

## INDEX

	Page
Notice of Appeal and Grounds .....	1
Summons .....	2
Complaint .....	3
Answer .....	6
Reply .....	8
Postea .....	9
Judgment .....	10
Postea .....	11
Rule to Show Cause .....	12
Opinion of Supreme Court Upon Rule to Show Cause .....	13
Testimony .....	15
Motion for Nonsuit .....	58
Motion for Direction of Verdict .....	138

### WITNESSES

#### *Plaintiffs':*

John Hammond,	
Direct .....	15
Recalled:	
Direct .....	26
Cross .....	27
Recalled:	
Direct .....	56
Cross .....	57
Dr. Charles A. Palmer,	
Direct .....	20
Cross .....	23
William Vitelli,	
Direct .....	33
Cross .....	34

	Page
Ned Hammond,	
Direct .....	35
Cross .....	37
Mrs. Iris Barton,	
Direct .....	42
Evelyn Hammond,	
Direct .....	43
Cross .....	48
Dr. Elmer C. Hazzard,	
Direct .....	48
Cross .....	50
William Best,	
Direct .....	52
Cross .....	53
 <i>Defendant's:</i>	
Joseph Wacker,	
Direct .....	58
Cross .....	63
Re-direct .....	75
Re-cross .....	76
Dr. Joseph M. Rector,	
Direct .....	78
Cross .....	85
Charles Stava,	
Direct .....	92
Cross .....	94
Leonard Harms,	
Direct .....	103
Cross .....	104
Vivian Disbrow,	
Direct .....	108
Cross .....	109
Betty Roughgarden,	
Direct .....	112
Cross .....	113

	Page
Mrs. Anna Bolz,	
Direct .....	115
Cross .....	116
Re-direct .....	122
Edith Bolz,	
Direct .....	122
Cross .....	123
Anna Bolz,	
Direct .....	125
Cross .....	126
Agnes Hahn,	
Direct .....	129
Cross .....	130
Warren Johnson,	
Direct .....	132
Cross .....	133
 <i>Rebuttal:</i>	
Theodore Kleisser,	
Direct .....	134
Cross .....	134
John Hammond,	
Direct .....	136
Mrs. Evelyn Hammond,	
Direct .....	137
Cross .....	137



# New Jersey Court of Errors and Appeals

NOTICE OF APPEAL AND GROUNDS. 10

NEW JERSEY SUPREME COURT

MONMOUTH COUNTY

JOHN HAMMOND, by Evelyn Hammond, his next friend, and EVELYN HAMMOND,	}	Action at Law	20
Plaintiffs,			
vs.			
JOSEPH WACKER,	}	Action at Law	20
Defendant.			

*To McCarter & English, Esqs., Attorneys for the  
defendant:*

SIRS: 30

PLEASE TAKE NOTICE that the plaintiffs in the above entitled cause appeal to the Court of Errors and Appeals in the last resort in all causes in New Jersey from the whole of the judgment entered in this cause on the following ground, to wit:

1. Because the Supreme Court erred in directing a verdict and entering a judgment in favor 40

*Summons*

of the defendant instead of permitting the case to be determined by the jury.

Respectfully yours,

10

QUINN, PARSONS & DOREMUS,  
Attorneys for Plaintiffs.

---

**SUMMONS.**

20 (Seal)

THE STATE OF NEW JERSEY, To JOSEPH WACKER: YOU ARE SUMMONED to answer the complaint of JOHN HAMMOND, by Evelyn Hammond, his next friend, and EVELYN HAMMOND, in an action at law in the Supreme Court.

30

AND TAKE NOTICE, that unless you file your answer to 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.

WITNESS, WILLIAM S. GUMMERE, Esquire, Chief Justice of the Supreme Court, at Trenton, this 24th day of September, A. D. Nineteen Hundred and Twenty.

EDWARD J. KELLEHER,  
Clerk.

QUINN, PARSONS & DOREMUS,  
Attorneys.

40

## COMPLAINT.

## NEW JERSEY SUPREME COURT

## MONMOUTH COUNTY

JOHN HAMMOND, by Evelyn Hammond, his next friend, and EVELYN HAMMOND,  <div style="text-align: right;">Plaintiffs,</div> vs. JOSEPH WACKER,  <div style="text-align: right;">Defendant.</div>	}	Action at Law          10
---	---	---

Plaintiff, John Hammond, an infant under the age of twenty-one years, to wit, the age of twelve years, by his next friend, Evelyn Hammond, specially admitted by an order of this court to prosecute this action for him, and Evelyn Hammond, plaintiffs, both of the Township of Middletown, County of Monmouth, and State of New Jersey, say that 20

1. On May 26th, 1927, plaintiff, John Hammond, was a patron of and a passenger in a bus operated by the defendant. 30

2. On the day and year aforesaid, the defendant was driving and operating said bus, and was approaching a stopping point or station to receive and take on passengers, and among said passengers was the plaintiff, John Hammond.

3. The defendant then and there invited and requested the plaintiff, John Hammond, to board 40

*Complaint*

the said bus, and held out said bus as ready to take on passengers, among whom was the plaintiff, John Hammond.

10 4. It then and there became the duty of the defendant to provide a safe manner of taking on passengers, and to provide a safe method for passengers, including the plaintiff, John Hammond, to board the bus, and to so operate the said bus that passengers who had been invited to said bus, and were boarding said bus, should have an opportunity safely so to do.

20 5. Notwithstanding the premises, defendant thereupon so negligently operated and drove said bus that plaintiff, John Hammond, while lawfully boarding or entering said bus, was thrown from said bus and received the injuries hereinafter set forth.

6. More particularly, the defendant was negligent in the following respects:

(a) He invited the plaintiff and other passengers to enter said bus while in an unsafe position on the highway;

30 (b) He drove and operated said bus at an excessive rate of speed while inviting passengers to board the same;

(c) He started said bus up suddenly while plaintiff was boarding said bus;

40 (d) He negligently and carelessly failed to keep the door to the entrance of said bus closed until said bus was in a safe position or place to be boarded;

*Complaint*

(e) He negligently failed to provide said bus with proper brakes or stopping appliances;

(f) He was in divers other respects careless and negligent in the providing of safe means of entrance to said bus, and with a safe method of entering or boarding said bus. 10

7. As a result of the negligence of the defendant, plaintiff, John Hammond, suffered and sustained the following injuries:

(a) Plaintiff, John Hammond, suffered cuts, bruises and contusions about his head, body, legs and arms. More particularly the ligaments, muscles, sinews, tissue, flesh and skin upon his right leg and heel were torn, lacerated and injured, so that the function of the right foot and leg has been permanently destroyed and impaired. Plaintiff further suffered injuries to his left leg, the ligaments and muscles being lacerated and torn, so that the functions of the left leg are permanently injured and impaired. Plaintiff, John Hammond, further underwent great pain and suffering, and suffered from nervous shock, and will further undergo pain and suffering and will suffer from nervous shock. Plaintiff's ability to earn a livelihood will be impaired, and by reason of the lacerations he will bear permanent scars and disfigurements. 20 30

(b) Plaintiff, Evelyn Hammond, is the mother of plaintiff, John Hammond, and is a widow. Plaintiff, Evelyn Hammond, has been deprived of the services of her son in and about the household, and will in the future be deprived of his earnings. Plaintiff has been further forced to 40

*Answer*

10 expend large sums of money in and about endeavoring to cure him of his injuries, and will in the future be further forced to expend large sums of money. Plaintiff will further be forced to aid and support her son during his natural life, by reason of the injuries he has sustained.

Plaintiff, John Hammond, demands as damages the sum of \$25,000 and costs of suit.

Plaintiff, Evelyn Hammond, demands as damages the sum of \$5,000 and costs of this suit.

QUINN, PARSONS & DOREMUS,  
Attorneys of Plaintiffs.

20

**ANSWER.**

## NEW JERSEY SUPREME COURT

## MONMOUTH COUNTY

30	JOHN HAMMOND, by Evelyn Hammond, his next friend, and EVELYN HAMMOND,  Plaintiffs,	}	Action at Law
	vs.		
	JOSEPH WACKER,  Defendant.		

40 The answer of Joseph Wacker of Port Monmouth, New Jersey, the defendant above named,

*Answer*

to the complaint heretofore filed against him herein, says that:

## FIRST DEFENSE

He denies Paragraphs 1, 2, 3, 4, 5, 6, and 7 of the complaint. 10

## SECOND DEFENSE

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

## THIRD DEFENSE

He denies he was guilty of any negligence whatever. 20

## FOURTH DEFENSE

The plaintiff John Hammond was guilty of contributory negligence in that at the time and place in question he was running in the street without looking to see where or how he was going, or taking any care for his safety, as a result of which he fell, sustaining injuries referred to in the complaint; wherefore he denies that he is under any liability to the said plaintiff John Hammond as alleged in the said complaint or otherwise. 30

## FIFTH DEFENSE

Any right of action which the plaintiff Evelyn Hammond may have was derived by her through her son, John Hammond, who at the time and place in question was guilty of contributory negligence. 40

*Reply*

ligence in that he was running in the street without looking to see where or how he was going, or taking any care for his safety, as a result of which he fell, sustaining injuries referred to in the complaint; wherefore he denies he is under  
 10 any liability to the said Evelyn Hammond as alleged in the said complaint or otherwise.

McCARTER & ENGLISH,  
 Attorneys for Defendant.

**REPLY.**

20 NEW JERSEY SUPREME COURT

MONMOUTH COUNTY

JOHN HAMMOND, by Evelyn  
 Hammond, his next friend,  
 and EVELYN HAMMOND,

Plaintiffs,

Action at Law

vs.

30 JOSEPH WACKER,

Defendant.

Plaintiffs, by way of reply to the answer filed herein, say that:

They deny the new matter raised therein and join issue upon the same.

40 QUINN, PARSONS & DOREMUS,  
 Attorneys of Plaintiffs.



## JUDGMENT.

## NEW JERSEY SUPREME COURT

10	JOHN HAMMOND, by Evelyn Hammond, his next friend, and EVELYN HAMMOND,  Plaintiffs,  vs.  JOSEPH WACKER,  Defendant.	} Action at Law.  } On Postea.  } Judgt. for Deft.  } McCarter & English, Attorneys.
----	---	--

20 Judgment entered this ninth day of May, A. D.  
 nineteen hundred and thirty in favor of defend-  
 ant and against the plaintiffs for the sum of two  
 hundred seventy-four dollars and thirty cents  
 costs.

WM. S. GUMMERE,  
 C. J.

Costs \$274.30.

(Seal)

POSTEA.

(Filed July 7, 1928)

## NEW JERSEY SUPREME COURT

MONMOUTH COUNTY

10

---

JOHN HAMMOND, by Evelyn  
Hammond, his next friend,  
and EVELYN HAMMOND,

Plaintiffs,

Action at Law

vs.

JOSEPH WACKER,

Defendant.

20

---

This case was tried at the Monmouth Circuit at Freehold, New Jersey, on July 3rd, before Judge Rulif V. Lawrence and a jury. The jury rendered a general verdict in favor of John Hammond, by his next friend, Evelyn Hammond, and against the defendant in the sum of Two Thousand Dollars, and in favor of the plaintiff Evelyn Hammond and against the defendant in the sum of Three Thousand Dollars.

30

RULIF V. LAWRENCE

Judge.

40



OPINION OF SUPREME COURT UPON RULE TO  
SHOW CAUSE.

(Filed May 4, 1929)

NEW JERSEY SUPREME COURT

No. 42, Oct. T., 1928

10

---

JOHN HAMMOND, *et al.*,

vs.

JOSEPH WACKER.

---

} Action at Law

Defendant's Rule to Show Cause.

Argued before Gummere, Chief Justice, and 20  
Justice Parker.

For the Rule, George W. C. McCarter.

Contra, Theodore D. Parsons.

PER CURIAM.

This is an action for personal injuries. The trial resulted in verdicts in favor of the plaintiff John Hammond and of his mother, with whom he was living and who supported him. The facts relating to the accident were as follows: The defendant operated an auto bus under a contract with the Board of Education of Middletown, which required him to carry pupils to and from the Leonardo High School. John Hammond was one of the pupils so carried. He was thirteen years old. The accident happened in East Keansburg, at the corner of Port Monmouth Road and 40

*Opinion of Supreme Court Upon Rule to Show Cause*

Ocean Avenue. The auto bus was then upon its way to the high school, and one of its regular stops was on the far corner of these two intersecting streets. At that corner some sixteen boys and girls, including the plaintiff John Hammond, had collected, waiting for the arrival of the bus. John saw it approaching and, instead of waiting until it came to a standstill at its regular stopping place, hurried across the intersecting street, evidently for the purpose of being one of the first of the crowd of sixteen to get on the bus. The door of the bus was open, and he attempted to board it while it was still in motion and approaching its regular stopping place. At that moment the bus swung off the concrete toward the curb, and John, who had taken hold of the handles of the bus, lost his grip, slipped under the wheels and was run over. This is his own story, and it demonstrates that the accident was due, in part at least, to his own negligence.

For this reason, the rule to show cause will be made absolute.

## TESTIMONY.

## NEW JERSEY SUPREME COURT

## MONMOUTH COUNTY

JOHN HAMMOND by next friend, <i>et al.</i> ,  Plaintiffs,  v.  JOSEPH WACKER,  Defendant.	}	10  Action at Law
--	---	-------------------------

Freehold, N. J., May 5, 1930.

20

JOHN HAMMOND, sworn for plaintiffs.

Direct-examination by Mr. Quinn:

Q. How old were you in May, 1927? A. Twelve.

Q. When is your birthday? A. September 8th.

Q. At that time where did you live? A. East Keansburg.

Q. Where did you go to school? A. Leonardo. 30

Q. And how did you get from Keansburg to Leonardo and school? A. By bus.

Q. Who drove you? A. Joseph Wacker.

Q. That is the defendant sitting here? A. Yes, sir.

Q. And for how long a period did he drive you from East Keansburg to Leonardo to school? A. You mean how long did I ride in his bus?

Q. Yes, how long a period of time. A. I 40  
couldn't say exactly.

*John Hammond—Direct*

Q. Approximately. A. About three years.

Q. Always he that would drive you there? A. Usually.

Q. What time in the morning would you meet the bus to go to school? A. About quarter of  
10 eight or eight o'clock.

Q. And at what street corner would you usually meet it? A. Ocean Avenue and Port Monmouth Road.

Q. What kind of a bus was it, large or small? A. It was large, I presume.

Q. Well, just your opinion; was it a small one or large? A. Large.

Q. What kind of a door did it have upon it?  
20 A. Had a folding door.

Q. When the folding door was closed will you tell us whether or not there was any step room so that you could put your foot on the step? A. No, there was no place you could put your foot at all.

Q. When the folding door was closed? A. No, sir.

Q. Then when the folding door was open was there a place then to put your foot? A. Yes, sir.  
30

Q. What was there on the bus in order to help a pedestrian to get in the bus? A. At that time there were two handles, one on each side of the door.

Q. And calling your attention to the day in question, did you see the Wacker bus coming down the street, the Port Monmouth Road? A. Yes, sir.

Q. And was that at the corner of Ocean Avenue and Port Monmouth Road? A. Yes, sir.  
40

*John Hammond—Direct*

Q. And when it reached the opposite corner from where you were standing on Ocean Avenue was it coming fast or slow? A. Slow.

Q. And when you saw the bus coming slow on the opposite corner from which you stood what did you do? A. Walked over to meet it and came 10 on the side and tried to get on.

Q. What did you do to try to get on? A. I grabbed hold of the handle and jumped on the step.

Q. When you did that what happened? A. The bus swayed, gave a lurch and I slid under the wheels.

Q. You fell off or slid under the wheels? A. 20 Fell off the bus.

Q. Can you describe the sway or lurch to the jury, or did it happen so quickly that you can't tell? A. No, I couldn't tell exactly how it happened.

Q. Do you know or can you tell us what caused the lurch? A. I believe it to be because it slipped off the concrete.

By the Court:

Q. Was the door open when you grabbed the 30 handle? A. Yes, sir; it was.

Q. Had the bus stopped? A. No.

Q. It was still in motion? A. Yes, sir.

Q. When you took hold? A. Yes, sir.

Q. And what did you do, run along with the bus? A. I ran by the side of the bus and grabbed hold of the handle and jumped on.

By Mr. Quinn:

Q. Could you say about how fast with respect 40 to it stopping, the bus was going when you

*John Hammond—Direct*

stepped on it, Jack? A. I just know it was going slow.

Q. About how many feet away was it from the corner where the children were standing to get on the bus when you stepped on it? A. About  
10 thirty or thirty-five.

Q. So it only had thirty feet to go between the point where you attempted to get on it and the point where the children were standing? A. Yes.

Q. Had it almost come to a stop? A. Almost.

Q. How many steps did you take with it as you tried to get on, if you recall? A. Two or three.

Q. Did you see Mr. Wacker, the defendant, at the time you got on the bus? A. Yes, sir.

20 Q. Did you say anything to him when you attempted to get in the bus? A. Not that I recall.

Q. After this lurch or sway of the car and you fell off do you know how far the bus went then? A. Almost to its usual stopping place.

By the Court:

Q. How far was that?

By Mr. Quinn:

30 Q. About how many feet? A. Well, the front of the bus would be about twenty-five or thirty feet before it stopped.

Q. About twenty-five or thirty feet? A. Yes.

Q. Then came to a stop? A. Yes.

Q. And where were you at that time? A. You mean after the accident?

Q. Right after the accident? A. About in the middle of Ocean Avenue.

40 Q. Did anyone come around to you as you were on the pavement? A. Yes.

*John Hammond—Direct*

Q. Who? A. My brother came first and then Mr. Wacker.

By the Court:

Q. Wacker was the driver, was he? A. Yes.

By Mr. Quinn:

10

Q. Did you have a talk or conversation with your brother and Mr. Wacker? A. No.

Q. Did you say anything at all? A. No.

Q. Were you in pain at that time? A. Yes.

Q. What did the bus do with respect to your heel or leg? A. Tore my right heel off.

Q. Did it go over that? A. Yes.

Q. And your legs were injured? A. Right heel and left knee. 20

Q. Do you recall the bus going over them? A. Yes, sir.

Q. Can you take down your stocking and show the jury your right heel?

(Witness exhibits heel to jury.)

Q. Now, if you will hold that sideways, so that the jury can see it.

(Witness complies.)

30

Mr. Quinn: If your Honor please, I might save time if I could have Dr. Palmer testify to part of his testimony while he has the bandage off of it, if Mr. McCarter has no objection.

Mr. McCarter: Absolutely. Very good.

40

*Dr. Charles A. Palmer—Direct*

DR. CHARLES A. PALMER, sworn for plaintiffs.

Direct-examination by Mr. Quinn:

Q. Doctor, you are a practicing physician of  
10 Monmouth County and have been for how long?

A. Since 1896.

Q. Calling your attention to May, 1927, was  
this boy brought before your attention on that  
date or in that month? A. Yes.

Q. Immediately after the accident? A. Yes,  
sir.

Q. And what condition did you find him in at  
that time, Doctor? A. I found the sole of the  
20 heel lying on top of his toes. The flesh had been  
entirely torn away from the ankle joint on both  
sides and straight back, which would mean about  
three and a half or four inches from the sole of  
the heel at the back of his leg, and on both sides  
were just wiped right away and only held by a  
small portion of skin with the front of his foot.  
But he came into my office in that shape, with the  
sole of his heel and all this flesh lying on top of  
his foot.

30 Q. Were the tendons affected at all, Doctor?

A. Well, the tendons themselves, no, but the flesh  
clear down to the bone and the hard sinews, ten-  
dons, were intact; all the soft tissue was torn  
away.

Q. You took him to Dr. Hazzard's hospital?  
A. Yes, sir.

Q. He remained there for about two weeks?

A. All of that.

40 Q. And then brought back home? A. Yes.

*Dr. Charles A. Palmer—Direct*

Q. And you have taken care of him since that time up to the present time? A. Yes.

Q. Is there any improvement, Doctor, in that condition? A. Oh, yes; wonderful.

Q. Between this time and the time of the last trial? A. Oh, some, some. 10

Q. And in what respect? A. Well, there is a small portion of skin there probably sticks and is being grown in. The skin is so poorly supplied with blood-vessels at that point that the nutrition is greatly interfered with, is why we don't get results.

Q. Was there a grafting operation attempted, Doctor? A. Yes.

Q. And where was that done? A. There was 20  
skin taken off of his leg and placed over this wound and placed on in regular grafting manner, but it didn't take.

Q. Were any results gotten from that grafting operation? A. Well, we tried to make ourselves believe that it helped some.

Q. Were there any results gotten, Doctor? A. Well, there was nothing to brag about.

Q. And do I understand you to say that the 30  
reason that no result or very little result was gotten from that operation was due to the fact that there was a lack of circulation there and for that reason it was not successful? A. Yes, where the circulation is better, which is all around here, if you can see, clear by his joint, this was all bare on both sides, clear up to where my finger is, which is four inches past the sole of his heel, was all bare; and that, as you see, is all filled in, 40  
which is a wonderful case of healing.

*Dr. Charles A. Palmer—Direct*

Q. Now, in that particular area is there a better circulation? A. Oh, yes; several hundred per cent better. But here at the sole of the heel, where the weight comes a little back, there is very, very little circulation and very little nerve supply, which handicaps the growth of tissue.

10 Q. Since the time of the accident, Doctor, and up to the present time approximately how often have you seen and treated this boy? A. I saw him the first year very, very often, every day for several months; every other day for a few more months, and several days or once a week for over a year, two years.

20 Q. For a period of time after he got out of the hospital was he confined to his home in bed? A. Oh, yes; couldn't get around for a long while.

Q. For a period of time after that did he use crutches? A. Yes, he used crutches a long while.

Q. Do you recall approximately how long he used the crutches, Doctor? A. Well, I should think for a year and a half, maybe more.

30 Q. Did you render a bill for the reasonable value of your services up to this date, Doctor? A. Not up to this time.

Q. Did you render it up to 1927? A. About a year ago, I think so; maybe it is longer.

Q. And up to a year ago, Doctor, what was the bill that you rendered? A. Somewheres around \$400.

40 Q. And for the treatment from that time and up to the present time what would be the reasonable value of your services for treatment and attention given? A. I should think about \$50.

Q. That would be an additional \$50; \$450 would cover your entire treatment? A. I think so.

*Dr. Charles A. Palmer—Cross*

Q. Doctor, in your opinion, can this heel be entirely cured? A. No, it never will be right. I doubt—I feel sure, rather, he will never step on the heel with any comfort. There is a certain amount of artificial growth there that is supplied by a sensitive supply of nerves that are not natural and I am sure that he will never step on that heel. 10

Q. If he did put weight on and attempted to step on that heel what would be the result? A. It would hurt him, that I don't think he will ever get used to it.

Q. You mean hurt to such an extent that he couldn't bear his weight? A. Yes. There is an artificial growth of bone there too which is a very tender nature, he can't bear any pressure on it. It hurts him. 20

Q. Was the condition attendant with much pain immediately after the accident, Doctor? A. Well, I don't know as it was, because of the nerves being all lacerated and bruised, so that it was in an anaesthetic condition.

Mr. Quinn: Cross-examine.

CROSS-EXAMINATION by Mr. McCarter: 30

Q. Has the boy got full use of that right ankle, Doctor? A. No.

Q. To what extent hasn't he got it? A. Well, let's see, John. (Examines plaintiff.) Well, I suppose he has got seventy-five per cent motion in the ankle. He can't raise his toes.

Q. Can't raise his toes? A. For the reason he can't let his heel down to the ground. He can 40

*Dr. Charles A. Palmer—Cross*

straighten his toe out, because that has been exercised ever since he has been able to get on his foot, by touching the toe down to develop that muscle, and not being able to come down on his heel, the ankle joint has become so that he can't  
10 raise his toe.

Q. The heel is in a good deal better condition than it was when you saw it at the previous trial, isn't it? A. Well, I can't say it is a great deal better.

Q. You can't? A. No, at that time I was in hopes that some day it would be entirely healed and I testified to that extent; but now, after watching it for a year and a half more very  
20 closely, I have decided it never will be right.

Q. Well, what has happened in the year and a half since you last testified here that makes you think now that it will not some day be all right, whereas then you thought it would? A. Its refusal to respond to treatment.

By the Court:

Q. Why doesn't it respond, Doctor? A. As I said a few minutes ago, the lack of proper nour-  
30 ishment from blood supply and nerve supply.

By Mr. McCarter:

Q. What treatment have you used since the last time? A. Well, we have used the thermalite and some ultra-violet lights, beside the regular anti-septic dressing.

Q. What improved and continuous treatment have you used and how often, Doctor, since the last trial? A. I don't quite understand you.  
40

*Dr. Charles A. Palmer—Cross*

Q. How often have you treated the wound since the last trial now? A. Well, on an average maybe once a week for a while soon after the trial, and then it got to be further and further apart, or once in two or three weeks.

Q. Is there any change in your treatment of the wound since the last trial? A. Yes, I tried galvanism on it sufficient to satisfy me it was not going to help any. 10

Q. Sufficient to satisfy you it would not help? A. Yes.

Q. You say you at one time tried skin grafting? A. Well, Dr. Hazzard did that.

Q. Dr. Hazzard did that? You yourself have never tried that? A. No. 20

Q. Why haven't you tried it? A. It is out of my line.

Q. Do you think in your opinion that skin could be grafted there to improve the condition? A. I don't think so, no.

Q. You don't think so? If you could get skin to grow there the wound would heal up, wouldn't it? A. The wound would heal but he wouldn't be any better off than he is now, except that he wouldn't have to dress it. He couldn't walk. 30

Q. He wouldn't be able to walk on it even if the skin grew on it? A. No.

Q. Why not, Doctor? A. Well, the skin has grown there now on the palmar surface, and he can't walk, because he can't get his toe up. If he did it would be very painful. You notice that the growth around there is quite irregular and you might say unnatural. 40

*John Hammond—Direct*

Q. Well, it would be an improvement over the present condition if you could get skin to grow there? A. Only from a hygienic standpoint.

Q. Which is a matter of considerable importance? A. Yes, a very great relief. If he could  
10 stop dressing it it would be a great relief.

Mr. McCarter: No further questions.

Mr. Quinn: That is all, Doctor, for the time being.

## JOHN HAMMOND, resumed.

20 Direct-examination by Mr. Quinn:

Q. How frequently do you dress that wound, as you are doing it now? A. Twice a day.

Q. And at what times a day? A. Morning and night.

Q. Did you at any other time get on this bus or attempt to get on it in the same manner you did on this day on which the accident occurred?

30 Mr. McCarter: Objected to as incompetent and immaterial.

The Court: It is.

Mr. Quinn: I withdraw it at this time.

Q. Do you have any pain in your heel now, Jack? A. Some.

Q. And how frequently do you have that and when? A. I have a slight pain all the time, and whenever there is rainy weather or stormy  
40 weather it pains a great deal.

*John Hammond—Cross*

Q. Now, if you can just let that down for a moment, pull your pant leg up on the other leg and show the jury the injury you received there, Jack.

(Witness complies.)

Q. Can you stand up so the jury can see the side and back of that injury? 10

(Witness exhibits to jury.)

Q. Any pain from that scar or numerous scars that you have on your left leg? A. Yes, it hurts when there is rainy weather, the same as the foot does, and if it is bumped or anything like that it pains a great deal.

Mr. Quinn: Cross-examine. 20

CROSS-EXAMINATION by Mr. McCarter:

Q. How much can you move that ankle now? Just move it around the way you can.

(Witness complies.)

Q. Wiggle your toes, will you, please?

(Witness complies.)

Q. Now, this accident happened in May, 1927, didn't it? A. Yes, sir. 30

Q. Do you remember the day of the month? A. May 26, 1927.

Q. What is the name of the street the bus was driving on? A. Port Monmouth Road.

Q. And the crossroad there is called Ocean Avenue? A. Yes, sir.

Q. And you were waiting on the far corner as the bus came up first, weren't you? A. Yes, sir. 40

*John Hammond—Cross*

Q. Do you remember how many other boys and girls were there with you? A. I couldn't say exactly.

Q. Well, there were about fifteen or twenty, weren't there? A. I think there was more than  
10 that.

Q. There were so many that when you all got into the bus somebody would have to stand, wouldn't they? A. Yes.

Q. How long a drive from where you got on the bus to your school? A. I should say approximately five to seven miles around the way we traveled.

Q. And about how long did it take you? A. I  
20 don't know.

Q. You don't remember? A. About a half hour, I guess.

Q. About a half hour? And you didn't like to stand during that half hour if you could help it, did you? A. No.

Q. Now, this morning how was the bus coming towards you, rather slow, you say? A. Yes.

Q. Are you sure the door was open? A. Positive.  
30

Q. And you ran out and whereabouts in the crossroad was the bus when you got to the door and took hold of the handles? A. When I took hold of the handles it wasn't quite across Ocean Avenue.

Q. Not quite across Ocean Avenue? A. In the middle of it.

Q. About in the middle; is that correct? A. Yes.  
40

*John Hammond—Cross*

Q. You grabbed hold of both handles? A. I grabbed hold of both handles.

Q. Then you tried to put your foot on the step?  
A. Got my feet on the step.

Q. Both feet on the step? A. Both feet on the step. 10

Q. Then came this lurch? A. Yes.

Q. A pretty bad lurch, wasn't it? A. Enough to throw me off the bus.

Q. Enough to throw you off the bus, and you say that lurch was caused by the bus rolling off the concrete into the graveled side of the road?  
A. I believe it to be.

Q. As far as you know that was it? A. Yes.

Q. Now, then you fell and the rear right wheel of the bus passed over your two limbs? A. Yes. 20

Q. Now, where were you lying after the bus passed over you? A. About in the middle of Ocean Avenue.

Q. About in the middle of Ocean Avenue? A. Yes, sir.

By the Court:

Q. Pardon me. Boy, you say the bus was still moving when you jumped on? A. Yes, sir. 30

Q. And the door was open? A. Yes, sir.

By Mr. McCarter:

Q. Now, you were about the middle of Ocean Avenue. Were you lying lengthwise of the Port Monmouth Road or lengthwise to Ocean Avenue?

A. Well, about the same way Ocean Avenue was running.

Q. You were lying lengthwise of Ocean Avenue, so to speak? A. Yes. 40

*John Hammond—Cross*

Q. Now, I want to be sure we understand this and I am just going to draw a little diagram here on the blackboard and have you indicate it. I am not much of an artist but we will call this Ocean Avenue, put an O in it, you see, and we  
 10 will call this P. M., Port Monmouth. Now, I don't want to make you get up and hobble around on your feet, but do I understand the bus was coming this way? A. The other way.

Q. This way? A. Yes.

Q. All right. Well, we will have the bus coming this way. I will point an arrow this way the bus was coming. Now, did the accident happen about up here? A. A little bit further over.

20 Q. This way more? A. About in the middle.

Q. I will make the cross there then. Is that right? You see ordinarily you could do this but I don't want you to come out here. A. The relationship with Ocean Avenue, yes.

Q. Is that about the right spot? If it is not I will rub it out. A. A little bit up higher, toward the O.

Q. All right; up more like that? A. Not quite that high.

30 Q. About there (indicating)? All right. Now, I don't want a cross after all; I want to draw something to imitate the way your body was lying. We have got a spot there, too. Is that about right? A. That is where the accident happened.

Q. Now, I want to draw your body. Which way was your head, up toward the O? A. Yes.

40 Q. We will make it an O. Were your legs straight down this way, like that? A. My legs were not straight. My legs were bent.

*John Hammond—Cross*

Q. Your legs were bent? A. Yes.

Q. We will bend them like that. Is that correct, like that? A. I was in such a position that my heel and knee would be together.

Q. We will mark about like that. Is that correct? A. I guess so. 10

Q. Were you lying straight? A. No, not exactly straight.

Q. A little more really curving this way? A. Yes.

Q. I will draw a dotted line to indicate you were heading this way. Is that right? A. Yes.

Q. Was your body on the gravel road? A. Part on the gravel.

Q. And your legs were on the concrete? A. Yes. 20

By the Court:

Q. Did the bus driver open the door of the bus? A. I couldn't say that he opened it but it was open when he came along.

Q. It was open when he came along? A. Yes.

Q. You didn't see him open it? A. No.

By Mr. McCarter:

Q. The parts of your legs that were hurt were lying on the cement, weren't they? A. Yes, sir. 30

Q. And it was on the cement that the bus ran over your legs? A. Yes, sir.

Q. Now, your brother was there at the time, wasn't he? A. Yes, sir.

Q. And he was the first person to come to you after you were lying there; is that correct? A. Yes. 40

*John Hammond—Cross*

Q. And the next person was Mr. Wacker, the driver, wasn't he? A. Yes, sir.

Q. Now, didn't you say to Mr. Wacker when he came up to you it wasn't his fault, it was the fault of some little dog that ran out? A. No, sir.

10 Q. Nothing like that? A. No.

Q. Do you remember a little dog running around there at all? A. After the accident occurred a dog came up.

Q. But you didn't see the little dog before the accident? A. I saw him before the bus came along.

Q. You saw him before the bus came along?

20 A. Yes, he was up at the corner most every morning.

Q. And didn't the little dog run in front of you as you ran out to get on the bus? A. No.

Q. You know Dr. Rector here, don't you, Jack?

A. I have seen him before.

Q. He has examined you several times, hasn't he? A. Yes.

30 Q. Don't you remember the first time you saw him or one of the times you saw him, whether it is the first, second or third, didn't you tell him that a dog passed in front of you, causing you to fall, and that is how the accident happened? A. No.

Q. You didn't say anything like that to Dr. Rector in all the times that he examined you?

A. Not that I recall.

40 Q. What did you say to Mr. Wacker, if anything, as he came up to you and you were lying there in the road? A. Nothing.

Q. Nothing at all? A. No.

*William Vitelli—Direct*

Q. You were in great pain, of course? A. Yes, sir.

Q. And I don't suppose you remember very definitely just what happened right after the accident, when you were suffering such intense pain? A. Yes, I remember what happened. 10

Q. Remember it very well? A. Yes.

Q. And you are sure you said nothing to Wacker? A. No.

Q. Not a thing? A. Didn't say anything.

Q. Did you say anything to your brother? A. No.

Q. Didn't say a word? A. The only thing I said was when I was in the butcher shop.

Q. And that was where you were carried right after the accident? A. Yes. 20

Q. And what did you say in the butcher shop? A. Told them to let me have some air.

Q. To let you have some air? A. It was hot.

WILLIAM VITELLI, sworn for plaintiffs.

Direct-examination by Mr. Quinn: 30

Q. How old are you, William? A. Sixteen.

Q. Did you go to the same school that Jack goes? A. Yes.

Q. Did you go to school in the same bus that he goes? A. Yes.

Q. Come along every morning? A. Yes.

Q. Do you remember the day that Jack was hurt? A. Yes.

Q. Were you there that day? A. Yes, sir. 40

*William Vitelli—Cross*

Q. Did you see this bus? A. Yes, sir.

Q. Did you see Jack when he was actually injured or not? A. He was running along with the hub; but to get onto the step he grabs for the handles.

10 Q. And was the door of the bus open when he did that? A. Yes, sir.

Mr. Quinn: Cross-examine.

CROSS-EXAMINATION by Mr. McCarter:

Q. The bus was moving at the time he grabbed hold of the handles and tried to get on, wasn't it? A. Yes, sir.

20 Q. Where were you standing as the bus came up? A. I was about—I was right in back of Jack, about three or four feet away from him. I was going to be second.

Q. And whereabouts in the crossroads was that? How far out into the middle of the crossroads, or in other words, how far away from the corner were you? A. You mean when Jack—

Q. When Jack first took hold of the handles of the door? A. I was right where he started to  
30 to get on when he went to—

Q. You were right behind him? A. Yes.

Q. Did you run out, too? A. Yes, started to run.

Q. Your idea was to get on right after he got on? A. Second.

Q. Were you looking at Jack or at the bus, which? A. Well, I was looking at Jack, because he was in front of me.

40 Q. Did you have a full view of the door? A. I had a full view of it from the side.

*Ned Hammond—Direct*

Q. Full view of it from the side? A. Yes.

Q. Are you absolutely sure the door was open?

A. Yes, sir.

Q. How many other boys and girls were waiting there for the bus, do you remember? A. I couldn't say about how many. 10

Q. Quite a crowd? A. Yes.

Mr. McCarter: That is all.

Mr. Quinn: That is all.

NED HAMMOND, sworn for plaintiffs.

Direct-examination by Mr. Quinn: 20

Q. You are a brother of Jack Hammond? A. Yes.

Q. How old are you? A. Seventeen.

Q. And were you there the day this accident happened? A. Yes, sir.

Q. Will you tell us what you saw, Ned? A. Well, the bus came up the Port Monmouth Road and William Vitelli and my brother went out to meet it and my brother went out and he grabbed hold of the handles and got his foot on the steps, and the bus swayed or lurched or something and he fell off underneath the wheel. 30

Q. About how far was the bus from the far corner of Ocean Avenue and Monmouth Road when your brother attempted to get on the bus?

A. He was on the opposite corner from where the bus generally stops.

Q. The opposite corner? A. Yes. 40

*Ned Hammond—Direct*

Q. And about how many feet is it away from that point where the bus stops? A. Thirty-five or forty feet, I guess.

Q. And how far were you in back of your brother? A. I was standing at the corner where  
10 the bus stops.

Q. And how many feet were you away from him at that time? A. Twenty or twenty-five feet, I guess.

Q. Was the door of the bus open or closed?  
A. Open.

Q. Do you know that of your own knowledge?  
A. Yes.

Q. Did you see it yourself? A. Yes, sir.

20 Q. Did you always stay at this spot every morning to get the school bus? A. No.

Q. I mean around this corner with the children? A. Well, I used to get the bus generally, most every morning there, but some mornings I used to run out and get it myself.

Q. Would the doors be open?

Mr. McCarter: Objected to as incompetent.

30 The Court: Oh, yes; it is not of importance.

Mr. Quinn: It is withdrawn.

Q. How fast would you say the bus was going when nearing the corner where all the children were waiting? A. I couldn't say.

Q. Had it nearly come to a stop? A. It was going very slow.

40 Q. You say it was only thirty or thirty-five feet away? A. Yes.

*Ned Hammond—Cross*

Q. Had it almost come to a stop at that time?  
A. Yes.

Q. And after your brother was injured, who came there and helped pick him up? A. I was the first one there and Mr. Wacker was the second one there. 10

Q. Any conversation between you and your brother or Mr. Wacker? A. I just asked him if there was any bones broken, that is all.

Q. What? A. I just asked him if he felt bad and if there was any bones broken.

Q. Did Mr. Wacker say anything to him? A. No, sir.

Q. How long after you got to your brother did Mr. Wacker get there? A. I couldn't say, I didn't pay any attention. I ran right over. 20

Q. Then where was your brother taken? A. To the butcher shop.

Q. Did you go along with him? A. Yes, sir.

Q. And at that time did he have any conversation with Mr. Wacker? A. No, sir.

Q. And you were right alongside of your brother all the time? A. Yes, sir.

Mr. Quinn: Cross-examine. 30

CROSS-EXAMINATION by Mr. McCarter:

Q. The bus was moving when your brother tried to get on, wasn't it? A. Sure.

Q. Did you see it lurch? A. You could see the bus sway.

Q. Sway? A. Yes, away or lurch.

Q. Did you see the wheels of the bus go off the concrete onto the gravel shoulder? A. I couldn't say that. 40

*Ned Hammond—Cross*

Q. You couldn't say that? A. No.

Q. But you just saw the body of the bus sway?

A. Yes.

Q. And did it sway at the time your brother fell off? A. Just when he got hold of it the bus  
10 swayed.

Q. After he got hold of it? A. Yes, he had his foot on the steps.

Q. He had his foot on the steps? A. Yes.

Q. How far away from him were you at that moment? A. About twenty-five feet, I guess.

Q. You were nearer the far corner, the usual stopping place, weren't you? A. Yes.

Q. Was William Vitelli between your brother  
20 and yourself? A. No, he was in front of my brother.

Q. In front of your brother? A. Yes, on the side.

Q. Between your brother and the bus? A. On the side, not directly in front of him.

Q. You were down Ocean Avenue? A. Well, sort of down Ocean Avenue.

Q. Yes, sort of down Ocean Avenue; and were  
30 you looking at your brother or what were you doing? A. Looking at my brother.

Q. Looking at your brother? A. Or looking at the bus and my brother at the same time.

Q. At the same time? A. Yes.

Q. Could you see the door of the bus? A. Sure.

By the Court:

Q. How far away from the regular stopping place was the bus when your brother jumped on?

40 A. He started to get on the full length across the street, about thirty feet.

*Ned Hammond—Cross*

Q. The full length across the street? A. Yes, sir.

Q. Thirty feet away? A. Thirty-five feet.

Q. Thirty-five feet away? A. Yes, sir.

Q. From its regular stopping place? A. Yes, sir. 10

By Mr. McCarter:

Q. Did you see your brother fall? A. Yes.

Q. Did you say anything to him at that time, cry out or anything? A. Yes.

Q. What did you say? A. I told him to watch out.

By the Court:

Q. You said that to your brother? A. Yes. 20

Q. Why did you say that to him? A. I saw him fall.

By Mr. McCarter:

Q. Did you see any dog? A. Not until after the accident.

Q. You didn't see a dog before the accident? A. No.

Q. Wasn't there a little dog that was running around there before the accident? A. I didn't see him. 30

Q. You didn't see it? A. No, sir.

Q. Did your brother say anything at all to you when you got up to him after he had been run over? A. Not that I remember.

Q. Was he crying or just lying silent? A. Why, he was—I don't remember whether he was crying now or not.

Q. Did he say anything in the butcher shop? A. Why, there was some woman in there that kept 40

*Ned Hammond—Cross*

patting his head all the time and he told her to leave him alone for it was hot in there.

Q. Now did you see the dog after the accident?

A. Yes.

Q. And where did he run? A. Up in front of  
10 the bus, come around back of the bus.

Q. As a matter of fact, the dog got to your brother before you did after the accident, didn't he? A. I don't remember now.

Q. You don't remember? A. No.

Q. You remember testifying in the first trial, don't you? A. Yes.

Q. And I am going to ask you, reading from the record, page 25, if you were not asked these  
20 questions and didn't give these answers: "Q. What is the corner this dog ran from, according to north and south, east and west? A. That was the southwest corner." Were you so asked and did you make that answer? A. Yes.

Q. You say yes? A. Yes, I must have if it is in there.

Q. Well, do you remember it now, Ned? That is what I am asking you. A. It has been a good while ago and I don't really remember it.

30 Q. Do you remember being asked this as the next question: "Q. So he ran clean across the street, across the paved street, the Port Monmouth Road? A. You mean the dog? Q. Yes. A. He didn't run completely across, when he saw my brother laying there he ran cata-cornered." Do you remember being so questioned and giving those answers? A. Yes, I remember giving that answer.

40 Q. Do you remember giving the next answer to the next question: "Q. Did he run in front of

*Ned Hammond—Cross*

the bus or back of the bus? A. Back of the bus. I saw him run to my brother because I was the first one there." Do you remember that? A. Yes.

Q. Do you remember this: "Q. You got to your brother before the dog did? A. No, sir; the dog was there first." Do you remember that? A. No.

Q. Don't remember that? A. No.

Q. Do you deny so testifying? A. No, I wouldn't say I deny it.

Q. Now you can step to that wonderful diagram I drew there, and will you take a piece of chalk and indicate where your brother was lying?

A. He was lying about here (indicating). 20

Q. You made the mark a little bit to the right of where I put the mark? A. Yes.

Q. So you think he was a little closer to the far corner? A. Yes.

Q. Than the mark which I put on when your brother was testifying? A. Yes.

Q. Now where were his legs, on the concrete or on the gravel? A. On the concrete.

Q. There were about twenty-five boys and girls waiting for the bus, weren't there? A. About that, I guess. 30

Q. And more than enough to fill the seats, so that if you were not among the first to get on you would have to stand all the way to school? A. Yes.

Q. That is correct, isn't it? A. Yes.

Q. And it was about eight miles from that point to school, wasn't it? A. Seven or eight miles, I guess.

Mr. McCarter: That is all. 40

*Mrs. Iris Barton—Direct*

MRS. IRIS BARTON, sworn for plaintiffs.

Direct-examination by Mr. Quinn:

- Q. Mrs. Barton, you are a practical nurse? A. Yes, sir.
- 10 Q. Do you know the plaintiff, John Hammond? A. Yes, sir.
- Q. After this accident were you called to his home to attend him? A. I was.
- Q. How long a period did you attend him? A. From June 25th until September 23rd.
- Q. Were you paid for that work? A. I was.
- Q. At what rate per week? A. It varied according to my duties and the hours.
- 20 Q. What was your approximate general average weekly? A. \$35.
- Q. Weekly? A. Yes, sir.
- Q. That was your average weekly? A. That was every day at that time.
- Q. What treatment did you give the boy? A. Surgical dressings, medication, all the doctor directed.
- Q. How frequently would you give those? A. The dressings?
- 30 Q. Yes. A. The doctor would make the morning dressing and I would make them about four in the afternoon and then if it was necessary I would make them later in the day, according to the weather and the boy's feelings.
- Q. What was the condition of the boy when you first got there? A. Generally delirious for the first three months.
- Q. Did you ever do anything to relieve that  
40 condition? A. We had to give him narcotics.

*Evelyn Hammond—Direct*

Q. How frequently would that be given? A. According to the doctor's directions.

Q. Did you ever give that yourself? A. The doctor left that for me.

Q. And you gave it according to the doctor's directions? A. Under the doctor's supervision only. 10

Q. During that time when you were there was he ever out of bed? A. No, sir; he wasn't, for the first three months.

Q. In what position did he lie in bed? A. He had to be laid on his back and propped with pillows to prevent the pressure and the wounds coming in contact with the bed, and a canopy over him to prevent the bed from coming in contact with him also. 20

Mr. Quinn: Cross-examine.

Mr. McCarter: No cross-examination.

EVELYN HAMMOND, sworn for plaintiffs.

Direct-examination by Mr. Quinn:

Q. Mrs. Hammond, you are the mother of John Hammond? A. I am. 30

Q. Your husband is not living? A. No.

Q. Nor at the time of this accident? A. No.

Q. You are employed, work yourself in New York? A. Yes.

Q. Calling your attention to the date of this accident and after the boy was taken to the hospital, did you go down immediately to the hospital? A. I saw him as soon as I was notified. 40

*Evelyn Hammond—Direct*

Q. Approximately how long did he stay in the hospital? A. Thirteen days.

Q. Taken from there back to your home? A. Yes.

Q. And that is where? A. East Keansburg,  
10 Sunset Place.

Q. Was he put to bed when he was brought back home? A. He was.

Q. And approximately how long a period of time was he confined to his bed? A. I would say about four months, figuring from the time we were first able to get him out at all.

Q. And during that period of four months was this wound, particularly the wound on the heel,  
20 was that dressed? A. It was.

Q. Do you know how frequently? A. Well, of course, I wasn't there in the daytime.

Q. Did you do any dressing at all yourself at night? A. No, because it was too serious for anybody that was not experienced to touch it.

Q. What attention did you give the wound at night, if any, Mrs. Hammond, was given the boy in any way? A. Well, the doctor would leave something for me in case his condition would get  
30 so delirious that I would have to quiet him, and outside of that practically nothing other than his regular care.

Q. Now, after that four months period was he able to get out of bed? A. Up in a wheel chair.

Q. And how frequently did that take place after the four months period? A. Well, whenever somebody would pick him up and put him in it. The wheel chair there was fixed so that he laid flat  
40 from the waist down.

*Evelyn Hammond—Direct*

Q. And for how long a period of time did that continue? A. Oh, I don't know. It seemed quite a while, but it is hard to pin down.

Q. Can you approximate the time that he was in the wheel chair? A. I would say a couple months, it seems. 10

Q. Now, after that period of time did he use crutches? A. Well, he had been trying to use crutches after we had him in the wheel chair. We would try to get him up until within a few months, but when the legs hung down the pain was so excruciating he couldn't stand up, and then both legs being injured he couldn't use crutches only a very few minutes.

Q. How long a time has he been so that he could use crutches and did begin to use crutches? A. I wouldn't say; about February of the following year. 20

Q. February, 1928? A. Yes. I am judging that from the fact that when he first got out of the house without help, without somebody being with him.

Q. Approximately how long a period of time after February, 1928, did he continue to use crutches? A. Well, I guess about a year or over. 30

Q. A year or over? A. Yes, because—

Q. Now after he discontinued the use of crutches did he walk in the manner that he walks here today, on his toe? A. Yes.

Q. Or rather, on his toes; at any time has he been able—have you ever seen him put any weight upon that heel? A. No.

Q. Since he has discontinued crutches, he has been walking in the manner indicated, by putting his weight on his toes? A. Yes. 40

*Evelyn Hammond—Direct*

Q. You have had doctors' bills rendered to you? A. I did, but the majority of them are unpaid.

Q. What are the amounts of the bills and by whom were they rendered? A. Well, Dr. Palmer, 10 I had a bill to December, 1928, which was \$245.

Q. Dr. Palmer has testified that his bill today is \$450? A. Yes.

Q. What is the other doctor's bill? A. It is when Dr. Palmer was away, Dr. Homans saw him and I paid him about \$6. Now the hospital, the first one, the bill was \$96.50. The second time he went to the hospital for skin grafting, the hospital bill was \$78. That was paid. But the \$35 for 20 the operation, Dr. Hazzard's bill, is not paid. And then the first few days he was home, before I could get Mrs. Barton, I had a Mrs. Tilton for three days at \$5 a day, that was \$15, and then Mrs. Barton I had for a couple weeks following that.

Q. What is the approximate amount paid to Mrs. Barton? A. Well, the first two weeks at \$35 would be \$70, and after that I only paid her \$20 a week, which was \$320.

30 Q. That is a total amount of \$320 to Mrs. Barton? A. No, \$390.

Q. Did you incur any other expenses? A. Well, since the last trial I have been paying checks toward the bill as I went along when I could, so I have paid out about \$50 cash in addition to Dr. Palmer's bill that is not paid.

By the Court:

40 Q. What is the total expenditure, Mrs. Hammond? A. Well, the total expenditures, the de-

*Evelyn Hammond—Direct*

tails, of course, accurately, would show, I gave the insurance company when I tried to settle with them and what I paid the last time, because I have had an additional expenditure of about \$258.43.

Q. Now that is hardly responsive; of course, you didn't realize it, but it is quite an improper remark to make. We are not interested in the insurance company. What is the total, Madam? A. \$2,133. 10

Q. And that covers everything, including hospital bills and druggists' supplies? A. Well, shoes, a specially built shoe, for, of course, he wears a specially built shoe all the time, so that the heel doesn't touch anything, quite heavy, crutches and crutch ends. Now we have a therapeutic ray so that he doesn't have to go to the doctor so often; he can put that on in his home every evening. 20

Q. Do it himself? A. Yes.

By Mr. Quinn:

Q. How many gross of bandages have been used? A. Bandages to July were five gross at eighteen cents a dozen; I get them in the cut-rate store, \$129.60. Since that, up to date, we have used four gross, \$103.68. The reason for the drop there in the longer period of time is that the left leg is healed. We only use it on the right foot now so I don't use so many. Then we used aristol powder, a couple ounces of that, at \$5 an ounce. He is now using iodex. We used one a week and I have spent \$31 on iodex. And then there have been prescriptions from time to time, and at one time we used iodoform. I spent \$8 on that. 30 40

*Evelyn Hammond—Cross*  
*Dr. Elmer C. Hazzard—Direct*

Q. Are all of those included in the total of \$2,133, representing your expenditures? A. Everything is included in that.

10 Mr. Quinn: Cross-examine.

CROSS-EXAMINATION by Mr. McCarter:

Q. As I understand, Mrs. Hammond, now the total figure is \$2,133? A. Yes.

Q. Does that include what you owe or just what you paid? A. It is everything, including what I owe and what I paid.

Mr. McCarter: I think that is all.

20

Adjourned till May 5, 1930, at 10:00 A. M.

---

Freehold, N. J., May 5, 1930.

Trial of the cause resumed at 10:00 A. M.

30 DR. ELMER C. HAZZARD, sworn for plaintiffs.

Direct-examination by Mr. Quinn:

Q. Doctor, you are a practicing physician and surgeon of New Jersey? A. Yes.

Q. How long have you been such, approximately how many years? A. In this state?

Q. In this state. A. About fifteen years in this state.

40

*Dr. Elmer C. Hazzard—Direct*

Q. Prior to that where? A. Other states.

Q. The plaintiff was brought to your hospital in the month of May, 1927, Jack Hammond? A. I think so, yes.

Q. And subsequent to that date, Doctor, was he afterwards brought back on April 6, 1928, for the purpose of a grafting operation? A. Yes. 10

Q. And did you attempt that operation? A. Yes, sir.

Q. And what success was met, Doctor? A. With only a fair degree of success.

Q. When he was first brought in, for the purpose of the record, Doctor, will you describe his condition with reference to the heel of the right foot, and the knee, and leg of the left foot? A. Well, Dr. Palmer brought him in. 20

Q. Would you rather have the boy take off his shoe so that you can describe it from actual observation? A. Yes.

(The plaintiff appears before the witness and removes his shoe and stocking.)

By the Court:

Q. Doctor, are you able to describe the boy's injury? A. Well, I am familiar with his injury in a general way. 30

Q. Well, tell in a general way.

By Mr. Quinn:

Q. It will have to come off anyway to describe just where the grafting was done. Now describe for the record, Doctor, just what condition the heel of the right foot was in. A. Well, as I recollect the case, this was all taken off by the accident (indicating heel) exposing the os calcis bone; 40

*Dr. Elmer C. Hazzard—Cross*

his tendons were destroyed or injured, and of course Dr. Palmer operated on it at the time. I know the boy was sick in the hospital and ran a high temperature following the injury, and then subsequently, you said the date was—

10 Q. April 6, brought back for the grafting. A. 1928. He was brought back on this date and skin grafting done. It had gotten down to about here and then the rest of it took place by granulation. It has now reached a place of about the size of a quarter, and I don't think it will ever get any better. I don't think the granulation will take place any further.

Q. And why not, Doctor, in your opinion? A. 20 Because there won't be circulation enough there.

Q. Do you find any difference in the heel now as compared with April 6, 1928, when the operation was performed? A. Well, it is better than it was on April 6, 1928.

Q. Will you describe to what degree, Doctor? A. Well, the skin grafting helped it as far as it was successful.

Q. But in your opinion it will not help it to any greater extent than what it is now? A. No, sir; 30 it will not.

Q. And that is because of lack of circulation at that particular point of the heel? A. Yes, sir.

Q. Then in your opinion, Doctor, is that condition a permanent condition? A. I think so; yes, sir.

Mr. Quinn: Cross-examine.

CROSS-EXAMINATION by Mr. McCarter:

40 Q. You only tried one skin grafting operation, Doctor? A. That is all.

*Dr. Elmer C. Hazzard—Cross*

Q. Don't you think it would be a good plan to try some more? A. I don't think it would help, no.

Q. Why not? A. Because I don't think there is circulation enough there to improve the condition. 10

Q. Isn't there an artery that runs down right to the heel bone there that supplies blood to that part of that heel and the foot? A. Yes, sir.

Q. That is a main artery and has branches, hasn't it? A. Yes.

Q. What is it called? A. The tibial artery.

Q. In spite of that artery you think it will not be possible to cause enough skin to grow on this man's foot? A. I don't think so, no. 20

Q. Of course, if the operation were successful it would be markedly improved, would it not? A. If that healed up, it would be somewhat improved, yes.

Q. There is no less blood now than there was at the time of the first skin grafting operation, is there? A. Yes, because you have got a lot of scar tissue there now.

Q. Even less blood now than there was then? A. Yes. 30

Q. And you think the chances of success or improvement from a further skin grafting operation are too slight to make it worth trying? A. I wouldn't undertake it; no, sir.

By Mr. Quinn:

Q. Will it be necessary for him to walk as he does now in the future, by putting his weight on the toes of his foot? A. Yes.

Q. In your opinion, will that be a permanent condition? A. Yes, sir. 40

Mr. Quinn: That is all.

*William Best—Direct*

WILLIAM BEST, sworn for plaintiffs.

Direct-examination by Mr. Quinn:

Q. How old are you, Billy? A. Fifteen.

Q. And in 1927 did you live around Keansburg?

10 A. Yes, sir.

Q. Did you go to the same school that Jack went to? A. Yes, sir.

Q. You are now living in Jersey City? A. Yes, sir.

Q. You just got out of bed; you have had an operation a week or so ago? A. No, I was in the hospital.

Q. How long have you been living at Jersey  
20 City? A. Two years.

Q. Do you remember the day of the accident?  
A. Yes, sir.

Q. Well, you remember the day it happened?  
A. Yes, sir.

Q. And you saw it? A. Yes, sir.

Q. Will you tell the Court and jury in your own way and words just what you saw and what happened? A. Well, Jack went out to Britton's corner to wait for the bus, and when the bus came  
30 along he caught the handles and stepped on the steps and went a few feet; then the bus gave a sudden jerk forward and he fell and when he fell he closed the door.

Q. You said what went a few feet? A. Well, the bus went a few feet.

Q. And that was after he had his foot on the steps and his hand on the handles? A. Yes.

By the Court:

40 Q. The door open at that time? A. Yes, sir.

*William Best—Cross*

By Mr. Quinn:

Q. Now, after Jack fell off after this sudden lurch, as you have described, what did you notice with respect to the door then? A. Well, the door was closed as soon as he fell.

Q. Who closed it? A. Mr. Wacker. 10

Q. Did you see that as soon as Jack fell off, he then immediately closed the door? A. Yes, sir.

Q. That sudden lurch, Billy, that you saw, which way did the bus lurch, if you can tell us? A. It jerked forward.

Q. It suddenly jerked forward? A. Yes.

Mr. Quinn: That is all. 20

CROSS-EXAMINATION by Mr. McCarter:

Q. Where were you standing as the bus drove up? A. Hahn's corner.

Q. Is that where the crowd of boys and girls were waiting? A. Yes, sir.

Q. Where were you standing when Jack was hurt? A. Right by the pole on the corner.

Q. Right by the pole on the same corner? A. Yes, sir.

Q. Were you talking with Jack at all before the accident happened? A. No, sir. 30

Q. Just saw him there? A. Yes, sir.

Q. And just what did Jack do as the bus drove up? A. Well, he walked over to the other corner.

Q. Walked over toward the opposite corner? A. Yes, sir.

Q. The corner nearer where the bus was coming from; is that right? A. Yes, sir. 40

*William Best—Cross*

Q. What were you doing at this time? A. I was waiting on the corner.

Q. Just waiting on the corner? A. Yes, sir.

Q. Tell me exactly, step by step, what you noticed Jack do and what you noticed happened to  
10 him. A. Well, he walked over on Britton's corner and when the bus come along he grabbed the two handles and jumped on the step.

Q. Was the bus moving as he did that? A. Yes, sir.

Q. Going fast or slow? A. It was going slow.

Q. He grabbed hold of the two handles and jumped on the step? A. Yes, sir.

Q. How far away do you suppose the bus was  
20 from you then? A. About twenty-five feet.

Q. Was it all the way across Ocean Avenue or not? A. No, it wasn't quite all the way.

Q. Not quite all the way across? A. No.

Q. And you were standing right by the telegraph pole at the corner? A. Yes, sir.

Q. Anybody between you and Jack when he jumped on the bus? A. No, sir.

Q. Where was his brother Ned, do you know? A. He was on the corner waiting, too.

30 Q. He was on the corner with you? A. Yes, sir.

Q. Near you? A. Yes, sir.

Q. Do you know the boy named William Vitelli? A. Yes, sir.

Q. Where was he? A. He was on the corner.

Q. He was on the corner, too? A. Yes.

Q. You are sure Ned was on the corner? A. Yes.

40 Q. And sure Vitelli was on the corner? A. Yes.

Q. Were you here yesterday? A. No, sir.

*William Best—Cross*

Q. Now then, you say Jack took hold of the handles and jumped on the steps. Was the door open or shut at that time? A. It was open.

Q. Did you see that for sure? A. Yes, sir.

Q. And then which did you notice first, that he fell off or the bus gave a lurch? A. Well, 10  
the bus gave a lurch first.

Q. The bus gave a lurch first? A. Yes.

Q. Then Jack fell? A. Yes.

Q. And you watched the wheels go over Jack or not? A. No, I didn't see that.

Q. Couldn't see that, or what did you do, turn your head away or unable to see it? A. I was looking at the driver.

Q. You were looking at the driver? A. Yes. 20

Q. How did you happen to be looking at the driver instead of Jack? A. Well, I was watching the door. I didn't notice.

Q. What was there about the door that attracted your attention or interested your attention? A. Well, as soon as he fell off the door was slammed shut.

Q. What attracted your attention to the door rather than this boy you knew had just fallen off? A. Because it was closed. He was closing 30  
it just then.

Q. Yes, but I don't think you understand me. I am trying to find out how it was that you can tell me that you happened to look at the door instead of at this more exciting and interesting sight of this boy falling off. A. I don't know.

Q. You don't know; you just happened to look at the door? A. Yes.

Q. And you say that was immediately shut? 40  
A. He closed the door.

*John Hammond—Direct*

Q. And then the bus drove on and came to a stop over near where you were, I suppose? A. Not quite to the corner.

Q. Not quite to the corner? A. No.

Q. Stopped out in the crossroads? A. Yes, sir.

10 Q. Where were you in July of 1928, do you remember? A. No, sir.

Q. Were you down around this part of the country a year ago last summer? A. I don't remember.

Q. You don't remember? A. No, sir.

Q. How long have you lived in Jersey City? A. Two years.

Q. Two years? A. Yes, sir.

20 Q. Then you were in Jersey City around the 4th of July, 1928? A. Well, I don't remember. I come down for the summer sometimes.

Q. Oh, you came down for the summer?

Mr. Quinn: Sometimes.

Q. Sometime that summer?

Mr. Quinn: Sometimes.

30 Q. You didn't testify at the former trial of this case, did you? A. No, sir.

Mr. McCarter: That is all.

---

JOHN HAMMOND, recalled for plaintiffs.

Direct-examination by Mr. Quinn:

40 Q. Jack, at the last trial you testified to some difference with respect to the concrete and the gravel condition of the road known as Ocean Avenue, with respect to the difference as to height.

*John Hammond—Cross*

Mr. McCarter: I just want to be sure I understood that question right. Did you say something about the last trial?

Mr. Quinn: Yes.

Mr. McCarter: I object. He has no right to contradict his own witness. 10

Mr. Quinn: I will withdraw it.

Q. What was the condition of the two roads, the Port Monmouth Road, the concrete road, and Ocean Avenue, the gravel road? A. Well, one was about two or three inches lower than the other.

Q. And what happened with respect to the wheels of the truck, or rather, of the bus? A. I believe the wheels to have gone off the concrete. 20

Q. And you say that was about two or three inches lower than the concrete? A. Yes, sir.

CROSS-EXAMINATION by Mr. McCarter:

Q. You say you believe that. You, of course, were too badly hurt to be sure of that, weren't you? A. Well, at the time the road wasn't finished, a couple days before. You could notice it around there every day. 30

Q. I am not asking you about the difference in height. You said you believed the bus ran off?

A. Yes, sir.

Q. I say you were too badly hurt to be sure immediately where the bus went after that? A. I wasn't quite sure but I think it went off there.

Q. You think so but you are not sure? A. No.

Plaintiffs rest. 40

*Motion for Nonsuit*  
*Joseph Wacker—Direct*

MOTION FOR NONSUIT.

10 Mr. McCarter: If your Honor please, I  
now move for a nonsuit on three grounds:  
In the first place, on the ground that there  
is no evidence of negligence; in the second  
place, that the case clearly shows contribu-  
tory negligence under the ruling of the Su-  
preme Court—under the ruling of the Su-  
preme Court on the prior point, too; and  
on the third ground that the plaintiff's ac-  
cident was evidently due to the fact that  
he boarded a moving vehicle and that he  
assumed the risks incident to that.

20 The Court: What have you to say, Mr.  
Quinn?

(Mr. Quinn replies.)

The Court: I think I shall hear the de-  
fense in this matter. The motion is denied  
without prejudice.

(Objection noted for defendant as ground  
of appeal.)

30

---

DEFENDANT'S TESTIMONY.

JOSEPH WACKER, sworn for defendant.

Direct-examination by Mr. McCarter:

Q. Where do you live, Mr. Wacker? A. Port  
Monmouth, New Jersey.

Q. How old are you? A. Thirty-seven.

40 Q. How long have you lived in Port Monmouth?  
A. About ten years.

*Joseph Wacker—Direct*

Q. Are you the defendant in this case? A. Yes.

Q. And you have the contract to drive the school bus that takes the children from Port Monmouth to some school? A. Yes.

Q. What school? A. Leonardo, which is the high school, and Port Monmouth, the grammar school. 10

Q. How long have you had it? A. For the last nine years.

Q. Were you driving the bus on the day this young man, Jack Hammond, was hurt? A. Yes.

Q. What time of day was the boy hurt? A. It was eight o'clock in the morning of May 28, 1927.

Q. Were there any passengers in the bus as you approached the corner where Hammond tried to get on? A. Only one boy, named Charles Stava. 20

Q. What road were you traveling along? A. Port Monmouth Road.

Q. What was the name of the street intersecting the Port Monmouth Road where this boy was hurt? A. Ocean Avenue.

Q. Do you remember the day of the month and day of the week? A. The 28th of May, 1927.

Q. The 26th of May, wasn't it? A. The 28th, my report to the Board of Education was the same date turned in. 30

Q. The 28th of May, you say? All right. A. Yes.

Q. Do you know whether the concrete was completed at the corner intersection of the Port Monmouth Road and Ocean Avenue at that time? A. Yes, sir.

Q. Tell us about the accident now. A. Well, coming along my usual way, my second stop would 40

*Joseph Wacker—Direct*

be Ocean Avenue and Port Monmouth Road, where I picked up approximately sixteen or eighteen, sometimes twenty—it all depends on sickness and so on—and coming along that same morning, pulling into the station probably at the  
10 rate of four miles, I don't think it was that much; you could easily walk along; I noticed a commotion on the corner, that the pupils were kind of excited, and so, naturally, looking backward, the motion being I should stop, so I applied my brakes immediately and opened the door and walks out, and there was Jack, of course, lying in the road. So I walked over to Jack and I says, "Jack, what happened to you?" That was the  
20 first thing I told him when I stooped down to pick him up. He says, "Mr. Wacker, the dog got in my way, tripped me and I fell. You ain't at fault at all." That is the true words he said to me in the road when I am taking him over to the store. At the same time we called up the other store to call up the nearest doctor in the vicinity, which was Dr. Palmer. And seeing the confusion on the street, I thought best to get my pupils back into the bus without having any more  
30 trouble, getting the pupils hurt by other cars passing by, so Mr. Stokes, in the meantime, come along and I asked him if he couldn't take the boy and go over to Dr. Palmer, if he sees him on the way to stop him, and continue to his office, wherever he lives. He was the family physician at that time.

Q. What was it Jack said got in his way? A. It was a dog. He even mentioned the dog's name  
40 at that time.

*Joseph Wacker—Direct*

Q. What name did he give? A. I couldn't recall. It was Prince or—it was a police dog.

Q. Was the door open or shut as you drove up?

A. It was shut. That is always my practice, sir.

Mr. Quinn: I move to strike that out. 10

The Court: Yes, strike it out.

By the Court:

Q. What was it this time, closed or open? A. When I got out I left it open, when I got out.

Q. But until then had you opened it? A. Until what?

Q. When you got out? A. When I got out naturally I had to open it; yes, sir.

Q. You hadn't opened it before that? A. I 20 hadn't had it open before that until I stopped the bus and got out.

Q. Had the boy to your knowledge jumped on the bus at any time? A. Yes, it was their practice.

Q. No, I am talking about this particular boy, not the practice; that has nothing to do with it. You say you always wind your watch in the morning, but you may neglect it and forget it sometime, then you may not be believed. A. That is 30 the rule of the Board of Education.

By Mr. McCarter:

Q. Was the door shut this morning? A. Yes, absolutely.

Q. Describe the door. What kind of a door is it? A. It is what we call a swinging inside door, which will break into two pieces and fold right in. 40

*Joseph Wacker—Direct*

Q. When the door is shut is there any step or flange or anything there? A. There is a fringe of approximately a quarter of an inch, which protects the step from getting wore down, or whatever the purpose it is there for.

10 Q. How many steps down to the ground are there? A. Two in the bus.

Q. Two in the bus? A. Yes.

Q. And about how long is the bus? A. About twenty-two feet.

Q. Now, just about where did you bring the bus to a dead stop that morning? A. Well, when I did bring it to a dead stop it was just about two or three feet from my regular stop, that is, from  
20 my regular station.

Q. You brought it to the curb, of course, ordinarily? A. I always do; yes, sir.

Q. And the pupils were on the corner that I think was described as Hahn's corner; was it that? A. Yes, Hahn's corner.

Q. Is that the corner right over the point P. M. on this map? A. Yes.

Q. The corner that I will indicate by the letter H, is that Hahn's corner? A. Yes.  
30

Q. And that is the regular stopping place? A. Yes.

Q. Now is the step covered when the door is closed? A. Absolutely.

Q. Except for this little flange? A. Just that little fringe there, flange, yes.

Q. What was the first you knew that anything was wrong that morning? A. The confusion or disorder in the pupils, the sign on their faces that  
40 something must have happened.

Mr. McCarter: Cross-examine.

*Joseph Wacker—Cross*

CROSS-EXAMINATION by Mr. Quinn:

Q. You were going very slowly as you approached the crossing? A. Yes.

Q. And you had almost come to a stop then? A. Yes.

Q. Going about two or three miles an hour at that point? A. Yes, just drifting in, what we call drifting in. 10

Q. It might not have been two miles an hour, coming up so slowly? A. Yes, you could almost walk alongside of it.

Q. You described it as being almost to a stop. A. Almost it was in position; I wouldn't call it the regular stop.

Q. You tell us again what this boy first said to you after you went around and saw him lying in the road. A. The first word—of course, he was across the street—"What happened to you, Jack?" in the excitement of picking him up. He says, "It ain't your fault at all, Mr. Wacker. The dog got in the way"—named the dog; I forget what he called it. 20

Q. When you were answering that question on direct-examination you left out the words "It ain't your fault at all." This is the first you have said, "It ain't your fault." A. Well, he said that. 30

Mr. McCarter: I object to that as a misquotation. My recollection is that he did mention it.

Q. Did he use those exact words? A. Yes.

Q. "It ain't your fault"? A. Yes.

Q. You remember that distinctly? A. Absolutely. 40

*Joseph Wacker—Cross*

Q. And those are the exact words that the boy used? A. Well, it must be the exact words because that is just the words he used at that time.

Q. Not what it must. Are they in your opinion the exact words he used? A. The exact words;  
10 yes, sir.

Q. And then what did he say? A. "A dog knocked me over. A dog got in my way, I tripped over him."

Q. Do you not recall in answer to a direct question asked by Mr. McCarter saying that "The dog threatened me and I fell"? A. No, he didn't say anything of that kind.

Q. Do you recall just a few moments ago in  
20 answer to a direct question by Mr. McCarter stating that the boy told you that he fell? A. He fell over the dog, yes.

Q. Did the boy say to you, "I fell"? A. No, he tripped, that is what he said.

Q. Do you recall just saying a few moments ago—now listen to my question, please—do you recall stating just a few moments ago in answer to Mr. McCarter's question that he said that "The  
30 dog threatened me and I fell"? A. The dog threatened him?

Q. Yes. A. No, that wasn't the words.

Q. So that if you said that a few moments ago those words were not used by the boy? A. Not threatening. There wasn't a word said about threatening.

By the Court:

Q. He is asking you whether you said it or not.

40 A. No, I didn't.

*Joseph Wacker—Cross*

Q. Why don't you listen to his question? He may assume that you said something you didn't say, and if you didn't say so, say "I didn't say so."

By Mr. Quinn:

Q. Listen to the question. What you meant to say was that the boy told you that he tripped over the dog? A. Yes. 10

Q. That is true? A. Got in his way and he fell over the dog or tripped over him.

Q. Fell over the dog or tripped over him, which? A. Well, you can take it both ways, I suppose.

Q. Do you recall upon the last trial, saying, "I remember to this day, he said 'It ain't your fault, Mr. Wacker, the dog got in my way, the dog knocked me down.'" Did he tell you that the dog knocked him down or that he tripped over him or fell over him? A. Well, it might have been the same words. 20

Q. Not what it might have been, tell us your best recollection. A. I can't recollect down to what was said three years ago.

Q. Tell us your best recollection and that will stand. A. The best recollection I know of is that the boy told me that he fell over the dog or tripped over him; that is the two words that I could— 30

Q. So that when you testified a year and a half ago that the boy told you the dog knocked him down, that is not what he said? A. Well, he might have said that, I wouldn't say. It is similar to both those items. 40

*Joseph Wacker—Cross*

Q. In other words, you are not clear just what the boy did say to you? A. Well, I am almost clear that he told me that the dog was in his way and the dog was the whole cause of it.

Q. Did you see this dog? A. Yes.

10 Q. Before this accident? A. Not the same day.

Q. That is, on the day of the accident, just before the accident happened, did you see this dog? A. I haven't seen him just before that.

Q. When did you first see the dog on that day, at the time of the accident? A. Well, when I picked up Jack and carried him over there was two or three of them around there.

Q. I am not asking about two or three dogs.  
20 You just named the name of this dog, or rather, Jack told you the name of the dog in question? A. Yes.

Q. Now, listen to my question. Did you see this dog in question— A. Yes, sir; I did.

Q. I haven't finished my question yet. Did you see this dog in question on or about the time of the accident? A. Yes, I did.

Q. Just before the accident? A. No, after.

30 Q. How long after? A. Well, immediately, as I was picking Jack up and carrying him over.

Q. Where was that dog at that time? A. Well, about the street.

Q. Tell us what caused a sudden jerk of your automobile or your bus as you approached this corner. A. A sudden jerk?

Q. Tell us about that. A. Well, I never felt any jerk. There is nothing in the way there that  
40 would cause a jerk.

*Joseph Wacker—Cross*

By the Court:

Q. Did you give the bus a sudden jerk? A. No, I didn't.

Q. Well, why don't you say so then?

By Mr. Quinn:

Q. Just answer the question yes or no, if you can. You don't recall the bus at any time just prior to this accident, at about the time of it, taking any sudden jerk? A. No. 10

Q. Were any dogs around your bus at that time? A. Yes.

Q. That day immediately around your bus; is that correct? A. There always were, yes.

Q. Then at the moment of this accident, at the time of the accident, there were dogs around your bus? Where were they? A. I didn't watch the dogs, I watched the people, not the dogs. 20

Q. You have just testified that at the time or about the time of this accident you remember dogs around your bus. Where were they on that morning, in front of your bus? A. They might have been, yes.

Q. You said you remembered they were there. A. I wouldn't say they were in front but they were around the bus. 30

Q. Were they on the side of the bus? A. Because I paid attention to people more than the dogs.

Q. Were those dogs on the side of your bus? A. Might have been, yes.

Q. Not what they might have been; you told the jury you remembered them being there? A. Yes. 40

*Joseph Wacker—Cross*

Q. Now, tell us where they were around your bus. A. They were around the bus.

Q. And if those dogs were around your bus isn't it a fact that they did cause your bus to take a sudden jerk in trying to dodge one of those dogs around your bus? A. No, it didn't.

Q. How many dogs were around your bus at the time of this accident? A. There might have been three.

Q. No more than that? A. I don't think so.

Q. You wouldn't say any less? A. I couldn't recall any.

Q. Now, won't you tell us whether one of those dogs of the three were around your bus just about the time of this accident? A. What is that?

(Question repeated.)

Q. Any one of them. A. Well, I couldn't tell you that.

Q. Well, you saw them? A. Yes, I did.

Q. Well, couldn't you tell us whether they were in front, in the back or on the side? You certainly know where they were if you saw them? A. Yes.

Q. Or do you want to conceal the fact that they were in the neighborhood of your bus? A. They were on the side, they might have been in front. I am telling you I have no recollection of them.

Q. Now, if they were in front you wouldn't run over them; you would naturally swerve to one side? A. I would not.

Q. If they were in front of the bus? A. No, I wouldn't.

Q. To miss that dog, wouldn't you? A. No, I wouldn't.

*Joseph Wacker—Cross*

Q. You say they might have been in front. Won't you see if your recollection is not in front of the bus? A. No, they were not. My eyes were in front.

Q. What did you mean by saying that one of those dogs might have been in front of your bus? 10  
A. Might have been there, too, but I didn't say they were in the front.

Q. Were they on the side? A. I don't know where they were.

Q. You saw them? A. Yes, I did.

Q. Where were they when you saw them? A. One glance was all, but I had my eyes on the people.

Q. Where were those dogs when you saw them? 20  
A. In the middle of the street. Sometimes they follow me half a block.

Q. On this very day, following up your testimony, that at the time of the accident there were about three dogs around your bus; you said one might have been in front of the bus. Can you recall one being in front of the bus? A. No, I can't recall one being in front of the bus.

Q. Might have been on the side of the bus? A. 30  
Yes.

Q. So that you saw three dogs but you can't tell where one of them was? A. No, sir.

Q. How big a bus is yours? A. About twenty-two feet long, about ten feet high.

Q. Carrying how many passengers? A. 40  
Twenty-seven.

Q. A heavy bus? A. Yes.

Q. Do you know the tonnage? A. Yes.

Q. How much? A. 11,000 and about 300. 40

*Joseph Wacker—Cross*

Q. 11,300 pounds? A. Yes, sir.

Q. Now, when the door is closed it is impossible for anyone to get their feet on the step of the bus; isn't that so? A. It is impossible, yes.

Q. Because the door goes over the entire step?  
10 A. It doesn't go entirely over. There is a fringe here about a quarter of an inch.

Q. No, one could put their foot on that quarter of an inch? A. Yes.

Q. There is not enough room for one to put their foot on that step when the door of the bus is closed? A. No.

Q. And the door is a glass door, is it not? A. Yes, sir.

20 Q. How many feet as you sit in the driver's seat are you from the handles of your bus? A. About, I would say, a motion about the same distance as to the steering wheel would be, about a foot.

Q. So as you sat in the driver's seat—I am now referring to the handles on the outside of the bus that they take hold of when they get into the bus. A. I know what you mean.

30 Q. How many feet are you when you sit in your driver's seat from the handles on the outside of the bus that people use to get in the bus? A. How many feet?

Q. Yes. A. Is the handle—

Q. Are you sitting from the handles of the bus which are used by people to get in? A. On the outside of the bus, you mean?

Q. Yes. A. Well, I would say about three feet.

40 Q. About three feet? A. Yes.

*Joseph Wacker—Cross*

Q. And the door which is in this bus is a glass door, so that you can see right through it? A. Yes.

Q. And do you mean to tell this jury, sitting only three feet away, that you didn't see Jack Hammond on your bus, sitting only three feet away from that point where he would take hold of the handles? A. I did not, sir. 10

Q. Where were you looking? A. I was looking the way I should look, driving the bus.

Q. Stand down here, please. You look straight at me. Can you see Juror No. 3? A. Yes, I can.

Q. You can see Juror No. 3 even though you are looking straight ahead of you? A. The lady in the white dress, yes. 20

Q. Can you see Juror No. 2? A. A man.

Q. And he is almost opposite you? A. Yes.

Q. Turn around and see if Juror No. 2 isn't almost opposite. A. Yes.

Q. Now, do you say that sitting in the seat and even looking straight forward, as you have testified to, that you couldn't see the boy, Jack Hammond, only three feet away from you on the left or on the right? A. If he was there I would see him. 30

Q. You didn't see him? A. No.

Q. Although as you stand there now looking directly at me you can see Juror No. 2, that is almost opposite you? A. Yes.

Q. And yet you didn't see Jack Hammond? A. No.

Q. Isn't it a fact that as has been testified to, that you did see him and when the boy fell off by reason of this sudden jar of your automo- 40

*Joseph Wacker—Cross*

bile, that then you immediately closed your door?

A. No, sir.

Q. How many children would you say there were out there waiting on that corner? A. About sixteen or eighteen, as I said before.

10 Q. And you say that at no time did you know that Jack Hammond had been injured or had fallen off your bus, excepting from the look on the faces of the children? A. Yes.

Q. Did you hear anyone yell? A. Yes.

Q. Who? A. I don't know who it was.

Q. Where did the yell come from? A. From the outside.

20 Q. Were all the children on the sidewalk at that time? A. Well, on the sidewalk or thereabouts.

Q. But they were on the sidewalk? A. Some of them, yes.

Q. What? A. Some of them.

Q. Were any of them in the road, the concrete road? A. They were around the pole, around on Ocean Avenue sometimes.

30 Q. But on the Port Monmouth Road there were no children there? They were all on Ocean Avenue? A. On Port Monmouth Road. They were not in Ocean Avenue; on Port Monmouth Road, the sidewalk.

Q. But the children were not on the concrete on Port Monmouth Road, they were either on Ocean Avenue or back from the road? A. Back from the road, yes.

40 Q. So the Port Monmouth Road was free and unobstructed so far as you and your truck were concerned? A. Yes.

*Joseph Wacker—Cross*

Q. About how many feet did you stop from this corner where the children were? A. About two or three feet, I generally pull.

Q. Indicate where you stopped on this day; not what you generally do. A. I stopped about there, about three feet from this corner (indicating). 10

Q. How far were you from the corner when you first noticed the look on the children's faces that caused you to believe that something had happened? A. I may have been probably four or five or six feet.

Q. Six feet? Then you stopped your bus within two or three feet? A. Yes, sir.

Q. Now, do you mean to say that when you were six feet from the corner that by merely looking at the children's faces something came to your mind that something was wrong and you immediately stopped? A. Yes. 20

Q. Is that right? A. A. Yes.

Q. And that brought you within three feet of the corner? A. About that.

Q. Why didn't you go on to your regular stop? A. Well, the commotion that the pupils made, and Jack fell down, and the commotion of some of the pupils made me stop. 30

Q. Jack fell down, did you say? A. That is what I heard through the—

Q. You said Jack fell down. I asked you what made you stop. You said the commotion of the children and Jack fell down. You knew he fell down? A. Well, naturally the people will say he fell down. He wasn't getting out.

Q. My question was directed to you, before you had ever talked to the children, and I asked you 40

*Joseph Wacker—Cross*

what caused you to stop and you said the commotion of the children and Jack fell down. A. Yes.

Q. That is before you talked to the children?

A. Yes.

10 Q. So that you did know that Jack fell down?  
A. Certainly, I knew it, that something happened.

Q. And I asked you what caused you to stop and one of your reasons was that you gave me that Jack fell down; and that is the truth of the matter, that you did know that before you stopped? A. It is the truth, yes.

Q. Before you stopped you knew that Jack fell down, didn't you? A. Before I stopped?

20 Q. Before you stopped. You have just given that as one of the reasons for stopping. A. Yes, a pupil told me.

Q. No, not what they told you. I asked you what made you stop, and you said the commotion and Jack fell down. A. Yes, if you want to have it that way.

By the Court:

Q. Was the boy ever on the bus? A. No, sir.

30 Q. Did you see him on the bus? A. No.

Q. Could he have gotten on the bus? A. He couldn't have got on the bus; no, sir.

Q. Why? A. First of all, the practice is of putting the girls on first.

Q. Well, he couldn't get on the bus. We are trying to find out what the facts were, not what the practice was. A. The door was closed.

40 Q. Because the rule is sometimes broken, everybody knows that. Witness the motor vehicle rules.

*Joseph Wacker—Re-direct*

RE-DIRECT-EXAMINATION by Mr. McCarter:

Q. What did you mean when you answered Mr. Quinn's question then and said Jack fell down?

A. Well, that was the words I understood from the pupils on the corner. 10

Q. How do you understand that from the pupils on the corner? A. Well, some of them called out, shrieked out, "Jack is down."

Q. And was that the first that you knew that Jack was down? A. Yes.

Q. Was that the first that you knew anything about Jack? A. Yes, sir.

Q. What was the first indication to you that anything whatever was wrong or anything out of the way had happened? A. Only from the sign of the pupils on the street, that is, on the sidewalk. 20

Q. And what were they doing to indicate to you something was wrong? A. Well, in a general—described like any juror, you might as well say.

Q. Well, did they call out? A. Some of them yelled out, yes.

Q. What did they yell out? A. Well, "Jack is down." Some of them say he fell down so I couldn't understand them all. 30

Q. Those that didn't yell out, what did they do? A. Well, some of them turned their faces away.

Q. Did you notice whether or not as you were driving up and approaching that corner before you came to a stop, did the bus give any kind of a lurch? A. Not that I can recall. 40

*Joseph Wacker—Re-cross*

Q. Were you in a position where you could have felt the lurch had there been one? A. Absolutely.

RE-CROSS-EXAMINATION by Mr. Quinn:

10 Q. Now, you say to Mr. McCarter that you heard some children call out, "Jack is down." You haven't said that before.

Mr. McCarter: Oh, yes; he said it to me.

Q. Yes, he said but one, but now you say some of them called out "Jack is down." Is that before you came to a stop you heard that? A. Yes.

Q. And how far were you from the corner when  
20 you first heard that? A. About five or six feet.

Q. So that after Jack had fallen down your bus proceeded until you got to at least six feet of the curb before you heard anybody yell out? A. About that.

Q. Between the time that Jack fell down, at the point which he says he fell down, and that six feet point from the curb, you heard children scream out? A. No, not before that.

Q. And then when you heard it you were only  
30 six feet away but you stopped within two or three feet? A. About that.

Q. And it was the yells that caused you to stop? A. Yes.

Q. Were there a number of yells? A. Several of them, yes.

Q. Were they altogether at one time, simultaneously? A. Well, I would say yes.

Q. You could hear plainly and distinctly? A.  
40 I would, yes.

*Joseph Wacker—Re-cross*

Q. Not what you would; did you? Did you hear them yell? A. I did; yes, sir.

Q. Plainly and distinctly? A. Yes.

Q. And when your bus came to a stop three feet from that corner was all of your bus entirely on the concrete? A. Yes, sir. 10

Q. And when you heard these children shout or yell, when you were six feet away, where were those three dogs that you have testified to around your bus? A. About the street, about around the bus somewhere. They generally do, generally used to do.

Q. At the time you heard the children yell those dogs were about the bus, around it somewhere, either in the front or on the side? A. I couldn't say they were in front. 20

Q. Were the dogs jumping and playing in the street? A. No, they were jumping at the boys.

Q. They were jumping at the boys? A. At times, yes. Not that morning. Pardon me.

Q. Oh, you are going to qualify it and say not that morning. Well, now I want to understand it. The only dogs I have been talking about were the dogs that were around your bus at the time of the accident. You said they were jumping at the boys? A. They usually did, yes. 30

Q. Now, I haven't asked you what they usually do, I only asked you what they did that morning, and you testified three were there, and they were jumping at the boys the morning of the accident; that is the truth, isn't it? A. Well, to tell you exactly how it was, you can hear them bark.

By the Court: 40

Q. They generally do, don't they? A. And fighting, in other words, yes, chasing the boys.

*Dr. Joseph M. Rector—Direct*

By Mr. Quinn:

Q. Oh, this morning they were barking and chasing the boys, weren't they? A. Yes.

Q. At least three of them? A. Well, about.

10 Q. And they were jumping and barking at the boys? A. Always do, yes.

Q. And on this morning? A. Yes.

Q. Now, if you will tell us, isn't that exactly what happened; they were so close to the bus that you did make a sudden slight swerve to your side in order not to touch one of those three dogs that were jumping and barking and playing around your bus? A. I couldn't have swerved.

20 Q. I am asking you yes or no. Did you do it? A. No, sir.

Q. In other words, you kept right on past those three dogs that you were jumping and barking about your bus? A. Yes.

By Mr. McCarter:

Q. How fast were you going when those dogs were playing around your bus? A. About two or three or four miles an hour.

30

---

DR. JOSEPH M. RECTOR, sworn for defendant.

Direct-examination by Mr. McCarter:

Q. You are a practicing physician, Dr. Rector?

A. Yes.

Q. How many years have you been practicing?

40 A. Thirty-seven years.

*Dr. Joseph M. Rector—Direct*

Q. Practice in the State of New Jersey? A. Yes, sir.

Q. Did you ever see the plaintiff, Jack Hammond, in this case? A. Yes, sir.

Q. What is the first time you saw him? A. June 23, 1927. 10

Q. Whereabouts? A. At his home in Keansburg, in company with the courtesy of the attending physician.

Q. Dr. Palmer? A. Dr. Palmer.

Q. Tell us what you saw then about the boy. A. The boy was lying in a small room—it is a bungalow, lying in a small room on the west side, lying on his side. He had a wet dressing upon his left leg and upon his right foot, which was removed and then replaced by Dr. Palmer. 20

Q. Did you examine his legs and foot? A. I did.

Q. Tell us what you found, please. A. I found on the left leg there was a granulation or granulating surface on the rear of the leg, extending from the lower part of the thigh across the bend of the knee and down to and upon the calf of the leg on the left side. And upon the right side there was a granulating surface which occupied his heel and a part of the sole of the foot and a part of the dorsum or upper part of the foot. That also was with a wet dressing, that is, a dressing which had been kept consistently wet with an antiseptic solution; and that was removed and beneath that was a granulating area as I have described. That was removed and then replaced by Dr. Palmer. 30 40

*Dr. Joseph M. Rector—Direct*

Q. Did you examine the boy again after that?

A. Yes, sir.

Q. When was the second examination? A. November 4th of the same year.

10 Q. What did you find then? A. I found this, the first described one upon his left leg and thigh, had almost entirely healed. There were still some granulating area over the area I have just described; also upon the right foot there was a small ulcer or granulating area upon the right heel, upon the back posterior surface of the right heel. The remainder had healed by scar formation.

Q. Did you examine the boy again after that?

A. Yes, sir.

20 Q. At the time of the first trial? A. Examined him the 2nd day of July, 1928. It was in the court house here.

Q. Tell us what you found then. A. I found, if I remember correctly, that the left leg was entirely healed but there was still an ulceration on the posterior surface of the right heel, that the boy was walking without any difficulty, that the scar formation which was present on the left thigh and left leg did not interfere with motions at the knee joint. The knee joint was not involved in the granulating process nor was there any motion of the knee joint involved in flexion and extension with the exception that the extension was in full line and arc of motion, and in flexion there was a subjective loss in the full line of arc in motion of about one-fifth. That was not caused by the scar tissue nor injury to the hamstring muscles, or those two muscles you feel in the back here in flexion. They moved freely as

30

40

*Dr. Joseph M. Rector—Direct*

the boy flexed or bent or moved freely, without any sense of pain or without any difficulty or without any interference at all as before, so when I took the foot I could take the foot and bring it right upon his thigh without any difficulty and without any expression of pain. There was some fixation in the right foot, as I remember, because the foot had not entirely healed and because of its position during the healing it had not been exercised constantly and there was some limitation of motion at the right ankle joint. That was not due to scar tissue. 10

Q. Leaving the right foot for a minute and returning to the left leg, Doctor, at the time you made this examination in the court house here, what was the then disability of the left leg, the one that was injured, around the knee? A. There was no disability. 20

Q. Did you notice the young boy yesterday when he had his foot exposed? A. Yes.

Q. Describe the condition then as compared with the condition at the time of the former trial. A. I could only state from where I sat. I sat in the chair next to where the court officer is sitting. There was no ulceration that I could see from that distance upon the sole of the foot. There is a reddened look, as I can see it from that distance, in the back of the heel, at the same position which one gets a blister on a new shoe when they are walking in the hot weather. That is what it has, the same appearance, from that distance. The foot was right, the toes were right, the ankle was moved freely, the toes were moved freely in flexion and extension, that is, bending 30 40

*Dr. Joseph M. Rector—Direct*

and straightening the ankle, or moved by both the boy and Dr. Palmer when he was describing the condition of the ulcered heel.

10 Q. Doctor, what is the prognosis with respect to that foot? A. There would be no disability of the right foot. The boy is irritating that foot constantly with his shoe, which includes that area. Besides that shoe he has a dressing over it; besides that he walks and friction is constantly being applied. That boy should have a shoe in which the heel is cut out, so that there will be no pressure on that heel and there will be no friction on that heel. There is no reason for any ulceration, for raw surface to have existed this length  
20 of time, because we have perfect ways, many ways of healing all those conditions which result from scar formation as a result of burns or scalds, which is practically what this was. It was a gangrenous, tender space. I didn't see it, but it was a granulating surface.

30 Q. By granulating do you mean a scar? A. Granulation is nature's form or method of repairing an injury. That is, when a part of the skin is destroyed it bleeds to start with and gradually nature throws out both from the sides, primarily, until it comes to the center in that tissue formation and then new tissue forms consisting of cells of the same classes that existed there previously, and as those cells coalesce and join themselves together, blood vessels are thrown out and work through like the fingers of the hand or the limbs of a tree, with the accompanying blood-  
40 vessels, both the arteries and the veins, nerve tissues are formed, filaments of nerve tissue are

*Dr. Joseph M. Rector—Direct*

thrown out in connection with and by the supply of the blood vessels; so that circulation, nutrition, sensation and feeling become present as the granulating surface. When it reaches its top and becomes to be healthy and near the surfaces which are the surrounding skin, then skin cells form themselves and those skin cells cover over this area of granulation and we get new skin formed as we find in the ordinary wounds. 10

Q. Has there been a marked improvement in the growth of the skin over this boy's leg from the time you first examined it until the present?

A. As near as I can tell from the distance. I haven't examined it closely.

Q. Has there been a marked improvement from the time you saw it in the court house in May? 20

A. Oh, yes. There was a small area of about an inch or inch and a half on the posterior surface of the heel which originally was a hemorrhagic granulating area involving the heel and the sole and the outer and inner side of the foot, over the area of the tip or lower extremity of the long and short bones of the leg.

Q. Do you know whether or not the entire heel is covered with skin now? A. Well, I can't say exactly that. I can only see it from a distance. If I could see the boy— 30

Mr. Quinn: Have him up there now.

A. I will be able to describe the result of the formation.

(The plaintiff appears before the witness and removes shoe and stocking.) 40

*Dr. Joseph M. Rector—Direct*

A. Upon examination I find on the heel of the right foot scar tissue involving the surface of the heel bone known as the os calcis, on the inside. On the outer side I find scar formation passing upward along the lower end of the outer bone of the leg, called the tibia; I find scar formation upon the outer side of the foot over the area of the heel bone, known as the os calcis, and over a section of the foot bone known as the astragalus, passing forward to the third bone which is known as the scaphoid bone. Solid skin formation is present except for the prominence of the heel; roughly measured by me, the first joint being one inch in length—three-quarters of an inch in length, and about the same in width. I find as regards nutrition the Achilles reflex is present upon the foot. Sensation is present upon the sole. There is no Babinsky.

By the Court:

Q. What is that, Doctor? A. It is the reflex there upon which irritation on the sole of the foot causes extension of the toes instead of the natural bending. This boy can bring his toes up—

30 Q. You mean bent in? A. No, extension.

Q. You mean being able to curl the toes is called Babinsky? A. No, extension. I only noticed that he said he couldn't move his toes. The toes can be very freely used without a bit of trouble. There is some amount of action in that ankle.

The Court: Anything more?

A. Not on that leg or foot. Do you want me to  
40 describe it on the left?

*Dr. Joseph M. Rector—Cross*

The Court: Not unless counsel wants you.

By Mr. McCarter:

Q. Now, Doctor, in view of what you have just seen of the boy's present condition, what would you say as to his future disability, if any, in that foot or heel? A. I would say if the boy received the recognized treatment that we give for those things now that the boy will be well in a very short period of time. 10

Q. What have you to say with respect to skin grafting on that heel? A. I would not graft any skin, because we do not graft skin any more; we have gotten away from that and we have found it is not very good upon raw surfaces. They are not using the skin graft very much, because it is slow in process, and the islands, little portion of skin, throw off and die and fail to grow, then we have got to graft them over again. 20

By the Court:

Q. Could you cure this boy, Doctor? A. Yes, I could cure the boy.

Mr. McCarter: Cross-examine. 30

CROSS-EXAMINATION by Mr. Quinn:

Q. You said, Doctor, so that you can cure any patient? A. I didn't say that.

Q. I am referring to this one patient. A. Yes, I can cure this boy.

Q. Do you mean to say that you can look at a patient and definitely say, "I can cure him"?

A. I said I can cure this boy. 40

*Dr. Joseph M. Rector—Cross*

The Court: Of course that is what we are talking about.

A. Yes, I am talking about this heel, this granulating ulcer.

10 Q. When you give that as your opinion with this new method of process the patient would be in a very short time— A. I didn't say new process, I said improved method of treatment.

Q. But then that would cure him in a very short time? A. I said in a short period of time.

Q. That is your opinion, Doctor? A. That is my knowledge. In fact, I am ready to take the boy.

20 Q. Just answer the question, so we won't be going on with more than one question. That is your opinion, Doctor? A. That is my knowledge of facts.

Q. That is your opinion? I am not asking you about your knowledge as yet. A. Yes.

Q. Do you remember testifying at the last trial about a year and a half ago? A. I remember testifying in the last trial a year and a half ago.

30 Q. You change your opinion then as to what could be done, and this boy could be cured in a very short time? A. Yes.

Q. You say now you are not using the grafting process? A. I said they are not using it so much.

Q. Because it is not satisfactory? A. It is not as satisfactory as the improved process. The improved method brings about a cure and the graft has not brought it out.

Q. Better than which— A. Get me straight.

*Dr. Joseph M. Rector—Cross*

Q. I will get you straight if you will answer the question. You say that there is a new method now? A. I said improved method.

Q. And it is an improved method over the grafting process? A. Yes.

Q. And therefore you do that now entirely or only partially? A. I said partially use it. 10

Q. Why do they use it in some cases, the skin grafting, and in other cases take this improved method? A. It depends entirely upon the injury.

Q. So that in some cases this new method is no better than the skin grafting method? A. It is not as good as the improved method. The grafting is not as good as the improved method.

Q. You don't follow me, Doctor. In some cases this new method that you speak about is not as good as the grafting method? A. I didn't say that. The improved method is not used, if you want this— 20

Q. Answer the question as I have given it to you. Do I understand you to say that this new method in some cases is not as satisfactory as the skin grafting method? A. No.

Q. Wait a minute. Therefore instead of using the new method they go back to the grafting method? A. No. 30

Q. Then do they entirely discard the grafting method? A. No.

Q. Why do they use it if it is not as good? A. Some prefer the grafting and some prefer the transfer.

Q. Then you mean it is only a matter of preference whether they use this new method or use the grafting method? A. No. 40

*Dr. Joseph M. Rector—Cross*

Q. Then why do they use the grating method instead of the new method in any individual case?

A. Individual custom of the surgeon.

Q. Is that the only reason? A. That is the only reason.

10 Q. Then will you say that in your opinion as a medical expert that in all cases the new method that you refer to is more satisfactory than the grafting method, as a medical expert, as you have qualified? A. Yes, with limitations.

Q. You have answered. A. I have the right to limit my answer.

20 Q. What are the limitations? A. With the position of the injury and the difficulty at times of getting the skin plant, and the difficulty of the embarrassment of holding that portion or that injured portion of the exact area on which the transfer is being placed.

Q. And do you consider this injury of the boy plaintiff within that exception that here they should use the new method rather than the grafting method? A. They should use the improved method rather than the grafting method.

30 Q. Because the improved method will bring about the result that you have suggested? A. I wouldn't even say that.

Q. Just answer my question.

(Question repeated.)

A. Neither one would be used in this particular case.

40 Q. What method would be used, in your opinion, in this particular case? A. Assistance in the repair of nature to heal cells.

*Dr. Joseph M. Rector—Cross*

Q. What assistance would that be? A. It would depend on the reaction of the wound to the treatment, which would be palliative.

Q. What would that assistance to nature be?

A. Formation of cells.

Q. How? A. Formation of cell tissue. 10

Q. How? A. By the sending out of cells.

Q. How do you do it? A. Nature does it, I don't do it.

Q. So that now I understand that your opinion is that nature will be the remedy in this case? A. I didn't say that; I said we would assist nature in doing it.

Q. And how? A. I am trying to tell you but you want yes or no and I can't tell it that way. 20

Q. Tell me.

By the Court:

Q. One thing you said, you would relieve pressure by making a hole in the heel? A. Yes.

Q. Then nature would do the rest? A. No.

Q. Well, what will you do? A. As far as I can tell you, as that wound progresses I would start out by taking away the infection from a dirty heel, a dirty dressing, a dirty shoe and a dirty sock. 30  
After I had disinfected that heel by putting on a wet dressing of bichloride of mercury one to one salve, of carbolic acid, one to one-tenth, five per cent picric acid or a three per cent of acetic acid or one per cent of acetone, one of those wet dressings which prevent the infection which is constantly going on on that dirty sore. I said dirty; by that I mean surgically dirty, I don't mean to convey— 40

*Dr. Joseph M. Rector—Cross*

Q. Surgically, not sterile? A. No, surgically. Now, as the infection is taken from that heel I would begin to assist nature by helping to reform the skin which has been lost. The first thing that I would try would be the ultra-violet ray, starting at one second for the first day, two seconds for the next day, five seconds for the third day, depending entirely upon the length of treatment upon the proceeding days as to the reaction which I get on the skin; that is, the traumatized area, I should have said.

Q. Injured area? A. Injured area. I would follow that up with either a preparation which we call bovine, which means ox-blood, and alternate that the next day with nutrient powder which we used to call protonuclein, which is made by Reed & Carnrick, of Jersey City, which is pulverized, dessicated tissue cells.

Q. Now, you are telling us; haven't you gone far enough? Let's stop this clinical discussion. We are getting nowhere, really.

By Mr. Quinn:

Q. You recall testifying in the last trial? A. I do.

Q. And do you recall giving as your medical opinion and the surgical opinion that the method by which a cure could be procured for this boy was by grafting and then a great number of times by putting him under anaesthetic? A. I do.

Q. And have you changed your definite opinion which you gave a year ago as to the method of cure to an entirely different method today?

Mr. McCarter: Almost two years ago.

*Dr. Joseph M. Rector—Cross*

Q. Two years ago? A. Because methods and treatments have changed.

Q. Now, you have answered. Do you recall just a few moments ago stating that now you would attempt to cure this boy by not using the old grafting method but by using this new method that you have referred to? Do you remember stating that a few moments ago? A. I never said new method. I corrected you every time you said so. 10

Q. What did you say? A. Improved method.

Q. Improved new method? A. It is not new.

Q. Do you recall stating a few moments ago that now your opinion was in order to cure this boy you would not use the old method of grafting but you would use the improved method? Do you remember saying that? A. Why, I don't remember saying it. 20

Q. Tell us the improved method that you refer to. A. It is one of the improved methods I am referring to.

Q. When did you first learn about this new improved method? A. We have been working on it back four or five years.

Q. When did you first know and attempt to use it as an improved method? A. I told you to the best of my knowledge we have been working on it four or five years. 30

Q. Then why in the last trial did you say it should be done by grafting and why did you fail to suggest this method if you have been working on it four or five years? A. But it was not in a stage of development but in experimentation and infancy. 40

*Charles Stava—Direct*

Q. You testified in the last case in July, 1928. This accident happened in July, 1927. Do you mean to tell this jury that when you gave your information a year after the happening of the accident that that theory was only in an experi-  
 10 mental stage, a year after its happening? A. This accident didn't happen in July, 1927.

Q. Answer yes or no. A. You are wrong in your facts. Your idea now—

Mr. Quinn: Can we agree on the happening of this accident?

Mr. McCarter: May 26, 1927.

(Question repeated.)

20 A. I can't answer that yes or no.

Q. It can't be answered yes or no? Then that is all.

CHARLES STAVA, sworn for defendant.

Direct-examination by Mr. McCarter:

Q. Where do you live? A. Port Monmouth,  
 30 New Jersey.

Q. How old are you, Stava? A. Nineteen.

Q. Were you one of the pupils that were traveling on the bus driven by the defendant Wacker the day Hammond was hurt? A. Yes, sir.

Q. Where did you get on the bus? A. I got on at the first stop, Port Monmouth. When he first starts out I get on.

Q. That is before the corner of the Port Mon-  
 40 mouth Road and Ocean Avenue? A. Yes.

*Charles Stava—Direct*

Q. How long before? A. I should say about a mile.

Q. Was anybody else in the bus besides you and the driver as you approached the Ocean Avenue corner? A. No, sir.

Q Tell us what you saw about this accident 10  
now? A. Well, as I was sitting in the bus I was in the third seat, the one I get every mornign. We were approaching this corner at a slow rate of speed and I saw a boy, Jack Hammond, ran out towards the bus, he made a pass to get on the bus but he couldn't get it. They just want to hang on the handles.

Mr. Quinn: Objected to.

The Court: Not what he wanted to do. 20

What did you see?

A. I saw him run towards the bus.

By the Court:

Q. What did he do? A. I couldn't tell you after that, because that was on the side. What I saw him do is run towards the bus and then as the bus proceeded towards the corner there was a commotion on the corner and the driver stopped 30  
immediately when he saw the commotion.

By Mr. McCarter:

Q. Now was the door closed or open as the bus approached the corner? A. The door was closed.

Q. Was the door open at any time until Wacker opened it to get out? A. No, sir.

Q. Did you get out when he did? A. Yes, I got out after he did.

*Charles Stava—Cross*

By the Court:

Q. Did you see the boy hanging on the bus?

A. No, sir; I saw him run towards the bus.

Q. That is the last you saw him? A. That is the last I saw him.

10 Q. When did you next see him? A. When I got out of the bus.

Q. You were in the bus? A. Yes.

By Mr. McCarter:

Q. Was your seat in the bus the same side as the door or the other side? A. The same side.

Q. How far back from the door? A. Well, it was in the third seat.

20 By the Court:

Q. In the third seat? A. Just about five or six feet away from the door.

By Mr. McCarter:

Q. When you first saw him after you saw him at the bus he was lying on the road? A. After I got out he was lying by the wheel.

Q. Was his whole body on the concrete or part on the concrete and part on the gravel? A. He  
30 was wholly on the concrete.

Q. Was the concreting of the road completed at that time? A. Yes.

Q. Including the wings into Ocean Avenue? A. Yes.

Mr. McCarter: Cross-examine.

CROSS-EXAMINATION by Mr. Quinn:

Q. You had known the defendant for a long  
40 time, hadn't you, Charles? A. Yes.

*Charles Stava—Cross*

Q. Been riding on the bus with him six years or more? A. Yes.

Q. Very close friend of his, aren't you? A. Yes.

Q. Your family, too? A. Yes, sir.

Q. Now, you say you saw this boy run towards the bus; is that right? A. Yes, sir. 10

Q. What obstructed your view from seeing any more than that? A. Because I can't see out the side.

Q. If you couldn't see out the side how could you see the boy run towards the bus? A. Well, I looked forward. You could see through the front of the bus, you can't see through the side of the bus. 20

Q. You were sitting in the back seat? A. No, sir.

Q. Where were you sitting? A. Sitting in about the third seat, where I always sit.

Q. And the defendant was sitting in front of you? A. He was in the driver's seat; yes, sir.

Q. And you sat about two or three feet back from him? A. In the third seat, I was sitting.

Q. From that point you could see Jack Hammond very plainly? A. No, sir; I could see him in the front of the bus as the bus was approaching the crossing. 30

Q. From the front of the bus you could see him very plainly? A. Yes, the front of it.

Q. Did you ever discuss with the driver that morning, did you ever discuss afterwards, whether or not he can see Hammond through the front of the bus? A. Yes, sir.

Q. He can see him through the front? A. He can see him through the front, as all the children. 40

*Charles Stava—Cross*

Q. There are glass windows in the sides? A. Yes.

Q. If you could see him through the front of the bus why couldn't you see him through the side windows? A. Because you can't see down there that low. If you are sitting on a level your head is probably a foot over the window or so, and you are not looking down that way, you are looking straight out.

Q. You mean to say that sitting in a bus with your head about a foot or more above the window, that you can't see down to the side of the ground on the side of you? A. If you strain your neck you can, yes.

20 Q. Do you mean to say that you can't do it without straining your neck? A. No, sir.

Q. Isn't it a fact that sitting in that bus you merely turn your head to look down? A. This was not the identical side.

Q. Isn't it a fact that you can look through the front and see everything on the side? A. You can look through the front, yes.

Q. But you can't look through the side windows and see what is going on on the side? A. No, 30 sir.

Q. So that you saw Jack Hammond from the front of the bus; that is the last you saw him? A. Yes, sir.

Q. How far away from the corner where the children were waiting was the bus when you first saw Jack Hammond? A. The bus was about, I should say, twenty-five feet away from the corner when he was approaching the bus window. 40

*Charles Stava—Cross*

Q. Now, let me get that straight. So that when you first saw Jack Hammond through the front of the bus window the bus was then about twenty-five feet away from the corner where the children were standing? A. Maybe some twenty-five or thirty feet away. 10

Q. Then the bus was thirty feet away from the corner? A. Yes.

Q. Where the children were standing? A. Yes.

Q. And was the bus going very slowly at that point, thirty feet away? A. Yes, it was.

Q. It had almost come to a stop at that point, had it not? A. Yes.

Q. And then when you saw Jack Hammond 20  
thirty feet away he was in front of the bus? A. He was in front of the bus. He was walking towards the bus at that time, already off the corner.

Q. After that you don't know what happened; you didn't see any more? A. I didn't see any more.

Q. And when you saw him running and you were thirty feet away how do you know he was running towards the bus if he was right in front of it? A. He met the truck, I say. 30

Q. Are you testifying in this case simply because you know what might have happened with other children? A. No, sir.

Q. If you saw Jack Hammond thirty feet away from this corner right through the front of the bus how did you know where he was going, what he was going to do? A. I didn't know what he was going to do; he was walking towards the bus.

Q. Walking towards the bus? A. Yes. 40

*Charles Stava—Cross*

Q. He wasn't running? A. I don't remember whether he was running or not.

Q. He was coming towards the bus, as far as your knowledge goes. You can't tell whether he was walking or running? You can't tell when you  
10 saw him through the front of the bus whether he was walking or running? A. He was walking at that time when I saw him through the front of the bus.

Q. But you are assuming that when you saw him in front the bus was just about thirty feet away from the corner? A. It was a good distance.

Q. About thirty feet? A. I don't know how  
20 far it was. I haven't any idea.

Q. Did you hear or see those dogs barking around the bus? A. I didn't notice any dogs.

Q. Did you hear them? A. I didn't notice.

Q. Did you hear them bark? A. No, sir.

Q. Didn't you notice any dogs around before or after the accident? A. I noticed dogs around after but I wasn't paying any attention.

Q. Immediately after the accident did you notice dogs? A. Not immediately after. Prob-  
30 ably five or ten minutes after they were around the bus.

Q. Were not around the bus? A. Not right afterwards.

Q. When you got out of the bus did you see any dogs? A. Not immediately, no.

Q. When you saw Jack Hammond at this point thirty feet away or he was walking toward the bus, did you notice anything else in front? Did  
40 you see the children standing on the corner? A. The children were on the corner, yes.

*Charles Stava—Cross*

Q. Did you see Mr. Wacker? Did you see what he was doing? A. Yes.

Q. Were you looking at Mr. Wacker? A. I was looking out the front, yes.

Q. Were you paying any particular attention to Mr. Wacker? A. No, sir. 10

Q. Were you paying more attention to the children standing on the corner? A. I always look at the children, yes.

Q. Did you hear someone yell? A. There was a commotion as we—

Q. Wait a moment. That is what Mr. Wacker said, a commotion. I asked you about a yell. A. I don't know whether there was any particular yell or not. 20

Q. Did you hear any children yell immediately after you heard quite a commotion? A. They shrieked more or less, the girls.

Q. And how far away from the corner were you when you heard the first shriek? A. Well, it wasn't far. The bus was—

Q. How far? A. Oh, about seven feet away from the corner, I guess.

Q. So that you were about seven feet away from the corner when you heard the first shriek? 30  
A. Yes.

Q. And then you were almost to a dead standstill, were you not? A. Well, it was just rolling slowly.

Q. Were the brakes put on quickly at that time or not? A. They were put on; yes, sir.

Q. Then you stopped when; how many feet from the curb? A. About three feet.

Q. Now, up to that point, or rather, beginning 40  
with the thirty foot mark, you were paying at—

*Charles Stava—Cross*

tention to the children, you said you saw the driver of the car? A. Yes, sir.

Q. And yet you say at the time of the accident, or rather, immediately around the time of the accident, the door was closed. Why did you pay  
10 particular notice to that? A. To what, the door?

Q. Yes, that the door was closed? A. The door always was closed.

Q. Is that the reason you are testifying, young man, under oath, that this door was always closed and therefore should have been closed this day? A. The door was positively.

Q. Isn't it a fact that the door was not always closed and that the children, the first one that  
20 got there, got in that door? Now, think that over. Isn't it a fact that many times it was open and many times the children tried to get that first seat?

Mr. McCarter: Objected to as immaterial.

A. No, sir; it was not.

The Court: He answered in the negative.  
30

Q. You have testified it was always closed and that this particular morning it was closed? A. Yes, sir.

Q. You don't recall the driver, Mr. Wacker, closing the door after this boy fell off? A. No, sir.

Q. When did you see him open the door? A. After he stopped the bus.

Q. Anyone in front of you at that time? A. He stopped the bus, I know—  
40

*Charles Stava—Cross*

Q. I haven't asked you a question.

The Court: Let him answer.

Mr. Quinn: I haven't asked him one.

A. You asked me a question, when did he open the door, so I am answering your question. 10

Q. Tell us when he first opened it? A. After he stopped the bus.

Q. At that time who else was in the front part of the bus? A. Who else?

Q. Yes. A. The children were on the side of the bus. There was nobody in the front of the bus.

Q. Who was on the side of the bus? A. The children on the corner. 20

Q. But who else was in the bus in the front, I mean? A. There was nobody in there.

Q. You were the only one in the bus? A. Yes.

Q. The only passenger? A. Yes.

Q. At that time? A. Yes.

Q. But you don't recall him shutting this door immediately after Jack fell off? A. No, sir.

By the Court:

Q. Did he close the door? A. No, sir. 30

By Mr. Quinn:

Q. Do you know Billy Best? Did you know him at that time? A. I know him by sight, but I didn't know his name.

Q. He was there that morning, was he? A. I don't remember.

Q. You don't remember seeing him? A. No, sir.

Q. Don't you remember him as one of the children who always got in the bus every morning 40

*Charles Stava—Cross*

to go to school? A. I didn't know him personally.

Q. By sight? A. By sight, yes.

Q. He was one of the children who always got on the bus to go to school?

10

The Court: Is he here?

Mr. Quinn: That is the one who testified this morning.

The Court: Stand up.

(William Best stands.)

By the Court:

Q. Did you ever see that boy before? A. Yes.

Q. Ever see him on the bus? A. Yes.

20 Q. You recognize him? A. Yes, sir.

The Court: All right.

By Mr. Quinn:

Q. You got out of the bus immediately, did you? A. After it was stopped, yes.

Q. Where did you go when you got out? A. I went out towards the back where all the children were in a commotion and ran towards where the commotion centered.

30 Q. You ran over to where Jack was? A. Yes.

Q. At that particular point you saw no dogs whatever? A. No, not on that morning.

Mr. Quinn: That is all.

*Leonard Harms—Direct*

LEONARD HARMS, sworn for defendant.

Direct-examination by Mr. McCarter:

Q. Where do you live? A. On Ocean Avenue.

Q. In what? A. Ideal Beach.

Q. Did you live over there in that neighborhood 10  
in May, 1927? A. I did.

Q. Are you one of the boys that took this bus  
to school, driven by the defendant in this case?  
A. Yes, sir.

Q. Were you there the day this plaintiff, Jack  
Hammond, was hurt? A. Yes, sir.

Q. Tell us about that, where you were standing  
and what you saw and everything. A. I was  
standing on the corner in front of Hahn's store 20  
and I saw Jack run up to the bus and then I don't  
know what diverted my attention, but the next  
thing I remember seeing is Mr. Wacker running  
out of his bus, that is all.

Q. How close did you see Jack get to the bus?  
A. Oh, I don't know; a few feet.

Q. Can you say whether the door of the bus was  
open or closed at that time? A. No, not at that  
point.

Q. Did you see Mr. Wacker open the door and 30  
get out? A. Yes.

By the Court:

Q. Was the door closed when he started to get  
out? A. Yes.

Q. He had to open it to get out, did he? A.  
Yes, sir.

By Mr. McCarter:

Q. Did you actually see the bus pass over Jack? 40  
A. No, I didn't.

*Leonard Harms—Cross*

Q. Did you see Jack lying in the road after the accident? A. Yes.

Q. Where was he lying, on the concrete or on the gravel or where? A. On the concrete.

Q. How far from the corner was he lying?  
10 Hahn's corner, I am talking about. A. I guess about between fifteen and twenty feet, I guess.

Q. About how fast was the bus going when Jack ran out and got close to it? A. About three or four miles an hour.

Q. How many boys and girls were in the crowd waiting for the bus there? A. About fifteen.

Q. The usual crowd? A. Yes.

Q. Whereabouts did the bus stop that morn-  
20 ing? A. I didn't get the question.

Q. Where did it actually come to a stop when Wacker got out? A. About three feet from the usual station.

Q. And where is that usual station? A. Right at Hahn's corner there.

Q. Right at the corner? A. Right at the corner.

Q. Right up against the curb? A. Yes.

Q. When you first noticed the door was it open or closed? A. I couldn't see it from that point.

30 Q. When you first noticed it. A. Oh, you mean after—

Q. When you first noticed it, whenever it was. A. It was closed.

Mr. McCarter: All right. Cross-examine.

CROSS-EXAMINATION by Mr. Quinn:

Q. At what point were you when you couldn't  
40 see the door, whether the door was open or closed?

A. When I first saw the bus?

*Leonard Harms—Cross*

Q. No, Mr. McCarter asked you whether you could see the door, whether it was open or closed; you said you couldn't see it from that point. A. I think he meant from that point.

Q. When Jack ran out to get on the bus you say you couldn't see it from that point? A. No. 10

Q. About how many feet was that away, about, as they say, thirty or thirty-five feet away from the corner? A. About twenty-five or thirty.

Q. So the bus was twenty-five or thirty feet away from the corner, and at that point you couldn't tell whether the door was open or not? A. No.

Q. Although you were looking right at the bus? A. Yes. 20

Q. What prevented you from telling whether the bus door was open or shut when you were twenty-five or thirty feet away from it? A. At the angle I was standing. I was standing right on the corner.

Q. After you saw Jack fall did you run right over? A. No.

Q. What did you do? A. Why, for a minute I stood there.

Q. Looking at him? A. Well, taking everything 30 in in general.

Q. Well, were you looking over in the vicinity where he had fallen? A. When do you mean?

Q. When you saw him fall I want to know what observations you made then; did you run over to him? A. No, I just stood there.

By the Court:

Q. How did this accident happen? You saw it.

A. I didn't see it. I seen them run up to him. 40

Q. Didn't see the boy fall? A. No, sir.

*Leonard Harms—Cross*

Q. Didn't see the bus run over him? A. No.

Q. Any dog around there? A. I can't remember.

By Mr. Quinn:

10 Q. After he fell I want to know how you observed the bus. Here was a boy lying in the road and the bus at that point when he fell was about thirty-five feet away from the corner where you were standing? A. About twenty-five.

Q. Then you couldn't see whether the bus was open, but you do say afterward when the bus came up to the corner that you noticed then that the door was closed and Mr. Wacker had to open the door to get out? A. It stopped directly in front  
20 of me.

Q. Were you at that time looking at Hammond lying in the road? A. I didn't see him.

Q. Did you see Mr. Wacker get out of the bus? A. Yes.

Q. Do you mean to say you were watching Mr. Wacker get out of the bus while this boy lay on the sidewalk twenty-five feet away? A. Yes, it all happened so quickly and it took only a few  
30 seconds till he got out of the bus.

Q. You mean after he stopped? A. Yes.

Q. Well, there was some time elapsed after Jack fell till he got out of the bus? A. Well, I didn't know he fell down.

Q. You didn't even see him slip at all? A. No.

Q. Did you see him lying on the ground at that time? A. Yes, about the same time, I guess, as I saw Mr. Wacker come out.

Q. What? A. About the same time that I saw  
40 Mr. Wacker get out of the bus.

*Leonard Harms—Cross*

Q. It was not until the time Wacker got out, then, that you saw him? A. Yes.

Q. So that you waited a long time after that time until Mr. Wacker got out of the bus before you went over there? A. Well, I wouldn't say that. It happened in such a short time that I just saw Mr. Wacker come right out of the bus and then everybody went over there. 10

Q. Didn't you see Jack get right up close to the bus and get his foot on the step? A. No, I say I saw him running toward the bus.

Q. Where was he when you first saw him run toward the bus? A. Oh, I guess about ten feet from the corner.

Q. About ten feet from the corner? A. Yes. 20

Q. The bus was only twenty-five feet from the corner at that time? A. Yes.

Q. Well, you could see him plainly ten feet from the corner, yet you can't tell the jury whether that door was open twenty-five feet away? A. Well, it takes you only a second to look but it takes you longer to walk.

Q. You could see Jack ten feet from the corner, yet you couldn't tell the jury whether the door was open, which was only twenty-five feet from the corner? A. No, sir. 30

Q. So that you don't know what happened between that twenty-five foot point and the corner? A. No.

*Vivian Disbrow—Direct*

VIVIAN DISBROW, sworn for defendant.

Direct-examination by Mr. McCarter:

Q. Where do you live, please? A. Ideal Beach.

Q. And how old are you now? A. Sixteen.

10 Q. Were you one of the boys and girls waiting for the bus the morning of the accident that we are interested in happening? A. I was.

Q. Where were you standing? A. Standing on Hahn's corner waiting for the bus.

Q. Whereabouts on Hahn's corner? A. I was standing on the sidewalk. All the girls were in line.

20 Q. Will you tell us just what you saw about the accident? A. Well, I was watching the bus coming, the driver was at the corner and I saw Jack run towards the bus; then the next thing I knew Jack was on the ground and I yelled at Jack and that is all I remember, because I was so stunned I couldn't move one way or the other.

Q. Was the door open or closed at that time? A. I remember the door being closed.

30 Q. Where did you see Jack right after the accident? A. He was lying about halfway between Hahn's corner and the opposite corner.

Q. On the cement entirely or partly on the cement and partly on the gravel? A. No, the cement.

Q. Where did the bus stop? A. The bus stopped—what I remember, I imagine the bus was right in front of the telephone pole there.

Q. How far was that from its usual position? A. I should judge about five feet.

40 Q. What did you do then? A. I just screamed.

Mr. McCarter: Cross-examine.

*Vivian Disbrow—Cross*

CROSS-EXAMINATION by Mr. Quinn:

Q. When you saw Jack fall did you then scream and turn your head away? A. Yes.

Q. Just as soon as you saw him fall you just screamed and turned your head away; therefore you couldn't tell whether the door was open or shut at that point, because when you saw him fall you screamed and turned your head away? A. I was watching the bus coming, and when the bus was coming, before I saw Jack go to the bus, I saw the door was closed. 10

Q. Before Jack started you say the door was closed? A. Yes.

Q. How far away was the bus then? A. The bus was just on the opposite corner. 20

Q. Just before Jack started off the corner to get it? A. I should say so, yes.

Q. About how many feet away? A. About twenty-five feet, I guess, twenty-five or thirty feet.

Q. Aren't you wrong in that? It was twenty-five or thirty feet away, Jack got on the bus? A. I couldn't say about the feet.

Q. Was it entirely across Ocean Avenue? A. Yes, it was entirely across Ocean Avenue.

Q. Further away than that, even? A. No, not further away than that. 30

Q. It was just coming into the crossroad of Ocean Avenue? A. Yes.

Q. And when it was just coming into Ocean Avenue Jack hadn't yet left the corner to go get it? A. I wouldn't say that.

Q. How far was the bus from the place where he was standing when Jack first left the corner to go get on the bus? A. I couldn't say that. 40

*Vivian Disbrow—Cross*

Q. Why not? A. I know the bus was at the opposite corner, the next thing I saw I saw Jack run over to the other corner. I saw him running to the bus.

10 Q. Was the bus on the opposite corner when you first saw Jack go over, run across to that corner? A. No, sir.

Q. Where was Jack then? A. Jack was on the opposite corner then, as I remember.

Q. You don't understand my question. When you saw this bus on the opposite corner at the time that you say you saw the door closed, was Jack still on the corner that you were on or had he left the corner? A. He had left.

20 Q. Where was he then? A. I couldn't say.

Q. Did you see him? A. I saw him, yes, but I can't remember whether he was on that corner or whether he was in the street, it all happened so long ago.

Q. Did you see how far he got across the street before he was hurt? A. No, sir; all I remember, when I saw him again he was lying about half-way in between the two corners.

30 Q. Now, as it pulled up to the corner where you were standing, did you notice that the door was closed? A. I wasn't looking then; I was looking at Jack.

Q. So when you noticed the door was closed it was away on over past the corner? A. It was inside the corner.

Q. What else did you notice about that bus except that the door was closed? A. I didn't notice anything.

40 Q. There is no single thing that you can remember about that bus except that the door was closed? A. No, sir.

*Vivian Disbrow—Cross*

Q. Did you know Mr. Wacker a long time? A. Yes, sir.

Q. Did you talk with Mr. Wacker about it? A. No, sir.

Q. Did you talk with anybody in respect to this collision at the corner? A. No, sir. 10

Q. You did talk to Mr. Wacker about it? Did you say at the last trial that you talked with certain people about this case? A. No, sir.

Q. You didn't know what you were going to tell today? A. I knew what I was going to tell, of course.

Q. You didn't talk with anybody about it at all? A. No, sir.

Q. Didn't you say in the last trial: "Q. Didn't 20 Mr. Wacker talk to you when he came around last Saturday? A. Yes, sir." A. I don't recall that.

Q. "Q. Didn't Mr. Wacker talk to you when he came around last Saturday? A. Yes, sir. Q. And didn't another man come around and talk to you? A. Yes, sir. Q. Didn't they talk the case over with you? A. Of course." You did say that, didn't you? A. I don't remember; I may have. I don't remember, it is so long ago.

Q. Did you say you thought you did? A. I 30 wouldn't say that I did or didn't.

Q. You don't even remember talking to Mr. Wacker? A. No, I didn't talk to Mr. Wacker.

Q. So it is very distinct in your mind that the only thing you recall about that bus was that the door was closed, only you don't remember ever talking to Mr. Wacker? A. No.

*Betty Roughgarden—Direct*

BETTY ROUGHGARDEN, sworn for defendant.

Direct-examination by Mr. McCarter:

10 Q. Where do you live? A. At Keansburg.

Q. And how old are you now? A. Fifteen.

Q. Were you one of the girls who rode on this bus to school the day Jack Hammond was hurt?

A. Yes, sir.

Q. Were you at the corner of the Port Monmouth Road and Ocean Avenue at that time waiting for the bus? A. Yes, sir.

20 Q. Whereabouts were you standing? A. By Hahn's corner on the sidewalk with the rest of the girls.

Q. Did you see the accident? A. Yes, sir.

Q. Tell us what you saw, please. A. When the bus was coming Jack ran toward the bus.

Q. Yes? A. The next thing I know he was on the road.

Q. How close did you see him get to the bus? A. I don't know how close it was.

Q. What did he try to do with the bus that you saw? A. He tried to get on the bus first.

30 Q. How did he come to fall, do you know?

Mr. Quinn: Objected to as leading.

By the Court:

Q. What happened? You tell in your own way. You saw it. You were there. A. He ran towards the bus.

Q. Was the door open? A. The door was closed.

40 Q. Was the door open at any time before he fell? A. No.

*Betty Roughgarden—Cross*

Q. What did he do when he ran towards the bus? A. I don't know.

Q. Did he get to the bus? A. I don't remember.

By Mr. McCarter:

Q. Did you see him after the accident? A. 10  
Yes, I saw him laying on the road.

Q. Where was he lying? A. On the cement.

Q. Whereabouts did the bus stop that morning?

A. Oh, about two feet from the regular place.

Mr. McCarter: Cross-examine.

CROSS-EXAMINATION by Mr. Quinn:

Q. You didn't see Jack with his hands on the 20  
handles and his foot on the step of that bus?

A. No.

Q. Then how can you tell us, if you didn't see him holding on one of the handles and a foot on the step of that bus, how can you tell us whether that door was shut? A. I saw it when it was coming toward us.

Q. How far away was it? A. I don't know.

Q. Was Jack out in the road when you saw 30  
that? A. I don't know.

Q. Was Jack out in the road when you first saw the bus coming down the street at the time you say the door was closed? A. He was running towards the bus.

Q. And was it when Jack was running towards the bus that you say that the bus door was closed? A. Yes.

Q. And had Jack reached the bus, too, at that time? A. Well, I don't know. 40

*Betty Roughgarden—Cross*

Q. Well, if at the time he was running towards the bus and you were not able to see how close he got to the bus, how can you tell us that the bus door was closed rather than open? You couldn't even see Jack, don't know how close he  
 10 got to the bus, do you? You have known Mr. Wacker a long time, haven't you? A. Yes.

Q. For years you have gone down on the bus with him? A. Three years.

Q. He talked the case all over with you a short time afterward? A. No.

Q. Somebody had afterward? A. No.

Q. No one talked to you about it at all? A. No.

Q. Didn't even know what you were coming up  
 20 here for today? A. Yes, I knew that.

Q. Who told you that? A. When I got my subpoena.

Q. That is the first you knew it? A. Yes.

Q. Again at the last trial when you got your subpoena was the first you knew what you were going to tell? A. Yes.

Q. Didn't discuss it with anyone at all? A. No, sir.

Q. Did you see Mr. Wacker close that door  
 30 when Jack fell? A. No.

Q. Did you see Mr. Wacker after the bus came to a stop? A. No.

Q. Tell us what prevented you, if Jack was right out in the middle of the road and you could see the door of the bus, tell us what prevented you from seeing Jack being hurt. A. I don't know; maybe I turned around and talked to the girls or something.

*Mrs. Anna Bolz—Direct*

Q. But then the only thing you saw when you looked down was that the bus door was closed and nothing else? A. And Jack was running towards the bus.

Q. And those are the only two things that you recall seeing? A. Yes. 10

Q. Did you see the front of the bus? A. Yes, as it was coming towards me.

Q. Were any of the windows in the front of the bus up or were they all closed? A. I don't know whether they were closed or not.

Q. And the bus was coming towards you? A. Yes.

Q. Now you can't remember whether the windows in front of the bus were closed, yet you can remember distinctly the door on the side of the bus was closed? A. Yes. 20

Q. In other words, you took more attention, that single glance to the side of the bus, rather to the front of it, than when it was right in front of you; you can't tell us a thing about the front of the bus, whether the windows were up or down, can you? That is all.

---

30

MRS. ANNA BOLZ, sworn for defendant.

Direct-examination by Mr. McCarter:

Q. Mrs. Bolz, where do you live, please? A. On Port Monmouth Road, East Keansburg.

Q. And how far is that from the corner where this accident happened? A. Oh, I should judge about seventy-five feet. 40

*Mrs. Anna Bolz—Cross*

Q. From where the bus starts or where the bus ends? A. Where the bus ends.

Q. From where it ends? A. Yes.

Q. Did you see this accident happen? Do you live near this place? A. Yes, sir.

10 Q. Did you see the accident that morning? A. Well, not exactly. I was out in front of the door and I seen the bus pass and I turned around and I went to go in when my daughter came running over and said, "Mother," and I turned around and I seen Jack Hammond laying there.

Q. I want to ask you one question before we go any further. When this bus passed you that morning did you notice whether the door was open  
20 or closed? A. It was always closed.

Mr. Quinn: Objected to.

Q. I didn't ask what it was every morning; was it closed that morning? A. It was closed.

Q. Did you see Jack lying on the road after the accident? A. Yes.

Q. Was he lying on the concrete or on the gravel or what? A. On the concrete.

30 Mr. McCarter: That is all.

CROSS-EXAMINATION by Mr. Quinn:

Q. How far is your home from the place where you say you saw the door closed? A. Right across the way. It has to pass my door.

Q. How many feet away would you say? A. From where the door is?

Q. How many feet from the bus is your home? A. I should judge about four feet, I guess.

40 Q. Four feet from the bus? A. Four or five feet.

*Mrs. Anna Bolz—Cross*

Q. Your home is four feet from the bus? A. Well, I can't give it making true figures, you know.

Q. I don't want to perplex you. You would be out in the road if that was so. A. I am fifteen feet off from the property line of the building. 10

Q. Do you live on the opposite side of the street? A. Opposite where the bus runs, yes, going towards Ocean.

Q. You don't live on the one where the girls get in the bus? A. No, sir.

Q. On the opposite side? A. On the opposite side.

Q. So that you did see, looking right through 20 one side of the bus to the other side, and tell when the door was open? A. I could tell by standing at my window.

Q. And this morning you did, didn't you? A. For reasons my attention was drawn to that.

Q. Why? A. One of the children, because I always questioned that to that effect quite a few years ago, because there was so many children in that bus.

Q. And this morning you were watching for 30 that particular thing? A. No, not that morning. I always watched it.

Q. So you looked through the windows and saw that it was open? A. Saw that it was closed.

Q. How far away was he from the corner at that time? A. I should judge he was about thirty-five feet.

Q. And that you just took a glance at it but then went away? A. No, I generally watched the children as they would try to get on the bus. 40

*Mrs. Anna Bolz—Cross*

Q. I am talking about the days when you saw that this bus had the door open. A. No, I stand there. I always watch the children get it.

10 Q. I am not talking about the children, I am talking about the door. You looked through this bus, over the head of the driver, and saw that the door was open? A. Yes.

Q. You could see quite clearly? That was thirty-five feet away? A. Yes.

Q. And then at that point did you keep right on looking till the bus came to a stop? A. Yes.

Q. At the door? A. Well, someone shut that door and it passed.

20 Q. What else did you notice about this that morning besides the fact that the door on the opposite side was open?

Mr. McCarter: Closed, she said.

Q. Closed, rather. A. I always watch the way he comes down.

Q. Tell us what else you noticed about this bus except the fact that this door was closed. A. I didn't notice anything.

30 Q. Did you notice the front of the bus?

The Court: The witness ought not to be unduly pursued.

By the Court:

Q. Your best impression is the door was closed, is it? A. Well, yes.

40 The Court: The witness is entitled to some bit of protection, I assume, against pursuing agencies, now, Mr. Quinn.

Mr. Quinn: Yes, if your Honor please.

*Mrs. Anna Bolz—Cross*

By Mr. Quinn:

Q. Do you know Mr. Kleisser? A. No, sir.

(Mr. Kleisser stands.)

By the Court:

Q. Did you ever see him before? A. Yes. 10

Q. You do know him then? A. Not to talk to.

Q. You would have to have an introduction before you talked to him? A. Yes, sir.

Q. Never been introduced to him? A. No, sir.

By Mr. Quinn:

Q. Who did you see him with? A. I met him down on the beach with Jack Hammond's mother at the time of an accident on the beach.

Q. It was after this particular accident? A. 20  
Yes.

Q. You had a talk with him, didn't you, about this particular accident? A. Mrs. Hammond brought it up.

Q. Didn't you tell or didn't you state to Mrs. Hammond in the presence of of Mr. Kleisser that you saw this accident and this accident happened because dogs were in front of the machine and the defendant in order to avoid the dogs, he suddenly 30  
put on his brakes or did something else quickly with his car? A. I didn't tell Mrs. Hammond that.

Q. Didn't you say the dogs ran in front of his car? A. I told Mrs. Hammond that there was dogs always followed that bus.

Q. And there were this morning? A. Posi-  
tively.

Q. And those dogs were in front of the bus? 40  
A. Not in the front of the front wheel but always ran slanting with the front wheel.

*Mrs. Anna Bolz—Cross*

Q. And didn't you tell Mrs. Hammond that you saw the defendant Wacker do something with his bus? A. I positively did not.

Q. I haven't asked any question. You have known Mr. Wacker for a number of years? A.

10 Yes, sir.

Q. Why were you discussing this fact with Mrs. Hammond on this morning, that there were a number of dogs around the bus? A. I didn't mention that to Mrs. Hammond.

Q. You just said you mentioned it? A. I said that there was certain times that this large dog, Bruce, they called him, always went to the front wheels, you know, slanting, sideways; he went to  
20 the front of the bus always, not that he would get in the way of the bus, but for the wheel.

Q. Don't volunteer that he was in the front of the bus, he was in the way of it. The jury will settle those. On this particular morning did you see this dog right in front of the wheel of the bus? A. No.

Q. You just said you saw a dog. A. I said I saw him running to the side of the wheel, yes.

Q. Which wheel, left or right? A. The left  
30 wheel.

Q. And he was right close to it? A. Well, I didn't notice that so particularly, that he was close to it.

Q. If you couldn't notice the dog running up to the wheel and the dog was close to the bus, how could you notice a door on the opposite side of the bus that was open? A. Well, I should think the bus would hit a a dog if it was right in front  
40 of the wheel.

*Mrs. Anna Bolz—Cross*

Q. Was he barking at the bus at the time? A. Barking at the bus.

Q. Jumping at the wheel? A. No, he wasn't jumping, he was running along with the bus.

Q. Didn't you tell Mrs. Hammond in the presence of Mr. Kleisser that the driver, Wacker, either stopped his automobile quickly or turned quickly in order to avoid that dog that was barking in front that day and said, "Well, that is the way the accident happened, the boy was jostled off"? A. No, I didn't. 10

Q. What did you tell her about that dog that was barking at the wheel of Wacker's automobile?

A. I told Mrs. Hammond it was hard for the driver of the bus to avoid those dogs, it is a wonder that the dog wasn't hit long ago. 20

Q. And that on this particular morning you say this dog barked at the wheel of this automobile driven by Mr. Wacker? Didn't you see Mr. Wacker attempt to avoid hitting that dog? A. No, sir.

Q. So that the only thing that you can recall about the bus is the fact that the door was closed? A. No. 30

Q. Didn't you see the automobile stop quickly?

A. Can I ask you to ask the young boy who picked him up?

Q. No, we are not discussing that. A. I was the one that was right with him and attended to him.

Q. Didn't you see this dog barking at that wheel and Mr. Wacker suddenly stop or start his automobile? A. No, he didn't.

Q. All you saw was the dog barking at the wheel? A. Yes, sir. 40

*Mrs. Anna Bolz—Re-direct*  
*Edith Bolz—Direct*

RE-DIRECT-EXAMINATION by Mr. McCarter:

Q. You were there when the injured boy was picked up? A. Yes.

10 Q. Did you hear him say anything, the injured boy? A. Not a thing; no, sir.

By Mr. Quinn:

Q. Didn't you also tell Mrs. Hammond in that conversation, although you saw the door closed at the point when it passed your house, you couldn't tell whether or not the door was closed when the accident happened? A. No, I didn't.

20 Recess till 1:05 P. M.

---

Trial of the cause resumed at 1:05 P. M.

EDITH BOLZ, sworn for defendant.

Direct-examination by Mr. McCarter:

30 Q. Are you a daughter of Mrs. Bolz, who was just on the stand? A. I am.

Q. And are you one of the girls who waited for the bus that morning that the plaintiff was hurt? A. I am.

Q. Did you see the accident? A. Well, not exactly. I saw the boy after he was hurt but not before.

Q. Did you see the boy before the accident? A. Yes.

40 Q. Where were you standing? A. On Hahn's corner by the pole.

*Edith Bolz—Cross*

Q. What did you see before the accident? A. I saw the bus come to the opposite corner and turned around to get my books and I didn't see anything after that.

Q. Did you see Jack Hammond before the accident? A. Yes, on the street. 10

Q. Where was he when you saw him? A. He was playing around the street there.

Q. Do you know whether the door of the bus was open or closed as it drove by? A. It was closed.

Q. Where was Jack Hammond after he was run over? A. He was lying on the street.

Q. On the concrete? A. Yes, sir.

Q. How old are you? A. Eighteen. 20

Mr. McCarter: Cross-examine.

CROSS-EXAMINATION by Mr. Quinn:

Q. When you saw it was closed it was away across the street? A. Opposite side.

Q. You saw Jack run out but you didn't see him get to the bus? A. No.

Q. So when he stepped on the bus to get into it you don't know then whether it was open or closed? A. He wasn't stepping on it; he couldn't get on it. 30

Q. Why do you volunteer that? A. He couldn't get on the bus, I know that, because the door was closed.

Q. You testified that you saw him run across and that is all you saw? A. Yes.

Q. You didn't see him try to get into the bus? A. No. 40

*Edith Bolz—Cross*

Q. And when you saw him run across to the bus the bus hadn't reached him yet? A. No.

Q. And when you saw the bus it was away across the street, when you think it was closed then? A. I don't think it, I know it.

10 Q. Well, it was across the street? A. Yes.

Q. And Jack yet hadn't reached the bus; he was on his way but he hadn't reached it, and then after that you turned your head, you say? A. Turned around for my books.

Q. Across the street? A. Yes.

Q. So that when Jack reached the bus and tried to get on to it there did you see him do that?

20 A. I didn't see him get on and I know he couldn't get on.

Q. You are a daughter of Mrs. Bolz, who testified before? A. Yes.

Q. Now, you say he couldn't get on; you didn't see him? A. Well, I know he couldn't.

Q. Then you don't know of your own knowledge whether or not he tried to get on? A. I know he tried because he always did it.

Q. Did you see him? A. No.

30 Q. Then you don't know? A. He ran to the bus to get on, I know that.

Q. If you didn't see him how do you know he tried to get on? A. It was a habit of his.

Q. No, not a habit of his, but on this particular morning. A. Yes, sir.

Q. You didn't see him try to get on this morning, did you? A. Yes, I saw him run to the bus.

40 Q. You didn't see him try to get on the bus? When you saw him run across the street the bus hadn't reached him? A. He was pretty near it.

*Anna Bolz—Direct*

By the Court:

Q. Did you see him fall? A. No, sir.

By Mr. Quinn:

Q. That is the last you saw him before the bus had reached him? A. Yes.

10

Q. What happened after that you know nothing about, do you? A. No, till he was on the street.

Q. You don't know whether or not this man opened the door quickly and then closed it that morning, do you, after you turned away? A. No.

---

 20

ANNA BOLZ, sworn for defendant.

Direct-examination by Mr. McCarter:

Q. You are a sister of the last witness? A. Yes.

Q. And how old are you, please? A. Sixteen.

Q. Did you see this accident? A. Yes, sir; I did.

Q. Where were you standing? A. On Hahn's 30 corner.

Q. Tell us what happened. A. Well, Jack ran to get on the bus and he got hold of the handle and then he was running alongside the bus and slipped and fell.

Q. Was the door of the bus open or closed? A. Closed.

Mr. McCarter: Cross-examine.

40

*Anna Bolz—Cross*

CROSS-EXAMINATION by Mr. Quinn:

Q. You are also a daughter of Mrs. Anna Bolz, who testified before? A. Yes.

Q. Did you see the dogs running around the bus that your mother testified about? A. I saw  
10 one black and white dog, Bruce.

Q. Was he standing there barking at the bus as it approached the corner? A. Yes.

Q. Which wheel was it, the right or left wheel, that he was barking at? A. Left wheel.

Q. Was it a loud bark, so that you and others could hear it there? A. Yes, you could hear it.

Q. And had the dog been doing that? A. Oh, he always did it, ran to catch the bus.

20 Q. Not what he always did, just what he did to day; and that was for some time before he reached the corner? A. Yes.

Q. And when Jack started across the street to get on the bus did you watch him all the time? A. Yes, I did.

Q. And how far away was he when he put his hand on the handle to get in the car? A. Well, about in the middle of the street, I should say.

30 Q. What? A. About in the middle of Ocean Avenue.

Q. About in the middle? A. About on the opposite corner, I guess.

Q. Were you on the same corner that the other children were on? A. Yes, I was.

Q. When this dog was barking at this wheel did you suddenly see the automobile lurch or sway? A. No, I didn't.

40 Q. You didn't notice that? A. No, it didn't.

*Anna Bolz—Cross*

Q. Did you pay particular notice whether it did or not? A. I was watching the bus when I saw Jack fall and then I watched the bus.

Q. But I say did you pay particular notice whether or not it did lurch or go forward? A. Why, I was watching the bus and I should have seen it if it had swerved. 10

Q. You didn't see it after that? A. No, I didn't.

Q. Then you saw Jack slip and fall? Do you know the little Best boy? A. Not necessarily.

Q. Did you see him there that morning? A. I don't remember.

Q. You don't recall seeing him there? A. No, I don't. 20

Q. Don't you recall seeing him out in the street after? A. No, I don't. I was talking to the girls.

Q. Don't you recall seeing him right near Jack? A. No, I don't.

Q. Do you recall seeing him out in the road? A. No, I don't.

Q. So you didn't see the bus driver suddenly close the door after Jack fell, did you? A. The door was closed. 30

Q. I say you didn't see the bus driver close it after Jack fell? A. No, I didn't.

Q. How far away was the bus when you first saw it? A. Well, you could see it first come around the turn.

The Court: Of course, Mr. Quinn, your questions assume that the witness has said things that she has not, and you assume 40

*Anna Bolz—Cross*

as facts things that she denies. She said that she saw the bus, saw the boy run and grab the handle, the door was not open, she saw him slip and fall.

10 Mr. Quinn: I am merely calling her attention to it. The other boy has testified different.

Q. You didn't see the Best boy there at all?  
A. No.

Q. How far away was the bus when you first saw it? A. You can see it as it comes around the curve.

20 Q. How far away is that? A. I don't know. I am not a good judge of distance.

Q. Did you see Jack running along after the bus for any distance before he fell? A. Yes, sir.

Q. Do you know whether the doors and windows on the front of the bus were open or closed? A. No, I didn't look at the front of the bus.

Q. Wasn't it coming right towards you? A. Yes, it was.

30 Q. When you were looking at the bus didn't you look at the front? A. Not necessarily; I didn't exactly look at the front of the windows.

Q. The bus was coming right towards you? A. Yes.

Q. And you say you noticed no part of the front of the bus? A. No, I didn't.

Q. The only part of the bus you noticed was the door on the side? A. I noticed the front of it but not that the windows were open or not.

40 Q. You can't recall whether they were open or not? A. No.

*Agnes Hahn—Direct*

Q. You don't remember anything with respect to the front of the bus? A. No, I don't.

Q. The only thing that you recall with respect to the side of it was with reference to this door?

(No reply.)

10

AGNES HAHN, sworn for defendant.

Direct-examination by Mr. McCarter:

Q. Where do you live, please? A. Ideal Beach.

Q. And are you one of the girls that were waiting to take the bus the morning this boy was hurt?

A. Yes.

20

Q. Did you see the accident? A. Yes, sir.

Q. Tell us where you were standing. A. On the corner where all the children were standing.

Q. On the corner? A. Yes, Hahn's corner.

Q. Tell us what you saw. A. Well, I saw Jack run for the bus on the other side of the road, he was running toward the other side of the road, and he grabbed a handle and tried to be the first one in the bus and he was holding on the handle and I think his hand slipped.

30

Mr. Quinn: I move to strike that out.

The Court: Not what you think, what you saw.

A. Well, his hand slipped anyway, he slipped and he fell on the cement and the side wheel hit his foot.

Q. Do you know whether the door was open or closed? A. The door was closed, positively closed.

40

*Agnes Hahn—Cross*

Q. How old are you? A. I am eighteen.

Q. Did you see Mr. Wacker, the defendant, get out of the bus afterward? A. Yes, when the kid was hit.

10 Q. Did you see him open the door when he got out? A. Yes.

Mr. McCarter: Cross-examine.

CROSS-EXAMINATION by Mr. Quinn:

Q. You say you saw his hand slip? A. Yes, not exactly, but I know it slipped anyway.

Q. The bus was going very, very slowly, wasn't it? A. Yes.

20 Q. Almost to a stop when it reached that corner? A. Yes.

Q. And he hadn't got his foot yet, as far as you can recall, on the step? A. No.

Q. Was he running very fast when he started to go to the bus the first time? A. No, he wasn't running very fast.

Q. Just a fast walk, would you call it? A. Yes, a fast walk.

30 Q. And then he put his hand on the bus, on the door like, and the bus was almost to a stop? A. Almost to a stop; yes, sir.

Q. And you say he slipped, though the bus was almost to a stop? A. It was not almost to a stop but it was going about five miles an hour.

Q. Do you drive a car? A. Yes.

Q. Did you drive a car at that time? A. No.

40 Q. How do you know it was going five miles an hour? A. It was about that. I couldn't say any nearer.

Q. It was almost to a stop, you testified to? A. Well—

*Agnes Hahn—Cross*

Q. It only had twenty-five feet to go, didn't it?

A. It was going kind of—it was almost to a stop.

Q. So that when he put his hands on the bar he could almost walk as fast as the bus was going, couldn't he? A. Not exactly. He had to run a little. 10

Q. Well, a fast walk? A. A fast walk.

Q. And was he walking fast with one hand on the bar when you saw him? A. Yes.

Q. How many steps would you say he took with one hand on the handbar? A. I can't say for sure. I can't remember so long ago.

Q. But you are sure in your own mind it was almost dead stopped when he put his hands on the bar? A. Yes. 20

Q. Then you saw nothing after that? A. No.

Q. Did you see any dog? A. I didn't see a dog at all. There was only a dog on the other side of the street, opposite.

Q. Did you hear a dog bark? A. I heard a dog bark, yes.

Q. Two or three witnesses have testified, including the driver of the car, that there was a dog barking at one of the wheels. Did you hear that? A. Yes. 30

Q. Did you see him by the wheel? A. Yes, sir; I saw him by the wheel, on the other side of the wheel, by the driver.

Q. While the dog was barking at this wheel did you notice or don't you know whether he suddenly swerved his car or lurched it over quickly? A. No, he didn't jerk the bus at all.

Q. Do you know or didn't you pay any attention to it? A. I paid attention to it. 40

*Warren Johnson—Direct*

Q. Particular attention to it? A. Not particular attention to it.

Q. Was the front window of the bus open or shut? A. I don't know. I didn't pay any attention to that.

10 Q. But the only thing you paid attention to was the side of the bus, that the door was open? A. Yes, the door was closed.

Q. Was closed, rather; but you can't tell us whether the front of the car was open? A. No, I couldn't tell you if the windows were open.

Q. You can't tell us a thing about a single window on that bus except the window of the door? A. I wasn't looking at windows.

20 Q. Why were you particularly looking at the door of a bus that had almost come to a stop? A. I was watching to get—try to get on.

Q. The door of a bus that had almost come to a stop. A. I was paying attention to Jack as he was trying to get on.

Q. But he was only on a fast walk, you say; there was nothing particular to pay attention to about that, was there? That is all.

30

---

WARREN JOHNSON, sworn for defendant.

Direct-examination by Mr. McCarter:

Q. Warren, where do you live? A. East Keansburg.

Q. How old are you now? A. Fourteen.

40 Q. Were you one of the boys waiting to take the bus the morning Jack Hammond was hurt? A. Yes.

*Warren Johnson—Cross*

Q. Where were you standing? A. I was standing right by the pole on the corner, Hahn's corner.

Q. Did you see Jack get hurt? A. Well, I didn't see him go underneath the wheel, no.

Q. What did you see? A. I saw him run up towards the bus and then I went and walked on the other side of the girls' line—the girls had a line in the middle and the boys had two lines, one on each side—and I went over on the other side, and when I looked around Jack was sitting there in the road. 10

Q. Did you notice the door of the bus as it drove up? A. I didn't notice the door, no.

Q. Where was Jack lying? A. Right in the middle of the road. 20

Q. On the concrete or on the gravel or what? A. On the concrete.

Q. Did you see Mr. Wacker, the driver of the bus, get out? A. Yes.

Q. Did he or did he not open the door when he got out? A. Yes, he opened the door.

Mr. McCarter: That is all.

30

CROSS-EXAMINATION by Mr. Quinn:

Q. But before you didn't see whether the door was open or not, you say? A. No.

Q. Did you see this dog barking around the front wheel of Mr. Wacker? A. No.

Q. Did you hear a dog barking? A. No.

Mr. Quinn: That is all.

Mr. McCarter: That is all.

40

Defendant rests.

*Theodore Kleisser—Direct, Cross*

## PLAINTIFFS' TESTIMONY IN REBUTTAL.

THEODORE KLEISSER, sworn for plaintiffs.

10 Direct-examination by Mr. Quinn:

Q. Do you know Anna Bolz, the witness who testified here this morning, Mr. Kleisser? A. I don't know her very well but I know her.

Q. Did you meet her? Who was with you at that time? A. My future wife, Mrs. Hammond, and Mrs. Bolz and Anna Bolz.

20 Q. Did she at that time have a conversation in your presence with reference to this automobile accident? A. Yes.

Q. Did she say that she saw dogs barking at this car and that the driver of the car suddenly pulled up his car or pulled it to one side in order to avoid the dog? A. Yes.

Mr. Quinn: Cross-examine.

CROSS-EXAMINATION by Mr. McCarter:

30 Q. When was this conversation, Mr. Kleisser?  
A. I don't exactly know the date, but it happened when a fellow named Raymond Hahn was drowned, or on that very night, and I don't remember the date.

Q. What year was it? A. Right after the last trial.

Q. Right after the last trial? A. Yes, I believe so.

Q. Down at Ideal Beach? A. Yes.

40 Q. On the beach? A. Yes.

*Theodore Kleisser—Cross*

Q. Mrs. Hammond and you and Mrs. Bolz were the only three present when the conversation took place? A. Why, I believe so, yes.

Q. I mean within hearing? A. Yes.

Q. And how was the subject matter of the accident to Jack Hammond brought up? A. I don't remember how it started, I couldn't tell you that. 10

Q. Well, Mrs. Hammond brought it up, didn't she? A. I believe she did, yes. I don't remember just how it started, what word was used, you know, to start it.

Q. What was it Mrs. Bolz said about a dog? A. She said a dog that was running around the street in front of the bus and the left wheel, and Mr. Wacker was paying attention to the dog and he suddenly put on his brakes to avoid running the dog over, so she told me he was a very careful driver and she knew that he would do that. 20

Q. She knew he would do that, that he was a very careful driver? A. Yes.

Q. And they were referring to this particular day when the little boy was hurt? A. Yes.

Q. Did I understand you to say that you were engaged to Mrs. Hammond? 30

Mr. Quinn: Objected to as immaterial.

Mr. McCarter: I withdraw it.

The Court: He said that himself. In other words, he admits it. I haven't heard the lady.

*John Hammond—Direct*

JOHN HAMMOND, recalled for plaintiffs.

Direct-examination by Mr. Quinn:

Q. What kind of a shoe do you wear on your right heel? A. A special built shoe.

10 Q. Describe it with reference to your heel. A. Well, about the middle of the shoe there is a place built up so that it rests on the arch of the foot and the heel touches nothing inside the shoe.

Q. So that the arch or any part of the shoe does not touch your heel? A. No.

Q. Do you wear any other kind of a shoe in addition to that with any heel in it? A. Yes, I wear a shoe when I am home from school with  
20 the heel cut out.

Q. This shoe that you have on this morning you only wear on special occasions? A. Yes, when I am out, like when I am going to school or at nighttime.

Q. Is that on account of having the other shoe to put on when you come back? A. Yes.

Q. The other shoe is just an indoor shoe, isn't it? A. No.

Q. When do you wear the other shoe? A. When  
30 I am around town, Keansburg, when I wear it.

Q. You ordinarily wear this shoe when you go out? A. When I go to school I wear this shoe and come home and put on the other one.

Q. You wear this shoe here? A. Yes.

Q. And if you go out anywhere except just playing around, you wear this shoe; is that right? A. Well, sometimes.

Q. Most times, don't you? A. Well, about half  
40 and half.

*Mrs. Evelyn Hammond—Direct, Cross*

Q. Doesn't this shoe touch your heel that fits like that? A. No.

Q. Doesn't touch it at all? A. No.

Q. It holds your heel in position to keep it from rubbing against the side, one side or the other?

A. There is a place built up on the side. On the side I touch the side, I don't touch the foot. 10

---

MRS. EVELYN HAMMOND, recalled for plaintiffs.

Direct-examination by Mr. Quinn:

Q. Did you have a conversation with Mrs. Anna Bolz, the witness who testified here this morning? A. I did. 20

Q. And was that conversation with reference to this accident? A. It was.

Q. Did she say to you that she saw a dog running around the bus or barking at the bus and the driver very suddenly stopped his bus or pulled it to one side in order to avoid hitting the dog? A. Yes.

Mr. Quinn: Cross-examine. 30

CROSS-EXAMINATION by Mr. McCarter:

Q. You brought the subject up, didn't you, Mrs. Hammond, at that time? A. I think I could answer that. Do you want me to say how it was brought up? Because I think it was brought up between us. The conversation started because I—

*Mrs. Evelyn Hammond—Cross*

Q. Wasn't it you that brought up the subject of your son's injuries? A. No.

Q. You didn't? A. No.

Q. How did Mrs. Bolz come to be talking about the accident?

10

Mr. Quinn: I submit the defense will have to be bound by the answer.

The Court: Oh, ordinarily that would be so, yes, that would be the rule. Ask the precise question. Now you are attempting to cross-examine as to the weight and credence to be given to the statement in order to meet the environment and circumstances under which it was given?

20

Mr. McCarter: Certainly.

The Court: I think it is competent.

(Question repeated.)

A. We were on the beach following another accident. They were working at that time over a boy. My son was carrying coffee to the workers and Mrs. Bolz said, "Isn't it fine he is getting along as nicely as he can and he is so little lame?" That is what started the conversation.

30 Q. And you tarried and she made this remark about this dog that you testified to? A. Yes.

Q. All right. That is all.

Both sides rest.

Motion for direction.

Mr. McCarter: At this point, if your Honor please, I wish to move for the direction of a ver-  
40 dict in favor of the defendant on the ground,

*Motion for the Direction of a Verdict*

first, that there is absolutely no evidence of negligence on behalf of the defendant.

The Court: I think I will allow you to argue it in the Judge's room.

(The Court and counsel retire to chambers.)

Mr. McCarter: Second, that the evidence of contributory negligence on the part of the plaintiff, John Hammond, is clear; and third, that it is clear on the evidence that the plaintiff, John Hammond, assumed the risk incident to boarding a moving bus by which, under the evidence, the accident solely was caused. 10

The Court: I incline to the view in this case that the testimony is substantially the same as in the former trial. I fail to find any new evidence which bears any causal relation to the issue of negligence or creates an issue of fact as to the contributory negligence of the boy. In the former trial the testimony as to the door being closed or its being open at the time practically is repeated in the testimony at the present trial. It is quite evident that the boy ran to get upon the car ahead of the other children who were there waiting with him, either slipped and fell or grabbed the rail and failed to get sufficient support to prevent falling by reason of the moving of the car. 20 30

In the circumstances I feel bound, since this is a Supreme Court issue, by the declaration in the Supreme Court in its opinion based upon the evidence at the former trial, and particularly with reference to the expression of the Court in the opinion to this effect: "He, the boy plaintiff, was thirteen years old. The accident happened in 40

*Motion for the Direction of a Verdict*

East Keansburg, at the corner of Port Monmouth Road and Ocean Avenue. An autobus was then on its way to a high school and one of its regular stops was at the far corner of those two intersecting streets. On that corner some fifteen  
10 or sixteen boys and girls, including the plaintiff, John Hammond, had collected, waiting for the arrival of the bus. John saw it approaching and instead of waiting until it came to a standstill at its regular stopping place, hurried across the intersecting street, evidently for the purpose of being one of the first of the crowd of sixteen to get on the bus. The door of the bus was open and John attempted to board it while it was still  
20 in motion, approaching its regular stopping place. At that moment the bus swung off the concrete toward the curb and John, who had taken hold of the handles of the bus, lost his grip, slipped under the wheels and was run over. This is his own story, and it demonstrates that the accident was due in part, at least, to his own negligence."

Now, while there is a variation in the testimony and I may say that it was also present in the former trial, as to whether the door of the bus  
30 was open or not, some children being produced as witnesses testifying that it was not, that the boy merely ran along with the bus, holding on the handle, and slipped and fell, nevertheless, the Supreme Court evidently assumed that the door was open, and even if it were open, according to the Supreme Court, that did not save the boy from the charge of being guilty of contributory negligence in the circumstances. Here, however,  
40 under a fair preponderance of the proof, it may

*Motion for the Direction of a Verdict*

well be open to the jury to find the door was closed; but in view of the opinion of the Supreme Court it seems to make no difference, that the boy would be charged with contributory negligence under the immediate circumstances just the same. 10

I am unable to find under the evidence in the case that the proximate cause of the accident was the boy being thrown off by any lurch of the bus, either by reason of the driver attempting to avoid striking a dog or any different circumstances than were developed at the former trial.

For the foregoing reason I consider myself bound by the declaration of the Supreme Court in this case, and in the circumstances I am of the opinion that the motion for a direction should be granted; the idea being, I may say, that the remedy of the plaintiffs now will be to take an appeal to the Court of Errors and Appeals as to the legal situation which gives ground for the present ruling. 20

(Objection noted for plaintiffs as ground of appeal.)

(The Court and counsel return to the court room.) 30

The Court: I may say that in this case a motion has been made for the direction of a verdict in favor of the defendant on the ground that no negligence has been proven against the bus driver involved, and that contributory negligence, even if negligence had been shown, has been established.

*Motion for the Direction of a Verdict*

The case is practically in the same situation exactly as when it was tried before and then was taken to the Supreme Court. I fail to find any different state of facts in the case now than in the former record. The Supreme Court on the  
10 review at the former trial had this to say: "The accident happened in East Keansburg at the corner of Port Monmouth Road and Ocean Avenue." I am now reading from the text of the opinion of the Supreme Court. "An autobus was then on its way to a high school and one of its regular stops was at the far corner of those two intersecting streets. On that corner some fifteen or sixteen boys and girls, including the plaintiff,  
20 John Hammond, had collected, waiting for the arrival of the bus. John saw it approaching and instead of waiting until it came to a standstill at its regular stopping place, hurried across the intersecting street, evidently for the purpose of being one of the first of the crowd of sixteen to get on the bus. The door of the bus was open and John attempted to board it while it was still in motion, approaching its regular stopping place. At that moment the bus swung off the concrete  
30 toward the curb, and John, who had taken hold of the handles of the bus, lost his grip, slipped under the wheels and was run over. This is his own story, and it demonstrates that the accident was due in part, at least, to his own negligence."

The Supreme Court thereupon reversed the former verdict in his favor for the reasons just stated, and I feel bound by this opinion. The result is that the plaintiffs have a remedy in  
40 the event that the present ruling is incorrect;

*Motion for the Direction of a Verdict*

they may appeal to the Court of Errors and Appeals upon the record. The Supreme Court, it may be noted, stated in its opinion that the door of the bus was open at the time that John attempted to board it. There is testimony in the case, the present case, to the effect that the door was not open and that John ran and grabbed the handles of the bus while it was still moving and slipped and fell. Since it does not follow that the happening of an accident means that compensation necessarily must go, I may say that I have no other recourse, as I see it, but to direct a verdict in favor of the defendant and against the plaintiffs. 10

Now it is very easy to exercise sympathy and realize that this boy was very seriously hurt, but it does not follow that this injury is one that can be compensated for. The Supreme Court has held on the same state of facts as I find them that the boy was guilty himself of contributory negligence, and in the circumstances I feel bound, therefore, to direct a verdict to be returned in favor of the defendant and against the plaintiffs. They have their right of appeal. 20 30

(Objection noted for plaintiffs as ground of appeal.)





In the opinion of the Supreme Court, there is a mis-statement of fact. It is recited that the plaintiff, John Hammond, was thirteen years of age. He was, in fact, twelve years of age.

The Supreme Court, in making the rule absolute, held that the accident was due, in part, to the negligence of John Hammond. *Hammond v. Wacker*, 7 N. J. Misc., p. 453. Upon a re-trial of the case, additional evidence was introduced, but for the purposes of this appeal this additional evidence may be disregarded. The Trial Court, at the close of the case, directed a verdict for the defendant, and said:

“The Supreme Court has held on the same state of facts as I find them that the boy was guilty himself of contributory negligence, and in the circumstances I feel bound, therefore, to direct a verdict to be returned in favor of the defendant and against the plaintiffs. They have their right of appeal” (page 143, ll. 23-30).

John Hammond, an infant of the age of twelve years, was standing on the far corner from the usual stopping place of a school bus operated by the defendant. As the bus approached him, it slowed down. The door of the bus was open. John seized both handles and had both feet on the step of the bus when suddenly the bus lurched and John was thrown underneath the rear wheel of the bus. The flesh of his calf and heel were torn. He was forced to undergo skin grafting operations and three years after the accident was still in a crippled condition.

There arises upon this appeal three questions.

- (1) Is the defendant chargeable with negligence?
- (2) Is the plaintiff, John Hammond, as a matter

of law, chargeable with contributory negligence?  
(3) Was the Trial Court justified in directing a verdict in favor of the defendant upon the ground that the Supreme Court had set aside on similar facts a verdict in favor of the plaintiff?

#### TESTIMONY.

John Hammond, on September 8, 1927, was twelve years old (p. 15, ll. 23-25). He was waiting for a school bus on May 26, 1927.

“Q. And calling your attention to the day in question, did you see the Wacker bus coming down the street, the Port Monmouth Road? A. Yes, sir.

Q. And was that at the corner of Ocean Avenue and Port Monmouth Road? A. Yes, sir.

Q. And when it reached the opposite corner from where you were standing on Ocean Avenue, was it coming fast or slow? A. Slow.

Q. And when you saw the bus coming slow on the opposite corner from which you stood, what did you do? A. Walked over to meet it and came on the side and tried to get on.

Q. What did you do to try to get on? A. I grabbed hold of the handle and jumped on the step.

Q. When you did that, what happened? A. The bus swayed, gave a lurch and I slid under the wheels.

Q. You fell off or slid under the wheels? A. Fell off the bus.

Q. Can you describe the sway or lurch to the jury, or did it happen so quickly that you can't tell? A. No, I couldn't tell exactly how it happened.

Q. Do you know or can you tell us what caused the lurch? A. I believe it to be because it slipped off the concrete.

Q. Was the door open when you grabbed the handle? A. Yes, sir; it was.

Q. Had the bus stopped? A. No.

Q. It was still in motion? A. Yes, sir.

Q. When you took hold? A. Yes, sir.

Q. And what did you do, run along with the bus? A. I ran by the side of the bus and grabbed hold of the handle and jumped on" (p. 16, l. 35 to p. 17, l. 40).

On cross-examination, John stated that he got both feet on the step (p. 29, l. 10). The lurch, which threw him off the bus, was caused by the bus rolling off the concrete onto the graveled side of the road (p. 29, l. 18).

William Vitelli said that when John went to board the bus the door of the bus was open (p. 34, l. 10).

Ned Hammond, a brother of John, saw the accident. His brother went out to meet the bus, grabbed hold of the handles and got his foot on the steps, when the bus lurched and his brother fell underneath the wheel (p. 25, ll. 28-33).

The bus door was open (p. 36, l. 15).

William Best, an eye witness of the accident, says as follows:

"Q. Will you tell the Court and the jury in your own way and words just what you saw and what happened? A. Well, Jack went out to Britton's corner to wait for the bus, and when the bus came along he caught the handles and stepped on the steps and went a few feet; then the bus gave a sudden jerk forward and he fell and when he fell he closed the door.

Q. You said what went a few feet? A. Well, the bus went a few feet.

Q. And that was after he had his foot on the steps and his hand on the handles? A. Yes.

Q. The door was open at that time? A. Yes, sir'' (p. 52, ll. 26-40).

\* \* \* \* \*  
 "Q. That sudden lurch, Billy, that you saw, which way did the bus lurch, if you can tell us? A. It jerked forward.

Q. It suddenly jerked forward? A. Yes'' (p. 53, ll. 15-20).

This completed plaintiff's affirmative testimony. Several witnesses were sworn by the defendant. There is no need of reviewing their testimony. If the evidence submitted by the plaintiff did not raise a question of negligence, then admittedly the Trial Court was right in directing a verdict. If, however, there was a question of negligence raised by the testimony of the plaintiff and his witnesses, then no matter how many witnesses on behalf of the defendant contradicted this testimony, the plaintiff was entitled to have his case determined by the jury. For this reason, this brief will not be burdened with a review or analysis of the testimony given by the defendant or his witnesses.

**ARGUMENT.****I.****THE EVIDENCE SUBMITTED BY THE PLAINTIFF IMPUTED NEGLIGENCE TO THE DEFENDANT AND THE DETERMINATION OF THIS NEGLIGENCE WAS FOR THE JURY.**

The facts as shown in plaintiff's evidence are briefly that the plaintiff, a school boy of tender years, to wit, twelve years of age, was about to board a school bus. He went out to meet it. The driver of the bus slowed down. The door of the bus was open. The boy boarded the bus. Both of his feet were on the step of the bus and he had hold of both handles of the bus. While in this position, the driver so operated the bus that it suddenly lurched forward, throwing the infant plaintiff under the wheels of the bus.

This statement concisely sets forth Plaintiff's evidence. At the close of the whole case, the only issue offered by the defendant as against this state of facts was a general denial by the driver himself and a statement of several school children that the door of the bus was closed when the plaintiff went out to board the bus.

This, at the most, was a contradiction of the evidence. In such a situation, this Court has resolved in favor of the plaintiff the question of negligence.

In the case of *Tansey v. Tedesco*, 93 N. J. L., p. 259, the Court of Errors and Appeals affirmed a judgment in favor of the plaintiff. From the opinion of the Supreme Court, affirmed by this

Court, it appeared that the plaintiff intended to board a bus. The door of the bus was open. The bus slowed up as it approached the plaintiff. The plaintiff stepped on, holding both of the handles and having his left foot on the step. Because of ice on the step, his foot slipped. Plaintiff lost hold and fell. The bus driver proceeded and the plaintiff was injured. The Court affirmed the opinion of the Supreme Court, which read as follows:

“As the case stood it appeared that the defendant’s servant refused to stop the jitney after he discovered the situation of danger in which the plaintiff was. The refusal to stop the car was negligence and also the proximate cause of the injury. *Plaintiff’s attempt, in the first instance, to enter the moving car, even if it be conceded that such act was negligent, had no causal connection with what occurred subsequent thereto, for, it is clear, that if the driver had stopped the car when requested, and when he saw the plaintiff’s situation, the accident would not have happened.*”

So, in the instant case, John Hammond, William Best and Ned Hammond testified positively and categorically that the plaintiff’s feet were both on the step; that he had hold of the handles; that the door was open. In other words, the plaintiff was safely upon the bus. He had boarded the bus. He was in a position of safety. Unless he did thereafter some act himself, and there is no scintilla of evidence of any such act, then the act of the defendant in so operating his bus that it lurched was the sole cause of the accident. The Supreme Court did not in its opinion

recite the fact in strict accord with the evidence. The Supreme Court found the facts as follows:

“The door of the bus was open and he attempted to board it while it was still in motion and approaching its regular stopping place. At that moment, the bus swung off the concrete toward the curb and John, who had taken hold of the handles of the bus, lost his grip, slipping under the wheels, and was run over.” *Hammond v. Wacker, supra.*

This statement does not comprise the entire facts of the case. A careful reading of the testimony shows that the plaintiff was safely on the bus. Both feet were on the step. He had hold of both handles of the bus. There was nothing further for him to do in boarding the bus. If the bus had been driven properly, had not lurched and had not run off the concrete, John would have still been whole physically and uninjured. Due alone to the driver's operation of the bus in such a manner that it lurched and swayed and ran off the concrete, the plaintiff has been crippled. This case, it is submitted, is practically on all fours with *Tansey v. Tedesco, supra.*

In *Kelly v. Consolidated Traction Co.*, 62 N. J. L., p. 514, a new trial was granted where the plaintiff had been nonsuited. The plaintiff, a boy of twelve years (the identical age of the plaintiff here) went out to board a trolley car. The movable rail was down on one side of the car. The infant plaintiff mounted the foot board of the trolley car on the side where the movable rail had been lowered but before he was safely on the conductor started the trolley car. The plaintiff was thrown under the wheels. Justice Collins, for the Supreme Court, says:

“It seems to me that on the question of the conductor’s negligence a clear case for the jury was presented. \* \* \* Still the fact remains, if the story of the injured boy be true, that the conductor did see him there and in a position of danger, yet signaled to set the car in motion. *It cannot be that a carrier owes an intending passenger no duty merely because that passenger is attempting to enter the vehicle in a wrong way or at a wrong place. Such an entrance need not be anticipated, but, if seen, proper care must be exercised for the safety of the passenger, and the more precarious the situation the greater should be the care.* \* \* \* Add to these considerations the powerful one that it is in a boy of but twelve years that negligence is asserted, and both reason and precedent declare against resolution of the question otherwise than as one of fact on which the plaintiffs are entitled to a verdict of a jury.”

So, in the instant case, here a boy twelve years of age was boarding a carrier. True, he may not have been boarding it at the accustomed stopping place. He was, however, boarding it under the very eyes of the operator of the carrier or bus. Surely the operator of the bus owed a duty to the plaintiff. In the words of the Supreme Court in the case just cited, the more precarious John Hammond’s position was, the greater duty the defendant, Wacker, owed to him.

In *Schmidt v. North Jersey Street Railway Co.*, 58 Atl., p. 72, the plaintiff boarded a moving car of the defendant and while doing so the motor-man speeded up the car. The Supreme Court said:

“On this case, we think the jury was justified in finding negligence on the part of the defendant company’s servant, and also that there was no negligence on the part of the plaintiff. Although a person attempting to board a moving car takes the risk of injury resulting from its ordinary motion, *he does not assume the risk of injury from sudden and negligent increase of the motion of the car.*”

So, in the instant case, had plaintiff, John Hammond, been thrown from the bus while boarding it, the jury would then have been justified in finding no negligence on the part of the defendant. Such a situation is not presented in the instant case. John Hammond was safely aboard the bus. Whatever risk was involved in boarding this bus had been safely overcome. He was not, moreover, expected to foresee that the driver would so operate the bus that it would lurch and sway. This is the negligence of which the plaintiff, John Hammond, complains. Under the cases cited above, this Court and the Supreme Court has held that such a situation presents questions of negligence to be determined by the jury. It is respectfully submitted upon this point alone that the plaintiff, John Hammond, was entitled to have his case determined by the jury.

## II.

**THE CONTRIBUTORY NEGLIGENCE OF THE PLAINTIFF, AN INFANT OF THE AGE OF TWELVE YEARS, WAS FOR THE JURY AND NOT A QUESTION OF LAW FOR THE COURT.**

The Supreme Court, in its opinion in making the rule absolute in the former trial, stated as a fact that John Hammond was a boy thirteen years old. This was erroneous. Reference to the state case in the former trial will reveal that the boy was in his twelfth year. His negligence or contributory negligence would be governed by the general rule of law applied to persons who have not yet arrived at years of discretion. It may generally be stated that the contributory negligence of an infant of tender years is for the jury. This Court and the Supreme Court have repeatedly held that contributory negligence of an infant is not a matter of law to be determined by the Court but a question of fact to be resolved by the jury, having in mind the mentality, the prudence and the experience of the infant plaintiff himself taken in conjunction with general knowledge of that of children of such age.

In *Traction Co. v. Scott*, 58 N. J. Law, p. 682, this Court was considering the case of a plaintiff seven years and eight months old. Justice Hendrickson exhaustively analyzed the cases relating to contributory negligence of infants. His conclusion is as follows:

“And when a child has reached the age of discretion, and is considered *sui juris* as a matter of law, the degree of care and caution required of him will be no higher

than such as is usually exercised by persons of similar age, judgment and experience. AND WHETHER THAT DEGREE OF CARE AND CAUTION HAS BEEN EXERCISED BY THE CHILD IN A GIVEN CASE, IS USUALLY, IF NOT ALWAYS, A QUESTION OF FACT FOR THE JURY."

In *David v. W. J. & S. R. R. Co.*, 84 N. J. L., p. 685, the Court of Errors and Appeals again considered the question of contributory negligence of a child. Justice Trenchard, after reviewing the reasons for the rule, says:

"And so in order to determine whether a child in such transition period has been guilty of contributory negligence, it is necessary to take into consideration the age of the child, and its experience and capacity to understand and avoid the danger to which it is exposed in the actual circumstances and situation under investigation; AND IT IS USUALLY A QUESTION FOR THE JURY TO DETERMINE WHETHER THE CHILD HAS BEEN GUILTY OF CONTRIBUTORY NEGLIGENCE."

In *Doryk v. Perth Amboy Bottling Co.*, 104 N. J. L., p. 87, the Court of Errors and Appeals again considered the contributory negligence of a boy ten years old. Justice Kalisch, speaking for this Court, said (at page 90):

"The plaintiff was of tender age and the question whether he exercised that reasonable degree of prudence for his safety as may be expected from a child of his age, intelligence and experience WAS NOT A COURT BUT A JURY QUESTION. Moreover, there was no causal relation between the plaintiff's act in taking his position on the truck and where he stood when he was hurled from it, and the driver's negligent manner in operating the truck."

In *Sharkey v. Herman Bros.*, 3 N. J. Misc., p. 126, the Supreme Court, in an opinion per curiam, in which Chief Justice Gummere took part, said:

“The plaintiff was a boy of twelve, and, normally, any negligence of his would be a jury question.”

In *Nichols v. Grunstein*, 144 Atl., p. 592, Justice Trenchard, speaking for the Court of Errors and Appeals, said:

“We cannot say that the child was guilty of contributory negligence as a matter of law. Between the time in life when a person is incapable of exercising the care and judgment necessary to avoid and avert danger, and the time when such person is in law an adult and responsible as such, there is a transition period during which responsibility depends on matters of fact, and in this transition period such person may or may not be guilty of contributory negligence.

“The degree of care required of a child old enough to be capable of negligence is such as is usually exercised by persons of similar age, judgment, and experience. In order to determine whether such a child has been guilty of contributory negligence, it is necessary to take into consideration the age of the child, and its experience and capacity to understand and avoid danger to which it is exposed in the actual circumstances and situation under investigation, and it is usually a question for the jury to determine whether the child has been guilty of contributory negligence. *David v. W. J. & S. R. Co.*, 84 N. J. Law, 685, 87 A. 440.”

Similar citations could be inserted in this brief. It is submitted, however, that the rule of this

Court and of this jurisdiction is so well-settled as exemplified by the excerpts of the opinions quoted above that it may be stated as a well-nigh inflexible principle that where negligence is shown on the part of the defendant and the infant is twelve years or younger, the question of his contributory negligence is for the jury, so in the present case it is respectfully submitted that the contributory negligence of the infant plaintiff was one for the jury to determine and was not a question of law for the Court.

### III.

#### **THE TRIAL COURT ERRED IN FOLLOWING THE OPINION OF THE SUPREME COURT UPON THE RULE TO SHOW CAUSE AND SHOULD HAVE PERMITTED THE CASE TO GO TO THE JURY.**

The Trial Court, in directing the verdict, said:

“For the foregoing reason I consider myself bound by the declaration of the Supreme Court in this case, and in the circumstances I am of the opinion that the motion for a direction should be granted; the idea being, I may say, that the remedy of the plaintiffs now will be to take an appeal to the Court of Errors and Appeals as to the legal situation which gives ground for the present ruling” (p. 141, ll. 18-27).

The Trial Court further said, in directing the verdict:

“The Supreme Court has held on the same state of facts as I find them that the boy was guilty himself of contributory negligence, and in the circumstances I feel bound, therefore, to direct a verdict to be

returned in favor of the defendant and against the plaintiffs. They have their right of appeal" (p. 143, ll. 23-29).

This identical situation has been before this Court repeatedly. It is well-nigh an elementary rule that the determination of the Supreme Court upon a rule to show cause is not dispositive of questions of fact which are for the jury to determine.

In *Horandt v. Central Railroad Co.*, 81 N. J. L., p. 488, a previous verdict had been set aside by the Supreme Court as against the weight of evidence. Upon the case being brought up for a second trial, the Trial Court directed a verdict. This was reversed by the Court of Errors and Appeals. Justice Parker, speaking for this Court upon the reversal, says:

"Without going into the details of the evidence, we think that a jury question on this point was fairly presented; and that the Trial Judge erred in treating it on the second trial as a court question."

In *Dickinson v. Erie R. R. Co.*, 85 N. J. L., p. 586, the first trial had resulted in a nonsuit. This nonsuit was reversed. At the second trial, the plaintiff recovered a verdict, which was set aside by the Supreme Court upon the ground that the plaintiff was guilty of contributory negligence. Chancellor Walker, speaking for this Court, says:

"The third trial resulted in a direction of a verdict in favor of the defendant on the ground that the evidence was substantially the same as the testimony on the second trial. \* \* \*

"The Circuit Judge was not, however, confronted with the proposition of grant-

ing a rule to show cause why the verdict should not be set aside and a new trial granted. What he was asked to do, and what he did, was to take away from the jury a jury question; and that was error.

*“A Trial Judge is only justified in granting a nonsuit or directing a verdict upon a court question arising from the admitted or uncontroverted facts of a case. The weight of conflicting testimony should always be submitted to a jury for their consideration and determination.”*

So, in the case *sub judice*, that fact that the Supreme Court set aside a verdict upon substantially similar facts did not justify the Trial Court in directing a verdict. There was before the jury a clear contradiction. It was the province of the jury to determine under this contradiction which issue the jury should believe. To take this question away from the jury was an act not inherent in the Trial Court and under the above case erroneous.

In *Tilton v. Pennsylvania R. R. Co.*, 86 N. J. L., p. 709, the plaintiff, upon a former trial, had received a verdict which was set aside by the Supreme Court. The same testimony was presented upon a re-trial by simply reading the evidence. The Trial Court granted a direction of a verdict because he felt himself bound by the decision of the Supreme Court upon the rule. The Court of Errors and Appeals held this was error.

*“As there was conflicting testimony in the record thus introduced in evidence, the ruling complained of was not justified. The weight of conflicting testimony should always be submitted to a jury for their consideration and determination.”*

The direction of a verdict in favor of the defendant was reversed.

In *LeBarron v. Erie Railroad Co.*, 91 N. J. L., p. 269, plaintiff had received a verdict at the former trial. The Supreme Court, upon a rule to show cause, set aside this verdict. Upon a re-trial of the case a verdict was directed for the defendant. An appeal was taken from this judgment. The Court of Errors and Appeals reversed this judgment. Mr. Justice Minturn, speaking for the Court of Errors and Appeals, said:

“The learned Trial Court conceived that the granting of a trial *de novo* upon the rule to show cause on the former trial, limited the inquiry to the question whether the reiteration of the same testimony upon the second trial necessitated the denial of a jury trial, doubtless by analogy to the rule underlying the doctrine of *stare decisis*; and concluding that such was the legal import and effect of the *venire de novo*, directed a verdict for the defendant. That this procedure was erroneous and that the plaintiff even upon the same record was entitled to go to the jury, has been repeatedly affirmed by this Court.”

In the instant case, there was a clear contradiction of fact. At the first trial and at the re-trial the evidence disclosed a boy twelve years old riding upon the step of a bus after having safely boarded the same while it was in motion. The driver, with this boy within his line of vision so riding, operated the bus in such a way that it jerked and lurched, throwing the boy under the wheels of the bus. Contradicting this testimony is the statement of the defendant and his wit-

nesses, among whom were several school children, who testified that the door of the bus was closed. Here is the distinct contradiction of fact which has been heretofore by this Court, in the cases cited above, held as a good and sufficient reason compelling the submission of the case to the jury.

The action of the Supreme Court in making absolute the rule to show cause in this matter was not binding upon the Trial Court. The Trial Court, with the contradicting, conflicting and opposing evidence given by both sides, should have necessarily submitted the determination of the issue to the jury. The infant plaintiff was entitled to a jury decision. He did not receive this. It is submitted that the action of the Trial Court in directing the verdict in favor of the defendant, because it felt itself bound by the opinion of the Supreme Court in making the rule absolute and setting aside the verdict at the former trial, was erroneous.

## IV.

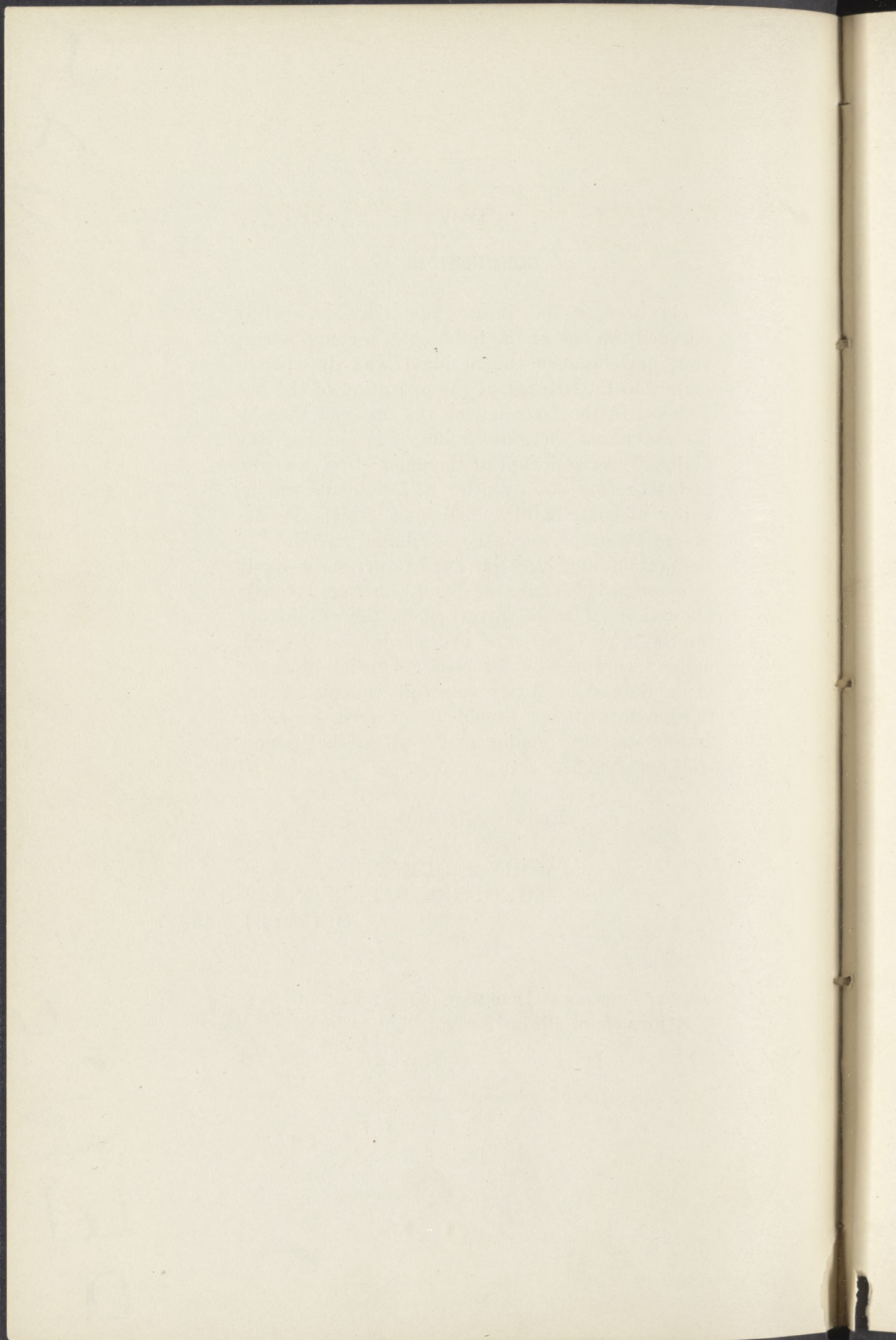
**CONCLUSION.**

(1) Because the infant plaintiff had safely boarded the bus of the defendant, a common carrier, and because the accident was due proximately to the manner of the operation of the bus and not to the boarding of the bus and thereby the defendant became liable; (2) because the plaintiff was an infant of the age of twelve years, and, therefore, as a matter of law, could not be guilty of contributory negligence, which the Supreme Court erroneously attributed to him and the opinion of which the Trial Court erroneously followed; (3) because the Trial Court erroneously allowed itself to be governed by the opinion of the Supreme Court, and in accordance with such opinion erroneously directed a verdict in favor of the defendant, it is respectfully submitted that the judgment below should be reversed, set aside and for nothing holden to the effect that a new trial may be had.

Respectfully submitted,

JOHN J. QUINN,  
THEODORE D. PARSONS,  
Of Counsel.

QUINN, PARSONS & DOREMUS,  
Attorneys of Plaintiffs-Appellants.



## New Jersey Court of Errors and Appeals

JOHN HAMMOND, *et al.*,  
*Plaintiffs-Appellants,*

*vs.*

JOSEPH WACKER,  
*Defendant-Respondent.*

*On Appeal  
from  
Supreme  
Court.*

### BRIEF FOR RESPONDENT.

#### Statement.

This action was brought by an infant plaintiff, by his mother, as next friend, and by his mother individually, to recover damages for personal injuries suffered by the boy plaintiff and for necessary expenses incurred by his mother, who supported him, alleged to have been caused by the negligence of the defendant, the driver and owner of a school bus. Verdicts were found in favor of the plaintiffs at the first trial, which, however, on rule to show cause were set aside by the Supreme Court in an opinion which said:

“The facts relating to the accident were as follows: The defendant operated an auto bus under a contract with the Board of Education of Middletown, which required him to carry pupils to and from the Leonardo High School. John Hammond was one of the pupils so carried. He was thirteen years old. The accident happened in East Keansburg, at the corner of Port Monmouth Road and Ocean Avenue. The auto bus was then upon its way to the high school, and one of its regular stops was on the far corner of these two intersecting streets. At that corner some sixteen boys and girls, including the plaintiff, John Hammond, had collected, waiting for the arrival of the bus. John saw it approach-

ing and, instead of waiting until it came to a standstill at its regular stopping place, hurried across the intersecting street, evidently for the purpose of being one of the first of the crowd of sixteen to get on the bus. The door of the bus was open, and he attempted to board it while it was still in motion and approaching its regular stopping place. At that moment the bus swung off the concrete toward the curb, and John, who had taken hold of the handles of the bus, lost his grip, slipped under the wheels and was run over. This is his own story, and it demonstrates that the accident was due, in part at least, to his own negligence" (R. 13).

The case came on for a second trial before his Honor, Judge Lawrence, and a jury, at the Monmouth Circuit. As was quite candidly admitted by counsel for the appellants in their brief (p. 2) the evidence in the second trial for the purposes of this appeal was the same as the evidence at the first trial. At the close of the trial a motion was made for the direction of a verdict in favor of the defendant on the grounds:

(1) That there is no evidence of negligence on the part of the defendant:

(2) That the evidence of contributory negligence on the part of the plaintiff John Hammond, is clear; and

(3) That it is clear on the evidence that the boy plaintiff took the risk incident to boarding the moving bus, by which under the evidence the accident was solely caused (R. 139).

Judge Lawrence directed the verdict and from the judgment entered on this verdict this appeal is taken.

### ARGUMENT.

The sole question on this appeal is the propriety of the direction of a verdict in favor of the defendant. We shall therefore commence by advertng to the evidence in more detail. The accident took place on May 26, 1927. The plaintiff would have completed his thirteenth year, that is to say, he would have attained the age of thirteen on the 8th day of September following (R. 15). The plaintiff had been riding in the defendant's bus to school for approximately three years, meeting it at the corner of Ocean Avenue and Port Monmouth Road, where the accident took place (R. 16). On the day in question the plaintiff testified that when the bus reached the opposite corner from where he was standing it was coming slow (R. 17), that he walked over to meet it and tried to get on, saying "I grabbed hold of the handle and jumped on the step."

Q When you did that what happened? A The bus swayed, gave a lurch and I slid under the wheels.

Q You fell off or slid under the wheels? A Fell off the bus.

Q Can you describe the sway or lurch to the jury, or did it happen so quickly that you can't tell? A No, I couldn't tell exactly how it happened.

Q Do you know or can you tell us what caused the lurch? A I believe it to be because it slipped off the concrete.

*By the Court:*

Q Was the door open when you grabbed the handle? A Yes, sir; it was.

Q Had the bus stopped? A No.

Q It was still in motion? A Yes, sir.

Q When you took hold? A Yes, sir.

Q And what did you do, run along with the bus? A I ran by the side of the bus and grabbed hold of the handle and jumped on" (R. 17).

He also said the bus had only thirty feet to go beyond the point where he attempted to get on and the point where the rest of the children were standing. (R. 18). He said he said nothing to the defendant when attempting to board the bus (R. 18), and that after the lurch or sway of the bus and after he fell off the bus went on almost to its usual stopping place—about twenty-five or thirty feet (R. 18). The plaintiff at no time testifies that the defendant saw him or looked at him. On cross examination he said that the drive from the point of boarding to the school was approximately five to seven miles, would take about half an hour, and that he did not like to stand during that half hour if he could help it. He said both feet were on the step when the lurch came, and testified:

“Q A pretty bad lurch, wasn't it? A  
Enough to throw me off the bus” (R. 29).

He reiterated that the bus was moving when he jumped on, and in answer to a question by the Court testified as follows:

“Q Did the bus driver open the door of the bus? A I couldn't say that he opened it but it was open when he came along.

“Q It was open when he came along? A  
Yes.

“Q You didn't see him open it? A No”  
(R. 31).

The bus was approaching and driving along the Port Monmouth Road and the cross road where the accident took place, called Ocean Avenue. (R. 27). When recalled the plaintiff testified as follows:

“Q What was the condition of the two roads, the Port Monmouth Road, the concrete road, and Ocean Avenue, the gravel road? A Well, one was about two or three inches lower than the other.

“Q And what happened with respect to the wheels of the truck, or rather of the bus?

A I believe the wheels to have gone off the concrete” (R. 57).

When cross-examined he testified:

“Q I am not asking you about the difference in height. You said you believed the bus ran off? A Yes, sir.

“Q I say you were too badly hurt to be sure immediately where the bus went after that? A I wasn't quite sure but I think it went off there.

“Q You think so but you are not sure? A No” (R. 57).

The plaintiff's witness, William Vitelli, testified that the door of the bus was open and the bus moving at the time the plaintiff grabbed hold of the handles and tried to get on (R. 34). This witness said nothing about the bus going off the concrete on to the gravel.

Ned Hammond, the plaintiff's brother, testified (R. 35):

“Well, the bus came up the Port Monmouth Road and William Vitelli and my brother went out to meet it and my brother went out and he grabbed hold of the handles and got his foot on the steps, and the bus swayed or lurched or something and he fell off underneath the wheel” (R. 35).

He said the door of the bus was open. (R. 36).

On cross examination he testified:

“Q The bus was moving when your brother tried to get on, wasn't it? A Sure.

“Q Did you see it lurch? A You could see the bus sway.

“Q Sway? A Yes, sway or lurch.

“Q Did you see the wheels of the bus go off the concrete onto the gravel shoulder? A I couldn't say that” (R. 37).

And also:

“Q But you just saw the body of the bus sway? A Yes.

“Q And did it sway at the time your brother fell off? A Just when he got hold of it the bus swayed.

“Q After he got hold of it? A Yes, he had his foot on the steps” (R. 38).

The plaintiff's only other eye witness was William Best. He testified:

“Q Will you tell the Court and jury in your own way and words just what you saw and what happened? A Well, Jack went out to Britton's corner to wait for the bus, and when the bus came along he caught the handles and stepped on the steps and went a few feet; then the bus gave a sudden jerk forward and he fell and when he fell he closed the door.

“Q You said he went a few feet? A Well, the bus went a few feet.

“Q And that was after he had his foot on the steps and his hand on the handles? A Yes” (R. 52) \*\*\*

“Q That sudden lurch, Billy, that you saw, which way did the bus lurch, if you can tell us? A It jerked forward” (R. 53).

The defendant and his witnesses told a different story, materially contradicting the plaintiff and his witnesses, and which, for that reason, for purposes of this appeal should in the main be disregarded. We invite the Court's attention, however, to the fact that the defendant categorically denied that he ever saw the plaintiff on the bus (R. 71, 74). Certain important facts should be noted. The plaintiff admitted he boarded a moving bus. Nobody testified that the bus actually rolled off the concrete onto the gravel. The plaintiff alone said he believed that was the cause of the lurch. Nobody testified that the defendant saw the plaintiff on or in

the act of attempting to get on the bus, and the defendant, as just hereinabove stated, directly denied that he did.

### I.

The accident was clearly due to the plaintiff's contributory negligence.

In *Murphy v. N. J. St. Ry. Co.*, 71 N. J. Law, 5, 6, the present Chief Justice, speaking for the Supreme Court, said:

‘Moreover, although it cannot be said, as a matter of law, that a person who attempts to board a trolley car while it is in motion is negligent, yet when the fact that the car is in motion is the sole producing cause of the injury, the risk of its occurrence is one which the person making the attempt must be held to have assumed.’

See also:

*Hoboken Ferry Co. v. Feiszt*, 58 N. J. L. 198 (C. E. A. 1895) *Baltimore Traction Co. v. State*, 28 Atl. 197 (Md. 1894).

In the last mentioned case the plaintiff was injured in attempting to board a moving cable car. Denying the plaintiff's right to recover, the Court said:

“We are of the opinion that if, under these circumstances, the deceased chose to make the experiment of attempting to enter the car, he must be required to bear the consequences of his own act, unless the defendant when he discovered his peril, failed to use the proper diligence in endeavoring to avert the injury. *Phillips v. Railroad Co.*, 49 N. Y. 177; *Reddington v. Traction Co.*, 132 Pa. St. 154, 19 Atl. 28.

“Even if the jury found that the signal to stop was or ought to have been seen by the gripman, and the deceased had a right to suppose from the slowing of the car, that his

tender of himself as a passenger had been accepted, it would not authorize him to make an attempt to enter under circumstances of peril open and known to him, and which, by the exercise of his senses, he could fully understand. He was on the street, and not on the property of the company, and need not have so acted unless he chose so to do.

“There was no evidence that the gripman saw his signal, and if he did the deceased could not infer his tender to become a passenger had been accepted by the slowing of the car, provided it was still moving so rapidly as to make it obviously unsafe to attempt to board it. The relation of carrier and passenger may indeed be implied from slight circumstances, but one who intends to take passage on a street car cannot be regarded as a passenger, while he is in the act of entering it, unless he does so with a proper degree of care and prudence. The street was in no sense a passenger station, for the safety of which the company is responsible. *Booth, St. Ry. Law* 445; *Creamer v Railway Co.*, (Mass.), 31 N. E. 391; *Platt v. Railway Co.*, 2 Hun. 124. So, until he had entered the car, or was in the act of prudently entering, he had not placed himself in the charge of the defendant; and, if the attempt to enter was so obviously reckless and careless as to amount in itself to contributory negligence it would be unreasonable to hold that such imprudent conduct entitled him to be regarded as a passenger while hanging onto the outside of the car.”

In the analogous cases of passengers leaving a car when the door is open but the car has not come to a full stop, the courts have uniformly held that such opening of a door is not an invitation for the passengers to alight at the time, but to alight when the train comes to a stop.

*Mearns v. N. J. Cent. R. Co.* (C. C. A. 2nd, 1905, 139 F. 543, 5, 71 C. C. A. 331.

“The contention of the plaintiff is, in effect, that when the porter or guard, made the statement, ‘Jersey City; last stop; all out,’ and followed it by opening the vestibule door, it amounted to a positive assurance by the defendant that the car had stopped and was an ‘invitation’ to the plaintiff to alight accompanied with a guarantee that he could do so with safety. It is argued that it was the duty of the porter to know whether the car had stopped or not; if he did not know it was negligence. If, on the other hand, he did know he should have warned the plaintiff not to get off, and his failure to do so was negligence. We do not think this contention can be maintained. It places upon carriers obligations which practically make them insurers of the lives and limbs of their passengers.

“The statement of the porter was not an ‘invitation’ to alight, but was the usual announcement of a fact of interest to the passengers, namely, that they had reached or were about to reach the end of their journey. The opening of the door of the vestibule did not warrant the inference that the car had stopped, but was only another act to facilitate the rapid and orderly egress of the passengers, after the train had stopped.”

To the same effect are *Elger v. Boston Elevated Ry. Co.*, 115 N. E., 242 (Mass. 1917); *Twaddell's Adm'r v. So. Covington Ry Co.*, 255 S. W., 1027 (Ky. 1923); *Morris v. Ill. Central R. R.*, 53 Southern, 698 (I a. 1910); *Weber v. Kansas City Cable Ry. Co.*, 12 S. W. 804 (Mo. 1890).

See also *Hanico v. Washington, etc. R. Co.*, 148 Atl., 82 (Md.); *O'Connor v. Omaha etc. Co.* 177 N. W. 838 (Neb.).

The mere fact that the boy plaintiff would not be thirteen years old until approximately three

months after the accident did not under the circumstances of this case require the Court to leave to the jury the question of his contributory negligence. The cases cited by the plaintiff's counsel on pages 11, 12 and 13 of his brief are to the effect that in the case of an infant of tender years the question of his contributory negligence *usually* is for the jury. No case holds that the negligence of a boy almost thirteen years of age under every and all circumstances is necessarily a question for the jury.

In the case at bar it appeared from the plaintiff's own evidence that he was familiar with the surroundings. If his belief was that the bus lurched because it rolled off the concrete on to the gravel shoulders, then that lurch was bound to happen and was inevitable in the ordinary operation of the bus, as the bus had to and was in the habit of drawing up to the sidewalk to enable the pupils to board it, as the defendant always brought his bus to the curb (R. 62). The plaintiff must have well known, therefore, that the bus would have to roll off the concrete and the defendant had to drive it off the concrete if he was to approach his regular stopping place.

Of course the great weight of the evidence is to the effect that the bus did not roll off of the concrete, and that there was no lurch, but at the moment we are looking at the case from the standpoint of the plaintiff's own testimony. Any boy of the age of the plaintiff and as familiar as the plaintiff was by three years of experience of the surroundings where the accident took place knows that if he boards a moving bus and misses his foothold or handhold, he will fall to the ground, and perhaps under the wheels. He also knows that if while he is in the act of boarding the bus and before he reaches the place of safety on the inside

of the bus, it gives a lurch because of rolling off the concrete onto the gravel shoulder, two or three inches lower, as it is bound to do in approaching its usual stopping place, there is danger of his being thrown off the bus. Such a boy also knows that if the lurch occurs at the moment of his entering the bus before he is fully in and occurs for any reason unexplained, it may cause him to lose his foothold and fall to the ground.

Under the facts in this case, notwithstanding that the boy was three months short of thirteen years of age, it was not open for the jury to say that he was not guilty of contributory negligence. In other words the circumstances were so sufficiently strong that, taking into consideration the plaintiff's age, experience and capacity to understand and avoid danger to which he was exposed in the actual circumstances and situation under investigation, it was not open to the jury to find that the plaintiff is not guilty of contributory negligence, and in such a case a non suit or directed verdict for the defendant must be granted. A direct authority for this proposition is found in *North Hudson Ry. Co. v. Flanagan*, 57 N. J. Law, 696 (C. E. A. 1895). In this case the plaintiff, a boy nine years of age, was playing a game of ball in a street through which the defendant operated its railroad. As the car of the defendant was approaching the plaintiff started to run across the street in front for the purpose of avoiding being hit by the ball which was being thrown at him by one of the players. Running diagonally across the street and looking over his right shoulder at the boy about to throw the ball he was utterly unconscious of the approaching car until "he heard the driver yell to him." Upon hearing this he stopped and turning around saw the car horses within four feet of him, and

the next instant he was run down. The Court held that it was error not to non suit the plaintiff, Gummere, *J.* for the Court, saying, p. 698:

“So far as the case shows there were no obstructions of any kind to prevent the plaintiff from seeing the defendant’s car, had he looked as he was crossing the street. His only reason for not seeing it was that he was engrossed in his game, and had his head turned in exactly the opposite direction to that from which the car was approaching. The rule is perfectly well settled that a person, crossing a street on foot, is bound to look out for approaching vehicles, and, if neglecting to do so, he is hurt, he will be considered to have contributed to the injury by his negligence, and will be barred from a recovery against the person who inflicted it. *Sheets v. Connolly Railway Co.*, 25 Vr., 518. It is urged on behalf of the plaintiff, that this rule only applies when the person injured is *sui juris*; that the plaintiff, although nine years old, was backward, both mentally and physically, compared with other boys of his age, and that it was for the jury to say whether he was of sufficient intelligence to be chargeable with negligence in crossing the street as he did. We do not think that there is anything in the evidence to warrant the idea that this plaintiff had not sufficient mental capacity to know the danger of attempting to cross a street directly in front of a moving horse-car, and to avoid such danger. A boy of his age, even if mentally not up to the standard of other boys of the same age, is not in law altogether exempted from the exercise of care and prudence in approaching a known danger and when the evidence shows that he has been the heedless instrument of his own injury, he cannot recover.”

Under the authority of the case last cited and on principle the Supreme Court was entirely right in holding, as it did the setting aside of the verdict in the first trial, that the plaintiff was

See also.

*Brady v. Consolidated Traction Co.*  
63 L 25 (Sep 1899).

*Clivic v. Innair*, 102 L 377 (C.E. A. 1899)

guilty of contributory negligence, and the trial Judge, the evidence being the same at the second trial, was right in directing a verdict for the defendant, and the judgment should be affirmed.

## II.

The plaintiff's injuries were caused by a risk which he assumed and therefore his injuries do not render the defendant liable.

In this connection we again invite the Court's attention to the language in *Murphy v. N. J. St. Ry. Co.*, 71 N. J. Law, 56, hereinabove quoted. See also the opinion of the Supreme Court in *Schmidt v. North Jersey St. Ry. Co.*, 58 Atl., 72 (Supreme, 1904), in which the Court said:

“Although a person attempting to board a moving car takes the risk of injury resulting from its ordinary motion, he does not assume the risk of injury from sudden and negligent increase of the motion of the car.”

So in the case at bar the plaintiff assumed the risk of injury resulting from boarding a moving bus, and the defendant must be on this ground held not responsible for his injuries, unless the plaintiff also shows that his injuries were caused, not by the boarding of the bus, but by the lurch, and shows that that lurch was also negligent. There is not a scintilla of evidence to show the last. Indeed, the only evidence there is as to the cause of the lurch is the plaintiff's own belief that it was caused by running off the concrete onto the gravel shoulder. As we have shown above, the plaintiff was bound to realize the bus would do this if it continued in its ordinary course, and if he boarded the bus before it had rolled off he assumed the risk of the lurch or jar which would be caused by rolling off the concrete.

## III.

There was no evidence to submit to the jury that the defendant was guilty of any negligence whatsoever.

This we feel was the fundamental and conclusive defect in the plaintiff's case.

The plaintiff charged the defendant with negligence as follows:

"6. More particularly, the defendant was negligent in the following respects:

(a) He invited the plaintiff and other passengers to enter said bus while in an unsafe position on the highway.

(b) He drove and operated said bus at an excessive rate of speed while inviting passengers to board the same;

(c) He started said bus up suddenly while plaintiff was boarding said bus;

(d) He negligently and carelessly failed to keep the door to the entrance of said bus closed until said bus was in a safe position or place to be boarded;

(e) He negligently failed to provide said bus with proper brakes or stopping appliances;

(f) He was in divers other respects careless and negligent in the providing of safe means of entrance to said bus, and with a safe method of entering or boarding said bus" (R. 4, 5).

Let us consider for a moment the six different specifications of negligence. Obviously (f) adds nothing to the other five. We immediately eliminate (e) because there isn't a word about improper brakes in the evidence. We can also immediately dispose of (b) and (c) because there is not the slightest evidence that the bus was doing anything but slowing up at the time the

plaintiff attempted to board then leaves for our consideration only items (a) and (d).

The plaintiff's case, taken most favorably to him, is that the defendant by opening the door invited the plaintiff to enter before the bus had come to a full stop, and that the bus lurched by going off the concrete, as a result of which lurch the plaintiff was thrown and run over.

Most cases in the books analogous to the case at bar approach the question of liability from the standpoint of contributory negligence or assumption of risk. It is, of course, elementary, however, that before there can be any liability, negligence on the part of the defendant must be shown. Sometimes the cases denying liability as a matter of law go on that ground. One of such cases was *North Hudson Ry. Co. v. Flanagan, supra*, in which the present Chief Justice, speaking for this Court, after discussing the question of contributory negligence as hereinabove quoted, said, on page 699:

“But it is not necessary to put our decision upon this ground, for the reason that we find nothing whatever in the evidence to justify the conclusion that the defendant was negligent in the management of its car. It was moving at an ordinary rate of speed as it approached the spot where the accident occurred, and the driver appears to have had both his horses and his car under control. But it is claimed that the driver was negligent in shouting to the plaintiff just as he was in the act of crossing the track, thereby causing him to stop; and it is said that the evidence warrants the conclusion that the plaintiff would have crossed the track in safety had he not been stopped by the driver's call.

“Admitting that this is true, it does not follow that there was anything culpable or negligent in the conduct of the driver in

shouting at the plaintiff as he did. He certainly had no reason to imagine that his doing so would have the effect of stopping the plaintiff just at the point of greatest danger, instead of causing him to hurry away from it. We think that the conduct of the driver, in the emergency which confronted him, was that of a prudent man, and that he was justified in supposing that his shouting at the plaintiff would bring about the result which he desired, namely, of frightening him off the track."

Among the other cases which approach the question from the standpoint of want of negligence on the part of the defendant are the following:

*Gagnon v. Boston Elevated Ry. Co.*, 91 N. E., 875 (Mass.) Rugg, *J.*, for the Court in that said, page 876:

"It is argued that there was evidence from which the negligence of Corbett, the conductor of the motor car, may have been found from the fact that he was violating the rule of the defendant which required him to be standing upon the lower step of his car, grasping each hand iron, so as to stop people from getting upon the car while in motion.

"The argument of the plaintiff is that it was the exercise of due care on the part of her intestate to endeavor to board a moving car, and that it was negligence on the part of the conductor not to restrain him from such an attempt.

"She predicates the negligence of the defendant's servant on his failure to thwart her intestate in his effort to use due care. The bald statement of such a proposition is *its refutation*. Under the conditions here disclosed, the act of the defendant's conductor in not observing such a rule, when there is nothing else to show want of proper caution on his part, cannot be treated as negligence toward the plaintiff's intestate."

*Moylan v. Second Avenue Ry. Co.*, 27 N. E. 977 (N. Y.). In this case the plaintiff sued for injuries received while boarding a slowly moving street car—was non-suited on the ground that if it was not careless for the plaintiff to board the car it was not negligence for the motorman merely to slow up and not come to a full stop. Earl, *J.*, for the Court of Appeals, said, page 977:

“It is impossible for us to perceive wherein the defendant was guilty of negligence, or, if it was guilty, wherein it was more guilty than the plaintiff. It was not careless for the plaintiff to attempt to enter the car while it was slowly moving. Thousands of young men get on and off street-cars daily, and are permitted to do so, in perfect safety. No negligence can, therefore, be imputed to the defendant merely because it did not stop the car for the plaintiff.

“The plaintiff, when he attempted to get upon the car, was probably nearer the truck than the conductor was; and he had a better opportunity to see the truck than the conductor had, as it was on the same side of the car with him, near him, in plain sight—in fact, in his immediate presence. If the conductor was careless in not seeing it, he was more careless. If the conductor was bound to guard him against the danger, so he was also bound to care for himself. It was his duty to see for himself that there was no obstacle in his immediate presence, outside of the car and the railway track, which made it dangerous for him to attempt to enter the moving car.”

The cases relied upon by counsel for the plaintiff are very different on their facts from the case at bar. *Kelly v. Consolidated Traction Company*, 62 Law 514, was a case in which the plaintiff was entering a standing trolley car on the wrong side. The car was started by the conductor, who saw the plaintiff in the act of boarding, and it was the

starting of the car which threw the plaintiff to the ground. In the case at bar, as we have hereinabove pointed out, there is not the slightest evidence that the defendant saw the plaintiff in the act of boarding, and the defendant's own evidence is that he did not see the plaintiff. *Schmidt v. North Jersey St. Ry. Co., supra*, also cited by counsel for the plaintiff, was a case in which the trolley car slowed down almost to a standstill, and then, while the plaintiff was in the act of stepping on, the motorman called to him to take the next car, and immediately put on his power.

How could the defendant have prevented the plaintiff from trying to board the moving bus? Of course, he could not. What did the defendant do that a reasonable man in his position would not have done, or what did he leave undone that a reasonable man in his position would have done? All the evidence is that the bus was rolling along slowly, coming to a regular stopping place. Even if the defendant saw the plaintiff in the act of boarding, of which there is no evidence, he could have done but one of two things—continued on slowly to his regular stopping place, or applied his brakes suddenly. Surely it is not possible to say that a reasonable man in the defendant's position, *even assuming he saw the plaintiff*, should not have continued to roll the few remaining feet to the curb stopping place, rather than run the risk of jarring the plaintiff loose by severely and suddenly applying the brakes. Counsel for the plaintiff at page 10 of his brief says:

“So in the instant case had the plaintiff, John Hammond, been thrown from the bus while boarding it the jury would have been justified in finding no negligence on the part of the defendant. Such a situation is not presented in the instant case, John Hammond was safely aboard the bus.”

With these words counsel for the plaintiff concedes his case out of Court. Obviously it is ridiculous to say that the plaintiff, while still clinging to the step of the moving bus, was safely aboard it, or had reached a place of safety. The whole affair was a matter of seconds, and the plaintiff's own story is that he was thrown from the bus while on the step. He was therefore thrown from the bus while boarding it, and it was not open to the jury to find any negligence on the part of the defendant. As we have several times hereinabove pointed out, the only testimony as to the cause of the lurch (that there was any lurch is of course very vigorously denied by the testimony on the part of the defendant) is the plaintiff's testimony that he believed it was caused by the bus rolling off the concrete to the gravel shoulder. Surely, even if the defendant saw the plaintiff, no negligence can be predicated in permitting the bus to roll on to its usual stopping place, when apparently the only alternative was the sudden and violent application of the brakes, which might well have jarred the plaintiff from his precarious position. When we add the fact that the defendant did not see the plaintiff it is impossible to see how any liability can be predicated upon the defendant's conduct unless he is in fact made a guarantor against injuries resulting from the plaintiff attempting to board the moving bus. That is, of course, not the basis of liability. Negligence, itself, some want of due care, must affirmatively be shown by the plaintiff.

Of course on this question of negligence of the defendant, the age of the plaintiff is immaterial. For example, if a child of three years should without warning toddle in front of an automobile approaching at a reasonable rate of

speed, but passing an obstruction, which on passing the driver had blown his horn, and if that child were struck with the car and injured, no negligence can be attributed to the driver because by hypothesis there is nothing he did or left undone which a reasonable man under the circumstances would not have done, and this is wholly independent of the fact that a child of such tender years cannot be guilty of any contributory negligence whatsoever. In other words, the plaintiff must show some want of care on the part of the defendant before the question of contributory negligence comes into the case at all. He cannot show any evidence of such want of care in this case, and the direction of a verdict is entirely proper.

#### IV.

The authorities cited by counsel for the plaintiff under Point III of their brief are inapplicable.

Counsel cite cases holding that where a verdict is set aside as against the *weight* of the evidence, although there is *some* evidence in support of the verdict, it is error on a second trial to direct a verdict in favor of, say, the defendant. Of course this is the law. Admittedly there is a difference between a verdict against the weight of the evidence and a verdict without any evidence to support it. The opinion of the Supreme Court in the case at bar, however, did not go on the weight of the evidence. After summarizing the testimony on the part of the plaintiff the opinion of the Court concluded:

“This is his own story, and it demonstrates that the accident was due in part at least to his own negligence” (R. 14).

This shows that the Supreme Court held that there was no evidence which would support a verdict that the plaintiff was not guilty of contributory negligence. With evidence of the second trial differing in no material point, it was the duty of the trial Judge to follow the opinion of the Supreme Court that there was no evidence upon which a verdict of contributory negligence could be based. It was his duty, therefore, to direct a verdict in favor of the defendant.

The rule to show cause allowed after the first verdict was based not only on the weight of the evidence, but also upon the failure of the trial Judge to non-suit or direct a verdict in favor of the defendant.

Wherefore it is respectfully submitted that the judgment should be affirmed.

G. W. C. McCARTER,  
Of counsel with defendant.

October Term, 1930.

