could see was when they crashed together.

Q Did you notice what part of the other car struck Malayfsky's? A No; I was about half way—on one side.

Q You don't know Malayfsky's? A Both were on the left side of the cars.

Q The left side of Malayfsky's car was struck? A The left side, I think.

40 Q And you don't know how far from the front of Malayfsky's car? A About the center.

Edward Seidel, for Defendant Malayfsky, cross.

Q What happened after the cars crashed? A I don't know. I had the child, and I didn't run out.

Q You didn't run out? A No, I am not as noseey as that.

Q Did you notice the cars in contact after the accident, up against each other, or apart? A 10 They were damaged, and the wrecker came down and towed one away to allow the street to be opened.

Q Did Mr. Ackenbout and Mr. Feinberg confer out in the hall? A Twice.

Q When was the first time? A On Friday.

Q Did they talk for just a moment—how long? A A couple of minutes they were there.

Q How many minutes would you say? A 20 Ten minutes.

Mr. Dorgeval: That is all.

By Mr. Wortendyke.

Q You had a sick child in your arms at the time? A Yes.

Q What story was that on, on the first or the second floor? A The first floor.

Q Can you indicate on this picture, referring to D. 2, as to what window you were at? A 30 The window right behind the second door.

Q The fifth window from the end of the building, nearest the Paterson Plankroad? All the windows are flush with the wall of the house? A Yes.

Q What were you sitting on? A A chair.

Q What kind of a chair? A A house chair.

Q An arm chair? A A rocking chair.

Q How was the rocking chair placed with respect to the window? A Close to the window, 40

Edward Seidel, for Defendant Malayfsky, cross.

to give the child some air; I had the window open.

Q You say you were sitting in a rocking chair alongside of the wall or the window in front as you sat facing? A I couldn't face it with the rocking chair; you have to take it on the side.

10 Q Which way, facing Paterson Plankroad or Hague street? A Facing Paterson Plankroad.

Q How old is this child? A The child is a little over three years old now.

Q You had it in your arms? A Yes, it had bronchial pneumonia.

Q What kind of weather was it that day? A Pretty fair weather.

Q Was it cold or warm? A Not too cold or not too warm—fair weather to give the child air.

20 Q The child was bundled up? A Bundled up.

Q When Mr. Malayfsky's car went by he blew his horn and you waved at him? A Yes.

Q You are not sure whether he waved back to you or not? A No.

Q You used to work for Mr. Malayfsky, did you not? A No, the Highland Wrecking Company—his brother.

30 Q What kind of a business was carried on at the time you were working for the Highland Wrecking Company? A The same as at the present day—lumber.

Q That is the business that Malayfsky was in? A Yes.

Q Where was your place of business at the time? A My place of business was on Lake street, now Shore.

40 Q How far away from the scene of the accident was that? A Just around the corner.

Edward Seidel, for Defendant Malayfsky, cross.

Q That is the place where Mr. Malayfsky had his lumber business? A The lumber business is on Highpoint.

Q At the time? A Yes.

Q You knew him at the time? A Transacted business, got lumber there and took it down to our yard. 10

Q You waved at him? A I knew the two of them.

Q Did you testify on your direct examination how far from Hague street and Paterson Plankroad that is—can you form an opinion? A That is all I know.

Q Is the condition of the street as indicated in D. 2 the same now as it was on the day of the accident? A Yes, practically the same. There are more houses—a couple of houses have been built since then and the street is open, but it has not been fixed yet. 20

Q When the house was building a year before you could pass beyond here a year before? A A year before.

Q That was in the year 1925? A Yes, sir.

Q Was that condition at the time of the accident better than that shown on this picture? A No, just the same.

Q Irrespective of the building of houses? A Yes. 30

Q You and the child put your bodies outside of the window as this car went by? A Why do that?

Q Did you get up out of the arm chair? A No.

Q You rocked the child? A Rocked her to sleep.

Q You heard the horn blown? A At the corner of the small harness store. 40

Edward Seidel, for Defendant Malayfsky, cross.

Q Do you know whose horn it was? A Yes.

Q Did you see Malayfsky blow his horn? A I never seen him—he blew at my house, and I think before he got to the corner.

Q You heard some kind of a horn? A Yes, sir.

10 Q But from the time Malayfsky passed your house, as you sat in this house with this child, you didn't move out of the window with the child? A No, sir.

Cross examination by Mr. Feinberg.

Q And notwithstanding the fact that you didn't move out of the arm chair you could tell whose horn was blown? A It made a sound that was repeated within the last three minutes.

20 Q Within the three minutes the accident had happened and the two cars had come together, yet you can tell whose horn you heard sounded? A I said it.

Q You saw me talking out in the hall for ten minutes? A Yes, sir.

Q Where? A Right across the circle.

Q In the corner of the room, sneaking away?

A In the open.

30 Q Did you see me handing out any checks?

A I don't know anything about that.

Q You got a couple of checks? A One.

Q One for each time you were here. How many checks did you get? A I don't know.

Mr. Dorgeval: The defendant Malayfsky rests.

Jacob Ackenbout, for Defendant Ackenbout, direct.

JACOB ACKENBOUT recalled in rebuttal.

Direct examination by Mr. Wortendyke:

Q Do you know this man? Levine, stand up?

A I do not.

Q Did you see him on Monday during the noon recess? A I was going to lunch, and I was talking to him. 10

Q Did you at that time, or any other time, say to him that if you had not been lucky that you would have killed him, meaning Malayfsky?

A I did not.

Mr. Dorgeval summed up to the jury for the defendant Malayfsky.

Mr. Wortendyke summed up to the jury on behalf of the defendant Ackenbout. 20

Mr. Feinberg summed up to the jury for the plaintiff.

*Charge to Jury.***CHARGE.**

The Court thereupon charged the jury as follows:

10 Gentlemen of the Jury: The plaintiff in this case, Rose Levine, is suing the defendants, Jacob Ackenbout and Abram Malayfsky, for the purpose of recovering damages for injuries she alleges she has received by reason of the negligence of these two defendants or one of the defendants, because, from the testimony here you may find that both of the defendants have been negligent and that they both therefore become civilly liable to the plaintiff because of their negligence. Or, you may find either one or the other has been negligent and that one or the other becomes liable to her in damages for said negligence.

20 Now, negligence consists of any omission or failure to do something which a person owes to another under a particular set of circumstances. A person using our highways has a perfect legal right to use those highways—that is what they were built for and that is what they are used for—but when using these highways they are charged that they should use due care for the safety and property of others who are lawfully on the highway, and if they fail to use that degree of care which a reasonably prudent man would use under the same circumstances, and if injury or damage results from such failure to use due care, then in that case we would have what is known in law as negligence established, and the person who is negligent, as the law terms it, would be responsible for any resulting damages or injuries which were the proximate result of such negligence.

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Charge to Jury.

There are two defendants and there are two rules of law which apply to one of the defendants. The rule I will lay down to you may apply to them both, and it will apply to both of the defendants, Jacob Ackenbout and Abram Malayfsky, providing you find that as a matter of fact Abram Malayfsky invited this old lady, the plaintiff, to go riding with him. If he invited her to come riding in his car, then he owed to her the duty of using all reasonable care to protect her from harm or injury, and if he failed to use such ordinary and reasonable care, and if that failure to do so resulted in injury to her, then, in that case, he would be liable to her, if these facts have been established to your satisfaction.

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If, on the other hand, Abram Malayfsky merely took the plaintiff, this old lady, riding because she asked him to do so—to take her to her cousin's or uncle's, or some other relative, or to take her riding, then, if you believe that is the fact, that she asked him and that is why she was riding in his car, then he only owed to her the duty of not wantonly and wilfully injuring her. I might say that there is no evidence whatsoever as far as the Court recollects of any wilful intentional injury, or purpose to injure her. So you, in considering this case, will consider that rule as applying to Malayfsky, and I so charge.

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As to Malayfsky there are two rules that will apply to him as to damage, depending on whether he asked her or whether she asked to go with him.

The presumption in law is that there is no negligence in the mere operation of your automobile on the highway. The presumption is that that is being done lawfully and legally. There-

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Charge to Jury.

fore the plaintiff has to establish by the preponderance or weight of evidence that the defendants or either one of the defendants in this case, was in fact negligent, and the proximate result of that negligence was the injury complained of. We have a system of what I would say could be called rules of law for the guidance of those using automobiles on our highways, limiting the rate of speed which may be used in various places, the rate of speed being not more than twelve miles per hour in a city where the houses are on the average of one hundred feet or less apart; at crossroads and at cross streets a maximum speed of fifteen miles an hour is permitted, but it is not a violation of such laws as these which would necessarily make any person guilty of negligence. You may go at any rate you please, and if you do not commit damage then there is no negligence. The law says that you cannot safely drive the full maximum rate of speed all the time without being guilty under a given set of circumstances. It is the time, place and circumstance that governs the speed, and if the mileage and operation is that which a reasonably prudent person would use at that time and place and under those circumstances, it is that which makes a man free from negligence or guilty of negligence if an accident happens and injury results therefrom.

As I recall, but it is always your recollection of the evidence that shall be your guide in determining the case, a Cadillac car driven by Ackenbout was travelling northerly on Paterson Plankroad; that Abram Malayfsky was driving in a westerly direction on Hague street. Hague street and Paterson Plankroad intersect at either a right angle or something less than a right angle

Charge to Jury.

—acute angle possibly—that on the corner between these two streets there is a building known as the Flatiron building, which obstructed, apparently, a view up and down either of these streets until you approached and got quite close to the corner. It appears that both defendants knew of this intersection. They knew that there was not a good view before they approached the intersection. Now, what does a reasonably prudent man do approaching a corner like that? He may blow his horn; he might slow down and approach at a slow rate of speed; he might put on his brake and be ready to stop suddenly. That is a question for you to say what this reasonably prudent man would do. I mean, if he had done that, or if either of them failed to do those things which occur to a reasonably prudent man to do, would this accident have occurred? If you are satisfied that the plaintiff has established that to your satisfaction by the evidence offered here, you might find either one or the other of the defendants guilty of negligence and then proceed to assess damages which the plaintiff is entitled to recover by reason thereof.

The rule of contributory negligence will not apply in this case, because the plaintiff was a passenger in the car. It is not indicated that she had any control over the driver of the car, so if you find that the plaintiff has established her case against these defendants or either of them as I have laid down, by a preponderance of evidence, then your verdict should be for the plaintiff and against the defendant or the defendants. If, on the other hand, you are not satisfied that the plaintiff has established her case by a preponderance of evidence, proving to your satisfaction that one or the other is guilty

Charge to Jury.

of negligence, then your verdict should be for the defendant or the defendants, whatever the case may be.

I have had a request to charge additional traffic laws, especially those applying to the case in question which reads as follows:

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“Every driver of a vehicle approaching an intersection of streets or a public road, shall grant the right of way at such intersection to any vehicle approaching from his right.”

“If you find that the defendant, Jacob Ackenbout, violated this provision of the traffic act, you may, from that fact, infer that he was negligent.”

I will so charge you with this modification:

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That that law has been construed by our courts to apply to where two cars approaching an intersection are likely to meet at about the same time at this intersection, but if one is a hundred feet away and the other fifty feet away, and both are travelling at the same rate of speed, one, clearly, would pass before the other reached there, but this rule of the right of way does not apply to where the two reach the corner travelling at the rate of speed they were when they first observed each other, for then the one on the right has the right of way, and it would be the duty of the other to take note of that law and slow up or stop, or do something, to allow the one on the right to pass in front of him.

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If you come to the point where you find one or the other of the defendants guilty of negligence, you may proceed to assess the damages which the plaintiff suffered. You will recollect what they consist of. Something was said in the testi-

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Charge to Jury.

mony about a hundred and fifty dollars expenses being incurred for medical services in the case. It is proper to consider this compensation if you find it was reasonably and necessarily spent in endeavoring to cure the plaintiff of her injuries. The hospital bill was twenty-five dollars, and there may be some other items, but I do not recall them now. You are further entitled to compensate her for the pain and suffering which she has endured, suffered, by reason of this accident, which, of course, you must find was the proximate result of negligence that I have described to you. It appears that the plaintiff's scalp was cut for some distance, and that it was sewed together; that she was compelled to remain in the hospital for some time. It has been testified that she has not been the same since the accident; that her health is now impaired; that she is unable to do things in the same manner she did them prior to that time. Any impairment of general health suffered by her, that she has endured or will endure in the future, she is entitled to be recompensed for.

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Counsel has called my attention to some things in his requests to charge. I have told you that if you find that the defendant, Jacob Ackenbout, violated this provision of the law as to the right of way, that from that fact you may infer that he was negligent. I shall further clarify that. Whether or not he was negligent is evidence for your consideration and determination. You must take all the testimony in this case, take into consideration all the circumstances in the case, the position of the cars, where they were when they struck one another and so forth. All possible surrounding circumstances should be taken all together, and then you should say after taking

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Exceptions to Charge.

all these things into consideration: "Did either of them fail to do what a reasonably prudent man would have done under the circumstances?"

10 There is another matter which I have not instructed you on, and that is the degree of negligence of these two defendants. If you find that they have both been proven guilty of negligence, and that that negligence caused this accident, it does not matter if one was more negligent than the other. If you find that if one of them was not negligent the accident would not have happened then you should find against the one, if you do find whose negligence was the cause of this accident, but if you find combined negligence, that both of them violated the rule of what a reasonably prudent man would have done, 20 it makes no difference if one was more negligent than the other, if it was necessary that the combined negligence of each brought about this accident, then you may find both responsible in damages for the resulting injuries. If you find both were guilty of negligence, both are responsible to the plaintiff, and you may assess the damages which she has suffered, jointly, against both defendants. There is no known way of saying what portion of the damages either particular one 30 of them may have caused. If you find this to be true you will find both guilty of negligence.

I refuse to charge the first, second, third, fourth and fifth requests of defendant Malayfsky's counsel, except in so far as I have already covered them in my charge.

Mr. Dorgeval: If the Court please, I respectfully take exception to your Honor's refusal to charge my first, second, third, fourth and fifth request.

40 The Court: You may have your exception.

*Requests to Charge of Defendant Malayfsky.***REQUESTS TO CHARGE OF ABRAM MALAYFSKY.**

1. It is the duty of the plaintiff to prove the alleged negligence of the defendant, Abraham Malayfsky, by a fair preponderance of the evidence. Unless she has done this, your verdict 10 must be for the defendant, Abraham Malayfsky.

2. Unless you find that the defendant, Malayfsky, was guilty of negligence in the manner charged in the complaint, you must find for the defendant, Abraham Malayfsky.

3. If you find that the defendant, Malayfsky, was negligent, but that his negligence was not the proximate cause of the accident, then you must find for the defendant, Abraham Malayfsky. 20 To permit a recovery by the plaintiff against the defendant, Malayfsky, it is not only necessary that you find that Malayfsky was negligent, but you must also find that such negligence was the proximate cause of the accident.

4. Unless you find that the defendant, Abraham Malayfsky, invited Mrs. Levine to ride with him, your verdict must be for the defendant, Abraham Malayfsky.

5. If you find that the defendant, Malayfsky, 30 did not invite Mrs. Levine, the plaintiff, to ride with him, but that she asked him to take her for a ride or to let her ride with him, then I charge you your verdict must be for the defendant, Abraham Malayfsky.

6. Section 4, subdivision (1) of the Traffic Act, provides that: "Every driver of a vehicle approaching the intersection of a street or public road shall grant the right of way at such in- 40

Statement as to Proceedings During Charge.

tersection to any vehicle approaching from his right.”

If you find that the defendant, Jacob Acken-
bout, violated this provision of the Traffic Act,
you may from that fact, infer that he was negli-
gent.

STATEMENT AS TO PROCEEDINGS
DURING CHARGE.

During the charge the following proceedings
were had: Just before the Court charged the
paragraph in his charge which begins with the
sentence: “Counsel has called my attention to
some things in his requests to charge,” he paused
and inquired of counsel whether he had covered
everything in his charge. Thereupon counsel for
the plaintiff and for the defendant, Jacob Acken-
bout, made certain oral requests to charge. Coun-
sel for the defendant, Abram Malayfsky, de-
murred to them, after which the Court proceeded
with the charge and the jury retired.

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Statement as to Exceptions.

STATEMENT AS TO EXCEPTIONS.

Counsel for the defendant, Abram Malayfsky,
then asked for exceptions, in addition to those
already noted, to the Court's failure to charge as
to proximate cause more specifically; to the
Court's failure to define the meaning of proxi-
mate cause; and to the Court's charge that the
defendant, Abram Malayfsky, owed to the plain-
tiff the duty not to wantonly or wilfully injure
her. The Court refused to permit said counsel
to take these exceptions at that time, giving as
his reason that they should have been called to
the Court's attention before the jury retired,
and during the conference, above referred to,
and directed the court stenographer (who was
present and prepared to function) not to note
the request of counsel for said exceptions.

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Opinion of Supreme Court.

OPINION OF SUPREME COURT.

Filed February 14, 1928.

NEW JERSEY SUPREME COURT.

No. 42 October Term, 1927.

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ROSE LEVINE,
Plaintiff-Respondent,

vs.

JACOB ACKENBOUT,
Defendant,

and

ABRAM MALAYFSKY,
Defendant-Appellant.

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Submitted October Term, 1927. Decided January, 1928.

Before Gummere, Chief Justice, and Justices Black and Lloyd.

For the respondent, Feinberg & Feinberg.

For the appellant, Hobart & Minard.

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PER CURIAM:

This is an action to recover damages for personal injuries to the plaintiff received in a collision between two automobiles, one driven by the defendant Malayfsky, and the other by the defendant Ackenbout, the plaintiff being at the time an occupant of Malayfsky's car. There was a verdict against both defendants and Malayfsky appeals. The grounds of appeal are that the

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Opinion of Supreme Court.

Court erred in refusing to charge the following requests for instruction:

10 "2. Unless you find that the defendant Malayfsky was guilty of negligence in the manner charged in the complaint, you must find for the defendant, Abram Malayfsky."

"4. Unless you find that the defendant Abram Malayfsky invited Mrs. Levine to ride with him, your verdict must be for the defendant, Abram Malayfsky."

20 "5. If you find that the defendant Malayfsky did not invite Mrs. Levine the plaintiff to ride with him, but that she asked him to take her for a ride or to let her ride with him, then I charge you your verdict must be for the defendant Abram Malayfsky."

20 One of the issues in the case was the relation which the plaintiff bore to the defendant Malayfsky in whose car she was riding, it being contended by the former that she was an invitee and by the defendant that she was a licensee only. The requests were therefore pertinent, but we think they were substantially charged in the general instructions given by the learned judge to the jury. In the charge negligence generally was clearly and accurately defined, and with like
30 clarity the jury was told that the negligence defined applied to Malayfsky provided he had invited the plaintiff to go riding with him, but that if she invited herself the defendant only owed a duty not to wantonly or wilfully injure her, and of which wanton or wilful conduct he could see no evidence. This we think must have been understood by the jury as making the defendant's liability depend upon a finding that the plaintiff was riding at Malayfsky's invitation and that
40 she was injured as a result of his negligence.

Order of Affirmance.

Appellant has not shown that his substantial rights were injuriously affected by the denial of the instructions prayed (Pr. Act. 1912, p. 382, sec. 27), and the judgment will be affirmed.

ORDER OF AFFIRMANCE.

Filed February 23, 1928.

This cause having been duly submitted at the October Term, 1927, of this Court by Hobart & Minard, of counsel for the defendant-appellant, and Feinberg & Feinberg, of counsel for the plaintiff-respondent, and the Court having considered the same, and finding no error in the record or proceedings in the Hudson County
20 Court of Common Pleas;

It is thereupon, on this 23rd day of February, 1928, ORDERED and ADJUDGED, that the judgment of the Hudson County Court of Common Pleas, removed by the appeal in this cause, be affirmed with costs; and that the record be remitted to the Hudson County Court of Common Pleas to be proceeded with in accordance with this judgment and the practice of said court.

Entered February 23, 1928.

On motion of

FEINBERG & FEINBERG,
Attorneys for Plaintiff-Respondent.

Notice and Grounds of Appeal.

NOTICE AND GROUNDS OF APPEAL.

Filed March 5, 1928.

To Messrs Feinberg & Feinberg, attorneys for plaintiff-respondent.

10 TAKE NOTICE that Abram Malayfsky, the defendant-appellant, appeals to the Court of Errors and Appeals from the whole of the judgment entered in this cause in the New Jersey Supreme Court affirming the judgment entered in the Hudson County Court of Common Pleas on the following grounds:

20 The Supreme Court affirmed the judgment of the Hudson County Court of Common Pleas in favor of the plaintiff-respondent and against Abram Malayfsky, the defendant-appellant, whereas said Supreme Court should have reversed said judgment of the Hudson County Court of Common Pleas for one or more of the grounds of appeal relied upon in said Supreme Court.

Dated February 29, 1928.

HOBART & MINARD,
Attorneys of Defendant-Appellant.

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NEW JERSEY

Court of Errors and Appeals

ROSE LEVINE,
Plaintiff-Respondent,

vs.

JACOB ACKENBOUT,
Defendant,

and

ABRAM MALAYFSKY,
Defendant-Appellant.

On Appeal
from
Supreme
Court.

**BRIEF OF HOBART & MINARD IN FAVOR
OF ABRAM MALAYFSKY, DEFENDANT-
APPELLANT.**

(1)

Statement of the Case.

This case is on an appeal by the defendant Malayfsky from a judgment of the Supreme Court affirming a judgment entered against him on February 25, 1927, in the Hudson County Court of Common Pleas in an action brought jointly against him and one Jacob Ackenbout.

A jury verdict was rendered in favor of the plaintiff and against both defendants and judgment entered accordingly for the sum of \$3,000 and costs (p. 14).

Ackenbout did not appeal; Malayfsky appealed to the Supreme Court and that court affirmed the judgment. The opinion is reported in VI. N. J. Misc. Rep. 210 and 140 Atl. 437. Malayfsky has now appealed to this court on the ground that the Supreme Court should have reversed the judgment against him for one or more of the grounds relied upon by him in said court (see Notice and Grounds of Appeal, p. 212; for Grounds in Supreme Court, see pp. 2-4).

The action was brought to recover damages for personal injuries sustained by the plaintiff on November 16, 1924, while riding as a passenger in an automobile operated by Malayfsky, which came into collision with another automobile operated by Ackenbout.

The plaintiff claimed that the collision was the result of joint negligence on the part of both defendants, the charge against Malayfsky being that he "negligently operated" the automobile in which the plaintiff was riding (p. 6, line 36).

(2)

Grounds of Appeal.

The Supreme Court affirmed the judgment of the Hudson County Court of Common Pleas in favor of the plaintiff-respondent and against Abram Malayfsky, the defendant-appellant, whereas said Supreme Court should have reversed said judgment of the Hudson County Court of Common Pleas for one or more of the grounds of appeal relied upon in said Supreme Court (p. 212).

Seven grounds were filed in the Supreme Court, but Nos. 1, 2 and 5 were not urged; the grounds that were urged are the following:

3. The trial court erroneously charged the jury as follows:

"There are two defendants and there are two rules of law which apply to one of the defendants. The rule I will lay down to you may apply to them both, and it will apply to both of the defendants, Jacob Ackenbout and Abram Malayfsky, providing you find that as a matter of fact Abram Malayfsky invited this old lady, the plaintiff, to go riding with him. If he invited her to come riding in his car, then he owed to her the duty of using all reasonable care to protect her from harm or injury, and if he failed to use such ordinary and reasonable care, and if that failure to do so resulted in injury to her, then, in that case, he would be liable to her, if these facts have been established to your satisfaction.

"If, on the other hand, Abram Malayfsky merely took the plaintiff, this old lady, riding because she asked him to do so—to take her to her cousin's or uncle's, or some other relative, or to take her riding, then, if you believe that is the fact, that she asked him and that is why she was riding in his car, then he only owed to her the duty of not wantonly and wilfully injuring her. * * * So you, in considering this case, will consider that rule as applying to Malayfsky, and I so charge.

"As to Malayfsky there are two rules that will apply to him as to damage, depending on whether he asked her or whether she asked to go with him."

4. The trial court erroneously refused to charge the following request to charge which

was submitted on behalf of the defendant Abram Malayfsky:

"2. Unless you find that the defendant, Malayfsky, was guilty of negligence in the manner charged in the complaint, you must find for the defendant, Abraham Malayfsky."

6. The trial court erroneously refused to charge the following request to charge which was submitted on behalf of the defendant Abram Malayfsky:

"4. Unless you find that the defendant, Abraham Malayfsky, invited Mrs. Levine to ride with him, your verdict must be for the defendant, Abraham Malayfsky."

7. The trial court erroneously refused to charge the following request to charge which was submitted on behalf of the defendant Abram Malayfsky:

"5. If you find that the defendant, Malayfsky, did not invite Mrs. Levine, the plaintiff, to ride with him, but that she asked him to take her for a ride or to let her ride with him, then I charge you your verdict must be for the defendant, Abraham Malayfsky."

(3)

Brief of the Argument.

I.

The trial court erroneously refused to limit the jury to the negligence charged against Malayfsky in the complaint.

The complaint has two counts; the first charges negligence against Ackenbout in certain particulars; the second repeats all the paragraphs of the first and then alleges "negligent" operation by Malayfsky.

The negligence of Ackenbout, which, by reference, is likewise charged against Malayfsky, as set forth in paragraph 4 of the first count, is as follows:

"That he operated the said automobile at an excessive rate of speed; that he operated the said automobile on the wrong side of the street; that he was so careless and reckless in the operation of said automobile that he lost control thereof, and he had no regard for the safety of others using the said highway" (p. 5, line 35, to p. 6, line 3).

Paragraph 2 of the second count alleges that Malayfsky "negligently operated the said automobile * * * so as to cause his said automobile to come into contact with the automobile being driven by the defendant, Jacob Ackenbout * * *" (p. 6, line 36, to p. 7, line 2).

It will be observed that both counts are limited to allegations of ordinary negligence and that in neither count is there any claim that there was any wanton or wilful conduct on the part of Malayfsky.

No amendment to the complaint was made or requested.

The appellant submitted the following requests to charge:

"2. Unless you find that the defendant, Malayfsky, was guilty of negligence in the manner charged in the complaint, you must find for the defendant, Abraham Malayfsky."

"4. Unless you find that the defendant, Abraham Malayfsky, invited Mrs. Levine to ride with him, your verdict must be for the defendant, Abraham Malayfsky."

"5. If you find that the defendant, Malayfsky, did not invite Mrs. Levine, the plaintiff, to ride with him, but that she asked him

to take her for a ride or to let her ride with him, then I charge you your verdict must be for the defendant, Abraham Malayfsky" (p. 205).

These were refused and exceptions taken (p. 204, lines 30-40).

The refusals to charge said requests are made the subject of grounds of appeal Nos. 4, 6 and 7 (pp. 3, 4).

The trial court not only refused to charge these requests, but permitted the jury to consider an entirely different theory of liability as to the appellant, concerning which there is no claim or suggestion in the complaint, namely, the theory that if the plaintiff was *not* invited to ride by the appellant, that then he owed to her the duty only of not wantonly and wilfully injuring her.

He said that in so far as related to the appellant there were *two* rules that might apply, depending on whether the appellant invited the plaintiff to ride, or whether the plaintiff asked to go with him, saying (*italics ours*):

"There are two defendants and there are *two* rules of law which apply to one of the defendants. The rule I will lay down to you may apply to them both, and it will apply to both of the defendants, Jacob Ackenbout and Abram Malayfsky, *providing you find that as a matter of fact Abram Malayfsky invited this old lady, the plaintiff, to go riding with him.* If he invited her to come riding in his car, then he owed to her the duty of using all reasonable care to protect her from harm or injury, and if he failed to use such ordinary and reasonable care, and if that failure to do so resulted in injury to her, then, in that case, he would be liable to her, if these facts have been established to your satisfaction.

"*If, on the other hand, Abram Malayfsky merely took the plaintiff, this old lady, riding because she asked him to do so—to take her to her cousin's or uncle's, or some other relatives, or to take her riding, then, if you believe that is the fact, that she asked him and that is why she was riding in his car, then he only owed to her the duty of not wantonly and wilfully injuring her. I might say that there is no evidence whatsoever as far as the Court recollects, of any wilful intentional injury, or purpose to injure her. So you, in considering this case, will consider that rule as applying to Malayfsky, and I so charge.*

"As to Malayfsky there are *two* rules that will apply to him as to damage, depending on whether he asked her or whether she asked to go with him" (p. 199, lines 1-36).

The point as to the allegations in the complaint, and the question of invitation by the appellant to the plaintiff to ride in the automobile, were specifically covered by the above requests 2, 4 and 5, all of which were denied by the trial court "except in so far as I have already covered them in my charge," and exception duly taken (p. 204, lines 30-40).

The record shows that after the jury had retired, counsel for the appellant asked for exceptions, in addition to those previously noted, to the court's charge that the appellant owed to the plaintiff the duty not to wantonly or wilfully injure her.

The trial court took the somewhat unusual attitude of refusing to permit this exception (with certain others) to be taken, and directed the court stenographer not to note the request for said exception (p. 207, lines 1-20).

As it is the practice in New Jersey to take exceptions to the charge of the trial court *after* the jury

has retired and not *before*, the request of counsel for the appellant to note the exceptions set forth on page 207 of the record was eminently proper. But however that may be, the present point is sufficiently raised by the refusal of the court to charge the said requests, except as already charged, and by the exception thereupon taken and allowed.

The question, therefore, is whether it was error for the trial court to permit the jury to find liability on the part of the appellant on a theory which was not alleged in the complaint and which was imported into the case by the charge of the trial court, in the face of specific requests that in so far as related to the appellant the jury were limited to the negligence charged in the complaint, and could not find the appellant liable unless they found that the plaintiff was *invited* by the appellant to ride with him.

The rule of law, as set forth in requests Nos. 4 and 5, is well settled, that unless a plaintiff is *invited* to ride in the defendant's automobile, then the liability of the driver (or owner) is limited to wanton and wilful injury.

Karas v. Burns, 94 N. J. L. 59;

Lutvin v. Dopkus, 94 N. J. L. 64;

Mackenzie v. Oakley, 94 N. J. L. 66;

Rose v. Squires, 101 N. J. L. 438; affirmed
IV. N. J. Adv. Rep., p. 1109;

Willett v. Heyer, VI. N. J. Adv. Rep. 511;

Gruda v. Karbowski, VI. N. J. Misc. 49;

Woodruff v. Lawler, VI. N. J. Misc. 219.

The rule is equally well settled that the trial court cannot legally submit to the jury a theory of liability which is not alleged in the complaint.

In *Excelsior Electric Co. v. Sweet*, 59 N. J. L. 441, the testimony of the plaintiff was directed to negligence on the part of the defendant in a certain particular specified in the declaration; the testimony of the defendant tended to disprove this allegation. The trial judge in the charge permitted the jury to find negligence in another respect which was not alleged in the declaration. Judgment for plaintiff was reversed, and the court refused to permit an amendment setting up the second theory of alleged liability.

In *Partridge v. Woodland Steamboat Co.*, 66 N. J. L. 290, the declaration charged that the plaintiff, while a passenger on a boat of the defendant, was injured because of the negligence of the master and crew in making no effort to stop a fight that started among some other passengers; the trial court submitted to the jury the question as to whether the defendant was negligent because it failed to have on the boat a special officer for the protection of passengers. *Held*, that this was outside the issue raised by the complaint and judgment for plaintiff was reversed.

In *Blackmore v. Ellis*, 70 N. J. L. 264, *held* that in an action for assault and battery the defendant was not entitled to have the trial court charge the law of self-defence where the only plea was that of the general issue.

In *Murphy v. North Jersey Street Ry. Co.*, 71 N. J. L. 5, the court said: "The defendant is only required to prove that he was not guilty of the negligent act charged against him in the declaration." Judgment for plaintiff was reversed on the ground that the trial judge in the charge permitted the jury to find the defendant liable on a theory which was not alleged in the declaration.

In *Merklinger v. Lambert*, 76 N. J. L. 806, the jury rendered a verdict in favor of the defendant. On writ of error by the plaintiff it was urged that there was error in the charge for the reason that the trial court limited the right of recovery to the negligence alleged in the plaintiff's pleading. Judgment for the defendant was affirmed, the court saying:

"Having alleged a particular act of negligence, in order to maintain his action he (the plaintiff) must prove it as laid. * * * the trial judge made no error in charging the jury that the plaintiff was bound to prove the injuries were sustained in the manner alleged in the declaration."

(*Per contra* in the present case it was error for the trial judge to refuse to charge when so requested, that the right to recover was limited to the allegations of the complaint.)

In *Jordan v. Reed*, 77 N. J. L. 584, it was held:

"(a) Under the Practice Act, section 125, there can be permitted no substantial variance between the case declared upon and the case proven, but a recovery must be *secundum allegata et probata*;

"(b) when a declaration sets up a contract growing out of commercial paper and entered into by the defendant alone, proof of a contract of a different nature entered into by the defendant and others will not sustain the declaration, unamended, for thereby the defendant would be denied an opportunity to plead the nonjoinder in abatement. Neither can the declaration be amended, on error, to conform to the proofs, because thereby the defendant would be bound by a verdict upon a matter which he had not expected or intended to try."

In *Bierman v. Stiefel*, 82 N. J. L. 658, the plaintiff sued to recover for rent; the defendant claimed non-performance of a covenant to restore the premises after partial destruction by fire, and the plaintiff replied that the covenant was performed. At the trial plaintiff claimed that under the contract he was not bound to restore the premises as they were at the time of the fire, but only as they were at the time of the date of the demise; the trial court held with the defendant, but submitted to the jury the question of diligence on the part of the defendant in performing the covenant to repair. This was held to be error, as that question was not put in issue by the pleadings.

In *Duel v. Mansfield Plumbing Co.*, 86 N. J. L. 582, plaintiff sued to recover damages for injuries caused by the fall of a flagstone that was resting against a fence in the front yard of premises where the defendant was making a sewer connection. The trial court permitted the jury to find liability on the ground that the defendant was the owner or occupier of the land, and that the plaintiff was "invited" by the defendant to come upon the premises. Judgment was reversed on the ground that (italics ours): "*This error in the charge injuriously affected a substantial right of the appellant which was to have the case against it disposed of upon the issue that had been framed and tried*" (p. 586).

In *Gilliard v. Public Service Ry. Co.*, 94 N. J. L. 288, the complaint charged that the defendant was negligent in that its employees started a trolley car on which the plaintiff was a passenger while she was in the act of alighting therefrom. Evidence was offered to sustain that allegation and, in addition, other evidence was offered tending to show that the plaintiff was induced by a statement

of the conductor to attempt to alight from the car before it had come to a standstill. Both theories of liability were submitted to the consideration of the jury and when the trial court's attention was called to the second theory as not being within the complaint, he refused to correct the charge. The court held that the second theory was not within the allegations of the complaint and the judgment was accordingly reversed.

In *Drew v. Cregar*, 98 N. J. L. 150, it was held to be error for the trial court to submit to the jury an issue which was outside the pleadings and judgment for plaintiff was accordingly reversed.

In *Oaklyn v. Rulofson*, 98 N. J. L. 304, the court held (italics ours) :

"The finding of the jury was based altogether upon the determination of a question which was not within the issue raised by the pleadings; and it is entirely settled that the defendant is only required to meet the case laid against him in the plaintiff's complaint. If he does that, and shows by a preponderance of the evidence that the charge against him is not justified by the fact, he has relieved himself from responsibility so far as the action then being tried is concerned. *Excelsior Electric Co. v. Sweet*, 59 N. J. L. 441; *Murphy v. North Jersey Street Railway Co.*, 71 *Id.* 5. The defendant, in the present case, attempted to meet the charge laid in the complaint by evidence that a nuisance did not in fact exist at the time when the board took the action which has been above recited. He was entitled to the finding of the jury upon the question whether or not he had shown by a preponderance of the evidence that this charge was contrary to the fact; and, if they so found, he was entitled to their verdict. *The adjudication against him placed his liability upon a cause of ac-*

tion not set out in the complaint, one which the case did not present, and which, therefore, he was not required to meet.

"The judgment under review will be reversed."

In *Garibaldi v. Rubenstein*, 99 N. J. L. 223, the action was to recover a commission for the sale of real estate. The complaint alleged an agreement in writing authorizing the plaintiff to sell the premises and agreeing to pay a commission. Judgment for plaintiff was reversed on the ground that a theory of liability was submitted which was not within the complaint, the court saying :

"Various exceptions to the rulings and charge of the trial judge were noted as grounds of appeal during the trial. In the view that we take of the case, one exception only need be discussed, viz., exception to the judge's charge to the jury, in which he said: 'If you find that the principal (i. e., the defendant) deliberately absented himself, so that the broker had no means of meeting such principal in order to conclude the transaction involved in this case,' &c. * * * 'If the absence of the defendant in Europe did not prevent the plaintiff from completing the terms of his contract in finding a purchaser,' &c.

"This we think is error injurious to the defendant, for which the judgment must be reversed. The record shows the defendant was in Europe between August 5th and September 18th, 1922. This evidence was offered by the plaintiff. The issue thus submitted to the jury was not within the pleadings. It was not within the issue framed. It was not fairly or fully tried out in the case.

"It is a well-settled rule of practice in the trial of civil cases that the questions submitted to the jury should be within the issues raised and framed by the pleadings.

"It is error to submit to a jury questions which are not within the issues raised by the pleadings. *Excelsior Electric Co. v. Sweet*, 59 N. J. L. 441.

"This, it is said, is a cardinal rule, for the control of a trial court, applied and illustrated in many cases in our reports" (citing cases).

In *Lambert v. Trenton & Mercer Corp.*, 127 Atl. 674, the Supreme Court, on appeal, reversed a judgment for the plaintiff for an erroneous instruction to the jury on the subject of the duty required of a pedestrian while in the act of crossing a street. The court said (italics ours):

"This instruction was delivered in compliance with a request submitted by counsel of the plaintiff. That it had no relevance to the case which the jury was called upon to determine is apparent. That its tendency was to confuse the jury as to the real issue which the case presented is equally apparent. That the verdict of the jury may have resulted to some extent from their attempt to give effect in their finding to this erroneous instruction, we think, is equally clear; for it was their duty to be governed in their finding by the legal rules which the court instructed them were applicable to the case they were to consider. *Where an erroneous principle of law is laid down by a trial court, a verdict which may have been the result of the erroneous instruction cannot be supported, and this, we think, is equally true where a principle of law, which has no bearing upon the issues involved in a litigation, is stated by the trial court to the jury as a rule which should govern them in their consideration of the cause.*"

In *Decker v. Miller*, 139 Atl. 394, there were two allegations of negligence in the complaint. On an

appeal by the defendants from a judgment entered on a verdict in favor of the plaintiffs the court found that neither of the allegations in the complaint were sustained by the proof; and in reply to the claim by the plaintiffs that there was negligence in another respect, the court said:

"Without determining the legal sufficiency of this factor to constitute negligence or passing on its causal relation to the accident, it is sufficient to say that the case presented no issue based thereon."

So in the present case the legal principle stated by the trial court relating to the degree of care owed by the appellant to the plaintiff on the assumption that the plaintiff became a passenger in the appellant's automobile *without invitation* had no bearing whatever on the issue raised by the complaint.

We therefore submit that it was prejudicial error for the trial court to permit the jury to consider *two* rules of liability as to the appellant—first, that he may have been liable for lack of reasonable care, and second, that he may have been liable because of wanton and wilful injury.

It is true that in the course of the charge the trial court said: "I might say that there is no evidence whatsoever *as far as the court recollects*, of any wilful intentional injury, or purpose to injure her" (p. 199, lines 28-30).

But this expression of the court's view of the evidence was not equivalent to the withdrawal from the jury of any consideration of wanton or wilful injury—particularly when the court elsewhere in the charge told the jury: "It is always *your recollection* of the evidence that shall be your guide in determining the case" (p. 200, lines 33-35).

But even if the statement of the court's view of the evidence on the subject of wilful injury was controlling, nevertheless the court elsewhere permitted the jury to find Malayfsky negligent (even if the plaintiff was *not invited*), provided the jury concluded there was wanton and wilful conduct on the part of Malayfsky (p. 199, lines 1-35).

We have quoted this part of the charge at length, *supra*; and without repeating it, it is sufficient to point out that the court specifically permitted the jury to consider whether, as a matter of fact, Abram Malayfsky "invited this old lady, the plaintiff, to go riding with him" (p. 199, line 10); and again specifically directed the jury that if Malayfsky merely took the old lady riding "because she asked him to do so," then "if you believe that is the fact, he only owed her the duty of not wantonly and wilfully injuring her" (p. 199, lines 20-25).

The trial judge told the jury there were "two rules" that applied to appellant, depending on whether appellant "asked" the plaintiff or whether the plaintiff "asked" to go with appellant (p. 199, lines 33-36); the first theory was alleged in the complaint, but the second was not.

Counsel for plaintiff may argue (as he did in the Supreme Court) that the complaint does not state whether the plaintiff was either a licensee or an invitee; the inference is that *if* the complaint failed to specify on which theory the plaintiff claimed recovery, then it was proper to submit the appellant's liability on either theory. The answer is that the complaint *does* allege a specific theory, namely, that the plaintiff was a passenger in the appellant's automobile and that he "negligently operated" it. Under such allegations the only possible ground of recovery against the appellant would be on the theory that the plaintiff was an *invitee*, as the plaintiff could not recover as a licensee unless the conduct of the defendant was wilful and wanton.

II.

The erroneous action of the trial court in permitting the jury to consider a theory of liability against the appellant which was not charged in the complaint, was prejudicial.

Under the authorities cited in Point I, we have argued that the trial court has no legal right to submit to the jury a theory of liability which is not alleged in the complaint. Such action necessarily imports prejudice, as a defendant is only obliged to meet the allegations of the complaint.

As was said in *Duel v. Mansfield Plumbing Co.*, *supra*:

"This error in the charge injuriously affected a substantial right of the appellant which was to have the case against it disposed of upon the issue that had been framed and tried."

But in the present case this error was intensified by reason of the unusual course adopted by the trial court in permitting the jury to consider whether this appellant might be held answerable in damages on the theory that his conduct may have been wilful and wanton. It was sufficiently harmful to permit the jury to consider such charge in the absence of any allegation of the complaint on the subject; the evidence may have been sufficient to require the trial court to submit to the jury as a question of fact the one (and only) allegation in the complaint, to wit, that the defendant was negligent, but it fell far short of justifying the inference that the acts of the defendant, in the management of his automobile at the time of the accident, were such as to indicate wilful and wanton conduct on his part.

In *Haucke v. Beckman*, 96 N. J. L. 409, this court sustained an allowance of \$1,000 for punitive damages in a case where the plaintiff was knocked down (while upon private property), by an automobile driven by the defendant at a speed of from forty to fifty miles an hour, while going around a curve in the highway; after knocking the plaintiff down the defendant made no effort to stop, but continued at the same rate until the road was blocked by a hay wagon. He was then caught and arrested.

In *Rose v. Squires*, 101 N. J. L. 438, a judgment was reversed for error in the charge relating to the subject of whether the appellant was chargeable with wilful and wanton conduct in the operation of his automobile; one of the questions was whether the defendant had invited the plaintiff's intestate to ride in his automobile; if he had not done so, then he owed no duty except to abstain from acts wilfully injurious. The evidence was that the defendant was driving at a speed of forty-five miles an hour, as he passed the intersection of another street, notwithstanding that one or more of the occupants of the car called his attention to the speed.

The court, after citing the evidence, said:

"Then you may conclude that the alleged reckless driving was the result of an intent, and intent without just cause or excuse."

The evidence in the present case does not justify the inference of wilful and wanton conduct within the principles of these decisions. Granting that we must view the evidence in the light most favorable to the plaintiff, we submit that there is nothing therein which would justify the trial court in submitting to the jury the question whether this

appellant wilfully and wantonly caused the injuries, even if the complaint had so alleged.

The plaintiff testified that the appellant was driving, but aside from that fact, said: "I don't know anything" about the accident. "I didn't see anything" (p. 20, lines 20-35).

The appellant was driving alone in the front seat and the plaintiff, with two girls, was riding in the rear seat (p. 24, line 35, to p. 25, line 12).

Plaintiff did not notice what the appellant was doing before or at the time of the accident (p. 25, lines 20-35).

At some time on the trip and prior to the accident the appellant was talking with one of the girls in the back seat, but the plaintiff could not say how long this was prior to the accident (p. 30, lines 10-35).

Annie Malayfsky, a daughter of the defendant, was sworn as a witness for the plaintiff and described the accident as follows:

"We were coming out of Hague Street and I happened to look to the left and I saw a car about nearly a block away. My father turned the corner, around the turn, and when we were on the track, we were going south, the other car hit us" (p. 69, lines 10-20).

This witness said she was sitting in the front seat with her father and that the car in which they were riding was going very slow, "much too slow to suit me" (p. 74, line 25). The other car was going "quite fast" (p. 74, line 35).

The front of the other car struck appellant's car and "whirled it around" (p. 75, line 15).

The principal witness for the plaintiff as to the circumstances of the accident was Jacob Ackebout, the co-defendant. He said he was driving

north on the Paterson Plank Road near Hague Street in Union City. "I had struck almost the corner when a car shot out of Hague Street" (p. 35, line 15).

The car came right around the corner—"a short turn" and there was a collision (p. 35, lines 15-32).

On the question of the speed of the other car, he testified:

"Q. How fast was the car coming out that hit you—coming out of Hague Street? A. Like a shot out of a gun.

Q. How fast in your opinion? A. That I couldn't very well say how fast.

Q. Was it going fast? A. It was" (p. 35, lines 20-25).

As he approached the corner he said that he sounded his horn (p. 39, lines 18-20). After blowing his horn the car shot out. "I jammed on the brakes and he struck me in the left front" (p. 40, line 25). He heard no other horn blown except his own (p. 41, line 35).

On cross-examination he was pressed as to his estimate of the rate of speed of appellant's car, but all he could say was that it was "very fast." He could not state whether it was more or less than thirty miles an hour (p. 56, lines 20-25).

There was very substantial contradiction of Ackenbout's testimony, but assuming it be truthful for the purpose of the argument, *there is nothing whatever to show wilful and wanton conduct on the part of the appellant.* In this respect the case is not as strong for the plaintiff as *Rose v. Squires, supra*, wherein it was held by the Supreme Court that there was nothing "to warrant the court in permitting the jury to infer malicious intent from the alleged reckless driving."

The action of the trial court in that case, which was found erroneous on appeal, is similar to the action of the trial court in the present case (with the addition that here there is not only no proof, but not even an allegation of wilful and wanton conduct).

The Supreme Court, in its opinion, concedes that the requests to charge were "pertinent," but held that they were "substantially charged in the general instructions," and that, therefore, the substantial rights of the appellant were not "injuriously affected" (p. 210, line 20, to p. 211, line 10).

We respectfully submit that the fallacy in this conclusion is the assumption that the jury were not misled by the reference on the part of the trial court to the conduct of the defendant. We have shown in the foregoing summary of the evidence that there was no basis for any claim that the appellant's conduct was wilful and wanton; on the contrary, the most that could be said is that it was a question of fact whether he was chargeable with ordinary negligence. Notwithstanding this posture of the proof, a large part of the charge of the trial court was taken up with a discussion of the question whether the appellant did or did not "wantonly and wilfully" injure the plaintiff.

If wilful and wanton conduct was not an issue under the pleadings (and obviously it was not, and apparently the Supreme Court agrees that it was not), and likewise if there was no proof of such conduct, then what possible occasion was there for the trial judge to discuss wilful and wanton conduct? It is impossible to ascertain the psychological reaction on the jury of the remarks of the trial judge, but we submit that it is a very violent assumption to take it for granted that after the trial judge had discussed at length the question of wilful

and wanton conduct the jury can be said to have assumed that this point had nothing to do with the case. It is true that the trial judge said in effect that so far as he was concerned, he did not see any evidence of "any wilful, intentional injury, or purpose to injure her"—the words used being, "as far as the court recollects" (p. 199, line 29). But the jury were later (and properly) told: "It is always your recollection of the evidence that shall be your guide in determining the case" (p. 200, lines 30-33). Hence, the natural query of the jury would be—if there is no question as to wilful conduct, why should the trial judge discuss it or lay down the legal rules by which the jury were to determine whether the conduct of Malayfsky was wilful? To put it another way, the court told the jury that it was always *their* recollection of the evidence that was to be their "guide" in determining the case; he said that according to *his* recollection there was no evidence of wilful or wanton injury—but in the same breath he explained in detail the legal rules by which the question of wilful or wanton conduct was to be determined; and, finally, he refused to comply with the appellant's request to specifically withdraw from the jury the question of wilful and wanton conduct.

Counsel for plaintiff may argue (as he did in the Supreme Court) that the charge of the court (quoted *supra*) was merely a definition of the duty owed to a licensee as distinguished from the duty owed to an invitee and that the distinction stated in this part of the charge was given so that the jury could properly determine whether the plaintiff was an invitee or a licensee. But this argument evades the real point, namely, that under the pleadings and the proofs the plaintiff was not en-

titled to recover as against the appellant *unless* the plaintiff was an invitee; and this for two reasons:

(a) There was no claim in the complaint that the plaintiff was anything but an invitee;

(b) There was no proof of wilful and wanton conduct on the part of the appellant;

and, hence, the appellant, if liable at all to the plaintiff would be liable *only* in the event that plaintiff was an invitee and not a licensee. Hence, the discussion in the charge of the court was misleading for the reason that the question whether plaintiff was a licensee or an invitee had nothing to do with the case under either the pleadings or the proofs.

III.

Summary.

We, therefore, have a case where the jury were permitted to find liability on the part of the appellant on a theory which was not alleged in the complaint, which had no support in the evidence, and which was first introduced into the case by the charge of the trial court in the face of specific requests that such theory be eliminated from the consideration of the jury.

For these reasons the judgment of the Supreme Court affirming the judgment of the Hudson County Court of Common Pleas against appellant should be reversed and a new trial ordered.

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