

New Jersey Court of Errors and Appeals

RICHARD P. JENNINGS,

Plaintiff-Respondent,

vs.

JOSEPH OKIN,

Defendant-Appellant.

*Action at
Law.*

*On Appeal
from Supreme
Court.*

Brief for Respondent—Plaintiff Below.

The statement of facts presented by the Counsel for the plaintiff in error, is substantially accurate and requires only such incidental comment as appears in the body of the brief.

I.

The trial judge properly denied the motion for a non-suit and the motion to direct a verdict.

The plaintiff in error bases his allegations of error on this branch of the case upon the alternative proposition;

FIRST. That the plaintiff has failed to connect Jacob Okin, the driver of the automobile, with the defendant as his agent; and

SECOND. That if such agency existed Jacob Okin had deviated from it at the time of the accident. (Brief, p. 3).

It is conceded in the case that Jacob Okin, the driver of the automobile, started out in the automobile on the evening of the accident as the agent of his father.

Indeed, the father, who is the defendant below, expressly testifies that he sent his son Jacob out with the car about his—the defendant's—business. The undisputed evidence in this regard is that the defendant was a builder, constructing a theater on Springfield Avenue, Newark; that his son Jacob was his superintendent in and about the work, and generally in and about all the defendant's work, and in control thereof during the father's absence; and that on the night of the accident, at about eight o'clock, the defendant gave his son directions concerning which the defendant testified in the following language:

“Well, I told him to go over to the Majestic Theater and see if the lights is burning, and come home.”

(case, p. 135, ll. 1-3).

Later the defendant testified that he authorized the son to take the automobile for this purpose, (case, p. 135, ll. 13-16).

This evidence clearly establishes that in the inception of the use of the automobile on the evening of the accident, the driver, Jacob, was the agent of the defendant Joseph Okin. It seems to us entirely unnecessary therefore, to argue further the proposition as to whether the son Jacob Okin, was the agent of the defendant, which is the first ground alleged as error.

We then come to the second ground, namely, “that if such agency existed Jacob had deviated from it at the time of the accident.”

It is not necessary to make lengthy citations from the evidence on this point. Accepting the most favorable interpretation which can be put upon that evidence for the defendant, we have the following state of facts:

The agent, Jacob Okin, leaving home in his father's automobile, upon his father's business, is

next shown under the evidence to have been at the Odeon Theater on Springfield Avenue, across the street from the Majestic Theater then under construction, the lights of which, under the defendant's theory, he had been instructed to examine. He appeared at the Odeon Theater "around eight o'clock" (case, p. 139, l. 9), and remained there "during most of the evening," (case, p. 139, l. 18). During the evening he and the witness, Steadman, who met him that evening, were "in and out; we were in the theater and then in the cafe next door" (case, p. 139, l. 21). The show was over about ten thirty. All of these facts were proved by the defendant's witness, Steadman, who was then asked:

"Q And had Jacob Okin been with you witnessing Merlin's performance at the time you were there? A He was not with me; I think he was in the theater; I don't know positively."

This evidence then fixes the fact that Jacob Okin, from eight until ten thirty, was somewhere in the neighborhood of the Odeon Theater which was owned by his father, although under lease to others (case, p. 148-150). The Odeon Theater is directly across Springfield Avenue from the Majestic Theater, at which, according to the defendant, his son Jacob was to inspect the lights (case, p. 87, l. 33; p. 88, l. 13). No proof whatever is made by the defendant as to the lights. So far as the record shows, the lights may have been out and have required attention; they may have been short of oil and required the procurement of fresh oil; they may have been broken and new lights required to be procured; they may have been flickering and uncertain so as to require Jacob Okin, in the full performance of his duty, to go, as the witness Steadman has testified, "in and out" for the purpose of watching and tending them. In the

absence of any proof on the part of the defendant that the son Jacob, had completed the task which he had been directed to perform, his duty cannot be presumed to have terminated either at ten thirty or at any other hour. In this connection we desire particularly to call attention to the fact that the duty of the plaintiff below, under the cases, was simply to prove that the son took the car as his father's agent. Having proven that, the burden of proof shifted and the duty was upon the defendant to demonstrate the termination of the agency. In the absence of proof as to the full performance of Jacob's duty in regard to the lights prior to ten thirty, the defendant can argue nothing through the mere lapse of time between eight o'clock and ten thirty.

The further proof relied on to show deviation from the agency is that Jacob Okin at ten thirty, instead of taking, as is alleged, the most direct route home and traveling there in lonely splendor, took into the automobile two friends, one of whom was an actor in the Odeon Theatre, owned by his father but leased, who desired to go to the Park Place Station of the Hudson & Manhattan Railroad Company. It is claimed that it was the intention of Jacob Okin to take these friends to the station and that the route to the station required a deviation north from Market Street, whereas the route home required a deviation south from Market Street, and that therefore the presumed intention of Jacob Okin to deviate to the north, *although unfulfilled at the time of the accident*, constituted a deviation from his agency.

For the purposes of this argument we are prepared to treat the matter as though it had been clearly proven that Jacob Okin intended, when he reached Broad Street, to turn North to the Park Place Station. The fact remains, however, that under the proofs in the case—proven out of the

mouth of the defendant himself, (case p. 137), the first asphalt pavement on any street running South from Market Street to Spruce, was Halsey Street. Now the accident occurred on Market Street before reaching Halsey Street. It is not seriously contended by the plaintiff in error that Jacob Okin would not have been acting fully within the scope of his agency if he had gone down Market Street with the intention of turning South on Halsey. He therefore is reduced to the proposition that he has proven a deviation from the agency of Jacob Okin, because, forsooth of his presumption that Jacob Okin intended to turn North instead of South at a point he had not yet reached. The mere statement of this situation concedes that Jacob Okin was, when the accident happened, at a place where he had a perfect right to be. The objection urged by plaintiff in error becomes then that his agency to be at the place he was at the time he was, is completely vitiated by the alleged fact that he intended a moment later to go somewhere that he would have no right to go. This proposition, we think, is so thoroughly untenable and absurd that we are content to rest our position on its mere statement. The discussion of the relation of intentions to pavements is more properly theological than legal.

We believe that our case can safely be rested upon this narrowest possible interpretation of our claim and without extended citation of authorities: *There had been no deviation at the time of the occurrence of the accident.* Jacob was required to follow no particular route in coming or going; his ultimate destination was his home, and his purpose in driving to Park Place Station, if we admit this to have been his intention, was purely incidental and to accommodate his friends. All the authorities are unanimous in holding that such circumstances do not constitute a deviation.

In *Jones v. Weigand*, 119 N. Y. Sup. 441, the driver was sent to a funeral from Manhattan Avenue, New York, into Queens County. On his return, instead of going directly to the stable, he deviated considerably from his route and called upon a friend. While starting his team after the call, he injured a child. It was held that the master was liable.

“But mere disregard of instructions or deviation from the line of his duty does not relieve the master of responsibility—the test is whether the act was done while the servant was doing his master’s work, no matter how irregularly or with what disregard of instructions. If the servant, for purposes of his own, departs from the line of his duty, so that for the time being his acts constitute an abandonment of his service, the master is not liable; but to constitute an abandonment the servant must be serving his own or some other person’s purposes, wholly independent of his master’s business. It seems to me that the making of the circuitous route was at the most a deviation, not an abandonment of the service.”

In *Sleath v. Wilson*, 9 Carr. & Payne, 607, a servant set his master down in Stamford Street, London, and was directed to put his vehicle in Castle Street, Leicester Square. Instead, he went to deliver a parcel of his own in another part of the city and in returning, injured a pedestrian. It was held the master was liable.

Erskine, J. “Whenever the master has intrusted the servant with the control of the carriage, it is no answer that the servant acted improperly in the management of it—the master in such case will be liable and the ground is, that he has put it in the servant’s

power to mismanage the carriage by intrusting him with it, and in this case, I am of opinion that the servant was acting in the course of his employment, and till he had deposited the carriage in the Red Lion Stables in Castle Street, Leicester Square, the defendant was liable for any injury which might be committed through his negligence."

Whatman v. Pearson, L. R. 3 C. P. 422.

Joel v. Morrison, 6 Carr. & Payne, 501.

Williams v. Koehler, 58 N. Y. Sup. 863.

Quinn v. Power, 87 N. Y. 535.

Hayes v. Wilkins, 194 Mass., 223.

Bourne v. Whitman, 209 Mass., 155, 173.

Ritchie v. Waller, 28 Atl. Rep. (Conn.), 29.

McKeever v. Ratcliffe, 218 Mass., 17.

Mitchell v. Crassweller, 13 C. B., 237.

LaBatt's Master & Servant, second edition, Vol. 6, Sec. 2294, p. 6936-6946.

Some recent decisions upon the point here at issue in which the master has been held liable, are:

Smith v. Jordan, 211 Mass., 269.

Stowe v. Morris, 144 S. W., 52 (Ken.)

Davis v. Littlefield, 81 S. E., 487.

Dailey v. Maxwell, 133 S. W., 351.

An effort is made by counsel for the plaintiff in error to bring the case within *Doran v. Thomsen*, 47 Vr., 754. In our opinion, it falls rather within *Missell v. Hayes*, 1 Gummere, 384. In the *Doran* case the court held that the owner was not liable because the only proof of agency was proof of ownership, and the defendant's daughter, who was driving the car, was using it without express permission solely for her own pleasure and had as her guests her own friends. In the *Missell* case the court held that since the car had been purchased for the general pleasure of the family and the son, who was driving it had in the car with him mem-

bers of the family as well as friends, he was the agent of the father even though he was primarily using the car for an errand personal to himself.

There is proof in the record in this case that Mr. Okin's car was used generally for pleasure as well as business. The extremely strained and narrow interpretation which counsel for plaintiff in error endeavors to put upon this evidence is, of course, unsustainable. It is diametrically opposite to the interpretation placed on the evidence by the Trial Judge who heard it. But even though the car were not used for pleasure at all, the fact that the son, who was the father's business superintendent, took it out on the father's business would bring it within the reasoning, if not within the facts, of the Missell case. It certainly cannot be brought within the facts of the Doran case. In the Missell case this Court expressly held that where any presumption of agency was in the case other than the mere fact of the defendant's ownership, the question was one for the jury. Certainly in the case at bar the Trial Judge had no option but to refuse the motions for non-suit and direction.

II.

The Trial Judge properly excluded the conversation between Jacob Okin and the defendant's witness, Steadman.

At page 141, line 18, the following question was asked Steadman on direct examination: "What did Mr. Okin say to you when he invited you to get into the automobile?" This question was objected to by plaintiff's counsel on the following grounds: First, that the conversation was not part of the *res gestae*, and second, that "the question whether Okin, Jr., was the agent of his father or

not is entirely independent of any statements that Okin, Jr., may have made; he cannot defeat or make his agency by anything he says" (case, p. 141, l. 31, to p. 142, l. 12. The Trial Court ruled out the evidence upon the latter ground, giving his reasons, which are to be found in the case, pages 142-143. This ruling was entirely correct under the authorities.

King v. Atlantic City Gas Co., 70 N. J. L., 679, at 681.

In that case Justice Garrison for the Court of Errors and Appeals said:

"The illustrative cases cited in that opinion show that where one authorizes another to speak for him he may be confronted by testimony as to what his representative said within the scope of his authority. But where the employment is purely mechanical, the master is not bound by what his servant may choose to say while at work."

In *Ryle v. Manchester Building & Loan Ass'n.*, 74 N. J. Law, 840-845, the Court said:

"Furthermore, it is settled law with us that the declarations of the person alleged to be the agent, although accompanying his acts, are not competent to establish either the fact or the extent of the authority."

Huebener v. Erie R. R. Co., 69 N. J. L., 327.

Dowden v. Cryder, 55 N. J. L., 329-332.

Standard Oil Co., v. Linol Co., 75 N. J. L., 294.

Farmers Bank v. Butchers Bank, 16 N. Y., 134.

Apart from the authorities, however, the admission or rejection of the evidence was absolutely immaterial for the reasons argued under the preceding point in this brief, since the intentions of the agent, Okin, were absolutely valueless to the

defendant in the circumstances under which the accident occurred. Certainly if his intentions unperformed could not affect his agency, his expression of those intentions could not help the defendant.

III.

The learned Trial Judge properly charged the jury.

Counsel for the plaintiff in error particularly urges the denial of his third request to charge as a reason for reversal; this third request we repeat here: "An act done by an agent while engaged in the master's work, may be entirely disconnected therefrom, done not as a means or for the purpose of performing that work but solely for the accomplishment of the independent purpose of the agent. Such an act is not, as a matter of fact or as a matter of law, the act of the master."

In support of this request the case of *Evers v. Krouse*, 41 Vr., 653, was cited, and also the case of *Doran v. Thomsen*, 47 Vr., 754.

In the *Evers* case the identical language used in the request to charge is used with the single exception that the last phrase of the first sentence reads, "but solely for the accomplishment of the independent *malicious* or *mischievous* purpose of the servant." It is true that Mr. Justice Voorhees in *Doran v. Thomsen*, interpreted *Evers v. Krouse* as not requiring that the purpose be malicious or mischievous. We submit, however, that this is not a proper interpretation of the *Evers* case. The *Evers* case was one where a boy having a right to use a hose for sprinkling a lawn, mischievously turned it on a horse, causing a runaway. After using the language quoted in the request to charge,

and citing and explaining various cases, the present Chief Justice, speaking for this court, said:

"Turning again to the case now under review. If the act of the defendant's son, in throwing water upon the plaintiff's horse, was not the result of his careless handling of the garden hose while sprinkling his father's lawn, but was deliberately done by him, purely out of a spirit of mischief, for the purpose of frightening the animal, the fact that he used the tool supplied to him for the doing of his father's work for the accomplishment of his own mischievous purpose, did not make it an act within the scope of his employment and did not render the defendant liable for the injury resulting therefrom." (41 Vr., at 656).

As we understand this ruling it means that the method of employing the master's tools by the agent, must contain some such element as malice or mischief, thus removing the use so entirely outside the scope of the intended agency as to in fact, absolutely, for the time being, terminate the agency and render the agent practically a trespasser *ab initio*. That this is the correct view we think is strengthened by the fact that the Evers case is based largely on *Bittle v. Camden & Atlantic Railroad Co.*, 26 Vr., 615. In this last cited case, this Court, speaking through Mr. Justice Lippincott, held that even though a locomotive engineer blew his whistle deliberately and maliciously, in a manner to frighten a horse, the railroad company was liable for the injury occasioned by frightening the horse, provided the rules of the railroad or the statute required some use of the whistle at the point where the malicious use occurred. In the Bittle case the Court said that if the engineer had thrown coal at the horse to frighten it, the company would not have been liable, but if he per-

formed an act which was a part of his duty, but through malice or otherwise caused an injury, the company would be liable. It seems to us to follow that the whole language by the Chief Justice in the Evers case, must be used, namely, that the act must be done "solely for the accomplishment of the independent malicious or mischievous purpose of the servant." We believe the omission of the comma between the word "independent" and the word "malicious" in the Evers case, was advised and that the interpretation placed thereon in the case of *Doran v. Thomsen*, was incorrect.

This view is further strengthened by the case of *Aycrigg's Executor v. New York & Erie Railroad Company*, 1 Vr., 460. In this case the court stated that if the agent, who was the master of a ferry boat, had left his dock before receiving the signal fixed by the rules for his leaving, and then had deviated from the route prescribed for him to take, the company would have been exempt from obligation, but that his deviation, if he left the dock after receiving the proper signal, would not have relieved the company. In other words, the whole use of the master's tools must be independent and solely to serve his private purpose, in order to relieve the master. The mere serving of an independent purpose, in connection with an authorized use of the master's tools, does not relieve the master.

As was held in *Jones v. Weigand*, *supra*, there must be an entire abandonment as distinguished from a deviation to terminate an agency.

If this view of the law be correct the request was properly denied for the reason given by the Trial Court, (case, p. 160, ll. 24-29):

"The reason why I deny that proposition is this: That it seems to me that work done by an agent for the accomplishment of an inde-

pendent purpose of the agent, can hardly be called the master's work. The word 'independent' must mean aside from the agent's duty to his master."

The request then becomes a request to charge an incorrect proposition of law.

Even, however, were the statement of law correct, it was not necessary for the Trial Court to charge it, since, as we have shown above, the agent at the time of the accident, whatever his future intentions may have been, was not then serving any independent purpose of his own.

From another viewpoint, even though the Judge were mistaken, strictly speaking, in refusing the third request, nevertheless the jury were properly instructed with respect to the law upon the master's liability for the acts of his servant. The language used by the Trial Judge on this charge on this point, is almost identical with that used in the case of *Holler v. Ross*, 39 Vr., 324, which has been repeatedly cited with approval; consequently, if the Trial Court did err in refusing the request, the error is entirely harmless for the jury were properly instructed upon all the law necessary for their decision.

The plaintiff in error objects to the failure of the Trial Court to charge the sixteenth request, and to the language used in denying the fourteenth, fifteenth and sixteenth. All of these charges related to presumptions from the facts and the inferences to be drawn from them. This Court, in *Bruch v. Carter*, 3 Vr., 554 at 565, held:

"The Judge has an undoubted right to make such comments upon the testimony as he thinks necessary or proper for the direction of the jury. He may intimate an opinion as to the weight of evidence. He may direct the attention of the jury to any matter in the cause

affecting the credibility of a witness. But whether he will exercise all or any of these rights in a given case, and to what extent, depends entirely upon his judicial discretion. Even if the Judge, therefore, in the present case, was mistaken in the exercise of this discretion, as in my opinion he clearly was not, such mistake cannot be assigned for error."

Foley vs. Loughran, 60 N. J. Law, 464, Court of Errors and Appeals.

Delaware & Lackawanna Railroad Co. vs. Toffey, 38 N. J. Law, 525.

The Trial Judge correctly refused the defendant's motion for a mistrial.

Counsel for the plaintiff-in-error assigns as reason for reversal and argues at length the failure of the Trial Court to order a mistrial because of the fact that a witness who was asked to narrate a conversation held with the defendant began his reply with the words, "Well, he said that the insurance company wanted him to say;" and because in questioning another witness as to the same conversation plaintiff's counsel instructed the witness to omit "any reference to any insurance company." In connection with the argument in his brief, counsel for the plaintiff in error makes a savage attack on our professional ethics in this connection.

The record shows clearly that counsel for the plaintiff below, so far from making any effort to get improper evidence into the record, consented instantly to a motion to strike out the testimony here objected to, and further (case, p. 112, l. 8, *et seq.*), voluntarily and without waiting for objection, stopped his own witness when that witness volunteered remarks about a proposed settlement.

On the one hand, counsel is accused "by a series of subtle and unfair questions" of having endeavored to drag the insurance matter into the record. The "subtle and unfair questions" to which counsel refers in his brief were, first, a general inquiry as to whether the witness had ever had a conversation with the defendant relating to the accident; and, second, "Now what did Mr. Okin say?" On the other hand, objection is made because counsel particularly instructed a subsequent witness to omit "any reference to any insurance company."

In the very case upon which counsel for the plaintiff in error particularly relies, *Simpson v. Foundation Company*, 95 N. E., 11; 201 N. Y., 479, the New York Court said (201 N. Y., p. 490), "A prompt withdrawal of the evidence by the counsel for the plaintiff would go farther toward correcting the evil than any motion made by the attorney for the defendant." Of his own volition, then, counsel for the plaintiff below did all that could be expected of him with an unexpected answer.

But we do not care to rest our case solely upon the absolute good faith of the conduct of the trial in this regard. We believe that the New Jersey rule is completely contrary to the New York and properly so.

Without extended citation of the cases, we believe that the opinion of this Court in *Bradley v. D. E. Cleary & Co.*, 90 Atl. Rep., 1015, is absolutely on all fours with the situation in this case. Both the Trial Court and counsel for the plaintiff below in this case did every thing possible to prevent undue influence on the minds of the jury from any fact not material to the issue, and as this court said in the *Bradley* case (p. 1016):

"The recapitulation of the trial proceedings, as they occurred is persuasive that the court scrupulously excluded from the trial record

every attempt (if any were made), on the part of the plaintiff, to introduce in the evidence before the jury any reference whatever to the defendant's alleged insurance.

It is apparent that the Judge did not fail to exercise at least a reasonable degree of care and watchfulness in keeping and eliminating from the testimony all allusion, either by plaintiff's counsel or witness, to the defendant's insurance against accident. To have granted defendant's motion from a mis-trial, and thus to have vitiated and rendered abortive this long and important trial, would have been, in our opinion, an unwarranted exercise of judicial power under the circumstances."

The other New Jersey cases cited in the brief of plaintiff in error to our mind directly sustain the propriety of the proceedings at the trial.

There is also to be borne in mind here the fact that the Supreme Court, by its decision in this case on rule to show cause, has expressly affirmed the verdict as free from any indication of prejudice on the part of the jury. It therefore cannot be here argued with any propriety that the defendant below was injured by references to insurance.

There is another ground, however, upon which we believe, if there were no decesions, the record discloses no error. The witness Lehman, who first injected the insurance company matter into the case, was sworn, as is the practice, to tell the truth, *the whole truth*, and nothing but the truth. Certainly it cannot be contended that in response to a question as to a conversation between the defendant and himself, the witness, without specific instructions, should have omitted any essential part of that conversation. Nor do we conceive that it is any part of the duty of counsel in preparing a case for trial to advise a witness to omit any

part of a conversation about which he is asked to testify. It is true in this case, undoubtedly, that if plaintiff's counsel had framed his question, "What did Mr. Okin say about instructing his son to take the car on the night of the accident?" the witness might properly have omitted the alleged harmful part of his answer, but probably if counsel had so framed his question, counsel for the defendant would have objected on the ground that the question was leading. It seems to us that it would be a dangerous rule for any court to lay down that a mistrial must be granted because a witness in truthfully narrating a conversation material to the issue refers to matters not in the strictest sense evidential. Such a rule can result only in conferring upon counsel the duty of advising witnesses what part of their recollection of a particular occurrence they shall omit to narrate, and we can conceive that some counsel might be quite as scrupulous in barring out evidence which might lead to a non-suit as evidence which might lead to a mistrial. The matter must remain where our courts have put it—in the discretion of the Trial Judge, who alone is in a position to judge whether intentionally or inadvertently serious harm has been wrought to either party. As the Trial Judge said on the motion that the Court direct a mistrial (case, p. 129, ll. 14-17), "I do not think this jury is going to be misled by anything that has been done or said on the subject of insurance. It is not in the case at all."

We cannot believe that this court will disturb a fair and just verdict and lay down a doctrine so dangerous as that contended for by the plaintiff in error.

For the reasons stated we submit the judgment of the Supreme Court should be affirmed.

FORT & FORT,
Attorneys for Respondent.

JEHIEL G. SHIPMAN,
FRANKLIN W. FORT,
Of Counsel.

New Jersey Court of Errors and Appeals

RICHARD P. JENNINGS,

Plaintiff-Appellee,

vs.

JOSEPH OKIN,

Defendant-Appellant.

Action-at-law.

*On Appeal
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Brief for Defendant.

This case was tried in Essex County and resulted in the large verdict of \$7,500 for the plaintiff. A rule to show cause was allowed by the trial judge, reserving the points of law raised at the trial, pursuant to rule 129 of the Supreme Court. The rule to show cause was argued at the June term last past, of the Supreme Court, and was discharged. The points of law now before the court, involve the correctness of the rulings of the trial judge, upon the defendant's motions for a mistrial, a non-suit, and the direction of a verdict in his favor. Also upon certain questions of evidence and upon his refusal to charge the jury as requested by the defendant.

The case involves the defendant's liability for injuries sustained by the plaintiff, as the result of a collision between him and the defendant's automobile, which occurred January 9th, 1914, about eleven o'clock at night, on Market Street, Newark, a little below the intersection of Washington Street, with the southerly side of Market Street. Market Street runs east and west. Washington Street north and south. The automobile was going east toward Broad Street on the right

hand side of the street between the curb and the car track. The plaintiff was engaged in crossing Market Street and was headed in a northerly direction, when the accident occurred.

The automobile, at the time of the accident, was neither driven nor occupied by the defendant, but, on the contrary, was being driven by his son, Jacob Okin, who was accompanied by his friends, not known to the defendant. Jacob Okin had died prior to the time when the case was tried. The defendant had no knowledge of the accident until after it had happened.

I.

The learned Trial Judge erred in refusing the defendant's motion for a non suit and for the direction of a verdict.

In order to hold the defendant liable for his injuries, it was necessary for the plaintiff to prove not only that the automobile in question belonged to the defendant, but that at the time and place of the accident it was being operated for him by his son Jacob.

See

Aycriggs, Exr. v. N. Y. & Erie R. R., 1 Vr., 460.

Holler v. Ross, 39 Vr., 324.

Evers v. Krouse, 41 Vr., 653.

Doran v. Thomsen, 47 Vr., 54.

The question of the agency of Jacob Okin to bind the defendant, was one of the main issues raised in the case.

The complaint, after alleging that the defendant operated the car by his agent, alleged (p. 3, l. 37):

“The driver of the car was about the said defendant's business and was authorized to drive said automobile at the said time by defendant.”

This was specifically denied by the answer (p. 5, l. 30). In addition the third defense set up in the answer was (p. 6, l. 17) that "the defendant was not present at the time of the occurrence of the accident, nor were his servants or agents present; neither the defendant nor his servants or agents caused the said accident, nor did they contribute in any extent whatever to the occurrence of the said accident."

This issue having been interjected into the case by the plaintiff's own complaint, he sought to meet it by proving agency through an alleged admission of the defendant at a conversation had between him and the plaintiff after the accident. Not only did this conversation, standing by itself, fail to prove any such situation, but the other evidence in the case, taken in connection with it, completely negated, as we contend, any question of agency between the son and his father at the time of the accident.

Accordingly, the defendant, at the conclusion of the plaintiff's case, moved for a non-suit, and at the conclusion of the entire case moved for the direction of a verdict in his favor upon the grounds that the plaintiff had failed to connect Jacob Okin with the defendant as his agent (p. 129, l. 28; p. 147, l. 32), and that if such agency existed, Jacob had deviated from it at the time of the accident (p. 148, l. 8).

The defendant is a contractor and builder. He owned a theatre building on Springfield avenue, Newark, known as the Odeon. This theatre he had constructed during the years 1909 or 1910, and had completed it in December of 1910. On the 25th of May, 1910, while this theatre was still building, he had leased it to the Palher Realty Company. This lease is still in operation and does not expire by its terms until December 1st, 1920 (see stipu-

lation, pp. 172-174). The Palher Realty Co. took possession of the building upon its completion in December, 1910, and have ever since been in possession, control and management of the theatre, and the plaintiff has had nothing whatever to do with it except collect the rent (p. 149, ll. 1-16; p. 173).

At the time of the accident the defendant was engaged in constructing another theatre building which was also located on Springfield avenue on the opposite side of the street from the Odeon Theatre. This theatre then under construction was known as the Majestic, but has since been named Loewe's (p. 133, ll. 20-30). At the time of the accident there were piles of brick and dirt in front of the Majestic, and under the requirements of the city ordinance the defendant, as the contractor, was required to have these obstructions lighted at night (p. 133, ll. 30-40).

The accident happened about eleven o'clock at night on Market street, near Washington. The scene of the accident is about six blocks from the Odeon and Majestic Theatres, and a distance of from one thousand to fifteen hundred feet (p. 124, l. 35 to p. 126, l. 24). The defendant lives at the corner of Spruce and Monmouth streets, in Newark, which is west and south of the Odeon and Majestic Theatres. The most direct route from the theatres to his house was up or west on Springfield avenue, to West street, thence south through West street to Monmouth street (pp. 132 and 133, l. 10). West street is paved with cobble stones (p. 137, l. 2). Going down or east on Springfield avenue the nearest cross street containing a smooth macadam, leading southerly and towards the defendant's home, was High street, which is west of the Court House, and some five blocks west of the place of the accident (p. 125).

About eight o'clock in the evening of the night of the accident, the defendant instructed his son, Jacob, to go to the Majestic Theatre to see if the lights which had been left burning upon the obstructions in the street in front of the building, were burning, and to come home. His testimony was (p. 134, l. 30):

“Q When previous to that had you seen Jacob that evening? A About eight o'clock.

Q Where? A At the house.

Q Did Jacob live with you on Spruce street? A Yes, sir.

Q How old a man was he? A Twenty-one.

Q Had you given him any directions that evening with reference to these lights down here at the theatre? A Yes, sir.

Q What had you told him to do? A Well, I told him to go over to the Majestic Theatre and see if the lights is burning, and come home.

Q What lights did you refer to? A The street lights.

Q Out on these obstructions? A Yes, sir.

Q And what time of night was that? A About eight o'clock.

Q And did you permit him to perform that errand by going in the automobile? A Not without my permission.

Q Well, you do not understand me. When you told him to go down and look at the lights did you permit him to ride down in the automobile? A Yes, sir.

Q Was Jacob ever employed by you to run your automobile? A No, sir.

Q Did you have any paid chauffeur? A I did have some of the time.

Q Who was it? A Well, I don't remember.

Q Well, it was not Jacob? A No.

Q It was not any of your sons? A No.

Q Do you run the car yourself? A Yes.

Q And you did in January, 1914? A Yes.

Q Now, you had no knowledge of the accident at all until after it was all over? A No, sir."

He also testified (p. 135, l. 36).

"Q Did you authorize Jacob in the use of the automobile that night to do anything else but go to the Majestic and see if the lights were burning and come home? A Only to go to the Majestic.

Q For what purpose? A To see if the light is burning."

This was the extent of Jacob's authority in the use of the car that night. He was to go to the Majestic theatre, see if the lights in the street were burning, and come home.

The normal way for him to come home would have been to have gone west on Springfield avenue to West street and then turned south on West street to Monmouth street to the defendant's home; or if it be assumed that as an automobile driver he would choose the smoothest direct way, he would have turned east on Springfield avenue to High street, then to the right, or south, which would have brought him to Spruce street, which intersects High street. It is doing violence to common sense to say, as the jury by this verdict necessarily say, that when Jacob was going down Market street at eleven o'clock at night, with two men in the car who were bound for the Park Place R. R. station, that he was on his way home in fulfillment of his father's instructions.

The father gave his instructions to his son, who left home for the purpose of performing them, about eight o'clock in the evening. The accident happened about eleven o'clock. The accident, instead of happening on any street which by any stretch of the imagination can have been regarded as a direct route from the Majestic theatre to the defendant's home, happened on Market street, six blocks east of the theatre. Not only that, but Jacob Okin had in the car with him at the time, two young men, one an actor at the Odeon theatre, named Merlin, and the other, his companion named Steadman. Neither of them was known to the defendant. It seems that after Jacob Okin had left home and had presumably attended to his errand of examining the lights at the Majestic theatre, which would normally occupy him about two minutes, he had gone to the Odeon theatre to witness the performance and had also spent some time in a cafe adjoining the theatre and located in the same building (p. 139). While there he met his friend Merlin, the actor, who introduced him to Steadman, and these three divided their time between the theatre and the cafe until between 10:30 and eleven o'clock (p. 139). After the performance was over Merlin and Steadman desired to take a train for New York from the Park Place station, and Okin invited them to get into his car, presumably for the purpose of taking them to the Park Place station. Certain evidence which the defendant offered in connection with this transaction was excluded improperly, as we say, but there is abundant evidence in the case to demonstrate that at the time of the accident, as Jacob Okin was running his car down Market street in company with his friends Merlin and Steadman, he was headed for the Park Place station, and was engaged upon an errand which had nothing what-

ever to do with the instructions which his father had given him with reference to the lights at the Majestic theatre. The sole evidence on this comes from the witness Steadman. Jacob Okin at the time of the trial was dead, and the exact whereabouts of Merlin, the actor, unknown. Steadman testified as follows (p. 140, l. 33):

“Q How did it come about you and Merlin got in the automobile? A Why at Mr. Okin’s suggestion.”

Again at page 141, l. 10:

“Q On whose invitation was it that you got into this automobile? A Mr. Okin’s.

Q And who got into the automobile on that invitation besides yourself? A Mr. Merlin.”

And again at page 144, l. 1:

“Q Before you were invited by Jacob Okin to get into the automobile, did you or Mr. Merlin in his presence state where you wanted to go? A Yes, sir.

Q You did state where you wanted to go? A Yes.

Q When was it with reference to the time that you stated where you wanted to go that Okin invited you to get into the automobile?

A Why, immediately.

Q And where did you want to go?

Mr. Fort. I object on the ground that the desires of this witness are not important.

The Court. It already appears in evidence, I think.

Q Well, you have already said that you wanted to go to the Park Place station? A Yes, sir.

Q And Merlin wanted to go there, too?

A Yes, sir.

Q And it was that destination that you told Okin that you wanted to go to? A Yes.

Q And he then invited you to get into the automobile? A Yes.

Q After that you got in the car and the car started, and you went down Springfield avenue, and then on down Market street; is that right? A Yes."

While they were thus proceeding down Market street and just below the corner of Washington street, the accident happened.

The plaintiff sought to account for the lapse of three hours (eight to eleven o'clock) between the time when the defendant instructed Jacob to go to the theatre and fix the lights to the time when the accident happened, by having it appear that the defendant had sent Jacob not to the Majestic Theatre to fix the lights in the street, but to the Odeon Theatre to examine the lights there. In this, however, he completely failed. To prove this contention he endeavored to prove a conversation between the plaintiff and defendant in Glori's cafe at the Odeon Theatre in May after the accident. All that this evidence shows was that the defendant had stated that he gave his son permission to take the car and go to the theatre to fix the lights. No theatre was named, no specific lights were mentioned, and the plaintiff sought to draw the unwarranted inference that he referred to the lights in the Odeon Theatre, which was a completed building and then under lease to the Palher Realty Co.

The witness Lehman testified (p. 83, l. 9):

"Q Now, you say that Mr. Okin said he had given his son permission to take the car and go and fix the lights at the theatre? A Yes, sir.

Q Did he mention the theatre? A I don't remember if he mentioned the theatre.

Q Did he say where it was? A No, sir; I don't think he did.

Q Where the theatre was located? A He just said 'the theatre.'

Q Was it a theatre that was being built or one that was already built? A I couldn't say; he didn't mention any theatre, that I know of.

Q Did he say what time of the evening it was he gave his son this permission? A He didn't say—I don't remember, no.

Q He did not state that, no. So that the conversation was that he said that he gave his son permission to take the car and go to the theatre and fix the lights; is that it? A Yes, sir."

Leo Goodman testified (p. 87, l. 19):

"Q And do you know whether he was referring to the Majestic Theatre or the Odeon Theatre, or what theatre do you? A No, sir.

Q Or he didn't mention it in his conversation? A No.

Q He simply said 'the theatre?' A He said 'theatre.'

Q What he said was that he would get on the stand and swear that 'My son went down there that night to fix the lights at the theatre;' is that right? A Yes, sir.

Q That was what he said, was it? A Yes, sir.

Q Did he say what time he went down? A No, sir."

The testimony of these two witnesses coincides exactly with that of the defendant, who said that

he sent his son to the Majestic Theatre to fix the lights, referring to the lights in the street.

The plaintiff himself sought to twist the language of the defendant into an admission that he had specified the lights in the Odeon Theatre (p. 112, l. 15). This was an highly strained construction, however. He said (p. 114, l. 10):

“Q Now are you quite positive that Mr. Okin indicated what theatre these lights were in which he sent his son to fix? A Well, one thing that confirms it in my mind—

Q No. Are you positive about it? A Well, he pointed to it right in the cafe that I was sitting in; ‘He fixed these lights,’ he said (illustrating).

Q He gesticulated with his hand, did he, that way (illustrating)? A He said, ‘these lights.’

Q So that you naturally deduced that he meant the lights in the Odeon Theatre? A Yes.

Q He might have meant the Majestic Theatre? A Well, ‘these.’ If he meant across the street he would say ‘those,’ I presume.

Q You make a distinction between ‘these’ and ‘those,’ do you? A Yes, sir.

Q And what you say he said was that he had sent his son to fix these lights? A Yes, sir.

Q Did he say he had sent him in his automobile? A Yes, sir.

Q And to fix these lights? A Yes.”

The plaintiff’s counsel in his cross examination of Steadman sought to develop this idea by showing that Jacob Okin assumed some responsibility for the management of the Odeon Theatre at the time he was there, but in this he failed utterly (p. 146, l. 20; p. 147, l. 10).

The absurdity of the contention is found in the fact that the lease in evidence, as well as the defendant's testimony, shows that the Odeon Theatre had been leased some three or four years before the accident, and the management, possession and operation of it turned over entirely to the lessee, and that the defendant had no responsibility in connection with the building at all. This being so, why should he have sent his son Jacob to the Odeon Theatre to tamper with the lights there at eleven o'clock at night? This is contrary not only to every plain deduction from the evidence of the plaintiff's own witnesses, but is conclusively opposed to the testimony of the defendant, which stands not only uncontradicted, but is the rather corroborated by the testimony of the plaintiff's witnesses as to his remarks in the cafe in May following the accident.

The legal question then is this: Was Jacob Okin, who was instructed by his father at eight o'clock in the evening, to take his automobile and go to the Majestic Theatre, and see if the lights in the street were burning and then come home, acting within the scope of that agency, when three hours later he was found going down Market Street in the opposite direction from his home, accompanied by two men, who were bound for the Park Place Railroad station, in order to take a train to New York.

The true test is: Was the act of the one done for the other; or adopting that to the facts here:—was Jacob Okin at the time he was driving his two friends down Market Street bound for the Park Place station doing that act for his father, the defendant?

A further and equally pertinent inquiry is:—Assuming he was then engaged in his father's business (a liberal assumption, surely) had he not

deviated from his original authority to such an extent as to separate his actions at the time of the accident from any legal relationship with his father, the defendant!

Doran v. Thomsen, 47 Vroom, 754 (Errors & Appeals, 1908)—is a case very much in point. There, a father owned an automobile which he kept upon his premises, and his daughter, 19 years old, was accustomed to drive it whenever she felt so disposed, asking permission to use it when the father was home, and taking it sometimes without permission. There was no proof that the daughter was actually employed by the father to operate the machine, and in an action against the father, where the daughter in using the machine for her own pleasure in driving her personal friends negligently injured a person in the highway, it was held that such proof was not sufficient to constitute the daughter the servant or agent of the master, and that a motion for a direction of a verdict should have prevailed. VOORHEES, J., (at p. 756) speaking for this Court, said:

“The case was submitted by the trial court to the jury solely upon the theory that the daughter of the defendant in driving the machine was the defendant’s servant and instructed the jury that unless they found that the daughter was such servant the defendant would not be liable. * * *

‘The real test as to the third persons,’ says Mr. Wood, in his work on Master and Servant, p. 11, section 7, ‘is whether the act is done by one for another, however trivial, with the knowledge of the person sought to be charged as master with his assent, express or implied, even though there was no request on his part to the other to do the act in question.’

"It will be noticed that the act must be done by the one for the other. That was not so in the case at bar, and so there was no evidence upon which to find the existence of the relation if the daughter was not doing an act for her father. She was not even driving other members of the family. She was using the machine as a means of recreation and pleasure for herself and her own friends, and it would seem impossible to draw the conclusion that she could be regarded as the agent or servant of her father upon that occasion."

The Court quoted from *Holler v. Ross* (*supra*) and *Evers v. Krouse* (*supra*), and in commenting on the latter case said on page 759:

"While in that case the act was malicious, yet an act not malicious is within the enunciated principle, if such act is not expressly or by necessary implication within the scope of duty, and with regard to which it cannot be said that the servant was engaged in the performance of the act for the other. The act must be done for the purpose of executing the master's orders and doing his work, and while actually engaged in serving the master, and it is not enough to say that the injuries complained of would not have been committed without the facilities afforded by the servant's relation to his master. * * * *

"The following are some recent authorities on this subject, with special relation to automobiles: *Stewart v. Baruch*, 103 N. Y. App. Div. 577; *Clark v. Buckmobile Co.*, 107 *Id.* 120; *Reynolds v. Bach*, 127 Iowa 601; *Quigley v. Thompson*, 211 Pa. St. 107; *Patterson v. Kates* 152 Fed. Rep. 481; *Slater v. Advance Thresher Co.*, 97 Minn. 305; *Evans v. Dyke Automobile Co.*, 121 Mo. App. 266; *Lotz v. Hanlon*, 217

Pa. St. 339; *Lewis v. Amorous* (Ga.), 59 S. E. Rep. 338; *Jones v. Hoge*, 47 Wash. 663."

So in *Perlstein v. American Express Co.*, 59 N. E., 194; (Mass.) 1901, KNOWLTON, J., said:

"The question for the jury was not whether the defendant owned the team, but whether the person who was driving it negligently was then acting for the defendant in doing the work which he was directed to do. If the servant was not then acting in the course of his employment, but was off 'on a frolic of his own,' the master would not be liable. *Howe v. Newmarch*, 12 Allen, 49; *Bowler v. O'Connell*, 162 Mass. 319, 38 N. E. 498, 27 L. R. A. 173; *Brown v. Engineering Co.*, 166 Mass. 75, 43 N. E. 1118, 32 L. R. A. 605; *Driscoll v. Scanlon*, 165 Mass. 348, 43 N. E. 100; *Bard v. Yohn*, 26 Pa. St. 482; *Storey v. Ashton*, L. R. 4 Q. B. 476-479; *Stevens v. Woodward*, 6 Q. B. Div. 318."

In *McCarty v. Timmins*, 59 N. E. 1038 (Mass. 1901) the facts as stated by the Court were:

"Scott had been employed to drive the team in the carriage of passengers, and that work was ended for the day. He was then directed to go to the stables; and there can be no doubt that, so long as he drove the team with that end in view, and for that purpose, and for no purpose of his own, he was engaged in his master's business, even if he made a detour contrary to the direction of his master. We are not disposed to lay much stress on the fact that he went down Boylston street rather than Commonwealth Avenue; but when he reached Massachusetts Avenue, it is plain that his only purpose in turning southward instead of northward, and going 750 feet to Dundee Street, was not only to deviate from the reg-

ular way of reaching the stable, but was for the purpose of his own, namely, to get a drink. He was upon no errand of his master, and this journey was not for the purpose of getting to the stables, even by a circuitous route; or, to use the language of Hoar, *J.*, in *Howe v. Newmarch*, 12 Allen, 49, 57, he was doing an act 'wholly for a purpose of his own, disregarding the object for which he was employed, and not intending by his act to execute it, and not within the scope of his employment.' In such case the defendant should not be held answerable."

In *Danforth v. Fisher*, 71 Atl. 535 (N. H.) the facts as stated in the opinion were:

"At 5 o'clock on the day of the accident McCauley, who was employed by the defendant as a chauffeur, took the automobile from the place where it was kept, drove to the defendant's store, and awaited orders. He was told to get his supper and to be at the New City Hotel with the automobile at a quarter before 7 o'clock. After he had eaten supper, instead of taking the car to the hotel according to the defendant's order, he drove to West Manchester, a mile or two distant from his boarding place, and in an opposite direction from the hotel, for the purpose of calling upon a friend. At the time of the accident he had finished his call, and was on his way to the hotel. Although the evidence shows that McCauley was the defendant's servant, and that he drove the automobile against the plaintiff's horse and caused the animal to run away, it also shows that he took the automobile without the defendant's permission and went with it on an errand of his own; that he was acting for himself, and not for the defendant at that

time. As it cannot be found from the evidence that McCauley was doing what he was employed to do at the time the plaintiff was injured, there was no error in the order of non-suit."

In *Patterson v. Kates*, 152 Fed. 481, (Circuit Court of Pa.) 1907, the defendant owned an automobile which broke down on the way from Atlantic City to Philadelphia, and was then left in charge of his driver with directions to repair it and bring it on to Philadelphia. After the driver had reached the Delaware River, and while waiting for the ferry, he consented to take a third person in the machine to a place about a mile back on the road, and while making such trip, through his negligence in running too fast, collided with a horse and buggy on the highway and injured the plaintiff. It was held that under these facts the defendant was not liable for the injury. In the course of his opinion McPHERSON, J., quoted at length from an exhaustive note to *Ware v. Canal Company*, 35 Am. Dec. 192, 15 La. 169, and then concluded:

"With these rules no one quarrels. The difficulty has been, to determine whether they are applicable to a given state of facts, and upon a question of this kind opinions will always differ. To take the case in hand, it would be easy to cite decisions that hold the master to be liable under similar or analgous facts, and it would be just as easy to cite cases—for example, the recent case of *McCarty v. Timmins*, 178 Mass. 378, 59 N. E. 1038, 86 Am. St. Rep. 490—in which his liability has been denied. I shall not extend this opinion by taking up either class of decisions, but shall content myself with saying that my opinion is against the master's liability under the facts

now before the Court. As it seems to me, the driver had temporarily abandoned his employment, and had gone off upon an expedition of his own, for a purpose in no way connected with his duty, but, on the contrary, opposed thereto, and I do not think that he could bind his master while he was engaged about his private affairs. Of course, he had no express authority to turn back for such a purpose, and I am unable to see upon what ground the master's assent to his deviation can be fairly implied."

In his memorandum denying the motion to direct a verdict, the learned trial judge said (p. 154, l. 25):

"Upon another ground I conclude that the use to which Jacob Okin was putting the automobile at the time of the accident was a use to which his father had devoted it. The car was designed for pleasure as well as for business. It was for the use of the family, and was used by the family for pleasure as well as for business. The son was a member of his father's family, and was empowered to use the car for the purposes for which it was intended, and did so almost daily."

In the opinion which the Supreme Court handed down upon the rule to show cause (in which rule the exceptions were reserved), they said (p. 177, l. 32):

"The defendant admitted at the trial that the car was used equally for pleasure and business, by the son, with the father's knowledge or permission, and that the son used it more than the father did."

These conclusions, which both the learned trial judge and the Supreme Court arrived at, are based upon the cross examination of the defendant, and

upon no other testimony, for there is none other, as follows (p. 136, l. 26):

“Q Was it a pleasure car or a car that was used in connection with the business? A Well, I only had one car, and I used to use it for pleasure and business, the same car.

Q And in connection with the business who drove it? A Well, when I have to go I drive and when he has to go he drove it.

Q He drove it a good deal, did he not? A Pardon me, I can't hear you.

Q He drove it a good deal, did he not? A Oh, yes.

Q Pretty nearly every day? A 'Most every day.

Q Used it more than you did, did he not? He drove it more than you did, did he not?

A I think he did.”

In concluding as they did, both courts misapprehended the facts. The question first asked was, was the car a pleasure car, or used in business, and the defendant said, “I used to use it for pleasure and business.” That question and the answer were directed to his personal use of the car.

The next question was, “And in connection with the *business* who drove it?” and the answer to that was that when the defendant had to go (on business) he drove it, and when Jacob had to go (on business) he drove it, but the answer was directed to that question, which question was strictly limited in its form to the business uses of the car, and the answer indicates that the use of the car by Jacob was limited to business necessities.

The next four questions which followed as to the extent which Jacob used the car were all in connection with the business use of the car. No other conclusion can be reached from the context.

Although neither court mentions it, very evidently the judges had in mind the case of *Missell v. Hayes*, 86 N. J. Law 348. In that case the court recognized the test for which we have been contending, namely, that the act is done by the one for the other with his knowledge, as laid down in the Doran case, but distinguished the case then in hand from the Doran case on the ground that the automobile at the time of the accident was occupied by the father's immediate family and their guests (p. 349). Upon these facts this court, by Judge White, said:

"This fact constituted affirmative evidence that the automobile was being used in the father's affairs or business. It was within the scope of the father's business to furnish his wife and daughter, who were living with him as members of his immediate family, with outdoor recreation, just the same as it was his business to furnish them with food and clothing, or to minister to their health in other ways. It cannot be said, therefore, that in this case there was no evidence of possession except a mere presumption which could be overcome by proof of inconsistent facts. Here there was affirmative proof of the fact of possession quite apart from any presumption."

And it appeared in that case that the son, who was driving the car, had invited his mother and sister, to take a ride as his guests on a trip. This *Missell* case recognized and applied the rule in the Doran case to the facts then at hand. Such facts are entirely wanting in the case at bar. There was no member of the father's immediate family in the car, except Jacob Okin, who was driving it without permission to the Park Place Station, and the occupants of the car, instead of being guests of the father, were casual acquaintances of the son,

whom he was personally seeking to accommodate by driving to the Park Place Station. The father's instructions to the son had been to go to the Majestic Theatre and come home. The evidence relative to the use of the car by Jacob Okin was limited strictly to a business use. There is not a scintilla of proof that he ever used it for his personal pleasure. Whatever use was made of the car for pleasure was made by the defendant alone. The whole theory of the submission of the case to the jury in the mind of the trial judge was that Jacob was entitled to use the car for his personal pleasure, but there is absolutely nothing in the evidence upon which this conclusion can be based, and hence there is nothing in the evidence from which any implication can be raised to create the relation of principal and agent between the defendant and Jacob Okin at the time of the accident. The exact contrary appeared. The very essential of such relationship, as pointed out in the Doran case, namely, that the act of the one must have been done for the other, is entirely wanting in this case.

We say, therefore, that the learned trial judge erred in refusing to direct a verdict for the defendant as requested.

II.

The learned trial judge erred in excluding the conversation between Jacob Okin and the witness Steadman.

Steadman was called by the defendant. He was one of the two occupants of the car along with Jacob Okin. Jacob Okin at the time of the trial was dead. The other occupant, Merlin, is an actor, on the road, and his exact whereabouts were not known. Steadman testified that he had gotten into

the automobile at about eleven o'clock at night at Jacob Okin's suggestion (p. 140) and he was then asked (p. 141, l. 18) "What did Mr. Okin say to you when he invited you to get into the automobile?" This was objected to and the objection sustained, and the objection noted as ground of appeal (p. 143, l. 10). The ground upon which the question was pressed, as stated by counsel at the time, was as follows (p. 141, l. 20):

Mr. English. My point about that is this, your Honor. The plaintiff has hung his case on the theory of the agency between Joseph Okin and the defendant. If he was the agent, and, as is essential to his case, he was acting within the scope of the employment, then what he said in pursuance of his agency is material. If he was not acting within that agency, the plaintiff has no case. In that event, the plaintiff must abandon his case, or, it seems to me, this conversation is material."

After some discussion, in which the learned trial judge expressed himself as being in doubt (p. 143, l. 7) the question was excluded. Closely connected with this question was a subsequent one, "And to what place were you bound?" (p. 143, l. 25), which was also excluded.

Assuming that it was admissible for Steadman to have testified to what Jacob Okin said to him when he invited him to get into the automobile, the statement would have been most material to the defense, because it would have shown that the object of their ride and the place of their destination were such that their journey down Market street to the Park Place Station was utterly removed from any business or connection with the defendant. It would also have further explained the statement of Steadman (p. 140, l. 34) that he and Merlin got into the automobile at Mr. Okin's suggestion.

And it would have completely set at rest any speculation or room for debate as to why Jacob Okin was driving down Market street at eleven o'clock at night, and as to where he was going. This question of doubt was one of the grounds upon which the trial judge allowed the case to go to the jury. In his memorandum denying the motion to direct, he said (p. 152, l. 35):

"As the accident occurred about two blocks before the automobile, if it had continued, would have reached the corner of Broad and Market streets, it does not demonstrably appear whether Jacob Okin intended to turn north on Broad street, and so go to the Park Place depot and deposit his passengers there. It is natural, I think, to suppose that such was his intention. It is true that Jacob Okin might have taken a more direct route home from the theatre than one which began by running east on Springfield avenue and Market street; but the rule as to deviation should not be held very strictly if the main purpose is within the scope of the employment. It would be very puzzling if courts and juries were called upon to figure out for a vehicle the most direct or most usual or most desirable road between two points. Jacob Okin was not on any joy ride or frolic; he was pursuing no design personal to himself. He may, indeed, have intended to deviate to the north on Broad street, to oblige his two casual passengers by dropping them at their station; but in fact, he never did so, for he never reached the corner of Broad and Market streets while they were his passengers. Very near the point on Market street which he had reached when the accident came two of the best streets in the City of Newark for night travel, Broad street and Halsey street, led straight to Clinton avenue, and afforded, over flat grades and smooth surfaces, an excellent connection with Spruce street. I do not see that up to the time of the accident there had

been what can fairly and reasonably be called a substantial deviation."

The evidence offered would have changed all this. It would have "demonstrably appeared" that Jacob Okin did intend to go to the Park Place station, and that he was not then bound for home by way either of Broad street or Halsey street. It would not only have shown a plain deviation from his original authority, but would have completely answered the query as to whether he was then engaged upon his father's business and acting within the scope of his employment.

The question asked as to what Jacob Okin said when he invited his friends to get into the automobile should have been allowed. The whole theory of the plaintiff's case was that Jacob Okin was the agent of the defendant, if he was not the defendant's agent the plaintiff's case failed, because his whole case was grounded on the agency of Jacob. If he was the defendant's agent then this conversation was material and admissible.

The rule is entirely settled that whether a principal is bound by the declarations of an agent depends on whether those declarations were made within the scope of the employment or committed to their agency.

Huebner v. Erie R. R. Co., 69 N. J. Law 327, p. 329.

King v. Atlantic City Gas & Water Co., 70 N. J. Law 679, p. 681.

Hayes v. Jersey City, etc., Ry. Co., 73 N. J. Law 639, p. 642.

Hill v. Adams, 74 N. J. Law 338, p. 342, and 77 N. J. Law 19, p. 28.

Cockran & Meloney v. Taylor, 77 N. J. Law 195, p. 197.

Yoshimi & Co. v. U. S. Express Co., 78 N. J. Law 281, p. 284.

The only question then is was it within the scope of Jacob Okin's agency, assuming, as was necessary to the plaintiff's case, that he was the defendant's agent, to have invited Steadman into his automobile. If it be conceded that it was within the scope of his agency so to do, then what he said in that connection must necessarily have been admissible. There seems no distinction between the case at bar and that of *Missell v. Hayes*, 86 N. J. Law 348, in this respect.

In the Hayes case the opinion says (p. 350):

"Here was affirmative proof of the fact of possession quite apart from any presumption. Under these circumstances testimony having also been given to the effect that the son invited his mother and sister to take a ride as his guests on a trip which he was taking for his own pleasure or business, and that they were doing so as such and not as members of his father's family, it became a question for the jury to decide whether they would or would not believe this testimony, and the effect claimed to result from it, or whether they would entirely disbelieve it or at least conclude that while one purpose was to enable the son to make the call mentioned, he was at the same time in his father's behalf taking the members of the father's family out for a trip for their health and recreation as members of his father's family. If they should decide in favor of the latter alternative, then the son was clearly acting for his father and as his servant in so doing."

So here, the mooted question was whether Jacob Okin was acting for his father, the defendant. If evidence was properly admissible in the Hayes case as to the invitation of the son there in inviting his mother and sister to ride as his guests, why was it not equally admissible here as to the invitation of the son Jacob to his two friends to ride

with him as guests on the trip? And if in the Hayes case, two alternative inferences were deducible from that testimony, so here, at the outside a question would have been presented for the jury; even if it had not clearly settled as a matter of law the mooted question of whether Jacob Okin in inviting his friends to ride with him to the Park Place Station was acting within the scope of his employment and doing what he did as the agent of and for his father, the defendant.

The failure to permit this question to be answered excluded from the case testimony of a most material character upon the vital point of the case, and was necessarily harmful to the defendant.

III.

The learned trial judge erred in his charge to the jury.

The defendant submitted certain requests to charge, some of which were charged as requested, some of which were denied, and some of which were charged in a modified form. Among the requests which were denied was the third request reading as follows: "3. An act done by an agent while engaged in the master's work may be entirely disconnected therefrom, done not as a means or for the purpose of performing that work, but solely for the accomplishment of the independent purpose of the agent. Such an act is not as a matter of fact or as a matter of law the act of the master," (p. 160, l. 17; p. 166, l. 37).

This request should have been charged under the authority of *Evers v. Krouse*, in this Court, 70 N. J. Law 653. In that case a boy engaged in watering his father's lawn with a hose, turned the hose on a horse, causing it to run away. The judge

charged that if from a mischievous disposition the boy turned the hose on the horse, the father was not responsible even though the boy was otherwise his father's agent. This court in reversing the trial court said (p. 654):

"The general rule as to the question of the master's liability for the wrongful acts of his servant is thus stated by Mr. Justice Fort, speaking for this court in the case of *Holler v. Ross*, 39 Vroom 324: 'The servant cannot bind the master to respond in damages to the plaintiff unless it be shown that the act which the servant did, which caused the injury, was an act which was expressly, or by necessary implication, within the line of his duty under his employment. * * * For a willful act done by a servant, not within the scope of his employment, no liability attaches to the master.'

A reference to the text-books which deal with this subject shows that the rule laid down in *Holler v. Ross* has been generally accepted in other jurisdictions, notwithstanding there has been much contrariety of result reached in the application of the rule; and this, it would seem, is due to the assumption in some jurisdictions that an act done by a servant while engaged in the master's work is necessarily an act done within the scope of the former's employment. But this is conspicuously a non sequitur. An act done by the servant while engaged in the work of his master may be entirely disconnected therefrom, done, not as a means or for the purpose of performing that work, but solely for the accomplishment of the independent malicious or mischievous purpose of the servant. Such an act is not, as a matter of fact, the act of the master in any sense and should not be deemed to be so as a matter of law. As to it, the relation of master and servant does not exist between the parties, and for the injury resulting to a third person from it the servant alone should be held responsi-

ble. *Ayerigg's Executor v. New York and Erie Railroad Co.*, 1 Vroom 460; *Rounds v. Delaware, Lackawanna and Western Railroad Co.*, 64 N. Y. 129; *Bowler v. O'Connell*, 162 Mass. 319."

It will be observed that the language of the third request employs almost verbatim the language of this court in this *Evers* case. In that case the ruling of the court was applied to the facts then before it, namely, the malicious or mischievous purpose of the boy in turning the hose on the horse. We do not understand the ruling of the court in exempting the master from the independent actions of his servant is limited to those actions which are malicious or mischievous.

Doran v. Thompson, 76 N. J. Law 754, expressly so holds. This court, in commenting on the ruling in *Evers v. Krouse*, said (p. 758):

"In *Evers v. Krouse*, 41 Vroom 653, the case last cited received again the approval of this court, and it was further stated that 'an act done by the servant while engaged in the work of his master may be entirely disconnected therefrom, done not as a means or for the purpose of performing that work, but solely for the accomplishment of the independent * * * purpose of the servant. Such an act is not, as a matter of fact, the act of the master in any sense, and should not be deemed to be so as a matter of law. As to it the relation of master and servant does not exist between the parties, and for the injury resulting to a third person from it the servant alone should be held responsible.' In that case the defendant's son had been entrusted with a garden hose with which to sprinkle his father's lawn, and while so engaged, deliberately turned the water upon a horse, frightening him, causing the injury complained of, and for which the father had been sued. The court then said: 'The fact that he (the son) used the tool supplied to him

for the doing of his father's work for the accomplishment of his own mischievous purpose did not make it an act within the scope of his employment, and did not render the defendant liable for the injury resulting therefrom.'

While in that case the act was malicious, yet an act not malicious is within the enunciated principle, if such act is not expressly or by necessary implication within the scope of duty, and with regard to which it cannot be said that the servant was engaged in the performance of the act for the other. The act must be done for the purpose of executing the master's orders and doing his work, and while actually engaged in serving the master, and it is not enough to say that the injuries complained of would not have been committed without the facilities afforded by the servant's relation to his master. *Garretzen v. Duenckel*, 50 Mo. 104; *Howe v. Newmarch*, 12 Allen 49."

In view of this the third request was eminently proper, and should have been charged.

But even assuming that this court in the Evers case did intend to limit its ruling to those cases where the independent act of the servant was malicious or mischievous, then again the third request was eminently proper. There is testimony in the case given by a number of the plaintiff's witnesses from which the jury would have a right to conclude, if they believed it, that Jacob Okin drove his father's automobile down Market street that night at so fast a rate of speed and in so reckless a manner as to show a reckless disregard of human life to such an extent to have made his act in so driving the car a malicious one. This was one of the questions in the case. See the motion for non suit, page 129, line 30.

In that view of the case the request was clearly within the ruling of the Evers case, and becomes most material. The observations of the trial judge

in denying the request seem to be entirely outside the mark (p. 160, l. 25).

The sixteenth request was denied by the trial judge. This request reads as follows:

"16. The defendant testifies that he instructed his son Jacob about 8 o'clock in the evening to take the car and go to the Majestic Theatre to see if the lights in the street were burning, and then come home, and the fact that about three hours later he was driving down Market street with two friends who wanted to go to the Park Place station militates against any presumption that he was then returning home from the performance of that errand." (p. 163, l. 26; p. 170, l. 14).

One of the questions left to the jury to decide was whether Jacob Okin when he was driving down Market street with his two friends was really going to take them to the Park Place station, or whether he was going to drop them en route, and himself turn off at either Halsey street or Broad street, and go home. In his memorandum denying the motion to direct, the trial judge said (p. 153, l. 15):

"He may indeed have intended to deviate to the north on Broad street to oblige his two casual passengers by dropping them at their station; but, in fact, he never did so, for he never reached the corner of Broad and Market streets while they were his passengers. Very near the point on Market street which he had reached when the accident came two of the best streets in the city of Newark for night travel; Broad street and Halsey street, led straight to Clinton avenue, and afforded over flat grades and smooth surfaces an excellent connection with Spruce street."

The plaintiff brought out on his cross examination of the defendant the character of the pavement

on Halsey street and its connection with Spruce street (p. 137, l. 38, and p. 138, l. 10), and sought to raise the inference or presumption that Jacob Okin in going down Market street was bound for Halsey street, thence to Spruce street and home. This was undoubtedly one of the questions in the case, and for the consideration of the jury.

In *Missell v. Hayes*, 86 N. J. Law, 348, this court said (at page 349) that the fact that the automobile at the time of the accident was occupied by the father's immediate family and their guests "constituted affirmative evidence that the automobile was being used in the father's affairs or business." In other words, the occupancy of the automobile by the father's family and their guests constituted a presumption that the automobile was being used in the father's affairs or business. So here, under the view of the case taken by the trial judge and given to the jury, the fact that Jacob Okin was driving the car was held to constitute a presumption that he was driving it for his father. In his memorandum denying the motion to direct the trial judge said (p. 154, l. 27): "The car was designed for pleasure as well as for business. It was for the use of the family and was used by the family for pleasure as well as for business. The son was a member of his father's family and was empowered to use the car for the purposes for which it was intended, and did so almost daily."

The case, therefore, came to the jury under the instruction of the trial judge with the presumption already established in favor of the view that Jacob Okin in driving down Market street was engaged in his father's business. The defendant had a right, therefore, to have the jury instructed that, when, after having completed his father's commission to examine the lights, Jacob was found driving down Market street three hours later with two friends, who wanted to go to the Park Place station, that

this such actions at least militated against the presumption with which the jury's minds were charged, that in driving down Market street he was engaged in the business of his father.

This same reasoning applies with less force, but, to some extent, to the 14th and 15th requests to charge, both of which were denied (p. 163, ll. 5 to 26).

The trial judge in denying the 14th, 15th and 16th requests used the following language (p. 163, l. 39):

"The true inquiry is what use Joseph Okin had authorized his son to make of the car and whether the son at the time of the accident was putting the car to a use which was unauthorized; and you will not forget that the particular commission to go down and see that those lights were burning did not constitute the whole of the relation which the son sustained to the car, nor embrace the whole of the father's authorization in respect to the car."

This charge of the trial judge to the effect that the commission to go down and see to the lights did not constitute the whole of the relation which Jacob Okin sustained to the car, nor embrace the whole of his father's authorization with respect to the car, is grounded upon the erroneous idea which the trial judge had that Jacob Okin used the car for his personal pleasure. As already observed at the close of Point I of this brief, the only evidence upon which any such theory could be predicated is the cross examination of the defendant at page 136, l. 26. But, as already pointed out, that evidence clearly indicates that the use which Jacob Okin made of the car was limited strictly to business purposes. When, therefore, the trial judge instructed the jury, as he did in the passage last quoted, he was bringing into the case facts which

were not in the testimony. This charge was upon a most material feature of the case, for the defendant's contention throughout was that Jacob Okin's authority to use the car was limited by the commission of his father to go and examine the lights, and that any general authority which he had to use the car was limited strictly to business purposes.

IV.

The Trial Court erred in not granting the defendant's motion for a mis-trial.

By a series of subtle and unfair questions put to the plaintiff's witnesses, Leopold Lehman, on direct examination, and Leo M. Goodman, also on direct examination, the plaintiff's attorney succeeded in eliciting answers which brought to the attention of the jury, the wholly irrelevant and incompetent information, that an insurance company was interested in the defence of the case. In fact, he tried to show that it was so interested, that it wanted the defendant to testify untruly—in other words, that one of its representatives was guilty of subornation of perjury. The plaintiff's witness, Lehman, was examined on direct as follows (p. 79, l. 12, &c.):

Q Did you ever have any talk with Mr. Joseph Okin, or did he ever say anything in your presence relating to the accident in which his car had run down Mr. Jennings? A Yes, sir.

Q Now, what did Mr. Okin say? A Why, there was a man in there by the name of Mr. Rachlin, and we went to go up to the show, but it seems that the performance wasn't ready yet—

Mr. English. Just a minute.

Q What did Mr. Okin say?

Mr. English. Are you speaking now of a conversation with this man here at the table or some other Mr. Okin?

Witness. Yes; that is the Mr. Okin that I am speaking of.

Q Now, what did he say? A Well, he said that the insurance company wanted him to say—

Mr. English. If your honor please, I think that entitles me to ask for a mistrial.

Witness. He said the insurance company—
Objected to.

Mr. Fort. Never mind that.

Q Never mind that. Go on with the rest of it.

Mr. English. That is very improper, and I ask that it be stricken out. It has been so held by the upper courts—that it is enough to prejudice the defendant's case.

Mr. Fort. I am offering the evidence to show, by admission of the defendant, that the car was in the possession of his son as his agent and for his purposes at the time of the accident, and that he so stated.

Mr. English. My first motion is that that be stricken from the record.

The Court. On what ground do you object to it?

Mr. English. On the ground that it is improper and it is an effort to prejudice the defendant's case.

The Court. Why is it improper?

Mr. English. It is immaterial evidence. It is an ingenious and veiled way to bring in the case of an insurance company, if there is any such thing in the case.

The Court. That is what you object to?

Mr. English. Yes, sir.

The Court. To the reference to an insurance company?

Mr. English. Yes, sir.

The Court. What case is there on which you base your objection?

Mr. English. I just argued this very question in the Court of Errors last term. There are a number of decisions in the New York Court of Appeals holding that any effort, whether indirect or how, along this line, is ground for a mistrial and entitles the defendant to ask for a mistrial; that it is highly improper and should be immediately ruled out by the court. I have a brief in my office, and I meant to have brought it. I can give your honor all the cases.

The Court. I should be happy to examine the cases.

Mr. English. Yes, sir; I will get that brief for your honor.

Mr. Fort. If your honor please, the purpose of this question is not to bring in any mention of the insurance company. I asked what Mr. Okin said. I am perfectly willing to consent to Mr. English's motion that any reference to the insurance company at this time go out of the case.

The Court. If counsel desires, I will strike out what the witness has said.

Q Now, begin at the point of your talk with Mr. Okin; do not say anything about any insurance company, but tell us what Mr. Okin said as to who was using the car on the night of the accident.

The Court. On the subject of the car.

Mr. Fort. On the subject of the car on the night of the accident.

A Well, his son was using the car and that he—

Mr. English. Are you telling us the conversation?

Witness. Yes; this is the conversation that Mr. Okin said.

Mr. English. All right; tell us what he said.

Witness. That he told his son—that he was told— Well, I would have to bring in the insurance company.

Q No, do not. You can do it without that. Think it over carefully. *A* Well, somebody wanted him to say that he gave—the son took the car without his permission, and he said he wouldn't say that; that he gave his son the permission to take that car and fix the lights in the theatre that evening."

Again, in examining the plaintiff's witness, Leo Goodman, concerning the alleged conversation between the plaintiff and the defendant, which was supposed to have been overheard by Goodman, the plaintiff's attorney framed his question thus (page 85, line 3 to line 8):

"Now, can you tell us any talk that there occurred with reference to the accident in which Mr. Jennings had been injured, omitting any reference to any insurance company, or anything of that sort."

It is submitted that the questions and answers above referred to were wholly irrelevant and immaterial, and such as entitle the defendant the granting of his motion for a mistrial. Such evidence served a double purpose for the plaintiff. It suggested to the minds of the jury the element of a defence conducted by an insurance company rather than by the defendant himself, and it also tendered to show an attempt by that company to induce the defendant to testify contrary to the facts. Its effect upon the jury is obvious. It prejudiced them in favor of the plaintiff and rendered it impossible for them to weigh the testimony with that dispassionate and unbiased state of mind as is required of them in the proper exercise of their functions as jurors. It is of no avail that the plaintiff's attorney consented that the reference to the insurance company should be eliminated from the case (page

81, line 21 to line 26). Such an offer only made a bad matter worse, because when he made it, he had already obtained the result which he sought, having successfully brought the insurance company's interest in the case of the attention of the jury, and thereafter the condition of the record was a matter of indifference to him. In support of this, it is but necessary to point to the very next question put to Lehman (page 81, line 30). After having signified his willingness to have any reference to the insurance company go out of the case, he warned Lehman to refrain from saying anything about the insurance company, while he himself subtly emphasized the very point by again directly referring to it.

Accordingly, when the plaintiff rested his case the defendant's counsel moved the court to declare a mistrial as follows:

"*Mr. English.* Now, if your honor please, I think I ought to make a motion that your honor direct a mistrial, under the cases, especially under the New York Court of Appeals cases which I have handed your honor, particularly *Simpson v. The Foundation Company*, 95 Northeastern, 11; *Akin v. Lee*, 99 Northeastern, 85, and *Rodzborski v. American Sugar Refining Company*, 104 Northeastern, 616, on the ground that there has been injected into the case the question of the statement of counsel in putting a question and the statement of a witness in answering the question, tending to show that the defendant was protected by insurance. The witness, Lehman, said that specifically, or, at least, that the defendant had said that, and counsel in framing another question to that witness enjoined upon him to leave out any question of insurance, thereby bringing into the case by implication such a fact. Upon the authority of those cases, as well as what was implied in the ruling of our

about Court of Errors in *Bradley v. C. E. Cleary Company*, 90 Atlantic, 1015, I move your honor to direct a mistrial.

The Court. I do not understand that that question is in this case. The testimony was excluded, and it was also withdrawn.

Mr. English. But, according to the New York cases, that is not enough.

The Court. I have not looked at the New York cases.

(Mr. English reads from the cases referred to.)

The Court. I do not think this jury is going to be misled by anything that has been done or said on the subject of insurance. It is not in the case at all.

Defendant's counsel object to this ruling of the court.

Objection noted as ground of appeal."

The New Jersey cases in which the question of the defendant's insurance has been considered in one phase or another, are

Day v. Donahue, 33 Vr. 380 (E. & A. 1898).

Lackenauer v. Lyons & Sons Brewing Co., 38 Vr. 677 (E. & A. 1902).

Kalker v. Hedden, 43 Vr. 239 (E. & A. 1905).

Suttin v. Bell, 50 Vr. 507 (E. & A. 1907).

Bradley v. Cleary Co., 1 Gummere 338 (E. & A. 1914).

De Vincenzo v. John Sommer Faucet Co., 94 Atl. 573.

It is true that these cases emphasize the discretionary power of the trial court in dealing with matters of this character. There is this distinction to be made between those cases, however, and the case at bar.

In *Day v. Donohue*, *supra*, and *Kalker v. Hedden*, *supra*, and *Sutton v. Bell*, *supra*, the defendant

himself was on the stand, and under cross examination.

In *Lackenauer v. Lyons & Sons Brewing Co.*, *supra*, the secretary of the defendant, which was a corporation, was being cross examined by the plaintiff's counsel.

In *De Vincenzo v. John Sommer Faucet Co.*, *supra*, the objectionable questions came up on cross examination of the defendant's doctor, and the discretionary rule was invoked to sustain the trial judge.

In *Bradley v. D. E. Cleary Co.*, *supra*, the plaintiff's son was under examination. The proceedings there were sustained because this court found "that the (trial) court scrupulously excluded from the trial record every attempt (if any were made) on the part of the plaintiff to introduce in the evidence before the jury any reference whatever to the defendant's alleged insurance."

This court, therefore, upheld the trial judge in his discretion, but limited the rule to one where it clearly appeared that no injury was done. The language of the court is (90 Atl., page 1016): "It is held that it was within the discretion vested in the trial judge to admit a class of evidence having only a remote bearing upon the issues in the cause unless it clearly appear that injury might be done by the admission," citing the cases *supra*.

In the Cleary case this court found that the trial court had a misconception of the meaning of the witness, which had to be and was at last corrected. There was no misconception on the part of the trial judge in the case at bar or anything that required explanation. It appears to have been a clever and subtle attempt of plaintiff's counsel on the examination of his own witnesses to interject into the case the fact of the defendant's insur-

ance for the purpose of prejudicing the jury. The large size of the verdict shows that the effort was not without its effect.

In all of the cases in our courts, with the exception of the Bradley case, the question came before the court upon objections to questions put to the defendant, or one of the defendant's witnesses upon cross-examination, and where the evidence was sustained, it was only upon the narrow ground that it was admissible for the purpose of showing the interest, or lack of it, of a witness, in the subject matter of the litigation. The question is now presented to the court in a manner quite different from that involved in any of the other cases. Here the objectionable evidence arose upon direct examination of the plaintiff's own witnesses. Obviously, the plaintiff's counsel knew the answer which his question would elicit, and undoubtedly, it had its effect upon the jury.

The language with which counsel framed his question to his witness, Goodman, is particularly subject to criticism. He not only asked the witness a question, but went further and told him what not to say, the question being (p. 85, l. 3): "Now can you tell us any talk that either occurred with reference to the accident in which Mr. Jennings had been injured, omitting any reference to any insurance company or anything of that sort?"

What necessity was there on the part of plaintiff's counsel to have warned his witness in that manner? The court had already ruled that any reference to the insurance company was improper. Counsel had concurred in the motion to strike out the answer of a previous witness which had referred to it, and there seems to be no explanation of it whatever except on the ground that counsel desired thus indirectly to introduce into the case, or at least into the minds of the jury, the fact of the insurance.

An attempt to introduce such facts, however indirectly, has been squarely ruled against by the New York Court of Appeals, and the judgments have been reversed wherein such attempts were made.

The leading case seems to be *Simpson v. Foundation Co.*, 95 N. E. 11. There the defendant's brother was asked who one Frank Johnson, was, and subject to exception and objection he answered: "From the insurance company" (page 14). Subsequently, another witness for the plaintiff was asked with reference to an interview with two attorneys, "'Where did they tell you they were coming from?' The answer was: 'Travelers' Insurance Company, I think they said.'"

Again in the trial, after one Reilly had testified for the defendant, a paper purporting to be a statement made by the witness, was offered in evidence to contradict him. The last words of the paper were: "I made a statement to a representative of the insurance company, but I never read it or signed my name."

...With reference to these questions the court, by Judge Vann, said (p. 15):

"While there was no proof in this case that the defendant was insured, by suggestion and indirection the jury were given to understand that such was the fact and the result, apparently, is reflected in the verdict.

Evidence that the defendant in an action for negligence was insured in a casualty company, or that the defense was conducted by an insurance company, is incompetent and so dangerous as to require a reversal even when the court strikes it from the record and directs the jury to disregard it, unless it clearly appears that it could not have influenced the verdict. *Cosselmon v. Dunfee*, 172 N. Y. 507; 65 N. E. 494; *Loughlin v. Brassil*, 187 N. Y. 128, 135; 79 N. E. 854; *Hordern v. Salvation*

Army, 124 App. Div. 674, 676; 109 N. Y. Supp. 131; *Haigh v. Edelmeyer & M. H. Elevator Co.*, 123 App. Div. 376, 380; 107 N. Y. Supp. 936; *Manigold v. Black River Traction Co.*, 81 App. Div. 381, 384; 80 N. Y. Supp. 861.

In *Hordern v. Salvation Army*, *supra*, Mr. Justice Ingraham said: 'The question as to whether or not under any circumstances evidence of this kind is competent has been so often before the court and so uniformly decided that there can be now no question that under no circumstances is it proper to ask such a question. The only possible ground of asking the question is to suggest to the jury that, as the defendant would sustain no damage by a verdict against it, they should give to the injured plaintiff compensation to which, under other circumstances, he would not be entitled. * * * As counsel in cases of this kind have been so often admonished as to the impropriety of suggesting either by way of argument or by way of questions to the jury, or in any other way, that the defendant was protected by insurance, it seems to be unnecessary to say more than that such a suggestion in the presence of the jury will render any verdict that has been obtained by the plaintiff valueless, as a violation of the rule will require a reversal of the judgment' 124 App. Div. 676; 109 N. Y. Supp. 133."

This case was followed by the same court in *Akin v. Lee*, 99 N. E. 86. There a witness telling of an interview with the defendant, testified that the defendant had said "that it was his car, that his chauffeur had told him about the accident, and that he was insured." At another time, when the defendant was a witness in his own behalf, upon cross-examination by the plaintiff's counsel, the following occurred (p. 85):

"We was asked about his conversation with the plaintiff's family, and this question was

asked of him: 'You told Mr. Akin that you were insured against such accidents, didn't you?' The witness answered: 'Why, I did after I tried to straighten the case myself with them; after she said they were going to the full extent of the law * * *'. At this point the defendant's counsel interrupted the witness by an objection, and asked 'to have the answer stricken out, until I get in the objection on the ground that it is incompetent, improper and immaterial.' The court again ruled that, if it was part of the conversation, the witness might answer and an exception was taken."

In commenting on this evidence the court, by Judge Gray, said (p. 85):

"If we might admit a doubt as to the first ruling, the error in the second is too serious to be disregarded. We have but recently held, following a rule already laid down by us, that evidence that the defendant in an action for negligence is insured in a casualty company is incompetent and its admission justifies an order for a new trial of the action. See *Simpson v. Foundation Co.*, 201 N. Y. 4790, 490; 95 N. E. 10. Such evidence almost always is quite unnecessary to the plaintiff's case, and its effect cannot but be highly dangerous to the defendants; for it conveys the insidious suggestion to the jurors that the amount of their verdict for the plaintiff is immaterial to the defendant. It was a highly improper attempt on the plaintiff's part to inject a foreign element of fact into his case, which might affect the jurors' minds, if in doubt upon the merits, by the consideration that the judgment would be paid by an insurance company. While frequently in the exercise of the authority conferred upon this court, we disregard technical errors, when we see that they do not affect the merits of the controversy, the error committed in this case is of too grave a nature to be put aside as merely technical. In re-

peated instances, judgments have been reversed for its commission, and counsel must take notice that we shall adhere to our rule and that we shall order a new trial in all cases, where, in such actions, a verdict may have been influenced by the consideration of such unauthorized evidence."

The same ruling was repeated by the New York Court of Appeals in *Rodzborski v. American Sugar Refining Co.*, 104 N. E. 616. The objectionable evidence, and the court's ruling thereon, appears from the opinion as follows (p. 618):

"We are also of the opinion that the judgment should be reversed for the reason that the counsel for the respondent adduced evidence which tended to show that the defendant was insured against accident by a liability insurance company. Plaintiff's witness, Laboda, was on the stand, and he had testified that he had accompanied the plaintiff when he called to see the defendant's officers in relation to the accident. Laboda testified to a conversation with a cashier of the defendant on that occasion. Plaintiff's counsel, under objection and exception by defendant, asked him: 'What direction did he give you?' The witness answered: 'When I came there with Mr. Rodzborski I asked him: "Was this man here with a letter?" And he said: "He was nere," and I said: "What do you intend to do about it?" And he said: "Nothing; we hold insurance, and you have to see the insurance," and I said: "Who is the insurance?" and he said: "Employers' Liability." I said: "Where are they located?" and he said: "56 Maiden Lane," and then I said: "I think I can locate it," and I bid him good morning and left.'" After this evidence had been received there was a colloquy between counsel and court, in which plaintiff's counsel disclaimed any intention to bring in the insurance company, while

defendant's counsel insisted that this testimony could have no other effect. The learned trial judge said that 'The trouble is that it is in, and we cannot remedy it.' Defendant's counsel asked leave to withdraw a juror, which was denied under exception. The record discloses that the witness, Laboda, besides being a very necessary and important witness for the plaintiff, had been quite active in aiding him. It must be assumed that plaintiff's counsel knew the answer his question would elicit. The circumstances repel any other assumption. Upon this branch of the case, it is sufficient to say that it falls squarely within the rule adopted by this court in *Simpson v. Foundation Co.*, *supra*. There Judge Vann, writing for the court, said: 'The circumstances indicate, however, that one object of the questions was to suggest to the jury that the defendant was insured in an accident company in order to induce them to give a larger verdict.' He further said: 'Evidence that the defendant in an action for negligence was insured in a casualty company, or that the defense was conducted by an insurance company, is incompetent and so dangerous as to require a reversal even when the court strikes it from the record and directs the jury to disregard it, unless it clearly appears that it could not have influenced the verdict.' See cases there cited.

The error here is sought to be defended on the ground that it could not have influenced the verdict. The main reliance in this respect is that in the cross-examination of this same witness, prior to the evidence complained of, the defendant's counsel drew answers from him to the effect that upon some other occasion and in connection with another accident, the witness had dealt with an insurance company. Whether these answers led the jury here to assume that the defendant was insured is, of course, purely conjectural. If the jury had.

any suspicions of that fact, we cannot tell how they were affected by the testimony.

Although the defendant is a large corporation, we cannot say that the evidence may not have suggested the result. In some cases it is true the courts have sustained judgments where such evidence has been elicited. A perusal of them will show that there was reason to believe that the evidence could not have influenced the verdict. In this case the plaintiff's case against the defendant depended upon his own interested version, which barely measured up to the requisite degree of proof, and was contradicted in every material particular by defendant's witnesses. When we consider these circumstances in connection with the bald references to the insurance company made by the witnesses, we cannot say that the error was harmless."

If these cases of the New York Court of Appeals be followed, then the motion for a mistrial should have prevailed.

If the more conservative rule as heretofore laid down by this court that the trial judge's discretion must be sustained unless it clearly appear that injury might have been done, be applied, then we submit that injury was done and that the trial judge failed to exercise his discretion properly and failed to exercise that "scrupulous" care which appeared from the record in the Cleary case.

For the various reasons urged, we contend that the record contains harmful error, and that the judgment should be reversed.

Respectfully submitted,

McCARTER & ENGLISH,
Attorneys of Defendant-Appellant.

AUGUSTUS C. STUDER, JR.,
CONOVER ENGLISH,
Of Counsel.

The committee on the subject of the
of a letter from the committee and that the
of the committee be referred to the

Respectfully submitted,

WILLIAM H. HARRIS
Secretary of the Committee

Wm. H. Harris, Jr.
Governor, New York
C. Harris

INDEX.

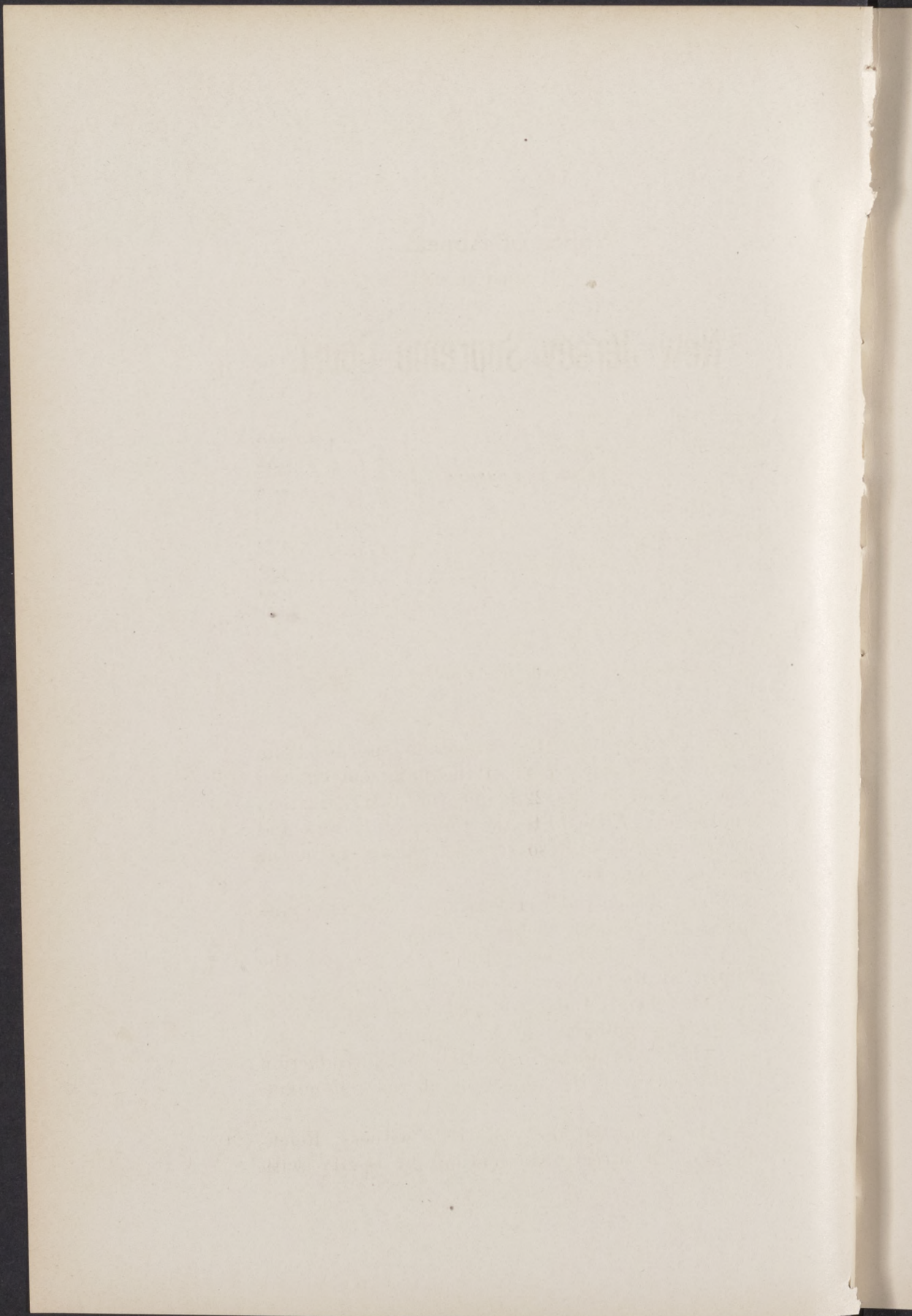
Notice of Appeal.....	i
Rule to Show Cause.....	1
Summons	2
Complaint	3
Answer	5
Reply	7
Order of Substitution.....	8
Motion to Direct a Mistrial.....	128
Motich for Non-Suit	129
Motion for Direction of Verdict.....	147, 150
Verdict	151
Court's Conclusions on Motion for Direction of Charge to Jury.....	155
Defendant's Requests and Objections.....	166
Stipulation	172, 174
Postea	175
Statement	175
Reasons	176
Opinion	177
Rule Discharging Rule to Show Cause.....	179
Rule for Judgment.....	180
TESTIMONY FOR PLAINTIFF.	
Martin Reichenbecker, direct examination.....	9
cross "	11
Fred C. Walsh, direct examination.....	20
cross "	20
re-direct "	23
William Parretti, direct examination.....	23
cross "	24
George E. Kaegi, direct examination.....	25
cross "	27
re-direct "	33

	PAGE.
Jacob Simon,	
direct examination.....	34
cross ".....	35
re-direct ".....	37
re-cross ".....	38
further direct ".....	38
William Morris,	
direct examination.....	41
cross ".....	46
re-direct ".....	58
Dr. Maurice Asher,	
direct examination.....	60
cross ".....	67
Dr. Carl E. Sutphen,	
direct examination.....	70
cross ".....	74
re-direct ".....	75
Charles Glori,	
direct examination.....	76
cross ".....	78
Leopold Lehman,	
direct examination.....	79
cross ".....	82
Leo M. Goodman,	
direct examination.....	83
cross ".....	86
Matthew J. Reilly,	
direct examination.....	90
cross ".....	93
George Scheiner,	
direct examination.....	101
cross ".....	102
Richard P. Jennings,	
direct examination.....	102, 111
cross ".....	113
re-direct ".....	126
re-cross ".....	127

	PAGE.
Dr. Charles F. Baker,	
direct examination.....	109
Cross “	110
re-direct “	110

TESTIMONY FOR DEFENDANT.

Dr. Sidney C. Keller,	
direct examination.....	130
cross “	131
Joseph Okin,	
direct examination.....	131, 148
cross “	136
re-direct “	138
Fred W. Steadman,	
direct examination.....	138
cross “	146
re-direct “	147



Notice of Appeal.

Filed August 4, 1915.

New Jersey Supreme Court.

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RICHARD P. JENNINGS, <i>Plaintiff-Appellee,</i> <i>vs.</i> JOSEPH OKIN, <i>Defendant-Appellant.</i>	}	<i>Action at Law. Notice of Appeal.</i>
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*To Messrs. Fort & Fort,
 Attorneys of Plaintiff-Appellee.*

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SIRS:

Take Notice that the defendant appeals from the whole and every part of the judgment entered in this cause on the 22nd day of July, Nineteen Hundred and Fifteen, to the Court of Errors and Appeals, the Last Resort in all causes, upon the following grounds:

30

1. The Trial Judge refused to declare a mistrial at the request of the defendant.
2. The Trial Judge refused to non-suit the plaintiff at the request of the defendant.
3. The Trial Judge refused to direct a verdict for the defendant at his request.
4. The Trial Judge permitted the introduction of evidence over the objection of the defendant, as follows:
 - a. He permitted the plaintiff's witness, Reich- 40
 enbecker, on direct examination, to testify with

Notice of Appeal.

reference to why he turned to look down the street after the defendant's automobile had passed him.

- 10 b. He permitted the plaintiff's witness, Dr. Asher, on direct examination, to refresh his memory concerning the plaintiff's injuries from a memorandum made by the said witness some time after he had treated the said plaintiff.

5. The Trial Judge refused to permit the defendant's counsel, on direct examination, to ask the following questions of the defendant's witness, Fred W. Steadman:

- a. "What did Mr. Okin say to you when he invited you to get into the automobile?"
- 20 b. "And to what place were you bound?"

6. The Trial Judge refused the requests of the defendant to charge the jury, as requested, as follows:

- a. "3. An act done by an agent while engaged in the master's work may be entirely disconnected therefrom, done not as a means, or for the purpose of performing that work, but solely for the accomplishment of the independent purpose of the agent. Such an act is not as a matter
- 30 of fact or as a matter of law the act of the master."

 b. "4. The mere fact that at the time of the accident the car, which was owned by the defendant, was being operated by his son does not create the relation of master and servant between the defendant and his son."

- c. "6. To hold the defendant you must find that when the accident occurred the boy was executing his father's orders and actually engaged
- 40 in serving him, and it is not enough to say that

Notice of Appeal.

the injuries complained of would not have been committed without the facilities afforded by the servant's relation to the master."

d. "7. If you find that at the time of the accident the boy was engaged in executing some private purpose of his own your verdict must be for the defendant."

10

e. "8. The fact that at the time of the accident the son was driving two men who were his friends and not those of the defendant raises the presumption that he was not engaged in the execution of his father's business."

f. "9. From the fact that several hours had elapsed between the time the boy left his father's house and the occurrence of the accident, together with the fact that he was then proceeding in a direction away from his father's house, there is a presumption that he was at that time engaged in executing some private purpose of his own."

20

g. "11. From the fact that the witness Steadman entered the automobile at the invitation and suggestion of the boy, Jacob, there is a presumption in favor of the defendant that from that time, until the accident occurred, the boy was driving the car for his own purposes."

h. "14. The fact that the place where the accident occurred is some distance from the place to which the boy was sent by the father and that he was then proceeding in a direction away from his father's house, together with the additional fact that the accident occurred several hours after the boy left his father's house, raises the presumption that he was then engaged in executing some private purpose of his own."

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i. "15. The defendant testifies that he instructed his son, Jacob, about eight o'clock in the evening, to take the car and go to the Majestic Theatre and see if the lights in the street were

40

Notice of Appeal.

burning, and then come home. There was nothing in the performance of this duty which would have required Jacob to consume as much as two or three hours of time, and there can be no presumption that when he was driving the car at the time of the accident he was returning from the performance of his duty.”

j. “16. The defendant testifies that he instructed his son, Jacob, about eight o’clock in the evening, to take the car and go to the Majestic Theatre to see if the lights in the street were burning, and then come home, and the fact that about three hours later he was driving down Market Street with two friends, who wanted to go to the Park Place station, militates against any presumption that he was then returning home from the performance of that errand.”

k. “17. The agency of Jacob Okin with reference to the use of the defendant’s car was to go from the defendant’s house to the Majestic Theatre, examine the lights and come home, and unless the jury find that driving the car down Market Street three hours after, in company with two friends of his own, was in fulfillment of the duty which his father had cast upon him in connection with the examination of the lights, the verdict must be for the defendant.”

l. “18. The plaintiff was guilty of contributory negligence and the verdict must be for the defendant.”

m. “20. If the jury finds that the plaintiff, after seeing the car coming rapidly toward him some 245 feet away, stepped into the street, and thereafter took no precautions to watch the car to see whether it would collide with him, but continued his way across the street without fur-

Notice of Appeal.

ther regard to the approach of the car, he was guilty of contributory negligence, and the verdict must be for the defendant.”

7. The Trial Judge erred in his charge to the jury in charging them with reference to the fourteenth, fifteenth and sixteenth requests, as follows:

10

“In denying these requests I say this: I refuse to charge the requests because I think that an attempt to deal with presumptions in this way would be merely confusing to the jury. The true inquiry is what use Joseph Okin had authorized his son to make of the car and whether the son at the time of the accident was putting the car to a use which was unauthorized; and you will not forget that the particular commission to go down and see whether those lights were burning did not constitute the whole of the relation which the son sustained to the car or embrace the whole of his father’s authorization in respect to the car.”

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McCARTER & ENGLISH,

Attorneys of Defendant-Appellant.

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Rule to Show Cause.

Filed May 1, 1915.

New Jersey Supreme Court.

Essex County.

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RICHARD P. JENNINGS,

vs.

JOSEPH OKIN,

Plaintiff,

Defendant.

*Action at
Law.*

*Rule to
Show Cause.*

Application for a rule to show cause having been
duly made within the time limited by law to me the
Circuit Judge to whom the above cause was referred
for trial, on behalf of the defendant Joseph Okin, and
I having considered the application,

20

It is ORDERED that the plaintiff Richard P. Jennings
do show cause before the New Jersey Supreme Court,
at the State House in the City of Trenton, on the
first day of June, next, at the opening of the term on
that day, why the verdict in this cause should not be
set aside, and a new trial granted.

And it is further ORDERED, that the following points
are expressly reserved to the said defendant in this
said rule, namely, the objections and exceptions taken
at the trial to the refusal of the court to grant the
defendant's motion for a non-suit; to the refusal to
grant the defendant's motion for a direction of a ver-
dict; to the charge of the said court to the jury; to
the refusal of the court to charge as requested by the
said defendant; to the refusal of the said court to

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Summons.

admit certain evidence propounded by the said defendant, and to the refusal of the said court to grant the defendant's motion for a mistrial.

Dated May 1st, 1915.

On motion of

McCARTER & ENGLISH,
Attorneys of Defendant.

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Let this rule be entered in the minutes.

FREDERIC ADAMS,
Circuit Court Judge.

Summons.

State of New Jersey, to Joseph Okin, GREETING:

20 (SEAL.)

YOU ARE SUMMONED to answer the annexed complaint of Richard P. Jennings, in an action at law in the Supreme Court, and take notice that unless you file your answer to the said complaint, with the Clerk of the Supreme Court at Trenton, within twenty days after service upon you of this writ and the annexed complaint, the plaintiff may proceed in the suit and judgment may be entered against you.

30 WITNESS, WILLIAM S. GUMMERE, Chief Justice of the Supreme Court, at Trenton, this fifteenth day of July, nineteen hundred and fourteen.

WM. C. GEBHARDT,
Clerk.

FORT & FORT,

Attorneys.

40

Complaint.

Complaint.

Filed July 15, 1914.

NEW JERSEY SUPREME COURT.

Essex County.

RICHARD P. JENNINGS,

vs.

JOSEPH OKIN,

Plaintiff,

Defendant.

*Action at
Law.
Complaint.*

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The plaintiff, a resident of the City of Newark, County of Essex and State of New Jersey, says:

1. On or about the ninth day of January, nineteen hundred and fourteen, and for a long time prior thereto, the defendant was the owner of a certain automobile. On or about the said date, the plaintiff was lawfully crossing Market street, in the City of Newark, from the south side of said street to the north side thereof, at or near the point where Washington street of said city intersects Market street.

20

2. On or about the said time, the defendant, by his agents and servants, did operate and drive his said automobile along Market street, in an easterly direction, and the said defendant, by his said agents and servants, at said time did drive the said automobile at a high and excessive rate of speed, and without warning did negligently and carelessly strike and run over the plaintiff, who was lawfully crossing said Market street as aforesaid. The driver of the said car was about the said defendant's business and was authorized to drive said automobile at the said time, by defendant.

30

40

Complaint.

3. Because of the negligence of the defendant and his said agents the said plaintiff sustained severe injuries, to wit: The plaintiff had concussion of the brain, three fractures of the pelvic bone in his hip, which resulted in the shortening of his left leg, and other severe injuries were inflicted upon him, and he was obliged to spend a considerable length of time in hospitals and was confined to his home for a long period of time, and is unable to work, and was and now is unable to carry on his business. The plaintiff has further expended large sums of money in efforts to recover from his injuries. Plaintiff demands the sum of twenty-five thousand dollars damages.

FORT & FORT,
Attorneys for Plaintiff.

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Answer.

Answer.

Filed August 1, 1914.

NEW JERSEY SUPREME COURT.

Essex County.

RICHARD P. JENNINGS,

Plaintiff,

vs.

JOSEPH OKIN,

Defendant.

*Action
at Law.*

Answer.

10

Joseph Okin, a resident of the City of Newark, County of Essex and State of New Jersey, the defendant herein, answers the plaintiff's complaint in this action as follows:

(1) The defendant admits that on the ninth day of January in the year nineteen hundred and fourteen, he was the owner of a certain automobile; the defendant has no knowledge, information or belief sufficient to form an opinion as to whether the plaintiff was lawfully crossing Market street in the City of Newark from the south side of said street to the north side thereof at or near the point where Washington street of said city intercepts Market street. 20

(2) The defendant denies all the allegations contained in paragraph two of the complaint herein. 30

(3) The defendant denies that the plaintiff sustained any injuries on account of the negligence of the defendant and his agents; the defendant has no knowledge, information or belief sufficient to form an opinion as to whether the plaintiff did sustain the injuries complained of in paragraph three of the complaint herein, nor whether the said plaintiff was obliged to spend a considerable amount of time in the hospital nor whether he was confined to his home for a long time, nor whether he is still able to work and 40

Answer.

carry on his business, nor whether said plaintiff has expended money and how much in order to recover from his injuries; and the said defendant insists as aforesaid, that whatever injuries or loss or damage said plaintiff did sustain, were not sustained through the negligence of the said defendant or through the negligence of his agents.

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FIRST DEFENSE.

The defendant was not guilty of negligence.

SECOND DEFENSE.

The agents of the defendant were not guilty of negligence.

THIRD DEFENSE.

20 The defendant was not present at the time and the occurrence of the accident, nor were his servants or agents present; neither the defendant nor his servants or agents caused the said accident, nor did they contribute in any extent whatever to the occurrence of said accident; and whoever was guilty of the negligence which caused said accident, or contributed to the occurrence thereof, the plaintiff was guilty of contributory negligence; of which the particulars are as follows:

30 Whatever damages and injuries were sustained by the plaintiff, Richard P. Jennings, at the time and place mentioned in the complaint, were caused and contributed to by his negligence in that he negligently and carelessly exposed himself to the risk of such an accident and neglected to take precaution or to exercise care to guard and protect himself against such an accident; moreover at the time and place mentioned in the complaint he was conducting himself in a careless, negligent and reckless manner and was not exercising care or taking proper precautions.

40 Wherefore the defendant demands judgment that the complaint herein be dismissed with the costs and disbursements in this action.

Attorney of Defendant.

Reply.

Reply.

Filed

NEW JERSEY SUPREME COURT.

RICHARD P. JENNINGS,

vs.

JOSEPH OKIN,

Plaintiff,

Defendant.

*Action
at Law.*

10

The plaintiff, in reply to the answer of the defendant filed herein, says:

1. Plaintiff denies that he exposed himself to any risk of an accident and neglected to take proper precaution or exercise care to guard and protect himself, and denies that he was in any way guilty of contributory negligence or in any way by his acts contributed to the injury which he sustained, as is alleged in the third defense in the answer.

20

FORT & FORT,
Attorneys for Plaintiff.

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*Order of Substitution.***Order of Substitution.**

Filed February 13, 1915.

NEW JERSEY SUPREME COURT.

Essex County.

10

RICHARD P. JENNINGS,

*Plaintiff,**vs.*

JOSEPH OKIN,

*Defendant.**Action
at Law.**Order of
Substitution
of Attorney.*

20

Application being made to the court and Jacob Schnieder, Esquire, the attorney of record of the defendant in the above entitled action consenting hereto,

It is ordered that Messrs. McCarter & English be and they are hereby substituted as attorneys of record for the defendant in place of the said Jacob Schnieder, Esquire.

Dated February 13th, 1915.

Let this rule be entered in the minutes.

WM. S. GUMMERE,

C. J.

30

I consent to the entry of the foregoing order.

JACOB C. SCHNIEDER,

Attorney of Defendant.

Rule actually entered this 13th day of February, 1915.

On motion of

McCARTER & ENGLISH,

Attorneys of Defendant.

40

Martin Reichenbecker, direct.

NEW JERSEY SUPREME COURT.

Essex Circuit.

Tuesday April 27, 1915.

RICHARD P. JENNINGS

vs.

JOSEPH OKIN.

*Action
at Law.*

10

Before Hon. Frederic Adams, *J.*, and a jury.

For plaintiff appear Messrs. Fort & Fort, by Franklin W. Fort, Esq., and Jehiel G. Shipman, Esq.

For defendant appear Messrs. McCarter & English, by Conover English, Esq., and Augustus C. Studer, Jr.

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A jury is called and sworn.

Mr. Fort opens for plaintiff.

Mr. English opens for defendant.

MARTIN REICHENBECKER, sworn in behalf of plaintiff.

Direct examination by Mr. Fort.

Q Mr. Reichenbecker, what is your business? A Police officer.

Q And were you a police officer in January, 1914? 30

A Yes, sir.

Q Were you on duty in Market street, Newark, at that time? A Yes, sir.

Q On the night of the 9th of January? A Yes, sir.

Q Did any accident occur there that came to your knowledge? A Yes, sir.

Q What was it? A Well, at 10.45, January 9th, I was standing on the corner, on the southeast corner 40

Martin Reichenbecker, direct.

of Market and Washington street, looking west of Market street, when I see an automobile coming down there at a pretty good rate of speed, and the theatre had just let out then, and I thought he was taking an awful chance—

Objected to.

The Court. Strike that out.

10 *Mr. English.* Just tell us what you saw.

The Court. Just what you saw.

Witness. He was going west on Market street at the rate of about between fifteen to twenty miles—

Q Going west, you say? A Going east on Market street. As he was coming by Washington street and had passed me, I turned around to see if he would strike anybody. As I turned around, about fifty feet
20 behind me he seemed to crash into two men there. One man went into the telegraph pole and the other seemed to fall right underneath the car. I ran up to the accident immediately, and there was about twenty-five or thirty feet of where the accident occurred that this automobile had stopped.

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

Q What was that number? A 13,799.

Q Do you know who was driving that car? A I
30 don't know him personally.

Q Did he give you his name? A I took him to the station house—Okin.

Q You took him to the station house? A Yes, sir.

Q Was he put under arrest? A He was held there, and he was paroled later on by Judge Hahn.

Q What was his first name? A I don't know his first name. Okin.

Q Okin? A Yes, sir.

Q Do you know Mr. Joseph Okin? A No, sir.

40 Q Did you see him there at the station house that night? A Yes, I think I did; I am not positive.

Martin Reichenbecker, cross.

Q What sort of a car was it, Mr. Reichenbecker?

A A touring car.

Q You do not know the make? A No, sir.

Q You made a report of the accident at that time to police headquarters? A Yes, sir.

Q Did you state the make in that report? A No, sir.

Q Do you know who the man was who was hit? A 10
No, I don't know him personally.

Q Well, did you know his name? A Jennings.

Q Richard P. Jennings? A Yes, sir.

Q Who was the other man who was with him, who was also hit, do you know that? A A man named Reilly.

Cross examination by Mr. English.

Q Were you at that time a night officer? A Sir?

Q Were you on night duty at that time? A Yes, 20
sir.

Q You were in uniform at the time? A Yes, sir.

Q Where were you standing at the time, Officer?

A On the southeast corner of Washington and Market.

Q That is, on the south side of Market and on the east side of Washington? A Yes, sir.

Q Where the tracks turn around, going south? A Yes, sir.

Q You stood right at the corner? A Well, I 30
would call it the corner; about five feet from the east curb of Washington street.

Q About five feet nearer to Market street? A No, about five feet east of the Washington street curb.

Q You were out on the street? A No, on the sidewalk.

Q On the sidewalk? A Yes, sir.

Q You were on the sidewalk? A Yes, sir.

Q And at that corner. You noticed the automobile coming down the street? A Yes, sir. 40

Martin Reichenbecker, cross.

Q At the time you first noticed the automobile did you see these men who afterwards, you say, were hit?

A No, sir.

Q Where was the automobile when you first saw it with reference to Washington street, was it west of the crossing? A Yes, sir.

Q West of the crossing? A Yes, sir.

10 Q And how far west? A Well, I should judge about thirty feet.

Q About thirty feet west of the crossing? A Yes, sir.

Q Washington street at that point is how wide, do you know? It is a pretty wide street, is it not? A Yes, about—

Q Seventy-five or 100 feet? A No, about thirty-five.

20 Q Oh, it is wider than that, is it not? A Not that street.

Q (*By Mr. Fort.*) You mean between curb and curb, do you not? A Yes, sir.

Q (*By Mr. English.*) Well, at any rate, this automobile was at least sixty-five feet away from you when you first saw it? A Yes.

Q And at that time, you say, you saw nobody in the street? A I have seen other people in the street, yes; there were people passing in all directions.

30 Q But they had nothing to do with this accident, one way or the other? A No, sir.

Q Then the automobile passed the crossing of Washington street? A Yes, sir.

Q And went on down and passed you? A Yes, sir.

Q And you turned around to look at it? A Yes, sir.

40 Q And when you turned around, following with your eyes the automobile, when did you first see these men? A Just as the automobile ran into them.

Martin Reichenbecker, cross.

Q When you first saw the men, or either of them, were they in the street or on the sidewalk? A In the street.

Q They were out in the street? A Yes, sir.

Q And how far away from the curbline were they?

A I should judge about six or seven feet from the curb.

Q Which one was, Jennings or Reilly? A Both.

Q Were they together? A Yes, sir.

Q And which way were they facing when you first saw them? A Facing north.

Q That is to say, they were going across Market street? A Yes, sir; just opposite the west sidewalk of North Washington street.

Q And that is how many feet from the corner where you stood? A About thirty-five or forty feet.

Q I guess it is a little more than that, as a matter of fact, is it not? Well, anyway, however many feet it was, it was opposite the west crosswalk of the other street; is that right? A Yes, sir.

Q All right. Did you notice whether they looked to see whether an automobile or anything was coming in the street? A No, sir.

Q They did not look? A I didn't say they didn't look.

Q What do you say? A I say I don't know.

Q You were not watching them all the time? A I wasn't watching the men, no.

Q How far away was the automobile when you first saw the men in the street? A I don't get that right.

Q How far away was the automobile from the men when you first saw the men in the street? A Well, it seemed it all happened just in a second; as I followed the car down with my eyes it happened.

Q You did not turn around to watch the car until it got past you, I suppose? A I watched it going past me, yes.

Martin Reichenbecker, cross.

Q You turned around as the car came down past you and watched it? A Yes, sir.

Q And when you got turned around so that you could look down Market street, you saw these men in the street? A Yes, sir.

Q Now, I want to know how far the car was away from them when you first saw them? A Well, I
10 should judge about five feet.

Q About five feet? A Yes, sir.

Q And what were those men doing when you first saw them there? A Well, the car was coming and they were walking.

Q Walking north? A Yes, sir.

Q And were they looking towards the car or were they looking north? A I don't know what way they were looking.

Q Well, do you remember which way they were facing? A North.
20

Q Facing north? A Walking north, anyhow.

Q And facing in the direction they were walking?

A Well, I don't know whether they were or not.

Q Well, will you tell us which way they were facing then? A I don't know.

Q And did you see the collision between the car and the men in the street? A Yes, sir.

Q How far do you think the car went after the accident happened? A About thirty-five feet, thirty
30 or thirty-five.

Q Did you measure it? A No, sir.

Q What you noticed was that it went some little distance below where the men were, and then stopped; is that right? A Yes, sir.

Q And then you, very properly, arrested the driver? A Yes, sir.

Q And he said his name was Okin? A Yes, sir.

Q He was not this gentleman sitting here by me, was he (indicating)? A No, it was a young fellow.

40 Q A young fellow? A Yes, sir.

Martin Reichenbecker, cross.

Q Did you take the number of the car? A Yes, sir.

Q Did you write it down? A Yes, sir.

Q What on? A On a memorandum book.

Q Have you got that book? A No, it is home.

Q How can you remember now what the number was? A I got a duplicate report here.

Q Oh, you refreshed your recollection from some other report? A Well, that is quite a while ago. I have got lots of other cases that I have got in my head. 10

Q Yes, that is what I am getting at. I want to know how you got the number of the car? A By looking at this report.

Q Did you write that out yourself? A No, sir.

Q Whose writing is it? A Lieutenant McCaffery.

Q Is your report in writing? A Yes, sir.

Q You have not refreshed your memory from your own report? A Yes, I have; I looked at it the other day a little bit. 20

Q Can you distinguish now what you refreshed your mind on from your own report and what you refreshed your mind on from the report of Captain McCaffery? A Practically the same.

Q Practically the same, you think? A Yes, sir.

Q When did you look at your report? A I think Wednesday or Thursday, when the young man notified me the case would come up in court.

Q If you had the report of the captain there, why did you get out your own? A Well, if I was notified it was coming up this afternoon I would have brought my own; I was only notified this afternoon. 30

Q Now, I think you said that young Mr. Okin was released that night on parole, or something like that? A Yes, sir.

Re-direct examination by Mr. Fort.

Q Mr. Reichenbecker, you said that when the car passed you you turned to look down the street? A Yes, sir. 40

Martin Reichenbecker, cross.

Q Why did you do that?

Mr. English. I object to that. Why he did it is not material. The fact is that he did it.

Mr. Fort. It may be material.

The Court. It seems to me competent. You may answer the question.

10 Defendant's counsel objects to this ruling of the court.

Objection noted as ground of appeal.

A The reason I followed him up with my eyes, I thought he was going pretty fast, and it is dangerous right there, on account of the theatre had just let out, people crossing the street there.

20 *Mr. English.* That is just what I thought might happen, your honor. He is giving us his thoughts on the subject, and his thoughts on the subject are what he diagnosed. Is that material?

The Court. I understood that was your objection, but I think the testimony is competent. I think a man may give his reasons for what he does, within certain limits. I do not think the witness has exceeded the proper limits.

By the Court.

Q Mr. Reichenbecker, Washington street crosses Market? A Yes, sir.

30 Q And if we call the part of Washington street that is north of Market street North Washington street and the part that is south of Market street South Washington street, is this true: that the east side of South Washington street is a little further west than the west side of North Washington street? A Yes, sir.

Q They are not in line? A No, sir.

Q Is there a difference in the width between North and South Washington streets? A Yes, sir.

40 Q Which is wider? A North Washington street.

Martin Reichenbecker, cross.

Q Now, you have spoken of a crosswalk. Was there a crosswalk, or where is the crosswalk that you spoke of? A There isn't any crossing, on account of its being that kind of pavement there, but these men were in a line—

Q You did not mean to say there was a line of flagging across the street? A No, sir; there is no flagging.

Q You did not mean to say that? A No, sir. 10

Q Now, as you stood on the southeast corner of Market and Washington street on the sidewalk, about five feet east of the Washington street curb, how does that compare with the west sidewalk of North Washington street? A The west side of North Washington street?

Q Yes. As you stood, were you opposite to the west side of North Washington street, or were you west of it—looking across the street, I mean, looking across Market street? A Yes, sir. 20

Q What were you opposite to on the other side? A Why, I was facing on an angle, like, towards Plane street, on the southwest.

Q I mean if you had looked straight across? A No, I wouldn't look straight across.

Q If you had looked straight across? A I wasn't. I would have looked over towards Donald's furniture store, pretty near, if I looked straight across.

Q Then was the place where you were standing nearer the Court House than the west line of Washington street? A Yes, sir. 30

Q You first saw the car as it was coming down west of you? A Yes, sir.

Q On this side, on the north side of Washington street? A Yes, sir.

Q I mean on the west side of Washington street? A No, the car was going east on Market street.

Q I understand that, but where you saw it was it west of Washington street, where you first saw it? A Yes, sir. 40

Martin Reichenbecker, cross.

Q It came on and passed you, and your eyes followed it around? A Yes, sir.

Q And just when was it that you saw these two gentlemen walking? A Just after the car had passed me about thirty or thirty-five feet.

Q How were they to North Washington street, where were they heading for? A It seems they were heading on the west corner of Market and Washington street.

Q As though they were going up on the west side of North Washington street? A Yes, sir.

Q In what part of the street was the automobile? A The automobile?

Q Yes, the automobile? A Why, it was on the south side of Market street.

Q Not in the trolley tracks? A No, sir.

Q On the south roadway? A I think it was about five or six feet from the curb.

Q And how far had these gentlemen got into the street towards the trolley line when one of them was struck, or when both of them were struck? A Oh, about seven or eight feet, probably nine or ten feet.

Q From the trolley track or from the curb? A From the curb.

Q From the curb? A Yes.

Q Now, I want to be sure I heard you straight. What did you say about the car being about five feet from the men? A When I followed the car with my eye as it was going by me, and by the time I had turned around to see the car, just before it struck these men, that is when I first seen the men and the car; it all come at one time, like. The last time I seen the men alone they were about five feet apart from the car; that is, off on an angle I seen it, like. I don't mean that they were five feet off—

Q What part of the car struck them? A It seemed to me like the front part.

Q Did the automobile cut off your view of the men? A Well, after it struck them, yes.

Martin Reichenbecker, cross.

Q Before it struck them? A After.

Q Did it before? A No.

Re-cross examination by Mr. English.

Q Officer, can you say whether they were hit by the right or left side of the automobile? A What do you say?

Q Can you say whether these men were hit by the right or left side of the front of the automobile? A 10
No, sir.

Q Jennings was the only one who was really hurt, was he not? A Well, we sent both of them to the hospital.

Q But you always do that as a matter of precaution, do you not? A He was hurt; we got a report from the hospital that he was.

Q Did you send for the ambulance? A I sent for the ambulance; yes, sir.

Q Did it come while you were there? A Why, no. 20

Q Did you go off with Okin and leave the injured man there? A Yes, I went away with Okin.

Q Was any other officer in charge? A Two other officers.

Q They came up while you were there? A Yes.

Q Now, what I want to know is whether Jennings was hit, if you can say, by the front of the car, or the radiator or the right mud guard or the left mud guard hit him? A By the front of the car, because I would have seen it if he was hit on the side. 30

Q That is as near as you can come to it, the front part of the car? A Yes.

Q You do not know what part of the front part of the car? A No.

By the Court.

Q What became of the car while you were taking Mr. Okin to the station house? A Why, they stopped right there; they went away from it, I suppose. I am not sure what became of the car. 40

Fred C. Walsh, direct—cross.

Q You did not ride down in it? A Yes, sir.

Q You rode down to the station house in it? A Yes, sir.

Q Did Mr. Okin bring you back? A No, sir.

Q How did you get back? A I walked back.

Q Then the car was left at the station house? A Yes, sir.

10 FRED C. WALSH, sworn in behalf of plaintiff.

Direct examination by Mr. Fort.

Q What is your business, Mr. Walsh? A I am in the automobile business.

Q Where? A 287 Halsey street.

Q Were you on Market street, Newark, on the night of the 9th of January, 1914? A Yes, sir.

Q Did you see the accident in which Mr. Jennings was injured? A Yes, sir.

20 Q Tell us where you stood and what you saw, please? A I was coming from Miner's Theatre on Washington street, and just stepped off the curb to cross Market street as a car passed me so quick, I turned sideways to jump back, and, naturally, watched the machine, because it went by me so quick, and it only seemed about a minute when I see two men step off the curb, and the machine struck the two of them, and it seemed to throw one against the pole. I went down to where the accident happened and watched
30 them for awhile, until the ambulance came, and then went on home.

Q How fast was the car moving, Mr. Walsh? A As near as I could judge, about forty miles an hour when it passed me.

Q You are familiar with automobiles from your business? A Yes, sir.

Cross examination by Mr. English.

Q What automobile house are you connected with?

40 A With the Walsh Auto Service Company.

Q That is your own business? A Yes, sir.

Fred C. Walsh, cross.

Q Now, what part of Market street did you start to cross from Washington street? A Just as I came along from the Empire Theatre—

Q Well, you were walking on the west side of Washington street? A On the same side that the theatre is on.

Q Well, I do not recall which side that is. Were you on the Court House side of Washington street?

A On the Court House side of Washington street. 10

Q That is, on the west side of Washington street? A Yes, sir.

Q And you were expecting to walk straight across Market street? A I just stepped off the curb when the car went by—

Q (*By the Court.*) Which part of Washington street is that, south of Market or north of Market?

A That is south.

Q (*By Mr. English.*) That is on the south side of Market and on the west side of Washington street? 20

A Yes, sir.

Q What the judge has called South Washington street? A Yes, sir.

Q Now, you were headed to go across Market street? A Yes, sir.

Q Were you alone or was anybody with you? A I had another young man with me.

Q And you say this car passed rapidly by, so you stepped back? A We stepped back; yes, sir.

Q And then did you start up to cross the street? 30

A No, sir; we turned around and watched the machine.

Q Now, you saw it go past the intersection of South Washington street with Market? A Yes, sir.

Q Did you see the officer standing on the corner?

A No, sir; I didn't notice the officer; I was watching the machine.

Q And you saw it go down below the east curb of Washington street? A Yes, the east curb of South Washington street. 40

Fred C. Walsh, cross.

Q It got past the corner? A Yes, sir.

Q And how far down did it go before the accident happened as you watched it? A Well, I don't know; I should judge it was about a hundred feet.

Q Was there a good light there? Did you have a good light on the scene around? A Yes, sir.

Q That is, a street light, an electric light? A Yes, sir.

10 Q When did you first see the men in the street with reference to the automobile? A Why, they seemed to step off the curb just as—

Q Just as the automobile got there? A Just as the automobile got there.

Q You were watching the car all the time? A Yes, sir.

Q And there was not anybody in the street until just as the accident happened? A Yes, it seemed—

20 Q What is that? A It was only a minute from the time it passed me until the thing was all over.

Q So that, as I understand you, you turned and watched the automobile going down the street, and as you looked the men appeared in front of the car? A Yes, sir.

Q And then the accident happened? A Yes, sir; it all seemed to happen at once.

Q Now, did you notice what direction those men were walking as they suddenly stepped in front of the car? A No, sir; I did not.

30 Q Did you notice which way they were facing? A No, they didn't seem to be, because they simply seemed to step off the curb and had taken two or three steps—

Q Facing the way they were walking? A Yes, sir.

Q How far from the south curb of Market street was the car as it passed you? A About four or five feet.

40 Q It was on the right hand side of the street? A Yes, sir.

William Parretti, direct.

Q It was on the proper side of the street? A Yes, sir.

Q And then these men stepped down off the curb, and were practically right in front of the car? A From my view.

Q That is, as far as you could see? A Yes, sir.

Re-direct examination by Mr. Fort.

Q When you say it was just a minute after the car 10
passed you before the accident happened, do you mean
sixty seconds or— A Well, I mean about that—I
stepped down, and the car went by so quick that I
jumped back to keep from being hit, and turned
around, and the whole thing was over in no time.

WILLIAM PARRETTI, sworn in behalf of plaintiff.

Direct examination by Mr. Fort.

Q Mr. Parretti, what is your business? A I am 20
elevator starter at Bamberger's.

Q Were you on Market street on the night of Janu-
ary 9, 1914? A Yes, sir.

Q About quarter to eleven? A After the Keeney
show came out I was up there.

Q Did you see an accident there in which Mr.
Jennings was injured? A I didn't see no accident;
I seen the car going down. I was at Plane and Mar-
ket street when this car passed me.

Q What happened? A This car was coming down 30
on the west side of Market street there as I was just
about to cross the curb. It was going so fast that it
was within a hair of hitting me; it almost hit a horse
and wagon that came out of Plane street.

Q This was at Plane street, was it? A Yes, sir.

Q Now, what happened after that, do you know?
A Well, I don't know what happened after that, only
I jumped back, and I looked down the street, and I
seen the crowd, and I ran down to it, and as I got
down there I seen a man lying on the sidewalk. 40

William Parretti, cross.

Q Just after this car passed you? A Just after this car passed me, just looked down the street, and I seen a crowd.

Q And was it the same car that passed you? A When I got down there it was standing there.

Q And was that the car that had hit the man or not? A Yes, sir.

10 Q How long would you say it was from the time that the car passed you at Plane street until you saw the crowd gather at Washington street? A I was just about able to get up when the car was gone, it was out of my sight.

Cross examination by Mr. English.

Q Where were you? A Corner of Plane and Market street, crossing over Market.

20 Q Does Plane street run all the way across Market street? A I was right on the southeast corner of Plane and Market, just going across, about four feet off the curbstone.

Q Going across what street? A Across Market street.

By the Court.

Q You were asked whether Plane street crossed Market street? A Whether Plane crosses Market street?

30 Q Yes. A Yes, sir; Plane goes right across Market street.

By Mr. English.

Q And you had been walking north on Plane street? A No, I had been coming up Market street from Keeney's theatre.

Q What street is Keeney's theatre on? A Keeney's theatre is on Branford place and Halsey street.

40 Q Then you intended to go where? A Home, on my way home.

George E. Kaegi, direct.

Q That would take you across Market street? A I came over from Halsey street and up Market to Plane street, and I seen all this.

Q I understood that you stopped there, or were you trying to cross Market street? A Yes, sir.

Q So that you were trying to walk north on Market street? A No, I was trying to cross Market street.

Q Well, that would take you north, would it not? 10

A Yes.

Q Well, you saw this car coming, and you stepped aside to avoid it? A Jumped aside.

Q All right. When you did that did you continue to walk across the street or did you stand still? A No, I looked down to where the automobile was going. I knew it was going to hit somebody.

Mr. English. I move to strike that out.

The Court. Strike it out. 20

Q What I asked you was whether you continued to walk across the street or stood still? A I continued to walk across the street.

Q You did not see the accident? A I did not see the accident.

Q After the car passed you, you later on saw the car down the street? A Yes, sir.

Q Did you go down there? A Yes, sir.

GEORGE E. KAEGLI, sworn in behalf of plaintiff. 30

Direct examination by Mr. Fort.

Q Mr. Kaegi, what is your business? A Clerk.

Q Where? A The Road Board, Essex County.

Q Did you see this accident on the 9th of January, 1914? A Yes, sir.

Q Where were you? A On Market street.

Q What part of Market street? A Right opposite Washington street.

George E. Kaegi, direct.

Q Opposite which part of Washington, North Washington or South Washington? A North Washington.

Q You were opposite? A Opposite North Washington.

Q Now, that is about seventy-five feet to the east of South Washington? A Yes, sir.

10 Q Who was with you? A Mr. Simon.

Q Now, tell us what you saw. A I saw an automobile coming down Market street, and just as it got up to me they swerved a little bit, and he just hit one fellow slightly and hit one man and ran over him. The man laid there for awhile, and the machine went on a few feet.

Q How many feet? A Oh, I should judge about fifty feet.

20 Q Well, now, was the machine going fast before it hit him? A Going pretty fast; yes, sir.

Q Who was the man it hit? Do you know the man that it hit? A Jennings.

Q Richard Jennings? A Yes, sir.

Q Do you know who was driving the car? A No, sir; I didn't know him.

Q Where was Mr. Jennings when the car hit him? A About six or seven feet away from the curb.

Q Which side of the car hit him? A The front of the car hit him.

30 Q Well, the right or the left of the front, the side nearest the curb or the side nearest the car track or the middle? A I don't remember.

Q Now, you say the car swerved just before it hit him. Which way did it swerve, in toward the curb or out toward the car track? A It was in toward the curb, and came out towards the car track; it then swung in again just slightly. That is the way he missed Mr. Jennings's pal that is, he missed him that way and caught Jennings.

40 Q Well, were they not together? A Yes, sir. He just hit one fellow's foot, or leg, and caught Jennings.

George E. Kaegi, cross.

Q Well, what part of the car hit Mr. Jennings? You say the front. Do you know whether it was the side of the car nearest the curb or the side of the car furthest away from the curb? A The one nearest the track.

Q Nearest the track? A Yes.

Q What part of Mr. Jennings's body did it hit, do you know? A It hit him in the stomach and ran right over him; it knocked him right on his back. 10

Q Was he facing the car? A He was then; yes, sir.

Q He was then? A Yes, sir.

Q When it hit him? A When the car hit him.

Q What had he been doing before that, walking in what direction? A Crossing the street.

Q And then did he turn, do you mean? A Just before it hit him.

Q Just before it hit him? A Yes. 20

Q Now, were you walking west on Market or east on Market? A West on Market.

Q How far away was the car when you first saw it? A I saw it the corner of Washington and Market; that is, the south side of Washington.

Q Where was Mr. Jennings then, do you know? A Why, he was just crossing the street.

Q He had started across already? A Yes, sir.

Q And how far out from the curb would you say he was when he was hit? A About six or seven feet. 30

Cross examination by Mr. English.

Q Mr. Kaegi, what time of night was this? A Around eleven o'clock.

Q And where had you been? A Down taking a walk.

Q Which way were you bound at the time this thing happened? A Bound for home.

Q Were you walking or standing still? A Walking up Market street. 40

George E. Kaegi, cross.

Q Towards the Court House? A Towards the Court House.

Q And you were down about opposite North Washington street? A Yes, sir.

Q And then you were right up by Jennings and the other man when they started to go across the street? A Yes, sir.

Q That is right? A Yes, sir.

10 Q So that it happened right by you? A Right by me, yes.

Q Did you talk to these men before the accident happened? A No, sir.

Q Did you know either of them? A Yes, I knew them by sight.

Q Which one did you know? A I knew Mr. Jennings.

Q How long have you known him? A I had known him a few years.

20 Q A few years? A Yes.

Q Is he a friend of yours or a business acquaintance, or what? A No, sir.

Q Well, what was the extent of your acquaintance for the past two years? A Just a greeting; that is about all.

Q So that you stopped to say a word to him as he walked up? A No, sir.

Q Just said "How do you do?" or what? A No, sir; he didn't see me.

30 Q Was he at that time engaged in going across the street? A Yes, sir.

Q Was he on the sidewalk or down in the street? A He was in the street, crossing.

Q Walking north across Market street? A Yes, sir.

Q And at that time when you saw him he was facing the direction he was walking, was he not? A Yes, sir.

40 Q And where was Mr. Reilly, on the east side or west side of him? A The west side of him.

George E. Kaegi, cross.

Q On the court house side of him? A Yes, sir.

Q And Reilly also was facing the direction he was walking? A Yes, sir.

Q When you first saw them how far away were they from the curb where you were? A Oh, about two feet.

Q About two feet? A Yes, sir.

Q And did you see the automobile at that time? A Yes, sir. 10

Q And where was it? A About Washington and Market street; that is, the south side of Washington and Market street.

Q It was at the southeast corner of Washington and Market street? A Yes, sir.

Q How far away is that? A Oh, about fifty feet.

Q Now, you say the car was coming fast at that time? A Yes.

Q You did not shout to Jennings or Reilly to get out of the way, did you? A I didn't have time to shout. 20

Q I asked you whether you did? A No, sir.

Q You did not try to, did you? A Sir?

Q You did not feel called upon to warn them, did you? A Yes, sir; I did.

Q Well, did you warn them? A I shouted, but it was too late.

Q Well, I thought you said you did not shout; a moment ago you said you did not shout. A I shouted, but it was too late; he was hit. 30

Q When did you shout? A Just about when he was hit.

Q What did you wait that long for? A I couldn't get the warning out any faster, it seems.

Q Well, was it not the fact that you did not pay any attention to them until after the accident happened? A No, sir.

Q Did you pay any attention to him? A Yes, sir; I ran out and picked him up. 40

George E. Kaegi, cross.

Q That was after the accident happened; I am talking about before it happened. You walked up Market street? A Yes, sir.

Q And you happened to see these two men starting to go across the street? A Yes.

Q There was nothing unusual about that? A No, sir.

10 Q And you happened to see up the street about seventy-five feet away an automobile coming down? A Yes, sir.

Q There was nothing unusual about that, was there? A Yes, sir; there was.

Q Did you continue to walk up the street then? A No, I saw the automobile, and I knew the accident was going to happen then.

Q You knew an accident was going to happen? A Yes, sir.

20 Q You thought it was going to happen when you saw the car up by Washington street? A Yes, sir.

Q And did you not say a word until after the accident happened, and then you hallooed, "Look out"? A I shouted, and he was hit at the same time.

Q Where was it that the car began to swerve, as you have described? A At Washington street, the corner of Washington and Market.

30 Q Oh, but you had not seen it until it got to Washington street? A That is where she started to swerve; it was getting near the curb then.

Q It was swerving toward the curb? A Yes, sir; coming out again.

Q Was it swerving in toward the curb or away from the curb when you first saw it at Washington street? A Toward the curb.

Q And how far below Washington street did it get before it started to swerve the other direction? A It turned real short.

40 Q It turned real short to the left? A Yes, sir.

George E. Kaegi, cross.

Q And how far from the southeast corner of Washington and Market streets was it when it turned sharp to the left? A Twenty-five or thirty feet.

Q Which way did Reilly jump, did he go on forward or did he go back toward the side of the street where you were? A Which one was Reilly?

Q Well, you know Jennings, do you not? A Yes, sir.

Q Well, did you know the other man with him? 10
A No, sir.

Q Well, we will call him Reilly for the sake of identification. Which way did Reilly, the man that was with Jennings, go, back towards the side where you were or straight across the street? A Straight across the street.

Q He went on across the street? A Yes, sir.

Q And had he got out of the path of the automobile? A Yes, sir.

Q What did Jennings do? A It hit Jennings. 20

Q Well, I know that. I want to know what Jennings did before he was hit. You say you were just standing there watching it? A This man that was with Jennings just jumped away, and Jennings turned around and the car hit him.

Q The man with Jennings jumped in what direction? A Towards the other side of the street, toward the car track.

Q In the direction that he was going? A Yes, 30
sir.

Q And Jennings turned and faced the car? A Yes, sir.

Q When it was right on top of him? A What?

Q When it was right on top of him? A Yes, sir.

Q When the car began to swerve to the left sharply, as you have described, they continued walking on across the street, did they not? A Yes, sir.

Q If they had stood stock still the car would have swerved right around them, would it not? A No. 40

George E. Kaegi, cross.

Q What? A No.

Q Well, how far from the curb were they when the car began to swerve sharply to the left? A About six or seven feet.

Q And the car was how close to the curb when it swerved sharply to the left, as you have described?

A He was very close to the curb.

10 Q And then it swerved sharply to the left? A Yes.

Q And did you notice what part of the street that brought it in, what part of Market street? A About five or six feet away or seven feet away from the curb when he swerved back.

Q Now, although you did not have time to shout, did you have time to make these mathematical measurements in your mind, six feet and seven feet, and all that? A I said about; I am not positive.

20 Q It might have been a great deal more than seven feet that it swerved out? A It might have been.

Q It was, as a matter of fact, was it not? A No, it couldn't have been much more.

Q Now, when Reilly, the man with Jennings, jumped ahead, he got up some activity and got out of the way of this car. Did he jump or run, or what did he do? A He jumped.

Q And Jennings did not jump at all, eh? A No.

30 Q He just turned around and looked at the car when it was right on top of him? A Yes, sir.

Q He did not make any effort to get out of the way at all? A Oh, yes, he did.

Q Well, what did he do? A He tried to step away from him.

Q What did he do in his effort to try to step away from it, did he run? A He turned around and made a step.

Q Turned around and made a step in which direction? A Towards the other side of the street.

40 Q Well, he was going in that direction already, was he not? A Yes, sir.

George E. Kaegi, re-direct.

Q Then why do you say he turned around? A Turned around and faced the car.

Q He turned his face towards the car and increased his speed across the street; is that it? A Yes, sir.

Q He did not attempt to go back to the sidewalk? A No, sir.

Re-direct examination by Mr. Fort.

Q Mr. Kaegi, you started to call as soon as you noticed that this car was likely to strike Mr. Jennings? A Yes, sir; I called, "Look out!" 10

Q Now, how long a time was it from the time you first saw the car at Washington street to the time it struck Mr. Jennings? A Oh, it seemed only like a flash, like about a minute.

Q Do you mean sixty seconds when you say "a minute," or do you mean a second?

The Court. Do you know how long a minute is? I will begin to count now, and you tell me when you think a minute is up (with watch in hand). 20

Witness. About now.

The Court. That is seven seconds.

Mr. English. Is all your testimony as accurate as your measurement of a minute?

Mr. Fort. I am examining the witness now.

Q So that, as a matter of fact, Mr. Kaegi, this thing happened so fast that you did not have a chance to call until the car was practically on top of him; is that it? 30

Objected to.

(Question withdrawn.)

Adjourned until to-morrow, Wednesday, April 28, 1915, at ten o'clock, A. M.

Jacob Simon, direct.

SECOND DAY.

Wednesday, April 28, 1915.

Met pursuant to adjournment.

Present, counsel as before stated.

JACOB SIMON, sworn in behalf of plaintiff.

10 *Direct examination by Mr. Fort.*

Q Mr. Simon, what is your business? A At the present time I am traffic man for the county.

Q On the night of the 9th of January, 1914, at about quarter of eleven, where were you? A Coming up Market street.

Q Coming up from what direction? A From Broad street up, traveling west.

Q Did you see anything happen at that time? A Yes, sir.

20 Q What did you see and where was it? A I saw a man hit by an automobile.

Q Who was the man? A I believe his name was Mr. Jennings; that is all I know.

Q This Mr. Jennings here (indicating)? A I don't know; I don't know the gentleman; I never saw him, only the night that he was struck; that is all; never seen him since.

Q Were you walking with anybody? A Yes, sir.

Q Whom were you walking with? A Mr. Kaegi.

30 Q Now, just tell us what you saw, Mr. Simon?

A All that I saw, we were coming up the street together and walking up very slowly, and we saw the gentleman crossing over the street, and this automobile came so quick and hit him, and that is all.

Q Well, now, where was Mr. Jennings when the automobile hit him? A Out on the street.

Q How far out? A Oh, I should judge six or seven feet from the paving.

40 Q From the curb, you mean? A From the curb, yes.

Jacob Simon, cross.

By the Court.

Q Which way was he going? A He was going from the south side to the north side.

Q When you say "the curb," which do you mean, the south curb or the north curb? A The south side.

Q (*By Mr. Fort.*) How fast was the car that hit him going? A I don't know. It was going pretty fast, it came so quick.

10

Cross examination by Mr. English.

Q You were coming up on which side of Market street? A On the south side.

Q Did you see the man in the street first or did you see the automobile first? A I saw the gentleman first.

Q What was the gentleman doing when you first saw him? A Walking.

Q Where was he walking? A Crossing the street.

20

Q You saw him crossing the street? A Yes, sir.

Q Which way was he facing when you saw him? A Facing toward the north.

Q In the direction he was walking? A Yes, sir.

Q Do you know whereabouts that was with reference to North Washington street? A Well, I should judge it was right there about that tailor shop there; I think it is Goldberg's tailor shop; that is about where I judge it was.

Q That is on the south side of Market street? A Yes, sir.

30

Q So that if he kept on straight across Market street he would have fetched up west of the corner, would he not? A I don't know where he intended to go.

Q You do not know about that? A All I know, he started to cross the street.

Q About opposite Goldberg's, on the south side. All right. And he was facing in the direction he was walking across the street? A Yes, sir.

40

Jacob Simon, cross.

Q Now, how far from the curb was he when you first saw him? A When I first saw him?

Q Yes? A I should judge about five or six feet.

Q Now, up to that time you had not seen the automobile, you say? A No, sir.

Q Then when after that did you see the automobile? A Oh, I don't think he went no more than about a foot.

10 Q And then you noticed the automobile? A I noticed the automobile when it struck him; it came so quick.

Q That is the first you saw it, when it struck him? A Yes, sir.

Q Did you see anybody with the man that was struck? A I didn't notice.

Q Did you notice whether he was walking alone or not? A It was done so quick, I didn't know whether there was anybody with him or not.

20 Q So that when you saw him crossing the street before you saw the automobile you did not know whether there was anybody with him or not? A No.

Q Do you know what part of the car hit him? A The front part.

Q Well, was it the left side? A I don't know. All I know, he was hit.

Q He was walking across the street, facing the way he was walking? A Yes, sir.

30 Q And you cannot say now whether this man who sits here was the man or not? You do not remember the man that was hurt? A No, I don't know the man.

Q You do not know whose automobile it was, either, do you? A Only what I heard after.

Q All you know is that you saw a collision between an automobile and somebody? A Yes, sir.

Q About what time of night? A Close on to eleven o'clock.

40 Q When was it, what time of year? A Why, the date there that you gave, that is all I know, the 9th of January.

Jacob Simon, re-direct.

Q Well, you do not remember now— A I don't know. You asked me. I couldn't tell you the exact date. All I know, I saw it, that is all.

Q But who it was and when it was you do not know? A I know he was hit by an automobile.

Q All you know is that one night when you were walking up Market street you saw a man hit by an automobile? A Yes, sir.

Q But whose car it was or what man it was you do not know? A I know he was hit.

Q But the date he was hit you do not know? A No, what day of the week it was I don't remember.

Q And you do not know who the man was? A Only what they told me afterwards.

Q And you do not know whose car hit him? A Only what they tell me, that is all.

Re-direct examination by Mr. Fort.

Q You never walked up Market street with Mr. Kaegi any other night and saw anybody hit with an automobile, did you? A No, sir; never, and we walked up there, I guess, a hundred different times.

By the Court.

Q Mr. Simon, what became of the man after he was hit, do you know—did you see? A Yes, sir; I helped to pick him up.

Q You helped to pick him up? A Yes, sir.

Q Did anybody help you? A Yes, sir; Mr. Kaegi helped me hold the man; him and I were the first two that got over there and helped to pick him up. I know I used about two handkerchiefs on him to wipe the blood off his forehead.

Q And what became of him after that? A Then they sent for the ambulance and took him up to the hospital.

Q Who sent for the ambulance? A The police.

Q And the ambulance came, did it? A Yes, sir.

Jacob Simon, re-cross—further direct.

Q Did you notice what became of the car after it hit him? A Yes, sir.

Q What did you see of the car after it hit him? A Why, the car after it hit him went down about as far as, I should judge—well, down as far as either Menk's or that Presto lunch house, and stopped in front of there, and then the young man—they told me he was the driver of the machine—

10 Q Never mind what they told you. Well, how far is it to the place where the car stopped? A Oh, I should judge it was anywhere from, well, every bit of at least sixty feet.

Q Was that the last you saw of the car? A No, sir; the last I saw of the car was when the police put him under arrest and took him to the station house; that is the last I saw of it.

Q In the car? A Took the man that drove the car to the station house in that car.

20 Q In that car? A Yes, sir.

Re-cross examination by Mr. English.

Q You did not measure the distance from where the man was hurt to where the car stopped, did you? A No, sir.

Q You are just giving your judgment now? A Just judgment, that is all.

Q It might have been less? A Might be more and might be less, but I think it was considerably more.

30

Further direct examination by Mr. Fort.

Q Mr. Simon, did the man who was driving the car make any statement in your presence that night? A Any statement?

Q Did you hear him say anything? A Yes, sir.

Q Well, what did he say?

Mr. English. I object to that. He is not the defendant. Besides that, he is dead, as a matter of fact.

40

Jacob Simon, re-cross—further direct.

The Court. That raises one of the questions that arise in this case: whether the defendant, Mr. Joseph Okin, is responsible for the acts or statements of the operator of the car.

Mr. English. The answer denies the agency.

The Court. I am ready to hear counsel on that whenever they are ready to discuss it.

Mr. Fort. I can understand that, unless the agency is subsequently proven, this evidence will be immaterial; but, nevertheless, it is part of the *res gestae*. As I understand the rule, remarks made practically simultaneously with the happening of an accident are part of the *res gestae*. 10

The Court. You did not ask a question directed to just that.

Mr. Fort. Well, that is what I meant to ask.

The Court. I understand that statements after the thing happened are too late. If it is substantially concurrent with the time of the accident, so as to form a part of the event, then it is part of the *res gestae*. 20

Mr. Fort. My idea was to direct it to a statement made immediately after the striking.

The Court. Do not answer this question after it is asked until we have time to think about it.

Q Did you hear the person who was driving the car make any statement immediately after the car had hit Mr. Jennings? A Yes, sir. 30

Q Now, do not answer this question until the court has said whether you may or not. What was that statement?

Mr. English. I object to that.

The Court. That raises the *res gestae* question.

Mr. English. Yes, sir; but I think that even on the theory of *res gestae*, I ought to be permitted to cross examine and see what he means by 40

Jacob Simon, re-cross—further direct.

the word "immediately." It is rather an elastic term.

The Court. You may do so.

By Mr. English.

Q Now, you say that the driver of the car made a remark immediately after the accident. Where was he when he made this remark? A Right alongside
10 of the man when he was lying on the sidewalk.

Q So that it was after he had gone down wherever he did and stopped his car? A Yes, and came back.

Q And had gotten out and come back? A Yes, sir.

Q How many people were there at that time besides you? A Oh, I don't know.

Q Well, you and Kaegi were there? A Yes, sir.

Q Were the policemen there? A Yes.

Q Other people there? A Yes, lots of them at
20 that time.

Q More than one policeman? A More than one; yes, sir.

Q Where was the injured man? Had he been lifted up at that time or was he lying on the street, or where was he? A Lying on the street.

Q And had he received any attention at that time? A Yes, sir.

Q What had been done to him? A Well, we sent
30 in there and got some water, and I took a handkerchief out and wiped his face off, his forehead, and so on.

Q Where did you get the water from? A I don't know where they got the water from.

Q Had the ambulance come by that time? A No, sir.

Q Had it been sent for? A Yes, sir.

Q By the policeman? A Yes, sir.

Q And the driver of the car was standing around there? A By that time he was there; yes, sir.

William Morris, direct.

Q And all these things that you described had happened in the meantime? A Yes, sir.

Mr. English. I do not think that was very immediately, your honor.

The Court. I am quite willing to hear counsel as to the applicability of the *res gestae* rule, but my strong impression is that this is too late. You remember the Trenton case, where a horse was injured by stepping on a rail charged with electricity, and, of course, plunged. In that case the exclamation of the driver—I think it was the driver—which was, of course, immediately called forth by the action of the horse, was allowed as a part of the *res gestae*. But when you come to separate the declaration, or statement, from the event by the time it would take a car to run fifty feet and the time it would take a man to walk back, and perhaps do some other things, I think that the rule is exceeded. As at present advised, I will sustain the objection.

WILLIAM MORRIS, sworn in behalf of plaintiff.

Direct examination by Mr. Fort.

Q Mr. Morris, what is your business? A Taxi cab business.

Q How long have you been driving a taxi, or driving a car? A Since 1899.

Q On the night of January 9, 1914, were you at the corner of Market and Washington streets? A Yes, sir.

Q Or near it? A Yes, sir.

Q At what time of night were you there, as near as you can remember? A I was at the corner of Market and Washington streets about 10.35, right by Schulte's cigar store.

Q Do you know Mr. Richard P. Jennings? A Yes, sir.

William Morris, direct.

Q Did you see him there that evening? A Yes, sir.

Q Just tell us what you saw there that night?

The Court. What part of the street were you on?

Witness. Right by Schulte's cigar store; I don't know what side it is.

10 *The Court.* Is that on the north side or south side of Market?

Mr. Shipman. The southeast corner.

Mr. English. Let him say.

Witness. Coming up from the Court House, coming on the Market street side, on the right-hand side.

The Court. On the right-hand side as you go downtown?

Witness. Yes, sir.

20 *The Court.* That would be on the south side of Market street.

Q And which side of Washington street was it on? A On the corner.

Q This side of Washington or the other side? A This side coming down.

Q You were on the right-hand side of Market street going down. A On the right-hand side of Market street going down.

30 Q Now, which side of Washington, this corner or the other corner? A This corner, near Schulte's cigar store.

Q The further corner or— A The south side, further down.

Mr. English. That is the Broad street side.

40 Q Now, tell us what you saw. A Richard—Mr. Jennings—Leo Goodman and Reilly, they just left me at Patsy Klein's. I waited behind them—I wanted to get a pack of cigarettes—and I walked behind perhaps ten feet, perhaps, behind them, and I went in

William Morris, direct.

Schulte's cigar store and got a pack of cigarettes. They no more than got to about twenty feet from me, above me, and just as I got my cigarettes and came out of the door I noticed a car about as far as Plane street coming at a terrible speed. I was standing on the southeast corner, as you call it, by Schulte's cigar store, and just as I got on the curb I looked at this car coming down, and I said to a friend of mine standing there— 10

Mr. English. Never mind what you said.

Witness. Well, this car was coming down at the rate of thirty-five, forty miles an hour, down Market street, and just as I got to the curb there I hollered to this man, "Cut it down!" like that to him, and he looked around; he didn't pay no attention; and just as Richard Jennings and Leo Goodman and Reilly—somehow or other I seen the three men in the street, and I saw this here man, Richard Jennings and Reilly—he missed Reilly and knocked him up right against the pole, the mud-guard did— 20

By the Court.

Q Knocked whom, knocked Reilly? A Yes, sir; just missed Reilly by the mud-guard; just touched him with the mud-guard.

Q He missed Reilly? A Missed Reilly by the front.

Q He did not hit him? A Yes, he did—missed him by the front, the front part of the machine. 30

Q Then he did not hit him? A He hit him by the rear mudguard.

Q On which side? A On the right-hand side.

Q You mean the rear part of the machine? A Rear part of the machine.

Q Hit Reilly? A Yes, sir.

Q That is, the front mudguard on the right-hand side? A No, that is the rear mud guard on the right-hand side. 40

William Morris, direct.

Q The rear mudguard? A Yes, sir.

Q You mean the mudguard over the rear wheel?

A Yes, sir.

Q It hit Reilly? A Yes, sir.

Q Well, go on and tell us what you saw. A And then I ran up there, and I seen him laying in the street, and I was surprised to see who was laying in the street, and I go and pick Richard Jennings up.

10 Q You have not told us anything about Jennings yet. A He was hit.

Q Tell us about that. A The automobile hit him about seven feet from the curb into the car track. Of course, I wouldn't say what hit him, the radiator or the mud guard; I was in back. I seen the automobile hit him, and I went there and picked him up, and I told a man to go in the drug store, Menk's, and get some water.

20 *Mr. English.* Never mind that.

Witness. Went and got some water, and washed his head off. It was all a lump—holler-ing with pain. And by that time, after I washed his head off a little bit, I went up to Okin's car; I said, "Okin"—

Mr. English. Never mind what you said; only tell us what you saw.

A What I saw then?

The Court. Just describe what you saw.

30 *Witness.* I went to Okin and said, "Okin"—Objected to.

Mr. Fort. Do not tell us what you said. Just what you saw, Mr. Morris.

Witness. Only what I saw, not—we talked together—

Mr. Fort. No, not that. We will talk about that later. Just tell us what you saw at this time.

Witness. Well, that is all I saw.

William Morris, direct.

By Mr. Fort.

Q Well, now, do you know who the man was who was driving the car? A Yes.

Q Who was it? A Okin's son. I used to work for Mr. Okin, and I know that gentleman.

Q A son of Mr. Joseph Okin? A Joseph Okin over there (indicating).

Q It was his son who was driving the car? A 10
Yes, sir.

Q Now, Mr. Morris, did you notice what Mr. Okin did before he crossed Washington street? A Did I notice what he did?

Q Yes. A I know I didn't hear no horn blowing.

Q Did you see him do anything? A No, I couldn't practically see that, you know, because he was going so fast.

Q Now, what sort of a car was it? A Why, it was a closed car—I mean a touring car—with the top up, 20
and I think it was a Cadillac.

Q How far did the car go after it hit Jennings?
A I should judge just about sixty feet. You can figure on it. It happened in front of Bergamo's tailor shop and it stopped right in front of Menk's.

Q You tried to tell us that you had a talk, or spoke to Mr. Okin after the accident? A Yes, sir.

Mr. English. I do not understand any such thing. I object to that.

Q Well, did you have any talk with Mr. Okin? A 30
Yes, sir.

Q How soon after the car struck Mr. Jennings was that talk? A Well, to give you a rough guess, it couldn't be over two minutes, or less than five minutes—less than five minutes' time.

Q Where was he when you talked to him? A
Right by the car.

Q By his car? A Yes, sir.

Q Was that before you had stopped to help pick 40
up Mr. Jennings or after? A After.

William Morris, cross.

Q Did you hear any sound of a horn or anything of that sort before the car hit Mr. Jennings? A No, sir.

Q Did Mr. Okin, so far as you could see, do anything to decrease the speed?

Objected to as leading.

Q Did the speed of the car change in any way before it hit him? A No, sir.

Q It was going at the same speed when it hit him as it was going when you first saw it?

Objected to as leading.

The Court. That is involved in the previous answer. He said the speed did not change.

Cross examination by Mr. English.

Q Whom do you drive a taxi cab for? A Myself.

Q Oh, you are the proprietor of the taxi cab? A Yes, sir.

Q How long have you been doing that? A In the taxi cab business?

Q Yes. A Two years.

Q Prior to that what were you doing? A Automobile business.

Q By yourself or with somebody? A Well, I was with Mr. Chardavoyne quite awhile.

Q What did you do for him? A The same thing.

Q Did you drive a car for him? A Yes, sir; taxi cab business.

Q He operated the taxi cab business? A Yes, sir; and after that I bought my own car.

Q Have you ever been in any other business except the taxi business? A Yes, sir.

Q What were you doing in 1899? A Janitor and driving automobiles, too.

Q Whom did you drive a car for? A Mr. Upper-cue and Mr. Newton and Mr. Snyder, the Motor Car Company of New Jersey.

William Morris, cross.

Q In 1899? A Yes, sir, 1899 and 1902. I worked for Mr. Okin between 1901.

Q Mr. Uppercue? A Mr. Okin; I worked for him quite awhile there, for about four months.

Q You worked for Mr. Okin, did you? A Yes, sir.

Q When was that? A I couldn't say the date now.

Q Well, as nearly as you can. A That would be pretty hard; I couldn't figure that out; I couldn't tell you that. 10

Q (*By the Court.*) About how long ago, ten years ago, five years ago? A Oh, it was later than that, Judge; it was about 1904, I think.

Q (*By Mr. English.*) Have you figured out when you worked for Mr. Okin?

The Court. About 1904?

Witness. Yes, sir; about that.

Q You were janitor for him? A Yes, sir. 20

Q On what building? A Ansonia, Broad and Murray.

Q And he discharged you, did he not? A No, sir.

Q Why did you quit then? A Mr. Beidelman bought the property, and Mr. Beidelman and my wife couldn't have no—had a misunderstanding, somehow or other, and that is how I came to leave there.

Q Now, you know Mr. Jennings well enough to call him Richard, of course? A That is the only name I know him. 30

Q How long have you known Richard? A Since I started to hack around the streets.

Q How long is that? A About a year.

Q You have been driving a taxi about two years on your own account? A I know that, but I got acquainted with Mr. Jennings about a year.

Q Before the accident or a year since the accident?

A Before the accident.

Q About a year before the accident you knew him?

A Yes. 40

William Morris, cross.

Q You knew him as Richard, eh? A Well, no more than I hear people say his name was Richard Jennings.

Q Well, you called him Richard? A Well, I don't see no objection to Richard. Anybody can have a short name, the same as mine.

Q Had you been with him that night before the accident happened? A No, sir; only practically met him in front of Snyder's clothing store, and then walked over to him and had a talk with him.

Q What about Patsy Klein's? A That is my hack stand there.

Q Well, you said you had been with him in Patsy Klein's. A I didn't say I was with him; I said I met him in front of the place there.

Q You say that now, do you? A I said it before.

Q You mean that you met him outside of Patsy Klein's place? A Outside; I was out there talking to a man about a job.

Q What is Patsy Klein's? A A saloon.

Q You go in there, do you not? A Off and on.

Q And so did Richard? A I didn't see him at that present time. He might have come in. I was talking to a man in front of the delicatessen store and Patsy's about a job, going to a certain hotel.

Q Well, you had seen him there that evening, had you not? A I saw him right there where I told you.

Q But I am asking you if you had not seen him inside of Patsy's that evening? A I wouldn't say that. You mean before the accident?

Q Yes. A No. I think I saw Leo Goodman and Reilly. I don't know whether Richard was inside at the present time or came outside. I met him right there, that is all.

Q I understand that, but I want to know if you had not been with him during the evening inside when you were with Goodman and Reilly? A No, I wasn't with him inside.

William Morris, cross.

Q With Goodman and Reilly? A I wasn't with him inside.

Q You were not with Goodman and Reilly inside?
A I wasn't with Reilly inside either.

Q Whom were you with, Goodman? A I was with nobody inside; I was outside.

Q That is the time you met him? A I was outside.

Q Well, I am asking you for something earlier in the evening— A I wasn't there early in the evening. 10

Q Had you been inside Patsy Klein's that night at all? A No, sir.

Q You said you had a moment ago? A No, I did not.

Q Now, what is your final statement about it? Had you been inside Patsy's that night or not? A Before the accident or after the accident?

Q That evening, before the accident. A Let me see. Not as I can recollect. 20

Q Well, anyway, you say you met Richard and Goodman and Reilly outside of Patsy's, just in front?
A Yes, sir.

Q Nobody suggested that you go in and have a drink? A No, I don't drink.

Q How long did you talk to them outside in front?
A Oh, I don't think I talked at all; I just said, "Hello, Leo," and they said, "Hello, Morris. Take us for a ride." 30

By the Court.

Q What is this? A They said, "How about going out for a ride, Morris"? And I said, "Nothing doing," and they went on past me.

Q Who said that, Richard Jennings? A No, Leo and Reilly. They always kid me every night.

By Mr. English.

Q Then they went on and you went to get your cigarettes? A They left me, yes.

Q Where did they go? A Across the street. 40

William Morris, cross.

Q This was in front of Patsy's that the conversation took place? A There was no conversation, that I know.

Q Well, this "Hello"? A Yes, sir.

Q How far is that from the southeast corner of Washington and Market streets? A I don't know that; I couldn't tell you that, how far.

10 Q Well, is it 100 feet or 150 feet? A I wouldn't say.

Q Well, there are a number of stores and things in between that and the corner, are there not? A How far is it from Patsy Klein's to Schulte's cigar store?

Q Where is the cigar store, on the corner? A On the corner of Market and Washington street.

Q How far is Patsy's from that? A Oh, I couldn't say; about fifty feet. That is a rough guess.

20 Q After you said, "Hello, nothing doing," they started right across the street? A Yes, sir.

Q And you went up to Schulte's cigar store? A Yes, sir.

Q And you bought your cigarettes? A Yes, sir.

Q And then you came out? A Came out of the store.

Q And while all that was going on they only progressed one foot in the street; is that right? A No, only seven feet in the street.

30 Q No? A No, because they wasn't in the street then; they walked up on the sidewalk, and then they started to cross over in front of Bergamo's clothing store, and by the time they crossed the street I was outside on the curb.

40 Q Now, I want your final statement on this. Did they start across the street when you left them and started for Schulte's cigar store, or did they cross the street after you came out of the cigar store? You have told us both. Which is right? A When I came out of the cigar store they was on the side going down towards the Market street station, the right hand

William Morris, cross.

side, and they got in front of Bergamo's clothing store, and they crossed the street; they started to cross the street when this all happened.

Q Well, which side of Washington street is Patsy Klein's place on, the Court House side or the other side? A Patsy Klein's isn't on Market; it is on Washington.

Q I thought it was on Market street. I am not as familiar with it as you are. It is on Washington street, is it? A Positively. 10

Q Now, you walked up from Patsy Klein's up to the corner? A Walked to the corner.

Q Corner of Washington and Market? A I didn't walk to the corner; I walked across the street.

Q Well, which side of Washington street is Patsy Klein's on, the Court House side or the Broad street side? A Patsy Klein's is on Washington street; it is not on Market street.

Q It is on Washington street? A Yes, sir. 20

Q That is what I understand you to say. Now I ask you on which side of Washington street it is? A On the right hand going down towards the Orpheum Theatre, the right hand side.

Q Then it is on the upper side of Washington street? A The right hand side as you go in this way.

The Court. On the west side of Washington.

Q As you walked up there did you walk ahead of them or did you all walk together? A They walked ahead of me from Patsy Klein's. 30

Q And when you got up to the corner you turned into Schulte's cigar store? A When they got to the corner—

Q What? A What was that question?

Q When you got to the corner of Washington and Market street you turned into Schulte's cigar store? A When they left me I left Patsy Klein's and went catercornered across the street to the store; I didn't go up to the corner and turn a square corner; I walked across the street diagonally. 40

William Morris, cross.

Q And where did they go? A They must have been ahead of me; they must have been about fifteen or twenty feet ahead of me.

Q And you went into Schulte's and got some cigarettes? A Yes, sir.

Q And then when you came out where were they? A They were right there about between—I think it is Peabody's shoe store.

10 Q What street is that on? A Market street, on the right hand side going down towards the station.

Q And how far is that from the corner? A Which side of the corner do you mean, Schulte's cigar store?

Q Yes? A I couldn't exactly tell you how far it is, but I will give you an estimate. I should judge about forty or fifty feet.

20 Q Now, when you first came out of the cigar store with your cigarettes did you look up Market street towards the Court House or down towards Broad street? A I looked up this way, coming up to the Court House.

Q Where did you expect to go when you came out of this cigar store? A Well, I will tell you why—

Q No. A Well, there was a lady standing right there, and I started to talk to her, and she said, "Hello, Mr. Morris," and I said, "Good evening."

30 Q So that you met this lady. Was it a colored lady? A I ain't saying what it was, colored or white. That is my affairs.

Q So you stopped there talking to her, did you? A Yes, sir.

Q Now, while you were talking to her—how long did you talk to her before the accident happened? A Well, I didn't no more than say, "Hello," before I seen this car coming down from Plane street.

Q So while you were standing there talking to the lady you saw the car coming down up by Plane street?

40 A Yes, I noticed this car coming, because there was a cloud of dust coming down behind it.

William Morris, cross.

Q And you looked up Market street and saw the car up about Plane street? A Yes, sir; I looked up Market street and saw that; I saw some car coming down.

Q Now, up to that time had you see Jennings and his friends? A Yes, sir; they just about barely started to go cross the street.

Q Were you looking both ways at once? A Now, wait a minute. Don't go so fast. Reilly just about got barely ready to turn around, and I said— 10

Q The judge does not want you to tell us what you said. A Well, I am talking about that lady.

Q Never mind what you said to anybody, man, woman or child. A I said, "I must go"—

Q I want to know how long after you looked up and saw the car at Plane street it was that you turned and saw Jennings and his party? A I couldn't tell you the time; it wasn't very long, because I said to that woman, "I must go"— 20

Q Never mind that. Were you facing up Market street as you were talking to this lady? A I was looking up and down and looking up and down, and then looking at her at the same time, and looking every way.

Q And while you were looking three directions at once, you say, you saw the car coming down and saw Jennings at the same time? A I wasn't looking three directions at once; I was sometimes looking there and there. Standing catercornered like, I could see in three directions without turning my back. My back was faced towards Schulte's door. You can see this man here and that man there, can't you (indicating)? I was standing with my back towards Schulte's store. 30

Q When you saw the automobile at Plane street where was Jennings and his party? A Well, they must have been by Peabody's shoe store.

Q On the sidewalk? A On the sidewalk. 40

William Morris, cross.

Q And walking in which direction? A Going this way, standing by Peabody's shoe store.

Q They were standing still there? A Yes, sir.

Q Well, did you watch them there or did you look in some other direction? A I had my back this way, catercornered towards Schulte's store.

10 Q I want to know whether you watched Jennings when the automobile was coming down, or which way you were looking? A I could look this way and that way and this way (indicating), when the car came down as far as the Homestead lunch room—

Q Did you watch the car and the lady and Jennings all at once? A Did I watch the car and the lady and Jennings all at once?

Q Yes. You said you could see all those things at once? A I was talking to the lady at the same time I was watching the road.

20 Q Do you remember the car when it passed you? A Do I remember the car when it passed me?

Q Yes? A I certainly do.

Q And where was Jennings at the time the car went past you, when you stood on the corner? A He must have just about—

Q We want to know what the fact was; we do not want to know what must have been? A I am giving you straight facts.

30 Q Well, do you remember where he was? A Yes, sir.

Q Well, where was he? A About—I didn't see at that—there is a pole right there, right there by Peabody's shoe store.

Q He was by Peabody's shoe store? A Yes, sir.

Q On the sidewalk? A Just about standing on the edge of the sidewalk, the curb.

Q He was near the edge of the sidewalk? A Yes, sir.

40 Q And were his two friends with him? A The only one I have seen after that was Reilly and Rich-

William Morris, cross.

ard. I think Leo must have left; Leo ran across the street.

Q How far is Peabody's shoe store from Schulte's?

A I don't know. I said before about thirty-five or forty feet.

Q When the car went past you at the corner Jennings was starting off the curb; is that right? A No, not when it passed me by the corner. You are ahead of the story. 10

Q Where was he? A When the car got as far as the Homestead restaurant, it was coming down such a fast clip—

Q Never mind that. I am trying to get the location. When the car was at the Homestead restaurant, then Jennings started from the curb? A Started from the curb.

Q Now, is the Homestead restaurant on the Court House side of Washington street and Market street, or where? A On the right hand side going down toward the station. 20

Q On Market street? A Yes, sir.

Q Is it on this side of Washington street or the other side? A On this side.

Q On the Court House side? A Yes, sir.

Q Where was Jennings when the car passed you on the corner? A He couldn't have been very far.

Q No, I do not want to know that; I want to know where he was? A When he passed me the car went so fast it was impossible for any car making— 30

Mr. English. No, no, just answer my question.

The Court. The question is, Mr. Morris, where Mr. Jennings was at the time the car passed you, if you saw him at that time, and that is the only way you can know where he was. If you know, tell us.

Witness. He must have been about seven feet in the middle of the street.

William Morris, cross.

Q You say "he must have been." Did you see him there? A Well, that is what I got to estimate. If you let me say it to you, I will explain it to you. That is a rough guess. I have got to explain it to you, it happened so quick.

Q No, I just want the fact? A A man going forty miles an hour couldn't have a chance to—

10 *Mr. English.* No.

The Court. The question is whether you saw him seven feet from the curb.

Q Did you see him seven feet from the curb when the car passed you? Just answer that question yes or no. Did you see him seven feet from the curb when the car passed you? A I can't answer it that way; I will have to explain it to you.

Q All right. I do not want your explanation. Which direction was Jennings walking when you saw
20 him in the street? A Across.

Q And he was facing the direction he was walking? A Facing the direction he was going?

Q Yes. He was, was he not? A Well, I wouldn't say that.

Q Well, was he gawking around, or what was he doing? A He was crossing the street.

Q And he was facing the direction he was going, was he not? A I don't know; he was crossing the street.

30 Q And how far away was the car from him when you first saw him in the street? A I am trying to tell you how far the car was.

Q Well, tell me? A The car was going so fast—

Mr. English. No.

The Court. Never mind that. If you can answer the question, answer it; if you cannot answer the question, say so; but first understand what the question is. How far was the car from Mr. Jennings when you first saw him in the street?

40

William Morris, cross.

Witness. Well, that was about thirty-five or forty feet.

Q And how far was Jennings from the curb when you first saw him in the street? A Well, about seven or eight feet, about seven feet.

Q Was Reilly with him? A No, Reilly—the car had passed Reilly, and the mud guard brushed Reilly against the curb.

Q Then the car was forty-five feet from Jennings? A I didn't say forty-five; I said thirty or forty feet.

Q When the car was thirty or forty feet from Jennings where was Reilly? A He started to cross the street.

Q Was he with Jennings? A Yes; I know they wasn't quite together; they was a little apart.

Q Which was nearer you, Reilly or Jennings? A Reilly.

Q Then Reilly was nearer to the car than Jennings was? A Yes, in a way.

Q Was he ahead of Jennings or behind him? A Well, I think Richard was a little bit ahead of him.

Q You think that Richard Jennings was a little bit ahead of Reilly? A Yes.

Q Did you see Reilly go across in front of the car?

A Oh, I see Reilly step back, jump back. The mud guard just grazed him.

Q He was hit by the rear mud guard, eh? A The rear mud guard on the right hand side. And, of course, Richard had no more than stepped down off the curb—

Q We are not talking about that now. Did this car suddenly stop and go backwards so that the rear mud guard hit him? A You say the rear mud guard hit him?

Q Well, you say the rear mud guard hit him? A I certainly did say the rear.

Q That is right, is it? A Yes, sir.

10

20

30

40

William Morris, re-direct.

Q Now, I ask you whether the car suddenly stopped and went backwards so that the rear mud guard hit him? Is that how it happened? A No, sir.

Q He must have walked into it, did he not? A No, sir.

Q All right. Now, we will leave Reilly for a moment. Jennings went on and continued straight across?

10 A Well, it was all such a quick motion, it is a pretty hard question to answer.

Q Well, you come here and undertake to tell us what happened, and we want to know did Jennings walk on straight across— A All I remember—

Q —or did he jump back? A He didn't have a chance to jump back.

Q Reilly had a chance? A Reilly just had a chance for his life. If you are going across the railroad track wouldn't you have a chance to go back?

20 Q Well, didn't Jennings have the same chance as Reilly? A Reilly no more than stepped off the curb than the car came like that (clapping hands), and he jumped back against the telegraph pole, and then he went into Jennings.

Q Was Jennings hit by the right or left mud guard of the car? A The left.

Q The left mud guard? A Let me see. I am driving down towards Market street station. The left hand side mud guard.

30 Q Was he hit by the front or rear mud guard? A The front.

Re-direct examination by Mr. Fort.

Q What is the relative width of the front and rear of the car? A I don't know; I calculate it must be—

Q (*By Mr. English.*) Did you ever measure this car, so that you know? A I know them so well.

Mr. English. I object to his general knowledge.

William Morris, re-direct.

Q Do you know the difference in width between the front and rear mud guards of a Cadillac car?

The Court. The question is regular enough. The witness may not be able to answer it.

Q What is the difference in width between the front and rear mud guards? A Why, the front mud guard is wider and the rear mud guard is more smaller.

Q How much difference is there in the width of the car at the rear and the width at the front? A Well, you have got to figure that out. Sometimes it tapers.

Q Do you know in the Cadillac? A No, sir.

By the Court.

Q You said something about Reilly being thrown against a telegraph pole. A Yes, sir.

Q A telegraph pole? A Well, they call it a telegraph pole, with those wires up there.

Q Where did that pole stand? Is that pole there now? A Oh, yes.

Q The same pole? A The same pole. I can point it right out to you.

Q Can you tell us where that pole is? A I couldn't tell you that. I know it is when you pass the gents' furnishing store.

Q Can you tell us what place it is opposite? A I think it is between that gents' furnishing store and Goldberg's, right near the gents' furnishing store, I think it is—

Q Well, if you do not remember, never mind. Where did Mr. Reilly fall, if you know? A I should judge he fell right between that clothing store and this here—

Q I did not mean that. Did he fall on the street or did he fall on the sidewalk? A Well, he fell—his feet was on the street and his body was on the sidewalk.

Dr. Maurice Asher, direct.

Q He fell across the curb? A Yes, sir.

Q Now, did you say that there was a third man who was with Jennings and Reilly? A Yes, Leo Goodman.

Q What became of Mr. Goodman before the accident? A He must have parted from the rest of the boys; I didn't see him go across the street at all.

10 Q You did not see him on the street? A No.

Q Where was it you saw him? A Right by the clothing store, between Peabody's shoe store there.

Q He was not with them at the time of the accident, then? A He must have been crossing the street with Reilly.

Q But you did not notice him at that time? A No, I didn't notice him.

MAURICE ASHER, sworn in behalf of plaintiff.

20 *Direct examination by Mr. Fort.*

Q Doctor, you are a practicing physician in Newark? A Yes, sir.

Q How long have you been practicing? A Twenty-two years.

Q Where is your office? A Court street, 19.

Q Do you know Mr. Richard P. Jennings? A Yes, sir.

30 Q In the month of January, 1914, were you called upon to attend Mr. Jennings? A I was.

Q Where was he when you first saw him? A At the Presbyterian Hospital.

Q Where is that? A Ninth street, near Warren.

Q (*By Mr. English.*) In New York or Newark? A Newark.

Q (*By Mr. Fort.*) What date did you first see him? A January 17th.

Q 1914? A Yes.

40 Q What condition did you find him in when you first saw him, Doctor? A He had a number of cuts

Dr. Maurice Asher, direct.

and bruises and he was suffering from concussion of the brain.

Q Anything else? A That was all he was treated for at that time. If you wish, I will go into the history in detail.

Q Just give up the history in detail.

Mr. English. One moment. This gentleman's attendance was, according to the evidence, a week or so after the accident. The accident happened on the 9th and this was on the 17th, eight days afterwards. Now, the history that he gets must be hearsay. It is not like a physician who comes in immediately. 10

Mr. Fort. I do not mean that history.

The Court. The doctor intends to detail his experience with the case, as I understand.

Mr. English. I thought he meant the history that the patient gave him. 20

Witness. No, sir.

Q (*By Mr. English.*) What do you refer to? A My knowledge of the case, as I know it.

Mr. English. I have no objection to that whatever.

Witness. I will go back a day or two earlier than the 17th.

Mr. English. We do not want you to do that; you were not there. 30

Witness. But there is something to be told; this is something of my own.

Mr. English. We do not want that.

The Court. It is impossible for the court to rule on something that is not before the court.

Witness. My telephone bell rang. The voice over the telephone said, "This is Dr. Sutphen. We have a patient in the City Hospital that we are about to transfer to the Presbyterian Hospital and put in your charge. He will be there 40

Dr. Maurice Asher, direct.

to-morrow, the day after." I think this was about the 15th. "He is to be put there at the request of his sister and put in your charge." And I saw him on the 17th. He had fever—

The Court. Now begin with your personal acquaintance with the case.

10 *Witness.* He had fever; he was delirious; he was tossing about in bed; he had a number of wounds and contusions, and the diagnosis was that of concussion of the brain. I have a little piece of paper here in which I can give you the details of his numerous wounds and contusions, if you wish.

Q (*By Mr. Fort.*) When did you make that paper up, Doctor? A Some little time afterwards I jotted this down.

20 Q How long ago? A Oh, let me see. Probably a year ago.

Q Just after your treatment? A While I had him under my care at the time.

Mr. English. That would be in April, 1914.

The Court. Yes.

Witness. Well, I took care of him for some little time afterwards.

Mr. English. I object to the use of the memorandum.

30 *The Court.* I think it is competent. I think the practical rule is that the witness may use almost anything that will refresh his memory.

Defendant's counsel object to this ruling of the court.

Objection noted as ground of appeal.

The Court. Go on.

40 *Witness.* He had these symptoms of concussion of the brain, this temperature, delirium, irrational, crying out at night in bed; he had to be controlled; he had a cut over his right eye; he

Dr. Maurice Asher, direct.

had a scalp wound on the right side, a wound over his left elbow, an open wound in the left thigh, another wound on the left leg, another wound on the right thigh. The wound that required the most treatment was the one on his left leg.

By the Court.

Q Whereabouts was that? A The left leg.

Q Whereabouts? A Over the shin, about midway 10
between the ankle and the knee. He was under my care until— Let me see. This was January 17th— until March 1st, when I went away on a vacation and turned him over to Dr. Sutphen. He was then up out of bed, but not walking about; he was able to rest in a chair by the side of his bed; most of his wounds had healed. When I returned—

Q When did you get back, Doctor? A On the 25th of March. —Dr. Sutphen showed me an X-ray 20
that had been taken by Dr. Baker, and this X-ray was a skiagraph, or X-ray picture—

Mr. English. If your honor please, if there is an X-ray it will speak for itself.

Witness. Well, I have the privilege of the knowledge of its interpretation; I can interpret the X-ray, and I am about to tell you what my interpretation is.

The Court. That will do very well after we have the X-ray before us.

Witness. It is right here. 30

The Court. Then you may interpret it to us.

Mr. Fort. We have it, but Dr. Baker, who took it, cannot be here until twelve o'clock to prove it.

The Court. Would there be any objection to calling Dr. Sutphen and afterwards calling Dr. Baker to prove it?

Mr. Fort. Is there any objection to that?

Mr. English. No, there is no objection to that. 40

Dr. Maurice Asher, direct.

The Court. Then the testimony of the witness will be taken, subject to the engagement of the plaintiff's attorney to produce Dr. Baker, who took the plate.

Mr. English. I suppose it will be subject to a motion to strike out if it is not properly proven?

The Court. Certainly.

10 *Witness.* Have I the privilege of telling why this was taken?

Mr. English. You were not there?

Witness. No.

The Court. No, just give us your own interpretation.

Witness. Dr. Sutphen showed me this picture, and this plate shows a fracture of the pelvis, with a crushing inward of the head of the thigh bone.

20 Q You mean the ball that goes into the socket of the joint? A Yes, sir; a crushing inward into the pelvis.

By Mr. Fort.

Q Just what is the pelvis, Doctor, will you tell us?

A The pelvis is the bony—is the bones that make up the parts—the part of the skeleton at the end of the spine; it is a bony ring composed of three bones. It is very difficult to explain it.

30 Q Extending from one thigh to the other—both thigh joints are in the pelvis, are they? A Both hip joints are part of the pelvis.

Q Go ahead.

The Court. That is near enough for practical purposes.

40 A This condition I did not know of when I went away, because his brain symptoms were so severe as to conceal the symptoms of this condition. As a result of this condition he would be rendered permanently lame. The measurements which I took afterwards, I think in April of last year, showed that the

Dr. Maurice Asher, direct.

left leg was an inch and a quarter shorter than the right leg; that the movements of the left leg were limited; he could not turn the leg outward.

Q (*By Mr. English.*) On what date are you speaking of, Doctor? A I can't give you the exact date; it was in April, 1914.

By the Court.

Q When you spoke of this crushing inward of the head of the thigh bone, you did not tell us on which side it was. A On the left.

Q Now, you say in April you measured— A He was then recovered and able to limp around.

Q —and found it half an inch shorter than the other? A No, an inch and a quarter, with a limitation of movement. He was unable to turn his leg outward. Therefore he is rendered permanently lame. This is a condition that cannot be recovered from or cannot be remedied by any operation.

By Mr. Fort.

Q You have seen him again lately, have you, Dr. Asher? A Yes, a short time ago.

Q And at that time was there any change in that condition? A No, his condition is absolutely the same as it was the past year.

Q And your last interview with him was within a week, was it not? A Within a few days ago.

Q Is there anything else the matter, other than those things you have told us of, with Mr. Jennings? A I would have to give you his history, then; that is, his words. He has some difficulty with vision.

Q (*By the Court.*) With what, reading? A With vision.

By Mr. English.

Q Are you speaking now of your last examination or a year ago? A No, I did not examine his eyes

Dr. Maurice Asher, direct.

to determine his difficulty with vision; it is only his own statement.

Mr. English. Then you ought not to tell us about it.

By the Court.

Q This is what he complains of? A Yes, sir.

10 Q You did not test his eyes? A No. His condition to-day is that he bears the scars of these numerous wounds and he is permanently lame, with a short leg, and with limitation of movement.

By Mr. Fort.

Q How about Mr. Jennings general condition as a result of this, Dr. Asher? A I didn't know before the accident—that is, to my recollection—but at the present time he presents the appearance of a man who is very weak and feeble. I don't know how he was before, because I didn't know him.

20

Q Doctor, you said something about the injury to the left leg. Is that healed up?

The Court. The one between the ankle and the knee.

A Yes, I think that is healed up. The last I saw of it it was apparently healed. He tells me it opens occasionally, but when I saw it last it was healed.

Q Is it the nature of injury that might open occasionally? A Injuries over the shin are very apt to open and discharge little pieces of bone when there is trouble there.

30

Q Dr. Asher, have you rendered a bill to Mr. Jennings? A I think I did about a year ago.

Q Do you remember the amount of it? A I think it was \$75.

Q And have you additional charges for your services since? A Well, there has been a little additional; I don't know how much more.

40

Dr. Maurice Asher, cross.

Q About how much? A Probably \$10 might cover it; I can't be certain.

By the Court.

Q Was that the additional service? A About that.

Q The additional service? A I should say about that. The bill I rendered—

The Court. I think the question you have asked was whether there has been no payment. 10

Mr. Fort. No, I said anything else since.

Q There have been no payments? A No.

Cross examination by Mr. English.

Q You returned to the care of this man on your return in March, March 25th? A Yes.

Q Was he then in the hospital or had he been taken home? A No, I think he was in the hospital then. 20

Q And how often did you attend him after that? A I can't tell you that; irregularly, as he required it from time to time.

Q I think you say that, except for the scars of the previous injury, he has practically recovered from everything except the shortening of the leg? A That is, everything that I can testify to. He has certain nervous symptoms that he will tell you of himself.

Q But you cannot, as a medical man— A I cannot give you any definite statement as to finding them. His vision, his inability to sleep, and all that sort of thing, is something that I cannot tell. 30

Q So that, as far as you, as a medical man, are able to determine from your examination and care of him, he has recovered from everything except the shortened leg? A No, I have to take the story that my patient tells me.

Q I understand that, but confine yourself to my question now; that is, what you, as a doctor, are able 40

Dr. Maurice Asher, cross.

to discover, apart from what he tells you. That is this question? A No, if a patient tells me he does not sleep at night because he is nervous, I could only tell that by spending the night with him and watching to see if he slept. If he tells me that he eats his dinner and it nauseates him afterwards, I cannot tell that unless I feel as he does; so that I cannot tell that.

10 Q The question I would like to have you answer is whether you, as a doctor, in examining him, without reference to what he tells you, can find anything the matter with him except the shortening of his leg? A No. He is pale, he looks anemic; he acts as though he lacked strength.

Q And he has a shortening of the leg? A Yes. As I say, I cannot tell how he looked before, because I do not remember his appearance before.

20 Q Now, doctor, you find that this leg is an inch and a quarter short, as I remember your evidence? A Yes, sir.

Q When did you make your examination, or measurement? A The last measurement I made about a year ago, but I was present when Dr. Keller made the measurement the other day.

Q Dr. Keller is this gentleman sitting by me (indicating)? A Yes, sir.

Q And he found it only an inch short, did he not?

30 A Well, Dr. Keller made the measurement, and he said, "Well, this is about the same as it was last year," and I said, "I expect it would be."

Q You did not see the actual figures, then? A I didn't think it was necessary for me to doubt Dr. Keller's word and go over it again. He said it was about the same as it was last year. I saw him do it.

Q What part of the anatomy did you make your measurement from? A I do not remember exactly, but there are several ways of doing it.

40 Q Well, you do not remember in this case? A No, but I would naturally make it from the anterior

Dr. Maurice Asher, cross.

superior spine of the ilium. If you want to know, I can tell you about where it ought to be made.

Q Have you made any recent test of him as to this limitation of motion which you found a year ago?

A No, I don't think so.

Q Well, that is a thing that normally ought to improve some? A Not with an injury like that, no.

Q Do not the muscles of the back adjust themselves to a situation like that? A It is not a muscular question here; it is a bony question. This is a case of ball and socket. The thigh bone is something on the principle of a half ball. 10

Q A ball bearing? A Something like that. If you destroy your socket you are not going to improve things by time.

Q Of course I am not a medical man, but do not other joints of the back rather over-develop and take up this deficiency in the defective parts? A I doubt it very much. You have an actual mechanical obstruction, a bony obstruction. 20

Q But you made no test or examination of that since April, a year ago? A No.

By the Court.

Q From your acquaintance with the case, did Mr. Jennings assist himself in walking? Did he have a crutch or a cane? A A cane; he always carries a cane.

Q He never used a crutch or two crutches, to your knowledge? A I think he did in the hospital. That I don't recall. He will be able to tell you that. Shortly after he got up from bed I was away on a vacation. 30

Q How recently have you seen him use a cane? A Why, two or three days ago.

By Mr. English.

Q Just one question more. The effect of this shortening, I imagine, is to make him limp when he walks? A Yes. 40

Dr. Carl E. Sutphen, direct.

Q He does walk now? A Oh, yes.

Q If he had a thick-soled shoe, or something of that character, would not that correct it somewhat?

A It might help him. If he had an automobile he would probably get over the ground more rapid.

Q Do not let us joke about it. I want to know if when a man has a shortened leg there is some artificial paraphernalia of that kind that would assist him? A
10 Yes, a thick-soled shoe would assist him in walking.

Q What they call an orthopedic shoe; is that what they call it? A Well, that sounds good.

Q Well, that would help him, would it not? A Yes, that would give him that additional inch, but it would not render him less lame.

Q No, it would not correct the condition of the hip, but it would correct the rolling effect of a lame man's gait? A He could also tilt his body a little.

Q Well, it would help him? A Well, it would
20 help him, surely.

Q In other words, he would not limp as much as now? A Yes. The only question is whether a thick-soled shoe would be bearable at all.

Q Well, that cannot be told until it is tried. Those things are bearable to a great many people, are they not? A Yes, sir; sometimes they can and sometimes they cannot.

30 CARL E. SUTPHEN, sworn in behalf of plaintiff.

Direct examination by Mr. Fort.

Q Dr. Sutphen, you are a practicing physician?

A Yes, I am.

Q In this city? A Yes, sir.

Q For a good many years? A Yes, sir.

Q How many years? A Fifteen years.

Q And you specialize as a surgeon, do you not? A Most of my work is surgical.

Q Did you ever see Mr. Richard P. Jennings? A
40 I did.

Dr. Carl E. Sutphen, direct.

Q What was the occasion of your first sight of him, if you recall? A He was brought into the Newark City Hospital and placed in a ward of which I had charge.

Q Do you recall when that was? A I would have to refer to my notes on the thing. (Referring to memoranda.) January 9, 1914, he was brought in.

Q What was the matter with him when you first saw him? A Well, he was conscious at intervals, very irrational at other intervals, crying out with apparent pain, very restless, tossing about in bed. On inspection, he had a lacerated wound over the forehead, up here at the right side, over the right eye (indicating); another lacerated wound over the parietal region on the right side— 10

Q Where is that, doctor? A About the center of the vault of the skull (indicating). He had been bleeding from the ear on the right side; he had an abrasion of the leg of the left side, what appeared to be a rupture of the tendon, the quadriceps, meaning the tendon which connects the knee-cap with the large muscles of the leg; numerous contusions and numerous tender, sore places on the body. His pupils were equal; they reflected to light. The ordinary nerve reflexes were very much exaggerated. That whole thing means that he had a concussion, with a possible, probable fracture of the skull, with the general conditions of shock. 20

Q How long did that condition continue, doctor? A Well, I only had him from the 9th till the 17th. They continued all of that time. 30

Q And your original diagnosis of concussion of the brain would be confirmed by your— A Absolutely. I saw him a number of times afterwards in the Presbyterian Hospital, at the suggestion of Dr. Asher, although he was not my patient.

Q Did he still continue to have concussion after you saw him in the Presbyterian Hospital? A Oh, yes. 40

Dr. Carl E. Sutphen, direct.

Q How long did that condition last, as nearly as you can tell? A About six weeks, roughly.

Q Was there a fracture of the skull, doctor? A There undoubtedly was a fracture of the skull.

Q It was not necessary for you to operate, however? A No, not at the base of the skull; we do not operate on those cases.

10 Q Did you at any time make an examination to find whether there was anything the matter with his thigh or pelvic bone? A At the time he was in the City Hospital he was so irrational and suffered so much that it was hard to get any intelligent idea as to the places of pain and suffering. We X-rayed his leg from the middle of the thigh down, and found everything normal, except, as I say, this ruptured part of this quadriceps tendon. We made no X-ray of the leg above the middle of the thigh at that time.

20 Q You did subsequently? A Well, I did not.

Q Dr. Baker did? A Yes.

By Mr. English.

Q Were you there at the time? A No; I saw the plate after.

Q You saw it after? A Yes.

By Mr. Fort.

Q From your examination of the plate, can you recall what you found to be the condition at that
30 time?

Mr. English. This is subject to the same motion, I suppose.

Mr. Fort. Yes, I will consent to its being stricken out if it is not proved.

The Court. This is from an examination of the plate taken by Dr. Baker?

Mr. Fort. Yes, sir.

Witness. (After examining plate.) I can't
40 swear that that is the plate I have seen before; it

Dr. Carl E. Sutphen, direct.

looks something like it. We see a great many X-ray plates, and I couldn't say. I can tell you from memory what I remember of the plate I did see.

By Mr. Fort.

Q Who showed you the plate? A Mr. Jennings.

Q And, from memory, what did you find? A It showed the results of a past fracture in three different places of the ilium, the left ilium, which is the bone of the pelvis, with a depression of the acetabulum, or the socket in which the hip joint moves inward. 10

By the Court.

Q Was that a fracture of the joint or— A No, a fracture of the bones around the joint.

Q And a depression? A A depression; the whole thing was pushed right in; the whole hip bones and socket were pushed right into the pelvis. 20

Q To what extent would that depression go, can you tell us? A From the picture that I saw, I should say at least half or three-quarters of an inch.

By Mr. Fort.

Q What was the effect of that, if you know, on Mr. Jennings's leg, Dr. Sutphen? A Made it shorter.

Q Did you measure it to find out how much shorter? A I did. 30

Q How much? A It was a full inch shorter than the other leg; that is, when I measured him, on the 4th of March, 1914.

Q Have you seen him lately? A Just casually; I have made no examination of him.

Q And is that condition a curable one, Dr. Sutphen, or is it permanent? A Permanent.

Q And about the fracture of the skull which you say he undoubtedly had, will that have any recurrent effects? A Probably not. 40

Dr. Carl E. Sutphen, cross.

Q Possibly so? A I would have to know his condition now, sir, to answer that. I do not know his mental condition or anything about him now.

Q You did not make any examination of his eyes except at the time of the accident, did you, doctor?
A No.

Q Dr. Sutphen, you have a bill against Mr. Jennings, have you not? A Yes.

10 Q Do you know what it amounts to? A No.

Q You have rendered it to him, have you? A I have not. It is not very large—just seeing him for Dr. Asher two or three times; I should think \$25 would cover the whole bill.

Cross examination by Mr. English.

Q You treated him professionally up to the time that he went to the Presbyterian Hospital? A Yes.

Q That is when your professional connection with
20 the case ceased? A Well, I saw him for Dr. Asher.

Q I mean you were not personally responsible for him after that? A When Dr. Asher was away I was.

Q Oh, yes; I forgot that. You treated him when Dr. Asher was away? A Yes.

Q And that ended, as Dr. Asher said, on March 25th? A Well, I don't recall those dates.

Q At any rate, when Dr. Asher came back you quit? A Yes, sir.

Q How long was it before he recovered from his
30 wound on his head, the concussion of the brain, or whatever it was? A Well, the acute symptoms subsided in about six weeks.

Q And apparently now, in your judgment, he has recovered from that? A I know nothing about it.

Q Well, you do not undertake to say that he has not? A I cannot say either way, sir.

Q You do not know what. What you are prepared to say now is that he has a permanent injury
40 in his leg because of this fracture of the pelvis? A Yes, sir.

Dr. Carl E. Sutphen, re-direct.

Q And that is the only permanent result of the accident that you now know of; isn't that true? A It is the only one that I know of.

Q And you found his leg to be about an inch shorter? A Yes, sir.

Q And that can be somewhat corrected by an orthopedic shoe, doctor? A Yes, sir.

Q That will make the limping less apparent and less perceptible? A Yes, sir. 10

Q And make it easier for him to walk, too, will it not? A Yes.

Q Do you think it will do away with the limping entirely? A No.

Q He will still limp some? A Yes, sir.

Q It will help it very much, will it not? A I should say it would help it some; I wouldn't say very much. There will always be a marked deformity in his walk.

Q But it will make things better? A Yes, sir. 20

Re-direct examination by Mr. Fort.

Q On the other hand, one of those thick-soled shoes throws the body somewhat off balance, does it not—puts the adjustments a little out very often? A Not if it is put on a shorter leg.

Q Never? A Not if it is put on a shorter leg.

Q You have never heard of a case where that has had that effect on the organs? A No.

By the Court. 30

Q Well, is the effect of this depression of the bones around the left thigh joint to alter the line which the foot takes in stepping? Does it throw it to one side, or would a man walk in the same line that he did before, but only a shorter distance? A No, his foot would be thrown slightly outward.

Q Slightly out? A Yes.

Q And that feature of the case would not be corrected by a shoe? A No, sir. 40

Charles Glori, direct.

CHARLES GLORI, sworn in behalf of plaintiff.

Direct examination by Mr. Fort.

Q You are a citizen of the City of Newark, Captain? A Yes, sir.

Q Formerly captain of police? A Yes, sir.

Q On the night of the 9th of January, 1914, were you at the police station in the City of Newark? A
10 I do not understand.

(Question withdrawn.)

Q On the night of January 9, 1914, were you keeping a saloon in the City of Newark? A Yes, sir, I was keeping a cafe.

Q Where? A At 102 Springfield avenue, in the City of Newark.

Q And on that night did you see William Okin, the son of Joseph Okin? A I did.

20 *Mr. English.* What date is this, please?

Mr. Fort. The 9th of January, 1914.

Q (*By the Court.*) You say you saw him? A Yes, sir.

Q (*By Mr. Fort.*) It is not William Okin; it is Joseph Okin, Jr., the son of Joseph Okin. A Yes, sir.

Q Where did you see him, Captain? A At the cafe.

Q What occurred at that time? A Well, he came in—

30 *Mr. English.* What time is this? Has the time of this been fixed?

Witness. This time was between ten and eleven o'clock some time; I don't know exactly.

Q (*By the Court.*) You mean in the evening? A In the evening; yes, sir.

Mr. English. I would like to make a further objection. It appears that Mr. Okin has more than one son. I think this man ought to be iden-

Charles Glori, direct.

tified with the man that drove the car. That has not been done yet.

Mr. Fort. I think that will be proved.

Mr. English. Well, I want it proved first.

Q (*By Mr. Fort.*) Was the one who came to your cafe that evening driving the car of his father, Joseph Okin, if you know?

Objected to.

10

The Court. You mean at the time when he came to the cafe?

Mr. Fort. Yes, sir.

Q At the time he came there, was he? A He was driving a car, as was his usual custom.

By the Court.

Q An automobile? A Yes, sir.

Q That is what you mean by "a car"? A Yes, sir.

20

By Mr. Fort.

Q You saw him frequently around those days, did you not? A Yes, sir.

Q Did you frequently see him in this car? A Yes, sir.

Q How frequently? A Well, daily, every day, and almost every night, or every evening.

Q Who was with him when he came to your cafe that evening? A Well, that evening there was a performer engaged at the theatre during the three days; that was a card manipulator.

30

Q What theatre? A The Odeon theatre, Okin's Odeon theatre.

Q When you say "Okin's Odeon theatre" you mean the theatre Mr. Okin owned? A Yes, sir; one of his theatres.

Q And you say there was a performer there with him that night? A Yes, sir; he met him in the cafe.

Q He did not come in the automobile, did he? A No, he did not; the performer was performing in the theatre during those three nights.

40

Charles Glori, cross.

Q And how near was your cafe to the theatre? A Right next door, adjoining, or connecting, with the theatre.

Q (*By the Court.*) Do you remember this man's name? A I think his name was Merlin, M-e-r-l-i-n; on the program it was "Merlin and his pack of cards."

Q (*By Mr. Fort.*) Later that evening you went down to the police station, did you not, at the First Precinct? A If you will permit me, I will—

Q Just answer questions, please. A I was called down to police station; yes, sir.

Q Whom did you see when you got there?

Mr. English. Wait a minute. What police station was this?

Mr. Fort. I asked him about the First Precinct.

Mr. English. I did not hear that.

20 Q Whom did you see when you got there? A Young Okin.

Q Anyone else? A That is all I saw.

Q You did not see Mr. Joseph Okin there? A No; he had been sent for, so I understood.

Q What was young Okin doing down there? A He was in custody.

Q For what, do you know?

Mr. English. That is objected to; he cannot know except by hearsay.

30 *The Court.* That is not the best evidence.

Q Was he in the custody of Officer Reichenbecker?

A I don't know what officer he was in custody of.

Cross examination by Mr. English.

Q Do you know Mr. Joseph Okin here (indicating)? A Yes.

Q How many sons did he have in January, 1914, to your knowledge? A Three, that I know of.

40 Q (*By Mr. Fort.*) The one that you saw at the police station was the same one who had come into your cafe earlier, was he not? A Yes, sir.

Leopold Lehman, direct.

LEOPOLD LEHMAN, sworn in behalf of plaintiff.

Direct examination by Mr. Fort.

Q Mr. Lehman, where do you live? A 187 Seymour avenue.

Q Do you know Mr. Joseph Okin? A Well, I just know him by sight, that is all.

Q The man that you know as Mr. Joseph Okin is this gentleman sitting here at the table, is he (indicating)? A Yes, sir. 10

Q Did you ever have any talk with Mr. Joseph Okin or did he ever say anything in your presence relating to the accident in which his car had run down Mr. Jennings? A Yes, sir.

Mr. English. Just yes or no.

Witness. Yes, sir.

Q What did he say at that time?

Mr. English. I would like to know when this was and where it was. 20

Mr. Fort. All right.

Q Where was it? A Why, in a cafe on Springfield avenue, Mr. Glori's cafe.

Q And when was it? A Why, I think it was some time in May. They were running a summer show there at the time.

By the Court.

Q May of what year? A Last year. 30

Q Last year? A Yes, sir.

By Mr. Fort.

Q Now, what did Mr. Okin say? A Why, there was a man in there by the name of Mr. Rachlin, and we went to go up to the show, but it seems that the performance wasn't ready yet—

Mr. English. Just a minute.

Leopold Lehman, direct.

Q What did Mr. Okin say?

Mr. English. Are you speaking now of a conversation with this man here at the table or some other Mr. Okin?

Witness. Yes, that is the Mr. Okin that I am speaking of.

10 Q Now, what did he say? A Well, he said that the insurance company wanted him to say—

Mr. English. If your honor please, I think that entitles me to ask for a mistrial.

Witness. He said the insurance company—
Objected to.

Mr. Fort. Never mind that.

Q Never mind that. Go on with the rest of it.

20 *Mr. English.* That is very improper, and I ask that it be stricken out. It has been so held by the upper courts—that it is enough to prejudice the defendant's case.

Mr. Fort. I am offering the evidence to show, by admission of the defendant, that the car was in the possession of his son as his agent and for his purposes at the time of the accident, and that he so stated.

Mr. English. My first motion is that that be stricken from the record.

30 *The Court.* On what ground do you object to it?

Mr. English. On the ground that it is improper and it is an effort to prejudice the defendant's case.

The Court. Why is it improper?

Mr. English. It is immaterial evidence. It is an ingenious and veiled way to bring in the case of an insurance company, if there is any such thing in the case.

The Court. That is what you object to?

40 *Mr. English.* Yes, sir.

Leopold Lehman, direct.

The Court. To the reference to an insurance company?

Mr. English. Yes, sir.

The Court. What case is there on which you base your objection?

Mr. English. I just argued this very question in the Court of Errors last term. There are a number of decisions in the New York Court of Appeals holding that any effort, whether indirect or how, along this line is ground for a mistrial and entitles the defendant to ask for a mistrial; that it is highly improper and should be immediately ruled out by the court. I have a brief in my office, and I meant to have brought it. I can give your honor all the cases. 10

The Court. I should be happy to examine the cases.

Mr. English. Yes, sir; I will get that brief for your honor. 20

Mr. Fort. If your honor please, the purpose of this question is not to bring in any mention of the insurance company. I asked what Mr. Okin said. I am perfectly willing to consent to Mr. English's motion that any reference to the insurance company at this time go out of the case.

The Court. If counsel desires, I will strike out what the witness has said.

Q Now, begin at the point of your talk with Mr. Okin; do not say anything about any insurance company, but tell us what Mr. Okin said as to who was using the car on the night of the accident. 30

The Court. On the subject of the car.

Mr. Fort. On the subject of the car on the night of the accident.

A Well, his son was using the car and that he—

Mr. English. Are you telling us the conversation? 40

Leopold Lehman, cross.

Witness. Yes, this is the conversation that Mr. Okin said.

Mr. English. All right, tell us what he said.

Witness. That he told his son—that he was told— Well, I would have to bring in the insurance company.

Q No, do not. You can do it without that. Think
10 it over carefully. A Well, somebody wanted him to say that he gave—the son took the car without his permission, and he said he wouldn't say that; that he gave his son the permission to take that car and fix the lights in the theatre that evening.

Cross examination by Mr. English.

Q Did he say what theatre the lights were in that were to be fixed? A Well, I don't recollect whether he said what theatre or not.

20 Q Who was there at the time this special conversation took place? A Why, there was a man by the name of Sam Rachlin and a young man by the name of Isenberg.

Q (*By the Court.*) Do you remember his first name? A I think his name is Herman Isenberg.—a party named Leo Goodman.

Q Yes, we have heard of him before. Who else?
A And myself, as far as I can remember.

Q Yourself? A Yes, sir.

30 Q Now, where did the conversation take place? A In Mr. Glori's cafe, on Springfield avenue.

Q What part of it? A Right in the barroom.

Q Standing up at the bar or sitting at the table?
A We were sitting—they had benches, like, in the place; it isn't a table, it is kind of like a booth.

Q What was the date of it? A The date it happened?

Q No, the date when the conversation took place.
A I couldn't tell you the exact date.

Leo M. Goodman, direct.

Q Well, how near can you come to it? A Well, the only thing, they were running a summer show at that time; I think it was in May some time.

Q May of what year? A Last year.

Q What time of the day or night was it? A Why, it was a little after eight o'clock.

Q Now, you say that Mr. Okin said he had given his son permission to take the car and go and fix the lights at the theatre? A Yes, sir. 10

Q Did he mention the theatre? A I don't remember if he mentioned the theatre.

Q Did he say where it was? A No, sir; I don't think he did.

Q Where the theatre was located? A He just said "the theatre."

Q Was it a theatre that was being built or one that was already built? A I couldn't say; he didn't mention any theatre, that I know of. 20

Q Did he say what time of the evening it was he gave his son this permission? A He didn't say—I don't remember, no.

Q He did not state that, no. So that the conversation was that he said that he gave his son permission to take the car and go to the theatre and fix the lights; is that it? A Yes, sir.

LEO M. GOODMAN, sworn in behalf of plaintiff.

Direct examination by Mr. Fort. 30

Q Mr. Goodman, where do you live? A 74 New street, Newark.

Q Do you know Mr. Jennings? A Yes, sir.

Q Do you know Mr. Joseph Okin? A Yes, sir.

Q Were you with Mr. Jennings on the 9th of January, 1914, in the evening, when he was injured? A Yes, sir.

Q Tell us what you saw that night at that time. A Why, I didn't see anything of the accident until the accident had already occurred. 40

Leo M. Goodman, direct.

Q Where were you? A On the opposite side of the street, going down Washington street toward—on the south side, going south of Washington street. I had already—

Q Going south on Washington street? A On Washington street; yes, sir; I crossed Market street at Riker's there and was going south, towards Broad.

10 Q (*By Mr. English.*) On Washington street, you mean? A On Washington street.

Q (*By Mr. Fort.*) You mean towards Broad? A I was going north, rather.

Q (*By Mr. English.*) On what? A On Washington street.

Q (*By Mr. Fort.*) On the north side of Market street? A Yes, sir.

Q You had been walking with Mr. Jennings before, had you? A Yes, sir.

20 Q You crossed the street ahead of him? A I and another party crossed the street ahead; in fact, I was leading the pace for the party.

Q So that you did not see the accident? A No, sir.

Q Now, Mr. Goodman, were you present at Captain Glori's cafe some time last spring or summer? A Yes, sir.

Q Did you see Mr. Joseph Okin there? A Yes, sir.

30 Q Who else was there? A Mr. Jennings, Mr. Lehman and Mr. Okin and myself were the four that were really sitting right at the table there; it was a table just suitable for four, and—

By the Court.

Q Mr. Okin, Jennings, Lehman and yourself? A Yes, sir.

Q That completed the four? A Yes, sir; that completed the four.

40 Q Who else was there? A Mr. Rachlin had introduced Mr. Jennings to Mr. Okin.

Leo M. Goodman, direct.

By Mr. Fort.

Q Mr. Rachlin had introduced Mr. Jennings to Mr. Okin? A Yes, sir.

Q Now, can you tell us any talk that there occurred with reference to the accident in which Mr. Jennings had been injured, omitting any reference to any insurance company, or anything of that sort? A Well, practically the whole thing is clear in my mind. 10

Q What? A Practically the whole conversation is clear in my mind.

Q Well, go ahead.

Mr. English. You say Mr. Jennings was there?

Witness. Yes, sir.

A How the conversation opened, Mr. Rachlin said to Mr. Jennings, "Did you ever meet Mr. Okin"—

Q (*By the Court.*) Was Mr. Okin present? A Mr. Okin happened to be present—no, Mr. Okin wasn't there at the time; he brought Mr. Okin in. 20

Mr. English. Then I object.

Q Just tell us what happened when Mr. Okin was there. A Well, we sat together, and Mr. Okin and Mr. Jennings were talking there, and he said, "Mr. Jennings, as far as I am concerned," he says, "I will get on the stand and swear that my son went down there that night to turn out the lights for me."

Q (*By Mr. Fort.*) Went down where? A Down to the theatre. 30

Q (*By the Court.*) That is what he said? A That is the words he said.

Q (*By Mr. Fort.*) He did not mention the theatre, did he? A No, at this theatre. He happened to be at the theatre at the time, in the adjoining building.

By the Court.

Q Can you give us exactly what he said? A Yes, sir. 40

Leo M. Goodman, cross.

Q What was it? A "If necessary, I will get on the stand and swear that my son went down to the theatre to turn out the lights."

Cross examination by Mr. English.

Q You say you happened to be near the theatre at the time. What do you mean by that? A In the same building; the cafe is in the same building as the
10 Odeon Theatre.

Q Well, did he mention the Odeon Theatre? A No, he didn't mention the Odeon Theatre.

Q And you say that Mr. Jennings was there at that time? A Yes, sir.

Q Was that after the accident? A This was after the accident.

Q And when do you say it was? A Why, I should judge it was about last May. It was when they were running those summer shows there.
20

Q May, 1914? A Yes, sir.

Q Do you remember anybody else who was there? A Yes, sir.

Q Who? A Well, there was Mr. Jennings and Mr. Lehman, Mr. Okin and myself, sitting right there at the table. I don't know whether Mr. Rachlin was in hearing distance or not, because he was standing up; there wasn't room enough for him to sit down with us.

Q And they were talking about this accident? A Yes, sir.
30

Q Now, did Mr. Okin say that he would say that his son went down to turn out the lights or to see if the lights were burning, or what did he say? A Fix the lights; he didn't say anything about the lights burning.

Q He said that his son went down that night to fix the lights; is that true? A Yes, sir.

Q At the theatre? A Yes, sir.

Q Did he indicate what theatre? A No, sir.
40

Leo M. Goodman, cross.

Q Now, as a matter of fact, Mr. Okin was building the Majestic Theatre, just across the street? A That was already complete at the time of the conversation.

Q I mean at the time of the accident? A Well, at the time of the conversation it was all complete, I mean.

Q Well, I mean at the time of the accident he was 10
as a matter of fact, building that theatre, was he not?
A I don't know; I don't know whether he owned the theatre even. I am not interested in real estate.

Q This is not real estate; this is merely a matter of knowledge. Don't you know that Mr. Okin was the man that built the Majestic Theatre? A No.

Q Do you know when it was built? A Oh, about a couple of years ago, I suppose, a year or so ago.

Q And do you know whether he was referring to the Majestic Theatre or the Odeon Theatre, or what 20
theatre, do you? A No, sir.

Q Or he didn't mention it in his conversation? A No.

Q He simply said "the theatre?" A He said "theatre."

Q What he said was that he would get on the stand and swear that "My son went down there that night to fix the lights at the theatre"; is that right?

A Yes, sir.

Q That was what he said, was it? A Yes, sir. 30

Q Did he say what time he went down? A No, sir.

By the Court.

Q Mr. Goodman, where is the Majestic Theatre?

A On Springfield avenue, right opposite the Odeon, about in the hundreds, I suppose.

Q About what? A It is about in the hundreds, about 110 or—109 or 111. It is on the odd side of the street. 40

Leo M. Goodman, cross.

Q Where do the numbers begin? A They begin right there at the Court House, Springfield avenue.

Q And how far is the Majestic Theatre above High street? A About 300 feet, I should think.

Q On which side of the street? A On the south side.

10 Q And where is the Odeon? A The Odeon is right opposite.

Q On— A On Springfield avenue.

Q On the north side of Springfield avenue? A On the north side of Springfield avenue.

By Mr. English.

Q Do you know where Mr. Okin lives? A Do I know where he lives?

Q Yes? A I think it is on the—

Mr. Fort. Do you know?

20 *Witness.* I think it is on Monmouth street.

Q He lives on Spruce street, does he not?

Mr. Fort. Just tell us what you know.

Witness. I know, yes, sir.

Q He lives on Spruce street, does he not? A It is on the corner there. I am not acquainted with the streets there.

The Court. The question is where Mr. Okin lived at the time of the accident, if you know?

30 *Witness.* Oh, at the time of the accident? No, sir.

Q Well, where does he live now, do you know?

Objected to as immaterial.

A I know where the house is, but I am not acquainted with the streets there.

Q That is Spruce street, is it not? A Yes, sir.

Mr. Fort. One moment. I object to that.

The Court. I sustain the objection.

40 Q How long, to your knowledge, has he been living in Spruce street? A I don't know.

Leo M. Goodman, cross.

Q Have you not got any information on the subject? A I just had an odd coincidence a few months ago that happened to me that made me acquainted with the fact that he lived there, that is all.

Q How long ago did the odd coincidence happen? A A couple of months.

Q Do you know any of Mr. Okin's sons? A One.

Q Which one? A Why, I don't know his name; I think it is Will. 10

Q How long have you known him? A Oh, some time.

Q Well, two or three years? A Oh, longer than that. Ten years, I guess.

Q Of your own knowledge, where does Will Okin live, or has he lived during the ten past years? A I don't know.

Mr. Fort. I object, your honor.

Witness. I don't know where he lived. 20

(Question read.)

Witness. I don't know where he lived.

The Court. You may answer the question, if you know.

Witness. I don't know.

The Court. You do not know?

Witness. No.

Q Have you ever been to his house? A Yes, sir.

Q Does he live with his father? A I suppose he does. 30

Q Now, the Odeon Theatre is on Springfield avenue? A Yes, sir.

Q That is up on the hill somewhere? A Yes, sir.

Q How far is that from the Court House, do you know? A From the Court House?

Q Yes? A About a block and a half.

Q A block and a half? A Oh, pardon me. It is more than a block and a half. Well, the extreme end of the Court House, taking the first entrance— 40

Matthew J. Reilly, direct.

Q Well, the High street end of the Court House?

A Oh, it is about—I should judge about 500 feet up.

Q Five hundred feet up? A I suppose so. That is just a mere guess, that is all; I should judge that.

MATTHEW J. REILLY, sworn in behalf of plaintiff.

10 *Direct examination by Mr. Fort.*

Q Mr. Reilly, do you know Mr. Jennings? A Yes, sir.

Q You were with him on the night of January 9, 1914, were you not? A Yes, sir.

Q Well, now, tell us, as nearly as you can, what happened there at the corner of Market and Washington streets that night? A Just what happened near the corner?

20 Q Yes? A Well, I and Jennings, Goodman and Mr. Scheiner walked across Washington street to Market, down Market, in front of Schulte's cigar store; we stood there, talking while we stood there. Goodman and Scheiner went across the street to the other side. They got as far as Riker's drug store. The parties that we were talking to didn't interest them, and they went on. We were supposed to walk across the street and meet them there. We walked down as far as where Bergamo's clothing store
30 is with these parties that we were talking to. We said, "So long, good-night." So I stayed back a little further than Jennings; I bid the last "Good-night," and Jennings was about eight or ten feet in front of me. Jennings started to go across, and I said, "Good-night," looking up Market street, and as I looked out I seen a machine coming and I tried to get out of the way of it the best I could. Jennings was just a little bit further away. The front guard had just grazed by me, and as it did I laid on the pole, and as I laid on
40 the pole Jennings was hit by the radiator of the ma-

Matthew J. Reilly, direct.

chine, and I was kind of dumbfounded at the moment, and I hollered; I hollered across the street to Goodman and Scheiner; I said, "Get Dick"—

Objected to.

Mr. Fort. That is part of the *res gestae*.

Witness. I hollered to Goodman and Scheiner.

The Court. Just answer questions.

Witness. The reason why I hollered—

10

Mr. English. We do not care anything about that.

The Court. Never mind about the reason you halloaed. You did halloa?

Witness. Yes, sir.

The Court. There is no objection to your saying that.

Q How far did the car go after it hit you? A After it hit me it went about 116 or 118 feet, about 118 feet.

20

Q Where was that? How far did it go? A In front of Menk's drug store. I didn't see where the car stopped until it was all settled that Jennings was not killed. I was so excited at the time.

Q But you say you think it went about 116 to 118 feet at the time? A Yes.

Q Who was driving the car at the time? A Okin.

Q Did you see him? A Well, I seen him after it was all over and Jennings was to be taken to the hospital; that is when I got my memory back again, after the scare. My whole thought was whether Jennings was dead or not.

30

Q Well, you saw Okin, and he was the man that was driving the car? A Yes, sir.

Q What Okin was it? A Well, Joseph. I didn't know him to see him; in fact, I didn't know his first name until that night.

Q Did you know that he was one of the sons of this Mr. Okin? A No, I had never seen Mr. Okin.

40

Matthew J. Reilly, direct.

Q Did you look before you stepped off the curb?

A Yes.

Q What did you see? A I seen the machine on the next block. Of course, there is a turn there. I looked up, and it came down so fast that I had to get away from it, and I started back—

10 Q I did not ask you that; I asked you what you saw before you stepped off the curb? A I seen the machine coming down Market street.

Q Where was it then? A Well, it was about just the other side of Washington, the car tracks, like, about in the middle of the thoroughfare, coming down.

Q And that was when you started to step off? A Yes.

Q And how fast was it coming? A Well, I am not a good judge of speed, but it was coming awfully fast, from what I have heard from people standing there—

20 *The Court.* Never mind that.

Witness. I am not a very good judge.

By the Court.

Q Let me see if I understand. You said it was in the middle of the car tracks coming down, and something about a curve. What curve of the car tracks have you in mind? A Washington street, coming into Market.

30 Q The place where the car tracks curve around into South Washington street? A Yes.

Q That is the curve you are speaking of? A Yes.

Q And where was it with reference to that when you saw it? A When I seen the machine?

Q Yes? A It was on the further side, that would be, walking up Market street.

Q How much beyond the curve in the tracks? A I don't think it is beyond the curve; I think it was near the tracks.

40 Q Near the tracks? A Yes, it was within the distance of the sidewalk on Washington street to

Matthew J. Reilly, cross.

cross Market, if you know where I mean, a little above, about where they call Snyder's clothing store, that first curb there; that is about where I seen the machine.

By Mr. Fort.

Q And Mr. Jennings was then off on the street, then, was he, when you saw him? A Yes, he was just a little ahead of me. 10

Q About how far? A About eight or ten feet, I should judge.

Q How many steps off the curb had you taken before the car hit you? A Oh, I didn't take over two, because when I jumped back—

The Court. That answers the question.

Cross examination by Mr. English.

Q Now, how many were in the party which stood in front of Schulte's? A There was four in that party, and then two walked away and left four there still. 20

The Court. You have answered the question; you say there were four in the party.

Q Well, there were four there in the beginning, and two walked away, and there were four there still? A No, I said there was four in the party and two walked away, and two more gentlemen that we were talking with stood there with us. 30

Q Then more reserves came up after the first two walked away? A Well, those were the acquaintances I spoke about that we were talking to.

Q Were they men or women? A Men.

Q And this new party of these four walked down how far? A About down to where the Newark shoe store is.

Q Do you know how far that is from the south-east corner of Washington and Market streets? A Well, I just know the distance. 40

Matthew J. Reilly, cross.

Q Well, how far was it with reference to North Washington street? A It wasn't north of Washington street.

Q Did you go down opposite to where Washington street runs into Market street on the north side?

A That is just about where it was.

Q Did all four of this party start across the street or just you and Jennings? A Just I and Jennings.

Q What became of the other two fellows? A They walked down Market street.

Q And you think that Jennings started ahead of you? A He started ahead of me.

Q At the time Jennings started and he got in the street had you seen the automobile? A I bid "Good-night," and when I did that Jennings walked on just a little bit further than I, and I said "Good-night," and I started to go across the street, and as I did I stepped just like that; the machine was coming so fast I looked around to try to get out of the way of it, and as I did I was—

Q You are not answering my question. My question is where you first saw the car after Jennings had stepped into the street? A About at Washington street, just beyond—about the center point.

Q This side of Washington? A Well, the right-hand side coming up Market street.

Q Well, it had not yet crossed the intersection of Market and Washington streets? A No.

Q So that it was on the court house side of Washington street? A Well, yes; that was on the right-hand side.

Q Well, that depends on which way you were going. A I am coming up Market street.

Q Coming up towards the Court House? A I am explaining the side I mean by saying when I am coming up it is on the right-hand side, or going down it is on the left-hand side. I want to show you where the car was when—

Matthew J. Reilly, cross.

Q Well, I can straighten it out this way. Schulte's store is on the southeast corner of Market and Washington streets? A Yes, the southeast corner.

Q And the automobile was on the opposite side of Washington? A Out in the center of the car tracks.

Q In the center? A About at the center, where the tracks are.

Q You mean where the cars curve into Washington street? A Yes, the machine was just the other side of them tracks, coming down Market street. 10

Q And you were opposite North Washington street on Market street? A Just about, yes.

Q So that you were at least a hundred feet away from the corner? A No, I got that measurement.

Q You have, eh? A Seventy-five feet that is.

Q Seventy-five feet away from the corner? A Yes.

Q And how far was Jennings out in the street at that time? A Jennings was about six feet. 20

Q Six feet from the curb? A Yes, sir.

Q And you were just about getting ready to step down off the curb? A Yes.

Q Now, Jennings was aimed across Market street? A Yes.

Q To go up North Washington street? A Yes.

Q And he was looking in the direction he was walking; was he not? A Yes, sir.

Q When you stepped down in the street and you jumped back, you say, you came up smack against a telegraph pole? A I was brushed against a telegraph pole, or trolley pole. 30

Q Did you have your back against it or your stomach against it? A My stomach; I laid holding onto it.

Q You hung on like a tree toad? A I was so scared I was glad to hold on and holler.

Q When you were in that position you had your back to the north side of Market street, did you not?

A No, my position would be, there was the pole, there 40

Matthew J. Reilly, cross.

was the machine where Jennings was in front, and I was hanging to this pole (indicating). I seen Jennings all the time.

Q Now, I want to know whether you back was to the north side of Market street or towards the court house or towards Broad street? A My back was towards the court house.

10 Q So that you were in a position where you could see what happened to Jennings? A Yes.

Q Now, this thing happened pretty quick, you say? A Yes, sir.

Q Had you got into this embraced attitude around the pole before the accident happened to Jennings or not? A Well, I hung onto the pole when Jennings was just hit (clapping his hands); I was brushed there, and I turned around and I looked after Dick, and I hollered—

20 Q Never mind Dick now. You had time to jump out of the way and cling to this pole? A No, I didn't jump out of the way; I was brushed out of the way.

Q You had time to be brushed out of the way and cling to the pole and turn around and look for Dick before the automobile got to where Jennings was? A No. You understand, the machine came by and brushed me into the pole, and when it brushed me into the pole my back was turned like that, and I was holding on; there was the machine there, and I was so frightened, to tell you the truth, I just hollered, that was all; I hollered for Goodman and Scheiner to come and pick Dick up.

30 Q Who is Dick, Richard Jennings? A Richard Jennings, yes.

Q Oh, he is the man that you call Dick? A Oh, yes. Pardon me!

Q I thought you meant somebody else by "Dick." A No.

40 Q Now, how far across in front of the automobile did Dick get before he was struck? A Six feet.

Matthew J. Reilly, cross.

Q No, you do not understand. Did he get across the path of the automobile or was he in the middle of it or— A Right in the center of it.

Q Right in the center of the automobile? A Yes, sir; the radiator hit him.

Q You did not undertake to measure the distance from where Mr. Jennings lay to where the car stopped, did you? A No. I will tell you the reason why I didn't do that— 10

Q We do not care about that. Why do you say it was 118 feet? How do you arrive at that figure? A Well, I did measure from where I thought—where the pole was, from there I did measure that; I thought it might be necessary.

Q When did you make that measurement? A Why, I just can't recollect when I made it.

Q Well, the night of the accident or some other time? A No, some other time, afterwards. 20

Q Quite lately? A Well, it was lately, yes.

Q Since this case was brought and about to come on for trial? A Yes.

Q Now, how far below the pole where you hung was it that Jennings was hit? A Well, it was about six or seven—about eight feet, I guess; I can't say; between eight and ten feet.

Q And you measured from the pole where you clung to what point? A To Washington street.

Q The projection of Washington street. How did you measure it, pace it off? A With a tape measure. 30

Q Who helped you? A Jennings and I.

Q And from the pole to Washington street where you measured was 118 feet? A No, from the pole to Menk's drug store was 118 feet.

Q Did you measure to Menk's drug store? A Yes.

Q Now, you say the man that drove the car you afterwards found out was Okin? A Yes, that was after all was over and after I came back from the hospital, and everything, I found out his name was Okin. 40

Matthew J. Reilly, cross.

Q You did not know him up to that time? A No; I saw him with Sammy Rachlin.

Q Did you know his name? A Well, I knew him from seeing him with Sammy Rachlin, and I know Rachlin very well.

Q Did you find out what his name was? A After that I did, yes; I found out that his name was Joseph Okin.

10

By the Court.

Q What part of the machine brushed you? You say it brushed you? A Yes, sir.

Q Do you know what part of it brushed you? A Yes, the front mud guard.

Q How many tracks are there on Market street at the place where the accident occurred? A There are four.

Q I am not asking you about rails. How many tracks? A Four—oh, not about rails. Oh, two tracks; that is, where two cars can come up and down at the same time.

20

Q Two tracks? A Yes, sir; and four rails.

Q Where was the trolley car when it struck Jennings with reference to the trolley tracks, if you know? A Where was the trolley car?

Q I will ask you the question again. Where was the automobile at the time it struck Jennings with reference to the trolley tracks? A Well, Jennings was closer to the curb than he was to the trolley tracks.

30

Q And where was the car? A The automobile?

Q Well, we will call it an automobile; probably that is better. A Or the machine. That was coming down Market street—

Q I do not mean that. At the time of the accident where was the car with reference to the trolley tracks? A It was about six feet away from the curb.

40

Q From the curb? A Yes, sir.

Matthew J. Reilly, cross.

Q That is not what I asked you. Where was it with reference to the trolley tracks, to the track, to the rails? A It was closer to the curbstone than it was to the trolley tracks.

Q You are speaking of the car? A Yes.

Q Then Jennings was closer to the curbstone than he was to the nearer trolley track, and so was the car?

A Yes, sir.

Q Were any of the wheels of the car on the nearer rail of the trolley track? A No, sir. 10

Q The whole of the automobile was in the south roadway? A Yes.

Q Between the trolley track and the south curb? A Yes.

By Mr. English.

Q Where had you been prior to your meeting on Schulte's corner that night? A Why, we was in a place on Washington street, the Iroquois, and we walked across the street to Klein's, and we stayed there about five minutes, and walked out and over and down Market street. 20

Q Who were in the party at the Iroquois and afterwards at Klein's? A Who was in the party?

Q Yes. A In the Iroquois and after in Klein's?

Q Yes. A Goodman, myself and Scheiner and Jennings.

Q The Iroquois Theatre is that? A No.

Q Was it a saloon? A Well, it is a bowling alley and there is a bar in there. 30

Q Had you been in there all evening? A No.

Q How long were you there? A About half an hour.

Q Half an hour there? A Yes, sir.

Q And five minutes in Klein's? A Yes, sir.

Q And what did you have to drink? A That particular night Jennings wasn't drinking. I myself drank a glass of beer, and I think the rest of the party drank beer, outside of Jennings; he had water. 40

Matthew J. Reilly, cross.

Q And at Klein's how about it? A The same thing.

Q They all drank beer except Jennings, and he drank water? A Yes.

Q Well, ordinarily Jennings didn't drink water, did he?

Objected to.

10 *The Court.* I will let the question stand.

Q Ordinarily he did not drink water, did he? A Well, Dick was a fellow who at times he drank, but he would go for months, and that was just one of the times that he wasn't drinking.

Q And this happened to be one night in the year that he did not drink anything? A Oh, no, not once; for months previous to that.

Q One of the few nights that he did not drink? A Well, if you put it that way—

20 Q Usually when he was out with you he would take a drink? A No, sir.

Q Well, this was one of the few nights that he did not? A Yes.

Q And you and the other two gentlemen all had beer and he drank water? A Yes.

Q Did he get this water right over the bar? A No, we sat at the table in the Iroquois.

Q And asked the waiter to bring him water? A Well, it is a place where they have a cabaret there,
30 and you can order water and pay ten cents for it.

Q In spite of the extra expense of the water he ordered water? A Yes, sir. I would have ordered water, too, only the beer was cheaper.

Q And notwithstanding the extra expense of the water, Jennings drank water instead of beer; is that it? A Just as he had been doing for some time.

Q Now, how about when you got to Patsy Klein's, did they charge you for water there? A Yes, sir; five cents there.

40

George Scheiner, direct.

Q Did he order water there? A Yes, sir.

Q He paid for that? A Yes, sir.

Q And the rest of you drank beer? A Yes, sir.

GEORGE SCHEINER, sworn in behalf of plaintiff.

Direct examination by Mr. Fort.

Q Mr. Scheiner, you live in the City of Newark?

A Yes, sir.

10

Q Where do you live? A 114 Belleville avenue.

Q Do you know Mr. Jennings? A Yes, sir.

Q You were with Mr. Jennings, Mr. Goodman and Mr. Reilly on the night of January 9, 1914, were you not? A Yes, sir.

Q Did you see any accident that night? A Yes, sir.

Q What did you see? A I seen Mr. Jennings get hit by a machine; that is, I didn't see him get hit, but I seen him lay there in the street after he got hit.

20

Q That is, you did not see him get hit? A Not exactly; it was too fast.

Q Did you see the car that hit him? A Yes, after.

Q Who was driving it? A Well, I don't know the gentleman; I didn't know him until after that evening, after awhile.

Q Well, never mind, then. Did you see the car before it hit him? A No, sir.

Q Had you just come across the street? A I was across the street.

30

Q How long had you been across? A About five minutes.

Q You did not see the car then? A No, sir.

Q You had been with Mr. Jennings all evening, had you not? A No, sir.

Q How long had you been with him? A Maybe fifteen or twenty minutes.

Richard P. Jennings, direct.

Cross examination by Mr. English.

Q Had you been with him at the Iroquois? A Yes, sir.

Q Well, did he drink water there, or what? A Yes, sir, seltzer.

Q What? A Seltzer.

Q Oh, seltzer this time. A Well, that is water.

10 Q The rest of you drank what? A Well, I smoked a cigar and the rest of them drank a little beer.

Q Were you with him in Patsy Klein's? A No, sir; I don't go in there.

Q You did not go in there? A No, sir; I was outside talking to a man.

Q Smoking that same cigar? A I don't know if it was a cigar; I think it was a cigarette.

Q And you did not see the accident at all? A I didn't see the accident that second, but I seen after
20 the car passed them.

Q After the accident you saw Mr. Jennings laying in the street? A Yes, sir.

Q That is all you know about it? A Yes, sir.

RICHARD P. JENNINGS, plaintiff, sworn in his own behalf.

Direct examination by Mr. Fort.

Q Mr. Jennings, you live in the City of Newark?

30 A Yes, sir; practically all my life.

Q All your life? A Practically.

Q Where is your present residence? A 4 Hawthorne avenue.

Q On the night of January 9, 1914, did anything happen to you? A Well, on the 9th of January, 1914, I was struck by an automobile on Market street.

Q Where did it happen? Tell us, as near as you can, when and where and how the whole thing happened? A Well, I came from Klein's, and crossed
40 over with Mr. Goodman and Mr. Scheiner and Mr.

Richard P. Jennings, direct.

Reilly, and me and Reilly stopped talking to two friends at Schulte's. Leo, or, rather, Mr. Goodman, and Mr. Scheiner walked on down and walked across to Riker's. Afterwards the two gentlemen that we were talking with walked down with us as far as Bergamo's. I was a little ahead of Reilly; in fact, I had said to him—

Mr. English. No, no, never mind what you said to him. 10

Witness. I was about ten feet of him, and I had looked up the street and seen the machine about in the middle of the block between Plane and Washington street, I started to cross the street and looked back again towards Reilly to see if he was coming and then on the instant I saw the flash of the machine, and that is about all for that time.

Q About how far had you walked from the curb when you saw this flash of the machine? A I was probably eight or nine feet from the curb. 20

Q And where was Reilly? A Reilly was behind me about probably six feet, four to six feet.

Q Now, where you stood, was Reilly nearer the Court House than you were or was he nearer Broad street than you were? A He was nearer the Court House.

Q And then you turned to your left, that would be, would it not? A Yes. 30

Q You turned to your left to look for Reilly? A Yes, sir.

Q And then you saw the machine? A I saw a flash, and that is all. Before I could move I was gone.

Q And the next thing you knew where were you? A Well, they claim—the next thing I really knew was on the operating table. They didn't administer chloroform or ether on account of the loss of blood, and they gave me injections of morphine, and so forth, 40

Richard P. Jennings, direct.

and that is all I remember. The next morning I kind of came out again.

Q But before you stepped in the street you say you looked up Market street? A Yes, sir.

Q And you say you saw a car? A Yes, sir; as near as I can recollect.

Q Where was the car when you first saw it? A Well, it was between Plane and Washington street, and, as I have since made measurements, it is about seventy-five feet from where I stood to Washington, it is fifty feet across Washington street and it is about 120 feet above Washington where I seen it, about at the Homestead restaurant.

Q That is where it was, as near as you could tell? A Yes.

By the Court.

Q That is, you estimate your distance from Washington street to be seventy-five feet? A Yes, sir.

Q The width of Washington street to be fifty feet? A Yes, sir.

Q And the distance beyond Washington street— A One hundred and twenty.

Q —to a spot opposite where the car was to be— A One hundred and twenty feet.

Q —One hundred and twenty feet? A Yes, sir.

By Mr. Fort.

Q Did you hear any sound of any horn before you were struck? A I heard nothing.

Q Now, you have told us the next thing you remember was being on the operating table. How long were you in the hospital? A I was in the City Hospital eight days and in the Presbyterian Hospital eight weeks.

Q Who was your doctor in the City Hospital? A Well, I had four or five doctors there; I had Eagleton for my eyes and Sutphen for my troubles in my hips,

Richard P. Jennings, direct.

and so forth, and my wounds, and Curtis also examined my ear, on account of bleeding from my ear, to see whether my ear drum was busted, and so forth.

Q While you were in the hospital, Mr. Jennings, did you suffer much? A Enough. I was using morphine, or they were using it on me, for a matter of seven weeks, I believe, until it got on my nerves so that I asked them to let up a little, which they done, and eventually tried to get away from it by a lot of work on my part, whether it was my part or whether I was blessed with just enough nerve to try to get away from it. 10

Q That was used for the purpose of— A For the purpose of relieving my pain.

Q Now, before this accident happened had you been a well man or not? A I was practically in perfect health.

Q Had you ever had a doctor? A Oh, I have had doctors, yes, at different times. 20

Q For minor matters or serious matters? A For minor matters practically.

Q Since you got out of the hospital what condition have you been in? A Of course, I am lame, as you know. Outside of that, my head—I get some head aches, and this wound here, whether they figure that it is a concussion or fracture (indicating).

The Court. Indicating—

Witness. The right side of the head; there is a sort of a permanent lump there. 30

The Court. The upper part of the head on the right.

Witness. Yes. I have a continual buzzing in the ear, also black spots in front of my eyes, more prominent on my right than on my left side; below my knee, where the wound is, there has been sloughing off particles of bone up until a few weeks ago, I should say probably seven weeks ago. Whether it will stop or not I don't know; 40

Richard P. Jennings, direct.

the physicians can't give me no confirmation that it will. My other wounds seem to have healed, outside of my hip. In the cold weather and damp weather it irritates me; in other words, it don't practically confine me, but I feel it better to be sitting down than moving around.

Q (*By the Court.*) What is it that irritates you,
10 your hip? A My hip.

Q (*By Mr. Fort.*) What about your eyes, Mr. Jennings? A They are blurred, black spots. They have a technical name for them which I can't just recollect. They give me stuff, medicine, and so on, and so forth, but they claim it is from the concussion more, from this gash over my eye, than anything else.

Q Have you got a scar on you there where the car hit you? A I have got a scar here (indicating). My skin is so light it is hard to see. It is about an inch
20 and a quarter long.

The Court. Indicating over the right eye.

Witness. Yes, sir.

Q That scar was from the accident? A Yes, there was a cut there.

Q Now, these various things that you have been telling us were the matter with you and have been the matter with you for the past fifteen months, did you have any of those things the matter with you before the accident at all? A No, sir; none whatever.

30 Q How about your nerves? A Well, they kind of give me consolation in telling me that time will help my nerves, but it seems very slow—the doctors—

The Court. You need not tell us what the doctors say, but tell us how you feel yourself.

Witness. Well, my nerves at times is bothered from my eyes, the nerves of my eyes. When the twitching comes, that is when I see those spots. They are not exactly continual, but they are there. Of course, the twitching of my other nerves, that
40 lets up more readily than the eyes does.

Richard P. Jennings, direct.

Q Is there any other form of your nervousness? A No, not exactly.

Q Can you sleep? A I get a certain amount of sleep, but they claim if I get more sleep they will have to give me drugs maybe. I have tried to get away from that; I hope it will be relieved without that.

Q Mr. Jennings, you had to pay a bill at the Presbyterian Hospital? A Yes, sir; \$131.50.

Q And you received a bill from Dr. Asher? A \$75.

Q What about Dr. Baker? A Dr. Baker, \$10, for the X-rays.

Q Now, have you had to buy any equipment of any kind? A Well, I had a crutch in the hospital until I got home; then I have since used a cane.

Q What did the crutch cost you? A Oh, a matter of \$3 or \$4; I really forget now what it was. They sent it up there to me.

Q Any medicine? A I buy myself medicine. My medicine don't average over about fifty cents a week.

By the Court.

Q What is that for, internal use? A For my nerves mostly.

Q You take it? A Yes, sir.

By Mr. Fort.

Q Were you employed at the time you were hurt, Mr. Jennings? A No, I hadn't been employed in about five days.

Q What had you been doing prior to the five days? A I was working for Zaizer & Company, on Market street. They are engravers and enamellers.

Q What were you doing for them? A Enameling work.

Q Your trade is what? A Well, that isn't my trade; my trade is pearl work more than that—pearl etching.

Q What sort of work is pearl etching when you do it? A It is done with an emery wheel, different

Richard P. Jennings, direct.

forms and so on, it is put up—pearl work, pearl buttons and different little ornaments.

Q What pay did you get for that work? A Well, from \$18 to \$25 a week.

10 Q Have you been able to do any of that since the accident? A I worked about nine days for the Arlington Pearl Company, on Lawrence and Market streets, but I had to quit. You have to stand up at it, and I couldn't get by.

By the Court.

Q When was that? A I have the exact date in my pocket. I think it was last summer. (Referring to memoranda.)

Q Some time last summer? A Yes, it was about last June. I have got two wage slips, but they haven't got the date on them.

20 *By Mr. Fort.*

Q Now, subsequently you did work for Zaiser again, did you not, over the holidays? A Yes, the last holidays, about seven weeks, I done work for them, but I couldn't exactly do their enameling work, because I wasn't up to it; my eyes bothered me; I done more watchman work for them at night; they had so much jewelry congested around there during the holidays.

30 Q Have you been able since the accident to do other enameling or pearl work except what you have told us? A Not outside of that.

Q You have tried to several times, have you? A I have tried etching once; I haven't been able to get a position for that since.

Q (*By the Court.*) What did you get for this watchman work? A \$12 a week.

40 Q (*By Mr. Fort.*) You have told us of the employment that you have had since the accident, now, have you? A Yes, sir; I tried for an appointment with the Westinghouse Electric Company, on Orange

Dr. Charles F. Baker, direct.

street; I had a letter to the superintendent to get a clerical position in the department of tools, where they distribute tools. There is a name for it; I can't just get at it in my mind. I had to be more active, he said, so I didn't get it.

Q How old are you, Mr. Jennings? A I am exactly thirty-nine—thirty-eight—thirty-nine, that is right.

At one o'clock, P. M., the court takes a recess
of one hour.

10

AFTER RECESS.

(By consent, the witness is directed to stand aside for the present.)

CHARLES F. BAKER, sworn in behalf of plaintiff.

Direct examination by Mr. Fort.

20

Q Dr. Baker, you are a practicing physician? A Yes, sir.

Q And, among other things, you are accustomed to taking what are commonly known as X-ray photographs, are you not? A I am.

Q Did you take one of Mr. Richard Jennings's hip? A Yes, sir.

Q Or thigh? A Yes, sir.

Q Is this the photograph that you took of Mr. Jennings's thigh (shown to witness)? A Yes, sir.

30

Q What does that disclose? When did you take that, doctor? A It was March 14, 1914, I believe.

Q What does that disclose as to the condition? A It shows a very serious injury to the hip bone, which is broken in three places; the cavity that forms the joint is broken—the hip joint—and two of the sections of bone immediately nearby. One is called the ramus of the ischium and the other the ramus of the pubis. The top of the femur, or thigh bone, is pushed partly into the pelvis through the joint.

40

Dr. Charles F. Baker, cross—re-direct.

Q From your medical knowledge, is that a curable injury or an incurable one? A Do I have to answer that yes or no?

Q Will you give us your opinion about it? A It is a very serious fracture; it will certainly permanently disable the hip to a marked degree.

Q Did you show this picture to Dr. Sutphen? A
10 I sent it to him; yes, sir.

Q And did you ever talk to Dr. Asher about it at all? A Not that I recall.

Q Did you deliver it to Dr. Sutphen? A It was delivered at Dr. Sutphen's office.

Q What were your charges to Mr. Jennings, doctor? A \$10.

Q At the time you saw Mr. Jennings did you examine him in any other way except simply to take the photograph? A I don't think I did.
20

Cross examination by Mr. English.

Q Have you not examined him since, doctor? A No, sir.

Q Where did you take the photograph, doctor? A At my office, 47 Walnut street.

Q Do you remember the date? A March 14th, I believe.

Q Did he walk to your office to have it taken, or how did he get there? A No, he was brought there in
30 a cab, or carriage.

By the Court.

Q Was there a print taken of this? A I don't think so.

Mr. Fort. I would like to offer this in evidence.
(Marked Exhibit P. 1.)

Re-direct examination by Mr. Fort.

Q Doctor, is there any way of identifying the envelope and the plate as being the same matter? A Yes,
40

Richard P. Jennings, direct.

the plate has a number photographed on at the same time that the picture was exposed, and the plate is marked with this number, 1612, which corresponds to the number on the envelope.

Q And you wrote the number on the envelope? A Yes.

Q So that there is no question but that the plate here is the plate that you took of Mr. Jennings? A Not the slightest. 10

(The plate referred to is placed in a plain envelope, which is marked Exhibit P. 1.)

RICHARD P. JENNINGS, plaintiff, resumes the stand in his own behalf.

Direct examination (continued) by Mr. Fort.

Q Mr. Jennings, how much did you weigh before this accident happened? A One hundred and fifty pounds. 20

Q And what did you weigh after it, the next time you were— A I weighed one hundred and eighteen about three days after I came out of the hospital.

Q That was some time in the latter part of March, 1914? A Yes, sir.

Q What do you weigh now? A One hundred and twenty-five last Saturday.

Q With your clothes on? A No.

Q (*By Mr. English.*) Stripped? A Stripped, yes. 30

Q. (*By Mr. Fort.*) Now, were you present at any time during the early spring or summer of 1914 at Captain Glori's café on any night when Mr. Joseph Okin was present? A I went up there one evening—

Q No, just answer that yes or no. A Yes.

Q On that occasion did you meet Mr. Okin? A Yes, I was introduced to Mr. Okin by Mr. Rachlin, I believe.

Q By whom? A By Mr. Rachlin, Samuel Rachlin, I believe his name is. 40

Richard P. Jennings, direct.

Q Was there any conversation between Mr. Okin and yourself in reference to the accident in which you were injured at that time?

The Court. Yes or no.

A Yes.

Q What was that conversation in so far as it related to the accident? A Well, he spoke of a settle-
10 ment—

Mr. Fort. No, I do not mean that. Strike that out, if there is no objection.

Q Was anything said about who was driving the car on the night of the accident? A Oh, he said he would get on the stand and swear that he had sent his son over to fix the lights in the building which we were then in.

Q In what? A In the building in which we were
20 then in, meaning the adjoining Odeon theatre; in fact, that was part of it. There is an entrance from the café to the Odeon theatre.

Q Did he say anything about whether his son was the one who was driving the car that hit you, or whose car it was? A He admitted it was his car.

Mr. English. I object to that and move to strike it out.

Q How did he say it?

The Court. Strike it out. Without reference
30 to any inferences you may put upon his statements, give us, as near as you can, what he said.

A Well, he spoke of the young man coming to the theatre, and it was his car he had sent him there with.

Q Who else was there at the time this talk occurred? A There was Mr. Goodman, Mr. Lehman, me and Mr. Okin; Mr. Rachlin and Mr. Isenberg were in and out at different times, conversing with us.

Q How long did you stay there and talk? A Oh,
40 possibly half an hour.

Richard P. Jennings, cross.

Q Mr. Jennings, can you fix anywhere near the exact point where the car was when you first saw it before you started to cross the street? A I believe I said it was at the Homestead restaurant, on Market street, above Washington street—whether I did or not this morning I can't say—about where I measured it to.

Q That is where you think the car was when you first saw it? A Yes, sir. 10

Cross examination by Mr. English.

Q Do you remember when this meeting occurred at Glori's café between you and the other gentlemen?

A Well, it was in the summer time there; it was probably in April, April or May; I couldn't be exact.

Q April or May? A Yes, sir.

Q Of 1914? A Yes, sir.

Q Were you there first or was Mr. Okin there first?

A Mr. Okin was in the theatre, and Mr. Rachlin came and told me, he says— 20

Q Never mind what he said. A All right.

Q And then afterwards Mr. Okin came into the café? A He was brought in by Mr. Rachlin and introduced to me.

Q Did you know him before that? A No.

Q Did you know him by sight? A Probably by sight, but not personally.

Q Did you know any of his sons? A Yes.

Q How many of his sons did you know? A I only, I believe, know Willie. 30

Q Willie? A William.

Q How long had you known him? A Oh, possibly five or six years.

Q Did you know where he lived? A No.

Q Had you ever been to his house? A No.

Q Which theatre is this saloon in? A The Odeon.

Q The Odeon theatre. That is right across the street from another one, is it not? A They call it Loewe's now; it was called the Majestic at that time. 40

Richard P. Jennings, cross.

Q And it was recently built about that time, was it not? A The time that we had the conversation, you mean?

Q Yes. Had it not just been recently completed? A I couldn't say exactly.

Q Well, it was a comparatively new building. You knew that, did you not? A Oh, it was a new building, yes.

10 Q Now, are you quite positive that Mr. Okin indicated what theatre these lights were in which he sent his son to fix? A Well, one thing that confirms it in my mind—

Q No. Are you positive about it? A Well, he pointed to it right in the café that I was sitting in; "He fixed these lights," he said (illustrating).

Q He gesticulated with his hand, did he, that way (illustrating)? A He said, "these lights."

20 Q So that you naturally deduced that he meant the lights in the Odeon theatre? A Yes.

Q He might have meant the Majestic theatre? A Well, "these." If he meant across the street he would say "those," I presume.

Q You make a distinction between "these" and "those," do you? A Yes, sir.

Q And what you say he said was that he had sent his son to fix these lights? A Yes, sir.

30 Q Did he say he had sent him in his automobile? A Yes, sir.

Q And to fix these lights? A Yes.

Q Did he say where his son was when he sent him?

A Where from?

Q Yes. A I believe he said from his home.

Q Did he say where his home was? A No.

Q Did you know, as a matter of fact? A No.

Q Do you know now? A No.

Q Now, you say that your business, or trade, is that you are a pearl fraezer? A Fraezer.

40 Q How long have you been working at that trade?

A Well, I worked at it for years.

Richard P. Jennings, cross.

Q How many years? A Oh, ten or fifteen years.

Q And at the time of the accident you had been out of work for five days? A Yes.

Q Prior to the beginning of those five days whom had you been working for? A Why, I was selling cameras at one time for myself.

Q Just before the accident, then, the last thing that you did was selling cameras? A Oh, no, that was with Zaiser & Company, on Market street. You said before I had my last position. 10

Q You say that just before the accident you had been out of work for five days? A Five days.

Q What was the last position you had or the last person you worked for before the accident? A Zaiser & Company, on Market street.

Q Polishing this enamel? A Yes, sir.

Q That is, enamel etching? A Yes, sir.

Q And how long had you been working for Zaiser? 20
A About two months. They had a rush in the holidays; that is what I do mostly for them.

Q During the holidays? A Yes.

Q That was a temporary holiday job? A Well, not necessarily a holiday job; if they were busy it would extend further.

Q How long before the expiration of these five days had you been working for Zaiser? A For two months.

Q Why had you quit five days before the accident? 30
A They had no more ready work for me.

Q They were through with you? A Yes.

Q And how much a week had you been getting? A About \$22 a week.

Q You say about? A Well, there was a difference in the hours; I was working overtime.

Q So that you got \$22 a week? A Yes, sir.

Q And before that what was the last job you had? 40
A Well, I have been steward of clubs, and so forth and so on, off and on.

Richard P. Jennings, cross.

Q Now, I want you to go back chronologically and tell me what job you had before January 9, 1914. Were you steward of a club then? A Yes, sir.

Q What club was it? A The Mechanics' Club.

Q Where was that? A On Mechanic street.

Q Did they have a club house? A Yes. It isn't there now.

10 Q Then it was there? A Yes.

Q How long were you steward of that club? A About three years.

Q That did not have anything to do with fraezing pearls, did it? A No, sir.

Q Did you live there? A No, sir; I lived home with my sister.

Q What did you get there? A I got a share of the profits.

20 Q What did you get there? A It netted me about \$40 or \$50 a week.

Q You got that for three years? A Yes.

Q Why did you quit that job and take up one for \$22? A We had a dissension in the club.

Q You had a difficulty and you got out? A It was with some of the members of the club.

Q Now, that lasted three years. Prior to that what had you been doing?

30 *Mr. Fort.* Now, if your honor please, I do not know what the limit is. I just want to save time. It seems to be getting back three years before the accident, it is a little far back to make an inquiry in this case. I do not see the materiality of the evidence.

The Court. Well, it has a bearing, perhaps, on the question of permanency of employment.

Mr. Fort. I do not understand that there is any rule that requires permanency of employment to be shown, is there?

40 *The Court.* Not that I am aware of. Proceed.

Richard P. Jennings, cross.

Q How long a time elapsed between the time when you quit the stewardship of the club and the time you got the job with Zaiser during the holidays? A A matter of a few months, possibly four months.

Q And during those four months you did nothing? A Practically, no. I sold cameras on commission, that was all.

Q Well, that did not amount to much? A No.

Q Now, prior to being steward of the club what did you do? What was your last job before that? A Why, I had been steward of various clubs for years.

Q Well, tell us the job that you had prior to becoming steward of this Mechanics' Club. A I was steward of a club on Plane street.

Q What club was that? A The Democratic Club.

Q And how long were you steward of the Democratic Club? A About two years.

Q That was before you got the job at the Mechanics' Club? A Yes.

Q Why did you leave that job? Was there a difference there, too? A No, there wasn't necessarily a difference. I quit when I feel like it.

Q When you felt like it, at the end of two years, you quit; is that it? A Yes.

Q How long a time elapsed between the time when you quit at the Democratic Club and got your job at the Mechanics' Club? A I went immediately there.

Q Now, the job at the Democratic Club had nothing to do with fraezing pearls, did it? A No.

Q What was the last job you had before the Democratic Club stewardship? A Prior to that I had practically been steward of clubs for practically ten years.

Q I want you to name the clubs. A I will say ten years, if that is sufficiently far enough back for you.

Q I want you to name the club that you were last steward of before you went to the Democratic Club.

Richard P. Jennings, cross.

A It was the Mechanical Club, on street and Eighth avenue; it was a draftsmen's club.

Q You had that job before you went to the Democratic Club? A Yes, sir.

Q How long did that last? A Oh, it must be four years.

Q How long a time— A I have given you nine years, now, I presume, already.

10 Q All right. Whatever it was, how long a time elapsed between the time you quit at the Mechanical Club and went on at the Democratic Club? A You mean the difference in time?

The Court. The interval of time.

Witness. Possibly a few months.

Q Did you do anything in that time? A No, I did nothing then.

20 Q And you left the Mechanical Club because you wanted to quit, or what was it? A Well, there was a change in the officers there.

Q A change in the management? A Yes, sir.

Q And you went out with the old managers? A Yes, sir.

Q Had you been steward of any club before? A Why, I don't think so; no, I don't think so.

Q So that began your experience as steward of clubs? A Yes, sir.

30 Q Now, previous to being steward of clubs what had you been doing?

Mr. Fort. I submit that, having gone back ten years, that is far enough, unless Mr. English has a special reason that he is willing to disclose.

The Court. Well, I think, if it is confined merely to the character of employment as a source of income, that it has gone back far enough; but there is another ground on which the question may be asked the witness: bearing on his personality.

Richard P. Jennings, cross.

Mr. English. He says he is a pearl fraezer, and we have covered ten years of his life, and he has not said anything about pearl fraezing.

Q Now, going back to the time you were steward of the club nine years before, what did you do before you got this job as steward for the Mechanical Club?

A Before I went to Eighth avenue?

The Court. That would bring you to about the age of twenty years, would it not? 10

Mr. English. No, he is thirty-nine now. That would be about twenty-nine years old. We have covered ten years of his life.

The Court. I made a mistake; I thought he said he was twenty-nine.

Mr. English. No, thirty-nine. Your honor misunderstood him.

Witness. I had done pearl turning before that; I put in my time; I can't just recollect—pearl turning and fraezing, which is practically the same thing. 20

Q My question is, what was the job that you had last before you became steward of the Mechanical Club? A Well, that was it, pearl turning.

Q Where did you work? A Webb & Company, Nassau street.

Q New York? A Newark.

Q How long did that last? A Oh, I worked for them for years. 30

Q Why did you quit that work and go in the business of being a steward in a club? A There was more income in it.

Q More in it? A Yes.

Q So that you have not worked at your trade of a pearl fraezer for the last ten years; isn't that right?

A Yes.

Q Well, aren't you now more an expert as a steward than you are as a pearl fraezer? A That is a matter of conjecture, I suppose. 40

Richard P. Jennings, cross.

Q Have you since your accident endeavored to get a job as steward of a club? A Yes.

Q There is nothing about your injury now that prohibits you from pursuing that calling, is there? A I am not active enough to take charge of a club.

Q Does the steward of a club have to be buzzing about? A Not necessarily, but he has to be around and put in hours, which I am not able to do.

10 Q Well, you can do that, can you not? A I can move around, but I can't put in the hours.

Q How many hours do you put in? A More in that line than you do in the other.

Q Well, how many? A Well, ten or twelve hours.

Q Beginning when and ending when? A Well, any time that the club opens and closes.

Q There is not much doing in that kind of a club in the morning, is there? A That is according to the club.

20 Q There is not much doing in that kind of a club in the morning, is there? A They open any time, according to the club.

Q Well, answer my question, whether there is much doing in that kind of a club in the morning? A No, not necessarily.

Q And not very much in the early afternoon? A Yes, there is from one o'clock on.

30 Q Where had you been on the night of the accident prior to the time when you found yourself on the corner in front of Schulte's? A Where had I been?

Q Yes. A I was in the Iroquois restaurant, and from there to Klein's.

Q What time did you go to the Iroquois restaurant that night? A Possibly about half-past nine.

Q Where had you come from before you went to the Iroquois? A From home.

Q Where do you live? A On Elizabeth avenue—Hawthorne avenue.

40 Q You are unmarried? A Yes.

Richard P. Jennings, cross.

Q So that you got there about half-past nine, and whom did you meet there? A Why, I had met Mr. Goodman before I went there and went there with him.

Q Where had you met Goodman? A On Market street.

Q Just happened to meet him? A Yes.

Q Or by appointment? A No, just happened to meet him. 10

Q And you and Goodman went to the Iroquois about half-past nine? A Yes.

Q And when did the rest of the crowd join you there? A Well, I believe they were in there when we went in there.

Q And you stayed there until you went out and stopped in Patsy Klein's, and then went on to the corner? A We were there possibly half an hour or three-quarters of an hour. 20

Q That would bring you to about quarter after ten? A Yes.

Q And then where? A We went to Klein's.

Q And how long in Klein's? A About half an hour.

Q What? A About half an hour.

Q That would bring you up to quarter of eleven? A Yes.

Q Then you went out on the corner. How long were you there? A Well, possibly talked there for ten or fifteen minutes. 30

Q That would bring you about eleven? A Yes, I should say so.

Q And what time did the accident happen? A About that time.

Q About eleven o'clock. Now, you did not have a drink while you were in the Iroquois? A Not a drink.

Q You drank water? A I drank seltzer.

Q And what kind of water did you drink in Patsy Klein's? A Seltzer. 40

Richard P. Jennings, cross.

Q What did the rest of the boys drink? A I believe they were drinking beer.

Q You drank seltzer that night? A Yes.

Q You sometimes drink beer? A Yes—no, never drink beer.

Q What do you drink when you drink anything?

A Drink a cordial after dinner, or a glass of wine, or anything that I feel like drinking, if I want to drink.

Q But that night you felt like drinking water?

A Yes.

Q Did you have to pay for it? A Yes.

Q Now you got out there on the corner in front of Schulte's, after drinking water, and how long did you stay there—about fifteen minutes, you say? A Yes.

Q And who were in the party of four that walked down from there to about Bergamo's before you went across the street? A Me and Reilly and a gentleman named Drucker.

Q You and Reilly and Drucker? A The other gentleman—I can't remember his name—he was only an acquaintance of Reilly's.

Q And when you got in front of Bergamo's you and Reilly intended to go across Market street? A I was ahead of Reilly, and I had asked him to come on, as Leo—

Q Well, we have not got that far yet? A We were going across to meet Scheiner and Goodman on the other side of the street.

Q Where were you going from there? A Just taking a walk.

Q You and Reilly stayed on that side of Market street? A Yes.

Q And you started to go across the street? A Yes.

Q So that you separated at Bergamo's? A Yes.

Q Where was Reilly when you started to go across the street? A He seemed to be at the curb; I turned, and as soon as I turned I was hit.

Richard P. Jennings, cross.

Q I understand that, but I want you to start when you were on the sidewalk? A I was ahead of Reilly.

Q And you left him on the sidewalk? A Yes.

Q And you started across the street? A Yes.

Q Now, you say when you started across the street you saw the automobile up by Plane street? A Before I started, before I stepped off the curb I see it in the middle of the block between Plane and Washington. 10

Q Between Plane street and South Washington street? A Yes.

Q Were you right at the edge of the curb at that time? A Yes.

Q And you looked up just before you stepped in the street and saw the automobile coming? A Yes.

Q And then you stepped out into the street? A Yes.

Q Is that right? A And I looked back to see where Reilly was. 20

Q I know you looked back; we will get to that in a moment. You looked up and saw the automobile coming, and then stepped down in the street and started across the street; is that right? A Yes.

Q Did you look at the automobile again after you got in the street? A When I turned to my left, while he was on my left, I saw the flash then, and before I could move I was hit.

Q So that the next time you looked in that direction you turned around to see where Reilly was? A I didn't turn around; I looked toward my left, where the machine was coming from. 30

Q You looked that way for the purpose of seeing Reilly? A Yes, because he was on my left.

Q And when you looked for that purpose you saw the machine? A Yes.

Q How far had you progressed from the curb when you turned to the left to look for Reilly? A About seven or eight feet. 40

Richard P. Jennings, cross.

Q Did you see Reilly before you were hit? A Yes.

Q Where was he? A He seemed to be at the curb, as if he was just about to step off.

Q He seemed to be at the curb? A Yes.

Q Then how long was it after you had turned and saw Reilly at the curb that you were hit by the automobile? A Well, practically immediately, it was coming so fast; it wouldn't be a fifth of a second.

10 Q Then, as I understand you, you started into the street, and before you started into the street, you say, you saw the automobile up between Plane street and South Washington street? A Yes.

Q You started to walk across the street, and walked some seven or eight feet, when you turned your head and looked for Reilly? A Yes.

Q And Reilly seemed to be standing right at the curb? A Yes.

20 Q And immediately after that, when you looked, you were struck by the automobile; is that right? A Yes.

Q When you were struck by the automobile was your head still turned in that direction, or had you had time to turn your head around? A I don't believe I had time to turn my head.

Q When you turned your head to look after Reilly did you see Reilly first or the automobile first? A I seen Reilly first.

30 Q Then you must have been in the act of bringing your head back to a frontal position when the automobile came back into your vision? A It was practically the same time I was hit.

Q But you saw Reilly first? A Yes.

Q You know where the Odeon Theatre is located, do you not? A Yes.

Q It is up here above the junction of Springfield avenue and South Orange avenue, is it not? A It is on Springfield avenue above High street.

40 Q And above the place where Springfield avenue — A The junction of South Orange avenue.

Richard P. Jennings, cross.

Q —branches off? A Yes.

Q It is about a couple of hundred feet above that junction, is it not? A No, it isn't that much from the junction; it is about 150 feet.

Q Then, starting from there, as you come down toward Broad street you come to this junction of Springfield avenue and South Orange avenue, and then you come on down to High street, do you not? A Yes, sir. 10

Q That is a block below the junction? A Yes.

Q And then as you go down on the right-hand side of the street when you get below High street you come to Shipman street, do you not? A Yes, the first street is Shipman street.

Q Below the court house? A Yes.

Q And then when you get past that you come to Arlington street? A Yes.

Q Which is still further down? A Yes. 20

Q And then when you get still further down you come to Plane street? A Yes.

Q And then next below Plane street is Washington street? A Yes.

Q Now, it is quite a distance from the Odeon Theatre down to the place of your accident? A Yes.

Q A couple of thousand feet? A I will tell you in a second about what I figure it.

Q All right, figure it out in your mind and tell us what it is. A Well, it is possibly a thousand feet. 30

Q A thousand? A Yes.

Q Only a thousand feet from the Odeon down there to Washington street? A Figure a block 200 feet, and it is about five blocks, isn't it?

Q Yes, it is six blocks, if you count the junction of Springfield avenue and South Orange as a block. A From the junction to the theatre a block?

Q If you count that as a block, that is six blocks? A Yes, the streets intersect there, I know, but— 40

Richard P. Jennings, re-direct.

Q Well, counting that as a block? A But it isn't a block; there is hardly a block in the city as small as that distance there.

Q Now, this theatre is about 150 feet the other side of the junction? A Yes.

Q And your accident happened seventy-five feet below Washington street? A Yes.

10 Q So that that would run it up at least 1,500 feet, on your own estimation, would it not? A It isn't 1,500 feet, I don't believe.

Q You do not think it is? A No.

Q Well, it is nearer that than a thousand, is it not? A Have you measured it?

Q What is that? A Have you measured it?

Mr. English. Well, I am asking you that.

The Court. It is very easy to find it out from the city map.

20 Q I have not measured it myself, if that is what you mean. A Well, I didn't measure it.

Q Well, anyway, it is a matter of some six blocks, as appears from your testimony? A Yes.

Q Have you tried to get an orthoepic shoe or any kind of a shoe with a thick sole to aid you in walking? A I am wearing a shoe now that I had made special; it has two inner soles about an inch and a quarter or an inch and a half in the heel. It doesn't seem that long to me. I will show it to you.

30 Q Does that aid you in walking? A Well, it does and does not; it is so much weight there. I find the extra weight of the leather, the extra weight on the heel, makes it too heavy.

Q You think you want a different kind of a shoe, then? A Yes, sir. I have tried two or three different kind of shoes.

Re-direct examination by Mr. Fort.

40 Q Mr. Jennings, what was your regular rate of wages at Zaiser's, apart from your overtime, do you

Richard P. Jennings, re-cross.

remember? A I said \$22— Oh, apart from the overtime?

Q Apart from the overtime. A About \$17 or \$18 a week.

Q And what did you make when you were selling cameras—approximately what did you make a week out of that? A About \$20 a week.

Q And over the whole period of your steward employment, what did you average at that? A Oh, I would average \$30 or \$40 a week at that. 10

Re-cross examination by Mr. English.

Q After you left the Mechanics' Club on account of the difference did you try to get any other stewardship? A Did I try?

Mr. Fort. This is not re-cross examination, if your honor please.

A We always try to get positions. 20

Q Theoretically we are, but did you make any specific effort to get a stewardship after you left the Mechanics' Club and before you went to Zaiser's for the holidays? A Yes; I wouldn't have went there if I could have got a stewardship.

Q Well, how hard did you try? A Well, it is a question what you term "hard."

Q Well, tell us what you did.

Mr. Fort. If your honor please, this is not re-cross examination. I object on that ground. 30

The Court. You may answer the question.

Q Just tell us what you did when you got through with the Mechanics' Club and before you went to Zaiser's. A Simply ascertained where clubs were located, and applied for a stewardship.

Q Which club did you apply at? A Well, several.

Q Well, can you name them? A Yes. The Adonis Club and the Olympic Club, in New York, was two that I applied for. 40

Motion to Direct a Mistrial.

Q Any others? A I can't just recollect.

Q What did you do besides finding out the location of the club? A Got acquainted with members of the club, and so forth.

Q You went to the members of them? A Certainly.

Q Well, did you go to the management? A Well, the directors is usually the management and usually
10 the members.

Q Did you see all of the members or just one of them? A Oh, no.

Q Did you ever try a hollow-soled shoe? A No, I never did.

Q What? A No.

Q That is lighter than a solid one, is it not? A I presume it would be.

Q You never tried it? A No.

20

PLAINTIFF RESTS.

30

40

Mr. English. Now, if your Honor please, I think I ought to make a motion that your Honor direct a mistrial, under the cases, especially under the New York Court of Appeals cases which I have handed your Honor, particularly *Simpson vs. The Foundation Company*, 95 Northeastern, 11; *Akin vs. Lee*, 99 Northeastern, 85 and *Rodzowski vs. American Sugar Refining Company*, 104 Northeastern, 616, on the ground that there has been injected into the case the question of the statement of counsel in putting a question and the statement of a witness in answering the question, tending to show that the defendant was protected by insurance. The witness Lehman said that specifically, or, at least, that the defendant had said that, and counsel in framing another question to that witness enjoined upon him to leave out any question of insurance, thereby bringing into the case by implication such a fact.

Motion for Non-Suit.

Upon the authority of those cases, as well as was implied in the ruling of our Court of Errors in *Bradley vs. C. E. Cleary Company*, 90 Atlantic, 1015, I move your Honor to direct a mistrial.

The Court. I do not understand that that question is in this case. The testimony was excluded, and it was also withdrawn.

Mr. English. But, according to the New York cases, that is not enough. 10

The Court. I have not looked at the New York cases.

(Mr. English reads from the cases referred to.)

The Court. I do not think this jury is going to be misled by anything that has been done or said on the subject of insurance. It is not in the case at all.

Defendant's counsel object to this ruling of the court. 20

Objection noted as ground of appeal.

Mr. English. Now, if your Honor please, I would like to move for a non-suit upon the ground that no negligence has been proven against defendant; upon the further ground that there is no connection shown in the case between the man who drove the car and the defendant here showing that the driver of the car was the agent of the defendant here. Another thing, even if the father did send the son to fix the lights, he certainly did not authorize him to rush through the streets at an illegal rate of speed. 30

The Court. (After argument.) I deny the application to grant a non-suit.

Defendant's counsel object to this ruling of the court.

Objection noted as ground of appeal.

Sidney C. Keller, direct.

SIDNEY C. KELLER, sworn in behalf of defendant.

Direct examination by Mr. English.

Q Dr. Keller, you are a practicing physician in Newark? A I am.

Q Where is your office? A 166 Washington street.

Q How long have you been practicing? A About eleven years.

10 Q Did you at our request examine Mr. Jennings?

A Yes, sir.

Q How many different times did you examine him?

A I believe on three different occasions.

Q When was the last one, quite lately? A Within a few days, on April 26th, this year.

Q That was last Monday? A Yes.

Q What kind of an examination did you make of him on last Monday? A A thorough physical examination.

20 Q Well, what does that imply? Did you strip him? A Yes, sir.

Q And where was the examination had? A At his home, 4 Hawthorne avenue, city.

Q Now, as a result of this very thorough physical examination that you made, what physical injuries or incapacities do you find him suffering from at the present time? A The injuries are the scars of the former lacerations of the forehead, the side of the head, the left elbow, the left and right thigh, left knee and left shin bone, which have entirely healed, and the injury described to the left hip and leg.

30

Q Well, you say that everything is entirely healed?

A With the exception of the left—

Q The left leg? A The left leg.

Q That is, this injury to the pelvis that has been referred to? A The injury to the left side of the pelvis.

Q And with that exception, you can find nothing at the present time the matter with him? A No, sir.

40

Joseph Okin, direct.

Q And that injury to the pelvis results in what trouble to him? A Lameness and shortness of the left leg.

Q Did you measure that shortening? A One full inch shortening of the left leg.

Q What can be done to cure or ameliorate that condition? A I think the wearing of a proper shoe fitted by an orthopedist will overcome a great deal of the difficulty in walking. 10

Cross examination by Mr. Fort.

Q What does a shoe like that cost, doctor? A Oh, \$6 or \$7.

Q What kind of a shoe do you refer to now? A A shoe that would have the sole and heel properly built up with hollow leather to overcome the loss of the one inch of shortening on that side, to compensate for the shortness.

Q Have you ever had one of these shoes made, or do you know from practical experience what they cost? A I haven't had occasion in a few years to, but I have had several previous to that. 20

Q Do you recall definitely what they cost? A Not more than \$10, under \$10.

Q For one shoe or a pair of shoes? A For a pair of shoes.

JOSEPH OKIN, defendant, sworn in his own behalf.

Direct examination by Mr. English. 30

Q Mr. Okin, where do you live? A 115 Spruce street.

Q Where is Spruce street, what part of the city? A Two blocks off High street.

Q Down in this direction, towards the south? A No, west.

Q (*By Mr. Fort.*) Two blocks off High street? A Two blocks from High street; Quitman, and then is Monmouth. 40

Joseph Okin, direct.

Q (*By Mr. English.*) I am talking about Spruce street. A Yes, sir.

Q If you wanted to get to it from the Court House where would you go? A You can go two ways; you can go through West street and through High.

Q Suppose you wanted to get to your house from the Odeon theatre, what would be the most direct way to go? A Through West street is the nearest way.

10

Q Where is West street? A West street is a continuation of Monmouth street.

Q Is that west of the Odeon theatre or east of it? That would be north.

Q That would be north? A North from Spruce street.

Q No, I want you to start at the Odeon theatre now. You know where the Odeon theatre is, here on Springfield avenue? A Yes, sir.

20

Q What is the most direct way to get home to Spruce street? A Why, I always go through West street.

Q Where is West street? A West street is toward the west side, west of High street.

Q West of High street? A Yes, sir.

Q So that when you started from the Odeon theatre, on Springfield avenue, would you drive west or east on Springfield avenue to get to West street? A I don't understand you.

30

Q Well, you start at the Odeon theatre, and you have either got to go up Springfield avenue or you have got to come down, have you not? Which way would you go to get to West street? Starting at your house and going to the Odeon theatre, how would you go? A I go through Monmouth street and then I go through West street.

Q And what does West street run to? A Up to Springfield avenue.

40

Q And when you got to Springfield avenue would you turn to the right or to the left? A You have got to turn to the east.

Joseph Okin, direct.

Q And then you come down Springfield avenue?

A Yes.

Q And then you would get to the Odeon theatre?

A Yes, sir.

Q And when you went home you would turn to the right up to West street? A Yes, sir.

Q And then go on to your house? A Yes, sir.

Q Would you have any occasion to come down to Market street at all? A To come home from the theatre? 10

Q Yes? A No.

Q What is your business? A Washington and Bank streets.

Q What is your business? A Real estate and builder.

Q You are a contractor? A Yes.

Q Did you build the Odeon Theatre? A Yes, sir.

Q On January 9, 1914, did you have under construction the Majestic Theatre, as it is called? A Yes, I constructed the Majestic Theatre. 20

Q That is now called Loewe's? A Yes.

Q Was that being built in January, 1914, or was it finished? A They began in 1913 and finished in 1914.

Q When was it finished? A It was finished, I think, about the first part of February.

Q So that it was still under construction in January? A Yes, sir. 30

Q During the early part of January, 1914, was there anything piled up in the street in front of the building? A Yes, sir.

Q What? A Dirt and some bricks.

Q Now, what was necessary on your part, as a contractor, with reference to lights at night on those obstructions? A Well, the city ordinance is, if you have any stuff out on the street, on the public street, you must have red lights over them. 40

Joseph Okin, direct.

Q And did you try to observe that? A Yes, sir.

Q Now, were you present at the accident which occurred down here below Washington street? A No, sir.

Q Were you there? A No, sir.

Q When did you first hear of it? A Why, I have been called up about half-past eleven.

10 Q Somebody called you on the telephone? A Yes.

Q And you learned from that that there had been an accident? A Yes, sir.

Q Did you learn who was driving the car at the time of the accident? A No, sir; I don't know.

Q I mean after you were called on the telephone?

A Well, all they told me—

Objected to.

Mr. English. No.

Mr. Fort. That would be heresay, anyway.

20 Q I do not want to know what you were told, but I want to know whether you found out in that telephone conversation who was driving the car? A I found out my son was driving the car.

The Court. He could only find out by what he was told.

Objection withdrawn.

The Court. You may answer it, then.

Q Your son? A Yes.

30 Q Jacob? A Yes, sir.

Q When previous to that had you seen Jacob that evening? A About eight o'clock.

Q Where? A At the house.

Q Did Jacob live with you on Spruce street? A Yes, sir.

Q How old a man was he? A Twenty-one.

Q Had you given him any directions that evening with reference to these lights down here at the theatre? A Yes, sir.

Joseph Okin, direct.

Q What had you told him to do? A Well, I told him to go over to the Majestic Theatre and see if the lights is burning, and come home.

Q What lights did you refer to? A The street lights.

Q Out on these obstructions? A Yes, sir.

Q And what time of night was that? A About eight o'clock.

Q And did you permit him to perform that errand by going in the automobile? A Not without my permission. 10

Q Well, you do not understand me. When you told him to go down and look at the lights did you permit him to ride down in the automobile? A Yes, sir.

Q Was Jacob ever employed by you to run your automobile? A No, sir.

Q Did you have any paid chauffeur? A I did have some of the time. 20

Q Who was it? A Well, I don't remember.

Q Well, it was not Jacob? A No.

Q It was not any of your sons? A No.

Q Do you run the car yourself? A Yes.

Q And you did in January, 1914? A Yes.

Q Now, you had no knowledge of the accident at all until after it was all over? A No, sir.

Q And did you know or expect that your son Jacob would be down on Market street around Washington street at eleven o'clock that night with your automobile? 30

Objected to.

A No, sir.

The Court. The objection is sustained.

Q Did you authorize Jacob in the use of the automobile that night to do anything else but go to the Majestic and see if the lights were burning and come home? A Only to go to the Majestic. 40

Joseph Okin, cross.

Q For what purpose? A To see if the light is burning.

Cross examination by Mr. Fort.

Q Mr. Okin, what was your son's business, your son Jacob's business, in January, 1914? A He was working for me.

10 Q In what business was he employed by you? A He was superintendent on the building.

Q What building? A On the Majestic Theatre.

Q Anything else, did he have any other duties? A No, sir.

Q In his work as superintendent of the building what were his duties? A Well, his duty was to see if the work has been done properly when I was away, practically.

20 Q And to do generally whatever you told him to when you were there; is that it? A Well, always there is something to do.

Q Did you pay for his services? A Yes, sir.

Q Now, this automobile that he was driving on the night of the accident, what kind of a car was that, Mr. Okin? A Cadillac.

Q Was it a pleasure car or a car that was used in connection with the business? A Well, I only had one car, and I used to use it for pleasure and business, the same car.

30 Q And in connection with the business who drove it? A Well, when I have to go I drive and when he has to go he drove it.

Q He drove it a good deal, did he not? A Pardon me, I can't hear you.

Q He drove it a good deal, did he not? A Oh, yes.

Q Pretty nearly every day? A 'Most every day.

40 Q Used it more than you did, did he not? He drove it more than you did, did he not? A I think he did.

Joseph Okin, cross.

Q Now, Mr. Okin, what kind of pavement is there on West street? A Cobblestones.

Q There was the same kind of pavement there in January, 1914, was there not? A Yes.

Q What is the next street as you come down from the Odeon Theatre, or the Majestic Theatre—what is the next street that you cross coming down Springfield avenue, the next cross street? A Towards where? 10

Q Towards Spruce—High street? A Oh, no, the first street crossing is William street and the next—

Q No, you do not understand me. Coming down Springfield avenue from West street toward Broad the next street that you cross is High, is it not? A Yes.

Q That has got a macadam pavement, has it not? A High street is; yes, sir.

Q Now, what is the next one? A The next one is Shipman street, and then is Arlington street. 20

Q How far does Shipman street run? Does it run through to Spruce? A No, sir.

Q And the next one is Arlington, is it not? A Yes.

Q Does that run through to Spruce? A No, sir.

Q How about Plane street, does that run through? A No, sir; I think Plane goes away down below, I think it does.

Q Plane runs into Spruce? A Away down below, I think it does, yes. 30

Q What kind of pavement is there on Plane street? A Cobblestones.

Q And the next one is what, Washington, is it not? A Yes.

Q And that is granite block pavement, is it not? A No, stone pavement.

Q And then you come to Halsey street, do you not? A Yes.

Q And that is asphalt, is it not? A Yes. 40

Fred W. Steadman, direct.

Q Now, Halsey street runs down to Lincoln Park, right where Spruce street comes in, does it not? A No, sir, Halsey street runs into Clinton avenue.

Q Well, just at Lincoln Park? A Yes, sir.

Q And Spruce street comes into Lincoln Park right there? A Yes, sir.

10 Q You just have to go around the corner to get to Spruce? A Yes.

Q At the time that this accident happened you owned the Odeon Theatre, too, did you not? A Yes, sir.

Re-direct examination by Mr. English.

Q Is your son Jacob living now or not? A No, sir; he is dead.

Q Was he killed in an accident? A He died in February, last year, 1914.

20 Q Did he die a natural death or did he meet with an accident? A Yes, sir; after the accident happened, about a month later.

Q He simply got sick and died? A No, he had an accident in the Majestic Theatre, and he fell down, and he died.

Q That was in connection with the construction of the theatre? A Yes, sir.

Q That was in February, 1914? A Yes, sir.

30 FRED W. STEADMAN, sworn in behalf of defendant.

Direct examination by Mr. English.

Q Mr. Steadman, where were you living in January, 1914? A Newark.

Q What was your business then and now? A I was manager of the Texas Company, in Newark.

Q The oil company? A Yes, sir.

Q The Texas Oil Company? A Yes, sir.

40 Q Did you know Jacob Okin in his lifetime? A Never before January 9th.

Fred W. Steadman, direct.

Q You met him that day or that evening? A That evening.

Q That was the day of the accident? A Yes, sir.

Q Where did you meet him? A At the Odeon Theatre.

Q At about what time of the evening did you meet him there? A Around eight o'clock, I should judge.

Q Who introduced you to him, if you did not know him? A Why, Mr. Merlin. 10

Q Mr. Merlin? A Merlin, yes.

Q What was his business? A He was an actor.

Q Performing at the Odeon Theatre? A Performing at the theatre.

Q Were you with Mr. Jacob Okin during the evening after eight o'clock, or did you separate from him and see him again later? A Why, during most of the evening.

Q At the show? A No, at the cafe. 20

Q Whereabouts? A In and out; we were in the theatre and then in the cafe, next door.

Q Now, did Mr. Merlin go on and perform on the stage, or whatever he was required to do? A Yes, he was on twice that evening.

Q And you witnessed that performance? A Yes, sir; each time.

Q He was a friend of yours? A Yes.

Q What time was that show over? A Why, I believe it was about 10.30. 30

Q And had Jacob Okin been with you witnessing Merlin's performance at the time you were there? A He was not with me; I think he was in the theatre; I don't know positively.

Q Now, when the show was over did you meet him again? A Yes.

Q And who was with you, if anybody? A Merlin.

Q You and Merlin and Okin? A Yes.

Q And where did you meet after the show was over? A In the cafe next door. 40

Fred W. Steadman, direct.

Q And about what time did you leave there? A I should say about 10.40; I am not sure about the exact time; it was between 10.30 and 11.00 o'clock.

Q And where did Mr. Merlin live, or where was his headquarters at that time? A Why, he was living in New York at the time.

Q And you say you had known him some time? A Oh, yes.

10 Q Where were you intending to go that evening at the time you left the place up there around half-past ten or eleven? A To the Park Place tube station.

Q Going with whom? A With Mr. Merlin.

Q For what purpose? A To take a train to New York.

Q You were going to spend the night with him?

A I was going to spend the night with him.

20 Q How did you get from the Odeon Theatre, or how did you start to get from the Odeon Theatre to the Park Place station? A In a car.

Q When you say "a car," you mean a trolley car or an automobile? A An automobile.

Q Whose automobile?

Mr. Fort. If you know.

A I don't know just who owned the automobile.

Q Do you know who was driving it? A Why, Okin.

30 Q Jacob Okin? A I don't know his first name.

Q Well, this young man that you met? A Yes.

Q How did it come about that you and Merlin got in the automobile? A Why, at Mr. Okin's suggestion.

Mr. Fort. I object. I do not know that the remarks of Mr. Okin are evidential.

The Court. Well, do you not think it is competent for the witness to explain how he got into the automobile?

40

Fred W. Steadman, direct.

Mr. Fort. Well, it only seemed to me, when he came to use the word "suggestion," the remarks of Mr. Jacob Okin are not evidential in this case.

The Court. I would not admit the conversation of Mr. Okin, but I think the witness may say, if such is the fact, that he got in the automobile on his invitation.

Q On whose invitation was it that you got into this automobile? A Mr. Okin's.

Q And who got into the automobile on that invitation besides yourself? A Mr. Merlin.

Mr. English. Do not answer this. I want the ruling of the court on this.

Q What did Mr. Okin say to you when he invited you to get into the automobile?

Objected to.

Mr. English. My point about that is this, your honor. The plaintiff has hung his case on the theory of the agency between Joseph Okin and the defendant. If he was the agent, and, as is essential to his case, he was acting within the scope of the employment, then what he said in pursuance of his agency is material. If he was not acting within that agency, the plaintiff has no case. In that event, the plaintiff must abandon his case, or, it seems to me, his conversation is material.

Mr. Fort. I object, if your honor please, on the ground that this is a conversation that is not part of the *res gestae* of this case. It is certainly not as closely connected with it as the conversations which we desired to prove and which were ruled out on the objection of Mr. English. This is a conversation concerning which we have never heard until we get here now.

The Court. It seems to me that you do not quite meet Mr. English's proposition. He says

Fred W. Steadman, direct.

your case rests on the theory that the relation of principal and agent, or master and servant, existed between the defendant and his son. Therefore it is that you sue the father for the carelessness of the son in the course of his employment.

10 *Mr. Fort.* But the question whether Okin, Jr., was the agent of his father or not is entirely independent of any statements that Okin, Jr., may have made. He cannot defeat or make his agency by anything he says.

20 *The Court.* Now, I think, you are putting yourself on stronger ground. Some agents are agents to talk; some agents are agents to act. A familiar example of an agent to act is the trolley car conductor or motorman. Their statements after an accident are never allowed, because they are the agents of the company, but they are not agents of the company to make statements. On the other hand, a real estate agent is an agent to talk. If he did not talk he would not accomplish anything. Now, is this agency which you bottom your suit on—I had Mr. English in mind—is this agency which the plaintiff's case is founded on an agency which admits declarations?

30 *Mr. English.* We say, first, that this man was not the agent of the defendant at all, your honor. We say, in the second place, if it be assumed that he was the agent, but was off on a frolic, as was said by Baron Parke, I want to show, if he was an agent, that he was off on a frolic of his own; I want to show, if the plaintiff's theory is accepted, that he was an agent, that he was off on a frolic by himself. I am giving the plaintiff the benefit of the doubt in asking this question. The question assumes that he was an agent.

40 *The Court.* (After further argument.) An agent cannot by word of mouth either create or destroy or limit his own agency. We have to

Fred W. Steadman, direct.

learn from circumstances what the scope of his agency is, and then determine from what he did whether he got outside of his sphere. My difficulty is in admitting his statement. I will sustain the objection. I am not at all sure that it is competent.

Defendant's counsel object to this ruling of the court.

10

Objection noted as ground of appeal.

Q Now, after you got in the automobile, were you and Merlin, at the invitation of young Mr. Okin, where did you start to go to in the automobile?

Mr. Fort. I object, unless you mean in what direction and on what street.

The Court. Where did you go? is the true question.

Mr. English. All right.

20

Q In the first place, where did you go? A Down Springfield avenue.

Q And from there where? A Into Market street.

Q And to what place were you bound?

Objected to.

The Court. The objection is sustained, because it must depend upon hearsay, it seems to me. That is, if I understand your question right, you mean, Where was the automobile bound? The witness has already testified where he was bound and where his friend was bound; they were bound to the Park Place station. That is where they expected to go.

30

Defendant's counsel object to this ruling of the court.

Objection noted as ground of appeal.

Mr. English. Let me state it this way.

40

Fred W. Steadman, direct.

Q Before you were invited by Jacob Okin to get into the automobile did you or Mr. Merlin in his presence state where you wanted to go?

Objected to.

Mr. English. That can be answered yes or no.

The Court. State to Mr. Okin, you mean?

Mr. English. Whether either of them stated to

10 Mr. Okin where they wanted to go.

The Court. Stated to Okin?

Mr. English. Yes.

The Court. Yes, I think you may answer that.

A Yes, sir.

Q You did state where you wanted to go? A Yes.

Q When was it with reference to the time that you stated where you wanted to go that Okin invited you to get into the automobile? A Why, immediately.

20 Q And where did you want to go?

Mr. Fort. I object on the ground that the desires of this witness are not important.

The Court. It already appears in evidence, I think.

Q Well, you have already said that you wanted to go to the Park Place station? A Yes, sir.

Q And Merlin wanted to go there, too? A Yes, sir.

30 Q And it was that destination that you told Okin that you wanted to go to? A Yes.

Q And he then invited you to get into the automobile? A Yes.

Q After that you got in the car and the car started, and you went down Springfield avenue, and then on down Market street; is that right? A Yes.

Q Do you remember the accident to this Mr. Jennings? A Yes.

40 Q Whereabouts in the car did you sit? A In the rear seat.

Fred W. Steadman, direct.

Q And where did Merlin sit? A In the front seat.

Q Did you see any man in the street before the accident happened? A Why, the street was very much crowded at that time.

Q Well, just immediately before the accident? A Not immediately.

Q Did you see Mr. Jennings in the street? A No, sir.

Q Can you say approximately how fast the car was traveling just before the accident—how fast it seemed to you from where you sat? A Approximately fifteen miles an hour.

Q Can you say whether or not any horn was sounded by young Mr. Okin just before he reached the corner of Washington street?

Mr. Fort. Which corner?

Mr. English. South Washington street.

Mr. Fort. You mean which corner, the southwest or southeast? 20

Mr. English. The southeast corner, this side.

A Yes.

Q The horn was sounded? A Yes.

Q And how soon after that did it seem to you that the accident happened? A Why, just after we passed the corner.

Q And the horn was sounded this side of the corner, I understood you to say? A On this side of the corner. 30

Q Do you know about, approximately, how far the automobile ran after Mr. Jennings was struck? A After he was struck?

Q Yes. A I should estimate about 20 or 30 feet.

Q What became of you after the accident happened? Did you finally go on to New York, or what did you do? A Went on to New York.

Q You were delayed there for some little time by the accident? A Stayed there until things cleared up. 40

Fred W. Steadman, cross.

Q Until the ambulance came? A Yes.

Q And then you went on to New York? A Yes.

Q The Mr. Merlin, that you speak of, you say, was an actor? A Yes, sir.

Q Do you know what company he is employed by? A No.

10 Q Do you know whether he is now playing in this part of the country or off somewhere? A I haven't heard from him since the accident.

Q You do not know where he is now? A No.

Cross examination by Mr. Fort.

Q Mr. Steadman, while you and Mr. Okin were up there in the Odeon theatre waiting for Mr. Merlin, what was Mr. Okin doing? A Why, he spent a good deal of time with me, talking to me.

20 Q Did you go back and forth into the theatre and from the theatre into the café; is that it? A Yes, sir.

Q When he went in the theatre what part of the theatre did he go into? A Well, he went in through the lobby; I didn't go in the theatre with him.

Q Well, did he go into the ticket office? A I couldn't say. He went into the part—he went through the door leading into the lobby of the theatre.

Q Did he go around the stage at all? A I didn't see him there.

30 Q Did he discuss with anybody while you were there anything with reference to the business of the theatre at all? A Do you mean the business they were doing there that night, the size of the house, or—

Q No, the general business dealings of the theatre in any way? A No.

Q Did he discuss any business matters relating to the theatre with Mr. Marlin at all that you heard? A Not that I heard.

40 Q The question of Mr. Merlin's compensation for his services, or anything of that sort? Be sure about that, now. A Not that I heard from him.

Motion for Direction of Verdict.

Q Not that you heard from him? A You mean did Mr. Okin mention anything to Mr. Merlin?

Q In your presence? A No.

Q Either in the theatre or in the café or in the car?
A No.

Q Sure about that, now? A I said no.

Q Who was the manager of the theatre, do you know? Do you know who was the manager of the theatre? A I met him that evening; I don't recall his name. 10

By the Court.

Q Where did you first see the automobile that day?

A In front of the theatre.

Q In front of the Odeon? A Yes, sir.

Q About what time? A About eight o'clock.

Q Did you ride in that automobile that day before you got into it with Mr. Okin? A No, sir.

Q After the performance? A No, sir. 20

Re-direct examination by Mr. English.

Q Did the automobile remain there until you got in it to go on down to the station? A Yes, sir.

Q From the time you saw it there? A Yes.

DEFENDANT RESTS.

Mr. English. Now, if your Honor please, I move for the direction of a verdict for the defendant on the ground that there is no proof of agency between Jacob Okin, who drove the car and caused the accident, if it was caused by his fault, and the defendant in this suit. Of course, the ground of the motion is that the defendant, to be held, inasmuch as he had no personal participation in the accident, must have been made responsible by the fact that the driver was his agent, and with reference to that there is, as I have already suggested to your Honor in the argument on a 30 40

Joseph Okin, direct.

question of evidence, two lines to our defense. One is that he was not in fact his agent to drive the car at all, and, second, if it be held that he was his father's agent for any purpose in connection with the car that night, that he had deviated from the scope of that agency, that authority, and was off on a frolic of his own. Therefore there is no responsibility on the defendant at all.

10

(Mr. English argues.)

Adjourned until to-morrow, Thursday, April 29, 1915, at ten o'clock, A. M.

THIRD DAY.

Thursday, April 29, 1915.

Met pursuant to adjournment.

20

Present, counsel as before stated.

The Court. Mr. English, you suggested that you might want to call a witness. I will open the case to make proof on the point mentioned.

Mr. English. As to the leasing of the Odeon Theatre; yes, sir.

The Court. I will open the case for that purpose.

30

JOSEPH OKIN, defendant, recalled in his own behalf.

Direct examination by Mr. English.

Q Mr. Okin, it appeared yesterday that you had built the Odeon Theatre? A Yes, sir.

Q Did you own it? A Yes, sir.

Q About when was it built? A 1909 or 1910.

Q And do you remember about when it was completed? A In December of the same year.

Q Of 1910? A Yes, sir.

40

Q Did you operate and manage the theatre personally, or did you lease it? A I leased it.

Joseph Okin, direct.

Q To whom did you lease it? A The Pahler Realty Company.

Q The Pahler Realty Company? A Yes, sir.

Q And they paid you rent for it? A They took possession.

Q They took possession and paid you rent? A Yes, sir.

Q Did you have any control over the management of the theatre or the conduct of its affairs, or anything of that kind? A Not at that time. 10

Q And was that true at the time of the accident, in January, 1914? A I didn't have anything to do with it.

Q Your lease was still in existence in January, 1914? A Yes, sir.

Mr. Fort. If the lease is in writing, it ought to go in.

Q Now, I show you a lease between Joseph Okin and the Pahler Realty Company, dated May 25, 1910, and, according to its terms, to run until December, 1920 (paper shown to witness). Is that the lease by which you turned over the possession and operation of the Odeon Theatre? 20

Mr. Fort. Are you going to prove the lease? If so, where is the witness?

Mr. English. You suggested that it ought to go in, and so I am adopting your suggestion. 30

Q Is this your signature here? A Yes, sir.

Mr. Fort. I object to it. The witness cannot prove the lease.

Mr. English. He can prove his own signature.

Q Was this paper signed in your presence? A Yes, sir.

Q "Pahler Realty Company, by Paul M. Hertz"—did he sign that in your presence?

Mr. Fort. I object. This witness cannot prove this lease. There is an attesting witness on it. 40

Motion for Direction of Verdict.

The Court. I do not think you are making strict proof.

Mr. English. No, I do not think I am, but I understood counsel to say that if there was a lease it ought to go in, and I adopted his suggestion. I did not think it was necessary to put it in.

Q Did you receive rent from the Pahler Realty Company? A Yes, sir.

Q Were you receiving rent from them at the time of the accident in January, 1914? A Yes, sir.

Q Did you on that date, January 9, 1914, give any instructions to your son Jacob with reference to the lights in the Odeon Theatre? A No, sir.

Mr. Fort. I object to that. That is apart from the line on which the evidence was opened.

Mr. English. I think it is part and parcel of it.

The Court. That is a little beyond the purpose for which the case was opened.

Mr. English. Do not answer this, then.

Q Did you in January, 1914, have any responsibility for the lights in the Odeon Theatre?

Objected to.

A No, sir.

The Court. That is a question of law.

Mr. English. Very good; I guess maybe it is.

The Court. Do counsel object to the lease?

Mr. Fort. I will let it in; I do not want to be technical.

Mr. English. Then I will offer the lease in evidence.

(Lease marked Exhibit D. 1.)

DEFENDANT RESTS.

Mr. English. Now, if your honor please, I renew the motion for the direction of a verdict which I made yesterday, and upon the grounds which I urged yesterday upon your honor.

Court's Decision of Motion for Direction of Verdict.

The Court. I have given such consideration to this matter as the time and my other engagements allowed.

The motion is to direct a verdict upon the ground that the plaintiff can recover only by showing that the driver of the automobile was the defendant's agent, and that the existence of such agency at the time of the accident to the plaintiff is not proved; that it is not proved that at that time the driver of the automobile, who was the defendant's son, was acting within the scope of his agency. 10

It is admitted that the automobile was owned by the defendant. It was used for the purposes of business and pleasure. Joseph Okin, the defendant, operated this car himself. Jacob Okin, who was operating it at the time of the accident, was a son of Joseph Okin, the defendant, a young man about twenty-one years old, unmarried, and a member of his father's household and family. The home of the defendant was on Spruce street, at the corner of Spruce and Monmouth streets. I have said that the defendant, Joseph Okin, the father, operated the car himself. His son, Jacob, who was operating it on the evening of the accident, also operated it habitually, nearly every day, and used it perhaps more than his father did. At the time of the accident, which occurred on January 9, 1914, Joseph Okin was engaged in constructing or was having constructed for him a theatre in the City of Newark, known as the Majestic Theatre, situated on the south side of Springfield avenue, near the junction of that avenue with South Orange avenue. He was at the same time the owner of another theatre, known as the Odeon, on the north side of Springfield avenue, about opposite to the Majestic Theatre, and the Odeon, it appears, was completed, leased and in operation. On the evening of that day Joseph Okin told his son, both being at their home, to take the automobile and do an errand. The witnesses for the plaintiff have testified that Mr. Okin 20 30 40

Court's Decision of Motion for Direction of Verdict.

subsequently said that he directed his son to go down to the theatre and fix the lights. Mr. Okin himself testified on the stand that he told his son to go down to the Majestic Theatre, in front of which were piles of brick and dirt which encumbered the street, and see whether the red lights, required by ordinance in such cases, were burning. It makes little difference. 10 Jacob Okin took the automobile, as directed, and went to the theatre. In doing so he was, up to that point at least, his father's agent. It does not appear by what route Jacob Okin went from his father's house, in Spruce street, to the theatre. There was a choice of streets and a choice of pavements. An automobilist may go a mile around in these days, when the motor engine has so much shortened both time and distance, in order to avoid a few blocks of soft road or rough pavement. Joseph Okin fixed no time for 20 his son's return. His son did not return immediately, but spent a good part of the evening in and about the Odeon theatre with friends and acquaintances, and when he left, at a little before eleven o'clock, invited to ride with him two gentlemen who wished to take a train for New York at the Park place station. The automobile, driven by Jacob Okin, in which these two gentlemen were seated, proceeded east on Springfield avenue and Market street, and at a point opposite North Washington street ran down the plaintiff, Mr. 30 Richard P. Jennings. I do not use that form of expression as even suggesting any conclusion as to whose fault the collision was. At any rate, the car came in collision with Mr. Jennings. This led to the arrest of Jacob Okin and ended the ride of his two passengers.

As the accident occurred about two blocks before the automobile, if it had continued, would have reached the corner of Broad and Market streets, it does not demonstrably appear whether Jacob Okin 40 intended to turn north on Broad street, and so go to

Court's Decision of Motion for Direction of Verdict.

the Park Place depot and deposit his passengers there. It is natural, I think, to suppose that such was his intention. It is true that Jacob Okin might have taken a more direct route home from the theatre than one which began by running east on Springfield avenue and Market street; but the rule as to deviation should not be held very strictly if the main purpose is within the scope of the employment. It would be very puzzling if courts and juries were called upon to figure out for a vehicle the most direct or most usual or most desirable road between two points. Jacob Okin was not on any joy ride or frolic; he was pursuing no design personal to himself. He may, indeed, have intended to deviate to the north on Broad street, to oblige his two casual passengers by dropping them at their station; but, in fact, he never did so, for he never reached the corner of Broad and Market streets while they were his passengers. Very near the point on Market street which he had reached when the accident came two of the best streets in the City of Newark for night travel, Broad street and Halsey street, led straight to Clinton avenue, and afforded, over flat grades and smooth surfaces, an excellent connection with Spruce street. I do not see that up to the time of the accident there had been what can fairly and reasonably be called a substantial deviation.

I quote from a case which counsel have favored me with, and which I have not had an opportunity to examine, because it is not in the Court House library, the case of *Joel vs. Morrison*, 6 Carrington & Payne, 501, where Baron Parke is said to have used this language: "The master is liable only where the servant is acting in the course of his employment. If he was going out of his way, against his master's implied command, when driving on his master's business, he will make his master liable; but if he was going on a frolic of his own, without being at all on

Court's Decision of Motion for Direction of Verdict.

his master's business, the master will not be liable." The distinction made by the learned judge is apparently between a case where the agent is shown to have been guilty of a faulty execution of his master's order and where the agent has abandoned the discharge of his duty to his master and has embarked on some inconsistent enterprise of his own.

10 A Massachusetts case, *McCarthy v. Timmins*, 178 Massachusetts, 378, is a case where the court laid little stress on merely taking a route longer than the usual one. The point of that case was different. The head note is as follows: "The driver of a public carriage is not acting within the scope of his employment, who, when ordered to drive to the stable, his day's work being done, turns out of his course and drives some distance in an opposite direction in order to visit a saloon to get a drink, and there leaves his horses unat-

20 tended, and his employer is not liable to a traveler on the highway injured by reason of the horse's running away on account of the driver thus leaving them." I have no doubt as to the correctness of that decision.

Upon another ground I conclude that the use to which Jacob Okin was putting the automobile at the time of the accident was a use to which his father had devoted it. The car was designed for pleasure as well as for business. It was for the use of the family, and was used by the family for pleasure as well as for business.

30 The son was a member of his father's family, and was empowered to use the car for the purposes for which it was intended, and did so almost daily. If in returning from a business trip, the purpose of which he had completed, he had gone out of his way for his own enjoyment or to do an act of civility, I should think that he had not exceeded his authority. For all that I can see, he might have taken his friends all the way to the Park Place station, or have gone there himself alone merely for the pleasure of riding around the

40 park, and still have been within the sphere of his authorized action.

Charge to Jury.

Upon these considerations I reach the conclusion that the motion to direct a verdict for the defendant should be denied.

Defendant's counsel object to this ruling of the court.

Objection noted as ground of appeal.

Mr. English sums up for the defendant.

Mr. Fort sums up for plaintiff.

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The court charges the jury as follows:

ADAMS, J.

Gentlemen of the Jury: I need hardly say to you that the mere occurrence of an accident does not prove liability. In order to determine where the legal responsibility lies it is necessary to investigate the circumstances under which the accident took place.

In denying a short time ago a motion to direct a verdict for the defendant, which involved the expression of no opinion upon the question of negligence which enters into this case, a question peculiarly for you, I expressed in your hearing certain views as to the considerations which apply to the question of agency. I shall therefore say nothing about that subject in my charge, except in commenting on some requests to charge submitted to me on behalf of the defendant, which I will speak of later, and to say now this: that Mr. Joseph Okin, the defendant, the father, against whom this suit is brought, is not accountable in this case for any consequences of any negligence of his son, Jacob Okin, unless his son at the time of such negligence, if he was negligent, was putting the automobile to a use which was embraced by the authority which his father had conferred upon him. Or, to state it shortly, the legal idea which underlies the plaintiff's theory is that the relation of principal and agent existed, and that the father is liable in law because his son was his agent and was

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Charge to Jury.

acting at the time of the accident in that capacity. It is a well-known rule, no doubt familiar to you, that a principal is liable for the negligence of his agent within the scope of the authority which he has given him.

10 Leaving that question for the present, to which I will refer later, the questions which remain are two, both of which are for your consideration. The first question is whether Jacob Okin, the son, at the time of the accident was operating the automobile in a manner likely to cause injury to persons on the street who were rightfully there, and whether this conduct, which would be negligent conduct, was a cause of the accident to the plaintiff.

20 What constitutes negligence in the operator of an automobile in the streets of a great city? The question is a general one, and I will give it a general answer. I am speaking of the operator of the automobile. The duty is to take reasonable care so to exercise his own right on the public highway as not to interfere with the exercise by others of their rights in a place common to the use of both; for I need not say to you that this pedestrian and this vehicle had equal rights in the public highway. That being the duty, in very general terms, negligence is the negation, the opposite, of reasonable care. It is the failure to come up to the standard which the law prescribes.

30 What does reasonable care require of a man who is running an automobile? To be vigilant and attentive to his surroundings; to keep his eyes and ears open; to keep his car under control; not to run it at a rate of speed so high that it may become unmanageable, or that it may be impossible for him to check its speed or to stop it or to change its direction, if contingencies arise which are naturally to be expected from public travel; so to manage and run his car that there is a reasonable probability of avoiding danger to all those

40 who have a right to be on the street; also to give warn-

Charge to Jury.

ing of its approach where notice seems to be necessary—not that it is always necessary, not that it is necessary continuously to blow a horn, but that there are certain places where it is peculiarly desirable that a horn should be blown, especially in approaching street crossings, curves and the like of that.

The questions, then, are, as to the operator of this car—questions which concern only the accident itself and not the question of agency—was Jacob Okin operating this car at a reckless and dangerous speed? Was he negligently changing its direction, without having due regard to the safety of persons who might be affected by a change of direction? Did he fail to blow his horn when, in the exercise of due care, he should have blown it? If he was negligent, was his negligence a cause of the accident to Mr. Jennings? Of course, we are not considering the abstract question, but the concrete question, whether some negligence of his, some failure of duty, stands to the injury to Mr. Jennings in the relation of a cause to its effect. It is for you to settle these facts, and, the burden of proof being on the plaintiff, if it shall not appear that the weight of the evidence shows that some negligence of Jacob Okin was a cause of the accident to the plaintiff, then the plaintiff's case fails, and your verdict should be for the defendant. In that case the plaintiff would not have sustained the burden of proof. On the other hand, if, on examining all the testimony on both sides, you shall think that the preponderance of the proof, the weight of the evidence, favors the conclusion that Jacob Okin was at fault and that his fault was a cause of the unfortunate result to Mr. Jennings, then you will proceed to consider whether Mr. Jennings was himself at fault and had a share in producing his own injury.

Mr. Jennings was crossing Market street about in line with the westerly sidewalk of North Washington street, apparently, as I think the evidence shows, in-

Charge to Jury.

tending to reach the sidewalk opposite to which he was. Owing to the pavement of the street being smooth, there is no crosswalk there; that is, there is no line of stones set in the pavement indicating to the eye where a crossing is; but I need not say that it is natural to cross from a point opposite to the sidewalk that you wish to reach, whether there is any crosswalk there or not, and that the person who does that is not open to the criticism that might be made of a man who took a long diagonal to cross the street or crossed in the middle of a block, which he might have a right to do, but the doing of which might impose upon him the obligation to use special care. In doing so, in attempting to cross this street at that place, Mr. Jennings was, of course, exercising a legal right; but he was bound to exercise it carefully. The same obligation of vigilance was on him that was on the operator of the automobile. He was with Mr. Reilly, and what he says himself as to his observation to the west is this: He says that he heard no sound of the horn, but that before he stepped into the street he looked to the west and saw a car coming on the south side of the road, the south roadway, the proper place for it to be—it was bound east—as he judged, about 120 feet west of the westerly corner of South Washington street. These estimates, both of time and of distance, are, naturally, somewhat inexact, but his estimate was, and I think there were some measurements of distance that entered into his testimony, that he was about 75 feet from the easterly corner of South Washington street; that added to that was the width between curbs of 50 feet, and adding that 125 feet to the estimated distance, which is perhaps more indefinite, of 120 feet, you have 245 feet as about the distance at which he saw an approaching automobile. He says that with that view, seeing that object, he stepped into the street. It is for you to say whether in so doing he acted unreasonably. Did he exercise the care of an ordinarily pru-

Charge to Jury.

dent person, did he exercise ordinarily good judgment, in thinking that, under those circumstances, he might safely walk on? Might he assume that the operator of the coming automobile would proceed with reasonable care and that the operator of the automobile had time to observe him and time to clear him?

You will also recall the testimony of Mr. Reilly as to the way that the car came on. He says it brushed him back over the curbstone. Mr. Jennings, according to his testimony, looked around for Mr. Reilly, getting a glimpse of the car, which was a little way to the west of him, and then being struck down. 10

Now, if it shall appear to you that some negligence of Mr. Jennings was a cause of the injury to him—that is, that but for some carelessness of his own, some absence of the reasonable care that a man of ordinary good sense and observation is bound to exercise, he would not have been hurt—if from that cause he was injured—in other words, if it was a cause, although not necessarily the sole cause—why, then, Mr. Jennings cannot recover, because he contributed to the very injury of which he complains. On the other hand, if you put all the blame on Jacob Okin, and acquit Mr. Jennings of any contributory negligence, then the verdict should be for the plaintiff against the defendant, provided you conclude that Jacob Okin was then acting within the scope of his employment, of the authority which his father had committed to him in respect to the car. You will remember that the car was his father's property; that it was used for business and pleasure by the family of which he was a member, and that both he and his father were in the daily habit of using it. 20 30

Coming now to the requests to charge, which deal almost exclusively with this phase of the case, I will read and make some remarks about them.

The first request is this: "In order to find that the defendant is liable you must be satisfied by the 40

Charge to Jury.

greater weight of the evidence that the son, Jacob Okin, was the agent of the defendant at the time of the accident, and that he was then acting within the line of his duty under his employment or agency." I charge it.

10 I charge the second request, which I shall now read, with the remark that I understand the words "master's work" in a certain sense. The request as it is handed to me is this: "An act done by an agent while engaged in the master's work is not necessarily an act done within the scope of the agent's employment." I charge that, understanding, as I do, by the words "master's work" work which may in some way concern the master.

20 I shall read and deny the third request, which is this: "An act done by an agent while engaged in the master's work may be entirely disconnected therefrom, done not as a means, or for the purpose of performing that work, but solely for the accomplishment of the independent purpose of the agent. Such an act is not as a matter of fact or as a matter of law the act of the master." The reason why I deny that proposition is this: that it seems to me that work done by an agent for the accomplishment of an independent purpose of the agent can hardly be called the master's work. The word "independent" must mean aside from the agent's duty to his master.

30 The fourth request I shall read, and I shall charge it, with a remark. The request is this: "The mere fact that at the time of the accident the car, which was owned by the defendant, was being operated by his son does not create the relation of master and servant between the defendant and his son." That I charge, with this remark: that the true question is, what was it that the principal, the defendant, Joseph Okin, the father, had authorized and empowered his agent to do? If you determine that, you settle in
40 your minds what relation the agent, by the direction

Charge to Jury.

of the master, sustained to the machine, and you will then have defined the scope of his agency.

The fifth request I charge: "Assuming that the relation of master and servant existed generally between the defendant and his son, there is no presumption that the boy was acting on the occasion in question within the scope of his employment. The burden is on the plaintiff to show that the son, at the time of the accident, was acting within the scope of his employment, and he must show this by the greater weight of the evidence." 10

I shall charge the sixth request, although I should prefer a phraseology which is somewhat broader. I do not, however, object to the request. I shall read it: "To hold the defendant you must find that when the accident occurred the boy was executing his father's orders and actually engaged in serving him and it is not enough to say that the injuries complained of would not have been committed without the facilities afforded by the servant's relation to his master." 20
I should prefer to say, more broadly, that you must find that Jacob Okin was acting within the scope of the authority committed to him by his father before you can hold his father liable.

I charge the seventh request, with an addition: "If you find that at the time of the accident the boy was engaged in executing some private purpose of his own your verdict must be for the defendant." I add to that proposition these words: "provided you find that the execution of such private purpose was in conflict with the right to the use of the automobile which his father had conferred upon him." It would not be necessarily inconsistent. 30

The eighth request I deny. It is this: "The fact that at the time of the accident the son was driving two men who were his friends and not those of the defendant raises the presumption that he was not engaged in the execution of his father's business." 40

Charge to Jury.

That I deny. No such presumption arises out of the mere fact that two friends of the son were riding in the automobile.

10 The ninth request I deny for the same reason. The request is this: "From the fact that several hours had elapsed between the time the boy left his father's house and the occurrence of the accident, together with the fact that he was then proceeding in a direction away from his father's house, there is a presumption that he was at that time engaged in executing some private purpose of his own." I deny that upon the ground that these facts merely of themselves raise no such presumption.

20 I charge the tenth request: "The fact that the car was used by the defendant both for pleasure and business and that both he and his son drove it, raises no presumption that at the time and upon the occasion in question the son was driving it in the execution of the father's business." I agree that that mere fact raises no such presumption.

30 I charge in a similar way as to the eleventh request, which is this: "From the fact that the witness, Steadman, entered the automobile at the invitation and suggestion of the boy, Jacob, there is a presumption in favor of the defendant that from that time, until the accident occurred, the boy was driving the car for his own purposes." I deny that because no such presumption arises merely from the fact supposed.

The twelfth request I charge: "If there is doubt in your minds as to the liability of the defendant, and the evidence on the two sides is in equipoise, your verdict should be against the party having the general burden of proof upon the issue; in this case against the plaintiff."

40 I charge the thirteenth request: "Preponderance, or greater weight of the evidence does not consist merely in having a greater number of witnesses." We do not count witnesses; we weigh them.

Chargé to Jury.

The fourteenth, fifteenth and sixteenth requests deal with the subject of presumption. I shall deny them all. I shall first read them and then shall make a remark about them.

Fourteenth: "The fact that the place where the accident occurred is some distance from the place to which the boy was sent by the father and that he was then proceeding in a direction away from his father's house, together with the additional fact that the accident occurred several hours after the boy left his father's house, raises the presumption that he was then engaged in executing some private purpose of his own." 10

Fifteenth: "The defendant testifies that he instructed his son Jacob, about eight o'clock in the evening, to take the car and go to the Majestic Theatre, and see if the lights in the street were burning, and then come home. There was nothing in the performance of this duty which would have required Jacob to consume as much as two or three hours of time, and there can be no presumption that when he was driving the car at the time of the accident, he was returning from the performance of this duty." 20

Sixteenth: "The defendant testifies that he instructed his son, Jacob, about eight o'clock in the evening, to take the car and go to the Majestic Theatre to see if the lights in the street were burning, and then come home, and the fact that about three hours later he was driving down Market street with two friends, who wanted to go to the Park Place station, militates against any presumption that he was then returning home from the performance of that errand." 30

In denying these requests I say this: I refuse to charge the requests because I think that an attempt to deal with presumptions in this way would be merely confusing to the jury. The true inquiry is what use Joseph Okin had authorized his son to make 40

Charge to Jury.

of the car, and whether the son at the time of the accident was putting the car to a use which was unauthorized; and you will not forget that the particular commission to go down and see that those lights were burning did not constitute the whole of the relation which the son sustained to the car or embrace the whole of his father's authorization in respect to the car.

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The seventeenth request is this: "The agency of Jacob Okin with reference to the use of the defendant's car was to go from the defendant's house to the Majestic Theatre, examine the lights and come home, and unless the jury find that driving the car down Market street three hours after, in company with two friends of his own, was in fulfillment of the duty which his father had cast upon him in connection with the examination of the lights, the verdict must be for the defendant." I deny that request because the conclusion does not follow from the premises.

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The eighteenth request is this: "The plaintiff was guilty of contributory negligence and the verdict must be for the defendant." I deny that because that question is for the jury.

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I charge the nineteenth request: "It was the duty of the plaintiff in crossing the street to take proper precautions for his own safety, and if the jury find that he failed in this regard, the verdict must be for the defendant." Of course, the words "proper precautions" mean that he must exercise the care of a reasonable man for his own safety.

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The twentieth request is this: "If the jury find that the plaintiff, after seeing the car coming rapidly toward him some 245 feet away, stepped into the street and thereafter took no precautions to watch the car to see whether it would collide with him, but continued his way across the street without further regard to the approach of the car, he was guilty of contributory negligence, and the verdict must be for the

Charge to Jury.

defendant." That request I deny because the question is for you. It is for you to say whether the plaintiff, assuming those to be the facts, in stepping into the street after he had noticed a car coming toward him rapidly some 245 feet away, was guilty of negligence, so that the accident which happened because the car ran into him was a result in part at least of his own want of prudence—whether that was so, or whether you think he might fairly assume, under the circumstances, that he had time to go on—the operator of the car being, of course, under the same obligation that he was to be observant and to exercise care for the safety of others. 10

This concludes all what I have to say on the subject, except as to the question of damages. If you find for the plaintiff—that is, if you exonerate the plaintiff from negligence contributing to his own injury, if you put all the blame of the accident on Jacob Okin, and find that he was acting within the scope of his agency at that moment—then, and not otherwise, you will take up the question of damages. If you do not find all that, your verdict must be for the defendant. If you reach these conclusions, which are favorable to the plaintiff, you will give damages, and the central idea of damages is compensation to make a man whole, as far as money will do it, where he is entitled to compensation. If you do not reach a conclusion favorable to the plaintiff, you will not be troubled with the question of damages at all; you will not have to consider it. You may not reach it. The things which a person is entitled to compensation for in a case of this kind are his pain, any disfigurement of person, any permanent injury, also to reimbursement for outlay occasioned by the accident in the past and probable in the future, and for pain and discomfort probable in the future, and the loss of income past and probable in the future, of which you are necessarily the judges. It is somewhat hypotheti- 20 30 40

Defendant's Requests and Objections.

cal, and you will exercise good judgment. Those are the heads under which the consideration of the subject of compensation naturally ranges itself, and if you have to deal with the question of damages, it is upon those principles and with reference to those features of the subject that you will proceed in reaching a conclusion.

10 (The jury retires.)

Mr. English. I would like to ask an exception, or to note an objection by way of exception, to the remarks of your honor in connection with the denial of the fourteenth, fifteenth and sixteenth requests, to the effect that the commission to the son, Jacob, to see that the lights were burning did not constitute the whole of the father's commission with reference to the use of the car—whatever your honor said about that.

20 Objection noted as ground of appeal.

Defendant's Requests and Objections.

Defendant's counsel request the court to charge the jury as follows:

(1) In order to find that the defendant is liable you must be satisfied by the greater weight of the evidence that the son, Jacob Okin, was the agent of the defendant at the time of the accident, and that he was
30 then acting within the line of his duty under his employment or agency.

(Charged.)

(2) An act done by an agent while engaged in the master's work is not necessarily an act done within the scope of the agent's employment.

(Charged.)

(3) An act done by an agent while engaged in the master's work may be entirely disconnected therefrom,
40 done not as a means, or for the purpose of performing

Defendant's Requests and Objections.

that work, but solely for the accomplishment of the independent purpose of the agent. Such an act is not as a matter of fact or as a matter of law the act of the master.

(Denied.)

Defendant's counsel object to the refusal of the court to charge as requested.

Objection noted as ground of appeal. 10

(4) The mere fact that at the time of the accident the car, which was owned by the defendant, was being operated by his son does not create the relation of master and servant between the defendant and his son.

(Charged with qualification.)

Defendant's counsel object to the refusal of the court to charge specifically as requested.

Objection noted as ground of appeal.

(5) Assuming that the relation of master and servant existed generally between the defendant and his son there is no presumption that the boy was acting on the occasion in question within the scope of his employment. The burden is on the plaintiff to show that the son, at the time of the accident, was acting within the scope of his employment, and he must show this by the greater weight of the evidence. 20

(Charged.)

(6) To hold the defendant you must find that when the accident occurred the boy was executing his father's orders and actually engaged in serving him and it is not enough to say that the injuries complained of would not have been committed without the facilities afforded by the servant's relation to his master. 30

(Charged with qualification.)

Defendant's counsel object to the refusal of the court to charge specifically as requested.

Objection noted as ground of appeal. 40

Defendant's Requests and Objections.

(7) If you find that at the time of the accident the boy was engaged in executing some private purpose of his own your verdict must be for the defendant.

(Charged as modified.)

Defendant's counsel object to the refusal of the court to charge specifically as requested.

10 Objection noted as ground of appeal.

(8) The fact that at the time of the accident the son was driving two men who were his friends and not those of the defendant raises the presumption that he was not engaged in the execution of his father's business.

(Denied.)

Defendant's counsel object to the refusal of the court to charge as requested.

20 Objection noted as ground of appeal.

(9) From the fact that several hours had elapsed between the time the boy left his father's house and the occurrence of the accident, together with the fact that he was then proceeding in a direction away from his father's house, there is a presumption that he was at that time engaged in executing some private purpose of his own.

(Denied.)

30 Defendant's counsel object to the refusal of the court to charge as requested.

Objection noted as ground of appeal.

(10) The fact that the car was used by the defendant both for pleasure and business and that both he and his son drove it, raises no presumption that at the time and upon the occasion in question the son was driving it in the execution of the father's business.

(Charged.)

Defendant's Requests and Objections.

(11) From the fact that the witness Steadman entered the automobile at the invitation and suggestion of the boy, Jacob, there is a presumption in favor of the defendant that from that time, until the accident occurred, the boy was driving the car for his own purposes.

(Denied.)

Defendant's counsel object to the refusal of the court to charge as requested. 10

Objection noted as ground of appeal.

(12) If there is doubt in your minds as to the liability of the defendant and the evidence on the two sides is in equipoise, your verdict should be against the party having the general burden of proof upon the issue; in this case against the plaintiff.

(Charged.)

(13) Preponderance or greater weight of the evidence does not consist merely in having a greater number of witnesses. 20

(Charged.)

(14) The fact that the place where the accident occurred is some distance from the place to which the boy was sent by the father and that he was then proceeding in a direction away from his father's house, together with the additional fact that the accident occurred several hours after the boy left his father's house, raises the presumption that he was then engaged in executing some private purpose of his own. 30

(Denied.)

Defendant's counsel object to the refusal of the court to charge as requested.

Objection noted as ground of appeal.

(15) The defendant testifies that he instructed his son, Jacob, about eight o'clock in the evening, to take the car and go to the Majestic theatre, and see if the

Defendant's Requests and Objections.

lights in the street were burning, and then come home. There was nothing in the performance of this duty which would have required Jacob to consume as much as two or three hours of time, and there can be no presumption that when he was driving the car at the time of the accident, he was returning from the performance of his duty.

10 (Denied.)

Defendant's counsel object to the refusal of the court to charge as requested.

Objection noted as ground of appeal.

(16) The defendant testifies that he instructed his son Jacob, about eight o'clock in the evening, to take the car and go to the Majestic theatre to see if the lights in the street were burning, and then come home, and the fact that about three hours later he was driving down Market street with two friends, who wanted to go to the Park Place station, militates against any presumption that he was then returning home from the performance of that errand.

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(Denied.)

Defendant's counsel object to the refusal of the court to charge as requested.

Objection noted as ground of appeal.

(17) The agency of Jacob Okin with reference to the use of the defendant's car was to go from the defendant's house to the Majestic theatre, examine the lights and come home, and unless the jury find that driving the car down Market street three hours after, in company with two friends of his own, was in fulfillment of the duty which his father had cast upon him in connection with the examination of the lights, the verdict must be for the defendant.

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(Denied.)

Defendant's counsel object to the refusal of the court to charge as requested.

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Objection noted as ground of appeal.

Defendant's Requests and Objections.

(18) The plaintiff was guilty of contributory negligence and the verdict must be for the defendant.

(Denied.)

Defendant's counsel object to the refusal of the court to charge as requested.

Objection noted as ground of appeal.

(19) It was the duty of the plaintiff in crossing the street to take proper precautions for his own safety, and if the jury find that he failed in this regard, the verdict must be for the defendant. 10

(Charged.)

(20) If the jury find that the plaintiff, after seeing the car coming rapidly toward him some 245 feet away, stepped into the street, and thereafter took no precautions to watch the car to see whether it would collide with him, but continued his way across the street without further regard to the approach of the car, he was guilty of contributory negligence, and the verdict must be for the defendant. 20

(Denied.)

Defendant's counsel object to the refusal of the court to charge as requested.

Objection noted as ground of appeal.

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Stipulation.

Stipulation.

NEW JERSEY SUPREME COURT.

10	RICHARD P. JENNINGS, <i>vs.</i> JOSEPH OKIN, <i>Plaintiff,</i> <i>Defendant.</i>	}	<i>Action at</i> <i>Law.</i> <i>Stipulation.</i>
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20 It is stipulated and agreed by and between the parties hereto that on or before the ninth day of January, nineteen hundred and fourteen, the time of the occurrence of the accident for which the above entitled action was brought, and since then, certain premises in the City of Newark, situated on Springfield avenue, known as the Odeon Theatre, and owned by Joseph Okin, the defendant herein, has been leased by the said Joseph Okin of the first part, to Palher Realty Company of the second part, by a certain indenture of lease, dated the twenty-fifth day of May, nineteen hundred and ten; that said lease among other things provided as follows:

30 "WHEREAS the said party of the first part is about to erect and construct upon part of said lands and premises certain building or buildings to be used and occupied as a theatre, according to plans and specifications prepared by William E. Lehman, architect, as modified and added to by C. W. Simpson, architect. Plans and specifications of both of said architects to be approved by Messrs. Lamb & Koehler, and to conform to their suggestions.

40 Now, therefore, the said party of the first part has let and demised and by these presents does lease and demise unto the said party of the sec-

Stipulation.

ond part the above mentioned lands and premises conveyed to the said Joseph Okin by the said George G. Frelinghuysen, &c., as aforesaid, reference being thereunto had, with the buildings and improvements hereinafter referred (excepting that part thereof to be constructed on the extreme southwesterly corner of said lands and premises), together with the appurtenances there-
 10 to or in anywise belonging, and together with the personal property or fixtures, such as curtain, chairs, &c., as described and mentioned in said plans and specifications, for a period commencing on the day when said theatre building shall have been completed by the said party of the first part, and terminating on the first day of December, 1920, at a yearly rental of fifteen thousand (\$15,000) dollars, payable in equal monthly installments of one thousand two hundred and fifty
 20 (\$1,250) dollars each, in advance on the first day of each and every month during said term."

That said lease further provided, among other things as follows:

"And the said party of the first part further agrees to keep the demised premises in good repair for a period of three months from the commencement of said term, and further agrees to remedy any structural defects that may appear during the first year of said term; and the said
 30 party of the second part agrees to keep the demised premises in as good repair as the same shall be at the end of the first three months of said term (reasonable wear and tear, damage by the elements and damage by structural defects during the first year excepted), and at the expiration of said term to yield up the peaceable possession thereof to the said party of the first part, his heirs, assigns, agents or attorneys. The landlord is to keep the roof in repair during the
 40 term of this lease."

Stipulation.

Said lease by its terms expires December 1st, 1920.

It is further agreed that this stipulation may be printed in the record of this case in lieu of the said lease which was duly produced by the said defendant at the trial and received in evidence.

FORT & FORT,

Attorneys of Plaintiff.

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MCCARTER & ENGLISH,

Attorneys of Defendant.

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*Postea.***Postea.**

NEW JERSEY SUPREME COURT.

(Essex Circuit.)

RICHARD P. JENNINGS,	} <i>Plaintiff,</i>	<i>Action</i>	10
<i>vs.</i>			
JOSEPH OKIN,			
	<i>Defendant.</i>	<i>at Law.</i>	
		<i>Postea.</i>	

This case was tried before Circuit Court Judge Frederic Adams, to whom the matter had been duly referred by Chief Justice Gummere, at the Essex Circuit with a jury, on April 27th, 28th and 29th, 1915. The jury rendered a general verdict against the defendant and in favor of the plaintiff for seventy-five hundred (\$7,500.00) dollars. 20

Statement.

RICHARD P. JENNINGS,	} <i>Action</i>	30
<i>vs.</i>		
JOSEPH OKIN,		
	<i>at Law.</i>	

Judgment entered May 3, 1915.

Amount of damages, \$7,500.00.

WM. C. GEBHARDT,

Clerk.

*Reasons.***Reasons.**

Filed May 19, 1914.

NEW JERSEY SUPREME COURT.

Essex County.

10	RICHARD P. JENNINGS,	Plaintiff,	} <i>Action at Law.</i>
	<i>vs.</i>		
	JOSEPH OKIN,	Defendant.	

Now comes the defendant, by McCarter & English,
his attorneys, and assigns the following reasons why
the verdict of the jury should be set aside and a new
20 trial granted:

1. The verdict is contray to the evidence.
2. The verdict is contrary to the weight of the evidence.
3. The damages are excessive.

McCARTER & ENGLISH,
Attorneys of Defendant.

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Opinion of Supreme Court.

Opinion.

Filed July 17, 1915.

NEW JERSEY SUPREME COURT.

JUNE TERM, 1915.

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RICHARD P. JENNINGS,

Plaintiff,

vs.

JOSEPH OKIN,

Defendant.

Argued June 2, 1915; decided July 16, 1915.

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On defendant's rule to show cause.

Before Justices Garrison, Trenchard and Black.

For the rule, McCarter & English.

Contra, Fort & Fort.

Per Curiam:

The plaintiff was struck and injured by an automobile owned by the defendant and driven by his son, and in this suit for damages therefor recovered a verdict of \$7,500.

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The defendant admitted at the trial that the car was used equally for pleasure and business, by the son, with the father's knowledge or permission, and that the son used it more than the father did.

That being the use the defendant had authorized his son to make of the car, the question arose whether the son at the time of the accident was putting the car to the use which was authorized.

40

Opinion of Supreme Court.

The defendant insists that the clear weight of the evidence shows the use to have been unauthorized. We do not so regard it.

10 It does appear that the son was engaged at the moment of the accident in carrying with him two friends on their way to the railroad station. But it is by no means clear that the execution of such private purpose was either in conflict with the right to use the automobile which his father had conferred upon him, or that he had, at the time of the accident, unreasonably deviated from his instructions to attend to the lights, which, of course, comprehended returning home by any convenient or reasonable route.

20 There is no merit in the contention that the verdict was against the clear weight of the evidence with respect to the negligence of the son and the alleged contributory negligence of the plaintiff. There was abundant evidence of negligent operation of the car, and the question whether the plaintiff was negligent in attempting to cross the street, in view of what he saw, was made a fair question for the jury by evidence of excessive speed of the car.

We cannot say that the jury erred in its determination of either of these questions.

30 Nor can we say that the verdict of \$7,500 was excessive in view of the unusual severity of the plaintiff's injuries.

The rule to show cause will be discharged.

Rule Discharging Rule to Show Cause.

NEW JERSEY SUPREME COURT.

RICHARD P. JENNINGS, <i>Plaintiff,</i>	<i>Action</i> <i>at Law.</i>
<i>vs.</i>	<i>Rule</i>
JOSEPH OKIN, <i>Defendant.</i>	<i>Discharging</i> <i>Rule to</i> <i>Show Cause.</i>

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A rule to show cause why the verdict in the above entitled cause should not be set aside and a new trial granted, having been heretofore allowed and entered, and said rule coming on to be heard before the Court, and the Court having heard the argument of counsel and duly considered the same,—

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It is Ordered that said rule to show cause be and the same is hereby discharged, with costs.

Entered July 22, 1915.

On motion of

FORT & FORT,
Attorneys for Plaintiff.

A true copy.

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WM. C. GEBHARDT,
Clerk.

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Judgment.

NEW JERSEY SUPREME COURT.

STATEMENT.

10	RICHARD P. JENNINGS, <i>vs.</i> JOSEPH OKIN.	} <i>Action at</i> } <i>Law.</i> } <i>On Postea &</i> } <i>R. to S. C.</i>
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Judg't entered July 22, 1915, as of May 3,
1915.

FORT & FORT,
Att'ys.

20	Damages\$7,500.00 Costs Disbursements Interest from May 3rd, 1915.
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WM. C. GEBHARDT,
Clerk.

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