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Summons.

THE STATE OF NEW JERSEY to ARTHUR H. BROWN and MUTUAL CASUALTY COMPANY:

(L. S.)

You are hereby summoned to answer the annexed complaint of Giuseppina La Bella, *adminstratrix ad prosequendum* of the estate of Dimetrio La Bella, deceased, in an action at law in the Hudson County Circuit Court. And take notice that unless you file an answer to said complaint with the Clerk of the Hudson County Circuit Court at Jersey City 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, WILLARD W. CUTLER, Esq., Judge of our said Hudson County Circuit Court, at Jersey City, this 25th day of July, 1923.

JOHN J. McGOVERN,
Clerk.

LAZARUS, BRENNER & VICKERS,
Attorneys.

Complaint.

Filed August 11, 1923.

HUDSON COUNTY CIRCUIT COURT.

GIUSEPPINA LA BELLA, administratrix *ad prosequendum* of the estate of DIMETRIO LA BELLA, deceased, Plaintiff, *v.* ARTHUR H. BROWN and MUTUAL CASUALTY COMPANY, Defendants.	Action at Law. Complaint.

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

FIRST COUNT.

1. On March 4, 1923, the defendant Mutual Casualty Company was the owner of a certain automobile, which was being driven by its servant and agent, Arthur H. Brown, upon and along the Hudson County Boulevard, a certain public street and highway in the City of Bayonne, County of Hudson aforesaid.

2. Said automobile was being so negligently, carelessly and improperly operated and driven by the defendant Mutual Casualty Co. through its servant and agent, Arthur H. Brown, that said automobile struck and ran into, knocked down and injured Dimetrio La Bella, now deceased, who was then lawfully in and upon said public street

and highway, inflicting upon him injuries which subsequently caused his death.

3. The negligence of the defendant consisted in this:

(a) That said automobile was being driven and operated at an excessive rate of speed.

(b) That no warning was given of the approach of said automobile.

(c) That no proper lookout was being maintained for the purpose of observing the person or persons lawfully upon said public street and highway.

(d) That said automobile was not under proper control.

4. Plaintiff is the *adminstratrix ad prosequendum* of the estate of Dimetrio La Bella, deceased, such letters of administration having been issued to her by the Surrogate of the County of Hudson, which letters she here and now brings into court.

5. Plaintiff's intestate left him surviving the plaintiff, his widow, and two children, to wit, Antonio La Bella, three years of age, and Angela La Bella, aged ten months, who have suffered pecuniary injury by reason of his death.

6. Plaintiff's action against this defendant was commenced within twenty-four calendar months from the date of the decease of the said Dimetrio La Bella.

Plaintiff demands as damages against the defendant Mutual Casualty Company $20,000.

SECOND COUNT.

1. The plaintiff hereby makes all of the paragraphs of the first count a part of this count in the same manner and to the same effect as if said paragraphs were herein specifically realleged, and further says:

2. The negligence of the defendant Arthur H. Brown consisted in this:

(a) That said automobile was being driven and operated at an excessive rate of speed.

(b) That no warning was given of the approach of said automobile.

(c) That no proper lookout was being maintained for the purpose of observing the person or persons lawfully in and upon said public street and highway.

(d) That said automobile was not under proper control.

Plaintiff demands as damages against the defendant Arthur H. Brown $20,000.

LAZARUS, BRENNER & VICKERS,
Attorneys of Plaintiff.

A true copy.

THOMAS MADIGAN,
Sheriff.

Filed in Clerk's Office Aug. 11, 1923.

Answer.

Filed August 13, 1923.

HUDSON COUNTY CIRCUIT COURT.

GIUSEPPINA LA BELLA, administratrix *ad prosequendum* of the estate of DIMETRIO LA BELLA, deceased, Plaintiff, *v.* ARTHUR H. BROWN and MUTUAL CASUALTY COMPANY, Defendants.	Action at Law. Answer.

Defendants Arthur H. Brown and Mutual Casualty Company, answering the complaint of the plaintiffs herein, say that:

ANSWER TO FIRST COUNT.

1. Defendants admit paragraph 1.

2. Defendants deny paragraph 2.

3. Defendants deny paragraph 3.

4. Defendants say that it does not have sufficient knowledge or information to form a belief as to the truth of the allegations contained in paragraph 4.

5. Defendants say that it does not have sufficient knowledge or information to form a belief as to the truth of the allegations contained in paragraph 5.

6. Defendants say that it does not have suffi-

cient knowledge or information to form a belief as to the truth of the allegations contained in paragraph 6.

ANSWER TO SECOND COUNT.

1. Defendants answer paragraph 1 of the second count the same as they answer the respective paragraphs of the first count therein referred to.

2. Defendant Arthur H. Brown denies paragraph 2.

FIRST DEFENSE.

The defendant Mutual Casualty Company was not guilty of negligence.

SECOND DEFENSE.

The defendant Arthur H. Brown was not guilty of negligence.

THIRD DEFENSE.

Neither the defendants nor its servants or agents caused the said accident, nor did they contribute in any extent whatever to the occurrence of said accident; and whoever was guilty of the negligence which caused said accident, or contributed to the occurrence thereof, the plaintiff was guilty of contributory negligence, of which the particulars are as follows:

Whatever damages and injuries were sustained by the plaintiff, Dimetrio La Bella, deceased, at the time and place mentioned in the complaint, were caused and contributed to by his negligence in that he negligently and carelessly exposed himself to the risk of such an accident and neglected to take precaution or to exercise care to guard and

protect himself against such an accident; moreover at the time and place mentioned in the complaint he was conducting himself in a careless, negligent and reckless manner, and was not exercising care or taking proper precautions.

FOURTH DEFENSE.

Defendant Arthur H. Brown, by way of further defense says, that the automobile which he was operating as mentioned in paragraph 1 of the first count did not at any time strike, collide with or run into the decedent, Dimetrio La Bella.

WHEREFORE, the defendants demand judgment that the complaint herein be dismissed with the costs and disbursements in this action.

JOSEPH C. PAUL,
Attorney for Defendants.

JACOB SCHNEIDER,
Of Counsel.

Reply.

Filed August 21, 1923.

HUDSON COUNTY CIRCUIT COURT.

GIUSEPPINA LA BELLA, administratrix *ad prosequendum*, etc., Plaintiff, *v.* ARTHUR H. BROWN, *et al.*, Defendants.	Action at Law. Reply.

Plaintiff for a reply to the answer of defendants says that:

1. She denies all the allegations contained in the third defense.

2. She denies the allegations contained in the fourth defense.

LAZARUS, BRENNER & VICKERS,
Attorneys of Plaintiff.

Summons.

THE STATE OF NEW JERSEY to L. C. Biglow & Co., a corporation, and
L. S. Charles W. Derr.

YOU ARE SUMMONED to answer the complaint of Giuseppina La Bella administratrix ad prosequendum of the Estate of Dimetrio La Bella, deceased, in an action at law in the Hudson County Circuit Court. And take notice that unless you file your answer to said

complaint with the clerk of the said court, within twenty days after service upon you of this writ and the anexed complaint, the plaintiff may proceed in the suit and judgment may be entered against you.

WITNESS, HENRY E. ACKERSON, Esq., Judge of the Hudson County Circuit Court, at Jersey City, this 26th day of April, 1924.

JOHN J. McGOVERN,
Clerk.

LAZARUS, BRENNER & VICKERS,
Attorneys.

Complaint.

Filed May 1, 1924.

HUDSON COUNTY CIRCUIT COURT.

GIUSEPPINA LA BELLA, administratrix *ad prosequendum* of the estate of DIMETRIO LA BELLA, deceased, Plaintiff, *v.* L. C. BIGLOW & CO., a corporation, and CHARLES W. DERR, Defendants.	Action at Law. Complaint.

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

FIRST COUNT.

1. On the 4th day of March, 1923, the defend-

ant corporation L. C. Biglow and Company was the owner of a certain automobile which was being driven by its servant, agent or employee upon and along the Hudson County Boulevard, a certain public street and highway in the City of Bayonne, County of Hudson, as aforesaid.

2. Said automobile was being driven so negligently, carelessly and improperly that the driver caused the said automobile owned by the defendant corporation to run into and over the body of Dimetrio La Bella, now deceased, who was then lawfully in and upon said public street and highway, inflicting upon him injuries which subsequently caused the death of the said Dimetrio La Bella.

3. The negligence of the defendant, its servant, agent or employee consisted in this,

(a) The said automobile was being driven at a high and improper rate of speed.

(b) That no warning was given of the approach of said automobile.

(c) No proper lookout was maintained for the purpose of observing the presence of the person or persons upon said public street and highway.

(d) That the said automobile was not under proper control.

4. Plaintiff is the administratrix ad prosequendum of the estate of Dimetrio La Bella, deceased, such letters of administration having been issued to her by the Surrogate of Hudson County, which letters she here and now brings into court.

5. Plaintiff's intestate left him surviving the plaintiff, his widow, and the two children, to wit, Antonio La Bella, 3 years of age, and Angela La Bella, aged 10 months, who have suffered pecuniary injury by reason of his death.

6. Plaintiff's action against this defendant was commenced within twenty-four calendar months from the date of the decease of the said Dimetrio La Bella.

Plaintiff demands as damages the sum of $20,000.

SECOND COUNT.

1. Plaintiff hereby makes all the allegations contained in the first count a part of this count in the same manner and to the same effect as if they were herein specifically realleged and further says,

2. That the injury and death of the plaintiff's intestate Dimetrio La Bella was caused by the negligence of the defendant Charles W. Derr, said negligence consisting in this,

(a) That he drove the said automobile at a high and improper rate of speed.

(b) That no warning was given of the approach of the said automobile.

(c) That he did not keep a proper lookout for persons in and upon the public street and highway as aforesaid.

(d) That the automobile was not under proper control.

Plaintiff demands as damages the sum of $20,000.

LAZARUS, BRENNER & VICKERS,
Attorneys of Plaintiff.

Order on Motion to Quash.

Filed June 12, 1924.

HUDSON COUNTY CIRCUIT COURT.

GIUSEPPINA LA BELLA, administratrix *ad prosequendum* of the estate of DIMETRIO LA BELLA, deceased, Plaintiff, *v.* L. C. BIGLOW & CO., a corporation, and CHARLES W. DERR, Defendants.	Action at Law. Order on Motion to Quash, &c.

The defendants appearing specially only, and moving to quash the service of the summons and complaint herein upon the defendant, L. C. Biglow & Co., a foreign corporation, upon the ground that the same was not made in accordance with the provisions of the statute in such case made and provided, and also to quash the service upon the defendant, Charles W. Derr, upon the ground of misnomer and other informality in designation of said individual defendant, and it appearing that due notice of this application has been given to the attorneys for the plaintiff, and the Court having heard the arguments of Runyon & Johnson, by Edmund S. Johnson, Esq., appearing specially for the defendants, and Lazarus, Brenner and Vickers, by Alfred Brenner, Esq., for the plaintiff,

It is, on motion of Runyon & Johnson, attorneys appearing specially, ORDERED, that the application

to set aside the service of the summons and complaint upon the defendant, L. C. Biglow & Co., a corporation, be and the same hereby is granted, and it is accordingly ordered that service of the summons and complaint herein upon the defendant, L. C. Biglow & Co., a corporation, be and the same hereby is quashed, set aside and for nothing holden; further ordered, that the motion to set aside the service of the summons and complaint upon the defendant, Charles W. Derr, be and the same hereby is denied.

And the plaintiff thereupon moving to amend the summons and complaint herein to make the name of the individual defendant therein read Carl W. Derr instead of Charles W. Derr, it is, on motion of Lazarus, Brenner & Vickers, attorneys for the plaintiff, ORDERED, that the summons and complaint be amended accordingly by changing the Christian name of the individual defendant herein to read Carl instead of Charles and that the said suit proceed singly against the defendant Carl W. Derr; FURTHER ORDERED that the defendant, Carl W. Derr, have 15 days from the date hereof in which to file his answer, or such other pleading or motion as he may be advised.

Dated June 9th, 1924.

Let the above rule be entered in the minutes.

HENRY E. ACKERSON, JR.,
Judge.

Order approved as to form and sufficiency.

LAZARUS, BRENNER & VICKERS,
Attorneys of Plaintiff.

Answer.

Filed July 22, 1924.

HUDSON COUNTY CIRCUIT COURT.

GIUSEPPINA LA BELLA, administratrix *ad prosequendum* of the estate of DIMETRIO LA BELLA, deceased, Plaintiff, *v.* CARL W. DERR, Defendant.	}	Action at Law. Answer.

The defendant, residing in the Borough of Richmond, in the City, County and State of New York, says that:

He denies the truth of the matters contained in the complaint.

SEPARATE DEFENSE.

The plaintiff's intestate, Dimetrio La Bella, was guilty of contributory negligence.

RUNYON & JOHNSON,
Attorneys for Defendant.

Consent is hereby given to the filing of the within answer as within the time required by the rules and practice of this Court.

LAZARAUS, BRENNER & VICKERS,
Attorneys for Plaintiff.

Reply.

Filed July 19, 1924.

HUDSON COUNTY CIRCUIT COURT.

GIUSEPPINA LA BELLA, administratrix *ad prosequendum* of the estate of DIMETRIO LA BELLA, deceased, Plaintiff, *v.* CARL W. DERR, Defendant.	Action at Law. Reply.

Plaintiff, for a reply to the allegations in the defendant's answer, denies the separate defense contained therein.

LAZARUS, BRENNER & VICKERS,
Attorneys of Plaintiff.

Judgment Record.

Filed May 27, 1925.

HUDSON COUNTY CIRCUIT COURT.

GIUSEPPINA LA BELLA, administratrix *ad prosequendum* of the estate of DIMETRIO LA BELLA, deceased,

Plaintiff,

v.

ARTHUR H. BROWN and MUTUAL CASUALTY COMPANY,

Defendants.

GIUSEPPINA LA BELLA, administratrix *ad prosequendum* of the estate of DIMETRIO LA BELLA, deceased,

Plaintiff,

v.

CHARLES W. DERR (amended to read CARL W. DERR),

Defendant.

These cases were consolidated and tried before Judge Henry E. Ackerson, Jr., with a jury on May 25, 1925, May 26, 1925, and May 27, 1925, and the jury after having retired to deliberate and consider the evidence returned a verdict in favor of the plaintiff Giuseppina La Bella, administratrix ad prosequendum of the estate of Dimetrio La Bella, deceased, in the sum of $12,000 and costs to be taxed.

It is ordered that judgment final be entered in favor of plaintiff Giuseppina La Bella, administratrix ad prosequendum of the estate of Dimetrio La Bella, deceased, and against the defendants Arthur H. Brown and Mutual Casualty Co. and Carl W. Derr in the sum of $12,000 and costs to be taxed.

HENRY E. ACKERSON, JR.,
Judge.

Dated, May 27, 1925.

Rule entered this 27th day of May, 1925, on motion of Joseph Scala and Alfred Brenner, attorneys of plaintiff.

Notice of Appeal.

Filed June 30, 1925.

HUDSON COUNTY CIRCUIT COURT.

GIUSEPPINA LA BELLA, administratrix *ad prosequendum* of the estate of DIMETRIO LA BELLA, deceased,

Plaintiff,

v.

ARTHUR H. BROWN and MUTUAL CASUALTY CO.,

Defendants.

Action at Law.

GIUSEPPINA LA BELLA, administratrix *ad prosequendum* of the estate of DIMETRIO LA BELLA, deceased,

Plaintiff,

v.

CHARLES W. DERR (amended to read CARL W. DERR),

Defendant.

Notice of Appeal.

To Lazarus, Brenner & Vickers, attorneys of plaintiff:

PLEASE TAKE NOTICE that the defendants, Arthur H. Brown and Mutual Casualty Co., appeal to the New Jersey Supreme Court from the whole of the

judgment entered in these cases in the above entitled cause.

JOSEPH C. PAUL,
Attorney of Defendant.

JACOB SCHNEIDER,
Of Counsel.

Due service of a true copy of the within notice of appeal is hereby acknowledged this 23rd day of June, 1925.

LAZARUS, BRENNER, VICKERS
& JOSEPH SCALA,
Attorneys of Plaintiff.

RUNYON & JOHNSON,
Attorneys of Defendant, Carl W. Derr.

Grounds of Appeal.

(Filed July 10, 1925.)

NEW JERSEY SUPREME COURT,

GIUSEPPINA LA BELLA, administratrix *ad prosequendum* of the estate of DIMETRIO LA BELLA, deceased,

Plaintiff,

v.

ARTHUR H. BROWN and MUTUAL CASUALTY CO.,

Defendants.

Action at Law.

On Appeal from Hudson County Circuit Court.

GIUSEPPINA LA BELLA, administratrix *ad prosequendum* of the estate of DIMETRIO LA BELLA, deceased,

Plaintiff,

v.

CHARLES W. DERR (amended to read CARL W. DERR),

Defendant.

Grounds of Appeal.

The defendants-appellants Arthur H. Brown and Mutual Casualty Co., hereby set forth the grounds of appeal in the above entitled matter.

1. The Trial Court refused to grant defendants' motion for a nonsuit at the close of the plaintiff's case and allowed the case to proceed, whereas said Court should have granted said motion and directed a judgment of nonsuit.

2. The Trial Court refused to grant defendants' motion for a direction of a verdict at the close of the case and submitted said case to the jury, whereas said Court should have granted said motion and directed a verdict in favor of the defendant.

3. The Court instructed the jury that if they found that a verdict should be rendered against all three of the defendants, the mere fact that there were two suits should not confuse them as to how their verdict should be rendered and that they should find a verdict for one lump sum and they should not split the verdict up as against the separate defendants. The Court expressly instructed the jury to find a one lump sum verdict and not separate verdicts although counsel for these defendants called his attention to this point and requested him to instruct the jury to find separate verdicts and not a lump sum verdict.

4. The Court permitted the jury to pass upon the issue of speed of these defendants' vehicle although there was no issue of fact involving the speed of said vehicle.

5. The Court instructed the jury that they might find under the evidence of the case that the death was caused by the concurrent or joint negligence of the defendants Derr and Brown thus substantially instructing the jury and permitting the jury to find that the death of the plaintiff's intestate was caused by the joint or concurrent negligence of both these defendants, whereas the negligence of these defendants, if any, was separate and distinct from that of the other and constituted separate causes of action.

6. The Court under its instructions submitted

this case to the jury on the theory that the death of plaintiff's intestate might have been caused by either of the defendants separately or by both of them jointly, whereas on the evidence of the case, it was not a case of joint liability but of separate or several liability.

7. The Court left it to the jury to determine what was the cause of the death of the plaintiff's intestate and particularly to determine as to whether his death was caused by the negligence of the defendant Derr or of the defendant Brown, whereas there was no evidence whatsoever to connect the cause of death with any negligent acts of omission or commission by the defendants Brown and Mutual Casualty Co.

8. The Court limited the jury in considering the question of contributory negligence of the plaintiff's intestate as applied to the defendants Brown and Mutual Casualty Co. from the time when he lay prostrate in the street after having been struck by the defendant Derr's automobile, whereas the Court should not have so limited this time and should have permitted the jury to consider all the actions of the plaintiff's intestate including actions prior to this time in determining whether he was guilty of contributory negligence with respect to these defendants.

9. When the Court called the jury back and supplemented his charge he submitted to the jury the case on the theory of joint liability and subsequently instructed the jury that in order to find both defendants guilty of negligence, "the negligence of each one of them must have been a proximate cause concurring with the other cause producing death."

10. The Court in said supplementary charge charged as follows: "Probably it would be better to say if the successive acts of these two parties, within one of the definitions I have laid down here, operated so that each successive act of negligence was a proximate cause leading up to and concurring in and causing the death of La Bella, then, under such circumstances, the cause of such acts of negligence might be liable." This was erroneous as it submitted the case to the jury on the theory of joint liability and not separate liability of the defendants.

11. Judgment was entered in this case for one lump sum of twelve thousand dollars against the defendants Derr, Brown and Mutual Casualty Co. This was erroneous as the causes of action against the defendant Derr and the defendants Brown and Mutual Casualty Co. were separate and several and not joint and judgment, therefore, should have been entered for separate sums.

JOSEPH C. PAUL,
Attorney of Defendants,
Arthur H. Brown and
Mutual Casualty Co.

JACOB SCHNEIDER,
Of Counsel.

Opening.

HUDSON COUNTY CIRCUIT COURT.

Before—Hon. HENRY E. ACKERSON,
Judge, and a Jury.

GIUSEPPINA LA BELLA, administratrix *ad prosequendum* of the estate of DIMETRIO LA BELLA, deceased,

Plaintiff,

v.

ARTHUR H. BROWN and MUTUAL CASUALTY COMPANY,

Defendants.

GIUSEPPINA LA BELLA, administratrix *ad prosequendum* of the estate of DIMETRIO LA BELLA, deceased,

Plaintiff,

v.

CARL W. DERR,

Defendant

Jersey City, New Jersey, May 25, 1925.

APPEARANCES:

Messrs. LAZARUS, BRENNER & VICKERS, Attorneys for Plaintiff; Hon. ALFRED BRENNER and JOSEPH SCALA, Esq., of Counsel.

JACOB SCHNEIDER, Esq., Attorney for Defendants Arthur H. Brown and Mutual Casualty Company.

Messrs. RUNYON & JOHNSON, Attorneys for Defendant Carl W. Derr; EDMUND S. JOHNSON, Esq., of Counsel.

It is agreed by counsel for plaintiff and the respective defendants that the two cases be tried together.

A jury was empanelled, declared satisfactory and sworn.

Mr. Brenner opens the case for the plaintiff.

Mr. Johnson opens for the defendant Derr.

Mr. Schneider opens for the defendants Brown and Mutual Casualty Company.

MRS. GIUSEPPINA LA BELLA, sworn (through interpreter), testifies.

Direct examination by Mr. Brenner:

Q. Mrs. La Bella, where do you live? A. 1950 Dodge Street, Bayonne.

Q. Were you living there with your husband on March 4, 1923? A. Yes.

Q. You did not see this accident to your husband, did you? A. No.

Q. When was the first time that you learned an accident had happened? A. The same night, midnight.

Q. Did you then go to the hospital where your husband was? A. Yes.

Q. And how soon after that did your husband die? A. Three days later.

Q. How long had you been married to your husband at that time? A. Four years.

Q. How many children have you as the result of that marriage? A. Two.

Q. You were previously married, were you not? A. Yes.

Q. And you have children also of that marriage? A. Two more.

Q. How old was your husband at the time that he met his death? A. Thirty-one.

Q. How old are you at the present time? A. Thirty-three.

Q. So you and he were about the same age? A. Yes.

Q. Was your husband a strong, healthy man at the time of his death? A. Yes.

Q. Did he work steady? A. Yes.

Q. Whom did he work for? A. Mr. Brady.

Q. Do you know how long he worked for him? A. He always worked for him.

Q. As long as you knew him he worked for Mr. Brady? A. Yes.

Q. How much money did your husband give you every week for the house? A.Twenty-three and a half; he would get every week $23.50.

Q. Did he turn that over to you? A. Yes.

Q. And you used that to take care of your family; is that right? A. Yes.

Q. Tell me the names and ages of the children? A. Dominic.

Q. How old is he? A. He is eleven years old.

Q. Now, the next? A. Tony, or Antonio.

Q. How old is Tony? A. Ten years old.

Q. Next? A. Nicolo, he is five years old.

Q. And then Angelo? A. Yes, Angelo, three years old.

Cross examination by Mr. Johnson:

Q. What are the names of the children of your marriage with the decedent, Dimetrio La Bella? A. Nicolo and Angelo.

Q. And this amount of $23.50 went to maintain the whole family, including the other two children by your former marriage, did it? A. Yes.

Q. You say your husband Dimetrio had been strong and healthy; had he had any illness prior to his death or prior to the accident? A. No.

By Mr. Schneider:

Q. What kind of work did your husband do? A. He worked in New York.

Q. What did he do? A. I don't know what kind of work he did; sometimes he worked with the carpenters, sometimes he had hard work down in the yard.

Mr. Brenner: We have two employers here. I would like to offer at this time the letters of administration *ad prosequendum*.

Letters received and marked Exhibit P 1.

TONY COSTERELLO, sworn as a witness, testifies:

Direct examination by Mr. Brenner:

Q. Where do you live? A. I live at 9 East 53rd street.

Q. Is that the same house in which Dimetrio La Bella lived? A. No, in a similar house.

Q. On the same street? A. Yes.

Q. But not in the same house? A. Yes.

Q. Were you related to him? A. Yes.

Q. What was your relationship; what were you to him; are you a brother or a cousin? A. I am a brother with a different father.

Q. A half brother? A. Yes.

Q. You both had the same mother, but you had different fathers? A. Yes.

Q. On March 5, 1923, were you with your brother? A. Yes.

Q. Were you with him at the time he was in an automobile accident? A. Yes.

Q. Were you crossing the street at that time or was he crossing the street at that time? A. Yes.

Q. Talk up so every member of the jury can hear you. A. All right.

Q. What street were you crossing when the accident happened? A. Fifty-second street, Boulevard, Bayonne.

Q. From which side to which side were you crossing? A. I was east of the Boulevard and I wanted to cross to the west.

Q. You know where Newark Bay is, don't you? A. Yes.

Q. Were you crossing from the side away from Newark Bay or were you crossing over toward Newark Bay? A. I was crossing from Newark Bay.

Q. Where were you going? To my home.

Q. Your home was between the Boulevard and what other street? A. I wanted to go to 53rd Street.

Q. Between what streets or avenues? A. I wanted to go to Avenue B.

The Court: Were you going east or west?

Q. Were you going over to your home? A. Yes.

Q. Which was over toward Avenue B? A. Yes.

Q. Well, Avenue B is east of the Boulevard, isn't it? A. That is west.

Q. You know where Newark Bay is? A. That is New York Bay (motioning).

Q. Not New York Bay, Newark Bay; were you going over this way from Newark Bay, or that way (motioning)? A. The other way.

Mr. Brenner: Can we agree that is east?

Mr. Schneider: Yes.

The Court: In other words, you were going from west to east?

The Witness: No; I was going west to east.

The Court: That is what I asked you.

Q. Were you with your brother at the time that he was hit or were you ahead of him or in back of him? A. Just a little close.

Q. Alongside of him were you? A. Yes, alongside of him.

Q. Besides you and your brother, were there other men there? A. Yes; there was another man in front of me.

Q. Who was that man? A. Salvatore Madaro.

Q. Was he with another man or alone? A. He was with another man.

Q. So there were four of you altogether? A. Four altogether, yes.

Q. Did all four walk together or did two walk ahead? A. Two walked ahead.

Q. Who were the two that walked ahead? A. Salvatore Madaro and Rosuchi.

Q. Who was the other man? A. Dimetrio Rosuchi.

Q. How far ahead of you did they walk? A. They were across the street.

Q. They were across the street at the time this accident happened? A. He was already on the sidewalk when the accident happened.

By the Court:

Q. When you say "he," do you mean one of the men ahead of you? A. Yes.

Q. Both of the men were already on the sidewalk; is that what you mean to tell us? A. Two were ahead.

Q. Had they reached the other curb or sidewalk before you and your brother started to go over? A. Yes.

Q. They had crossed all the way over the street? A. Yes.

By Mr. Brenner:

Q. When you and La Bella started to cross, did you see any automobile coming? A. I see.

Q. And when you started to cross the street, how far was that automobile away? A. It was about a block away.

Q. And those blocks up at 52nd Street and 53rd Street are short blocks, aren't they? A. I can't tell that.

By the Court:

Q. About how many feet are they? A. I can't say how many feet.

By Mr. Brenner:

Q. But you know it was a block away? A. Yes.

By the Court:

Q. Which way, north or south of the Boulevard?

By Mr. Brenner:

Q. Toward Jersey City or toward Staten Island? A. Towards Jersey City.

Q. About a block away from where you were going to cross, towards Jersey City? A. Yes.

Q. Where were you crossing, near the crosswalk or where?

Mr. Johnson: I object to that question as leading.

Mr. Brenner: I will change it.

Q. Whereabouts did you cross the street; whereabouts at 52nd Street? A. Straight across 52nd Street.

By the Court:

Q. Had you been walking on 52nd Street, on the sidewalk on 52nd Street? A. How do you mean? I don't understand.

Q. You were walking on the sidewalk, weren't you? A. Yes.

Q. And you were along the sidewalk on 52nd Street? A. Yes.

Q. When you came to the corner of the Boulevard and 52nd Street, you started to go across? A. Yes.

Q. Now, assuming the sidewalk on 52nd Street had been continued in a straight line, straight across the Boulevard, did you go straight across the street? A. Straight across.

By Mr. Brenner:

Q. Which walk were you on, the walk towards Jersey City or the walk toward Staten Island? A. Straight over on 52nd Street.

Q. But there are two corners on 52nd Street, a corner toward Jersey City and another corner toward Staten Island; was it the corner toward Staten Island? A. It was on the left sidewalk toward Jersey City.

Q. That is the way you were crossing, you were on the left crossing? A. Yes, sir.

Mr. Brenner: Can we agree, if that is correct, that would be the north crossing?

Mr. Johnson: I am not quite clear.

Mr. Brenner: Crossing from along the east, and we say that is the crossing on the left-hand side, coming across. I will try and get it on the record.

Q. What time of the day was this, morning, afternoon or night? A. It was at night, about a quarter after nine.

Q. Was it light or dark at that time? A. It was dark, of course.

Q. Were there any lights around there? A. Oh, yes, on the west side there was a light.

Q. On which side of the street? A. The side I was going to.

Q. What kind of light was that? A. Electric light.

Q. An overhead lamp? A. Yes.

Q. An electric overhead lamp? A. Yes.

Q. Was it light or dark at this place? A. It was light all right.

Q. How far did you get in the street before something happened? A. About from where I am to where you are.

Q. You got that far? A. Yes.

Mr. Brenner: Can we agree on that distance?

The Court: Seven feet six inches from the front to that place.

Q. When you got that far, what happened? A. I heard a wind blow behind me, and my brother say, "Hel, hey," and I turned around and saw my brother right there (motioning), and then the automobile run on top.

Q. You heard something like the wind blow? A. Yes.

Q. And then you heard your brother holler. A. Yes.

By the Court:

Q. Where was he then, when he hollered? A. I was ahead.

Q. Where were you? A. I was about over here (indicating), all I know it; I can't say about the feet.

Q. Do you mean about to the window? A. About that.

Q. About four feet? A. Yes.

By Mr. Brenner:

Q. And when you felt something like the wind and heard your brother holler, did you look back? A. Sure, I turned right round.

Q. Where did you see your brother? A. I saw him up away there (indicating); I was ahead there, where he catched the autombile; he was about along there on the ground, with the face down, and the automobile running.

Q. Do you mean the automobile was that far ahead? A. He by.

Q. He kept on going? A. He kept on going, and stopped after.

Q. Where was your brother lying, in the road when you saw him? A. Yes, I saw him.

Q. How far away was your brother from where you were? A. About from where I am to the wall.

Q. From where you are to the wall he had been carried on by the automobile? A. Yes.

Q. And did the automobile stop there? A. No, it went farther down and went down alongside the sidewalk and then stopped.

The Court: I have a memorandum here that the witness' indication from where he is to that wall is twenty-five feet distance.

Mr. Johnson: If your Honor has that, we will agree on it.

Q. Before you felt the wind of the automobile and heard your brother holler, was any horn blown? A. I never heard any.

Q. Did you hear any other signal, bell or anything like that? A. No.

By the Court:

Q. Did I understand you to say when you stepped first off the sidewalk you saw this car about a block away; is that right? A. Yes.

Q. What did your brother do as he stepped off the sidewalk? A. He never stopped at all.

Q. In which direction was his face, did you notice him at all? A. Who, my brother?

Q. Yes, as he started to cross the street? A. He started right after me.

Q. I say as he started to cross, did you see him? A. Sure I see him start to cross.

Q. At the time he started to cross did you notice where he was looking? A. Sure, he was looking.

Q. Where was he looking, if you saw him; that is, in what direction was he facing? A. Because he talked to me.

Q. I do not care about his talking, but where was he looking? A. He looked for the walk.

By Mr. Brenner:

Q. When you stepped down to go into the street, did you look either toward Jersey City or towards

Staten Island, to see if anything was coming? A. Sure I did.

Q. When you looked, is that when you saw the automobile? A. Yes.

Q. Now, when your brother stepped down with you, did you notice if he did anything, did he look in either direction? A. I never say anything.

Q. Did you notice if your brother looked in either way? A. Sure he looked.

Mr. Johnson: Objected to as incompetent, and not proper.

Mr. Brenner: Question withdrawn. I think, your Honor, we cannot well get on without the interpreter.

The Court: Very well, take the interpreter.

(Continued through interpreter.)

Q. Did you notice what your brother did when he stepped down into the street? A. He followed me, he looked on this side.

The Court: Who did?

The Witness: My brother.

The Court: Your brother did?

The Witness: Sure, of course, I did too.

Q. Now, after the automobile hit your brother, did you go where your brother was lying or not? A. Where he was lying?

Q. Did you go where your brother was? A. I go to pick him up.

Q. Now, when you went to pick him up, did your brother say anything to you or did you say anything to him? A. No, just "Oh, oh!"

Q. Just grunted? A. Yes, sir.

Q. Did you say anything to him? A. I said "Get up," and he tried to get up and couldn't.

Q. Did he say anything about it? A. No.

Q. What were you doing to help him get up? A. I tried to help him up, to lift him up, and I turned either way and see another automobile coming.

Q. When you saw the other automobile coming, what did you do? A. I stand up and reach my hands up and said, "Ho, ho, ho!" for him to stop, and he never stopped but kept on going, and I stepped back or it would be on top of me and I would be killed.

Q. You stood up and waved your hands to the automobile to stop. How far away was the automobile then? A. About as far as from one wall to the other here.

Q. Twice the distance of the two walls? A. I saw the light.

Q. You saw the light away about twice the distance of these two walls from one another? A. Yes.

Mr. Brenner: Can we get that distance, your Honor?

The Court: Eighteen feet five inches to the left of the chair and eighteen nine inches to the right.

Mr. Brenner: That would be about eighty feet.

Q. When you say you stood up, put your hands up and yelled, the automobile did not stop but kept right on going? A. Yes.

Q. And you say you stepped back? A. Yes, when I saw it too close.

Q. When you stepped back, what did the auto-

mobile do, stop or keep on going? A. It kept on going.

Q. How far did it go? A. It went on.

Q. Did it go very far? A. No.

Q. About how far? A. About to the end of the room here.

The Court: That is twenty-eight feet two inches.

Q. Did that automobile touch your brother or not? A. Sure it did, right on top.

Q. It went on top of him? A. Yes.

Q. What part of your brother did the automobile hit, did you notice? A. You couldn't see right away; I was there with my hands up, and he was on top and I did not see.

Q. You did not see which part him him? A. No.

Q. But you do know it went over him? A. Yes.

Q. Did it run over him? A. Yes.

Q. When it ran over him did your brother remain in the same place? A. It dragged him.

Q. Did it drag him alone? A. Yes.

Q. How far did it drag him? A. About to the rail there.

Q. About from where you are to the rail? A. A. Yes.

Mr. Brenner: I suppose that is about twelve feet?

Mr. Schneider: I will take anything fixed by the Court.

The Court: That is about half the distance to the wall, and the wall is twenty-eight feet two inches; about fourteen feet I should think.

Q. Did you go over to where your brother was then, after that? A. Yes.

Q. After the automobile hit him? A. Sure, I did.

Q. Did you try to talk to him? A. I did, but he wasn't talking.

Q. He was not talking anything? A. No.

Q. When the first automobile hit him was there any blood there? A. I can't say that because it was in the night.

Q. Did you go with your brother to the hospital then? A. Yes, sir.

Q. On the way to the hospital did he talk? A. No.

Q. How long did you stay at the hospital? A. About half an hour.

Q. And then where did you go? A. Home.

Q. Did you say to your house? A. I go to my house because I was living round the corner, and my wife wait at the window.

Q. Did you tell his wife about the accident? A. I tell my wife when I see her, and then I went and told her and she started to cry.

Q. You went home first and then went and told his wife? A. Yes.

Q. And he died how soon afterwards? A. Three days.

The Court: This was on March 4, 1923?

The Witness: Yes, sir.

Cross examination by Mr. Johnson.

Q. Where had you been before this trouble? A. I was over to a sick friend of mine, to go and see, one lady, was sick on West 53rd Street.

Q. Who was there with you? A. Me, my brother and the other fellow.

Q. What did you do down there? A. I go and see, she was sick, that lady, and talk some.

Q. You made a visit? A. Yes.

Q. Were you on the way home from this visit when this trouble occurred? A. Yes.

Q. When you left the house you were at how did you start to walk back? A. Well, we were at 53rd Street, at the back of the lot, and go to 52nd Street, and on 52nd Street we were together, and the other two want to take something, they walk fast because they want to take something for themselves, don't want to know everybody.

Q. Were you trying to catch up with them at the corner of the Boulevard and 52nd Street? A. Yes.

Q. When you were crossing the Boulevard were you trying to catch up with them? A. Yes, sir.

Q. You spoke about the back of the lot; do I understand that you cut across lots? A. Yes, between 53rd and 52nd Streets.

Q. You did not come up 52nd street but you cut through a lot from 53rd Street to 52d Street? A. Yes.

Q. That would bring you over to 52nd Street? A. Yes.

Q. Did you continue walking in the way you had cut through the lots? A. No; you can't walk there because there is full lots there, only 52nd Street is empty.

Q. Did you start to cross the street before you came to 52nd Street? A. It is straight, about four or five houses down.

Q. You mean you started to cross about four or five houses down from the corner of 52nd Street? A. Yes.

Q. And you started to cross over? A. Yes, when

I was down to the street, on 52nd Street, I walked to the street.

Q. Did you keep in that general direction, walkin the same direction, slanting—weren't you walking slanting? A. No, on the street, on the sidewalk of 52nd Street.

Q. But how did you get there crossing lots from 53rd street? A. About three or four houses down, in the Boulevard, all the ways, got one house there and got empty lots on the back; we was on the back of the yard, and back home, when we want to go home I was going through the back way and turned down 52nd Street when I was on the sidewalk of 52nd Street.

Q. When you got to the curb on the Boulevard, do you remember that, where was your brother then, was he in front of you or behind you? A. Behind me.

Q. How far behind you was he? A. A little farther, like that (indicating).

Q. About from where you are to the wall? A. Yes.

Q. Which would be about four feet, say? A. Something like that.

Q. And you were behind the others and walking to catch up with them? A. Yes.

Q. And your brother was walking behind you? A. Yes.

Q. And when you left the curb on the Boulevard your brother was still behind you, wasn't he? A. Sure.

Q. You did not look back to say anything to him, did you? A. Before he hollered, no.

Q. Before he hollered you did not look back to say anything to him? A. No; of course, he talked to me.

Q. But you were in front of him? A. Yes.

Q. You were trying to catch up with those other men? A. Yes.

Q. And your brother was behind you? A. Yes.

Q. And you did not turn around until you heard this noise, did you? A. No.

Q. What side of the Boulevard are the lights on? A. What lights?

Q. Which side of the Boulevard are the lights or lamps that light the Boulevard? A. On the east sidewalk.

Q. And on the west side there are no lamps, are there? A. Well, there is a light in the middle of the street, of course; the fellow had gone by the light that is in the middle of the street.

Q. But the pole from which the light hung is on the east side, isn't it? A. Yes, on the east side.

By the Court:

Q. Did this automobile that first struck your brother come from your left-hand side or your right-hand side as you crossed the street? A. From the left side.

Q. It was going from the north to the south then?

(No reply.)

By Mr. Johnson:

Q. Did you stop to let this automobile go by yourself? A. No; I hollered; one can't talk so very quick like that, and I hollered.

Q. I mean when you were crossing to get across in front of this machine, did you get across in front of the machine or after the machine? A. In front of the machine.

Q. You got across in front of the machine? A. Yes, part over.

Q. And you say the machine when you first saw it was about a block away? A. Yes.

By the Court:

Q. Which way did the second automobile come, from your right or your left? A. On the left.

Q. The same way as the other? A. The same way.

By Mr. Johnson:

Q. And you got across ahead of this machine? A. Yes.

Q. And you kept going on towards your friends? A. Yes.

Q. So the first you knew of the accident was when your brother yelled? A. Yes.

Q. You did not see the car strike him? A. No.

Q. And the car was stopped when you went over to help your brother, was it? A. Yes.

Q. And it was drawn up to the curb? A. Yes.

Q. Did your brother try to raise himself then? A. Yes.

Q. And he spoke? A. Yes.

Q. And then you said you saw another car come along while you were leaning over your brother? A. Yes, I seen the other automobile and I went to stop the other automobile, and he never stopped.

Q. And it is the second car you are speaking about now? A. The second car, yes.

The Court: We will now take a recess until tomorrow morning at 10 o'clock.

May 26, 1925.

APPEARANCES:

Hon. ALFRED BRENNER and JOSEPH SCALA, Esq., for Plaintiffs.

JACOB SCHNEIDER, Esq., for defendants Arthur H. Brown and Mutual Casualty Company.

EDMUND S. JOHNSON, Esq., for defendant Derr.

The trial of the case was resumed pursuant to adjournment.

TONY COSTERELLO resumes the stand.

Cross examination by Mr. Schneider:

The Court: Let me ask you, did you see the driver of the automobile which struck your brother?

The Witness: The driver of the automobile?

The Court: Yes, did you see the driver of the automobile?

The Witness: Yes.

Mr. Schneider: I don't think he said he saw the driver of the car.

By the Court:

Q. You looked round when you heard a swish of a car, is that right? A. Yes.

Q. Did you see a car right after that near to your brother? A. The first one, yes, sir.

Q. What did that car do? A. He kept on going.

Q. Didn't it stop at all; was there any other car than this car which you say went on a ways and

stopped, and other than the car which you say later struck your brother, were there any other cars there at that time? A. After I was trying to pick him up, and he say he couldn't get up because he had a sore leg and he can't get up, and he try to get up, I saw another automobile coming, and I raise my brother up and stand up and hold my hand up.

Mr. Brenner: May I ask that that question be put through the interpreter?

Q. (Through interpreter.) Did you see any other automobiles in that street, moving, other than the one which you say went past you first and stopped, and also the one which you say later struck your brother? A. No.

Q. Then there were only the two automobiles there at the time your brother was lying in the street that you saw, is that right? A. There were other automobiles which were going by that way (indicating) and also the one which took my brother to the hospital.

Q. Were there any other automobiles in the immediate vicinity of your brother's body at the time he lay on the pavement, when you first saw it, other than the one you say went on and stopped, and the other which later struck him? A. Afterwards there was a confusion of automobiles and people who stopped there.

Q. When you looked round and saw your brother lying there, did you see any other automobiles than the one that stopped and the one you say later hit him? A. The second one?

Q. No; this one that went toward your brother and stopped, did you see the driver of that car? A. No.

By Mr. Schneider (through interpreter.)

Q. How near to the other side of the street—that is, the side to which you were crossing, how near to that side were you when you heard your brother call? A. Not even half a block; in the middle of the street.

Q. By "not even half a block," you mean not even half across? A. Yes, in the middle.

Q. Were you about half way over; you say you were in the middle of the street? A. Yes.

Q. You were about half way over when you heard your brother call? A. Yes.

Q. From the time you left the curb and started across the street, you did not see your brother until you heard him call to you? A. No; one was following the other.

Q. Now, these blocks there are very short blocks, are they not? A. I don't know, I think all blocks look alike.

Q. The Boulevard at this point is quite wide, is it not? A. Yes.

By the Court:

Q. Were there any other automobiles stopped —that is, standing still—in that street when you looked round after your brother was down, other than the one which you say went on a little ways and stopped? A. I didn't pay no attention to that.

By Mr. Schneider:

Q. This first automobile you say was about a block away when you first saw it, and you were able to get to the middle of the street before it came up to you; is that so? A. Yes.

Q. You were walking over the street at this

time, were you? A. Yes, I did try to cross it but I didn't cross it.

Q. But you were walking at the time? A. Yes.

By Mr. Johnson (through interpreter):

Q. Are you a married man? A. Yes, sir.

Q. Just where do you live? A. 9 East 53rd Street, Bayonne.

Q. Is that east or west of the Boulevard? A. East of 53rd Street.

Q. Is that nearer to New York or nearer to Newark Bay than the Boulevard? A. Bayonne.

Mr. Johnson: I think we can agree that is east of the Boulevard. That is what I want to find out.

Q. Did you live there at the time of this accident, Mr. Costerello? A. No; I lived at 1068 Broadway.

(Counsel agree that is east of the Boulevard.)

Q. With relation to 53rd Street, is that nearer to Jersey City or Bayonne; in other words, is it north or south of 53rd Street? A. Nearer Jersey City.

Q. North of 53rd Street? A. Yes.

Q. Where did your brother live at that time? A. 19 East 53rd Street.

Q. The same place where you live? A. The same street, not the same house.

Q. Where was this sick lady that you were visiting? A. 170 West 53rd Street.

Q. How many blocks down from the Boulevard is that? A. Half a block.

Tony Costerello, cross.

Q. Where were you going at the time of the accident? A. Home.

Q. Where was your brother going? A. Home also.

Q. Where were you going first? A. We were both going home; sometimes I go in my house first, sometimes I go in his house first.

Q. How far was your house from 53rd Street and the Boulevard? A. Three blocks.

Q. Three blocks down towards Bayonne? A. Yes.

Q. So you would have to go down as far as 50th Street or so? A. No, 53rd Street.

Q. Well, in order to get to your house, where you were going, you would have to go down towards 52nd Street, south on the Boulevard? A. Yes, from 52nd Street I would go to 53rd Street.

Q. Well, you had been on 53rd Street, hadn't you? A. Yes, but there was an empty lot and we had to cross the empty lot.

Q. If you say you were going right down 53rd Street, how would you come to 52nd Street? A. When we were down 52nd Street, there was a townsman of ours, and we had a talk down there, and then we were going home.

Q. So you were first to see your townsman? A. Yes.

Q. Where was he, where did he live? A. 161 West 51st Street.

Q. So you were going first down to 161 West 51st Street? A. Yes.

Q. Is that east or west of the Boulevard? A. West of the Boulevard.

Q. How did you come to be across the street; the lady at the house you were visiting lived west of the Boulevard? A. Yes.

Q. And you were going to see a townsman, who also lived west of the Boulevard? A. Yes.

Q. How did you come to be across the street at 52nd Street? A. They were all empty lots there.

Q. Had you seen the townsman already or were you going to see him? A. We were there together in his house.

Q. I mean before the accident, had you seen the townsman on West 51st Street before the accident? A. Yes.

Q. So you were coming from the townsman's house? A. No; we were there already, we had been there.

Q. I mean at the time of the accident, you had just left your townsman's house? A. No.

Q. Well, where had you come from then? A. We came from the back yard of this house situated on 53rd Street.

Q. Of whom? A. Of a party of the name of Lorenzo La Jujia.

Q. And he is the gentleman who lived at 51st or 53rd Street? A. 53rd Street.

Q. Did the sick lady live there too? A. Yes.

Q. And the townsman lived there too? A. No, he lives on 51st Street.

Q. Now, when you started out in the evening where did you start from, your house? A. Yes.

Q. Where did you go first, to the sick lady's house on 51st Street? A. First we visited the party on 51st Street.

Q. Mr. La Jujia? A. No, the other party.

Q. What name? A. Pasquale Ruccio.

Q. On 51st Street? A. Yes.

Q. How long did you stay there? A. About half an hour or three-quarters of an hour.

Q. What time did you get there, about? A.

About seven or a quarter after seven or half-past seven.

Q. When you left Mr. Pasquare Ruccio's house on 51st Street, where did you go? A. 53rd Street.

Q. To whose house? A. Lorenzo La Jujia.

Q. How long did you stay there? A. About an hour.

Q. When you left Lorenzo's house, where did you go? A. Home.

Q. Now, you lived on 53rd Street, did you? A. Yes, sir.

Q. Well, how did you get to 52nd Street? A. We didn't cross the street at all; we happened to be in the back yard of this house, and as there were a lot of empty lots we went through the lots.

Q. You were on West 53rd Street? A. Yes.

Q. And you were going to East 53rd Street, weren't you? A. Yes.

Q. Well, why did you go to the corner of 52nd Street, one block south? A. Because we were in the back yard of this townsman, and he was going to 51st Street and we went together.

Q. So you were all going to 51st Street? A. No; he was to go his own way and we would go our own way.

Q. Let me ask you one more question. How long have you been in this country?

(Continued without interpreter.)

A. I was around 1905 over there.

Q. You can understand English a little? A. Yes.

Q. When you got through at Mr. Lorenzo La Jujia's house on 53rd Street, were you going home? A. Yes.

Q. Were you going to 51st Street with the townsman? A. I was going before.

Q. And was your brother going home, too? A. Yes.

Q. And he lived at East 53rd Street? A. Yes.

Q. To get from West 53rd Street to East 52nd Street you would cross the Boulevard at 53rd Street? A. No, 52nd Street.

Q. Do you mean to say you would cross on 52nd Street? A. Yes, straight.

Q. Why would you do that? A. Because no automobile there; just stroll across, passing.

Q. Maybe I do not express myself clearly. You were on 53rd Street and you were going to East 53rd Street? A. Yes.

Q. How did you come to get down to 52nd Street? A. Because I was in the back yard of my other friend, and he wants to go through the lots in the back way, and he go through the lots, and on 52nd Street I go home.

Q. How big a man was your brother who died? A. About 31, I believe.

Q. I mean to say how big was he, about your size? A. Bigger than me.

Q. How much did he weigh? A. I don't know.

Q. How tall was he? A. He was a bigger man than I am.

Q. Bigger than I am? A. More, yes.

Q. Taller than I am? A. Yes.

Q. Thicker than I am? A. A little bit.

Q. How many were there of you that left Lorenzo's house after visiting this sick lady? A. Four.

Q. There weren't any more? A. No.

Q. Are you sure there weren't six? A. Five with the other who lived on 51st Street.

Q. You are sure there weren't six? A. Yes,

Q. But there were five? A. Yes.

Q. That is the four mentioned before and the other who lived on 51st Street? A. Yes.

Q. What way did you walk, in two groups? A. Yes.

Q. How many in the first group, three? A. Two.

Q. Who was in the lead? A. Dimetrio Ruccio and Salvatore Madaro.

Q. Then you came? A. Yes.

Q. And then your brother was behind you? A. Yes.

Q. Where was the townsman, the fifth man? A. Dimetrio Rosuchi.

Q. Where was he, with the group behind or was he with you? A. Pasquale and Rosuchi, we were all together.

Q. All in the one bunch? A. Yes.

Q. All crossing those lots at 52nd Street? A. Yes.

Q. And then Dimetrio and Pasquale Ruccio went ahead? A. Not Pasquale Rusuchi—Ruccio; it was Dimetrio Rosuchi and Salvatore Madaro went ahead.

Q. Then you came? A. Yes.

Q. And your brother was behind you? A. Yes.

Q. And you think he was about four feet behind you? A. I think so.

Q. About from here to that wall? A. Yes.

Q. Have you been in this court room before this? A. No.

Q. Never? A. No.

Q. Weren't you here the other day when the case was supposed to come up for trial? A. Yes.

Q. Did you observe the measurements of the distances from these walls, did you take any practice in measuring these distances before, when you were here in court? A. I no understand all that.

Q. Where was Mr. Pasquale; was he behind your brother? A. When he was, but when we were on 52nd Street he went home.

Q. As you were crossing 52nd Street where was Pasquale? All together.

Q. You just said that Mr. Rosuchi and Mr. Madaro were ahead. A. Rosuchi and Madaro had gone ahead.

Q. And you came next? A. Yes.

Q. And your brother was behind you? A. Yes.

Q. Where was Pasquale? A. He go home through the lots again, from 52nd to 51st Street, going through the lots; those were all empty lots and we went through the lots.

Q. He had left you? A. Yes.

Q. He had gone ahead? A. Yes.

Q. Had you been talking with him? A. Before he go home, sure; I said good night to him.

Q. Then you wanted to catch up with the other fellows? A. He walked ahead and I walked behind.

Q. You said goodby to Mr. Pasquale? A. Yes.

Q. Good night? A. Yes.

Q. And the other two fellows had crossed the street; they were going across the street? A. They walked home.

Q. And you and your brother wanted to catch up with them? A. We walked, sure.

By Mr. Schneider:

Q. You said, in answer to Mr. Johnson's question, that you and your brother were trying to catch up with other two? A. Not run, just to walk.

Q. Did you say a little while ago, when Mr. Johnson asked you, that you were trying to catch up with them? A. What do you mean?

Q. Didn't you say you wanted to catch up with them? A. Yes.

Q. A little while ago, yesterday afternoon? A. Yes; I no understand that—because I want to catch who?

Q. You understand English, don't you? A. I can't understand at all; I understand a little bit.

Q. You understand sometimes and sometimes you don't? A. Some things I do and some things I don't.

Q. When you were near the center of the street you heard a swish, a noise like the wind? A. Yes.

Q. Then you turned around? A. Yes.

Q. And you saw this car coming along? A. Yes.

Q. Had it already hit your brother then? A. The first one, yes.

Q. It had struck your brother? A. Yes.

Q. And you said, I think, it dragged him 26 feet? A. I can't tell that.

Q. Will you tell from the distances in this court room—you did before; you told from the distances here, and the Court said the distance was 26 feet? A. Yes.

Q. Do you know if the front of this automobile hit your brother? A. Well, he was hurt, because he dropped, and it ran on top of him, and he tried to get up.

Q. Did he run on top of your brother? A. Yes.

Q. And when the car stopped, how far away from you was your brother's body in the street? A. I was about that and that (indicating).

Q. About 26 feet away from you? A. I can't say by the feet.

Q. This distance from the wall (indicating? A. Yes.

Mr. Schneider: I think that was the distance the Court said it was, 26 feet.

Q. Your brother's body was 26 feet away from you when the car came to a stop? A. Yes.

Q. Did you see the wheels go over your brother? A. Yes.

Q. Which wheel, do you know? A. I don't know.

Q. The front wheels or the back wheels? A. I see it; I don't know whether it was with the first wheel.

Q. Did you see your brother struck in the street by this first car? A. I see, because he was over here and I was over there (indicating).

By the Court:

Q. Well, when you saw your brother lying in the street, was his body further away than it was when you were crossing over the street? A. I don't understand.

Q. You say your brother was behind you before he was struck? A. Yes.

Q. Now, keep in mind his position behind you. A. Yes.

Q. When you looked around when you heard this swish, was his body lying on the ground in the same place that it had been before you looked round, or was it away from that place? A. Away.

Q. Much farther away? A. From here to over there (indicating).

Q. That is, 26 feet away? A. I can't say by the foot.

Q. Was that far away to your right hand or far away to your left hand? A. To my right hand.

By Mr. Schneider:

Q. In the position in which the automobile was traveling; in the direction in which the automobile was traveling?

By the Court:

Q. Was the body in the direction in which the automobile you say was traveling, and which you say stopped? A. Yes.

By Mr. Schneider:

Q. How near to the curb was your brother's body; how near to the west curb of the Boulevard; do you know what a curb is? A. I no understand.

(Examination continued with interpreter.)

Mr. Schneider: Please repeat the question.

Q. (Repeated to interpreter by stenographer) How near to the curb was your brother's body; how near to the west curb of the Boulevard; do you know what a curb is? A. From here to there (indicating from witness chair to end of counsel table.)

The Court: That would be about seven feet eight inches.

Mr. Brenner: Yes, seven feet eight inches.

Q. What part of his body was nearer to the curb, his head or his feet? A. The feet.

Q. How near to the curb, to the west curb of the Boulevard, were the feet? A. It was from where I am now to here (indicating nearest point of counsel's table.)

Mr. Schneider: I do not think he understands.

Q. Where his feet sticking out towards the street or towards the curb? A. Towards the curb of the sidewalk.

Q. Now, I suppose you ran right up to your brother as soon as you saw this car strike him? A. Yes.

Q. And you took hold of him? A. Yes.

Q. Did you try to drag him to the sidewalk? A. Yes; he tried to get up, too.

Q. You said yesterday he could not get up? A. He tried to get up, but said he couldn't get up because it hurt his leg.

Q. He said that? A. Yes.

Q. Yesterday you said your brother did not say a word; what did you say in answer to Judge Brenner's question that he did not say anything, just grunted? A. He hollered, "Hey!"

Q. Let me ask you this question. Judge Brenner asked you yesterday, on direct examination, "Did your brother talk?" and you said he just said, "Oh, oh!" or "Uh, up!"? A. Yes.

Q. He just groaned? A. He tried to get up.

Q. He just groaned? A. Yes.

Q. How do you come to say now that he spoke to you while he was lying there? A. I tried to raise him up but couldn't do it, and he couldn't get up, he said.

Q. Your brother said that? A. Yes.

Q. Didn't you say yesterday that your brother could not speak; he simply groaned and said, "Uh, uh!"?

The Interpreter: He says: "I don't un-

derstand by the English language that you speak to me."

Mr. Schneider: Tell it to him in Italian then.

(Question repeated by interpreter.)

A. I did say that.

Q. And yesterday, when you were asked by Judge Brenner here whether your brother spoke, you said all your brother said was "Uh, uh!" that is right, isn't it? A. I don't remember because I don't understand the language.

Q. But you said that yesterday, didn't you, that all he did was groan? A. Yes.

Q. And today you say your brother said, "I can't get up because I am hurt"; do you say that today, that your brother said those words? A. He said he couldn't raise up.

Q. Did you talk to anybody about this case last night? A. No.

Q. To nobody at all? A. No.

Q. Not even to your wife? A. That's all.

Q. You did talk to your wife? A. Sure, I talk to my wife.

Q. Which was right, when were you telling the truth, yesterday or today? A. Yesterday you didn't give me no chance to talk through an interpreter, so I now say what I wanted.

Q. I am referring to yesterday, when my friend, Judge Brenner, asked you this question—I did no talking yesterday, as you remember—which was the truth, when you were answering Judge Brenner's question yesterday or today when you answered mine? A. Yesterday somebody stopped and asked me about it; somebody laughed.

Q. Somebody laughed about it yesterday? A. Yes.

Q. And did those people who laughed talk to you about it after court?

The Interpreter: He says he referred to the jury.

Q. Did somebody on the jury ask you? A. I mean somebody in back.

Q. Nobody on the jury laughed at you yesterday? A. Not that I know.

Q. Yesterday, when Judge Brenner asked you whether your brother could get up, you said he could not get up, didn't you say that yesterday? A. I said he tried to get up.

Q. You said yesterday, didn't you, that your brother could not get up?

Mr. Johnson: My recollection is that he said his brother tried to get up and couldn't.

Mr. Schneider: But couldn't get up.

Mr. Johnson: The witness said he raised himself up.

Q. Didn't you say yesterday that your brother tried to get up but couldn't get up? A. Yes.

Q. Now, you went right over to your brother, didn't you, and you took hold of him? A. Yes.

Q. You ran right over to your brother, didn't you? A. Yes.

Q. And you took hold of him, didn't you? A. Yes.

Q. What part of his body did you take hold of? A. Under the arms, this way (indicating.)

Q. So you were more out in the street than towards the curb? A. I was where he was.

Q. And when you got hold of him by the arm,

which way were you looking? A. Towards where I am sitting.

Q. Then you saw the second car, you say? A. I don't understand everything; I don't want to make a mistake.

Q. When I say this simply in English, do you understand; then you saw the second automobile, didn't you; do you understand that?

The Interpreter: He says "Yes."

Q. And you say that was 80 feet away? A. I said 70 feet.

(From this point, the examination is continued entirely through the aid of the interpreter.)

Mr. Schneider: I believe he indicated that distance yesterday as twice the distance between the walls, which it was agreed would be eighty feet.

Mr. Brenner: Yes.

Q. And did you hold your brother when you saw this machine? A. Yes.

Q. To which side was the machine when you saw it, to the right or to the left? A. From the same direction.

Q. To your right or left? A. From the right.

Q. Was that machine coming right on you? A. Yes.

Q. Whereabouts in the block or how far down the block? A. Between 51st and 52nd Streets.

Q. It was coming from the Jersey City side, wasn't it? A. Yes.

Q. This accident happened on 52nd Street, didn't it? A. Yes.

Q. Don't the blocks get bigger toward Jersey City? A. The higher numbers.

Q. As you go towards Jersey City the numbers get higher, don't they? A. They are small and big numbers.

Q. Do you mean to say this second automobile was between 52nd and 51st Streets? A. Between 52nd and 53rd.

Q. And where was it, in the middle of the block? A. It was in the same line.

Q. At what part of the crossing were you; were you on the north crossing or the south crossing? A. West side.

Q. Had you been crossing on the crossing in 52nd Street which is nearest to Jersey City? A. Yes.

Q. And is that where your brother was hit? A. Right at that crossing.

Q. That is the place where he was struck? A. And he was dragged.

The Court: If that is so, would that be the north or the south?

Mr. Schneider: They were crossing over the north.

Q. Your brother was carried over the street? A. Yes.

Q. Was he carried over the whole street or was his body to the north or the south crossing? A. He was on the same direct line.

Q. Was he in the middle of the crossing or was he beyond the crossing? A. A distance from here to that table (indicating counsel's table).

Q. From what? A. He was near the sidewalk.

Q. Suppose you were crossing 52nd Street was

your brother all the way across 52nd Street towards Bayonne? A. No, he was following me.

Q. Now, as soon as you saw this other car did you wave your hand and shout? A. Yes.

Q. And you did that when the other car was about 80 feet away? A. I didn't measure the feet; I told you about the distance.

Q. And the car came right on towards you? A. Yes, sir.

Q. Where did you jump to? A. I drew back.

Q. Towards the sidewalk? A. Yes.

Q. Did you try in any way to drag your brother to the sidewalk? A. When I saw it was impossible to drag him away and the automobile was coming, then I dropped my brother on the ground.

Q. This car was 80 feet away, wasn't it—this car you say was twice the distance or width of the walls of this room away from you? A. Yes.

Q. You were holding your brother's body there? A. Yes.

Q. And your brother's head was about ten feet from the sidewalk, wasn't it? A. I couldn't say that; I couldn't measure it.

Q. His feet were nearer to the sidewalk, weren't they? A. Yes.

Q. Your brother was about five feet six inches tall, was he? A. Yes.

Q. Then your brother's feet must have been four or five feet from the sidewalk, weren't they? A. I can say from here to that table; I can't measure it.

Q. When you saw this car 80 feet away, you did not make the slightest effort to drag your brother's body to the sidewalk, did you? A. I didn't try to drag my brother because the automobile I thought was going to stop.

Q. And at no time at all did you make the slightest effort to drag your brother's body to the sidewalk? A. I didn't want to injure my brother; I thought the automobile was going to stop.

Q. And you just jumped to the sidewalk? A. Yes.

Q. You got up altogether on the sidewalk safely, didn't you? A. Yes.

Q. High and dry. Now, you say this other car went right over your brother? A. Yes.

Q. All four wheels? A. Yes.

Q. Did you see the wheels go over him? A. Yes.

Q. You were right close there, weren't you? A. Yes.

Q. You were about five feet from your brother, weren't you? A. Yes.

Q. And you could see the car and you could see your brother clearly, couldn't you? A. Yes.

Q. And you saw that whole car go right over your brother? A. Yes.

Q. Did two wheels go over his head? A. That I couldn't say.

Q. But he was altogether under the car when you saw him? A. Yes.

Q. And the car rolled right over him? A. Yes.

Q. Then it dragged him 14 feet? A. From here to where that bench is.

Q. Where was your brother lying in the street with reference to the curb when the dragging was over? A. The same direction.

Q. Were his feet toward the curb? A. Yes.

Q. And his head out toward the street? A. Yes.

Q. In the same position relatively as before? A. Yes.

Q. Your brother had a bump on his head, hadn't he; a large bump? A. Yes.

Q. And he had a little bruise, I understand on his leg, hadn't he? A. Yes.

Q. And outside of that he did not have any bruises or cuts on any part of his body, did he? A. That was what we could see; he was not undressed.

Q. Don't you know, as a matter of fact, that there was a bump on your brother's head—a large bump—and a bruise on the inside of his leg, and outside of that he had no apparent injuries in any part of his body? A. We could see blood all over, but we could see where the blood was coming from.

Q. Don't you know outside of an injury to his head your brother had no broken bones or any other injury to his body? A. That I couldn't say; I didn't see that.

By Mr. Johnson:

Q. Let us get this clear, Mr. Costerello; I understand you to say that the first you knew of what had happened to your brother was when he called to you? A. Yes.

Q. And when you heard him call to you, wasn't this machine up against the curb—this first car? A. It stopped near the curb.

Q. The car was up near the curb? A. Yes.

Q. And the car was away from your brother's body, was it not? A. Yes.

Q. Near the curb? A. Yes.

Q. And where in the street was your brother's body; what part of the street? A. Between 51st and 52nd Streets.

Q. And what part of the roadway was it in? A. On the side; on the right side.

Q. So with reference to the first car, the first

thing you knew about the accident was when your brother called you, and you started back there and saw him in the roadway, and you saw the first car near the curb; is that right? A. When I turned back I saw the car run over him.

Q. Didin't you say that the first you heard your brother call to you, that was the first you knew of any trouble? A. Yes, when he was struck by the automobile he hollered "Hey!"

Q. Didn't you say before that when you turned round the body was in the street and the automobile up near the curb? A. When I turned back I saw the hat in one place—I saw the body of my brother in another place and the automobile in another place.

Q. That was the first you saw of anything, wasn't it? A. Yes.

Q. And the automobile was stopped at that time, wasn't it? A. At that time it wasn't; it hadn't stopped; it stopped by the sidewalk later.

Q. He turned toward the curb, didn't he; he brought his automobile near the curb, did he not? A. Yes.

The Court: For the purpose of getting the record clear, there are two automobiles. Your statement or reference has been to the first automobile?

Mr. Johnson: Yes.

Q. So, when you saw this first automobile it was going toward the curb, wasn't it? A. It stopped there; it was going towards that direction.

Q. Going towards the curb? A. Yes.

Q. And the car, when you got up there, was stopped near the curb, was it not? (No reply.)

Q. The first automobile, when you got near your

brother, was stopped near the curb, wasn't it? A. Yes.

Q. And his body was in the roadway? A. Yes.

Q. And it was when you got up near your brother, to try to help him, that you saw this other car, the second car, coming along, wasn't it? A. Yes.

Q. Now, where was the body with reference to the crosswalk of 52nd Street when you saw it; when you saw it for the first time in the roadway? A. It was still this distance from the sidewalk (indicates from witness chair to counsel's table).

Q. Was that the crosswalk nearer to Bayonne? A. On the Bayonne side.

Q. This trouble with the first car had already happened before you heard your brother call, hadn't it? A. Sure, yes.

SALVATORE MADERO, sworn as a witness, testifies.

Direct examination by Mr. Brenner:

Q. Mr. Madero, where do you live? A. 19 East 53rd Street.

Q. At the time of this accident were you living there? A. Yes.

Q. Was that where Mr. La Bella lived? A. Yes.

Q. Are you related to him, are you a cousin or brother of his, an uncle or what? A. Just a friend.

Q. Did you board with him in his house? A. Yes, sir.

Q. And you went with him on the night of the accident to 51st Street? A. Yes, sir.

Q. To visit your townsman? A. Yes.

Q. And then did you go from there to 53rd Street, to the sick lady? A. Yes.

Q. And did you come back with him? A. Yes.

Q. Where did this accident happen, on what street? A. 53rd Street, after I was to 52nd Street.

Q. Where did the automobile hit him? A. 52nd Street.

Q. Did you see the first automobile hit him? A. No.

Q. Where were you at the time the first automobile hit him? A. I was pretty near on the sidewalk, on the other side.

Q. Which side of the Boulevard? A. On the east side.

Q. You had crossed over the Boulevard then? A. Yes, I had crossed the Boulevard.

Q. And you were near the sidewalk? A. Yes.

Q. What was the first thing that made you know there was an automobile accident? A. Because Costerello was hollering and I turned round and looked to see what was the matter.

Q. When you turned round what did you see? A. I saw La Bella was down on the ground and Costerello was picking him up, and I saw him drop him down.

Q. You saw Costerello pick him up? A. Yes.

Q. And then you say you saw him drop him down? A. Yes.

Q. And what about the other fellow? A. He was passing on top of him and carried him about 30 feet.

Mr. Johnson: You are referring now to the second car?

Mr. Brenner: Yes.

Q. Now, when you saw Costerello drop him down on the ground and heard him holler, what did he holler? A. "Stop, stop!" with the hands up.

Q. Did the automobile stop or did it come right on, did it keep right on coming? A. Well, he passed about 14 feet.

Q. You mean he passed the body about 14 feet? A. Yes.

Q. Was that after he had dragged it? A. Yes.

Q. He dragged the body about 30 feet and then stopped in about 14 feet? A. Yes.

Q. When Costerello dropped La Bella and put up his hands and cried "Stop!" and the automobile did not stop, what did Costerello do, did he stand there or jump? He jumped back or he kill himself too.

Q. Who was walking with you? A. Dimetro Rosuchi, I was in front with him.

Q. You were in front with him? A. He had a store at that time.

Q. Where is he now? A. I don't know.

Q. Did you hear any horns blown by any automobiles at that time? A. No.

Q. No signal? A. No.

Q. The second automobile or the automobile that you say dragged La Bella, do you know how fast that automobile was going? A. Well, I saw him going pretty fast, because he no stop, because Costerello was hollering "Stop, stop!"

Q. Do you drive an automobile? A. No.

Mr. Johnson: I have no questions.

Cross examination by Mr. Schneider.

Q. How far, Mr. Madero, were you from the other side of the street, about how many feet? A. How far from La Bella?

Q. How far were you from the east side of the Boulevard? A. I was on the left-hand side.

By the Court:

Q. How far from the east curb were you? A. I was facing the curb.

Q. You had gotten up on the Boulevard sidewalk? A. I was just putting my foot on the other side of the Boulevard.

By Mr. Schneider:

Q. The Boulevard is about 60 feet wide? A. Sure.

Q. It is all of that, isn't it? A. Well, I didn't measure it but I think it is 60 feet.

Q. Counsel agree it is 60 feet. Was your friend walking right alongside of you? A. La Bella?

Q. No, your friend who was with you? A. He was a little in front of me, just a little bit, a couple of feet.

Q. Did your friend walk three feet in front of you? A. Yes.

Q. And you followed along after him? A. Yes.

Q. What was it that attracted your attention to the accident, some shouting, what made you turn round? A. When I heard the holler I turned round quick.

Q. Who was hollering? A. Costerello.

Q. What was he hollering? A. He hollered "The automobile catch my brother."

Q. What was he hollering? A. "Stop, stop!"

Q. With his hands up? A. Yes, and "Stop, stop, stop, stop!"

Q. And that was what made you turn round? A. Yes.

Q. Where was this automobile which you say

went over the body of La Bella? A. When I saw it, it was about 50 feet away.

Q. Where was the body with reference to the intersection? A. I don't know that.

Q. Were you crossing over on the side of 52nd Street which is nearer to Jersey City? A. I had just crossed.

Q. As you came down 52nd Street, on which side were you, left or right? A. On the left.

Q. Say this is 52nd Street, between these two tables, you say you were coming down the street, and you were passing on the left crossing? A. Yes.

Q. And this table is the right crossing? A. Yes.

The Court: May we understand he was crossing on the north crossing?

Mr. Schneider: Yes.

Q. When you turned round, where was the body of La Bella, was it nearest to the north or the south crossing? A. It was to the left-hand.

Q. Near this crossing (indicating), the north crossing? A. Yes.

Q. How far from this north crossing was his body?

The Court: That is the crossing you were crossing over on.

A. I was this side and I go to the other side.

Q. Yes, you were on the other side of the street; but you are crossing this street and you are coming on this side (indicating), here is the crosswalk and you are going over? A. Yes.

Q. Here is the other side of the Boulevard, you are here (indicating)? A. Yes, sir.

Q. You are about to put your foot on the east side of the Boulevard? A. Yes.

Q. And you heard a noise, you heard some hollering, shouting? A. Yes.

Q. And you turned round quick? A. Yes.

Q. Where was the body of Mr. La Bella then? A. He was in the middle of the street then.

By the Court:

Q. In the middle of what street? A. 51st Street.

Q. It could not be in 51st Street? A. I was past 52nd Street.

Q. Do you mean it was towards 51st Street? A. The car was pulled up to 51st Street.

By Mr. Schneider:

Q. The first car was pulled up to 51st Street? A. No, he go to 51st Street, he was about 30 feet past.

Q. Thirty feet ahead of 52nd Street? A. Yes.

Q. And going toward 51st Street? A. Yes.

Q. And the second car was about 30 feet beyond 52nd Street? A. Yes.

Q. In other words, if these are the cars, the first car was down here (indicating) somewhere between 51st Street and 52nd Street? A. I no see the first car.

Q. This first car was between 51st and 52nd Street? A. Yes.

Q. About 30 feet beyond the crossing? A. Yes.

Q. So the first car was about 30 feet beyond the southern crossing of 52nd Street? A. Yes.

Q. It had gone on across 52nd Street 30 feet beyond? A. Yes, towards 51st Street.

Q. It was standing there 30 feet beyond 52nd Street? A. About that.

Q. Where was the body, was the body beyond

52nd Street, towards 51st Street, or where was it? A. It was on the right.

By the Court:

Q. On your right? A. Yes, on my right.

By Mr. Schneider:

Q. Say here is the street (indicating), this is 52nd Street, where was the body? A. On the right-hand.

By the Court:

Q. How far from the north corner on which you crossed over was it, to the south, towards 51st Street? A. It was about 30 feet.

By Mr. Schneider:

Q. Thirty feet after you crossed the whole street, or was it in the middle of the street? A. In the middle of the street.

Q. What street? A. The Boulevard. It was about ten feet from the curbstone of the Boulevard.

Q. Which was nearest the curbstone, his head or his feet? A. His feet.

Q. Now, you are up here on the north side (indicating), you had crossed over, and this (indicating table) is the other side of the street, was the body further from this side? A. No.

Q. Was it further in to 52nd Street? A. It wasn't past 52nd Street.

Q. How near to this crossing was it? A. It was pretty near across to the other crossing.

By the Court:

Q. It was pretty near across to the south crossing, below the one you crossed over on? A. Yes.

Q. You understand that question, do you? A. Yes, sir.

Q. Now, if the second car struck the body, then it was taken how many more feet along? A. About 30 feet.

Q. Thirty feet beyond that? A. Yes.

By Mr. Schneider:

Q. Did you see the other car go over the body? A. The second car I see, I didn't see the first car.

Q. Did you see the second car go over the body? A. Yes; I was about the middle of the street then.

Q. What part of the second car ran over the body? A. I saw it on top, I didn't know what.

Q. Did the whole car go over the body? A. Yes.

Q. So you could not see the body when the car was on top of it? A. No.

Q. And for 30 feet you could not see the body? A. I saw some blood out for 30 feet.

Q. Are you sure of that? A. Yes; I see no blood for the first car.

Q. You did not see any blood for the first car? A. No; I see, when I go down, just a little piece when I look at the ground.

Q. How did you know this blood was from the second car? A. I saw all the blood.

Q. How do you know it? A. I see it.

Q. Did anybody tell you to say the blood was from the second car? A. No, I saw the blood myself.

Q. Did you talk to anybody about this case? A. No.

Q. Nobody at all? A. No.

By the Court:

Q. How do you know that the blood you say

you saw was produced from the second car dragging his body? A. Because in the morning I was going down there and saw the blood still down there.

Q. I did not ask you if you saw the blood, but what indicated to you that it was produced by the second car? A. Because when I picked him up from the car that night, I saw just a little blood on the first car, that I saw.

Q. You mean when you came to the place where the body was lying, you saw a line of blood from there on, is that what you mean? A. Yes.

Q. Did you see any back of that, where the body lay by the first car? A. No.

By Mr. Schneider:

Q. You went there next morning and examined the blood? A. Yes.

Q. And you saw the blood came from the second car? A. Yes.

Q. That is, most of the blood came from the second car? A. Yes; I no see no blood from the first car.

By the Court:

Q. You saw where the blood started from, did you? A. Yes.

Q. Was that the place where the body lay after the first car struck it? A. Yes.

Q. Did you see a lot of blood there where the body lay after the first car struck it, more than was around the second car? A. No.

Q. Not a pool of blood? A. No, just a little bit.

By Mr. Schneider:

Q. How do you know the second car dragged the body 30 feet? A. Because I measured it.

Q. Did you measure it? A. Yes.

Q. Did you measure it with a tape measure? A. Yes.

Q. Next morning? A. Yes.

Q. Who was with you when you measured it? A. A lot of men working down there.

Q. Was anybody with you? A. No.

By the Court:

Q. Were you alone? A. I was alone because he was going to the hospital to see his brother and there was only me and Mrs. La Bella in the house.

By Mr. Schneider:

Q. You went down alone that next morning and you made measurements with a tape, to see how far the first car had dragged him? A. Yes.

Q. And to see how far the second car had dragged him? A. Yes.

Q. And to see how far the blood extended? A. I went to see where he stopped the car.

Q. When you saw it that night, was Mr. La Bella in under the first car for 30 feet? A. Yes.

Q. Being dragged? A. Yes.

Q. And then Mr. Brown's car went 14 feet more? A. Yes.

Q. Did you measure that next morning with the tape measure? A. Yes.

Q. And the tape measure showed you he went on 14 feet further after he stopped dragging him? A. Yes.

Q. That is exact, is it? A. Yes.

Q. No more or no less? A. No.

Q. And you measured and found it was exactly 30 feet that he dragged him? A. Yes.

Q. No more and no less? A. No.

Salvatore Madero, cross.

Q. How far did the first blood extend by your measurement, how many feet did the blood from the first car extend, by your measurement? A. I didn't see any blood, I saw a little blood where the first car stopped.

Q. Where the first car stopped you saw blood, you say? A. Yes, a little bit.

Q. Thirty feet beyond the crossing? A. Yes.

Q. You mean where the first car stopped, 30 feet toward the crossing, you saw blood there? A. Just a little bit.

Q. Was it 30 feet across towards 51st Street, where the first car had been standing, was that where the blood was? A. Yes.

Q. That was the next morning you saw that blood? A. Yes.

Q. Did you see it that night? A. I saw some blood, but I didn't bother with blood then, I was taking him to the hospital.

Q. But next morning was when you were taking the measurements accurately? A. I had a tape line and measured it.

Q. Did you have a steel tape or just an ordinary tape? A. It was a tape line.

Q. The kind you wind up; what business are you in? A. Digging cellars.

Q. Did you see La Bella in the hospital afterwards? A. Yes, I was there once but they wouldn't let me go in.

Q. Did he have a bump on his head, did you notice? A. No, I didn't see; I saw a little scratch right here (indicating).

By the Court:

Q. Did you take notice what kind of automobiles it was that first hit him? A. I don't know; I saw blood, I didn't bother myself.

Q. Did you see the driver of the first automobile? A. No.

Q. Did you know who the driver was? A. No.

Q. Did you see the driver of the second automobile? A. No.

Q. You did not see the driver? A. No.

By Mr. Schneider:

Q. Were there any sand piles on the street there where they were building? A. Yes, sir.

Q. On what side were they building? A. On the right hand.

Q. On the east or west? A. West side.

Q. What side of the street, toward Jersey City or toward Bayonne? A. Bayonne, 51st Street is in Bayonne.

By the Court:

Q. On the west side of the Boulevard? A. Well, on the right-hand side. On the west.

By Mr. Schneider:

Q. Were they building at the corner of 52nd Street?

The Court: The southwest corner?

A. Well, on the right-hand side.

The Court: As you went over, it was on the right-hand side of 52nd Street?

The Witness: Yes.

Q. And there were sand piles on the street, along the curb? A. I didn't bother so much with them; I saw a lot of lumber.

Q. When you came there next morning with your tape measure, did you go on the same side

of the street? A. Yes; there was a lot of lumber there.

By the Court:

Q. Was it along 52nd Street, on the south side of 52nd Street, near the Boulevard or on the Boulevard? A. On the Boulevard.

Redirect examination by Mr. Brenner:

Q. You said you were a digger—are you in business for yourself? A. For myself.

GEORGE H. SEXSMITH, sworn as a witness, testifies:

Direct examination by Mr. Brenner:

Q. Doctor, you are a practicing physician in this city and State? A. I am.

Q. And have been for how many years? A. Thirty-five.

Q. And you are connected at the present time with Bayonne Hospital? A. Yes.

Mr. Schneider: The doctor's qualifications are admitted.

Q. Did you see Mr. La Bella either when he was brought to the hospital or shortly thereafter? A. I did.

Q. When was the first time you saw him, the night he was hurt or the following day? A. I should say I saw him two hours after he was in, an hour after he was in.

Q. Did you examine him? A. I did.

Q. About what time of the night did you examine him? A. I suppose it was about 10 o'clock.

Q. Did you examine him as his physician or in your official connection with the hospital? A. In my official connection with the hospital.

Q. And when you examined him, what was his condition? A. Well, he had the general appearance of a man right away whom you might expect to see or find had been badly injured by an automobile; he was covered with dirt, and he had a very decided contusion on the right leg, thigh.

Q. By contusion you mean what, Doctor? A. Bruises of the skin, and roughened and in a bleeding condition, and the dirt was scraped into it. He had a large contusion or swelling, a decided contusion with a good deal of swelling, on the head, back of the head. He was suffering from shock, very decidedly, and was, as I recall it, practically unconscious; he may have known some things that were going on but we did not get any definite answers from him at that time.

Q. Did you question him in any way to ascertain whether he could talk? A. Yes; as I recall, we got no answers from him at that time. Sometimes patients afterwards tell you things they heard you say, when they did not make responses. He was certainly a very dilapidated looking object.

Q. You spoke about dirt; where was that dirt, all over him? A. Everywhere, just like all those cases that are slammed in the street from an automobile accident—there are so many of them —and it is just pushed into them, everywhere.

Q. Was he undressed at that time or did he have his clothes on? A. He had his clothes on.

Q. Was there any bleeding from any part of the body? A. Yes, he was oozing of blood; there wasn't what we would term a hemorrhage such as the ladies generally have, when you have a

hemorrhage there is apt to be a teacup of blood around, but he was oozing.

Q. Was he bleeding from the nose or ears? A. No, I don't recall any of that, and the record does not prove that.

Q. What was your diagnosis as to the nature of his injuries? A. I recall stating, as I do in many of these cases—when they come in, they are already suffering from shock, and the less you handle them or move them about the better they are apt to be, and I recall saying: "Don't take his clothes off, don't manipulate him. From the appearance of this thigh I would say it was fractured, but don't let us move it around, producing any more shock than we have now"; and to my mind then he was beyond repair, he was going to die, but to move him about and manipulate him to find out if this leg was broken, which would accomplish nothing at the time, we did not want to do it, and we manipulated him as little as possible.

Q. The following day did you visit him again? A. I did.

Q. And did you make any definite diagnosis at that time? A. I did; that is, I saw him.

Q. As to what his condition was? A. I wouldn't say I did. I said the first time I saw him, I believed the femur was broken—the contusion there was so tremendous it did not seem possible it could be otherwise. The next day there did not seem to be any difference in the diagnosis, he was just in the same semi-conscious condition.

Q. How long did he remain in that condition? A. He came in at 9 o'clock at night on the 4th and died on the 7th at 4 o'clock in the morning,

if I remember right; that would be two days and some eight hours.

Q. How many times did you see him during that interval? A. I would say I saw him six times.

Q. And do you know, Doctor, or have you ascertained the cause of this man's death? A. Well, do you mean by a post-mortem? There was none.

Q. No, without a post-mortem? A. I would say he died from hemorrhage of the brain.

Q. That was your diagnosis, was it? A. Yes, as to the cause of death.

Q. Was that on the report? A. I can't tell you what is on the report.

Q. Did you determine whether or not the leg had been fractured? A. Yes, sir; it was not fractured.

Q. When did you determine that? A. I would not say I determined that. I would say the house physician, after his death, in manipulation of his leg, found it was not fractured.

Q. So that was found out subsequent to the death? A. Yes.

Q. But from your observation, the injuries were such as to make you believe there was a fractured leg? A. Yes, on a snap diagnosis without manipulating and without moving him around any more, I said that was fractured. It was a very severe bruise.

Q. Did the man ever regain consciousness? A. I can't recall that he ever spoke naturally or gained sufficient consciousness to have what I would call his reason, I can't recall that he ever did.

George H. Sexsmith, cross.

Cross examination by Mr. Johnson:

Q. You attended this party up to the time of his death, Doctor, did you? A. I was in attendance for that month at the hospital. I did not see him the morning he died; I saw him the night he came in, after he came in; twice the next day, and twice the next day, that would be twice on the 5th and twice on the 6th; I saw him on the 4th, 5th and 6th.

Q. But you did not see him the day he died? A. No.

By Mr. Schneider:

Q. Doctor, you were on the staff of the hospital at that time? A. Yes.

Q. On the visiting staff? A. Yes; I am on the surgical staff of the hospital and that was my month on duty for all cases in the free ward.

Q. Do they have one of the staff on duty in the employ of the hospital always? A. No; that is one of the house physicians.

Q. That was your month? A. Yes, my month.

Q. And you have charge of the ward for the month you are there on duty? A. Yes.

Q. And under you is the house surgeon, who works in cooperation with you and under your instructions? A. Yes.

Q. And I suppose he makes reports to you, and you have the final say for anything? A. Yes.

Q. And you make reports to the Board of Managers when they come in? A. Yes; they come in monthly.

Q. Is there another man on the medical end? A. Yes.

Q. And you are in charge of the surgical end? A. Yes.

Q. About the condition of his head, I understood you to say there was a severe contusion there; in plain English, was there a bump there? A. I guess you would call it a bump, a large swelling.

Q. On what part of the head was that? A. Back of the head, in this region (indicating back of head).

Q. Which side? A. I wouldn't say which side, I imagine it was the back of the head.

Q. How large a swelling was it, Doctor? A. I suppose at the high point it probably was two inches and a half from the bone, and the swelling was a big mass.

Q. Putting it in an inelegant way, was it the size of an ordinary egg? A. No; if you got a small musk-melon and cut it in two and put it against the head, it would about represent it.

Q. And that swelling was there to that extent when you first saw the patient? A. I would not say to that extent when I first saw him. My impression is it was there the next day. It gets there the first 24 hours.

Q. And that would indicate to you that he had a fracture of the skull? A. I believe the man had a fracture of the skull, although there was no post-mortem.

Q. But that would indicate it? A. Yes.

Q. And he died from that? A. He died not from fracture of the skull but from injury to the brain; the crack of the bone wouldn't kill him necessarily.

Q. Unless it touched the brain? A. No.

Q. And you can get a good crack here (indicating) and get along? A. Yes; you might have

a hard time for three months about, but you could live; but if you have a fracture here (indicating back of head) you are, of course, sure to interfere with the brain.

Q. And that is what caused his death? A. To my mind, yes.

Q. The lacerations and the condition caused by this fractured skull— A. The condition, the bruising, the brain is just a soft mass and it is in a hard, bony basin, and when you get a slam it vibrates and bruises it, and very often you find a jarring of the brain, the brain will be turned in different directions.

Q. And that is all caused by fracture of the skull? A. Not by the fracture of the skull, but by the smash; not the crack of the bone necessarily; but if in this fracture of the skull you had a fracture where the top of his head was smashed and the bone went right down into the brain—as I had a case of a few weeks ago, and I don't recall anything in his case like that.

Q. In the case you speak of the bone went down into the brain? A. Yes, fragments of it.

Q. That severe contusion of the leg, Doctor, which leg was it? A. It was the right leg.

Q. What side, the inner side? A. I would say the outer side, about the middle third, as we call it.

Q. Between the thigh and the knee? A. Yes.

Q. And the thigh was black and blue, was it? A. Yes, it was badly bruised.

Q. Now, as to that leg, Doctor, the house physician made an inspection later as to whether there was a fracture there or not? A. Yes.

Q. And he reported to you that there was no fracture? A. Yes.

Q. He tried it by manipulation? A. Yes; that is easy to make after a man is dead or if he is under anaesthetics, but to push him around and manipulate him in his condition you would only hasten his death.

Q. It was easy to find out whether there was a fracture later on? A. Yes; we don't manipulate badly shocked people when they come in.

Q. In other words, the leg was the minor injury? A. The minor, comparatively.

Q. Doctor, he did not have any fracture of any other kind around his body, did he, of any of his limbs? A. There was none reported. That report, of course, I took from the house physician, that he manipulated the different parts, especially this leg.

Q. And there were none in any other part of his body? A. No.

Q. There were no severe lacerations on any other part of his body? A. No, I don't recall seeing any lacerations at all.

Q. A laceration is a cut, isn't it? A. Yes.

Q. And there were no lacerations on him? A. I do not recall seeing any; there might have been some small lacerations about his head, but they were not of much consequence.

Q. I suppose the thigh—is that what you would call a brush burn? A. Yes, it had a brush burn, but in combination with that there was a good deal of swelling of the tissues.

Q. And there were no other brush burns in any other part of his body, were there, Doctor? A. I would not be able to speak of anything more particularly than on his face and head; he was generally bruised.

Q. Your attention was particularly toward his head condition? A. Yes.

Q. And that you felt it your duty as a physician at that time to treat? A. Yes, to observe carefully.

C. J. JULIEN, sworn as a witness, testified:

Direct examination by Mr. Brenner:

Q. By whom are you employed? A. Seymour Coal & Lumber Company.

Q. Is that the place where Mr. La Bella was employed? A. Yes.

Q. What is your connection with the concern? A. I am yard superintendent.

Q. How long was Mr. La Bella working there? A. Well, anywhere from 14 to 17 years; he worked for three or four years and then went to Italy, and then came back; I think he was there 14 to 17 years altogether.

Q. During that time was he a steady worker? A. Yes, sir.

Q. What type of work did he do? A. Well, general laborer, handling lumber and coal, one of our good men, handling almost anything in the coal and lumber line.

Q. He was one of the good men you had down there? A. Yes.

Q. Was his work of a heavy nature? A. Yes.

Q. How many hours a day did he work? A. Well, ten and nine hours a day; for a while it was ten and then reduced to nine hours.

Q. Did he appear to be a man who was in good health or not? A. Up to the time he went to Italy he was; the day after he returned I didn't think he was so well.

Q. But he, notwithstanding that, continued working there? A. Yes.

Q. How many years did he work there after he returned from Italy? A. I would say six or seven years.

Q. Did he work steadily? A. Yes.

Q. Do you know what his salary was? A. Not for sure; I know he was paid anything from forty-five to fifty cents an hour.

Q. What would that average per week about the time that he died? A. Well, it is $4.50 a day. May be averaged $26 a week, I suppose.

Q. Do you know why he went back to Italy? A. I understand he went on account of war.

Q. He went for service on the other side? A. Yes.

Q. During the World War? A. Yes.

Q. And then he returned to you after that? A. Yes.

The Court: What about the question of ownership and operation?

Mr. Brenner: I will bring that out, your Honor, in the course of the case.

Mr. Johnson: No questions.

Mr. Schneider: No questions.

LOUIS L. MOZIER, sworn as a witness, testifies:

Direct examination by Mr. Brenner:

Q. Mr. Mozier, you are also employed by the Seymour Coal & Lumber Company? A. Yes.

Q. That is the place where Mr. La Bella worked? A. No, that is the main office.

Q. You are in the main office, are you? A. Yes.

Q. And he worked in what place there? A. At 54th Street.

Louis L. Mozier, cross.

Q. What is your position in the company? A. Bookkeeper and timekeeper.

Q. Have you the records showing Mr. La Bella's employment by that company? A. Yes.

Q. Have you that record with you? A. Yes.

Q. And by referring to that record, can you tell us the average wage that Mr. La Bella received for a year prior to his death? A. I think it averaged somewheres around $21 a week.

Q. Can you state definitely by looking at your book? A. Yes (refers to book); the last year he worked the average was $21.11 a week.

Q. Was he employed fairly steady during that year? A. Yes, very steady.

Cross examination by Mr. Johnson:

Q. The average was what? A. $21.11 a week.

Q. What was his position with the company? A. La Bella's?

Q. Yes? A. I think he was a common laborer.

By Mr. Schneider:

Q. How big a man was he, how tall? A. I didn't know him.

Q. You did not know him? A. No, I don't think I ever saw him.

Mr. Brenner: I can put Mr. Julien back if you want to ask about that.

Mr. Schneider: It is not very important.

C. J. JULIEN, recalled, testifies:

By Mr. Schneider:

Q. Do you know about how tall a man La Bella

was? A. Man about five feet ten inches or five feet eleven inches, something like that.

Q. How much was his weight? A. He had two weights; when he went away he was a great, big husky fellow, when he came back he had reduced 25 to 30 pounds.

Q. What was his weight when he came back? A. About 130 or 135 pounds.

Q. And his height was about five feet eleven inches? A. Yes.

WILLIAM GANNON, sworn as a witness, testifies:

Direct examination by Mr. Brenner:

Q. Mr. Gannon, on March 4, 1923, did you see an accident happen on 52nd Street and the Boulevard? A. Yes, sir.

Q. Were you driving at that time or walking? A. Driving.

Q. In which direction were you driving? A. Toward Jersey City.

By the Court:

Q. South or north? A. South going to Jersey City.

By Mr. Brenner:

Q. Were you going toward Jersey City? A. Toward Jersey City.

Q. That would be north, wouldn't it? A. Yes, north.

Q. What kind of conveyance were you driving in? A. I was going pretty lively.

Q. I asked what kind of car were you driving? A. A Dodge.

Q. Taxicab? A. Yes.

Q. What is your business? A. Taxi.

Q. Do you own a taxi business? A. Yes.

Q. And do you drive a taxi yourself? A. Yes.

Q. And you were driving this Dodge taxi north on the Boulevard when you saw something happen? A. Yes.

Q. What was the first thing you observed as you were driving along? A. The first I saw was what appeared to be a bundle of cloth in the street.

Q. How far away from 52nd Street were you at that time, when you first observed what appeared to be a bundle of cloth? A. About 49th Street.

Q. That is two blocks away? A. Three blocks away.

Q. And you said you were going pretty lively? A. Yes.

Q. About how fast were you going? A. About 25 miles an hour.

Q. When you observed what appeared to be a bundle of cloth, did you see anybody standing alongside of that object? A. No, sir.

Q. Did you see somebody then come up to that bundle of cloth? A. Yes, I saw a Ford sedan come up.

Q. Did you observe how fast that sedan was coming? A. I couldn't exactly tell, we were both going towards one another.

Q. You could not judge the speed? A. No.

Q. Did you hear any shouting or noise of any kind at that time? A. I was coming toward the bundle and I thought I saw a man there waving his hands.

Q. How close was he to that bundle? A. He

was about ten feet, I judge, on the west side of the man, towards a pile of sand.

Q. About ten feet on the left? A. Yes.

Q. And there was a lot of sand there? A. Yes.

Q. Was that quite out in the Boulevard? A. Yes.

Q. What corner was that? A. On the southwest corner.

Q. They were building a house there? A. Yes.

Q. And when you saw him waving his hand, did the Ford car stop or did it keep on going? A. Why, it came towards him waving his hand, and he made a short turn and ran over the man lying in the street.

Q. Did the whole car go over him? A. Yes, both right wheels.

Q. Both right wheels? A. Yes; as you sit driving, the car was on the right side.

Q. How far away were you at that time from that place? A. I was about 51st Street.

Q. So you were about a block away? A. Yes.

Q. When you observed that sedan first you were at 49th Street, about three blocks away? A. Yes.

Q. And then you observed it again when you were at 51st Street? A. Yes.

By the Court:

Q. What is the distance of the blocks there? A. There are about six building lots.

By Mr. Brenner:

Q. Are they the ordinary 25 foot lots or 50 foot lots? A. Twenty-five foot lots.

Q. And would you say about 15 feet for each sidewalk? A. Yes.

Q. That would be about 30 feet more, that would be 180 feet? A. All short blocks.

Q. And are they all short blocks from 49th to 53rd Street? A. Yes, all about the same average.

Q. What was the condition on 52nd Street as to light, is there a light there at night? A. There is a light on the eastern side of the Boulevard.

Q. Do you know which corner that is on, whether the northeast corner or the southeast corner? A. It is on the northeast corner, if I am not mistaken.

Q. Is there a pole there? A. Regular telegraph pole.

Q. Is this light right up against the telegraph pole or does it come out on the street? A. It extends out on the street.

Q. About how much? A. About 10 or 20 feet into the roadway.

Q. Does that cause a bright light or not? A. A regular arc light.

Q. A regular city arc light? A. Yes.

Q. On this particular night, as you were driving along, could you see along the Boulevard for some distance or not? A. Oh, yes, plain.

Q. You had no difficulty in seeing this object in the roadway three blocks away? A. No, sir, no more than it seemed to be a bundle of cloth when I first got a glance of it.

Q. After you saw this car go over what appeared to be a bundle of cloth, did you continue along in your car or did you stop? A. I stopped right alongside the accident.

Q. Then you drove up to 52nd Street and stopped? A. Well, about 30 feet this side of 52nd Street.

Q. I mean up in the vicinity of 52nd Street? A. Yes.

Q. Did you do or say anything after the accident had occurred? A. Yes; I was kind of sore to see the way the man lay there, all gone away from him.

Q. Did you talk to anybody about him? A. I had two colored ladies and two colored men in the car, and we were after picking him up when somebody else's car took him down to the hospital.

Q. Did you see Mr. Brown there at the time or after the accident happened? A. Yes, I saw him, he told me he was the man in the second car.

Q. You did not see the first car strike him at all, did you? A. No, sir.

Q. You spoke to Mr. Brown and he told you he was the man in the second car? A. Yes.

Q. Did you say anything further to him or did he say anything further to you about the accident? A. I asked him why he didn't help pick the man up and ran the car to the curbstone, what was the reason he ran over him with two wheels, I thought it was bad enough to go over him with one, and he said he thought it was a holdup man—the man waving his hands.

By the Court:

Q. The Brown man, who was driving the Ford sedan? A. Yes; I didn't see him at the time of the accident.

Q. But he was the man who was driving the car which you say went over the body? A. He claimed he was.

Q. Is he the man who is in court here, one of the defendants? A. Yes.

By Mr. Brenner:

Q. Is the man here who took him to the hospital? A. Yes, over there (pointing).

Q. Mr. Newman? A. I believe that is his name, yes.

Cross examination by Mr. Johnson:

Q. How wide is the Boulevard at this point? A. I judge about 60 feet wide.

Q. Wider than that, isn't it? A. It may be.

Q. Sixty-five feet, isn't it? A. Sixty, I judge.

Q. It is pretty wide at that point; have you or not any idea about it? A. I don't know definitely; I know the sidewalk is 15 feet on account of the way I ride, that's all.

Mr. Johnson: Well, never mind that.

By Mr. Schneider:

Q. Mr. Gannon, you say Mr. Brown said to you at that time that he thought the bundle in the street was a hold-up man? A. No, the man waving.

Q. The man was waving his hands on 52nd Street? A. Yes.

Q. And Mr. Brown said he thought he was a hold-up man? A. Yes.

Q. Did you say he had come to a stop? A. He came to a stop.

Q. He swerved his car and came to a stop? A. Yes, after he ran over the man that was lying in the street.

Q. But he came to a stop at that point after he made a swerve? A. He came to a stop; he got out of the man's way, he turned.

Q. And then stopped? A. No, he didn't stop until after he ran over the man who was lying in the street.

Q. But he finally came to a stop, didn't he? A. Sure.

Q. Where was the "hold-up" man when he came to a stop? A. He was behind him.

Q. How far behind him? A. I should judge 15 to 20 feet.

Q. And where was the body when he came to a stop? A. The body was right behind the car.

Q. How far behind? A. I should judge five or six feet.

Q. Wasn't it closer, wasn't it close to the right wheel, to the side of it? A. I said I should judge five or six feet to the right wheel.

Q. You could not see through his car, could you? A. No, but I could see behind it.

Q. But you were down at 51st Street? A. When this happened I was right behind the car.

Q. When you saw a man waving his hand you were down at 51st Street? A. Yes.

Q. How far was Mr. Brown from the man waving his hand? A. I should judge he was about ten feet in front of him.

Q. The front of Mr. Brown's car was ten feet away from this "hold-up" man, and you were down at 51st Street? A. I judge so.

Q. What side of 51st? A. Going towards Jersey City.

Q. You had crossed 51st Street already? A. Yes.

Q. Where was this man standing, was he standing on your side of 52nd Street? A. No, sir, on the opposite side.

Q. On the north side? A. Yes.

Q. Where was the body? A. On the south side.

Q. And the man was on the north side? A. Yes.

Q. How close to the south side was the body? A. I should judge about 20 feet from the south side.

Q. Twenty feet north of it? A. Twenty feet south of it, east of the Boulevard I should judge.

Q. Was it 20 feet towards you? A. It was more than that, I guess.

Q. The body was in the Boulevard, wasn't it? A. Yes.

Q. Which side of 52nd Street was it on? A. On the north side, that is towards the Point.

Q. Was he towards you? A. Yes.

Q. Well, that is south?

Mr. Brenner: Yes, that is south.

Q. The body was towards you, past the street, wasn't it? A. Yes.

Q. How many feet past the street was it towards you? A. Well, a full lot, I guess.

Q. There was sand over the Boulevard there? A. Yes.

Q. So the body, when you first saw it over there, or, as you described it, when you saw what appeared to be a bundle of cloth—was about 25 feet to the south of the southwest corner of 52nd Street and the Boulevard? A. Yes.

Q. Where was the man standing who was waving his hand? A. He was on the southwest corner.

Q. In the middle of the street, was he? A. Almost in the middle.

Q. About 31 feet was he from the north curb? A. I should judge so, about 25.

Q. How close to the body did he stand? A. He was—there was nobody near the body.

Q. Where was this one man who was waving his hand; how close to the body was he? A. About ten feet away, I should judge, toward the west side of the Boulevard.

Q. Ten feet towards the west side of the Boulevard? A. It appeared like that, going towards him.

Q. And how far was he to the north; was he further from you in that direction you were going than the body was? A. More than—yes, he was.

Q. How much further to the north was he beyond the body? A. I should judge about ten feet.

Q. How far from the curb was the body? A. I should judge the body, when I first saw it, was about 20 feet from the easterly curb.

Q. You mean the westerly curb, don't you? A. No, the easterly curb.

Q. The curb nearest where you were of the other one? A. Nearest where I was.

Q. The curb towards Avenue C? A. Towards Avenue C, yes.

Q. So the body was about 25 feet from the northerly curb and about 20 feet from the easterly curb? A. Yes.

Q. Or on the side of the street on which you were driving? A. Yes, sir.

Q. And it must have been about 40 feet from the curb where the sand was; is that right? A. It would be about that, I guess.

By the Court:

Q. When this Ford sedan ran over this body, was the Ford sedan on its right-hand side or its left-hand side of the centre line of the body? A. It was on the left-hand side. It was on account of the pile of sand, I suppose, as he was coming in, and he cut over that.

Q. How far did the pile of sand extend? A. It extended about 20 feet out, I suppose; I don't know definitely.

Q. There is a chalk line in the centre of the Boulevard, isn't there? A. Not now, not them days.

Q. Is there now? A. No.

Q. Not down there? A. No.

Q. If you took a centre line right in the centre of the Boulevard to the side of the street, how was the body lying as the Ford came along? A. On its left.

Q. On the left of the centre of the street, about two-thirds across? A. Yes.

Q. And the man standing was about ten feet beyond it, ten feet to the north of it? A. Ten feet to the north of it.

Q. Close to the curb was he? A. Close to the west curb.

Q. How close to the west curb was he? A. I should judge he would be about 25 feet away, about the middle of the road.

Q. When did you first see that man there? A. About 48th or 49th Street.

Q. You were between 48th and 49th Streets? A. Yes.

Q. Closer to 48th or closer to 49th? A. I don't know exactly, but in that neighborhood.

Q. You were between 48th and 49th? A. Around that.

Q. In other words, you were about three and a half blocks away? A. Well, 49th Street.

Q. You were more than three blocks away, were you? A. I don't know exactly how far I was away.

Q. Well, this body was near 52nd Street? A. Yes.

Q. And you were down beyond 49th Street? A. Well, I was coming to 49th Street.

Q. So you were just three blocks away? A. About that.

Q. And from that distance down there, a dis-

tance of, say, between 500 and 600 feet, you saw this body in the street? A. Yes.

Q. There are no lights on the westerly side of the Boulevard, are there? A. No.

Q. And those lights on the easterly side of the Boulevard, they come just on the corner, don't they? A. Well, there are some in the middle of the block.

Q. Well, there was none around there in the middle of the block, was there? A. I didn't notice.

Q. And this accident you are speaking of was on the far corner of 52nd Street? A. On the far corner.

Q. On the northeast corner? A. On the northeast corner, on the Jersey City side.

By the Court:

Q. Can you tell me whether the houses along there where this accident occurred were on an average of more than 100 feet apart or on an average of less than 100 feet apart? A. There are only two houses on that block on one side, and I don't believe there are any on the other side at all.

Q. Do they average more than 100 feet apart? A. There is a house and a garage there and a lot in between that and the other house.

The Court: Do you all agree on that condition?

Mr. Brenner: I think we can agree; I think there is no dispute that that is a built-up section. On the west side is the park, right below that, but I would state it is all built up.

Q. Can you say whether the houses there are,

on the average, more or less than 100 feet apart? A. I don't know what you mean by "average."

Q. If there are 20 houses in a certain distance, you divide the 20 houses into that distance; can you do that and say whether the houses, on the average, are more than 100 feet apart? A. There are only three houses there.

Q. I do not car about that; I want your best judgment, whether the houses are, on an average, more or less than 100 feet apart? A. I can't explain.

Mr. Brenner: I think we can agree on that. Very probably this witness does not know.

Mr. Schneider: During recess we will talk it over, your Honor, and agree on it.

By Mr. Schneider:

Q. How wide, about, is 52nd Street, Mr. Grannon? A. I should judge it is about 30 feet wide.

Q. You had passengers in your taxi, had you? A. Yes.

Q. How many? A. Four.

Q. You were coming from where? A. From 508 Boulevard.

Q. How far down the Boulevard is that? A. Right near 19th and 20th Streets.

Q. You say this car you saw passed over this body? A. Yes, sir.

Q. Nearer which curb was the man's head? A. The man's head, when I first saw it, it looked like a bundle of clothes.

Q. Did you notice in which direction the head pointed? A. After the first wheel went over it?

Q. I mean before any wheel went over it, did you notice it? A. No, I couldn't notice it.

Q. How close to the curb were you traveling? A. I was about ten feet away.

Q. From the curb? A. Yes.

Q. And how far down the street were you when you say the wheel went over him? A. I should judge I was around 51st Street.

Q. Had you passed 51st Street? A. I couldn't say exactly.

Q. Or were you in that intersection? A. I was reached round that neighborhood.

Q. Now, from 49th Street you kept on watching this body? A. Yes.

Q. And kept your eyes right on it? A. Yes.

Q. Saw it all the time? A. Yes, sir.

Q. Clearly? A. Yes, sir.

Q. That is, you traveled a distance of about 400 feet until you got to 51st Street and saw the body all the time? A. Yes.

Q. Was anybody trying to lift it ? A. No.

Q. When you got to 51st Street, was anybody trying to lift it? A. No.

Q. Was anybody trying to lift that body any time when you were traveling from 49th Street to the scene of the accident? A. No, sir.

Q. When did you first see the man that was waving his hand? A. When I was in the neighborhood around 51st Street.

Q. Where did this man come from? A. What man?

Q. This man who was waving his hand? A. I don't know where he came from.

Q. Did you notice from which side of the street he came? A. From the west side of the Boulevard.

Q. Did he come running or walking? A. When I first saw him—I didn't see him come; he was there. The Ford sedan came up on top of him.

Q. As you were coming east from 50th Street to 51st Street, did you see this man who was waving his hand coming out from the curb? A. No.

Q. You did not see him until he was there waving his hand? A. No, sir; right in front of the Ford sedan.

Q. So you don't know where he came from? A. No.

Q. You said before he came from the west side. A. That is where he must have come from; if he had come from the east side I would have seen him.

Q. You did not see him until he was actually waving his hand? A. No.

Q. Was he doing anything else besides waving? A. He was hollering.

Q. What was he hollering? A. I couldn't tell what he was hollering.

By the Court:

Q. Did you notice an automobile pass you in the opposite direction and in the same direction the Ford was coming, before you saw this bundle in the street, as you described it? A. No, sir; there was nothing but the Ford coming towards me.

Q. Your first attention was directed to it or attracted to it about 49th Street? A. About that.

Q. Was there any vehicle other than the Ford within the line of your vision during all that time until you got to the body? A. No, sir.

By Mr. Schneider:

Q. Did you see the lights of any automobile between you and the body, anywhere? A. Yes.

Q. Where was that? A. There was the lights of the Ford sedan coming towards me.

Q. I mean besides the Ford sedan? A. Yes.

Q. Where did you see him? A. I saw them coming towards me.

The Court: In the rear?

Q. Further away than the Ford? A. Yes.

Q. Did you see any car further than 52nd street coming? A. No.

Q. Did you see any standing still? A. Yes.

Q. Where? A. On the westerly curb.

Q. How far out was it? A. I should judge about 75 or 100 feet.

Q. Beyond the body? A. Yes.

By the Court:

Q. Did you see anybody in it? A. I saw a crowd around there.

Q. Did you see the driver of that car? A. No, sir.

By Mr. Schneider:

Q. Are you sure of this, Mr. Gannon, that from the time you had reached 49th Street and up to the time you came to 51st Street and were crossing 51st Street, you saw what you called a bundle of cloth, or body, without anybody near it, lying in the street? A. Yes.

Q. For about two blocks, while you were going two blocks? A. Yes.

Q. Nobody near it at all? A. No.

Q. And that is a distance of about 400 feet? A. Yes.

Q. You did not see anybody near it at all? A. No, sir.

Q. This body was lying about 20 feet from the curb on which side of the street? A. From the easterly curb, yes.

Q. You were about ten feet out in the street? A. Yes.

Q. So it was almost in the line of your travel? A. I couldn't miss seeing it but for the lights of other automobiles.

Q. Were there any other cars ahead of you? A. No; on my side of the street there were none.

Q. You say you saw Mr. Brown's Ford sedan coming down the street; how far down the street was it when you first say it? A. It was about 54th Street, I should judge.

Q. That is over two blocks from the scene of the accident? A. Yes.

Q. Was the man waving his hand then? A. No, sir, I didn't see him at that time.

Q. Were there other cars around at that time? A. There were other cars, yes.

Q. Where were you at that time? A. I was coming to the bundle of clothes, as I thought it, at that time.

Q. Near what street were you before you saw him? A. Around 50th Street.

Q. What side of the street was the Ford sedan traveling? A. On the westerly side of the Boulevard.

Q. About how close to the curb? A. I should judge 10 or 15 feet from the curb.

Q. Coming ahead straight? A. Yes.

Q. He had his lights on? A. Yes.

Q. And you say when he came near to the man waiving his hands he swerved? A. Yes.

Q. And a wheel went over the body? A. Both wheels.

Q. Both right wheels? A. Yes.

Q. What part hit the body? A. It was all over; the first wheel did, and the second wheel I should think went over his hip.

Q. How was the man lying, on his back or on his stomach? A. On the stomach.

Q. Where was his head pointing? A. West of the Boulevard.

Q. You don't know where the first wheel went over? A. I couldn't see, but when he hollered I saw the second go over his leg or hip.

Q. No part went over his head, did it? A. I couldn't very well say.

By the Court:

Q. Did the man who was on the ground holler when the wheel went over him? A. Yes.

By Mr. Schneider:

Q. Whereabouts were you at that time? A. coming towards him.

Q. Near what street were you when the man who was on the ground hollered? A. I should judge about 30 feet from the accident at that time.

Q. And that was when the front wheel went over him? A. Yes, sir.

Q. And you heard the man holler? A. Yes, sir.

Q. What did he holler, if you know? A. He groaned, "M-m-m."

Q. And then the Ford veered to the left sharp? A. After the front wheel went over him?

Q. The Ford turned to the left sharp? A. No; after the hind wheel went over it turned sharp.

Q. After the hind wheel went over he turned sharp? A. Yes.

Q. In what distance did he stop? A. I should judge about five or six feet.

Q. Where did you pull up your car? A. Right alongside of the man lying in the street.

Q. Did you go past the Ford car? A. Yes.

Q. Where, to the right of the Ford car? A. What do you mean by the right?

Q. Well, did you pass to the east of the Ford car? A. Yes, sir.

Q. How far away were you when you passed it? A. I should judge right direct across from the back of the man to the back of the car.

Q. This Ford car must almost have hit you when it turned sharp, then? A. Oh, no.

Q. This body was about ten feet from the curb, you say? A. Yes.

Q. And you were driving ten feet from the curb? A. Yes.

Q. And your car is about five feet wide? A. Yes.

Q. And you say he turned sharply? A. Yes.

Q. He must have been pretty near to you? A. No, I didn't have to duck him at all.

Q. And then you got out of your cab and spoke to Brown? A. No, sir, I didn't know Mr. Brown at all.

Q. You knew him before, didn't you, from seeing him around the Boulevard there? A. I knew him before, yes.

Q. And you spoke to him? A. I spoke to him in police headquarters.

Q. Where did he tell you he thought it was a hold-up? A. Down at police headquarters.

Q. Just what did he say to you about the "hold-up" man? A. I questioned him why he didn't stop, why he should run over the man the way he did,

and he said he thought it was a hold-up man and he didn't see the other fellow lying in the street.

WILLIAM NEWMAN, sworn as a witness, testifies:

Direct examination by Mr. Brenner:

Q. Mr. Newman, were you in the vicinity of 52nd Street and the Boulevard on the night of March 4, 1923, when an accident occurred? A. Yes.

Q. Did you see the accident happen? A. I got there just a few minutes after it happened.

Q. After you got there, what did you observe as to the general conditions; did you observe any automobile there? A. I did.

Q. Where were the automobiles that you saw? A. There was one on my left side, on the left curb.

Q. In which direction were you going, towards Jersey City? A. I was going into Bayonne from Jersey City.

Q. You say you saw one car parked on your left? A. Yes.

Q. That would be to the east of the Boulevard? A. Yes.

Q. Do you know whose car that was? A. I know now, I know it was Mr. Gannon's car, the taxicab.

Q. That was the taxicab that was parked on the east side of the street, then? A. Yes.

Q. How about the west side of the street? A. Up on 51st Street I believe I saw a car—I am not sure, as I was excited at what I saw there.

Q. But your recollection is that you saw a car parked there? A. Yes.

Q. How about a third car? A. And a third car was stopped right alongside where the man was lying about the center of the road.

Q. Did you see the man lying parallel with the road or across the road? A. Lying right across the road, his head towards Newark Bay and his feet towards New York Bay.

Q. Where was the car in relation to the man, how far away? A. About six feet on the other side of the man.

Q. When you say the other side, do you mean the side towards 51st Street? A. Yes.

Q. So he had passed the man? A. It seemed as though he had gone over him, he couldn't have gone any other way.

Mr. Schneider: I move to strike out the latter part as a conclusion.

The Court: Strike it out.

Q. You can't tell us what your supposition is, just tell us what you saw, just outline it as you saw it; take this to be the car, this is 52nd Street (indicating), the car going straight, you say, in the center of the roadway, take this to be the man (indicating), how was he lying, that way, that way, diagonally or how? A. The way you had the paper first; this would be 51st Street (indicating).

Q. You say the man was lying right across and directly in back of the car? A. Directly in back, about four to six feet back of the car.

Q. You say he was directly in back of the car, to the right or left? A. Directly in back.

Q. Did you see this car before it came to a stop, did you observe it at all? A. No, sir.

Q. When you got there what did you do? A. I stopped the car immediately, practically within ten feet of where the man was lying, alongside of the man, and went over to see what was the matter, and I saw a man lying there in a pool of

blood. Mr. Gannon says: "There's a car and he will take him to the hospital," and I says: "All right. Let's lift him up."

Q. Were you alone at the time? A. Yes.

Q. And Mr. Gannon helped you lift him up? A. Yes; I think there were some others there, I am not sure.

Q. You knew Mr. Gannon before that? A. I knew of him.

Q. The other men there were what? A. Italians.

Q. Would you recognize them if you saw them again? A. Well, I don't know that I could; they were excited and I had enough to do to get the man in the car; I had to chase the men off the sides of the car.

Q. The men that were there were excited, and you know they were Italians? A. Yes.

Q. You said something about observing a pool of blood where the man was lying? A. Yes.

Q. Did you notice where that blood was coming from? A. From his head, because when I lifted him up I lifted the head and I got a lot of blood myself.

Q. What part of the head was the blood coming from? A. From all parts of the head.

Q. You say you brought him to the hospital? A. Yes; I helped carry him into the hospital, and took his shoes off when he went in the hospital.

Q. Did you know this man La Bella before the accident? A. No.

Cross examination by Mr. Schneider:

Q. Your main concern, Mr. Newman, was to render aid to the man and get him to the hospital, where he could be attended to? A. Yes.

Q. In other words, to give aid to the injured man? A. Yes.

Q. Did you say there was a pool of blood round his head? A. Yes, there was a pool of blood and he was all blood, his head was all blood.

Mr. Brenner: May I recall Mr. Gannon for one question?

The Court: You may.

WILLIAM GANNON, recalled, testifies.

By Mr. Brenner:

Q. Mr. Gannon, did you know Mr. La Bella before this accident? A. No.

Q. Did you know any member of his family? A. No.

Q. Do you know them now? A. Only from seeing them.

Q. Did you know either of these gentlemen who testified before you? A. No.

Q. But you do know Mr. Newman, don't you? A. I know him, yes.

Q. Did you know him before this accident? A. I met him here. That is the only conversation I had with him. I have seen him lots of times but never talked to him.

Recess.

AFTERNOON SESSION.

May 26, 1925.

Mr. Brenner: Do you admit, Mr. Schneider, that the first car was being operated by Mr. Derr?

Mr. Schneider: I do.

The Court: Of course, he does not admit that the car struck this man but that this was the second man referred to.

CARL W. DERR, sworn as a witness for plaintiff, testifies.

Direct examination by Mr. Brenner:

Q. Mr. Derr, you have heard a car referred to as being the first car referred to in this accident? A. Yes, sir.

Q. Were you driving that car at the time this accident occurred? A. I couldn't answer that directly; I was driving a car in that vicinity at that time.

Q. Were you driving the car that has been referred to as the first car? A. Yes.

By the Court:

Q. Is that the car that was on the west side of Hudson County Boulevard on March 4, 1923, about 9 o'clock at night? A. Yes.

Mr. Brenner: That is the plaintiff's case, if the Court please.

By the Court:

Q. Before you step down, what time was it when you pulled your car over to the side? A. I couldn't state the exact time; it was around between 9 and 9:30.

Q. Why did you pull your car to the side? A. I had my wife with me and I wanted to get the car away from the scene of the accident and away from any other cars that came along.

Q. There wasn't any other car there then? A. No.

Q. What kind of car was it you had there? A. A Ford sedan.

Mr. Johnson: If the Court please, I de-

sire to move for a non-suit on behalf of the defendant Derr, on the following grounds:

That there is no evidence in this case of negligence on the part of Derr;

That there is no evidence that Derr's action was the proximate cause of the death of this decedent;

That there has been no evidence produced showing that Derr killed the decedent.

The plaintiff produces evidence of something which intervened between the alleged conduct—I do not say there is any evidence of that even, but for the sake of argument, the plaintiff produces evidence of an intervening cause, and if this intervening cause is the cause of death, the defendant Derr is thereby relieved.

The Court: That may be answered by your word, "if."

Mr. Johnson: I urge those grounds, your Honor, as the basis for a non-suit on behalf of the defendant Derr, particularly urging that there is no evidence of negligence on his part, there is no evidence of any connection of Derr with the transaction or the proximate cause of death; there is no evidence that Derr killed the decedent; and there is evidence produced by the plaintiff of an intervening cause.

The Court: I will deny your motion now.

Mr. Johnson: May I have an exception?

Mr. Schneider: On behalf of the defendants, Arthur H. Brown and the Mutual Casualty Company, I move for a non-suit on the ground that there is no testimony of any negligence against Brown—and therefore

none against the Mutual Casualty Company; and on the further ground that there is no evidence of any act of negligence on the part of Brown, and none was therefore attributable to his principal, the Mutual Casualty Company.

The Court: I assume neither of you deny that this man died?

Mr. Schneider: That is admitted.

Mr. Johnson: Yes.

The Court: If he died, and he had abrasions on his body, or bruises on his body, and was in the street, he must have been struck by something. Now, to show you how wild those motions are, suppose I should deny one and allow the other, where would you be? That shows it is a jury question. I deny both motions.

Mr. Schneider: I take an exception.

CARL W. DERR, recalled in his own behalf, testifies.

Direct examination by Mr. Johnson:

Q. Mr. Derr, where do you live? A. In Bloomfield, New Jersey.

Q. What is your occupation? A. Salesman.

Q. For whom? A. L. C. Biglow & Company, New York City.

Q. How long have you lived in Bloomfield? A. About six weeks.

Q. Previous to that where did you live? A. Staten Island.

Q. Do you do anything besides work as a salesman? A. I am a church organist.

Q. Do you play the organ on Sundays? A. Yes.

Q. Sunday morning and afternoon? A. Sunday morning and night.

Q. Do you recall the evening of March 4, 1923? A. Yes, sir.

Q. Where had you been prior to 9 o'clock, or where had you been earlier in the evening? A. I had been to the Wayne Street Reformed Church.

Q. Playing there? A. Playing there.

Q. From there where did you go? A. I came to No. 1 Madison Avenue and stayed there a few moments, picked up my wife, who was staying there with her folks, and started for my home.

Q. Were you driving your car in the vicinity of 51st or 52nd Street and the Boulevard on the evening in question? A. Yes, sir.

Q. And as you approached the intersection of either one of those streets, did anybody pass in front of you? A. Yes, sir.

Q. Who was it, or who were they? A. Three men.

Q. What did you do with your car with reference to those men? A. I slowed up to allow them to pass.

Q. And had they passed you completely in front of your car before you started again? A. Yes, sir.

Q. What kind of car were you driving at that time? A. A Ford sedan.

Q. After these men had passed in front of you and you had gotten beyond the intersection of the Boulevard and 51st or 52nd Street, what occurred? A. I had gone just a few feet beyond the intersection.

Q. How many feet would you say about? A. About 25 feet—when a figure suddenly loomed up right up under the car.

Q. What did you do as soon as you saw this

figure? A. I put on all the brakes and stopped immediately.

Q. You stopped immediately? A. Yes, sir.

Q. How was the figure coming with reference to the car? A. It was coming diagonally facing the car.

Q. What did the figure do with reference to the car? A. It came in contact with the car.

Q. What part of your car did it come in contact with? A. With the front, the radiator.

Q. When the figure came in contact with the car, what did it do? A. I saw it hang there for an instant and then drop to the side.

Q. Drop to which side? A. To the left side.

Q. Toward the east of the Boulevard? A. Yes.

By the Court:

Q. Which way was it coming from, from west going east or from east going west? A. From the west.

By Mr. Johnson:

Q. You say the figure was coming from the west to the east when it loomed in front of you? A. Yes.

Q. How fast do you say you were coming at the time this figure loomed up in front of you? A. About 12 miles an hour.

Q. How do you figure that? A. I had just come to a stop to allow those three men to pass, and I had just started up again.

Q. Who was with you in the car at the time of this accident? A. Mrs. Derr.

Q. Was this a left or a right-hand drive? A. A left-hand drive.

Q. Which position in the car did she occupy? A. Right alongside of me.

Q. Did you have your lights on at the time of this accident? A. I did.

Q. Which lights? A. Regulation lights.

Q. What kind of night was it? A. It was a dark night.

Q. Was there any light in the vicinity of the accident? A. There was a light on the other side of the Boulevard but not on the side I was driving on.

By the Court:

Q. How far was this man away when you first saw him? A. About six inches.

Q. Why didn't you see him before? A. He stepped right out of the darkness, I didn't see anything before that.

By Mr. Johnson:

Q. What way was he walking towards you? A. He was walking diagonally towards me.

Q. Now, after the accident, what did you do with your car? A. After I had stopped I started up and pulled over to the curb.

Q. What did you do then? A. I got out and started back to see.

Q. You started back yourself to assist the man? A. Yes.

Q. And as you got near the man, what did you see? A. I saw another car come along.

Q. What did that car do? A. It passed over the body.

Q. Do you know whose car that was? A. It was Mr. Brown's car.

Q. Do you remember what part of Brown's car

came in contact with the body? A. My impression is it was around the middle part of the body.

Q. How long had you been driving a car prior to that time? A. About four years.

Q. Did you use the Boulevard to Bayonne going and coming from your residence in Staten Island? A. Yes.

Q. Did you use it for that purpose? A. Yes.

Q. Is your wife in court today? A. She is not.

Q. Why isn't she here today? A. She is unable to be here; she is under a doctor's care.

Q. What is the matter with her?

Mr. Brenner: I will concede that she can not be here, and that is the reason we took her deposition.

Mr. Johnson: She cannot be here because of the fact that she is about to become a mother.

Mr. Brenner: If you say that, it is sufficient.

Q. That is the fact, isn't it, Mr. Derr? A. Yes.

Q. And that event is due to take place now, is it not? A. Yes; very soon.

Q. You say this person came out of the dark right into your car, practically? A. Yes, sir.

By the Court:

Q. Were there any obstructions in the street just about the intersection of 52nd Street and the Boulevard? A. I believe they were doing some building there at the time, I don't know just where they were.

Mr. Brenner: I move to strike out the answer on the ground that it is only his belief.

The Court: Yes, strike it out.

Carl W. Derr, cross.

By Mr. Johnson:

Q. The blocks in this vicinity are rather short, aren't they? A. They are very short.

Q. What would you say with reference to the closeness of the houses; the Judge wanted to get that information this morning? A. In my judgment, in that vicinity they are less than one hundred feet apart.

Cross examination by Mr. Brenner:

Q. When you saw the three men crossing the street, Mr. Derr, were those three men together or were the three men straggling across? A. My impression is that two of them were together.

Q. And the third, how far back of the two would you say he was? A. Why, I would imagine about six feet.

Q. And they were crossing at 52nd Street, were they not? A. The three men were, yes, sir.

Q. And was that on the south side of 52nd Street or the north side? A. My impression is that the three men crossed on the south crossing.

Q. When you first observed them, how far away were you? A. I was less than half a block away.

Q. Less than half a block away at the time you saw them starting to cross? A. (No reply.)

Q. You say those three men starting from the curb? A. I couldn't say that exactly, but I saw them crossing the street.

Q. Where were they in the street when you first observed them, when you were half a block away? A. I imagine they were about starting to cross at that time.

Q. Just about leaving the curb, is that right? A. That is my impression.

Q. And you observed them from the curb until they had passed in front of your car? A. Yes.

Q. Where were you driving, on the crown of the road or over toward the side? A. I was nearer the center of my side.

Q. The Boulevard is about sixty feet in width, isn't it? A. A little wider.

Q. And when you talk about the center, you mean the center between the center of the Boulevard itself and the right-hand curb, do you not? A. I don't quite understand you.

The Court: You said he was between the center of the right-hand side?

Mr. Johnson: I said between the center and the right-hand curb.

By the Court:

Q. Now he is speaking of the right-hand side of the Boulevard; do you mean between the center line and the right-hand curb you were driving? A. Not exactly midway between, I was probably slightly to the left of that. The idea is I wasn't driving along the curb.

By Mr. Johnson:

Q. I want to get that exactly clear. Take the Boulevard and you divide it into two sections, the right-hand side and the left-hand side; you were driving between the middle line and the right-hand curb? A. Surely.

Q. And would you be closer to the middle line of the Boulevard or closer to the right-hand curb? A. I was probably closer to the middle line.

Q. Could you give us your judgment as to how many feet you were out from the curb, approximately? A. I was probably twenty feet out.

Q. Twenty feet out from the curb? A. That is a guess.

Q. Probably you can do it better by indicating from where you are sitting to some point in this room, working, for instance, from the front of the witness stand as the west curb of the Boulevard, where would you say you were away from that curb? A. The right wheels of my car were probably along where those chairs are (pointing).

Mr. Johnson: What distance would the Court say that was?

The Court: That is seven feet six inches from the point indicated to the far side of the table.

Q. That is approximately the distance you say you were out, from where you are sitting to this row of chairs? A. Yes.

Q. And you approximate that as twenty feet? A. I wouldn't approximate it if it wasn't correct, but that is about the distance. I would have to measure it to know what it was.

Q. And you state then that you brought your car practically to a stop. Now, where did you bring your car practically to a stop? A. I would say about the north crossing.

Q. And at that time these three men were crossing right in front of you, weren't they? A. Yes.

Q. So before that time you were going beyond twelve miles an hour? A. Approximately.

Q. And had slackened down and had started up again, and were going about twelve miles an hour, is that correct? A. Yes.

Q. Now, the first time you saw this man you came in contact with, he was directly in front of your machine? A. Yes.

Q. And you say he was about six inches in front of your machine, is that correct? A. About that, yes.

Q. At that time was he to the left-hand side of your car or to the right-hand side of your car? A. He was to the right-hand side, he was right of the center line of the car.

Q. Your car is less than five feet in width? A. It is a standard width car.

Q. And from the time that he left the curb up until the time you noticed him six inches ahead of the car, directly in front of you, you never saw him? A. I did not.

Q. He went with your car some distance? A. Yes.

Q. And then fell off to the left? A. Yes.

Q. When he fell did he fall clear of your car? A. Yes.

Q. Did you observe the man from that time up until the time he was flung off your car? A. No.

Q. Couldn't you? A. I couldn't.

Q. Why couldn't you? A. I couldn't, because immediately after I stopped I pulled the car over to the curb, and naturally he wasn't back of me.

Q. So you did not observe him again until he was struck by the next car? A. That is correct.

Q. Did you notice him just about the time he was struck or before he was struck? A. Just about.

Q. Did you observe him trying to do anything, trying to get up? A. I couldn't say that.

By Mr. Schneider:

Q. These three men, Mr. Derr, were crossing on the north crossing? A. No; I said my impression was the south.

Q. The south crossing? A. Yes.

Q. In other words, the crossing down towards Bayonne and not towards Jersey City? A. Yes.

Q. In other words, before they crossed you had come down across 52nd Street, hadn't you? A. Yes, sir.

Q. And had slowed up to allow them to pass? A. Yes.

Q. Were they passing at the corner? A. I believe they were.

Q. Where was the other man passing, the man with whom your car came in collision, how far down? A. I believe I stated that I proceeded about 20 feet.

Q. About 20 feet south of the southerly crosswalk? A. Yes, sir.

Q. And he was alone as far as you could see? A. As far as I could see.

Q. Did Mrs. Derr get out of the car with you? A. She did not.

Q. Did you have a bumper on your car? A. I couldn't state.

Q. Can't you tell us whether you had a bumper on your car or not? A. I couldn't say whether I had or not because I had a bumper on that car but it was off part of the time.

Q. When the bumper is off the arms remain on the car, don't they? A. Not necessarily.

Q. Weren't the arms on that night? A. I couldn't say.

Q. Can't you remember that; what is your best recollection? A. I could not; I know the bumper was off the car at one time, I don't know whether it came off at that time or not.

Q. And whether the arms were on alone or not, you can't remember that? A. I couldn't say.

Q. If the arms were on, arms are where they can be seen, aren't they? A. Well, not exactly, they are to a certain extent.

Q. They protrude, don't they, forward from the car? A. Slightly.

Q. And to a certain extent forward? A. To a certain extent.

Q. Did you see the man waving his hand at all? A. I couldn't say that I did.

Q. That is, you do not recollect seeing him at all, or do you say he was not waving his hand, or what was he doing? A. I can't say, I don't recollect seeing him wave his hand.

Q. But you don't recollect, that is the best answer you can give on that? A. Yes.

Q. Now, you say you saw Mr. Brown's car run over this man's body? A. Yes.

Q. What part of the body? A. My impression is the middle part of the body.

Q. What do you mean by your impression? A. I can't say exactly just what point, but I think it was across the middle part of the body.

Q. Across the legs? A. I couldn't say exactly.

Q. In which direction was this man lying, in what direction was his head, towards the west side or towards the east side of the road or street; in other words, were his feet out towards the centre of the street or towards the curb? A. His feet were towards the centre of the street.

Q. And was he lying across the street, and were his feet towards the westerly curb? A. Yes.

Q. Did Mr. Brown's car stop immediately? A. I couldn't trace those movements; I know he didn't travel half a block or anything like that; I couldn't give you any number of feet.

Q. But he stopped almost immediately, didn't he? A. I say I couldn't tell you; he stopped quickly, I can say that.

Q. He stopped quickly? A. Yes.

Q. And the body lay in the same position as before, didn't it? A. I couldn't say.

Q. Don't you know that he lay the same, with his feet out towards the centre and the head towards the curb? A. I couldn't say.

Q. You were somewhat excited? A. Yes.

Q. By the man being in contact with your car? A. Yes.

Q. Did he fall off backward as he fell off your car? A. I couldn't say that.

Q. You don't know if he fell forward or backward? A. No, I couldn't say that.

Q. Anyway, you know he fell clear of your car and down on the pavement? A. Yes.

Q. He fell to the left of your car? A. Yes, sir.

Q. When he came in contact with your car, do you say he sort of clung to the radiator for a while? A. For an instant.

Q. Towards the left side of the radiator, was it, or the centre of the radiator? A. It was slightly to the left of the centre line of the car.

Q. Then as your car went on he fell off to the left side of it? A. I think that is so.

Q. And then you pulled for the curb? A. I stopped first.

Q. Did you get out when you stopped? A. No.

Q. Did you get to the curb before you got out? A. Yes.

Q. And did not get out when you stopped? A. No.

Q. You thought you would put your car in a

safe place first, in order not to obstruct the street? A. Yes.

Q. And after you put it there you walked back? A. Yes.

Q. And I suppose at that time you were a little excited? A. Yes.

By Mr. Johnson:

Q. You say your car did not run over this man, I believe? A. The car didn't run over him.

By Mr. Schneider:

Q. So after the man fell off your radiator in front of your car, you did not see him again until you walked back? A. No.

By Mr. Brenner:

Q. Did you help put the man in the automobile and take him to the hospital? A. I did not.

Q. Did you see who did help him? A. I did not.

Q. You saw Mr. Gannon in court this morning? A. Yes.

Q. Did you notice Mr. Gannon there? A. I knew there were people there but I couldn't identify Mr. Gannon.

Q. Did you know he was with his taxicab there? A. No, sir; a taxicab was coming in that direction.

Q. And don't you recall Mr. Gannon being there? A. I couldn't identify him, I know there were some men there.

Q. And did you notice these Italian men there? A. I noticed they did come back.

By Mr. Johnson:

Q. You went back after this contact to render assistance to the man? A. Yes, sir.

Mr. Johnson: Your Honor, I will now read the testimony of Mr. Derr's wife, taken by consent on the 14th day of March, 1925, in the presence of both counsel. It was taken before George A. Wardell, a Supreme Court Examiner of this State, at the office of G. Ernest Smith, Esq., 36 Richmond Terrace, St. George, Staten Island, New York, at 10:30 o'clock in the forenoon, in the presence of

Messrs. Lazarus, Brenner & Vickers, attorneys for the plaintiff; Joseph Scala, Esq., and Samuel E. Kresch, Esq., of counsel.

Messrs. Schneider & Schneider, attorneys for the defendant Brown and others; Jacob Schneider, Esq., of counsel; Messrs. Runyon & Johnson, attorneys for the defendant Carl W. Derr; Edmund S. Johnson, Esq., of counsel.

"RUTH DERR, a witness called on behalf of the defendant Carl W. Derr, having been first duly sworn by the Supreme Court Examiner, testifies as follows:

"*Direct examination by Mr. Johnson*:

"Q. Mrs. Derr, please state your residence. A. 694 Glove Road, West Brighton, Staten Island.

"Q. And is Carl Derr, one of the defendants in these actions, your husband? A. Yes.

"Q. And how long have you been married to him? A. Four years in March—it will be four years on the 26th of March.

"Q. About four years? A. Yes.

"Q. And do you and your husband live together at the Glove Road address? A. Yes, we do.

"Q. Will you please state the reasons why you are not able to personally attend the trial of this case and testify? A. Well, my doctor does not wish me to, on account of my condition. I am pregnant and about to become a mother.

"Mr. Scala: I understand that there will be no objection to the reading of this deposition when the case comes up.

"Mr. Johnson: It is stipulated that there is no objection on the part of counsel to the taking of this deposition and to its use in court by the defendant Derr.

"Q. Do you recall the evening of March 4, 1923, Mrs. Derr? A. Yes.

"Q. And on that evening were you with your husband on the Hudson County Boulevard in the vicinity of 51st and 52nd Street in a Ford sedan? A. I was.

"Q. Who was driving this Ford sedan? A. Mr. Derr.

"Q. And what time of the evening was it? A. It was between nine and half past.

"Q. That you were in the vicinity of those streets? A. Yes.

"Q. About what time did you say? A. About a quarter past or half past—between nine and half past.

"Q. Around nine thirty? A. Around nine thirty.

"Q. Where did you come from and where were you bound to? A. We were going from 1 Madison Avenue, Jersey City; we were bound for home, 694 Glove Road.

"Q. Was Mr. Derr, your husband, an organist in a local church in Jersey City at that time? A. Yes, in Greenville.

"Q. Was he on the way home from his duties as organist at the time? A. Yes.

"Q. Where were you seated in the car, Mrs. Derr? A. I was next to him, at his right.

"Q. Was he in the driver's seat? A. Yes.

"Q. Is it a left-hand drive? A. Yes.

"Q. As you approached the intersection of either the Boulevard and 51st or 52nd Street, did you notice any person pass in front of your car? A. A little group of men was passing.

"Q. And what did Mr. Derr do with reference to the car when he saw this group passing? A. He slowed up. We saw them and he slowed up and they passed. They were straggling past.

"Q. Do you recollect whether this was at the intersection of 51st or 52nd Street? A. I could not be sure of that.

"Q. It was either one or the other, wasn't it? A. Yes.

"Q. In Bayonne? A. Yes.

"Q. And what side of the road was Mr. Derr driving his car on when he permitted these persons to pass? A. We were on the right side of the road.

"Q. Did anything occur after you left the intersection of the Boulevard and 51st or 52nd Street after Mr. Derr had permitted these persons to pass in front of you? A. Did anything occur after that?

"Q. Yes? A. Yes; then, after they had passed, we had almost stopped to let them pass, and then we started on—and—do you want me to tell you the rest?

"Q. Yes, in your own language. A. We started on and we were going very slowly, when, suddenly, I saw lurching toward us, right in front of the car, facing us, a man—a figure coming towards us.

When I saw him he was to the left of the cap—what do you call it?—the radiator cap of the car, and we instantly came in contact with him, and Mr. Derr stopped the car quickly and drew the car to the curb.

"Q. How far was this figure from the car when you first saw it? A. I should say very close; almost on top of the car, when I saw it.

"Q. Where did this figure seem to come from, if you know; was the figure practically on top of the car when you first saw it? A. Yes, when I saw it.

"Q. When this figure came in contact with the car, was it between the streets—was it between the cross streets of the Boulevard? A. Oh, yes, we had only left the crowd a short distance—I should say about 35 or 40 feet from where we let these other men pass.

"Q. When this figure appeared suddenly in front of you? A. Yes, facing us.

"Q. Would you say, then, it was beyond the intersection of the street? A. Oh, yes, we had gone on, you see, from that point.

"Q. You mean you had gone about 35 feet beyond the intersection of the street? A. Yes.

"Q. How fast would you say your car was going at the time this figure and your car came in contact? A. Well, we had stopped at the corner, and we had not started; we might have been going eight or ten miles.

"Q. At the time of the contact? A. Yes.

"Q. What did Mr. Derr do immediately prior to coming into contact with the person with reference to his attempting to bring the car to a stop? A. He pulled the emergency brake, and we almost hit our noses on the top of the car.

"Q. Did you stop immediately? A. Yes.

"Q. What did the figure do? A. That was rather hazy in my mind after the shock; my impression was that he did ride on the car a second and then fell off.

"Q. He fell from which side, do you recall? A. The side Mr. Derr was on; the left.

"Q. Did it fall to the east? A. Yes, surely; towards the middle of the road rather than to the west.

"Q. When you say the left side, you mean toward the east side rather than toward the west? A. Oh, yes, because the position I was in—

"Mr. Scala: You were driving towards the south.

"Q. At this time, prior to the accident, Mr. Derr was driving south on the Boulevard, wasn't he? A. Yes.

"Q. Did the car run over him? A. Oh, no.

"Q. You say that the car came to a stop immediately upon coming in contact with this person? A. Oh, yes, I am sure of that.

"Q. And then after stopping you say that Mr. Derr pulled up to the curb? A. Pulled up to the curb.

"Q. Did he come back and endeavor to render any assistance? A. I said he ran right to the curb; he ran right near the curb.

"Q. Did he render any assistance that he could? A. Oh, yes, he was there.

"Q. Were the lights on your car lit at the time of the accident? A. Yes.

"Q. What was the situation with reference to the vicinity, was it light or dark in that immediate vicinity? A. Well, it was at that part of the Boule-

vard—there were no center lights, as I remember, and as we noticed afterwards, there were no lights on the right side.

"Q. Going south? A. Yes, going south there no lights there, but there were on the other side, and of course the Boulevard was lighted.

"Q. What was the general appearance; was it light or dark? A. We thought it was quite dark.

"Q. Did you have any warning of the presence of this man before you saw him lurching into the car? A. No, that was the first that I saw.

"Q. Did he seem to come right out of the darkness into your car? A. He did, right towards us.

"Q. Was he walking diagonally or straight across on an angle from the curb? A. To the center of the road.

"Q. In a diagonal direction, would you say? A. Yes, I saw the face; he was not turned away from us; I saw him coming towards us.

"Q. You saw his face at the time of the contact? A. Yes.

"Mr. Johnson: All right; you may cross-amine.

"*Cross examination by Mr. Scala*:

"Q. When you say he was walking diagonally across the street, you did not see him until the car had come into contact with him? A. I saw him just previous.

"Q. How long previous, immediately upon the car coming into contact with him, or before that? A. Well, I would say perhaps half a minute before that. I was conscious of the man being in front of us.

"Q. Where was he with respect to the automo-

bile; was he right near it or was he one or two feet away from it on your right side? A. Not on my right, no; you see, we were driving in this direction (indicating), when I saw the man—

"Mr. Johnson: Pointing south on the Boulevard?

"A. (Continuing.) Yes, pointing south; and when I was conscious of the man being in front of us, he was a little on the center of the car.

"Q. That is when you saw him? A. Yes, that is when I saw him.

"Q. He just had passed your radiator cap to the left? A. Had just passed the radiator cap to the left.

"Q. And then he was struck? A. Yes, then he came in contact with the car.

"Q. That is all you saw; you did not see him coming diagonally across the street then? A. I saw him approaching the car.

"Q. What do you mean—at an angle? You do not mean he was crossing diagonally across that street? A. Crossing diagonally; I am speaking with reference to my position in the car. It was not as though you saw him full face, but he came right there (indicating), as though he was on an angle, so I saw his face, and I was under the impression that he was coming on an angle, you see.

"Q. You did not observe in what direction the man was crossing; you did not observe that? A. In what direction he was crossing? A. I should say what I have described would cover that; that is all I could tell. He seemed to be coming at an angle towards us, and I only saw him that one minute, you see.

"Q. You saw him directly in front of you after he had gotten past the radiator cap? A. That is, a little to the left.

"Mr. Scala: I will ask no further questions.

"*Cross examination by Mr. Schneider*:

"Q. Do you remember what kind of lights you had on that car? A. Well, I think they were dimmers; they were not very strong ones, I think; that is only what I think—I do not know that.

"Q. Your husband would know that better than you? A. Yes.

"Q. Well now, when the car came into contact with this man, just what part of the car came in contact with him? A. Wouldn't it be the radiator?

"Mr. Johnson: Just answer as far as you know.

"The Witness: Yes, the radiator, I think.

"Q. What did he seem to do when the radiator came in contact with him? A. He seemed to go—to cling on, somewhat—to be on a minute and then drop off.

"Q. Just where did he drop off, with reference to the car? A. On the left side of the car, that is all.

"Q. Did you notice how he fell—what part of the body fell? A. I didn't see anything of that.

"Q. You were sort of a little excited, and didn't notice that? A. Yes.

"Q. But he fell to the left of the car? A. Yes, to the east side of the car—to the east side, yes.

"Mr. Schneider: That is all.

"*Redirect examination by Mr. Johnson*:

"Q. When you first saw this person, was he headed towards the car? A. Yes.

"Q. What space of time intervened between the time you first saw him and when the car was brought to a stop, and did it seem to happen almost at one time? A. Yes, that was my impression.

"Q. How far away from the car would you say you think he was at the time you first saw him? A. Well, he was as near as you are to me, I think. If this was the front of the car (indicating).

"Q. Indicating a distance of about three feet? A. Yes, a little more than that.

"Q. About three feet away; did he continue coming on toward the car? A. Yes, it seemed as though he walked into us. We were coming towards each other, and he didn't stop, I mean, or anything.

"Mr. Scala: I move that that be stricken out, as there was no question asked on that.

"Q. Did or did not this person stop when you first saw him, or did he continue on towards you? A. I did not see him stop at all.

"Q. Did you say that this person was walking at the time? A. Yes, he was walking towards us when I saw him.

"Q. When you say 'lurching' what do you mean? You stated in your direct examination that he seemed to be lurching towards you? A. In that he was coming fast.

"Q. Towards the car? A. Yes.

"Mr. Johnson: That is all.

"It is stipulated by and between counsel for the parties hereto that the signature of the witness is waived."

Mr. Johnson: Then follows the regular certificate of George A. Wardell, Supreme Court Examiner, with statement as to fees. I have read it, and I suppose it is an exhibit.

The Court: It has been read, but it may be marked if you wish; there seems to be no objection.

(The deposition is received and marked Exhibit P 2.)

Mr. Johnson: That is all.

ARTHUR H. BROWN, sworn in his own behalf, testifies:

Direct examination by Mr. Schneider:

Q. Mr. Brown, are you the man who was driving the Ford sedan that night? A. I am.

Q. Where did you live at the time? A. At 37 West 45th Street.

Q. What city? A. Bayonne.

Q. By whom were you employed at the time? A. By the Mutual Casualty Insurance Company.

Q. In what capacity? A. As a claim agent. At the time I was tied right to that company.

Q. In the course of your duties? A. Yes.

Q. What were your duties at that time? A. During the rush hours or whenever there was any heavy travel on the busses, it was necessary for me to go out and see the busses didn't carry any step-riders, or speed, or take any unnecessary chances.

Q. And you were on duty that night? A. Yes.

Q. How long had you been on duty that night? A. I started out about eight o'clock that night and had been over the Boulevard several times.

Q. Have you a family? A. Yes.

Q. Was your family with you? A. No.

Q. How long had you been driving automobiles? A. My first license was issued in 1907.

Q. And you have been driving continually ever since? A. Yes.

Q. Have you had any technical experience regarding automobiles?

Mr. Brenner: I object to that as having no bearing on this case.

Mr. Schneider: I will withdraw that temporarily.

Q. In what condition was your car that night? A. In the best of condition.

Q. How were the brakes? A. In the best of order.

Q. The steering apparatus? A. Good.

Q. Who took care of your car? A. I did myself.

Q. Are you a mechanic? A. I am.

Q. What has been your experience in that line? A. My first experience was in 1907, when I went with the old Locomobile Company, and from 1907 until 1910 I was connected with various automobile concerns and finally wound up with the Pierce-Arrow, where I had to straighten out their difficulties and judgments.

Q. During that time did you take any mechanical course? A. I had to use my time about the shop.

Q. Had you any other technical experience concerning automobiles? A. Not steady; I had night study.

Q. Had you any experience during the war? A. During the war I had charge of the tank service; prior to going in the tank service, I was connected with the motor car service, part of the time

driving; it was all repairing work, repairing tanks, etc.

Q. On that night you say your car was in good condition? A. It was.

Q. Where were you going at that time? A. I had been as far north as the fire station and was returning to Bayonne and going up the Boulevard. I was just going up and down the southern end of the Boulevard.

Q. What kind of night was it? A. Clear night but dark.

Q. How were the lights on the Boulevard? A. The lights on the Boulevard were the old oil lamp. Each corner was dark.

Q. What did they have on the corner of 52nd Street? A. The light was on the northeast corner of 52nd Street.

Q. Will you just tell the Court and jury about this accident, what you saw yourself? A. I was driving south on the Boulevard just to the right of the centre line on the Boulevard, driving about twelve miles an hour; when I got to about twenty-five to thirty feet of the south crosswalk on 52nd Street, I saw a man directly in front of me swinging his arms and hollering, and it seemed to me calling "Brother"; to avoid striking him, I turned slightly to the left of this man, and when I stepped out of my car I asked what was the trouble, and he said: "My brother hit by automobile." I said: "Where is your brother?" and then I saw the man lying a little to the right of and slightly to the rear of my car. In the meantime this taxicab and several other cars had pulled up and they started in talking and picking the man up and placing him in another automobile. I asked the man then whereabouts was the car that

did it, and he said at the curb, and we then walked over to the curbstone and there I met Mr. Derr. Mr. Derr seemed to be much excited. We went over to his car, and then I suggested—

Mr. Brenner: I object to any suggestion.

Q. You can't repeat conversations; what happened eventually? A. Then after that we both got in our cars and I directed Mr. Derr to police headquarters in Bayonne, to 26th Street and Avenue C.

Q. Did you go with him? A. Yes.

Q. How did you come to go there? A. Mr. Derr didn't know the way to headquarters.

Q. Then what happened? A. While we were in there reporting it, there was a telephone call came in saying—

Mr. Brenner: I object to that; Mr. Brown knows he should not give any conversations or communications.

Q. Do not give any conversation. Did you see the body of this man lying in the road? A. I did when I got out of my car.

By the Court:

Q. Did you run over the body? A. I did not.

Q. How do you know you did not? A. I never ran over a human being, but I should think it would have been considerably hard for me to go over it.

Q. How was this body lying? A. To the right and slightly to the rear.

Q. How far to the right? A. About two or three feet to the right and about the same distance to the rear of the right rear wheel.

By Mr. Schneider:

Q. As you came up what was it that attracted your attention? A. This man swinging his arms.

Q. As you swung to the left, as you say, did you apply your brakes? A. I did, and stopped immediately.

Q. What was the condition of the road there where the man lay, light or dark? A. Very dark.

Q. What caused that, if you know? A. Well, poor lighting of the Boulevard caused that.

Q. And about how far south of the southerly crosswalk was the body? A. The body was about forty or fifty feet south of the southerly crosswalk.

Q. About how wide is 52nd Street? A. Fifty-second Street, I think, is a 30-foot road; I am not positive though.

Q. Was there any obstruction in that road at that point? A. At the southwest corner there was a sand pile or something piled in the road, there was a construction going on or something.

Q. How far did that extend into the road? A. About 10 to 15 feet into the road.

Q. They were building on that corner, do you say? A. They were building on that corner.

Q. What kind of car were you driving? A. A Ford sedan.

Q. Do you know how wide a Ford sedan is? A. Something like twenty-two or twenty-three hundred pounds, I believe.

Q. That is the weight, I asked about the width; was it a regular standard Ford? A. A standard Ford.

Cross examination by Mr. Brenner:

Q. When you saw the man he was standing in the roadway? A. Yes.

Q. And you saw him as he himself described, waving his arms and shouting? A. Yes.

Q. When you observed that for the first time, how far away from him were you? A. About 10 feet.

Q. You did not observe him until you got within 10 feet of him; that is correct, is it? A. Correct.

Q. Did you have lights on your car lit? A. Yes.

Q. Headlights or dimmers? A. The headlights.

Q. They are powerful lights on a Ford car, are they not? A. No, I wouldn't say that at all.

Q. You say your lights were not powerful? A. No.

Q. Don't you know you can see a considerable distance ahead with the assistance of those Ford lights? A. You can for a considerable distance, yes.

Q. Then you can see particularly good with the lights on your car? A. Not when another car is coming in the opposite direction with bright lights.

Q. Was there one? A. Yes.

Q. Do you know what it was? A. I didn't know at the time, but it turned out to be a taxicab.

Q. A taxicab was coming towards you at that particular time? A. Yes.

Q. Were you blinded in any way by his lights? A. I wouldn't say; I was blinded in a way.

Q. Were you prevented seeing by his lights? A. If you looked directly in his lights, you would be.

Q. Did you look directly in his lights? A. No.

Q. Then they did not affect you? A. They didn't affect me but they—they conflicted with mine.

Q. Wouldn't they help light up the roadway? A. They would, but when the light comes towards you it prevents you from seeing.

Q. You think that prevents you from seeing, both lights coming together? A. Yes, conflicting lights.

Q. How fast had you been running prior to that time? A. I had been running at various speeds, perhaps as high as 18 to 20 miles an hour.

Q. Was there any particular reason for going so slow at this particular time? A. I was waiting for a bus, I was waiting for some one to come along, that is what I was out for.

Q. And as you were driving along, were you watching for these busses that were coming up and down? A. I was.

Q. Where did you expect the next bus to come from,—from the direction of Jersey City or towards Jersey City? A. That is difficult to say, there is no special schedule.

Q. So you were observing the road in both directions? A. No, I was not.

Q. Weren't you going to watch for a jitney? A. Not until such time as he got in front of me.

Q. Going at the rate of speed that you say you were going, you can stop your car almost instantly, can't you? A. Yes, sir.

Q. And within how many feet would you say you could stop your car? A. I could stop it very easily within 10 feet.

Q. And did you observe this man waving his hands 10 feet away from you? A. Yes, sir.

Q. Did you apply your brakes at once? A. I did.

Q. Where did the front of your car come to a stop with reference to where this man was standing? A. It was about three feet from the front of my car to where he was standing.

Q. Was he standing south of the body of this

man or to the north of it? A. He was standing south of the body.

Q. You had no difficulty in seeing him, had you? A. No difficulty in seeing his hands and face; the rest of his body was pretty dark.

Q. You are referring now to the man standing up? A. Yes.

Q. Waving his arms? A. Yes.

Q. Was he standing in a direct line with the body or was he standing to the side of the body? A. I should say he was to the east of the body.

Q. And south of the body, not north? A. Not north.

Q. So the body intervened between your machine and where this man was standing, is that correct? A. Yes. Well, no, not exactly correct; his body was to the west of my direct line.

Q. I did not ask you whether the body was in the direct line or not; I asked you whether the body intervened between your machine and the place where the man was standing? A. No, he was not on a direct line.

Q. Your car was coming down, wasn't it? A. Yes.

Q. The next thing that would come to you would be the body? A. Yes.

Q. Then you would come to the man who was waving his arms? A. Correct.

Q. So the body of this man lay between where the man was waving his arms and where you were when you first saw him? A. And slightly to the west.

Q. And you never saw the body at any time until after you spoke to the man? A. Until after I got out of my car.

Q. And then he told you his brother had been hit? A. Yes.

Q. And he showed you his brother lying to the left of your car? A. That is right.

Q. What did you do next? A. We went back to give assistance to the brother.

Q. What did you do to give assistance? A. By the time I got there, there were people piling out of other cars, and they picked this fellow up and there was really nothing I could do.

Q. You were the first man on the scene of this accident, weren't you? A. Yes.

Q. You were there before the taxicab got there? A. I could say we arrived at almost the same time.

Q. But the taxicab had stopped to the east? A. He was closer to the body than I was.

Q. You were within a few feet of the body when you got out of your car? A. Perfectly right.

Q. You say you went back to render assistance? A. Yes.

Q. Who was there with the body when you got there? A. Several men.

Q. And they had arrived at this body, which was a few feet away from you, before you got there? A. Yes.

Q. Although you stopped your car immediately and went right back? A. The only time I lost was in asking this Italian man, who was rather difficult to understand, what it was.

Q. That only took an instant, didn't it? A. Yes.

Q. He did not point out anybody else who was coming to the assistance of this man, did he, you were the only man he was speaking to? A. Yes.

Q. After you saw this man was being helped by others, what did you do? A. Then I asked him—

Q. Not what you asked him; what did you do? A. I went over to the car that had previously run over him.

Q. That was over to Derr's car? A. Yes.

Q. That was on the westerly curb? A. Yes.

Q. And how far from this body? A. Seventy-five feet, I should say.

Q. So you walked down there and did not pay any further attention to this man? A. The man had been placed in an automobile.

Q. By whom? A. There were several men there.

Q. Were there any Italian men there? A. There were several Italian men there.

Q. Did you see Gannon there helping? A. No.

Q. Would you say he was not helping? A. I don't know who it was helped.

Q. Did you see Newman there helping too? A. I did not.

Q. Was it Newman's car he was put in? A. I learned that afterwards.

Q. And Newman's car had come in back of you, hadn't it? A. He must have been following directly behind mine.

Q. The first time you noticed Newman's machine was after you got out of your car? A. Yes.

Q. Did you notice how far it was back of you? A. Very close up to the rear of my car.

Q. You had not called the attention of any of the drivers of these several cars to this man's body lying in the street, had you? A. No, I had not.

Q. And none of those cars were any closer than you were to this man at the time it was hit by Derr's car? A. They were directly behind me.

Q. You did not see the motion of Derr's car? A. No.

Q. So far as you know, Derr's car had been absolutely stopped when you got there? A. Yes.

Q. You did not see the car at all? A. No.

Q. So when you got to where this man was wav-

ing his arms, the only car you saw was this taxicab coming towards you? A. Yes.

Q. And as soon as you got out of your car, the taxicab stopped, Newman's car stopped, and several people gathered? A. Yes.

Mr. Johnson: The defendant Derr rests.

The Court: Any rebuttal?

Mr. Brenner: No, your Honor, there is no rebuttal.

Mr. Johnson: If the Court please, I want to make a motion for the direction of a verdict in favor of the defendant Carl W. Derr, on the ground that there is no evidence of negligence on the part of Derr in this case; no evidence has been produced of any act by Derr, if there was any, that was the cause of death; there has been no evidence that Derr killed the decedent. The evidence that was attempted to be introduced by the plaintiff sought to show some one else responsible for the death and bringing in an intervening cause, but that is all; and there is evidence of contributory negligence on the part of the decedent.

The Court: I deny the motion.

Mr. Johnson: I also make the motion on the same grounds as stated in my motion for a non-suit.

The Court: The motion is denied.

Mr. Johnson: I respectfully except to your Honor's denial.

Mr. Schneider: I also move for the direction of a verdict in favor of the defendants Brown and the Mutual Casualty Company, on the same grounds as stated in my motion for a non-suit.

The Court: I deny the motion.

Mr. Schneider: And I pray an exception.

The Court: Yes.

Mr. Johnson sums up for the defendant Derr.

Mr. Schneider sums up for the defendants Brown and Mutual Casualty Company.

Mr. Brenner sums up for the plaintiff.

The Court: The case will stand adjourned until 10 o'clock tomorrow morning.

Charge to Jury.

LA BELLA

v.

BROWN and MUTUAL CASUALTY COMPANY.

LA BELLA

v.

CARL W. DERR.

May 27, 1925.

The case was resumed pursuant to adjournment.

APPEARANCES:

Hon. ALFRED BRENNER and JOSEPH SCALA, Esq., for Plaintiffs.

JACOB SCHNEIDER, Esq., for Defendants Arthur H. Brown and Mutual Casualty Company.

EDMUND S. JOHNSON, for the Defendant Derr.

Charge to Jury.

The Court charged the jury as follows:

The Court: Gentlemen of the jury, you are trying in this action two suits. The first is brought by Giuseppina La Bella, administratix *ad prosequendum* of the estate of her husband, Dimetrio La Bella, deceased, as plaintiff, against L. C. Biglow & Company and Charles W. Derr, as defendants, and the second suit is by Giuseppina La Bella, administratix *ad prosequendum* of the estate of Dimetrio La Bella, deceased, plaintiff, against Arthur H. Brown and the Mutual Casualty Company as defendants.

These two suits are to recover damages which it is alleged that the next of kin of Dimetrio La Bella sustained, by reason of his death, which the plaintiff in these suits says was due to the negligence of the drivers of two automobiles, or, at least, of the driver of one of them; and these two drivers are parties defendant in these two suits, one of the drivers being Arthur H. Brown and the other driver being Charles W. Derr. And in one of these suits, the owner of the automobile is a party defendant—that is, the Mutual Casualty Company—for which company it is claimed Arthur H. Brown was driving the automobile at the time of the accident.

You must bear in mind, though, with respect to the defendant L. C. Biglow & Company, for which company it is claimed Charles W. Derr was driving, that it is not named as a defendant, because service was not properly obtained upon that company, so you will not consider L. C. Biglow & Company is in this case at all. That company is not at the present stage of the proceedings a party defendant here.

Now, the two suits are being tried together, and inasmuch as they are to recover damages arising out of the death of the same party, it is proper that they should be tried together, and therefore, you will consider them as though they were brought in here in one suit.

The cause of action, as it stands, is brought under the Death Act, so called. Prior to its enactment in this State, where death ensued from the negligent act of a party, there could be no recovery, so this act was passed—from which I will quote to you in a moment—which enables the personal representatives of a deceased person, who had been killed by the negligent act of another, or others, to sue and recover the pecuniary loss resulting to the next of kin by reason of the premature taking off of the decedent.

The plaintiff in this case contends and claims that the decedent La Bella and three friends were crossing the Hudson County Boulevard, at 52nd Street and the Boulevard, about nine o'clock on the evening of March 4, 1923, and when he had reached a point out in the Boulevard, which is stated at various distances by various witnesses, he was struck, it is claimed, by the automobile of the defendant Derr—at least, by an automobile driven by him at that time—and I do not understand that he denies that he was driving or that he struck this La Bella at about the time and place claimed; and it is further claimed that after the car driven by Derr struck the decedent, and while they were in the street, an automobile belonging to the Mutual Casualty Company, driven by Arthur H. Brown, ran into La Bella, and that as the result of both of these collisions, or at least one of them, La Bella died in the hospital three days later.

The defendant Charles W. Derr claims that while he was driving his Ford sedan along this Boulevard in a southerly direction, on the right-hand or westerly side thereof, suddenly, in the vicinity of 52nd Street, a body loomed up out of the darkness, I think about six inches in front of his car; that he did all he could to avoid striking the person but that he could not do so, and that although the car did strike the decedent, nevertheless he, Derr, was not negligent; he also says that even if negligent, his negligence was not the proximate cause of this man's death, and that the decedent himself was guilty of contributory negligence.

The defendants the Mutual Casualty Company and Arthur H. Brown both claim that the automobile driven by Brown did not touch La Bella as he lay in the street, their insistence being that Brown brought his automobile to a stop slightly beyond and to the right of the prostrate body of La Bella, after it had been struck by the automobile of Derr, and that, therefore, no liability can be attached to either the Mutual Casualty Company or Brown, the driver of the company's car. They further say that the plaintiff's intestate La Bella was guilty of contributory negligence, and that even if Brown was negligent, nevertheless it was not his negligence which was the proximate cause of La Bella's death.

Now, remember that the Mutual Casualty Company does not deny—and in fact counsel for the company concedes—that the automobile which was driven by Brown belonged to that company, and Brown, who was himself on the stand, admits that at that time he was driving as agent of the Mutual Casualty Company and within the scope of his employment as such; so you have

not to determine that question of whether or not the Mutual Casualty Company can be held as negligent if Brown was negligent and his negligence was the proximate cause of the death of the decedent, because if his negligence should be held to be the proximate cause of the death of La Bella, such negligence would be chargeable, as matter of law, to the Mutual Casualty Company. So you will not have to trouble with that phase of the situation at all.

You gentlemen have served here long enough, of course, to appreciate one great fundamental fact, and that is that the mere happening of an accident which results in the death of a party, standing alone, of itself does not entitle the representative of that deceased person to recover a verdict against the person who caused the accident and death. Before the plaintiff in this case can recover, she must prove to your satisfaction, by a preponderance of the evidence, that these defendants, or one of them—and when I say defendants at this time I am referring to the drivers of the cars—were negligent and that such negligence was the proximate cause of La Bella's death.

I have used the phrase "preponderance of the evidence," and that phrase, gentlemen, does not necessarily mean the greater number of witnesses on the one side or on the other, but it does mean the greater weight of the evidence; it refers more particularly to quality rather than to the quantity of the evidence.

The suits are based upon a charge of negligence, and that presupposes there has been a violation of some duty which the drivers of these two automobiles, or one of them, owed to La Bella. The first question, therefore, is to determine what

duty, if any, did these defendants, or any of them, owe to the plaintiff's intestate; and if there was a duty, then whether the defendants, or any of them, were negligent with respect to the performance of that duty.

The plaintiff's intestate as well as the respective drivers of these two cars had a lawful right to use this highway, but with respect to such use, each owed a duty to the others, and that duty, gentlemen, was to so drive, control and operate their respective vehicles, to make such observation for other traffic upon that thoroughfare, at that time and place, and to exercise such judgment as to how, and where, and when to drive over this intersecting street and beyond, as a reasonably prudent person would have done under the same circumstances.

You want to examine this evidence, gentlemen, with this question formed in your mind: what did the drivers of these two cars do or fail to do which a reasonably prudent person would not have done, or would have done, under the same circumstances? If you find that the rule of reasonable care, as applied to the circumstances of this particular case, required the drivers of these automobiles, or one of them, to do something which he or they did not do, or to refrain from doing something which he or they did, then such driver or drivers would be classed as negligent.

To determine this question of negligence, you must also take into consideration certain rules laid down by the Motor Vehicle Act and the Traffic Act of this State with respect to the operation of motor vehicles upon the public highway, and the first has to do with the question of

speed, and it is provided that where the houses are on an average of less than one hundred feet apart, the rate of speed which the act says may be maintained but shall not be exceeded, is twelve miles an hour; if the houses are a greater average distance apart, then the rate of speed is thirty miles an hour. But the act goes on to provide that nothing therein shall permit any person to drive a motor vehicle recklessly, or at any speed greater than is reasonable, having regard to the traffic and use of the highways, or so as to endanger the life or limb or to injure the property of any person. So you see, gentlemen, the act gets back to and really rests upon the proposition of reasonable care—because it may very well be that the speed at which a car is driven has no connection whatever with the cause of an accident. The question always is, whether the operation with respect to speed was reasonable under the circumstances.

There is another provision also with respect to signalling device, and that reads:

"Every motor vehicle must be equipped with a horn or signalling device, and the operator of the same shall give reasonable warning of his approach whenever necessary to insure the safety of other users of the highway, and before passing any vehicle he may overtake, or pedestrian using any part of the highway other than the sidewalk, also at curves and intersecting highways where the view of approaching vehicles is obscured; but the horn, bell, or other signalling device shall not be sounded unnecessarily."

Then the Traffic Act contains this provision:

"A vehicle shall keep to the right, and when the improved portion of a road is of sufficient width,

the vehicle shall keep to the right of the center of such road, except when passing a vehicle ahead."

Here again, the same act provides that in places where the houses are on the average less than one hundred feet apart, pedestrians shall have the right of way over vehicles at any street crossing. And street crossing is defined to include "all duly indicated crossings marked by a pavement or otherwise, and the most direct route from curb to curb at the intersection of streets."

Of course, there is testimony in these cases involving two different propositions, one that La Bella was crossing over what may be called a crossing under the definition given in this act—and the other, that he came diagonally out into the street at a place which would not be such a crossing. If he came out under the latter condition, of course he would not have the right of way. But while you must remember the rule about the right of way, it is not intended to provide a hard and fast rule applicable to all hazards and all circumstances, regardless of actual conditions, and thus relieve of responsibility one who is careless and otherwise reckless of the situation of others; that is to say, a pedestrian at a crossing could not be justified in exercising his right of way if he had reasonable notice or warning that a driver of a motor vehicle was not going to afford him a right of way, and he would not be justified in going out and exercising his right in the face of apparent danger. He would, under such circumstances, in the exercise of reasonable care, be required to give way.

Now, gentlemen, even if you should find from your investigation, that the driver of one of these

cars was in violation of, or that the drivers of both cars had violated, one or more of these rules which I have just read to you, nevertheless that in itself would not be negligence. It would be evidence of negligence which should be taken into consideration by you in determining whether or not, under all the circumstances, having regard to the violation, if there was any, but also having regard to all the other attendant circumstances, the driver of the vehicle whose conduct you are investigating exercised reasonable care,—such care as a reasonably prudent person would have done under like circumstances.

But even though the defendants or some of them were negligent, you still have a very important question to determine, and that is whether such negligence was the proximate cause of the death of the plaintiff's intestate; and the plaintiff here also has the burden of proof cast upon her, of proving that such negligence was the proximate or concurrent cause of the death of La Bella, by a fair preponderance of the evidence.

In the first place, what is meant by proximate cause? It has been defined as the efficient cause, the one that necessarily sets all other causes in motion. It is that cause which led up to and which might have been expected to produce the result,—the result in this case being the death of the intestate.

The plaintiff claims that the driver of each of these cars was negligent, and that such negligence on the part of each one of them, concurrently or successively, operated in such a way that they combined in producing the intestate's death, so it may be said that the negligence of both produced such death.

It becomes very important, gentlemen, for you to understand certain phrases which have been used by the attorneys in these cases, and which have been referred to by the Court, namely, concurrent causes and intervening efficient cause, on which I will quote to you from the law:

"As a general rule it may be said that negligence to render a person liable need not be the sole cause of an injury. It is sufficient that his negligence concurring with one or more efficient causes, other than plaintiff's fault"—and that would mean in this case the decedent's fault—"is the proximate cause of the injury. So that where two causes combine to produce injuries a person is not relieved from liability because he is responsible for only one of them. Within the rule, the causes concurring with one's negligence may be the negligent act of another, if the act of such other is not imputable to the person injured or inevitable accident, act of God, or some inanimate cause. A person is not excused from liability for failure to perform a duty because another person failed to perform his duty. Where several causes producing an injury are concurrent, the injury may be attributed to all or any one of the causes. It is sufficient if the negligence of the party sought to be charged is an efficient cause, without which the injury would not have resulted, and that such other cause is not attributable to the person injured. But it must appear that such person was responsible for one of the causes which resulted in the injury. The concurring negligence of another cannot transform the remote into the proximate cause of an injury or create or increase the liability of another.

"Concurrent causes within the rule are causes acting contemporaneously and which together cause the injury, which injury would not have resulted in the absence of either."

And to apply that rule which I have quoted to you gentlemen, you would consider the injury in this case to mean death. I quote further:

"But where the negligence of one consists in a condition merely which is rendered injurious by the subsequent negligence of a third person" —or another person—"the acts of the two persons are not concurrent. The mere fact that the concurrent cause was unforeseen will not relieve from liability for the act of negligence.

"The mere circumstance that there have intervened between the wrongful cause and the injurious consequence acts produced by the volition of animals or persons does not necessarily make the result so remote that no action can be maintained. The test is not to be found in the number of intervening events or agencies but in their character and in the natural connection between the wrong done and the injurious consequence, and if such result is attributable to the original negligence as a result which might reasonably have been foreseen as probable the liability continues. But an intervening cause will be regarded as the proximate cause, and the first cause as too remote where the chain of events is so broken that they become independent and the result cannot be said to be the natural and probable consequence of the primary cause."

And it has been expressly held, if the concurrent acts of two persons combined together result in an injury to another person, he may recover damages from either or both; and in the practical

furtherance of justice, it is the principle of the law of torts, that where two or more wrongdoers injure another in person or property by their several acts, all of which contributed to one wrong, then upon the evidence, no distinction can be drawn between their own acts; they are all jointly and severally liable.

Now, gentlemen, in these cases it seems to have been fairly well shown that La Bella, after being struck by the automobile driven by the defendant Derr, lay in the street for some length of time; and if you find that the automobile driven by Mr. Brown, which came along later, actually struck the prostrate form of La Bella, then you will have to apply these rules which I have given you, in order to determine whether or not death was caused by the concurrent negligent acts of both Derr and Brown, or whether or not it was caused solely by the independent act of one or the other. If it was an independent act of Mr. Derr, in which any negligence on the part of Brown did not concur, then of course Brown would be exonerated and also the Mutual Casualty Company.

Again, if you find that it was the independent act of Mr. Brown in driving the Mutual Casualty Company's automobile which caused the death of La Bella, without the contributing cause of the negligence of Derr so that Derr's negligence became a proximate cause of La Bella's death, then of course Brown and the Mutual Casualty Company would be chargeable with his death, and not Derr.

So you see you have a nice question there to determine: whether or not under the rules I shall give you with respect to contributory negligence, and also upon the main question of the negligence of each party, or not the death of La Bella was due

to the negligence of either driver, or both, or whether or not these two drivers were both of them free from any charge of negligence.

Now, right here, gentlemen, I think we should consider the claim of Mr. Brown, who says that he did not strike the body of La Bella—and, of course, gentlemen, if that is so, then immediately your verdict would be in favor of the defendant Brown and of the defendant the Mutual Casualty Company, and against this plaintiff, because they could not be charged under such circumstances, very naturally, with any responsibility for the death of La Bella. If, however, you find that both automobiles struck the plaintiff's intestate, then it becomes necessary—as I indicated a moment ago —to determine if both were—and if one, which one was—negligent, which negligence was the proximate cause of the death so it can be said that the negligence of both together concurrently operated in causing the death of La Bella.

If you find that neither driver was negligent, then, of course, the verdict would be for all of the defendants and against the plaintiff. If both were negligent but the negligence of neither was a proximate cause of La Bella's death, then your verdict again would be in favor of all the defendants and against the plaintiff. If only one driver was negligent, then as to that one who was not negligent, and his master if he was driving for somebody else who is a party defendant, your verdict would be in his or their favor, as the case may be, against the plaintiff. But if the driver is found negligent and his negligence was the proximate cause of the death of La Bella, then you must find whether La Bella was guilty of contributory negligence on his part.

If both parties, both drivers, were negligent and only the negligence of one was the proximate cause of the death, or it could not be said that the negligence of each was a unit, then as to the one whose negligence was not a proximate cause your verdict would be in his favor, and in his master's favor, if any, against the plaintiff, and as to the other driver, the question of his and his master's liability, if he represented a master who is a defendant here, would depend upon whether the plaintiff's intestate was guilty of contributory negligence.

So, therefore, if you find one or both of the drivers was negligent and his negligence was a proximate cause, or a concurrent cause, of the death of the plaintiff's intestate, then before the plaintiff can recover you will have to consider whether the intestate himself was guilty of contributory negligence; and that is raised by all these defendants here as a defense against any claim against them, and it being a special defense the burden rests upon the defendants to prove such contributory negligence to your satisfaction by a fair preponderance of the evidence.

Since contributory negligence is charged against La Bella, that indicates that there must have been some duty which he himself, as a pedestrain crossing this street, owed to other users of this thoroughfare; and he did owe it to them. That duty was to exercise such a degree of care for his own safety that a reasonably prudent person would have done under the same circumstances. He was required to make such observations for other traffic upon that thoroughfare, and to exercise such judgment as to how, when and where to pass over the Hudson County Boulevard at that time and place,

as a reasonably prudent person would have done under the same circumstances. But the law requires of one crossing a roadway on foot to extend his observations only to the distance in which vehicles proceeding at a customary and reasonably safe speed would threaten his safety. Now, of course, an intelligent person looking down a straight thoroughfare for the distance of several blocks might see an automobile and not, under those circumstances, be required to wait to cross until the vehicle, several blocks away, had crossed over that particular crosswalk which this pedestrian expected to use. So you have got to investigate the circumstances under which a person attempts to cross the street, and then ask whether or not that person, under those circumstances, exercised reasonable care.

If it is a fact that La Bella, being free from fault, on being struck by the first automobile, lay prostrate in the street and unable to take care of his safety, then of course this requirement might not apply in its fullest extent, and, under such circumstances, that portion of the rule which says that "a person shall exercise such care as a reasonably prudent person would have done under the same circumstances," would have to be very clear, because the circumstances under such a state of facts might be very different. If he was in such a condition that he could not make observations, or could not take care of himself, you see his position would be very much different to one who had normal faculties and who was proceeding across the street on foot, perfectly able to take care of himself.

Something has been said about this brother who went out into the street, as he says, to assist La

Bella, and who put up his hands, as he says, to stop the automobile which he stated was driven by Brown, and that he then retreated—and a thought might have been injected into these cases, gentlemen, that this witness, who was a step-brother of La Bella, might have been negligent in the manner in which he handled the situation. But this is not his case, and La Bella is not chargeable with the negligence of some one with whom he might have been crossing the street, after La Bella had been struck down, because you can see that would be a very unfair rule to apply.

If you find, gentlemen, that La Bella was guilty of contributory negligence with respect to the conduct of Charles W. Derr, no matter in what degree, no recovery can be had against Mr. Derr, even though Derr himself was guilty of negligence which was a proximate cause of La Bella's death, because in this State we do not weight the relative degrees of negligence. If both parties to an accident are negligent, the law leaves them where it finds them, and there can be no recovery, if one of those parties became a party plaintiff, if his negligence in any way contributed to the unfortunate result.

If the deceased was guilty of contributory negligence with respect to the conduct of the defendant Brown, no matter in what degree, no recovery can be had against Brown, and that would apply also to the Mutual Casualty Company, and as to both of those defendants, under such circumstances, the verdict would be in favor of the two defendants and against the plaintiff.

If you find, however, that both drivers, Derr and Brown, were negligent and that the negligence of each one of them was a proximate cause or a con-

current cause within the rules I have given you, so that the negligence of each one of them was a proximate cause directly contributing to the death of La Bella, and that they were concurrent causes, then if plaintiff's intestate was free from any contributory negligence, the plaintiff would be entitled to recover against all three defendants, Derr, Brown, and the Mutual Casualty Company.

If, however, you find that only one of these drivers was negligent, and his negligence a proximate cause, and the other driver was not negligent, or even if he was negligent that such negligence was not a proximate cause, or a concurrent cause, so as to charge him under the rules I have given you, then if plaintiff's intestate was not guilty of contributory negligence, the plaintiff could recover against the driver who was negligent and whose negligence was the proximate cause of La Bella's death; and if it was Brown's negligence, such negligence would be chargeable against the Mutual Casualty Company also, because Brown's negligence would be chargeable to the Mutual Casualty Company as his master.

Now, if you find that the plaintiff is entitled to a verdict against one or two or all of these defendants, then, gentlemen, the Death Act to which I have already referred provides the measure of damages which you should use in arriving at the amount of your verdict. It provides as follows:

"Every such action shall be brought by and in the names of the personal representatives of such deceased person, and the amounts recovered in every such action shall be for the exclusive benefit of the widow and next of kin of such deceased person, and shall be distributed to such widow and next of kin in the proportion provided by law

in relation to the distribution of personal property, of such person during intestate, and in every such action the jury may give such damages as they shall deem fair and just in reference to the pecuniary injury resulting from such death to the wife or next of kin of such deceased person leave wife or next of kin of such deceased person, provided that where such deceased person leave a widow, the widow shall be entitled to the whole of the damages which she shall sustain and which shall be hereafter recovered," etc.

Of course, in these cases, the word "widow" used in the Act does not apply because this is the husband who was killed. But there are next of kin, and the Act which I have just referred to has been amended so as to include the husband as one who would be entitled to a distributive share. There were two children of this marriage, as I recall it, one being five years old and the other three. I think that the husband and wife were about thirty-one years of age.

Now, our Court of Errors and Appeals has amplified the rule of damages provided for in this statute in the following language:

"What the plaintiff is entitled to recover is a capital fund which shall represent the present value of the pecuniary loss which shall fall on the next of kin by the premature taking off of the intestate."

What is meant by a capital fund? If you sit down and say, for example, that the pecuniary damages which would be derived from a continuation of the life of La Bella would be so much money per year, contributed in weekly instal-

ments or monthly instalments, as the case may be, you would not be privileged to say, "We will take these various sums which we find will be the reasonable expectation and add them together for a year," and then multiply that by the number of years which you think La Bella might probably have lived, and then say that is the amount of your verdict, because, you see, the next of kin would be getting it practically right now, the whole sum of money which otherwise would be given, possibly, over a period of years, in small installments. Therefore the laws say you must take that total sum and discount it, and you must take into consideration that, if the plaintiff is entitled to a verdict, the verdict will call for a sum of money right now instead of being spread over a period of years. That fund is to be ascertained by taking into consideration all of the probabilities of the case. The intestate, of example, in these cases, might have died in the course of nature shortly after this accident; the next of kin, these children and this wife, might have predeceased La Bella; he might not have been able to earn the money which he was earning at the time of his death. The damages are to be determined exclusively with reference to the pecuniary injury resulting to the next of kin, and compensation for such deprivation of pecuniary profit of the next of kin is, therefore, the sole measure of damages in these cases. Now, if it is of any assistance to you, my recollection is that the widow said that a sum of about $23 a week was earned by her husband, and that the representative of a defendant here said that his weekly earnings throughout for a considerable time before La Bella's death were $21.11. But you will use your own recollec-

tion, gentlemen, of the entire evidence in these cases; you are the sole judges of the facts and the Court's function is merely to give you the law to apply to the facts as you recall them.

Now, I have already said you must take into consideration all of these probabilities and all of these circumstances in arriving at what would be the pecuniary loss resulting to these next of kin by reason of the premature taking off of the decedent La Bella.

I think a moment ago I said the word wife did not apply, in referring to the death act. That was an oversight, gentlemen. I had in mind at the time I said it that the decedent was the woman, but the surviving spouse here is the widow.

If you approach these cases, gentlemen, with these rules which I have given you in mind, and divorce from your considerations all questions of sympathy or passion or prejudice, then I feel you need not concern yourselves with the question of how the verdict will please one party or the other party, because your verdict, under such circumstances, will be a right verdict, no matter which way you find.

Now during the case motions were made by the attorneys for the two defendants for a nonsuit and also for the direction of a verdict in favor of these two defendants. These motions were denied by the Court, and you are not to allow that to influence you in any way or to suspect that the denial indicated in any way the feeling of the Court as to what your verdict should be. It was nothing more than the Court performing its function of deciding whether or not it was such a case as should be submitted to you as the arbiters of the facts, to sift out and determine the conflicting

evidence here, and apply the law which the Court would give you, and the Court determined it was a case that you would have to decide and not the Court. So you will remove the denial of those motions from your minds entirely.

Mr. Schneider: Your Honor, I desire to withdraw my requests. I think your Honor has fully covered them.

Mr. Johnson: I think your Honor has fully covered my requests.

The Court: Just before you retire, gentlemen, I should possibly say this to you, that if you should find a verdict should be rendered against all three of these defendants, the mere fact of there being two suits should not confuse you as to how your verdict should be rendered, because you would find one lump sum; you would not split it up as against the separate defendants. You are not privileged, in a case such as this, to say that one defendant was 25 per cent, negligent and the other defendant 75 per cent. negligent, although the negligence of both constituted proximates causes of La Bella's death. You would have to find one lump sum under such circumstances against the defendants.

If, on the other hand, you find that the verdict should be against only Mr. Derr, and not against Mr. Brown and the Mutual Casualty Company, then the form of your verdict would be: "We find in favor of the plaintiff and against the defendant Derr," stating the amount in one lump sum; and at the same time you would say: "We find in favor of the other two defendants against the plaintiff." And again, if you should find that Mr. Brown and the company which he represented, the Mutual Casualty Company, were negligent and

your verdict should be against them in favor of the plaintiff, you would find against them for one lump sum in favor of the plaintiff and against those two defendants, but, at the same time, you would find a verdict in favor of the defendant Derr and against the plaintiff.

And again, in order to make the situation clear, if you should find that the plaintiff was not entitled to a verdict against any of the defendants, then you can say you find in favor of all the defendants and against the plaintiff of no cause of action.

The jury retired.

Mr. Schneider: May I have an exception to that part of your Honor's charge where your Honor instructed the jury to find a lump sum verdict against all the defendants, and not find a separate verdict against each, my contention being based on the separate causes of action, and they were not joined except for convenience of trial?

The Court: They were consolidated by consent.

Mr. Schneider: Just for convenience of trial.

The Court: I have assumed they were together.

Mr. Johnson: They were consolidated.

Mr. Schneider: They were consolidated for the purpose of trial.

The Court: You can look it up and see what the form of consolidation was.

Mr. Johnson: They were consolidated in open court by agreement.

Mr. Brenner: That the two causes should be tried together.

The Court: The Court understands and so rules that the causes have been consolidated in open court, as though they had been instituted as one suit. That is the course I have pursued. You can take an exception, if you wish.

Exceptions.

Mr. Schneider: May I take the stand, your Honor, that we consolidated the actions for the purpose of convenience in trying them together, so it may appear that these exceptions were taken on behalf of the defendants Brown and the Mutual Casualty Company?

I desire also to except to your Honor's ruling or charge leaving the issue of speed to the jury, as there seems to have been no issue of speed here, with respect to negligence.

I also except to your Honor's charge on the concurrent causes of death, as it seems to me that the actions of both sets of defendant were absolutely separate and several and not in any way concurrent or joined.

I would also except to your Honor leaving the cause of death to the jury, as there was no evidence to connect Brown and the Mutual Casualty Company with the cause of the death.

I except also to what your Honor said on the question of contributory negligence, as applied to Brown and the Mutual Casualty Company.

The Court: In what way?

Mr. Schneider: In your Honor saying that they could consider the fact that he lay prostrate on the ground, thereby limiting in every respect the question of contributory negligence on his part, which only a jury had a right to determine.

I also except to what your Honor said about the step-brother's actions.

And I desire to take a general exception to the general theory of your Honor's charge, in that your Honor seemed to leave the question to the jury on the theory of the joint negligence of the defendants, as there were two cases brought, and the evidence shows there were two separate actions,

and therefore there were two separate causes and not a joint cause of action.

Mr. Johnson: I except to the charge of the Court leaving it to the jury to determine the cause of the decedent's death, on the ground that there is no evidence showing that any action of the defendant Derr was responsible for the decedent's death. I make that exception on behalf of Derr.

The Court: Call the jury back for a moment.

The jury returns.

The Court: Gentlemen of the jury, I have called you back in order that there may be no misapprehension of the meaning of the Court with reference to certain parts of the charge. One part had to do with the question of contributory negligence as applied to the decedent as he lay in the street, because he did lie in the street, prostrate—in connection with the actions of the driver Brown. I do not want you to have the impression that the Court charged that La Bella was not obliged to use any care under such circumstances. There is conflicting evidence here as to his condition; there is also conflicting evidence as to under what circumstances he came to be there.

What I meant to charge you was this, that you have in mind, of course, his entire conduct, and then ask yourselves whether or not, considering his conduct, considering the manner in which he came, and lay there and the manner in which you may find that the automobile of Brown approached him, under all those circumstances, whether or not he exercised reasonable care for his own safety. Of course, I did not intend to charge you that Mr. La Bella owed no degree of care with respect to

his safety when you come to consider the conduct of this defendant Brown because there is a large question of fact for you to determine there just what the circumstances were. So I called you back to make clear to you that you will have to investigate the question of Mr. La Bella's conduct with respect to the driver Brown as well as with respect to the driver Derr.

Now some question was raised that I seemed to leave the case to you upon the theory that there was a joint cause of action—whatever that may mean—I apprehend it to mean that there was but one accident. I think I made it clear to you that you were to investigate his conduct with respect to the charge of negligence against these two drivers and investigate their conduct and if one automobile struck him before the other one struck him. But what I intended to charge you was this, that in order to find both of these defendants guilty of negligence, the negligence of each one of them must have been a proximate cause, concurring with the other cause producing death; not upon the theory that La Bella was struck by these two cars at the same time, or that it was only the one accident that we are to investigate, but when I referred to concurrent causes I was referring to that which produced death—whether or not there were two, later united, concurring together that produced death; that is, whether this death resulted from the negligence of each one of these defendants operating together in producing death. Probably it would be better to say if the successive acts of these two parties, within one of the definitions I have laid down here, operated so that each successive act of negligence was a proximate cause leading up to and concurring in and causing

the death of La Bella, then, under such circumstances, the cause of such acts of negligence might be liable.

The jury retires.

Mr. Schneider: On behalf of the defendants Brown and the Mutual Casualty Company, I desire to renew my exception to that portion of your Honor's charge allowing the question of contributory negligence as against Brown and the Mutual Casualty Company to go to the jury, on the ground that your Honor did not charge the original negligence of La Bella, if any, might be chargeable in favor of these defendants.

I also renew my exception to that part of your Honor's charge leaving the case as a joint liability case and not a separate liability.

Mr. Johnson: I except to that last portion of your Honor's charge which tends to make the liability joint rather than several, and tends to eliminate the question of proximate cause as applied to either defendant—that is, that the jury must find one or the other defendant's negligence was the proximate cause of death.

Opinion.

(Filed May 5, 1925.)

NEW JERSEY SUPREME COURT.

GIUSEPPINA LA BELLA, administratrix, &c., *v.* ARTHUR H. BROWN and MUTUAL CASUALTY CO.	No. 32, Oct. T., 1925.
GIUSEPPINA LA BELLA, administratrix, &c., *v.* CARL W. DERR.	

Appeal from Hudson Circuit Court.

Argued before GUMMERE, Chief Justice, and Justices KALISCH and CAMPBELL.

For the Appellants, JACOB SCHNEIDER.
For the Respondent, LAZARUS, BRENNER & VICKERS.

The opinion of the court was delivered by GUMMERE, C. J.:

These two suits were brought by the administratrix of Dimetrio La Bella to recover compensation for his death. In the act of crossing the Hudson County Boulevard, in the City of Bayonne, he was knocked down and run over by an automobile operated by Derr, the defendant in the second suit; and, while lying helpless in the roadway, as the

plaintiff alleged, and shortly after the happening of the original accident, he was run over by another automobile, belonging to the Mutual Casualty Company and operated by Brown, the defendants in the first suit. He was taken to the Bayonne Hospital, and died there shortly afterward.

The averment set out in the complaint in the suit against Derr was that the death of the deceden was the proximate result of the original accident. In the suit brought against the Mutual Casualty Company and Brown the averment of the complaint was that the act of Brown in running over La Bella while lying in the roadway was the proximate cause of the latter's death.

When the cases were ready for trial it was agreed by counsel for the plaintiff and for the respective defendants "that the two cases be tried together." This was done, and a single verdict was rendered by the jury in favor of the plaintiff and against Derr, the Mutual Casualty Company and Brown in the sum of $12,000. This verdict was rendered in compliance with the instruction of the court, over the protest of counsel for the defendants Mutual Casualty Company and Brown, and a proper exception was taken and allowed to this judicial action. A single judgment having been entered on this verdict, the defendants have appealed from that judgment; the principal ground of appeal being directed at the alleged illegality of the judicial action just recited.

Our consideration of this ground of appeal leads us to the conclusion that the rendition of a single verdict against the several defendants in these two independent actions, and the entry of a single judgment thereon against all of such defendants, were neither of them warranted by the mere fact that

the cases were consolidated solely for the purpose of trial. In order to justify the direction of a single verdict, and the entry of a single judgment thereon, there must be an actual fusion, or merger, of the two actions into one, and such fusion, or merger, must appear upon the record of the single suit thereafter prosecuted. Moreover, in order to warrant the fusion, or merger, of two tort actions like the present, brought by the same plaintiff against different defendants, it must appear that a single suit could have been maintained against all of them jointly; that is, that the injury complained of *was a single one,* although resulting from diverse and disconnected acts of negligence on the part of the respective defendants. Such is the underlying principle upon which the decision in *Matthews* v. *Del., Lack. & West. R. R. Co.,* 56 N. J. L., 34, was rested. Where a person seeks to recover from several tort-feasors compensation for separate injuries resulting from distinct and disconnected wrongful acts, some of which were committed solely by one wrong-doer and others by entirely different persons, a single action will not lie in his behalf against all of such wrong-doers jointly. The correct rule upon this subject is thus stated in *Cyc.,* Vol. 38, p. 484, as follows: "Where wrong-doers have not acted in concert, and separate and distinct injuries are caused by the act or neglect of each, the liability is several only." This rule was followed and is the basis of the decision in *Chipman* v. *Palmer,* 77 N. Y., 51, and also in the case of *Nierenberg* v. *Wood,* 59 N. J. L., 112. It is true that there may be difficulty in determining whether the death was caused by the one injury or the other, or whether it was the combined result of

both; but this fact furnishes no reason for holding that one tort-feasor should be liable for an act of others who have no association with and do not act in concert with him, and for whose conduct he is in no way responsible. *Nierenberg* v. *Wood*, *supra*.

For the reason indicated, we conclude that the judgment under review should be reversed.

Judgment of Reversal.

NEW JERSEY SUPREME COURT.

GIUSEPPINA LA BELLA, administratrix, etc., Plaintiff-Respondent, *v.* ARTHUR H. BROWN and MUTUAL CASUALTY CO., Defendant-Appellant.	On Appeal, etc.

This case was heard before our Supreme Court, at the October Term of 1925, and an opinion was rendered on May 5th, 1926, reversing the judgment of the Court below.

It is ordered that the judgment removed by appeal in this cause be reversed, and that the said record be hereby remitted to the Hudson County Circuit Court, to be proceeded with according to law and the practice of said Court.

Dated May 11, 1926.

On motion of

JOSEPH C. PAUL,
Attorney for Defendant-Appellant.

Notice of Appeal.

(Filed June 21, 1926.)

NEW JERSEY SUPREME COURT.

GIUSEPPINA LA BELLA, administratrix, etc., Plaintiff-Appellant, *v.* ARTHUR H. BROWN and MUTUAL CASUALTY CO., Defendant-Appellee.	On Appeal, etc.
GIUSEPPINA LA BELLA, administratrix, etc., Plaintiff-Appellant, *v.* CARL W. DERR, Defendant-Appellee.	

To

JACOB SCHNEIDER, Esq.,
Attorney for Appellee
Arthur H. Brown and
Mutual Casualty Co.

RUNYON & JOHNSON, Esqs.,
Attorneys of Appellee
Carl W. Derr.

TAKE NOTICE that the appellant Giuseppina La Bella, administratrix ad prosequendum of the Estate of Dimetrio La Bella, deceased, appeals to the Court of Errors and Appeals in the last resort in all

causes in New Jersey from the whole of the judgment entered in this cause on the following ground:

Because the New Jersey Supreme Court reversed the judgment of the Hudson County Circuit Court, although there was error in so doing.

LAZARUS, BRENNER & VICKERS,
Attorneys and of Counsel for Appellant.

New Jersey Court of Errors and Appeals

GIUSEPPINA LA BELLA, administratrix *ad prosequendum* of the estate of Dimetrio La Bella, deceased,
Plaintiff-Appellant,

v.

ARTHUR H. BROWN and MUTUAL CASUALTY COMPANY,
Defendants-Appellees.

On Appeal.

GIUSEPPINA LA BELLA, administratrix *ad prosequendum* of the estate of Dimetrio La Bella, deceased,
Plaintiff-Appellant,

v.

CHARLES W. DERR (amended to read CARL W. DERR),
Defendant.

BRIEF OF PLAINTIFF-APPELLANT.

Statement of Facts.

On March 4th, 1923, deceased, Dimetrio La Bella, while crossing the Hudson County Boulevard in Bayonne was struck by an automobile operated by Carl W. Derr. While lying helpless in the roadway plaintiff alleges that deceased was

struck by a second automobile belonging to the Mutual Casualty Company and operated by Arthur H. Brown.

La Bella was removed to the Bayonne Hospital and died shortly thereafter from the injuries received.

Two actions were thereafter instituted, one against Derr, the driver of the first automobile, the other against the Mutual Casualty Company and Brown, the owner and driver respectively of the second automobile.

In both actions it was claimed that the negligence was the proximate cause of death.

The cases were thereafter tried in the Hudson County Circuit Court and a joint verdict rendered as against all defendants in the sum of $12,000, from which an appeal was taken into the Supreme Court by the defendants Brown and Mutual Casualty Co., the defendant Derr not joining in the appeal.

The judgment was reversed upon the grounds urged that there was no proof of a joint liability and no such consolidation of actions as would warrant the jury bringing in a joint verdict against all defendants.

Appeal is now taken into this Court upon the ground that the Supreme Court erred in reversing the judgment entered.

POINT I.

There was proof of joint negligence which would have warranted institution of a single suit and the recovery of a single verdict against all defendants.

The testimony showed that the deceased was crossing the Hudson County Boulevard in an easterly direction where it is intersected by 52nd Street

(C., p. 28). That when he arrived at the place of crossing the automobile driven by Derr was about a block distant to the north (C., p. 30, lines 15-20), and that he was crossing in a straight line from corner to corner (C., p. 31, lines 25-30).

The place of crossing was illuminated by an overhead electric lamp (C., p. 32, lines 20-30). The deceased reached a point in the roadway about seven feet from the curb when he was struck with the left side of the car (C., p. 32, lines 35-40; C., p. 33, lines 1-30).

The brother of the deceased went to his assistance and attempted to pick him up. The deceased then said that his leg was sore and that he could not get up (C., p. 44, lines 1-15).

A second automobile was then observed coming directly toward the place where La Bella was then lying and endeavoring to arise. The brother, Costerello, realizing that if this automobile held its course the injured man would again be struck, shouted to the driver, Brown, in an attempt to attract his attention and to have him stop the car. The attempt, however, was not successful and the then injured men was struck by this second automobile and dragged along the ground for a considerable distance (C., pp. 36-37).

The brother Tony again went to the assistance of La Bella but this time he was unconscious and lay perfectly still on the pavement (C., p. 38). He was removed to the hospital in this condition and so remained until his death, about three days later (C., pp. 78-81).

The case was tried upon the theory that the injuries inflicted as the result of both collisions united in causing death, with the result that the liability was both joint and several.

The Supreme Court in reversing the judgment held that inasmuch as the defendants did not act

in concert, they could not be joined in one action, the liability being several only.

As authority for its determination is cited 38 *Cyc.*, 484.

In another section of the same work it is held that although concert is lacking that if the independent acts of negligence united in causing a single injury that then there may be a joint recovery, the language being as follows:

> "Where, although concert is lacking, the separate and independent acts of negligence of several combine to produce directly a single injury, each is responsible for the entire result, even though his act or neglect alone might not have caused it. It has been said that 'to make tort-feasors liable jointly there must be some sort of community in the wrongdoing, and the injury must be in some way due to their joint work, but it is not necessary that they be acting together or in concert if their concurring negligence occasions the injury.' "
>
> 38 *Cyc.*, 488.

There is further cited as authority for the opinion the case of

Nierenberg v. *Wood*, 59 N. J. L., 112.

In that case a joint action was brought against separate owners of two dogs which had entered the property of the plaintiff and damaged a growing crop. An examination of this case will reveal the fact that there is a very clear distinction between damage caused by animals belonging to individuals and damage caused by human beings, the Court holding in the one instance that the persons causing injury are responsible for all of the consequences of a wrongful act, while, on the other hand, in the event of injuries by animals, the owners thereof are liable for only such part of the

damage as is caused by the animal belonging to that owner; the following language being used:

> "In the case of a joint tort, each offender's liability arises out of the fact that his participation in the wrongful act was voluntary and intentional, and the law, as a punishment for his wrongdoing as well as for the protection of the rights of the injured party, makes him answerable for all the consequences of that act. But in the case of animals which wander off and unite in perpetrating mischief, there is no actual culpability on the part of their owners. Liability in such a case only exists by reason of the negligence of the owners in permitting their animals to stray away and commit the depredations, and it has, therefore, always been held, when the question has come before the courts, that a joint action will not lie against separate owners of dogs which unite in committing mischief."

At the expense of repetition the observation of the Court is directed to the distinction drawn in the opinion between mischief by animals and the wrongdoing of persons.

A further authority cited in support of the proposition advanced in the opinion that there must be concert of action is the case of

Chipman v. *Palmer*, 77 N. Y., 51.

In that case an action was brought against several defendants for the pollution of water used by the plaintiff and it was held by the Court that no joint liability existed but that each defendant was severally responsible for the damage occasioned by him, the damages being based on the extent to which each of the defendants polluted the stream.

That decision, however, is not supported by the decisions in the courts of our own state, it being said in

Weidman Silk Dyeing Co. v. *East Jersey Water Co.*, 91 A., 338:

> "The argument is that the defendant should be held for only a portion of the verdict as rendered, and the remainder left to be recovered, if possible, against the various polluters. But this is not the law. The rule as stated in 38 Cyc., 488, is as follows: 'Where, although concert is lacking, the separate and independent acts or negligence of several combine to produce directly a single injury, each is responsible for its entire result, even though his act or neglect alone might not have caused it.' This rule is adopted and applied in such decisions as *Newman* v. *Fowler*, 37 N. J. L., 89, and *Matthews* v. *D., L. & W. R. R. Co.*, 56 N. J. L., 34."

The statement in the opinion of the Supreme Court where it is said:

> "But this fact furnishes no reason for holding that one tort feasor should be liable for an act of others who have no association with, and do not act in concert with him, and for whose conduct he is in no way responsible" (citing Nierenberg *v.* Wood, *supra*),

except where it relates to injuries caused by the mischievous acts of animals seems to be without precedent in this state.

On the contrary, all of the authorities hold that a lack of association or concert of one tort feasor with another does not necessarily imply that the tort committed is several and not joint.

The legal rule is enunciated in a case continuously cited by our courts as authority where the following language is used:

> "If two or more persons owe to another the same duty, and by their common neglect of that duty he is injured, doubtless the tort is joint, and upon well settled principles each,

> any or all of the tort feasors may be held. But when each of two or more persons owes to another a separate duty which each wrongfully neglects to perform then *although the duties were diverse and disconnected and the negligence of each was without concert, if such several neglects concurred and united together in causing injury, the tort is equally joint and the tort feasors are subject to a like liability.*"
>
> *Matthews* v. *D., L. & W. R. R. Co.*, 56 N. J. L., 34.

The rule as stated has been quoted with approval in numerous cases.

> *N. Y. etc. R. R. Co.* v. *N. J. Electric Co.*, 60 N. J. L., 338;
> *Lombardi* v. *Yulinsky*, 119 A., 873; 98 N. J. L., 332;
> *Goekel* v. *Erie R. Co.*, 126 A., 446;
> *Rose* v. *Squiers*, 128 A., 128.

The particular portion of the charge of the Trial Judge which it was claimed was erroneous is the portion in which it is stated by the Court:

> "You are not privileged in a case such as this to say that one defendant was 25% negligent, and the other defendant 75% negligent, although the negligence of both constituted proximate causes of La Bella's death. You would have to find one lump sum under such circumstances against the defendants" (Case, p. 165, lines 10-30).

How the Court could charge other than in this manner under the pleadings in this case is inconceivable. In the complaint filed as against Brown and Mutual Casualty Company (Case, p. 2), it is directly charged that the injuries inflicted as the result of the negligence of both defendants was the cause of death, and likewise, in the complaint filed against Derr (Case, p. 10), there is the similar

charge that the negligence of Derr created the injuries which caused the death.

There is no charge in either making claim for injuries which did not so result and it was, therefore, incumbent upon the Trial Judge to bring to the attention of the jury that no recovery could be had against either, any or all of the defendants unless the injuries inflicted resulted proximately in the death of the plaintiff's intestate.

The jury by its finding must have determined that the death was due to a combination of the injuries inflicted as the result of the concurrent negligence of all defendants, and it is our contention that there was a justification in the evidence to warrant such verdict.

The testimony concerning the negligence of Derr, the driver of the first automobile, was to the effect that when La Bella started to cross the street he was crossing at the place where a crossing would be placed, his course being direct from corner to corner (Case, p. 31, lines 25-30); at that time the automobile was about a block distant and that he proceeded but a very short distance into the roadway when he was struck by the machine.

Upon this evidence the question of the negligence of Derr was one of fact for the jury.

> *Thornton* v. *Cater,* 111 A., 158; 94 N. J. L., 435.

Assuming that the jury found as a fact that the defendant Derr was negligent in the operation of his automobile, it would follow as a natural sequence that the deceased was placed by him in a position of danger, such danger being the likelihood of exposing him to the risk of being struck by another vehicle proceeding in the same direction, and the result would be, having put the deceased in such position of danger, if he were

struck, and the testimony indicates that he was struck by the following automobile, Derr would be responsible for the injury or consequent death that resulted, not only from his collision, but the subsequent collision.

> *Collins* v. *West Jersey Express Co.*, 72 N. J. L., 231.

The further evidence is that while the injured man was lying in the roadway he was then alive and conscious, he having stated to his brother that he could not stand up because his leg was sore.

As there was proof that life then existed the presumption is that life would continue.

> "Proof of the existence at a particular time of a fact of a continuous nature gives rise to an inference, within logical limits, that it exists at a subsequent time. * * * This presumption of continuance of facts once shown to exist has been applied in respect of life, etc."
>
> 16 *Cyc.*, 1052.

The testimony of the plaintiff's witnesses then shows that while the deceased was attempting to arise from his position in the roadway that the second automobile owned by the Mutual Casualty Co., and operated by Brown, was observed approaching in such position that the injured man would be directly in its path, and that the brother sensing the situation, waved his hands and called to the driver for the purpose of attracting his attention to the man lying in the roadway, but that the course of the vehicle was not changed, with the result that the injured man was struck and rendered unconscious (Case, pp. 36-38).

At the time of both collisions the roadway was well lighted, there being an electric over-head

lamp directly above the place of collision (Case, p. 32, lines 20-30).

The testimony of the plaintiff's witnesses is that the driver, Brown, attempted to justify his conduct in failing to stop the car by claiming that he believed that the man waving his hands was a hold-up man (Case, p. 92, lines 20-30).

Brown denied this testimony, but in view of the conflict the jury had the privilege of finding that the injured man then still alive was attempting to arise from the roadway; that the place was sufficiently well lit so that his movements could be observed; that he was a sufficient distance away at the time when his attention was directed to the situation to either stop his car or veer it to the right or left to avoid coming into contact with him, and that his only excuse for not so doing, and this excuse, it is needless to say, was without justification, was that he believed that there was the danger of a hold-up.

It has recently been held in the Supreme Court where a like situation was presented that the jury is warranted in finding negligence. In the case referred to the Court said:

> "Now, this motorman was required to use the care and caution that a reasonably prudent man would have used in operating a trolley car of this description at that particular time, and, if you find from the evidence that this motorman was negligent and did not stop his car, and that the deceased's death was caused by the negligence of the motorman in not properly managing his car, then the plaintiff can recover, if the deceased was not guilty of contributory negligence."
>
> *Hexamer* v. *Public Service Ry. Co.*, 132 A., 310.

It was stated in this opinion that no exception

was taken to this charge, but the Court holds, nevertheless, that the proper legal rule was charged, the Court saying:

> "The case was submitted to the jury upon two theories: (1) Defective condition of the platform, which was alleged to have caused the plaintiff's decedent to trip and fall upon the tracks. (2) The decedent being upon the defendant's tracks in a prostrate position, and, if without his fault, whether the defendant's motorman, if he had been on the alert and in the exercise of ordinary care, would have been able to notice the decedent's perilous position in time to have stopped his car and avoided injuring him."

Hexamer v. *Public Service Ry. Co., supra.*

The determination in the case last cited is supported by the decision in

Minarcsik v. *Blank,* 132 A., 251.

Under the cases cited the jury was certainly warranted in determining that the defendant, Mutual Casualty Co. and its driver, Brown, was negligent; that as the result of such negligence injury was inflicted and in view of the testimony that the deceased suffered only an injury to the leg as the result of the first collision, and that he was rendered unconscious and could not speak, although he had spoken immediately previous to the second collision, that the injuries causing death were the result of the contact with the second automobile.

Dr. Sexsmith testified, that on his examination of the man, the injured was unconscious, could not talk and, as he puts it, was "a very dilapidated object" (Case, p. 78, lines 1-30). His diagnosis was that he was suffering from a fractured leg (Case, p. 79, lines 10-28), the injury probably in-

flicted as the result of the striking by the first automobile, but that the cause of death was a hemorrhage of the brain (Case, p. 80, line 15), and the jury had the right to conclude that this was the result of the second striking.

The features of this case are so unusual that it is not surprising that no similar case can be found in this state, except those in which the general rule is laid down.

The general rule as stated by our Courts is well settled in

Hammill v. *Pennsylvania R. R. Co.*, 56 N. J. L., 370,

wherein it is said:

> "It would perhaps be unprofitable to any very great extent to enter upon any examination as to the almost infinite number of cases upon this subject of causal connection, proximate cause, combined and concurrent causes, or intervening efficient causes. If there could be deduced from them the very best possible expression of the rule, it would remain after all to decide each case largely upon the special facts belonging to it, and often upon very nice discriminations; the border line at which natural sequence ceases to exist and becomes unnatural is, it seems to me, extremely difficult to determine. * * *
>
> "We look for the primal negligence contributing to the injury, and then follow it up to its natural consequence and ascertain whether any independent efficient cause intervened to produce the injury, AND IT MUST BE GENERALLY LEFT TO THE JURY TO DETERMINE ACCORDING TO THE CIRCUMSTANCES OF EACH PARTICULAR CASE WHETHER THE FACTS FIT THE STANDARD OF NATURALNESS. * * *
>
> "WHOEVER DOES A WRONGFUL ACT IS ANSWERABLE FOR ALL THE CONSEQUENCESS THAT MAY ENSUE IN THE ORDINARY AND NATURAL COURSE OF

EVENTS, THOUGH SUCH CONSEQUENCES BE IMMEDIATELY AND DIRECTLY BROUGHT ABOUT BY INTERVENING CAUSES, IF SUCH INTERVENING CAUSES WERE SET IN MOTION BY THE ORIGINAL WRONGDOER."

The rule stated, although in somewhat different language, has been reiterated in other decisions in this state.

Cox v. *Penna. R. R. Co.*, 76 N. J. L., 786;
D. L. & W. R. R. Co. v. *Salmon*, 39 N. J. L., 299;
Sutphen v. *Hedden*, 67 N. J. L., 324.

In other jurisdictions there seems to be a like absence of authority in which the facts are identical with those in the case at bar.

The facts which nearest approach those in the present case will be found in

Adams v. *Parish*, 189 Ky., 628.

There the evidence was that Adams was struck by a Ford automobile owned by the defendant. He was thrown to the ground and before he had an opportunity to arise was again struck by a large automobile owned by a man named Donohue. As the result of the second collision he lost his leg and suffered other considerable injury. Suit was started against the owners of both cars, but due to the fact that Donohue was a non-resident the case proceeded only as against the defendant Parish, and the Court said:

"We think there are many facts in the record which would justify a jury in finding that defendant was guilty of culpable negligence rendering him and his co-defendants liable to Adams for the injuries sustained, not alone by being struck by the Ford car, but for all injuries which directly and proximately resulted therefrom and which Adams would not

> have sustained but for the negligence, if any, on the part of the driver of the Ford car. In other words, if the Ford car negligently knocked Adams prostrate on the street, and as a direct result thereof and before he could rise he was run over by the big Donohue car, appellees could not escape responsibility for all of the injuries suffered by Adams, even though Donohue was also negligent."

In *Siegel & Cooper Co.* v. *Treka,* 115 Ill. App., 56, suit was instituted to recover damages for injuries sustained in an elevator operated by employees of the Siegel & Cooper Co. The facts were that the elevator was faultily constructed; that while the plaintiff was riding therein he was pushed by a fellow employee and he suffered injury as the result of the act of such fellow employee in pushing him, and further because of the faulty construction of the elevator. In holding that there was a right of recovery the Court said:

> "The negligence of the boy who threw appellee down was the first cause in point of time. The existence of this unguarded opening is next in point of time. The concurrence of these two negligences injured plaintiff.
>
> "The rule is where one is injured by the concurring negligence of two different parties, each is or both are liable, and they may be sued jointly or separately."

In *Fine* v. *Interurban St. Ry. Co.,* 91 N. Y. Supp., 43, the facts were that plaintiff was a passenger in one of the defendant's cars. While attempting to alight the car started, threw him to the roadway where the fingers of one of his hands were injured admittedly as the result of the wheels of a passing truck going over the same. In holding that the railway company was liable for the crushing of the fingers, although it is conceded that such injury was not inflicted by a car, but admittedly by the passing vehicle, the Court said:

"Moreover, the negligence of the defendant's employees was an efficient, and therefore a proximate, cause of the plaintiff's injury. While upon the car he was in a position of comparative security from injury by passing vehicles. Assuming, therefore, that the driver of the truck was also chargeable with negligence, it remains that but for the conduct of the defendant's employees in causing the car to start before the plaintiff had reached a position of safety he would not have fallen, and so would have been immune from injury by the truck. The concurrent negligence of the driver of the truck would not have the effect of absolving the defendant from liability for the negligence of its employees, if such negligence efficiently contributed to the cause of the plaintiff's inqury; and for the predicament of negligence as an efficient or proximate cause of injury, it is enough that, in the exercise of reasonable care, the person or persons charged with negligence might reasonably have foreseen that some injury would result from his or their conduct. It need not be shown that he or they could reasonably have anticipated the actual consequences."

There are numerous other cases in foreign jurisdictions supporting the doctrines enunciated in the cases cited.

Schneider v. *Second Ave. R. R. Co.*, 15 N. Y. Supp., 556;
Louisville E. & St. L. Ry. Co. v. *Hicks*, 11 Ind. App., 593;
Village of Carterville v. *Cook*, 129 Ill., 152;
Pacific Telephone & Telegraph Co., v. *Parmenter*, 170 Fed., 140;
Elgin A. & S. Traction Co. v. *Wilson*, 120 Ill., 371;
St. Louis Bridge Co. v. *Miller*, 138 Ill., 465;
Wolff v. *Wilson*, 46 Ill. App., 381;
Allison v. *Hobbs*, 96 Me., 26;

Brown v. *Thayer*, 212 Mass., 392;
Boston & Albany R. R. Co. v. *Shanley*, 107 Mass., 568;
White v. *Geer*, 6 Vt., 151;
Bartran v. *Sharon*, 71 Conn., 686;
Shearman Redfield on Negligence, Section 54;
Bishop on Non-Contract Law, Section 455.

It is our contention that under the evidence supported by the authorities cited, that this case presented one of joint liability and that the Court was, therefore, justified in leaving to the determination of the jury the question of whether the defendants were jointly and severally liable.

POINT II.

The charge of the Court permitting the rendition of a single verdict was proper.

The Court charged the jury (C., pp. 165-166) that if the defendant Derr was alone responsible for the death of La Bella, that a verdict should be rendered against him, and the other defendants absolved. On the other hand, that if it were found that the defendants, Mutual Casualty Co. and Brown, were responsible for the death of La Bella, that the verdict should be rendered as against those defendants, absolving Derr, but, if it were found that the negligent acts of all defendants concurred in causing the injury resulting in death, that then a joint verdict should be brought in as against all defendants, and that the jury was not privileged in determining that one defendant would be responsible for a percentage of the verdict rendered, because, once having found liability and that death resulted, their sole duty was to find against the defendants, and announce the amount of damages in one lump sum.

Objection was made to this portion of the charge it being contended that the two cases, that is, the one brought against Derr, and the other against Brown and the Mutual Casualty Co., had been joined merely for convenience in trial and for no other reason, and that the Court, therefore, was in error in permitting the jury to assess a lump sum verdict, or single verdict, as against all defendants, even in the event that liability of all was established.

At the commencement of the trial counsel entered into a stipulation, which we contend was to be understood as having the effect of uniting the actions as if started at the same time with the filing of a single complaint charging liability against all defendants; the language of the stipulation is as follows (C., p. 25, lines 1-10):

> "It is agreed by counsel for plaintiff and the respective defendants that the two cases be tried together."

That counsel for plaintiff understood that this was the arrangement, there can, of course, be no doubt. That counsel for the defendant Derr had a similar understanding of the agreement, there can likewise be no doubt because he says (Case, p. 166, line 28), "they were consolidated," and again (Case, p. 166, line 35), "they were consolidated in open court by agreement."

In making this statement counsel for that defendant was taking issue with counsel for the other defendants, who insisted that the consolidation was, as he puts it, "just for convenience of trial" (Case, p. 166, line 26).

The Court, however, maintained that the consolidation was not merely for convenience and agrees with the representatives of Derr and the plaintiff that there was a definite understanding

that the cases should be so consolidated as to be considered one case, and in emphatic language so indicates, the Court stating:

> "They were consolidated by consent. * * * I have assumed they were together. * * * *The Court understands and so rules that the causes have been consolidated in open court, as though they had been instituted as one suit. That is the course I have pursued. You can take an exception, if you wish*" (Case, p. 166).

The language of the stipulation may be inelegant in phraseology, but it must be remembered that at the time when the stipulation was entered on the record, as far as counsel for the defendant Derr or counsel for the plaintiff were concerned, it was well understood that the cases were to be so consolidated as to be considered as one case.

The representative of the other defendants, we believe, likewise so understood the arrangement, and his objection at the last moment, differing as it does with the recollection of everyone else, including the Court, has all the earmarks of an afterthought occurring only at the time as a possible reason for appeal.

The Court had the opportunity of observing the manner in which the case proceeded, the conduct of counsel in the trial thereof and the evident intention, from the manner of counsel in presenting the case, to judge their understanding as to the manner in which the verdict, if one was forthcoming, should be rendered, and the Court's recollection where there is a difference of opinion, should most assuredly govern, and its determination of the matter should be so final that no appeal could be predicated thereon.

That the Court had the right to consolidate there can be no question, and the tendency seems to be to hold that if there is a consolidation by the

Court the powers are purely discretionary and cannot be reviewed.

Defiance Fruit Co. v. *Fox,* 76 N. J. L., 482-484.

That the Court likewise has a wide discretion in determining the manner in which cases shall proceed and be conducted, seems to be likewise without question, it having been said:

> "It is essential to the orderly administration of justice and to the upholding of the dignity of the court that trial judges to the fullest extent should have control of their calendars and of the conduct of causes before them. In this respect a trial court is vested with a wide discretion and this court will not interfere with the exercise of such discretion as in the case before us, unless there has been an abuse or a most unwise exercise thereof."

Stein v. *Goodenough,* 73 N. J. L., 812.

As previously indicated the case at bar presented a single issue and there would, therefore, be no abuse of discretion on the part of the Court if it were insisted that the two cases be tried as one issue, and no possible harm could come to the objecting defendant if that course were pursued.

The Court took great care to inform the jury that no verdict could be found against that defendant unless they were satisfied that negligence as to that defendant had been established and that that negligence was the proximate cause of the death which ensued, and that damages against such defendant could only be awarded in the event that the death was the direct result of such defendant's negligence, and that the damages awarded, if an award was made, must be computed in accordance with the death act and in conformity with the decisions construing the same.

If the cases had been separately tried the law could not be more clearly charged.

No harm, therefore, coming to those defendants there was no such harmful error as would justify an interference with the discretion of the Court on appeal.

In the opinion of the Supreme Court, there seems to be a determination that the word "consolidate" does not imply that the cases are to be considered as if started by a single action, the Court saying, in effect, that if there were the intention to indicate that the cases were to be considered as being tried together in the same manner as a single suit against all defendants would be prosecuted, that the proper term to use would be "merger" or "fusion."

The definition given in Webster's of the three words, "consolidate," "merge" and "fuse," would seem to indicate that they are synonymous and the text writers do not use the words "fusion" or "merger" to indicate a union of action, but on the contrary, do use the word "consolidation," the definition given being—"consolidation of actions may be defined generally as the union of two or more actions in one."

8 *Cyc.*, 591;
Burrell Law Dictionary.

It is also laid down as a rule of law that the Court's action on motion to consolidate is discretionary, the language being:

> "Unless by statute consolidation is a matter of right, the court is vested with a discretion to consolidate or to refuse to do so; and the exercise of that discretion will not be revised, unless in a case of palpable abuse."

8 *Cyc.*, 593.

"The effect of consolidating actions at law is to unite the causes as if the issues had been originally embraced in one action."

8 *Cyc.*, 606.

Whether the actions were tried together, consolidated, merged or fused, could make no possible difference as far as the rights of the defendants Brown and the Mutual Casualty Co. were concerned. Whether tried as one case or separately tried, the jury was under a duty, before holding those defendants, to determine whether or not they were negligent. Secondly, whether that negligence was the proximate cause of the injuries resulting in death, and a finding adverse to the plaintiff on either of these issues must necessarily result in absolving those defendants from responsibility, whether the actions were joined or separately tried.

Once having arrived at a determination that those defendants were responsible by reason of their negligence for the death of plaintiff's intestate, they had but one duty to perform, and that was to assess damages, and no different amount could be awarded as against the defendant Derr as would be awarded against the defendants Brown and Mutual Casualty Co.

The Court charged the jury as to the provisions of the death act; it further charged the determination of the authorities construing this act, and the damages which the jury awarded must necessarily be alike in each case.

It is not within the province of the jury to separate in actions of this kind the amount that each defendant must contribute toward the payment of the award.

In an action brought to recover for injuries alleged to have been sustained by the plaintiff as the

result of the joint negligence of the defendants, this Court has said:

> "The function of the jury in such a case is twofold—first, to pass upon the issue, guilty or not guilty, and secondly, if they find the defendant or defendants guilty, they are to assess the damages of the plaintiff. It is no part of the jury's duty to apportion the damages as between two defendants in an action of tort."
>
> *Jones* v. *Pennsylvania R. R. Co.*, 78 N. J. L., 571.

To the same effect is the latter case

> *Tricoli* v. *Centalanza*, 126 A., 214.

There is nothing to indicate that the jury became confused as the result of the cases being tried as one and certainly under the charge of the Court it cannot be argued that the jury disregarded the instructions that liability must be established before an award of damages is made, and it cannot be contended that the amount allowed would have been different as against these defendants had a separate verdict been rendered in the place of a joint verdict.

The only difference would have been, and it is purely technical, that the jury would have announced their verdict by saying that they found for the plaintiff as against the defendant Derr; that they found for the plaintiff against the defendants Brown and the Mutual Casualty Co., and that they assessed the plaintiff's damage as against Derr in the amount of $12,000; that they assessed the plaintiff's damages as against Brown and the Mutual Casualty Co. in the amount of $12,000, and upon such verdicts judgment could then be entered on the record separately against Derr, in the amount of $12,000, and as against Brown and the

Mutual Casualty Co. in like amount. The effect would be exactly the same, because if the plaintiff sought to recover the full amount of his damage from the defendants Brown and the Mutual Casualty Co., those defendants could not be heard to complain because it has been reiterated time and again by our courts, and needs no citation of authority, that as between joint tort-feasors there can be no contribution.

We, therefore, repeat that the rendition of a joint verdict and the entry of a single judgment in effect is identical with the rendition of separate verdicts and the entry of separate judgments and, therefore, even conceding that there was error on the part of the Court in following its own judgment as to what the understanding was between counsel as to a proper consolidation of the cases, that no harm has, as a result thereof, come to the defendants Brown or the Mutual Casualty Co.

For the reasons urged, we respectfully submit that the judgment of the Supreme Court should be reversed, and the judgment of the Hudson County Circuit Court affirmed.

Respectfully submitted,

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New Jersey Court of Errors and Appeals

GIUSEPPINA LA BELLA, administratrix *ad prosequendum* of the estate of DIMETRIO LA BELLA, deceased, *Plaintiff-Appellant,* *vs.* ARTHUR H. BROWN and MUTUAL CASUALTY COMPANY, *Defendants-Appellees.*	*Action at Law.* *On Appeal from New Jersey Supreme Court.*
GIUSEPPINA LA BELLA, administratrix *ad prosequendum* of the estate of DIMETRIO LA BELLA, deceased, *Plaintiff,* *vs.* CHARLES W. DERR (amended to read Carl W. Derr), *Defendant.*	

BRIEF OF DEFENDANTS-APPELLEES, ARTHUR H. BROWN AND MUTUAL CASUALTY COMPANY.

1.

Statement of the Case.

The plaintiff-appellant is appealing from a decision of the New Jersey Supreme Court reversing a judgment of the Hudson County Circuit Court, from which the present defendants-appellees had appealed. These defendants alone had taken the appeal; the defendant, Charles W. Derr, had not appealed. The plaintiff sued

Charles W. Derr in one action in the Hudson County Circuit Court and sued Arthur H. Brown and Mutual Casualty Company in another action in the same court.

The plaintiff administratrix sued under the Death Act for the alleged wrongful death of her husband, which occurred as follows: He was crossing the Hudson County Boulevard, at or near Fifty-second street, from the westerly side to the easterly side. An automobile, driven by the defendant, Derr, in a southerly direction on said Boulevard, struck him and threw him to the ground. After an interval and after the automobile of Derr had come to a complete stop, and while Derr was walking back to where the deceased lay, another automobile, which was the property of the defendant, Mutual Casualty Company and which was being driven by the defendant, Arthur H. Brown, came along in the same direction and (it is alleged by the plaintiff, although denied by these defendants) collided with the plaintiff's intestate as he lay on the ground. He subsequently died at the hospital.

The first suit was brought against Arthur H. Brown and the Mutual Casualty Company; the second suit was subsequently instituted against Charles W. Derr and the owner of the car which Derr was driving, namely, L. C. Bigelow Co. On the motion, the summons and complaint against L. C. Bigelow & Co. was quashed on the ground of improper service and this corporation was thereby removed permanently from this litigation.

On motion in open court, by consent of all counsel involved, the two cases were consolidated for the purpose of trial.

At the close of plaintiff's case, counsel for these defendants moved for a non-suit, which was denied (pp. 111 and 112). At the close of the case, counsel for these defendants moved for a direction of a verdict, which was denied (p. 144). Moreover, counsel for these defendants took various exceptions to the Court's charge (pp. 166 to 170, inc.). The Court, against objection by counsel, submitted these two cases to the jury on the theory of joint liability and instructed the jury that they could bring in a verdict against either Derr or against Brown and Mutual Casualty Company or against both sets of defendants. The Court, in effect, instructed the jury that they could bring in a joint lump sum verdict against all the defendants; and the jury did, in fact, bring in one verdict of twelve thousand dollars against all the defendants. One judgment was subsequently entered on this verdict against all the defendants (pp. 16 and 17).

Eleven grounds of appeal were advanced by these defendants (pp. 20-23, inc.). These were combined as follows: Grounds 3, 5, 6, 9, 10 and 11, dealing essentially with the Court's submission of these cases to the jury on the theory of joint liability, were consolidated as Point I. Grounds 1 (denial of motion for non-suit), 2 (denial of motion for direction of a verdict), and 7 (charge of the Court on cause of death) were argued as Point II. Ground 8 was waived. Ground 4 is now waived. These points will be argued in the same manner in this brief. The Supreme Court, in an opinion written by the Chief Justice (pp. 171-174, inc.) reversed the judgment on the ground that the rendition of a single verdict against the several defendants in the two independent actions and the entry of

a single judgment against all of the defendants were unwarranted because: firstly, there was no actual fusion or merger of the two actions in the one and secondly, because there could be no such fusion as to warrant a single verdict as it did not appear by the testimony that a single suit could have been maintained against all of the defendants jointly as the injury complained of was not a single one since it resulted from divers and disconnected acts of negligence on the part of the respective defendants.

2.

BRIEF [redacted] OF THE ARGUMENT.

POINT I.

The Supreme Court was correct in finding that the causes of action against the two sets of defendants were several and not joint; that a single suit could not have been maintained against all of the defendants jointly; that the injury complained of was not a single one; that it resulted from disconnected acts of negligence and that, therefore, there should have been separate verdicts for the respective injuries caused by each of the defendants.

The grounds of appeal embraced under this point will not be repeated verbatim and comprise Nos. 3, 5, 6, 9, 10 and 11 and are found on pages 20 to 23 of the State of Case. They all deal with the error of the Court in instructing the jury that they might return a lump sum verdict against all the defendants on the ground that they were joint *tort-feasors* as well as with the erroneous entry of a single judgment in one lump sum against all the defendants.

The various pertinent parts of the Court's charge under this head are as follows:

At page 147 the Court charged:

"The plaintiff in this case contends and claims that the decedent La Bella and three friends were crossing the Hudson County Boulevard, at 52nd street and the Boulevard, about nine o'clock on the evening of March 4, 1923, and when he had reached a point out in the Boulevard, which is stated at various distances by various witnesses, he was struck, it is claimed, by the automobile of the defendant Derr—at least, by an automobile driven by him at that time—and I do not understand that he denies that he was driving or that he struck this La Bella at about the time and place claimed; and it is further claimed that after the car driven by Derr struck the decedent, and while they were in the street, an automobile belonging to the Mutual Casualty Company, driven by Arthur H. Brown, ran into La Bella, and that as the result of both of these collisions, or at least one of them, La Bella died in the hospital three days later."

At pp. 154, *et seq.*, the Court charged:

"It becomes very important, gentlemen, for you to understand certain phrases which have been used by the attorneys in these cases, and which have been referred to by the Court, namely, concurrent causes and intervening efficient cause, on which I will quote to you from the law:

'As a general rule it may be said that negligence to render a person liable need not be the sole cause of an injury. It is sufficient that his negligence concurring with one or more efficient causes, other than plaintiff's fault'—and that would mean in this case the decedent's fault—'is the proximate cause of the injury. So that where two causes combine to produce injuries a person is not relieved from liability because he is responsible for only one of them. Within

the rule, the causes concurring with one's negligence may be the negligent act of another, if the act of such other is not imputable to the person injured, or inevitable accident, act of God, or some inanimate cause. A person is not excused from liability for failure to perform a duty because another person failed to perform his duty. Where several causes producing an injury are concurrent, the injury may be attributed to all or any one of the causes. It is sufficient if the negligence of the party sought to be charged is an efficient cause, without which the injury would not have resulted, and that such other cause is not attributable to the person injured. But it must appear that such person was responsible for one of the causes which resulted in the injury. The concurring negligence of another cannot transform the remote into the proximate cause of an injury or create or increase the liability of another.

'Concurrent causes within the rule are causes acting contemporaneously and which together cause the injury, which injury would not have resulted in the absence of either.'

And to apply that rule which I have quoted to you gentlemen, you would consider the injury in this case to mean death. I quote further:

'But where the negligence of one consists in a condition merely which is rendered injurious by the subsequent negligence of a third person'—or another person—'the acts of the two persons are not concurrent. The mere fact that the concurrent cause was unforeseen will not relieve from liability for the act of negligence.'

'The mere circumstance that there have intervened between the wrongful cause and the injurious consequence acts produced by the volition of animals or persons does not necessarily make the result so remote that no action can be maintained. The test is not to be found in the number of interven-

ing events or agencies but in their character and in the natural connection between the wrong done and the injurious consequence, and if such result is attributable to the original negligence as a result which might reasonably have been foreseen as probable the liability continues. But an intervening cause will be regarded as the proximate cause, and the first cause as too remote where the chain of events is so broken that they become independent and the result cannot be said to be the natural and probable consequence of the primary cause.'

And it has been expressly held, if the concurrent acts of two persons combined together result in an injury to another person, he may recover damages from either or both; and in the practical furtherance of justice, it is the principal of the law of torts, that where two or more wrong-doers injure another in person or property by their several acts, all of which contributed to one wrong, then upon the evidence, no distinction can be drawn between their own acts, they are all jointly and severally liable.

Now, gentlemen, in these cases, it seems to have been fairly well shown that La Bella, after being struck by the automobile driven by the defendant Derr, lay in the street for some length of time; and if you find that the automobile driven by Mr. Brown, which came along later, actually struck the prostrate form of La Bella, then you will have to apply these rules which I have given you, in order to determine whether or not death was caused by the concurrent negligent acts of both Derr and Brown, or whether or not it was caused solely by the independent act of one or the other. If it was an independent act of Mr. Derr in which any negligence on the part of Brown did not concur, then of course Brown would be exonerated and also the Mutual Casualty Company.

Again, if you find that it was the independent act of Mr. Brown in driving the Mu-

tual Casualty Company's automobile which caused the death of La Bella, without the contributing cause of the negligence of Derr so that Derr's negligence became a proximate cause of La Bella's death, then of course Brown and the Mutual Casualty Company would be chargeable with his death and not Derr.

So you see you have a nice question there to determine whether or not under the rules I shall give you with respect to contributory negligence, and also upon the main question of the negligence of each party, or not the death of La Bella was due to the negligence of either driver, or both, or whether or not these two drivers were both of them free from any charge of negligence.

Now, right here, gentlemen, I think we should consider the claim of Mr. Brown, who says that he did not strike the body of La Bella—and, of course, gentlemen, if that is so, then immediately your verdict would be in favor of the defendant Brown and of the defendant the Mutual Casualty Company, and against this plaintiff, because they could not be charged under such circumstances, very naturally, with any responsibility for the death of La Bella. If, however, you find that both automobiles struck the plaintiff's intestate, then it becomes necessary—as I indicated a moment ago—to determine if both were—and if one, which one was—negligent, which negligence, was the proximate cause of the death so it can be said that the negligence of both together, concurrently operated in causing the death of La Bella."

At page 160, the Court charged as follows:

"If you find, however, that both drivers, Derr and Brown, were negligent and that the negligence of each one of them was a proximate cause or a concurrent cause within the rules I have given you, so that the negligence of each one of them was a proximate cause directly contributing to the

death of La Bella, and that they were concurrent causes, then if plaintiff's intestate was free from any contributory negligence, the plaintiff would be entitled to recover against all three defendants, Derr, Brown and the Mutual Casualty Company."

The Court continued its charge as follows (p. 165):

"The Court: Just before you retire, gentlemen, I should possibly say this to you, that if you should find a verdict should be rendered against all three of these defendants, the mere fact of there being two suits should not confuse you as to how your verdict should be rendered, because you would find one lump sum; you would not split it up as against the separate defendants. You are not privileged, in a case such as this, to say that one defendant was 25 per cent. negligent and the other defendant 75 per cent. negligent, although the negligence of both constituted proximate causes of La Bella's death. You would have to find one lump sum under such circumstances against the defendants.

If, on the other hand, you find that the verdict should be against only Mr. Derr, and not against Mr. Brown and the Mutual Casualty Company, then the form of your verdict would be: 'We find in favor of the plaintiff and against the defendant Derr,' stating the amount in one lump sum; and at the same time you would say: 'We find in favor of the other two defendants against the plaintiff.' And again, if you should find that Mr. Brown and the company which he represented, the Mutual Casualty Company, were negligent and your verdict should be against them in favor of the plaintiff, you would find against them for one lump sum in favor of the plaintiff and against those two defendants, but, at the same time, you would find a verdict in favor of the defendant Derr and against the plaintiff.

And again, in order to make the situation clear, if you should find that the plaintiff was not entitled to a verdict against any of the defendants, then you can say you find in favor of all the defendants and against the plaintiff of no cause of action."

When the jury retired the following colloquy took place:

At page 166:

"Mr. Schneider: May I have an exception to that part of your Honor's charge where your Honor instructed the jury to find a lump sum verdict against all the defendants, and not find a separate verdict against each, my contention being based on the separate causes of action, and they were not joined except for convenience of trial.

The Court: They were consolidated by consent.

Mr. Schneider: Just for convenience of trial.

The Court: I have assumed they were together.

Mr. Johnson: They were consolidated.

Mr. Schneider: They were consolidated for the purpose of trial.

The Court: You can look it up and see what the form of consolidation was.

Mr. Johnson: They were consolidated in open court by agreement.

Mr. Brenner: That the two causes should be tried together.

The Court: The Court understands and so rules that the causes have been consolidated in open court, as though they had been instituted as one suit. That is the course I have pursued. You can take an exception, if you wish.

Mr. Schneider: May I take the stand, your Honor, that we consolidated the actions for the purpose of convenience in trying them together, so it may appear that these

exceptions were taken on behalf of the defendants Brown and the Mutual Casualty Company."

A further exception was taken on this point as follows:

At page 167, lines 15 to 20:

"I also except to your Honor's charge on the concurrent causes of death, as it seems to me that the actions of both sets of defendants were absolutely separate and several and not in any way concurrent or joined."

Also page 167, lines 35 to 40:

"And I desire to take a general exception to the general theory of your Honor's charge, in that your Honor seemed to leave the question to the jury on the theory of the joint negligence of the defendants, as there were two cases brought, and the evidence shows there were two separate actions, and therefore there were two separate causes and not a joint cause of action."

The Court recalled the jury and pertinent to this present point charged as follows:

At page 169:

"Now, some question was raised that I seemed to leave the case to you upon the theory that there was a joint cause of action—whatever that may mean—I apprehend it to mean that there was but one accident. I think I made it clear to you that you were to investigate his conduct with respect to the charge of negligence against these two drivers, and investigate their conduct, and if one automobile struck him before the other one struck him. But what I intended to charge you was this, that in order to find both of these defendants guilty of negligence, the negligence of each one of them must have been a proximate cause, concurring with the other cause producing death; not upon the theory that La Bella was struck by these two cars at the same time, or that it was only

> the one accident that we are to investigate, but when I referred to concurrent causes I was referring to that which produced death —whether or not there were two, later united, concurring together, that produced death; that is, whether this death resulted from the negligence of each one of these defendants operating together in producing death. Probably it would be better to say if the successive acts of these two parties, within one of the definitions I have laid down here, operated so that each successive act of negligence was a proximate cause leading up to and concurring in and causing the death of La Bella, then, under such circumstances, the cause of such acts of negligence might be liable."

Exception to this was taken in the following language (see p. 170, ll. 15 to 20):

> "I also renew my exception to that part of your Honor's charge leaving the case as a joint liability case and not a separate liability."

If the Court committed error in the above, it certainly was prejudicial as the judgment record shows a joint verdict to have been rendered against both sets of defendants that is, against the three defendants; in fact, a one lump sum joint verdict was rendered against all three of them (see pp. 16 and 17).

A brief resume of the testimony of the witnesses as to the liability is important to show that the cause of action could not in any respect have been joint and that, in fact, the two collisions were separate and distinct and each gave a separate and several cause of action to the plaintiff and not a joint one. This testimony coincides with what the Court charged. (See quotation from charge from p. 156, ll. 12 to 20.)

> "It seems to have been fairly well shown that La Bella, after being struck by the auto-

mobile driven by the defendant Derr, lay in the street for some length of time; and if you find that the automobile of Mr. Brown, which came along later, *et cet.*"

Thus the two collisions were absolutely separate and an interval of time elapsed between them. They are not one occurrence but two separate occurrences and, therefore, produce two several causes of action and not one joint cause of action.

Tony Costerello, a half brother of the intestate, showed by his testimony that *there was quite an interval between the two collisions,* viz, the collision between Derr's car and the intestate and the collision of Brown's car and the intestate (pp. 27-65; see especially his testimony from p. 35, l. 31 to p. 38, l. 15). *In this connection an erroneous fact set forth in our opponent's brief should be corrected as a very serious argument is made on the basis of it that it appeared that Brown's machine caused the death.* Our opponent (on p. 3 and elsewhere of his brief), says that the testimony was that when the brother of the deceased went to pick him up, the deceased said that his leg was sore and that he could not get up and that after the second collision he could not talk. *This is absolutely wrong as the testimony is that he could not talk after the first collision but just grunted* (see p. 35, l. 35 to p. 36, l. 10). This appears on direct examination. His evidence shows that the intestate was struck by the first automobile, which proceeded some distance and stopped, that the witness then tried to pick his brother up, saw another automobile in the distance, dropped his brother and tried to signal to the second automobile to stop. It did not do so and struck the deceased and dragged him about 14 feet.

Salvatore Madero (pp. 65-76) corroborates the point that there was an *appreciable interval* between the two collisions.

William Gannon (pp. 88-106) saw only the second car (Brown's) run over the deceased as he lay in the road, his brother being about ten feet from him, waving his hands.

Charles W. Derr, the co-defendant (pp. 110-124), testified that he struck the intestate with his Ford car without fault on his part, the deceased came into contact with the radiator, hung for an instant and then dropped to the left side of the automobile. He (Derr) then stopped his car, started up and pulled to the curb, got out and started to walk back to the man who lay on the road; he then saw another car (Brown's) pass over the body. Ruth Derr (pp. 125 to 134) substantially corroborates her husband's testimony.

A very appreciable interval, therefore, elapsed between the two collisions, enough of an interval to allow Derr to stop his car, pull to the curb and to walk back towards the body.

Arthur H. Brown, one of the defendants (pp. 134-144), testified that he was driving in a southerly direction on the Boulevard to the right of the center line, about 12 miles an hour; that when he got to about 25 or 30 feet of the southerly cross-walk on Fifty-second street, he saw a man directly in front of him, shouting and calling "Brother!" He turned slightly to avoid striking the man who was shouting and stopped his car. He then asked the man what the trouble was and was informed, "My brother hit by automobile." He then saw the deceased lying a little to the right and slightly to the rear of his car.

He asked the man which car had been involved in the collision and the man pointed to the car of Mr. Derr at the curb. He said specifically that he did not run over the body or touch it. He said that the road was very dark and that he applied his brakes and stopped immediately.

It is also essential to consider the testimony of Dr. George H. Sexsmith (p. 77 *et seq.*) the physician produced by the plaintiff to prove the cause of death and the only physician who testified. He said that he examined the deceased on his admission to the Bayonne hospital, found him covered with dirt and ascertained that he had a decided contusion on the right leg, thigh, bruises of the skin and a bleeding condition with dirt scraped into it; he had a decided contusion with a good deal of swelling in the back of the head, he was suffering decidedly from shock and was practically unconscious. *He said specifically that the patient died of hemorrhage of the brain.* He also said that the leg was not fractured. He said that the swelling on the back of the head was a big mass, about two and one-half inches from the bone, about the size of a half of a muskmelon. He said that he believed that the *deceased had a fractured skull and that he died from injury to the brain and that the leg injury was the minor injury comparatively.* He said also that the patient had no other fractures of any kind on his body excepting the lump on his head and no lacerations.

An analysis of the testimony shows, therefore, that the two collisions, namely, that of the deceased with Derr's car and that of the deceased with Brown's car were absolutely separate and distinct as to (a) time, (b) place, (c) circumstance and (d) the amount of damage caused by each.

(a) *As to time.* All the testimony was uniform on this point and shows that there was an appreciable interval of time between the two collisions. As long as this element exists it does not make any difference whether it was a long interval or a short interval. Tony Costerello testified that Derr's car passed, that he picked up the deceased's body, saw Brown's car at a considerable distance away, dropped the body and sprang aside. Madero testified that he did not see Derr's car at all but saw Brown's car at a considerable distance down the street. Gannon, the taxicab driver, testified that when he was about three blocks away he saw what he thought was a bundle, but it really was the body of the deceased in the street, and did not, at that time, see Derr's car; therefore, he must have been a distance of three blocks after the first collision. Derr testified distinctly that he stopped his car, pulled to the curb, alighted from it and was on his way back to the body before he saw Brown's car come along; his wife's testimony is likewise; Brown testified that he did not see the first car as he came along the Boulevard.

Therefore, all are unanimous in showing this appreciable interval between the two collisions.

(b) *As to place.* Although the two collisions happened at about the same place, still there was an appreciable difference in place between the two. Derr testified—and he is not contradicted—that the deceased suddenly loomed in front of his car, hung onto the radiator for a short space of time and dropped to the left of his car. It is then alleged that Brown's car went over him as he lay there. *The collisions, therefore, occurred at different places.*

(c) *As to circumstances.* There was an entirely different set of circumstances in the two

collisions. The collision with Derr's car occurred while the plaintiff's intestate was crossing the street, as detailed above, whereas the collision with Brown's car, if any, occurred while the intestate was on the ground, his brother waving his hands and shouting, etc.

(d) *As to the damages and injury caused by each collision.* The deceased caught onto the radiator of Derr's car and dropped to the ground, Derr's car apparently not passing over him; so Derr testified. The only clear evidence on the damage wrought by Brown's car, if any, is that it passed over the middle or lower part of his body. Gannon testified that he thought that one wheel passed over the middle of his body in the region of the thigh; Derr testified likewise and thought that Brown's car passed over the upper part of the leg or legs. Dr. Sexsmith testified that the outstanding objective symptoms on the patient when he was brought to the hospital were: Firstly, a large lump on the back of his head which indicated a fracture of the skull, and secondly, a bad swelling on the right leg or thigh. Therefore, there were two outstanding distinct injuries, the probability being that the head injury was caused by Derr's car and the leg injury by Brown's car, if any. At any rate, the jury had a right to determine which of these injuries was caused by each car or whether both were caused by one car, and the jury, moreover, had a right to determine which of the injuries resulted in the death of the plaintiff's intestate. It might very well have been determined that the fracture of the skull was caused by Derr's car in the first collision and that, therefore, the death was caused by Derr and that the other injury to the leg, caused by Brown, was comparatively a minor injury, as Dr.

Sexsmith testified, and had nothing to do with the death. *It should be noted that there is no testimony whatsoever that the leg injury contributed in any way to the death. Dr. Sexsmith said that the brain injury was the cause of the death and does not ascribe any contributory cause. It is, therefore, clear that it might very well have been that the two collisions caused two entirely different injuries as to kind and degree and the jury should have been allowed the right to determine which was the cause of the death.*

Moreover, as will be shown by citations below, the fact that it might be difficult for the jury to reach a conclusion as to how much injury each of the collisions caused does not make any difference in the legal principle; that is, the peculiar function of the jury, and there are many cases where juries are faced with similar difficulties.

The Court should have submitted these cases to the jury on the theory of a separate or several liability and should have instructed them to bring in separate verdicts against the two sets of defendants; that is, a separate verdict against Derr, if any, for the injury which he inflicted and a separate verdict against Brown and the Mutual Casualty Company, if any, for the injury which they inflicted. The jury should have been charged that a lump sum verdict against the two sets of defendants was not permissible in these cases.

Our opponent, in his brief, lays tremendous emphasis on the fact that the cases were consolidated and argues very ingeniously, although speciously, on the same; in fact, he makes it Point II of his brief and devotes seven pages or more thereto. The opinion of the Supreme

Court (p. 172 of State of Case), describes this occurrence at the trial in the following language:

> "When the cases were ready for trial it was agreed by counsel for the plaintiff and for the respective defendants that the two cases be tried together. This was done, etc."

The Court refers to what occurred at the trial as described on page 25 of the State of Case (ll. 7-10), wherein the following recital occurs after the title of the cases is set forth and the appearances of counsel noted.

> "It is agreed by counsel for plaintiff and the respective defendants that the two cases be tried together."

The Supreme Court (p. 172, ll. 25, *et seq.*), says of this:

> "Our consideration of this ground of appeal leads us to the conclusion that the rendition of a single verdict against the several defendants in these two independent actions and the entry of a single judgment thereon against all of such defendants were neither of them warranted by the mere fact that the cases were consolidated solely for the purpose of trial. In order to justify the direction of a single verdict and the entry of a single judgment thereon, there must be an actual fusion or merger of the two actions into one and such fusion or merger must appear upon the record of the single suit thereafter prosecuted. Moreover, in order to warrant the fusion or merger of two tort actions like the present, brought by the same plaintiff against different defendants, it must appear that a single suit could have been maintained against all of them jointly, that is, that the injury complained of was a *single one*, although resulting from diverse and disconnected acts of negligence on the part of the respective defendants."

The Trial Court took the stand that the causes were consolidated in open court as though they had been instituted in one suit. As far as that went, the ruling was free from error. In going further, however, and ruling that one single verdict might be rendered against all of the defendants, the Trial Court erred, for even though the two causes had been instituted in one suit, it would not have been proper to find a single verdict unless this cause of action was a joint one and not several. In fact, a single suit could have been instituted with two or more counts; this is a frequent occurrence. In such cases the Court instructs the jury properly to find separate verdicts if the causes of action be several, as in this case. *Counsel for the defendant confuses the word "Case" with cause of action.* It is perfectly possible to have one case with several separate and distinct causes of action in it. There is no doubt, however, from the phraseology of the oral stipulation in court that the cases were consolidated, as the Supreme Court says, solely for the purpose of trial.

The underlying and fundamental point, however, is the theory enunciated in the last part of the quotation from the Supreme Court (*supra*), viz., that in order to justify one verdict against all the defendants, the injury must be a single one. The Supreme Court cites *Matthews* v. *Del., Lack. and West. R. R. Co.,* 56 N. J. L. 34, for authority on the point that where a person seeks to recover from several tort-feasors for separate injuries resulting from distinct and disconnected wrongful acts, some of which were committed solely by one wrong-doer and others by entirely different persons, a single action will not lie in his behalf against all of such wrong-

doers jointly. The opinion then quotes rom Cyc., Vol. 38, page 484, as follows:

> "Where wrong-doers have not acted in concert and separate and distinct injuries are caused by the act or neglect of each, the liability is several only."

The opinion further holds that this rule was followed in *Chipman* v. *Palmer,* 77 N. Y. 51, and *Nierenberg* v. *Wood,* 59 N. J. L. 112, and cites the last-named case as authority for the proposition, that *while there may be difficulty in determining whether the death was caused by one injury or the other, or whether it was the combined result of both, still this fact furnishes no reason for holding that one tort-feasor should be liable for an act of others who have no association with and did not act in concert with him and for whose conduct he is in no way responsible.*

Our opponent's brief (p. 4) quotes from 38 Cyc., page 484, and argues that this quotation holds to the contrary. It might possibly appear on the surface that the two quotations from Cyc. are conflicting but a careful reading of the one cited in our opponent's brief and the one cited in the Supreme Court opinion will show that they are not only non-conflicting but agree. The quotation cited by our opponents is as follows:

> "Where, although concert is lacking, the separate and independent acts of negligence by several combine to produce directly a *single injury,* each is responsible for the entire result, even though his act or neglect alone might not have caused it. It has been said that 'to make tort-feasors liable jointly there must be some sort of community in the wrong-doing and the injury must be in some way due to their joint work, but it is not necessary that they be acting together or in concert if their

concurrent negligence *occasions* the injury.' " (Italics ours.)

It can be noted without much scrutiny that this theory pre-supposes a *single injury* as well as *concurrent* negligence, which must *occasion* the injury. These elements are all lacking in the instant case. The defendant Derr's automobile struck and knocked down the decedent, inflicting one single injury; Brown's automobile struck him later, inflicting another single injury; these two collisions did not concur but happened at an appreciable interval; moreover, Brown's automobile could not have occasioned the injury which was caused by the preceding collision with Derr's automobile.

It can be seen, therefore, that this quotation from Cyc. refers to an entirely different set of circumstances and that the quotation from Cyc. in the opinion of the Supreme Court applies and covers the case *sub jud.*

> "Where wrong-doers have not acted in concert and separate and distinct injuries are caused by the act or neglect of each, the liability is several only."

In fact, the quotation given by our opponent applies to such cases as where a person is injured by a collision between a railroad train and a trolley car at a crossing, as in *Matthews* v. *Del. Lack. and West. R. R. Co.*, (*supra*). Our opponent quotes this case on page 7 of his brief; it is also quoted by the Supreme Court in its opinion (p. 173). *The fallacy of our opponent can readily be seen from this.* He confuses a crossing accident between two vehicles with the instant case. We have read all the cases which he quotes and they are similar ones to the Matthews case; *all of them involve accidents where two vehicles collide or similar situations.*

These cases really support our position, for the acts of negligence produce directly a *single* injury, *concur* and *occasion* the injury. In the instant case, acts of negligence did not concur, were separate and occasioned different injuries.

Justice Kalisch, who sat in the instant case in the Supreme Court, was counsel for one of the defendants in the Matthews case and the facts of that case must have been clearly in his mind. The differentiation between the Matthews case and the instant case becomes clear as crystal upon even a superficial analysis of the facts. In addition to the Matthews case, our opponent CITES [redacted] four cases (p. 7 of his brief). These, upon an analysis of the facts, are as much in our favor as the Matthews case.

N. Y., etc. R. R. Co. v. *N. J. Elec. Co.,* 60 N. J. L. 338, involves a collision between two railroad trains; a joint occurrence and not separate and several occurrences; likewise *Lombardi* v. *Yulinsky,* 98 N. J. L., 332, which involves the negligence of a driver of an automobile in striking a pile of bricks and the negligence of a defendant who did not place a light on them; *Goekel* v. *Erie R. Co.,* 126 A., 446, is a case where a plaintiff driving an automobile was struck by a train and sued the railroad company and the engineer, and the jury found a verdict against the railroad company and in favor of the engineer; *Rose* v. *Squires,* 128 A., 880 (erroneously referred to in our opponent's brief as p. 128) involves a collision between two automobiles.

Our opponent, in his brief (p. 5) critizes the fact that *Chipman* v. *Palmer* (*supra*) is cited by the Supreme Court opinion and says that it is not followed in our State, citing *Weidman*

Silk Dyeing Co. v. *East Jersey Water Co.*, 91 A., 338.

If this were so, it would be worthy of note as Chief Justice Gummere, as well as Justice Kalisch, were two of the judges who sat in the Weidman case as well as in the instant case. A reading of the Weidman case, however, as well as its companion cases, will show that they enunciate the same theory as *Chipman* v. *Palmer*. The companion cases are *Weidman Silk Dyeing Co.* v. *City of Newark*, 91 A., 335, wherein also Chief Justice Gummere and Justice Kalisch were two of the judges that sat, and *Weidman* v. *Jersey City Water Supply Company*, 91 A. Rep., 337, where the same judges sat.

In these cases, the plaintiffs sued the various Municipalities for various diversions of the natural flow of water. It was squarely held that there was no joint liability but, in fact, a several liability. In the case against Newark, the plaintiff proved a total loss of $57,541.02. A larger verdict was reduced to $9,590.16 on the ground that he had proven that Newark diverted only one-sixth of the waters. In the case against the Jersey City Water Supply Company, the defendant was charged with two-fifths diversion and as the verdict was less than two-fifths of the total damage, it was allowed to stand, being held to be not excessive. In the case against the East Jersey Water Co., the same course was followed. The defendant sought to have a verdict set aside on the ground that part of the damage was caused by the polluting of the waters by several parties, but the Court said:

> "It was open to the jury to find that, notwithstanding the pollution, plaintiff could have still used the water but for the abstraction by the defendant and defendants

> in the other suits which collectively absorbed a large proportion of the entire flow for Municipal water supply."

These cases, therefore, agreed with *Chipman* v. *Palmer,* which held that where different parties polluted a stream by the discharge of sewerage therein, each from his own premises and each acting separately and independently of the others, one of the number would not be liable for all the injury suffered by another because of the nuisance thus created; each would be liable only to the extent of the wrong committed by him.

Cooley on Torts, 3rd Ed., Vol. I., page 251, says:

> "A tort which is several when committed cannot be made joint by matters occurring subsequently, over which the tort-feasor has no control."

On behalf of these defendants in the instant case it can be argued that a tort which is several when committed cannot be made joint by matters occurring prior, over which the tort-feasor has no control.

This language is followed in Cyc., page 485, as follows:

> "Furthermore, if defendant's act was several when it was committed, it cannot be made joint because of a consequence which followed in connection with the result of the same or a similar act committed by others."

In note 96 under this excerpt, various cases are cited, including *Chipman* v. *Palmer* (*supra*).

Bouvier's Law Dictionary, Rawle's 3rd Edition, Vol. 2, page 1707, says:

> "Where two or more parties act, each for himself and independently of each other in a manner which may be injurious to another,

they cannot be held jointly for the acts of each other."

Livesay v. *First Nat'l. Bank,* 86 Pac. Rep. 102, 6 L. R. A. N. S. 598 (Colorado 1906).

This case quotes from Pomeroy in his work on Remedies and Remedial Rights, Second Edition, page 265, as follows:

"In order, however, that the general rule thus stated should apply, and a union of wrongdoers in one action should be possible, there must be some community in the wrongdoing among the parties who are to be united as co-defendants; the injury must in some sense be their joint work. It is not enough that the injured party has, on certain ground, a cause of action against one for the physical tort done to himself or his property, and has, on entirely different grounds a cause of action against another for the same physical tort; there must be something more than the existence of two separate causes of action for the same act or default, to enable him to join the two parties liable in the single action. This principle is of universal application. Persons who act severally and independently, each causing a separate and distinct injury, cannot be sued jointly, even though the injuries may have been precisely similar in character and inflicted at the same time. A joint tort is essential to the maintenance of a joint action. For separate and distinct wrongs in nowise connected by the ligament of a common purpose, actual or implied by law, the wrongdoers are liable only in separate actions, and not jointly in the same action.

The great weight of authority supports the principle that, where two or more parties act each for himself and independently of each other in a proceeding the result of which may be injurious to another, they cannot be jointly held liable for the acts of each other."

Blaisdell v. *Heister Stephens, et al.,* 14 Nev. 17 (1879).

In this case plaintiffs owned a ditch in which flowed waste waters from lands of the defendants, which lands each defendant owned and irrigated separately. It was held that:

> "The general principle is well settled that where two or more parties act, each for himself, in producing a result injurious to plaintiff, they cannot be held jointly liable for acts of each other."

Similarly *White* v. *Delmany,* 2 N. H. 547.

City of Valparaiso v. *Moffit,* 39 N. E. 909 (Indiana, 1895).

> "If several distinct acts of several persons have contributed to a single injury, but without concert of action or common intent, there is generally no joint liability."

This case approved the following language in *Miller* v. *Ditch Co.,* 87 Cal. 430, 25 Pac. Rept. 550:

> "It is held that in such a case the tort of each defendant was several when committed and that it does not become joint because afterwards its consequences united with the consequences of several other torts committed by other persons. If it were otherwise, say the authorities, one defendant, however little he might have contributed to the injury, would be liable for all the damages caused by the wrongful acts of all the other defendants, and he would have no remedy against the latter because no contribution can be enforced between tort-feasors."

This Indiana case further says:

> "If there be no concert of action between the tort feasors, and their acts be separated as to place and time, but united in their consequences, the fact that it may be difficult to apportion the damages to each act or wrongdoer may be the plaintiff's misfortune, but it furnishes no good reason to make one wrongdoer liable for all the damages."

Similarly, *Howell* v. *Bent, et al.,* 137 Pac. Rept. 49 (Montana).

In this case the defendants each had a ditch and tapped a creek, causing wrongful diversion of water and thereby loss of crops to the plaintiff. It was held that the plaintiff's remedy was several and not joint.

Similarly, *Verheyen* v. *Dewey,* 146 Pac. Rept. 1116 (Idaho, 1915).

This case held substantially that where the tort was several when committed it did not become joint because afterwards its consequences united with the consequences of several other torts committed by other persons.

We contend, moreover, that these defendants *Brown and Mutual Casualty Company were prejudiced very materially by this error of the Trial Court in submitting the case on the theory of a joint tort and that it is a reversible error.* If the jury had been allowed to find separate verdicts against the defendants, it is very conceivable that they might have found a comparatively small verdict against Brown and a substantial verdict against Derr. It would have been within their power to do so considering the testimony as to how the accident occurred, the damages were inflicted and the cause of death.

It is, therefore, respectfully urged that the Supreme Court properly reversed the Circuit Court on this account.

POINT II.

This point deals with grounds of appeal 1, 2 and 7; (1) being the refusal of the Court to grant a non-suit at the close of the plaintiff's case, (2) being the refusal of the Court to direct a verdict at the close of the entire case and 7 being the error of the Court in its charge in submitting to the jury the question as to whether the death of the deceased was caused by the Mutual Casualty Company and Brown, its agent, to which proper exception was taken. (See p. 167, ll. 20 to 25.)

A. Brown, the driver of the car belonging to the Mutual Casualty Company, was not guilty of any negligence and the motion for a non-suit should have been granted; likewise the motion for a direction of a verdict.

The testimony of the various witnesses has been detailed at length under Point I and it is, therefore, unnecessary to go over the same again. Moreover, as the testimony of the defendant Brown, who was the only witness produced for himself and the Mutual Casualty Company, did not materially change the situation, the Court's refusal to grant a non-suit and to direct a verdict may be discussed together; likewise the point as to whether the Court should have submitted to the jury the question as to whether, from the medical point of view any act or neglect on the part of Brown caused the death of the deceased.

A careful reading of the testimony does not show any act of omission or commission on the part of the defendant Brown which amounted to legal negligence. *There is no testimony that he was exceeding the legal speed limit.* On this point all the witnesses agree that Brown's automobile was traveling at the usual and ordinary rate of

speed. The body was lying on a dark road and the companion of the deceased was standing in the roadway waving his arms and shouting. There was nothing in the action of the latter to bring to Brown's notice the fact that the deceased was lying in the roadway in a dangerous position. He did, in fact, stop—and quickly, too—so as to avoid striking the man standing in the roadway. Of course, we, in this argument, must adopt the verdict of the jury, which evidently found that Brown's car did collide with the body, but, even so, negligence cannot be predicated on this mere fact of the collision. Brown testified—and he was uncontradicted in this, in fact, corroborated by Gannon—the taxicab driver—that the approach of the taxicab had the effect of temporarily diminishing his vision. It would be no negligence on his part under such circumstances not to see the body lying on the ground. He would then naturally only see the man standing up and would stop to avoid hitting him, as he did. Moreover—and this is important—the fact that a man was standing and waving his hands and shouting in the roadway would attract the attention of a driver such as Brown and he would take his eyes off the ground, so that he would not see the body even if he were using the care and caution that a reasonable man would under the circumstances. After all, the test of prudence and negligence is all relative and comparative and depends upon all the circumstances of the case. If the witness Costerello had run forward and had been waving his arms and shouting in advance of the body in the direction towards Brown and Brown had then not stopped, under those circumstances it would be a question as to whether he was negligent or not. We contend, however, that under the circumstances of this case, Brown did everything

that a reasonably prudent and cautious man would be expected to do.

B. *Even if we assume that Brown was guilty of negligently causing his automobile to collide with the deceased, there is no testimony that the death was caused by the same.* The testimony on this point has been detailed above and will be, therefore, touched upon only lightly here. There is substantial unanimity among the witnesses, who testified that Brown's car did collide with the body of the deceased, that the right wheel or wheels thereof went over the upper part of one leg or thigh. Dr. Sexsmith testified that when the deceased was brought into the hospital the two outstanding injuries were the fracture of the skull in the region of the head, where there was a very large mass or lump on the outside thereof, and a severe contusion to the upper part of the right leg or thigh. *He also said clearly and without any equivocation that the death was caused by the injury to the brain. He did not say that there was any other contributory cause to the death outside of the head injury and, therefore, the leg injury had nothing to do with the death.*

Assuming, therefore, that Brown's automobile did collide with the deceased, it appears from the evidence that it caused the injury to the leg or thigh, which did not in any way contribute to the death. *Therefore, Brown's act was not a contributory or proximate cause of the death of the deceased and the Court erred in submitting to the jury this question.* Moreover, a non-suit should have been granted on this ground, as it was not enough to show negligence on the part of Brown, but it was necessary to show negligence that contributed proximately to the death of the deceased; likewise, the motion for the direction of a verdict should have been granted.

The Circuit Court, therefore, erred in refusing to grant the motion of these defendants for a non-suit and for a direction of a verdict.

The Supreme Court did not pass on this point, apparently considering the first point sufficient to reverse the judgment. It is, however, here urged as an additional reason for reversing the judgment of the Hudson County Circuit Court.

It is, therefore, respectfully submitted, for the reasons above stated, that the judgment of the Supreme Court, reversing the judgment of the Hudson County Circuit Court, should be affirmed.

Respectfully submitted,

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