

supply of a different area. This meter was installed after 1908. The water furnished through this meter was billed by the City from 1913 to 1936 inclusive at the rate of 75 cents per thousand cubic feet. The City claims that the water furnished through this meter was not included in the contract of 1908, and the quantities consumed should have been billed at the rate of 90 cents per one thousand cubic feet, the rate then prevailing in Jersey City to ordinary consumers.

In denial of this claim it is sufficient to point out that the amount of the claim, \$9,577.13, was never entered on the books of the City, was not included in the advertisement of sale, was not contemplated by the writ, was not included in the return, and is predicated upon an entirely different state of facts.

In addition to this, we urge the question of estoppel and statute of limitations as above.

The charges upon this meter also in part are within the period of Federal control.

There is nothing in the case to indicate that the rates claimed by the City were the rates in force during the period of the claim. We believe that for a portion of the time at least the Prosecutor was entitled to the 75 cent rate.

The judgment of the Supreme Court should be affirmed.

JOSE MILTON,
Solicitor for and of Counsel with
Prosecutor-Respondent.

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Complaint.

COMPLAINT.

Filed Sept. 21, 1924.

New Jersey Supreme Court

ESSEX COUNTY.

10

FANNIE GLUCK, administratrix
of the estate of EMIL M.
GLUCK, deceased,

Plaintiff,

vs.

CASTLES ICE CREAM COMPANY,
a corporation, and TRUBIN
BROS., a corporation,

Defendants.

*Action
at Law.*

Complaint.

20

The plaintiff, Fannie Gluck, administratrix of the estate of Emil M. Gluck, deceased, residing in the Borough of Brooklyn, County of Kings, City and State of New York, says that:

1. That by an order of the Surrogate's Court of the County of Kings, the said Fannie Gluck, the plaintiff herein, was duly appointed administratrix of the estate of Emil M. Gluck, deceased, for the purpose of prosecuting the claim for damages, arising from the death of the said Emil M. Gluck, as hereinafter set forth, and brings said letter of administration into this court.

30

2. That at all times hereinafter mentioned, the defendant, Castles Ice Cream Company, was and still is a corporation duly organized under and by virtue of the laws of the State of New Jersey.

40

Complaint.

3. That at all times hereinafter mentioned, the defendant Trubin Brothers, was and still is a corporation organized and existing under and by virtue of the laws of the State of New Jersey.

10 4. On October 28th, 1922, the said defendant, Castles Ice Cream Company, by its servants controlled and drove a certain automobile truck along Bergen Place, at or near the intersection of Broad street, in the City of Red Bank, State of New Jersey.

20 5. On said 28th day of October, 1922, the defendant, Trubin Brothers, by its servants controlled and drove a certain Ford automobile delivery truck along Broad street, at or near the intersection of Bergen Place, in the City of Red Bank, State of New Jersey.

30 6. On said 28th day of October, 1922, Emil M. Gluck was a passenger in the Ford delivery truck of the said defendant, Trubin Brothers, which was being driven and was under the control of the said defendant, their agents, servants or employees, and which truck at that time, was being driven at a southerly direction on said Broad street, at or near the intersection of Bergen Place, in the City of Red Bank, State of New Jersey.

40 7. That on said 28th day of October, 1922, while said automobile truck in which the said Emil M. Gluck was a passenger, as aforesaid, was proceeding in a southerly direction on Broad street, at or near the intersection of Bergen Place, in the City of Red Bank, State of New Jersey, and while the said Emil M. Gluck was riding, as aforesaid, without fault or neglect on his part, the automobile truck controlled by the servants and agents of the said defendant, Castles

Complaint.

Ice Cream Company, through the negligence of the said defendant, or either or both of them, collided with the automobile truck in which the plaintiff was a passenger, striking him, by reason of which he received great physical injuries from which he died.

10 8. That the neglect from which the complainant claims of and of which the defendant or either or both of them are guilty, consists of the fact that the said automobile truck of the defendant, Castles Ice Cream Company, was operated and propelled at a high rate of speed under the circumstances, and that no signal or other warning was given of the approach of the said automobile truck, and that it continued to cross said street after the driver of the said automobile truck had seen the automobile truck in which the said Emil M. Gluck was a passenger, approach and did not stop the said automobile truck, and in the fact that the said defendants Trubin Brothers failed and neglected to keep the said automobile truck in which the said plaintiff was riding, under proper control, and failed to properly operate the said automobile truck, and failed and neglected to stop the same after the driver had seen the said automobile truck of the defendant's Castles Ice Cream Company approaching, but allowed and permitted the said automobile truck of the defendant Castles Ice Cream Company to collide with the said automobile truck in which the said Emil M. Gluck was a passenger, resulting in his death.

40 9. That the said Emil M. Gluck at the time of his death aforesaid, was married and left him surviving his wife Fannie Gluck and two children, Adolph, who was eleven years of age, and

Complaint.

Arthur, who was three years of age, who were solely dependent upon him for their support, and have suffered pecuniary loss and damage because of his death.

10. This action is commenced within two years after the death of the said Emil M. Gluck.

Plaintiff demands as damages the sum of \$50,000.00, besides costs.

ABRAHAM HENIG,
Attorney for Plaintiff.

20

30

40

Amended Complaint.

AMENDED COMPLAINT.

Filed Dec. 30, 1924.

NEW JERSEY SUPREME COURT.

FANNIE GLUCK, administratrix <i>ad prosequendum</i> of EMIL M. GLUCK, deceased, <div style="text-align: right;"><i>Plaintiff,</i></div>	}	10
<i>vs.</i>		
CASTLES ICE CREAM COMPANY, a corporation, and TRUBIN BROS., a corporation, <div style="text-align: right;"><i>Defendants.</i></div>	}	20

*Action
at Law.*

*Amended
Complaint.*

The plaintiff, Fannie Gluck, administratrix *ad prosequendum* of Emil M. Gluck, deceased, residing in the Borough of Brookyn, County of Kings, City and State of New York, says that:

1. That she has been duly appointed by the Essex County Surrogate's Court, administratrix *ad prosequendum*, to prosecute a suit for damages arising from the death of Emil M. Gluck, as hereinafter set forth.

2. That at all times hereinafter mentioned, the defendant, Castles Ice Cream Company was and still is a corporation duly organized under and by virtue of the laws of the State of New Jersey.

3. That at all times hereinafter mentioned, the defendant Trubin Brothers, was and still is a corporation organized and existing under and by virtue of the laws of the State of New Jersey.

4. On October 28th, 1922, the said defendant, Castles Ice Cream Company, by its servants con-

20

30

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Amended Complaint.

trolled and drove a certain automobile truck along Bergen Place, at or near the intersection of Broad street, in the City of Red Bank, State of New Jersey.

10 5. On said 28th day of October, 1922, the defendant Trubin Brothers, by its servants controlled and drove a certain Ford Automobile Delivery Truck along Broad street, at or near the intersection of Bergen Place, in the City of Red Bank, State of New Jersey.

20 6. On said 28th day of October, 1922, Emil M. Gluck was a passenger in the Ford delivery truck of the said defendant, Trubin Brothers, which was being driven and was under the control of the said defendant, their agents, servants or employees, and which truck at that time, was being driven at a southerly direction on said Broad street, at or near the intersection of Bergen Place, in the City of Red Bank, State of New Jersey.

30 7. That on said 28th day of October, 1922, while said automobile truck, in which the said Emil M. Gluck was a passenger, as aforesaid, was proceeding in a southerly direction on Broad street, at or near the intersection of Bergen Place, in the City of Red Bank, State of New Jersey, and while the said Emil M. Gluck was riding, as aforesaid, without fault or neglect on his part, the automobile truck controlled by the servants and agents of the said defendant, Castles Ice Cream Company, through the negligence of the said defendant, or either or both of them, collided with the automobile truck in which the plaintiff was a passenger, striking him, by reason of which he received great physical injuries from
40 which he died.

Amended Complaint.

8. That the neglect from which the complainant claims of and of which the defendant or either or both of them are guilty, consists of the fact that the said automobile truck of the defendant, Castles Ice Cream Company, was operated and propelled at a high rate of speed under the circumstances, and that no signal or other warning was given of the approach of the said automobile truck, and that it continued to cross said street after the driver of the said automobile truck had seen the automobile truck in which the said Emil M. Gluck was a passenger, approach and did not stop the said automobile truck, and in the fact that the said defendants Trubin Brothers failed and neglected to keep the said automobile truck in which the said plaintiff was riding, under proper control, and failed to properly operate the said automobile truck, and failed and neglected to stop the same after the driver had seen the said automobile truck of the defendants' Castles Ice Cream Company approaching, but allowed and permitted the said automobile truck of the defendant Castles Ice Cream Company to collide with the said automobile truck in which the said Emil M. Gluck was a passenger, resulting in his death.

30 9. That the said Emil M. Gluck at the time of his death aforesaid, was married and left him surviving his wife Fannie Gluck and two children, Adolph, who was eleven years of age and Arthur, who was three years of age, who were solely dependent upon him for their support, and have suffered pecuniary loss and damage because of his death.

40 10. This action is commenced within two years after the death of the said Emil M. Gluck.

Answer of Castles Ice Cream Company.

Plaintiff demands as damages the sum of \$50,000.00 besides costs.

ABRAHAM HENIG,
Attorney for Plaintiff.

10

ANSWER OF DEFENDANT CASTLES ICE CREAM COMPANY.

Filed Nov. 7, 1924.

NEW JERSEY SUPREME COURT.

20	FANNIE GLUCK, administratrix <i>ad prosequendum</i> of EMIL M. GLUCK, deceased, <i>Plaintiff,</i> <i>vs.</i> CASTLES ICE CREAM COMPANY, a corporation, and TRUBIN BROS., a corporation, <i>Defendants.</i>	} <i>Action at Law.</i> } <i>Answer of Defendant Castles Ice Cream Company to Amended Complaint.</i>
----	------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

30 The defendant, Castles Ice Cream Company, having a place of business at Perth Amboy, New Jersey, for answer to the amended complaint herein alleges as follows:

FIRST DEFENSE.

1. It has no knowledge or information sufficient to form a belief as to the matters alleged in the first paragraph of the complaint.
 2. The second paragraph of the amended complaint is admitted.
- 40

Answer of Castles Ice Cream Company.

3. It admits the third paragraph of the amended complaint.

4. It admits the fourth paragraph of the amended complaint.

5. It admits the fifth paragraph of the amended complaint.

10

6. It admits so much of the sixth paragraph of the amended complaint as alleges that on October 8th, 1922, Emil M. Gluck was riding in an automobile truck of the defendant Trubin Brothers, which truck was being driven on Broad street, a public highway, at or near the intersection of Bergen Place, City of Red Bank, State of New Jersey, but it has no knowledge or information sufficient to form a belief as to any of the other matters alleged in said sixth paragraph.

20

7. It admits so much of the seventh paragraph of the amended complaint as alleges that its automobile and another automobile came into collision, but denies so much thereof as alleges that it negligently drove and operated said automobile and admits that the other automobile involved in said collision was negligently driven, but except as hereby admitted this defendant has no knowledge or information sufficient to form a belief as to any of the allegations contained in said seventh paragraph.

30

8. This defendant admits so much of the eighth paragraph of the complaint as alleges that the truck of the defendant Trubin Brothers was negligently driven and that the driver of the truck of said Trubin Brothers failed and neglected to keep said automobile truck in which the plaintiff was riding under proper control, and failed to properly operate said automobile

40

Answer of Castles Ice Cream Company.

truck, and failed and neglected to stop the same after the driver had seen the said automobile truck of the defendant Castles Ice Cream Company, but allowed and permitted said automobile truck of said Trubin Brothers to run into the truck of this defendant, but except as hereby
10 admitted each and every allegation of the eighth paragraph of the amended complaint is denied.

9. This defendant has no knowledge or information sufficient to form a belief as to any of the allegations contained in the ninth paragraph of the amended complaint.

10. The tenth paragraph of the amended complaint is denied.

20 . SECOND DEFENSE.

Whatever of injury and damage which were suffered by Emil M. Gluck at the time and place mentioned in the amended complaint were caused by the negligence of a third party for whose conduct this defendant is not responsible.

THIRD DEFENSE.

30 Whatever of injury and damage were suffered and sustained by Emil M. Gluck at the time and place mentioned in the amended complaint were caused and contributed to by his own negligence in that he failed to warn the driver of the vehicle in which he rode of the danger of an impending accident, although he knew thereof or by the exercise of reasonable care and judgment should have known; he did not protest against the excessive speed and negligent manner in which the car in which he rode was being driven but acquiesced and agreed therein, and otherwise negligently conducted himself and failed
40

Answer of Castles Ice Cream Company.

to take reasonable precaution to guard himself against injury.

FOURTH DEFENSE.

1. At the time and place of the happening of the accident wherein Emil M. Gluck sustained
10 injury, the automobile in which Emil M. Gluck was riding was being driven by a driver in the employ of said Emil M. Gluck and others who had borrowed the automobile of Trubin Brothers, and the said automobile was being driven in a common enterprise to which said Emil M. Gluck was a party, by virtue whereof the negligence of the driver of Trubin Brothers' automobile was imputable to said Emil M. Gluck.

2. The driver of the automobile in which
20 said Emil M. Gluck was riding was negligent in that he did not maintain a proper lookout as to the traffic ahead of him, he did not make due and timely application of the brakes which were upon his automobile and drove said automobile when not equipped with proper devices for stopping the same, and otherwise drove his said car in violation of the traffic laws and regulations applicable to the time and place of the accident so that the same ran into the automobile of this
30 defendant.

FIFTH DEFENSE.

The plaintiff was not appointed administratrix
ad prosequendum of Emil M. Gluck, deceased, within two years after the death of said Emil M. Gluck, and this defendant raises the objection and point of law that because of the fact that she was not appointed such administratrix
ad prosequendum within two years of the death
40

Answer of Castles Ice Cream Company.

of Emil M. Gluck, she is precluded from having and maintaining this action, and that this action is not legally maintained or maintainable because it was not legally instituted within twenty-four months after the death of Emil M. Gluck, the period limited by the Death Act of New Jersey and acts supplemental thereto and amendatory thereof for the institution of an action there-
under.

KELLOG & CHANCE,
Attorneys of Defendant,
Castles Ice Cream Company.

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20

30

40

Answer of Trubin Brothers.

ANSWER OF DEFENDANT TRUBIN BROTHERS.

Filed Jan. 21, 1925.

NEW JERSEY SUPREME COURT.

ESSEX COUNTY.

10

FANNIE GLUCK, administratrix
of the estate of EMIL M.
GLUCK, deceased,

Plaintiff,

*Action
at Law.*

vs.

CASTLES ICE CREAM COMPANY,
a corporation, and TRUBIN
BROS., a corporation,

Defendants.

*Answer of
Trubin
Brothers.*

20

The defendant Trubin Brothers, a corporation of the State of New Jersey, answering the complaint says:

1. It has no information sufficient to form a belief as to paragraph one of the complaint.
2. It has no information sufficient to form a belief as to paragraph two of the complaint.
3. It admits paragraph three of the complaint.
4. It has no information sufficient to form a belief as to paragraph four of the complaint.
5. It denies paragraphs five, six, seven, eight and nine of the complaint.

30

FIRST SEPARATE DEFENSE.

As a further separate defense, the defendant Trubin Brothers says that any injuries sustained

40

Answer of Trubin Brothers.

by the plaintiff was the direct result of the negligence of some other person or corporation other than this defendant.

SECOND SEPARATE DEFENSE.

10 At the time of the accident alleged and set forth in the complaint, this defendant was under no legal obligation of any sort, kind or character to the said plaintiff.

THIRD SEPARATE DEFENSE.

At the time of the accident alleged, the plaintiff's intestate was engaged in a joint adventure with the parties in said automobile wherefore he has no right of action against the driver of the same.

20

FOURTH SEPARATE DEFENSE.

The defendant Trubin Brothers will move at the trial of the above-entitled action to strike out the plaintiff's complaint on the ground that the same was brought by a general administratrix appointed in New York who is not the proper party plaintiff to this suit.

30

ROBERT CAREY,
Attorney for Defendant.

A true copy.

EDWARD J. KELLEHER,
Clerk.

40

Discontinuance as to Trubin Brothers.

DISCONTINUANCE AS TO TRUBIN BROTHERS.

Filed Nov. 17, 1926.

NEW JERSEY SUPREME COURT.

ESSEX COUNTY.

10

FANNIE GLUCK, administratrix
of the estate of EMIL M.
GLUCK, deceased,
Plaintiff,

vs.

CASTLES ICE CREAM COMPANY,
a corporation, and TRUBIN
BROS., a corporation,
Defendants.

*Action
at Law.*

*Discontin-
uance as to
Trubin Bros.*

20

The matters in dispute between the plaintiff and the defendant Trubin Bros., having been adjusted between the parties hereto,

It is on this 17th day of November, A. D. 1926, stipulated by and between the respective attorneys that the cause may be discontinued without costs to either party as against the other.

30

It is further stipulated that this discontinuance shall in no wise effect the defendant Castles Ice Cream Co.

ABRAHAM HENIG,
Attorney for Plaintiff.

ROBERT CAREY,
Attorney for Defendant Trubin Bros.

40

Opening.

NEW JERSEY SUPREME COURT.

ESSEX CIRCUIT.

Monday, November 8, 1926.

10 FANNIE GLUCK, administratrix
ad prosequendum of the
 estate of EMIL GLUCK, de-
 ceased,
 Plaintiff,
 vs.
 CASTLES ICE CREAM COMPANY,
et als.,
 Defendants.
 Action
 at Law.

Before Hon. Worrall F. Mountain, J., and a Jury.

For the plaintiff appears Abraham Henig (by Abraham Levitan).

For the defendant appears Kellogg & Chance (by R. Robinson Chance).

(A jury is called and sworn.)

30 Mr. Levitan opens for the plaintiff.

Mr. Chance opens for the defendant.

Mr. Levitan: I offer in evidence the letters of administration *ad prosequendum* issued to Fannie Gluck as the widow and next of kin of Emil Gluck.

40 Mr. Chance: I object to them as it appears on their face that they were not issued until twenty-four months after the death of Emil Gluck.

Fanny Gluck, direct.

Mr. Levitan: This was passed upon by preliminary motion of the Chief Justice.

The Court: Objection overruled.

(Letters of administration are marked Exhibit P. 1.)

Defendant's counsel prays an exception to this ruling of the court. 10

Exception noted as ground of appeal.

FANNIE GLUCK, plaintiff, sworn in her own behalf.

Direct examination by Mr. Levitan.

Q Speak right out loud so the last juror can hear you. What is your full name? A Fannie Gluck. 20

Q Where do you live? A I live now at 917 Greene avenue, Brooklyn.

Q You are the widow of the late Emil Gluck? A Yes, sir.

Q When did Emil Gluck die? A October 28th.

Q What year? A 1922.

Q How long were you married at the time of his death? A Fourteen years. 30

Q How old are you? A I am forty-one.

Q How old was your husband at the time of his death? A Thirty-five or thirty-six.

Q Did you have any children with him? A Two, I have them right here.

Q What are their ages? A Now?

Q Yes. A One is fifteen and the other is seven and a half.

Q What are their names? A Arthur Gluck and Dorothy Gluck. 40

Fanny Gluck, direct.

Q Arthur is the older? A Dorothy is the older.

Q Dorothy's age is fifteen and a half? A Yes, sir.

Q How old is the little fellow? A Seven and a half.

10 Q How long did you know your husband prior to your marriage? A Five years.

Q So, at the time of his death you knew him nineteen years? A Yes, sir.

Q Did you know what his condition of health was during the twenty years you knew him? A Perfectly all right.

Q Was he a steady worker, or otherwise? A A steady worker all the time.

Q What was his business before he went to work in Red Bank? A In Victrolas.

20 Q Selling Victrolas? A Yes, sir.

Q How long had he been doing that? A All the time before his death.

Q Where did he work before? A 123 Essex street.

Q New York City? A New York City.

Q How much were his average weekly earnings when he worked in New York? A \$100 a week.

30 Q Where was he employed at the time of his death? A In Red Bank by Trubin.

Q A phonograph and Victrola concern? A Yes, sir.

Q How long did he work there before his death? A About four or five weeks.

Q What were his average earnings there during that period? A About \$75 he averaged a week.

40 Q (By the Court.) When was this \$75 a week; just before his death, he earned? A Before his death, yes, sir.

Fanny Gluck, direct.

Q When did you say he earned \$100 a week? A Before he went with Mr. Trubin.

Q (By Mr. Levitan.) You say it a seventy-five dollar a week average? A Yes, sir.

Q What do you mean by that? A That is what he claimed and as he came in to New York he said it was a little place and worked up to a big plant and then he got \$75. 10

Q Did he work on a salary or commission for Trubin's? A Commission, if I ain't mistaken.

Q Did he work regularly, as far as you know? A All the time.

Q Did he ever miss any time from work? A Never.

Q How much of his earnings did he usually give to you? A By Trubin's or New York? 20

Q In New York. A In New York he gave me \$90 a week.

Q How much did you receive of his wages that he earned at Trubin Brothers? A Sixty.

Q What is your condition of health? A Well, I am all right.

Q And the children, what is their condition of health? A One of them is perfectly all right, but the younger one was born with a cough and don't feel so well. 30

Q The older boy is well? A The older boy is well.

Q Did your husband own any property or other means, or income at the time of his death other than wages? A No, sir.

Mr. Chance: I object to that as immaterial.

The Court: The question has been answered. 40

Fanny Gluck, cross.

Q You don't know anything about the accident? A No, sir.

Q Your husband was brought home dead, was he? A Sunday afternoon. He was supposed to come Saturday night, but they brought him home Sunday afternoon dead.

10 Q When did the accident occur? A Saturday between eleven and twelve, they just notified me, a policeman came along, that my husband is dead.

Cross examination by Mr. Chance.

Q Did you keep any record at all of the moneys you received from your husband during his lifetime? A I beg your pardon?

20 Q Did you keep any record of the moneys you received from your husband during his lifetime? A All the time.

Q Did you have any money in savings banks? A I had quite some, but I spent it after his death.

Q Have you in court any book, record, paper of any kind, that shows the money you received from your husband during his lifetime? A No, I haven't no record.

30 Q You were not down at Red Bank at any time while your husband was working? A No, sir.

Herbert S. Dwight, direct.

HERBERT S. DWIGHT, sworn in behalf of plaintiff.

Direct examination by Mr. Levitan.

Q Where do you reside? A 14 Riverside avenue, Red Bank. 10

Q What is your business? A At present I am engaged in driving a car in the taxi business.

Q Did you know Emil Gluck in his lifetime? A I knew him for a short period.

Q For how long a period? A Altogether between two and three weeks before his death.

Q How did you come to meet him? A I was engaged—I had a young fellow ask me if I wanted to work selling Victrolas and he took me around to Trubin's store and I was engaged by Mr. Gluck selling Victrolas on commission. 20

Q You worked with Gluck for Trubin Brothers? A Yes, sir; on commission.

Q What commission did you receive? A I don't recall exactly now.

Q How long did you work in that fashion? A Why, worked a little over a week that way and I told them it was not satisfactory to me.

Q Do you remember the day of Mr. Gluck's death? A Yes, sir; I do. 30

Q Where were you on that day? A I went to work that morning to drive for Mr. Gluck.

Q Where were you driving? A I was driving a car that Mr. Gluck used, to Long Branch.

Q Who was in the car with you when you started? A There was Mr. Kantor, Mr. De-Marco, Mr. Gluck and myself.

Q Was anything else with you in the car at the time? A We had some Victrolas in the back of the car. 40

Herbert S. Dwight, direct.

Q Where were you bound for? A We were bound for Long Branch.

Q Do you know where you were going? A Yes, sir.

Q Who gave you the address? A We didn't have any address, but we were down there the day before.

Q You knew where you were going when you started out? A Yes, sir.

Q Who was driving the car? A I was driving the car.

Q What, if anything, did Gluck have to do with driving? A Mr. Gluck didn't have anything to do with driving.

Q You were in control of the car? A Yes, sir.

Q From where did you start from Long Branch? A We left Trubin's store.

Q Where is Trubin's store? A Located on Broad street.

Q That was the same street where the accident happened? A Yes, sir.

Q Only further north from this place? A Yes, sir.

Q Tell us your story of what happened in your own way? A We were in the rear—

Q Pardon me. What time of day was this? A When the accident happened?

Q Yes. A A little after 11:30, around 11:40.

Q Around noon time? A Just before noon-time. We were in the rear of Mr. Trubin's store and put the Victrolas on the car and got ready to go and took the things we needed and we left and went down White to Broad street and went up Broad street going south towards Long Branch. I drove up Broad street and approaching Bergen place I looked to my right for a minute, because

Herbert S. Dwight, direct.

a car coming from the right has the right of way over me and when I looked back I saw the Castle Ice Cream truck in front of me and he occupied all my side of the road. I turned to cut around the rear of the truck and collided with the truck, with the tailboard, which went right through the Ford and took the steering wheel out of my hand, all but one spoke of the wheel, and took Mr. Gluck and Mr. Kantor, who was sitting back of Mr. Gluck, threw them out of the car in the road and I tried to get straightened out and there was a car coming down Broad street and I swung out of the way of that and as soon as I got the car so there was nothing interferring I put on the brake and stopped and went back to get Mr. Gluck and Mr. Kantor to the hospital, to see what I could do for them.

Q How fast were you going as you neared the intersection between Bergen Place and Broad street, do you know? A I was going about twenty-five miles an hour.

Q What was the condition of the houses in that neighborhood? A The houses are quite always apart.

Q What do you know about the houses being quite always apart? A Some houses are at right angles apart.

Q How many feet are there there? A I don't know how many feet exactly, some of them are, but they are quite a good distance apart.

Q Where was the Castles truck when you first saw it? A The Castles Ice Cream truck was directly in front of me.

Q How far away from you? A I was very close to it so I don't know just how far.

Q Did you see it approach? A No, sir, I did not.

Herbert S. Dwight, direct.

Q Did you look for the truck as you drove along, look for traffic on the cross street? A As I was driving I was looking straight ahead and I didn't see anything approaching.

10 Q (By the Court.) Was it coming east or west, the Castles truck? You were going south, I think you said. Was the Castles Ice Cream truck coming from your left or from your right? A From my left.

Q It was going west? A Yes, sir.

Q (By Mr. Levitan.) What was the condition of the truck after it stopped, do you know? A I don't understand.

20 Q Did the truck keep right on going across the street or did anything happen to it before it got across? A No, sir, when I saw the truck before I collided with him, that's where it stood and I went back to pick up Mr. Gluck and the truck was still standing there.

Q When you collided with the truck was it moving or standing? A That I couldn't say, but it stopped right there when I collided with him.

30 Q After the collision what did you do then? A After the collision I stopped a car going north on Broad street and got Mr. Gluck in the car and told them to take Mr. Gluck to the doctor and I walked down with them and showed them where there was a doctor and I reported to one of the policemen who was on traffic duty.

Q What kind of a car did you have? A A Ford.

Q How old was your car? A It was a new car.

40 Q How many miles had it run? A I couldn't say as to that, they just got it a little before the accident.

Herbert S. Dwight, direct.

Q What was its condition as far as driving was concerned? A How do you mean?

Q What was its condition as far as the brakes and everything else on the car was concerned?

A It was all right.

Q What were the conditions of the brakes?

A The brakes were all right. 10

Q You got away from the truck, you say, to clear the road for traffic? A Yes, sir.

Q After the collision? A I didn't understand you.

Q After the collision you say you pulled off to the side to leave the roadway open to traffic?

A After I hit the truck I was on the wrong side of the road and there was a couple of cars coming and I pulled over, and when they went by I pulled over to the left curb and stopped. 20

Q Who took the injured people to the hospital? A I don't know as I remember. I put Mr. Gluck in this car and they took him down to the doctor and left Mr. Gluck there and another fellow was coming along and I stopped him and got Kantor in the car.

Q Did you see the doctor examine Gluck? A No, sir.

Q Were you at the hospital when Gluck went to the hospital? A No, sir; I reported to the Town Hall as the policeman told me. 30

Q After someone else was taking care of the injured parties? A Yes, sir.

Q Do you know when Gluck died? A No, sir.

Q When you arrived at the police station did you see any one there? A There was a clerk there and someone else in the office when I went in and I don't remember whether the other driver came in after I was there or came in when I was there. 40

Herbert S. Dwight, cross.

Q Do you see him here in court? A Yes, sir.

Q Where is he? A In the third row.

Q Is that the man (indicating)? A Yes, sir.

Q You say he was at the police station with you? A I don't recall whether he was there
10 when I came in or he arrived shortly after.

Q Did you hear him say anything to any one at that time?

Mr. Chance: I object as immaterial whether he did or not.

The Court: Sustain the objection.

Q Did you go back after you made your report to the police? A Where?

20 Q To the scene of the accident? A No, sir; I stayed right in court.

Q Did the Castles Ice Cream Company's truck driver remain there, too? A We both made a statement and then the Justice made an indictment out against me and I don't recall about the other driver.

Q The Justice made out some papers there? A Yes, sir.

30 Q Then, what happened after that? A I had to wait there until they came and took me to Freehold.

Cross examination by Mr. Chance.

Q Did you say you were working for Mr. Gluck on this day? A Yes, sir; I worked for Mr. Gluck.

Q In other words, Mr. Gluck was your employer? A Yes, sir.

40 Q Did you see the Castles Ice Cream truck approaching the place where the accident hap-

Herbert S. Dwight, cross.

pened? A No, sir; I did not see him approaching.

Q How wide is Broad street in your judgment and recollection? A Broad street is wide enough for five cars to fit on across.

Q How many cars could have passed between the rear of the Castles truck on the side of the street he had passed over before the accident happened? A Two cars. 10

Q Was the tailboard the only part of the Castles Ice Cream truck you hit? A As near as I noticed.

Q Did you say on your direct examination that when you came back after you stopped your car that the Castles truck was then standing in the same place as it stood when you saw it? A A What do you mean by that? 20

Q (Question read.) A He had moved just a couple of feet, probably; he had stopped right in Broad street on my side of the road.

Q Didn't you see it crossing Broad street at all? Didn't you see it crossing over there? A As I approached Bergen Place I looked to my right and saw nothing coming and I looked to my right and when I looked back it was directly in front of me. 30

Q There wasn't any other car behind him in this place you say was wide enough for two cars, was there? A No, sir.

Q There were no other car which interfered with you or came up and had anything to do with this accident, was there? A No, sir; there was not.

Q How far to your left was it possible for you to see before the accident? A How far to my left?

Q Yes. A On Bergen Place? 40

Herbert S. Dwight, cross.

Q Yes. A I could see right around the corner of Bergen Place a little bit.

Q How far back, 100 feet back? A I don't think you could see 100 feet back.

10 Q How far would you judge? A I couldn't say in feet because I don't just know how many feet.

Q Can you indicate in the court room how far back from the corner you could see, approximately? A There were some trees on the street; some places you could see and some places you couldn't see.

20 Q How far could you see at the place where you could see? A When the car was in this position you could see quite aways down Bergen Place, right near Bergen Place, but coming up the road you couldn't see far down.

Q At a place ten feet back from the intersection? A You could see quite aways down Bergen Place from there.

Q How far down? A I don't know.

Q About twenty-five feet back from Bergen Place, how far could you have seen to look to your left? A You could see in the vicinity of the corner there.

30 Q There wasn't anything at all to obstruct your view, was there, of the approach of this Castles Ice Cream truck in the intersection? A Anything in the intersection?

Q Yes. A No, sir; nothing was in the intersection.

Q How close was this Castles truck to you when you first saw it? A Very close to it.

40 Q Fifteen feet? A I was too close to stop without hitting him and I tried to go around him; I figured if he would go ahead I would go around him.

Herbert S. Dwight, cross.

Q You did not get around him, did you? A No, sir.

Q What part of your truck hit him? A The right side of my truck, the tailboard went through the windshield.

10 Q Was it standing still when you hit him? A I couldn't say that, but he stopped right after I hit him, or at the time.

Q Did you see him crossing you at all? A I saw him directly in front of me.

Q Was he crossing or standing directly in front of you, or don't you know? A From the time I saw him I was too busy until I stopped there. He was standing there when I went back to get Mr. Gluck.

20 Q You don't know whether it was moving or not at the time? A No, sir.

Q You made a statement to the police of Red Bank after the accident, didn't you? A Yes, sir.

Q Is that your signature? A Yes, sir.

Q That statement is one you made in your own handwriting, isn't it? A Yes, sir.

Mr. Chance: I ask to have this statement marked for identification.

(Same is marked D. 1 for identification.) 30

Q When you made that statement did you have in mind whether or not you saw the Castles Ice Cream truck crossing Broad street and Bergen Place or whether it was still standing in front of you? A When I made that statement?

40 Q Yes. A When I made that statement I didn't hardly know what I saw then because I was very nervous at that time. I made that

Herbert S. Dwight, cross.

statement because they told me I would have to make statement there and I made the statement there.

Q You didn't know what you were making?

A I wrote as near as my mind would let as to the happening of the accident.

10 Q Do you think your recollection today is better than it was immediately after the accident? A I was more confused after the accident than I am today.

Q When did you first meet this gentleman who is trying this action for the plaintiff? A When did I first meet him?

Q Yes. A I believe it was in April of this year.

20 Q Where did you first meet him? A I first met him in his office in Jersey City.

Q Where do you live? A I live in Red Bank.

30 Q How did you happen to be in his office in Jersey City? A Well, right after the accident I made a statement to an insurance man and another man came down and asked for a statement and I told him any time he wanted it to tell me who he wanted the statement for and he told me he wanted it for Mr. Gluck, and I told him I would make the statement at any time he wanted, but not right then, and he asked me to come up to Mr. Levitan's office and I came up to Mr. Levitan's office.

Q So the only reason you went to Mr. Levitan's office was your desire to keep your promise to this other man to whom you had said you would make a statement? A I promised the man I would go up there any time he wanted me and besides that I figured I might be able to help Mrs. Gluck out.

40 Q You went to help Mrs. Gluck out? A I just wanted to see justice, that's all.

Herbert S. Dwight, cross.

Q Did you want to see the tailboard when you were going down there and ran into it at the time of the accident? A I don't know how to answer that question.

10 Q Did you see the tailboard before you ran into it? A I saw the truck; I didn't notice any particular part of the truck at that time.

Q There is no doubt you did run into the tailboard, is there? A No, sir, there is not.

Q There is no doubt behind that truck there was room for two cars to pass if they had been going up there, is there? A No, sir.

Q There is no doubt that when you did see the truck you were too close to it to turn out to avoid it, was there? A No, sir.

20 Q How big is the truck of the Castles Ice Cream Company? A It is a very long truck; it takes the whole side of the road up.

Q How long is it? A Well, the road will be take about five cars and it takes about half the road up.

Q How high is it? A I didn't measure it.

Q Approximately how high would you say it was? A It has a big van on it.

30 Q It was not camouflaged in any way so it was not noticeable as you were proceeding towards it, was it? A No, sir, it was not.

Q Who was in this car that you were riding in at the time of the accident? A The car I was driving?

Q Yes. A Mr. Gluck was sitting on my right and Mr. DeMarco was sitting behind me and Mr. Kantor was sitting in the rear of Mr. Gluck.

40 Q Who is Mr. Kantor and Mr. DeMarco? A Mr. Kantor was selling Victrolas and Mr. DeMarco was selling Victrolas.

Herbert S. Dwight, cross.

Q A couple of employees of Mr. Gluck? A I think they worked for Mr. Gluck.

Q Who, if anybody, did you talk with as you were riding towards the place where the accident happened? A Just before we came up near the street we were talking together.

10 Q Just before you came up the street who was talking together? A Well, they were all talking, and once in awhile I would speak to answer a question or say something.

Q Do you remember what was the last thing Gluck said to you before the accident? A No, sir; I do not.

Q Did he tell you to look out for the ice cream truck or anything about the ice cream truck? A No, sir, he did not.

20 Q He made no remarks of any kind about how you were operating the car or what you should do about it, did he? A No, sir.

Q How far were you down the street from the place where you hit the tailboard when your car stopped? A After I hit the truck?

Q Yes, where did you stop? A I stopped at the lefthand curb of Broad street.

30 Q How far down the lefthand part of that tailboard was it you stopped? A I couldn't say.

Q One hundred feet? A I couldn't recall. I got out of the car and went back to help Mr. Gluck and didn't look at the car again.

Q Were you twelve feet away? A I don't recall.

40 Q You haven't any recollection of the distance you were from the corner when you stopped? A Quite away from the corner, but I don't know where it was.

Herbert S. Dwight, cross.

Q You stopped on the opposite side of the road from where you had been travelling before the accident, didn't you? A Yes, sir.

Q That was the lefthand side to the curb? A Yes, sir.

10 Q Why didn't you stop sooner? A Right after I hit the tailboard the steering wheel was taken out of my hand all but one piece, one spoke of the wheel, and I was swinging left then and there was a car coming down Broad street and I swung to the right and that car went by and another car was going up and I was coasting then to get the car straight and as soon as I got it straight I pulled to the left curb and pulled the car up and jumped out.

20 Q How far away had these two cars been when the accident happened? A I couldn't just say, when the accident happened.

Q They were so far away they did not interfere with the happening of the accident? A No, sir.

Q They had time enough to come up between you and Castle's truck before you stopped? A Time enough to do what?

30 Q Had they passed between you and the Castle's truck before you stopped, or the Ford car? A No, sir, I swung to the right and they passed me on the left.

Q Then you swung to the lefthand side of the street, did you? A Yes, sir.

Q Then, did you go up over the curb? A No, sir, I did not.

Q Did you apply your brakes promptly when this accident was happening? A When I saw the truck?

40 Q Yes, before the accident happened. A Yes, I put on my brakes and swung to the left.

Herbert S. Dwight, cross.

Q Were you afraid you would overturn?

A I swung as sharp as I could. I didn't think I would overturn.

Q When you made your statement to the police did you have anything in mind about the possibility of your car overturning? A When
10 I made that statement to the police, I told you I was confused, I didn't know what I was saying, I was worried about the accident and mixed up.

Q When you say in here that you saw the truck crossing Broad at Bergen going west, was that true or not? A No, sir, it was not. I didn't see the truck until it was directly in front of me.

Q When you said you applied your brakes and turned as sharply as you could, without
20 overturning, was that true? A I turned the Ford as sharp as I could, but there was no danger in overturning.

Q You do not deny, "Without overturning" is in your handwriting, do you? A No, sir.

Q You do not recall about how it was you came to answer, "Without overturning" when you had written the lines, do you? A No, sir, I do not.

Q Do you recall whether or not as you
30 looked at this statement you put the words, "Without overturning" in there after the line had been written? A It must have been put in there.

Q But you do not recall any reason at all why you put "Without overturning" in there? A No, sir, I do not.

Q Did you tell us how far away you were from this tailboard when you turned out if you did not, tell us. A How far I was away from
40 the tailboard when I turned out?

Herbert S. Dwight, cross.

Q Yes. A You mean when I saw the truck?

Q Yes. A I was very close to the truck.

Q Can't you give us any idea at all in feet?

A I couldn't say just how many feet.

Q You testified under oath in court with respect to this accident on one occasion, did you not? A Yes, sir. 10

Q May 13th of this year? A In May of this year, yes, sir.

Q At that time were you asked, "You cannot form any estimate at all as to the number of feet you were from the standing truck when you started to turn to your left to go around the truck? Answer: Probably fifteen feet." Was that question asked and was that your answer?

A I was excited and made some answer and he kept asking me just how many feet and I pointed
20 a mark out and that's what he said, about fifteen feet and I acknowledge that because it was the distance of the mark.

Q Show this jury how far away it was when you saw it. Am I further away than you were, if I am I will come towards you. A Just a little bit.

Q Tell me when I get to the place it was indicating the distance you were from the truck when you first saw it. A About there (indicating). 30

Q Indicating from the witness seat to the second seat in the jury box?

The Court: Have that measured.

(The distance is measured and indicates 12 feet 9 and 1/2 inches.)

Q Was there anything the matter with your eyes on that day? A No, sir, there never has been anything the matter with my eyes. 40

Herbert S. Dwight, cross.

Q You do not wear glasses now and you did not then? A No, sir.

Q After the accident didn't you make the statement to the driver of the Castles truck that your brakes worked hard?

10 Mr. Levitan: I object to that.
(Argument.)

Q (Question read.) A I talked to the driver of the truck one day, but I don't recall just what I said.

Q Did you say to him that your car was a new car and that it worked hard, therefore, preventing you from stopping in time to avoid the accident. Did you make that statement? A I
20 don't recall just what I said to the driver. I remember speaking to the driver of the truck just after the accident, but I don't recall, just exactly what I said.

Q Is that the fact, that your car was a new car and it was working hard? A It was a new car and things were stiff on it, if that is what you mean.

Q The things were stiff on it. What was stiff? Were the brakes stiff? A All the pedals
30 on it worked stiff.

Q How about the steering wheel, did that work stiff, too? A It worked all right when new, but when new it works a little harder.

Q Did you look to your left at all any time before the accident? A When I was approaching Bergen Place I looked on Bergen Place and straight up Broad street and there was nothing coming and I looked to the right when I was near the street and I looked ahead and saw the
40 Castles Ice Cream truck.

Herbert S. Dwight, cross.

Q How long a time was it between when you looked to the left and saw the truck?

A You mean when I looked to the right and saw the truck?

Q When you looked to your left some time before that? A Before I got up to the street
10 I looked to the left.

Q How far back from the corner were you when you looked to the left; the next block?

A No, sir.

Q Half a block? A It is an unusual block there; it is a long block.

Q How far back were you when you did look to your left? A I was quite aways up the street when I looked to the left, from the intersection.
20

Q You cannot give us any estimate at all as to the proportion of the block you were from the corner, can you? A No, sir.
20

Q Did you see any other automobiles standing around there at the time the accident happened?

A Well, as I went up Broad street I passed a wagon and a car, but I don't remember any other cars.

Q What part of your car was it that hit this tailboard? A The righthand side of my
30 car.

Q Immediately following the contact between that tailboard and your car what happened to Mr. Gluck? Did he fall out of the car? A Yes, sir, Mr. Gluck and Mr. Kantor were knocked out into the road.

Q By the violence of the contact? A The tailboard took them right out.

Q This tailboard was not coming towards you, sideways, was it? A No.
40

Herbert S. Dwight, cross.

Q How about Mr. Kantor? He was knocked out, too, by the violence of the contact? A Yes, sir.

Q Why didn't you stop right away, the minute you saw the accident was happening, why didn't you stop right away? A I was right
10 behind the truck and I could have stopped right there, but there was a car coming and I was on his side of the road and I swung over to the right and then I swung over to the left and stopped.

Q You were not afraid you would stop traffic if you stopped there? A I was out of place there, I was on the left side of the road, and they were coming at me, the cars.

Q Did it enter into your mind that is why you
20 did not stop, because you would block traffic? A Its a habit to get out of the way when you are on the wrong side of the street.

Q At this time when you were testifying under oath, "Why didn't you stop right away?" you answered, "I would have blocked traffic on the street, the car was crossways." Was that question put to you and did you make that answer? A I don't recall just what questions were being put. I remember the question being
30 asked. I don't remember what the answer was.

Q As a matter of fact was that true you did not stop right away because of your fear you would block traffic on the street, as the reason you did not stop? A If you say it that way, it is true; I would have been in traffic if I stopped.

Q With Mr. Gluck and Mr. Kantor lying on the ground and the whole righthand side of your car knocked out you still had presence of mind
40 enough to consider the approaching traffic?

Herbert S. Dwight, cross.

A The cars were coming directly at me there and I didn't belong there. If you had presence of mind enough to know you were on the wrong side of the road, habit will take you back. You would be crazy to run head on with cars coming at you.

Q You would be crazy to run into tailboards,
10 too, wouldn't you?

Mr. Levitan: I object to that as improper.

The Court: Sustain the objection.

Q When you were driving along this street how far were you proceeding from the righthand side of the road? A Why, if there five cars across the street I would have the position of
20 second car from the righthand curb.

Q Didn't you at this other examination say that this car was out of control owing to the steering wheel and, "I was on an angle and there were cars coming down the road; I couldn't stop it there, it would have blocked traffic going north on Broad street." A Yes, sir, the car was out of control on account of the steering wheel.

Q When your car actually did stop what was
30 its position? A I left the car on the lefthand side of the road, up against the left curb, of the left curb.

Q On this other examination did you not have this question asked of you and did you not answer in this wise. "The first time you saw it, it was stopped, is that right? *Answer:* Yes, sir." Were you so asked and did you so state?

A The first time I saw what?

Q The first time you saw the Castles Ice
40 Cream truck. Were you so asked and did you so

Herbert S. Dwight, cross.

state? A Well, it is impossible for me to say whether it was stopped or not right then, but when I came back the truck was still there.

Q Did you or did you not have asked of you this question, "The first time you saw it it was stopped, is that right? *Answer: Yes, sir.*" Did
10 you make that answer to that question? A I may have answered it that way because after I came back the truck was right on Broad street.

Q The same place you saw it first? A Yes, sir.

Q Do you know Mr. McCarron? A Yes, sir.

Q That gentleman (indicating)? A Yes, sir.

Q Did you see him around that section at the time the accident happened? A Yes, sir.

Q He was driving the truck, wasn't he, on
20 the same side you were? A I believe so.

Q You passed him just before the accident, didn't you? A I don't recall passing him; I passed a wagon and a car.

Q How far away from the corner was this car you passed? A It was quite away back.

Q When you passed that were you going at the same rate of speed you were going when you got up to the corner? A Just about the same rate of speed.

Q About the same rate of speed when you
30 passed him as when you got to the corner? A I didn't say I passed him.

Q Whoever you passed you continued that same speed at which you passed them up to the corner? A Yes, sir.

Q What is it that has happened since the time you made this statement to the police that has tended to make your recollection clearer now than it was then, if you think your recollection is clearer now than it was then? A I was
40 confused.

Herbert S. Dwight, cross.

Q What was the date of this accident?

A October 28, 1922.

Q What year? A 1922.

Q 1922? A Yes, sir.

Q There was some shrubbery on this corner on your left? A Yes, sir, there was a hedge,
10 and some trees.

Q Did you see anything pass between that shrubbery, in back of this ice cream truck that interfered with your view? A What was that?

Q Did you see anything pass between that shrubbery and back of this ice cream truck that interfered with your view? A I didn't see the truck until I saw it in front of me.

Q You did not look though until you were away down the block? A As I approached the
20 street, quite away from the street I looked to the left and straight ahead and saw nothing, and when I looked to the right it was in front of me.

Q You did not look within one hundred feet of that corner, did you? A I wouldn't say.

Q Would you say seventy-five feet? A I wouldn't say how far it was.

Q Can't you approximate the distance when you last looked in the direction from which this
30 truck came? A No, sir, I couldn't tell you that.

Q Do you know how wide Bergen place is? A Bergen place is a fairly wide street.

Q How many cars can pass on that street beside each other? A About four cars.

Q It is practically the same width as Broad street? A I don't believe quite as wide as Broad street.

Q There is very little difference? A Not
40 much difference.

Herbert S. Dwight, cross.

Q Was there any speedometer on your car?

A No, sir, there was not.

Q This was in the built-up section of Red Bank, in the residential section? A Yes, sir.

10 Q You were familiar with this corner, were you before the accident? A I had been up the street quite a lot.

Q Pretty busy corner, was it not, and was then? A It is a fairly busy corner; it is one of the crosstown streets that run crosstown.

Q One of the busiest corners in Red Bank? A I wouldn't say that.

Q You would say that there was a lot of traffic at that intersection? A No, I would say it was a fairly busy street.

20 Q You knew, as you were approaching that fairly busy place that the shrubbery was on that corner, didn't you? A I looked and didn't see anything to the right and I didn't see anything so I was going straight across the street.

Q When you say you looked to the left that observation was made down the street? A Yes, sir.

30 Q Apart from the look that you did or did not make you knew from having looked on previous occasions that there was shrubbery at that corner there from which this ice cream truck is supposed to have come? A I knew there were trees there, yes, sir.

Q How long was it you looked to your right? A Why, I looked to the right in this manner and I looked back in the center of the road and saw the truck (indicating).

40 Q How much did Gluck pay you a day for driving that car that day? A He didn't pay me, but I would receive \$4.00 for that day and the day before.

Herbert S. Dwight, cross.

Q That is the agreement you made with Mr. Gluck, was it? A Yes, sir.

Q Immediately after the accident the Chief of Police and Officer Newman came there from Red Bank, did they? A I think it was the Chief of Police I reported to; I don't know anything about Officer Newman. When I reported 10 to the Chief of Police he told me to go to the Town Hall.

Q The second gentleman from the far side (indicating) do you recognize Officer Newman as having been there? A I don't remember him being there. I reported to the officer there.

Q Did you see Officer Newman at all? A I don't believe I saw him.

20 Q Were you so befuddled you did not know what you saw, or so befuddled you didn't know what you were putting in the statement? A I am pretty sure I saw Mr. Clayton there.

Q You do not know whether you saw Mr. Newman? A I don't believe I did.

30 Q Had either of these officers arrived as far as you know before the cars had been moved after coming to rest after the accident? A No, sir; I don't know when they arrived, because when they told me to go to police headquarters I went up.

Q Did you get paid for going to Jersey City or at the time you went to keep this appointment for the gentleman who asked for the statement? A I didn't get paid, but I got my expense money.

40 Q Why didn't you give him a statement when he asked you for it the first time? A My father thought it would be better for me not to make the statement. I told this man before that

Herbert S. Dwight, cross.

I would give him a statement and my father told me not to.

Q So, because your father told you not to you decided you would not give him one then? A Yes, sir.

10 Q What changed your mind? A I said, "If you want a statement for Gluck," I said, "If you ever want one let me know and I will give it to you."

Q Did your father hear you when you told him that? A He came in when I was going to and told me not to.

Q Did you tell him you wouldn't give him one then, but any time he wanted one you would give him one? A I don't know whether he heard it or not, because I was working right there in the shop with my father.

20 Q Why couldn't you give him a statement then instead of waiting to go to Jersey City? A I was, but my father advised me not to.

Q What occurred that made you think your father's advice not to give him a statement was not good advice? A What occurred?

Q Yes. A Nothing occurred. My father told me not to make any statements.

30 Q You did make a statement to him, didn't you? A Yes, sir.

Q You went back to Jersey City to make it, too, didn't you? A Yes, sir.

Q You did not get anything for making it, did you? A I received expenses for making it.

Q Did you keep a copy of that statement you made for him? A I asked for a copy.

Q Have you the copy with you? A I believe I have.

40 Q This paper you just handed me has written down on it things you told this lawyer when you went to Jersey City? A Yes, sir.

Herbert S. Dwight, cross.

Q Did you say anything then to him as to whether you looked to your left or not before the accident? A I told him in the statement just how the accident happened.

Q Did you tell him whether you looked to the left or not? A The statement is there; I haven't read it recently. 10

Q Do you remember what you told him or what you did not tell him? A I told him the truth.

Q Do you remember what you told him or what you did not tell him? A I told just in court the truth the same as should be on there.

Q Did you tell him the Castles Ice Cream truck was going fast? A I don't know anything about the speed of the Castles Ice Cream truck; I didn't mention that. 20

Q You didn't tell him that the Castles Ice Cream truck continued to cross the street after you know he had seen you, did you? A Will you repeat that?

Q That the Castles Ice Cream truck continued across the street after you knew he saw you? A After I knew he saw me?

30 Q Yes. A I don't understand how I could know he saw me.

Q Didn't you see him put his hand out to indicate for you to stay back? A No, sir.

Q How fast did you tell the lawyer over in Jersey City you were going as you were driving there? A I told him I was going about twenty-five miles an hour.

Q Did you tell him, that at the time you were driving about ten feet east of the west curb on Broad street? A I told him just the same as— 40

Herbert S. Dwight, re-direct.

Q Going south, after you had crossed Harding Road and when you got about twenty feet north of Bergen place this Castles Ice Cream truck was coming from the east over to the west stopped dead suddenly? A I told him the truck was there after I hit him, right there and
10 he put it in that way. I told him the truck must have stopped because it was still there after I came back to pick up Mr. Gluck.

Q You did not see him stop? A The truck was there and had stopped after I came back to up Mr. Gluck.

Q You did not see him slowing down and stopping there, did you? A No, sir, I didn't see him slowing and stopping, but he must have stopped, because he was there.

20 Q Did you know Mr. Kantor and Mr. DeMarco at the time? A I worked with them before when I worked with Mr. Gluck before. Mr. Kantor and Mr. DeMarco had been down a couple of times before and I drove them every time.

Q That's all you know of them? A No.

Q They were not friends of yours, but were they friends of Gluck's? A I don't know as far as friendship goes.

30 *Re-direct examination* by Mr. Levitan.

Q How many days prior to the accident had you been work for Mr. Gluck? A Mr. Gluck spoke to me one night in the week and asked me if I wanted to drive for him and I said, "Yes." I think it was Thursday night; he told me to come to work Friday, and told me—

Q Were you out several times? A Yes, sir.

40 Q You were engaged for just those two days?
A Yes, sir.

Herbert S. Dwight, re-direct.

Q You haven't received your pay; that is, Gluck never lived to pay you? A No, sir.

Q Did you hear any signal or warning at all as you approached Bergen place? A No, sir, I did not.

Q You said you made this statement which is marked for identification D. 1. Who asked you
10 to make this statement? A Some one in headquarters told me I would have to make a statement about the accident.

Q Then you sat down and wrote it out yourself? A Yes, sir.

Q How soon after the accident was that? A Right after the accident.

Q Did you know then Gluck had died? A No, sir, I didn't.

Q You knew nothing other than this man
20 Kantor had been seriously injured? A No, I knew they were seriously injured but I didn't know how seriously.

Q You say you made another statement to some company, some one representing the Castles Ice Cream Company?

Mr. Chance: I object. He said nothing of the kind.

The Court: Sustain the objection. 30

Q Did you say you made a statement to some insurance company? A I don't know what insurance it was. He said he wanted it for insurance—

Mr. Chance: I object to that and ask that it be stricken out. That has no bearing on us at all, and there is nothing shown to connect the Castles Ice Cream Company at
40 all.

Herbert S. Dwight, re-direct.

The Court: Sustain the objection, if the statement is not in court.

Plaintiff's counsel prays an exception to this ruling of the court.

Exception noted as ground of appeal.

10 Q How many statements did you make in this case? A One at headquarters.

Q That is one. A The one this man told me that he wanted for insurance, he was an insurance adjustor.

Q That is two. A And I told him how the accident happened, and then I made out that one there you have.

Q You signed all the statements, did you? A Yes, sir.

20 Q When someone representing Mrs. Gluck asked you for a statement, you had already made a statement to the man who said he was representing some insurance company? A I made a statement at the Town Hall and that one (indicating) for the insurance adjustor.

Q On the advice of your father you did not make a statement then? A No, sir.

30 Q Do you see a man here in court for whom you made a second statement? A No, sir, I do not.

Q Do you remember being subpoenaed to come to Jersey City to testify in the case of Kantor against Trubin Brothers and others? A Yes, sir.

40 Q When you came to this lawyer's office in Jersey City, in connection with this matter in court, or was it on another occasion? A When I received the subpoena from the court I couldn't just say. I was up two or three times that week.

Herbert S. Dwight, re-direct.

Q Under subpoena? A I received a subpoena some time; I couldn't say whether it was a case of subpoena or not.

Q Then by arrangement with this lawyer in Jersey City you held yourself ready to come to court and testify? A Yes, sir.

10 Q Was it after one of these occasions you made the statement you have exhibited here to Mr. Chance, or a copy of it? A I don't recall whether I received a subpoena at that time to come up or not. I told him I would come up.

Q This is not signed? A No, sir.

Q Is that a correct copy of everything you said? A It was a typewritten copy and I told him to make corrections on it.

20 Q In whose handwriting are those corrections? A This one here is mine (indicating) and the rest I told some one to put in.

Q They were made under your direction? A Yes, sir.

Mr. Levitan: I offer the statement in evidence.

Mr. Chance: I object to his offer as nothing has been asked this witness about this statement.

30 The Court: How is that evidential on re-direct, or if it was direct.

Overrule the offer.

Plaintiff's counsel prays an exception to this ruling of the court.

Exception noted as ground of appeal.

(Statement is marked P. 2 for identification.)

40 Q Do you remember when you were driving this car whether Gluck said anything to you

Herbert S. Dwight, re-cross—re-direct.

about the operation of the car or the manner in which you were driving? A I don't understand how you mean that.

10 Q Did Gluck interfere in any way with you while you were driving this car? A No, sir, he did not.

Q Did he make any suggestions about its operation? A No, sir.

Q You were in exclusive control and operation of the car all the time? A Yes, sir.

Q What kind of tires did your car have?

The Court: This is not re-direct.

A Pneumatic tires.

20 *Recross examination* by Mr. Chance.

Q This statement we have been talking about and certain objections were entered on the record, the lawyer in whose office you obtained that is the same one who has been asking you questions at this trial?

Mr. Levitan: We will concede that.

30 *Re-direct examination* by Mr. Levitan.

Q Do you remember whether Mr. Levitan was present when that statement was prepared in his office in Jersey City.

The Court: What difference does that make?

(Argument.)

40 The Court: Is it admitted that the death of this man was due to this accident?

Motion for a Non-suit.

Mr. Chance: We do not deny it. I admit now he died as the result of this accident.

PLAINTIFF RESTS

Mr. Chance: I move for a nonsuit in this case on the first ground that it appears by the record in the case that this action was not instituted by this administratrix *ad prosequendum* within two years, the twenty-four calendar months being the period allowed by the statute and that an amendment from an *ad damnun* of another kind to that kind is not sufficient to bring the case within the twenty-four months. 10

My second ground of motion is that it appears by the discontinuance filed in this case that there has been an adjustment between Trubin Brothers and the plaintiff and the adjustment with one in and of itself operates as the result of the other. 20

On the third ground that it appears in this case that there was negligence on the part of the driver of the Ford car. It is the testimony in the case that Mr. Dwight was employed by Mr. Gluck and being his employee, of course, the contributory negligence or negligence of the employee is imputable to his employer or master. 30

(Argument.)

The Court: The motion will be denied.

The first ground covered by Mr. Chance I have already discussed. The second as to the adjustment will be denied because the only paper I have before me is that there has been some adjustment between Trubin Brothers and the plaintiff and there is a 40

Nels C. Mathiasen, direct.

10 discontinuance against them. If I had proof before me there had been a release I would grant the motion, but in the absence of that the motion will not be granted. As far as I am concerned all I have before me is the discontinuance of the alleged joint tort feasons.

As to the last ground I think it is a jury question.

I will hear the defense.

Defendant's counsel prays an exception to this ruling of the court.

Exception noted as ground of appeal.

20 NELS C. MATHIASEN, sworn in behalf of defendant.

Direct examination by Mr. Chance.

Q What was the line of work in which you were engaged on October 28, 1922? A I was a chauffeur for the Castles Ice Cream Company.

Q What kind of a car were you using as such? A Five and a half ton Packard truck.

30 Q You had an accident which we are talking about here today, did you? A Yes, sir.

Q What time of the day was that accident? A To my memory about a quarter to twelve October 28, 1922.

Q What make of car was this you were driving? A A five and a half ton Packard truck.

Q At the time of the accident was it loaded or empty? A We were distributing our load.

40 Q How much did you have aboard? A At that time of the day I was about half finished.

Nels C. Mathiasen, direct.

Q The place where this accident happened was what cross street? A Bergen place and Broad street in Red Bank.

Q Which street were you travelling on going west? A On Bergen place.

Q In which direction was the other car? A Going south on Broad street. 10

Q As you approached that corner at what rate of speed were you proceeding? A Why, ten or twelve miles an hour.

Q How long have you been driving automobiles? A How long have I been driving automobiles?

Q Yes. A Somewhere around ten years.

Q As the result of this accident what damage was done the truck in which you were riding? A The tailboard was almost torn off. 20

Q Did you run into him or did he run into you?

Mr. Levitan: I object to that as a conclusion.

The Court: Sustain the objection.

Q What part of your truck was in contact with his car? A Why, the tailboard. 30

Q What part of his car was in contact with the tailboard of your car? A The right side of his car.

Q After the accident how far did you go before stopping? A I judge about thirty feet.

Q How far did the Ford car go before stopping? A About 250 feet.

Q Who was with you in your car? A Why, my helper was riding in the rear of the truck.

Q Did you notice what happened to him at the time of the collision? A No, only from what he told me. 40

Nels C. Mathiasen, direct.

Mr. Levitan: I object to that.

Q Did you see him or didn't you? A He was in the rear; I didn't see him until after the collision.

10 Q Where was he then? A Standing on the ground coming over to me.

Q What was the condition of this tailboard of yours after the accident? A Why, to my memory it was hanging on to the other part of the truck with the two chains and I think there was one hinge still hanging on.

Q What kind of hinges had that been fastened to your car with before the accident? A I think it was about a quarter of an inch iron hinge, four of them.

20 Q Was there any device on your car which regulated the mechanism for speed which it was possible for the car to make? A The governor on to the engine.

Q How was that regulated, if you know? A Well, the governor was set for fifteen miles an hour.

Q Now, did your car slow up as you were going over that intersection? A It did not.

30 Q Was your car stopped when the other car and your car came in contact? A I stopped as soon as I heard the crash.

Q When the crash came were you standing still? A No, sir.

Q Who was then going the fastest, your car or his car? A I judge the Ford car was—

Mr. Levitan: I object to what he judges.

40 Q Which was it, your car or his car? A I think his car was.

Nels C. Mathiasen, direct.

Q How fast do you think his car was going?

A That I couldn't say.

Q How fast was his going when you had last seen it, in your judgment? A That I couldn't say.

10 Q Which reached the intersection of the street first, your car or the Ford car? A I did. 10

Q As he came up to this intersection tell us what happened, how did the accident occur? A When I came up to this street intersection I saw I had plenty of time to cross Broad street before anything came in either direction.

Q Well, you saw that. What did you do? Tell us all that you did up to the time the accident happened. A I didn't get that question.

20 Q Tell us what took place, what you did and what the other fellow did all the way from that time on up until the accident happened? A When I came to Broad street I blew my whistle, which is on the truck, and started to go across, and as I did the Ford delivery was coming down South and I had plenty of time to cross the road, to my knowledge. 20

Q Go on. Did you cross the road? A Yes, sir.

30 Q How far across the road did you get? A Why, the front of my truck was in on Bergen Place off of Broad street when he hit me. 30

Q How far in off Broad street were you when he hit you? A It was over half-way in.

Q When you started to go across the street, approximately how far is it your recollection that this Ford car was from the intersection? A I judged a little over 200 feet.

40 Q After the contact where did his car go? A On the left-hand side of the road, south of the accident. 40

Nels C. Mathiasen, direct.

Q Did you notice any marks on the road behind his car? A No, I did not.

Q Did you measure the distance his car went between the time it hit your automobile and the place where it stopped? A Yes, sir, by a size nine working shoe.

10 Q How many of them did you measure as the distance he went? A I think somewhere in the neighborhood of 250.

Q Did you measure the distance you went? A Yes, sir.

Q About how many of them did you make? A About thirty.

Q When the car driven by Mr. Dwight came at rest where was it with respect to the side of the road? A Will you repeat that?

20 Q (Question read.) A I don't get that.

Q (Withdraw the question.) Which side of the road was the car driven by Dwight on when it stopped? A After the accident on the left-hand side of the road.

Q How far from the curbline? A Close to the curb.

Q How far is close? A Up against it.

30 Q Now, after the accident did you speak to Mr. Dwight about the accident? A I think I talked to him at police headquarters.

Q What did he say as to why it was he did not stop, if anything?

Mr. Levitan: I object to that.

The Court: Sustain the objection.

Defendant's counsel prays an exception to this ruling of the Court.

40 Exception noted as ground of appeal.

Nels C. Mathiasen, cross.

Q Did Mr. Dwight made a statement that his car was a new car and that it worked hard, therefore preventing him from stopping in time to avoid the accident?

Mr. Levitan: I object to that.

The Court: I will admit it. 10

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

A I think he did say something about that.

Q Do you know whether he did or not? A That I am not sure of, it is so long ago.

Q You said as you came to this place you held out your hand. Indicate to the jury how you held your hand out. A As I started to go across Broad street I saw him and held my hand up that way (indicating), as he was coming kind of fast. 20

Q Did you notice any lessening of speed on his part at the time that you held out your hand that way and the time of the contact?

Mr. Levitan: I object to the question as leading. 30

The Court: Sustain the objection.

Cross examination by Mr. Levitan.

Q You were about half through with your route on this day? A Yes, sir.

Q You were quite familiar with this street? A I was at that time, yes, sir.

Q This was part of your regular daily routine? A Every day. 40

Nels C. Mathiasen, cross.

Q Broad street is not very heavily routed with traffic about this time of day, is it? A It is a main highway.

Q Traffic there is not very heavy, is it? A At times.

10 Q You always cross Broad street at this time at noon? A I couldn't say.

Q In your route about in an hour or so, isn't that so? A I think so.

Q You knew there wasn't very much traffic on Broad street about the time you were in the habit of crossing it every day? A I always watch out for traffic.

Q Yes, of course. You very seldom were bothered with traffic there? A Oh, yes.

20 Q When you came along—you know the rules of the road? A I do.

Q You were supposed to watch traffic on your right? A Yes, sir.

Q You know that traffic on your right is entitled to the right of way at the intersection? A I understand so.

Q You knew it on that day? A Yes, sir.

Q You had a large truck? A Quite large.

30 Q Did you have an automatic hand signal or did you use your own hand? A I used my own hand.

Q How far was Trubin's truck away from you when you reached the intersecting point? A That I couldn't say.

Q Can't you remember? A I don't quite remember.

40 Q You remember testifying at the previous trial where you were a witness in Jersey City giving us the distance that Trubin's truck was when you reached the intersection? A I remember being in Jersey City.

Nels C. Mathiasen, cross.

Q Do you remember telling us then you measured it with a number 9 shoe? A Yes, sir.

10 Q Does that refresh your recollection? Can you tell us how far away this Trubin's truck was when you approached the intersection? A About 200 feet, I think.

Q Do you remember testifying it was 220 feet away by your measurements? A I don't remember.

Q Well, if you made that statement in Jersey City that is correct, is it not? A It must be.

Q So that when you approached this crossing you were right at the crossing, were you? A I was.

20 Q And you looked to your right, or north, as you were coming west and saw this truck down the block 220 feet away? A Yes, sir.

Q How fast did you say you were going? A Ten to twelve miles an hour at that time.

Q No faster than that? A No, sir.

Q How wide is Broad street at this point? A I judge about forty feet.

Q What part of Broad street did you start to cross when you looked down? A The east side.

30 Q That is, you were going from the east to the west? A I was going from east to west, yes, sir.

Q Had you crossed any part of Broad street yet? A No, sir.

Q Just about on the crosswalk? A Just ready to cross.

40 Q How many feet did you travel before you collided with this Trubin's truck? A My truck was at least half-way over Broad street when he hit me.

Nels C. Mathiasen, cross.

Q What part, the front or the rear of the truck? A The front of the truck.

Q So the rear of the truck was still almost in a line parallel to the curb line of the garage way of the road? A It may have been a little out.

10 Q About how far from the curb would you say the tailboard of your truck was at the time of the collision? A That I couldn't say.

Q You said it was a little bit out there. Can't you give us an idea? You understand my question, do you? A I do.

Q Answer it. A The rear of the truck may have been out five feet or so.

Q How long is your truck? A I don't remember ever measuring it.

20 Q Have you any idea how long it was? You drove it a number of times? A About in the neighborhood of 20 feet.

Q So you then covered about twenty-five feet on Broad street at the time of the collision? A No.

Mr. Chance: I object as that is a misstatement.

30 The Court: I will admit it.

Q Your truck is about twenty feet long and you were about five feet from the curb and twenty and five is twenty-five feet from the curb line? A My rear end was five feet from the curb line.

Q And not the tailboard? A My tailboard, too.

40 Q So you traveled twenty-five feet from the time you noticed Trubin's truck 220 feet away to your right and when you were at the intersec-

Nels C. Mathiasen, cross.

tion of Bergen place and Broad street? A My truck was about three-quarters of the way in on Bergen place.

Q I am not asking you that. You said your truck was about twenty feet long. A Yes, sir.

Q Behind the rear of your truck was five feet away from the easterly curb of Broad street? A From the west end. 10

Q You were traveling from east to west? A I was going towards the west.

Q The front of your truck was straight west? A Yes, sir.

Q The front of the truck had traveled to a point where the rear tailboard was five feet away from the easterly curb line that you had just left, is that right? A No. 20

Q All right. What is the fact? A The rear of my truck was about five feet from the west end of Broad street.

Q You were not going backwards, you were traveling west? A Broad street has two sides, east and west side.

Q Had you already crossed the westerly curb of Broad street? A Yes, sir.

Q So that during the time that you saw Trubin Brothers' truck 220 feet away you traveled to a point about five feet from the westerly curb of Broad street, or about thirty-five feet all told, assuming Broad street is forty feet wide at this point, is that correct? A Yes, sir. 30

Q Where was your truck when you first noticed Trubin's truck coming out? A Starting to cross Broad street.

Q Is that the only time you saw him? A Yes, sir. 40

Nels C. Mathiasen, cross.

Q You did not see him after that until after the collision? A I saw him while he was coming towards me all that time.

Q Why didn't you stop instead of putting your hand out? A I had sufficient time to cross Broad street in my opinion.

10 Q You figure he was 220 feet away? A I figure he was far enough away from me and I had time enough to cross Broad street.

Q You figured he was 220 feet away? A About that.

Q So all the time you traveled thirty-five feet he traveled 220 feet and collided with you?

A Yes, sir.

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

Q Are you sure about that? A Yes, sir.

20 Q Are you certain of those distances? A I think so.

Q Do you realize how many miles an hour he had to travel to strike you, if that is a fact?

A No, sir.

Q How many times is 220 times 35?

The Court: No, that is argumentative.

30 Q (Withdraw that question.) You are quite sure this is the fact, that you have just told me, that in the same time that you traveled this thirty-five feet across Broad street Trubin's truck traveled a distance of 220 feet. That is correct, is it? A I think so.

Recess from 1 to 2 P. M.

Nels C. Mathiasen, cross.

AFTER RECESS.

Q Broad street at the intersection of Bergen avenue has quite a drop or dip in the road, has it not? A Yes, sir.

Q Quite a deep dip there? A Not deep.

Q You can feel it when you go by? A You can feel it. 10

Q Did anything happen to your car after you passed this dip on Bergen Place? A Not to my knowledge.

Q Did your car stall? A No, sir.

Q Did you have any trouble with it at all? A None at all.

Q Do you remember after the accident telephoning from police headquarters in the presence of Mr. Dwight where he spoke to you? A No, only that I made a report. I telephoned to the manager of the plant to send another driver down. 20

Q Do you remember after the accident all hands went to the Town Hall in Red Bank? A Yes, sir.

Q You were there and Dwight was there? A Yes, sir.

Q You then telephoned to your superior? A Yes, sir. 30

Q You remember telling them, "You had better send a wrench along because the dog was caught in your emergency brake"? A No, sir.

Q Did you make any such request of your office? A No, sir.

Q Do you remember telephoning them to send someone over to relieve you? A I telephoned to have another driver come down and finish the route. 40

Nels C. Mathiasen, cross.

Q Did you also tell them then to send along a man with a wrench because the dog on your emergency brake, somewhere on your car, was jammed? A No, sir.

Q Did you use that expression? A I don't remember anything of that kind.

10 Q Do you say you didn't say it or you have forgotten it? A I don't remember ever saying it.

Q They sent relief down to you? A Yes, sir.

Q Did the man bring a wrench along with him to repair the car? A No, sir.

Q How do you know? A Because I finished the route myself.

Q The man came down? A Yes, sir.

20 Q You finished the route with him? A No, he went home in the car he came down in.

Q Did he make any repairs to your car? A None at all.

Q Who repaired the tailboard? A I think the carpenters.

Q Where, right there? A No, in the Castles plant.

Q Who made the temporary repairs to that? A I did.

30 Q Didn't the mechanic who came down make any repairs? A None whatsoever.

Q But a mechanic did come down? A I don't know.

Q Who was the man who came down from the shop or office to relieve you? A A person named Lawrence Gordon.

Q Was he a driver? A He was a driver at that time.

Q Is he a mechanic now? A I don't know.

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

40 Q Was— A Not that I know of.

Nels C. Mathiasen, cross.

Q Did Gordon help you repair that tailboard? A No, sir.

Q You are quite sure you made no mention about that at police headquarters in the hearing of Mr. Dwight? A I don't remember of it.

Q When you saw Trubin's driver coming along about how fast was he going? 10

Mr. Chance: I object, because he was not Trubin's driver.

Q I mean Dwight (withdraw the question). When you saw Mr. Dwight driving Trubin's car about how fast do you say he was going? A That I couldn't say; it was quite a fast rate of speed.

Q Very fast? A That I couldn't say. 20

Q How fast would you say he was going? A He must have been going at a pretty good rate of speed; if he wasn't he couldn't have done the damage he did to my truck.

Mr. Levitan: I ask that that answer be stricken out as not responsive to the question.

The Court: Strike it out.

Q Would you say he was speeding? A I 30 wouldn't say that.

Q What would you consider speeding?

Mr. Chance: I object.

The Court: Sustain the objection.

Q How fast would you say then he was going? A That I couldn't say.

Q Would you say he was going at a moderate speed? A I couldn't say. 40

Nels C. Mathiasen, cross.

Q You remember testifying before Judge Cutler in Jersey City in this case and you were then asked this question, "It was not going fast then, was it, just at a moderate speed," and your answer was, "I do not know." Do you remember that? Do you remember being asked that question? A (No answer.)

Q Do you remember being asked, "Well, didn't you say he was speeding?" and your answer was, "Well, I won't say he was speeding, no." Do you remember that question and that answer? A No, sir.

Q Do you remember being asked, "Well, would you say he was going moderately?" and your answer was, "At a fair rate of speed." Do you remember that question and that answer? A No, sir.

Q Would you say you never so testified or you don't remember? A I don't remember.

Q You have no recollection of making these answers? A No, sir.

Q If you so testified last 13th of May, 1926, just about six months ago, was that correct, was that the truth at that time? A I presume so.

Q You said you do not recall now what rate he was going in May, 1926. You knew he was going at a fair rate of speed.

Mr. Chance: I object.

The Court: Sustain the objection.

Q Well, now, would you say he was or was not going at a fair rate of speed? A He must have been going at a pretty good rate of speed.

Q What did you mean then last May in testifying he was going at a fair rate? Why do you change that now? A Because I don't remember what I said last May.

Nels C. Mathiasen, cross.

Q You do not remember? A No, sir.

Q Is what you are telling us now the truth of what actually occurred at that time or only your guess? A The truth.

Q Did you tell the truth before Judge Cutler? A I did.

Q Why didn't you so testify then as you are testifying now?

Mr. Chance: I object. The testimony he gave before is the same as he is giving now.

The Court: I will admit it.

Q (Question read.) A I didn't quite get that.

Q You remember you testified before Judge Cutler? A I do.

Q In response to the question I put to you a moment ago which I will repeat because you do not understand it, "Well, would you say he was going moderately," and your answer was, "Well, at a fair rate of speed." Do you remember that? A Yes, sir.

Q Was that correct? A It must have been.

Q What is that? A It must have been.

Q Why do you change that testimony now when you said in May, 1926, that he was traveling at a moderate rate of speed, or a fair rate of speed, to use your language, why didn't you say that now? A Well, I don't exactly remember what I said in Jersey City six months ago.

Q Was the statement you made in that connection the truth in Jersey City?

The Court: He has already said he thought so. Do not go over it again.

Frank McCarron, direct.

Q Is your memory clear as to what happened at the time of the accident, today? A Yes, sir.

Q Was it clearer then than it is today? A No, I don't think so.

Q Is it clearer today? A I don't think so.

10 Q Now, then, upon what statement do you desire to rely, upon the statement you testified to here or the one you made before Judge Cutler six months ago?

Mr. Chance: I object.

The Court: Sustain the objection, because he answered it and it does not make any difference which one he relies on.

20 FRANK McCARRON, sworn in behalf of defendant.

Direct examination by Mr. Chance.

Q On October 28, 1922, by whom were you employed? A Texas Oil Company, Red Bank, New Jersey.

30 Q That day about the time of the accident we have involved in this case was taking place were you in the vicinity of the accident? A Yes, sir, I was.

Q What street were you going on? A I was going down Broad street, traveling south towards the Texas Oil Company's plant.

Q Did you see the Ford commercial car that was being driven by Mr. Dwight as you were driving along there? A Yes, sir, I did.

40 Q At what rate of speed were you going? A I was going at eighteen miles an hour.

Frank McCarron, direct.

Q Where did you see this Ford car driven by Dwight? A I seen him pass me right about 130 feet from the accident when he passed me.

Q You were going eighteen miles an hour? How fast was he going when he passed you?

A I couldn't really say how fast he was going. 10

Q He must have been going faster than you?

A He must have been going faster than me. I was going eighteen.

Q Did you see any lessening of speed on the part of the car driven by Dwight before the collision?

Mr. Levitan: I object as leading.

The Court: I will admit it.

Plaintiff's counsel prays an exception to this ruling of the Court. 20

Exception noted as ground of appeal.

Q (Question read.) A No, sir, I did not.

Q Did you notice the Castles Ice Cream truck before the collision? A Yes, sir.

Q What can you say as to the speed of that car? A The car was going across the street slow. Its rate of speed I don't know.

Q What was the speed as compared with the speed when the Ford car passed you? A I 30 couldn't say about that.

Q Was the truck going as fast as the Ford car? A No, sir, it was not.

Q How far over the street did the Castles Ice Cream truck go before the collision took place? A It was over half way across the street.

Q Did you see the actual contact? A I seen the Trubin car hit this Castles Ice Cream truck and swirl off to the left. 40

Frank McCarron, direct.

Q What part of the Castles Ice Cream truck did the Ford car hit? A It hit the corner of the tailboard on this side (indicating). That would be the north side of the truck facing me, the north end of the tailboard.

10 Q Did you see any change in the direction of the part of the Ford car before it hit that tailboard of the truck? A I don't understand you on that.

Q (Withdraw the question.) Did the Ford car change its direction at all before it hit the Castles Ice Cream truck tailboard? A Change its direction?

Q Yes. A Well, it just pulled out to me and pulled in front of me and as it got to the Castles Ice Cream truck she swung off to his left.

20 Q How are you at drawing? Can you make a sketch of this thing? A Yes, I can explain it better that way.

Q Let us see you make one. Put north at the top and south at the bottom. Which do you want to call Broad street? A This here is Broad street (indicating) and this is Bergen Place.

30 Q Which way were you going? A I was coming up here on Broad street.

Q You have south at the top, have you? A Yes, sir.

Q You were going— A Going this way (indicating).

Q Where was the Ford car going? A I was about here and the Ford car passed me just about the same place here (indicating).

40 Q Just indicate the course the Ford truck took as you saw it and the course the ice cream truck took? A Tell how they went?

Frank McCarron, direct.

Q Yes. A I was coming down Broad street here and the Ford truck passed me and I saw the Castles Ice Cream truck right about there (indicating). The Ford truck passed me here and the Castles Ice Cream truck was right about here, that is, the front wheels was on the curb here, and the Castles Ice Cream truck was right here, and here the Ford passed me, he shot in front of me, and when he got up to the Castles Ice Cream truck, what made him do it, I don't know, but he went and hit the tailboard and shot over that way (indicating). 10

Q Mark on there where the ice cream truck was when the tailboard struck. Just put the car on there. A There.

Q Now, was there anything between the back of that ice cream truck and this side of Broad street? A Which way? 20

Q Why, between. Here is the back of the truck and the side of the street. Was there anything in there to interfere with the Ford car? A No, sir, there were no cars coming along.

Q Did you notice how far from the curb line of Broad street the Ford car came to a stop? A No, sir, I did not. I didn't pay any attention. When the Ford car hit the Castles truck a man fell out the side and I pulled my truck right on close over to there (indicating). This is where my truck stood or stopped, and Mr. Gluck, the man I took to the hospital, lay back here in back of the Castles truck on one elbow trying to get up and I tried to help Mr. Gluck up and stopped the car and took him to the Long Branch Hospital. 30

Q Was the Castles Ice Cream Company truck standing still when you saw it, or in motion? A No, sir, in motion, going across the street. 40

Frank McCarron, cross.

Q Did you see how far he went down there?

A He didn't go very far, no sir. There is a big maple tree there and he stopped right by it and it was there a short distance from where the accident happened.

10 Q Are you sure whether or not he slowed at this intersection? A No, sir, he did not, his car was moving.

Cross examination by Mr. Levitan.

Q What distance did you say you were away from the intersection of Bergen Place when you first saw the Castles truck? A About 150 feet, to the best of my knowledge.

20 Q No further than that? A That is the best I can give.

Q Do you remember you testified in the hearing before Judge Cutler last May? A Yes, sir.

Q Do you remember how far away you said you were at that time? A I don't remember.

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

Q Was the distance you told us you were away the correct distance at that time? A I am not positively sure.

30 Q You are not sure whether you told us the correct distance at that time? A I know I told you something, but I don't know whether it was 150 feet, to my knowledge now.

Q You were asked the question, "How far back of the place of the accident was it she passed you?" and your answer was "About 300 feet." Was that correct? A I don't remember now.

40 Q Which is it, 300 or 150, or neither? A I don't really know.

Frank McCarron, cross.

Q Why did you testify it was 300 feet away if it was only 150 feet away as you just state? A That's as near as I can come to it.

Q You just gauged the distance? A I just gauged the distance, yes, sir.

10 Q Your guess wasn't very accurate, was it? You thought then it was 300 feet and now you say 150 feet. A I don't know.

Q Suppose you show us in this room the space you were away from the scene of the accident at the time Trubin's car passed you? A I couldn't tell you now. There aren't any houses here. I figured the houses were 50 feet apart.

20 Q Do you remember testifying in answer to my question that the Trubin car was 150 feet away from the scene of the accident at the time it passed your car on Broad street? Do you remember being asked that question three or four times and answering it the same way, 300 feet each time? A Not now, I don't seem to remember.

30 Q Do you remember Mr. Chance asking you this question, "Where were you with respect to the Ford car, Trubin's car?" Answer: "I was in front of Mr. Harping's place on Broad street, which I judge was 300 feet from the corner of Broad street." A Yes, sir.

Q Is Harping's place 300 feet away from the crossing? A I don't know about that.

Q You seemed to be sure last May. Are you in doubt now? A I lost all track of it now.

Q Just think and give us the correct distances. A That's about as near as I can come.

40 Q Which is correct, 300 feet or 150? A I don't know which is correct.

Frank McCarron, cross.

Q What distance do you say you were from the corner, or what distance would you say now Harping's place was from the corner? A It is in about 150 feet.

10 Q Would you say what you meant was 300 feet the last time? A That is as near as I can come to it.

Q How long have you been driving a truck? A I have been driving a truck for ten years.

Q The best judgment you have, varies between 300 and 150 feet. On the road you cannot tell the difference between 150 feet and 300 feet in gauging distances, is that correct? A Sometimes you can and sometimes you can't.

Q How often do you pass through that intersection? A Quite a lot.

20 Q You are still working for the Texas Oil Company? A No, sir.

Q You passed there a good many times with your truck, did you not? A Yes, sir, I did.

Q Isn't that place 300 feet away from the crossing as you said it was, and not 150? A I don't know about that.

Q What sort of a truck do you drive? A Pierce-Arrow.

Q How many tons? A Five-ton truck.

30 Q Is it regulated by a governor? A Yes, sir.

Q What regulation, fifteen miles an hour? A Eighteen miles an hour.

Q Have you a speedometer on your car? A No, sir.

Q How do you know how fast you are going? A The Texas Oil Company don't allow no trucks to do only eighteen miles an hour.

40 Q How do you know that you were only going eighteen miles an hour? A That has been tried out by inspectors and the State troopers have

Frank McCarron, cross.

tried to find out what my rate of speed was and I would ask them and they would trail me and the only time I would do better than eighteen miles an hour would be going down a hill.

10 Q Do you remember being asked this, "At what rate of speed were you traveling?" Answer: "My truck is governed, the best I can get out of it is fifteen miles an hour." A Eighteen miles an hour.

Q Let me read the question again, "At what rate of speed were you traveling?" Answer: "My truck is governed, the best I can get out of it is fifteen miles an hour." Did you so testify? A I don't recall it.

20 Q How do you explain the fact that in May you said your truck was governed at fifteen miles an hour and today you said your truck was governed at eighteen miles an hour? A That's what I figured it at and then what I know it is supposed to be.

Q What is your explanation of that discrepancy? A I don't understand.

Q How do you explain the difference in your testimony, last May and today? Did anybody talk to you about this case? A No, sir.

30 Q Why didn't you testify today as you did last May, if that was the truth in May? A That is the truth in May and the truth now.

Q That is your explanation? A I come here to tell the truth, and that's all.

Q Can't you tell us—your recollection is very good as to how this truck was governed? A That's to the best of my knowledge.

40 Q At this distance 300 feet away you saw this Castle Ice Cream truck crossing west on Bergen Place, is that correct? A I seen Castles Ice Cream truck crossing west on Bergen Place.

Frank McCarron, cross.

Q Just at that moment Trubin's car was passing you, is that correct? A Yes, sir.

Q Let us get this thing straight. Here is your truck (indicating) and here is the crossing of Bergen Place (indicating). Assuming you were going south and assuming this is east and this is west to the left, you were traveling along at this distance and here is Trubin passing you on the left? A Yes, sir.

Q And here, about 300 feet away you then saw this truck passing there? A What truck is that?

Q The Castles Ice Cream truck. A Castles truck, yes, sir.

Q How far had it gone across when you were here and the Trubin truck was passing you? A I couldn't make it out that way.

Q All right. Let's get it on the board and you will understand. South is at the top. We will call this north (indicating). A Yes, sir.

Q This is east? A Over here.

Q This is west (indicating)? A Yes, sir.

Q You were traveling in a southerly direction on Broad street going towards this point, is that correct? A Yes, sir.

Q Your position was about here somewhere where it was? A Yes, sir.

Q This is your truck. Call that the Texas Oil Company's truck. Now, at what distance away from this corner were you when you saw Trubin's truck going from east to west 300 feet or 150 feet—I mean the Castles Ice Cream truck? A I was right about in front as I said, of Harping's house.

Q How far is Harping's house from the corner? A I should judge about 150 feet.

Frank McCarron, cross.

Q At that same moment where was the Castles Ice Cream truck, how far across Bergen Place had it gone? A The Castle Ice Cream truck was about here when I seen the front of him coming up.

Q Just nosing out of Bergen Place across the street? A He had his front motor and everything across here about, right about in front there, somewhere (indicating).

Q Was he half way across the street, across Broad street? A When?

Q When you first saw him? A No, sir, he wasn't half way across.

Q Was he a quarter of the distance across? A He was about here (indicating).

Q How far from the easterly curb of Broad street was it? A He had the right of way.

Mr. Levitan: I object and ask that that be stricken out.

The Court: Strike it out.

Q How far from here was the truck when you saw him? A About here say, about half way is the front part of his car (indicating).

Q Is forty feet a fair distance, a fair width for Broad street? A I don't really know how wide it was.

Q You say it was half across Broad street? A Yes, sir.

Q That is twenty feet across? A I don't really know how wide it is.

Q Assuming Broad street is forty feet, it would be twenty feet across Broad street when you saw him? A About twenty feet.

Q At that moment when you saw him Trubin's car passed you? A Yes, sir.

Frank McCarron, cross.

Q And you were in front of Harping's store there? A Yes, sir.

Q Sure about that? A In front of Harping's.

10 Q That is a very long block, isn't it, the block north of Bergen Place? The block that you had crossed before you came to Bergen Place how far away from Bergen Place is that? A I don't really know the distance.

Q It is a very long block, isn't it? A It is long, I don't know how long it is.

Q You were about the middle of the block, weren't you? A I was more than the middle of the block.

20 Q Which way, nearer to Bergen Place or further away? A Nearer to Bergen Place.

Q What is on the corner of Bergen Place and Broad street? A On which corner?

Q The northwest corner, the corner you were going down? A There is a house on the corner.

Q How wide is that? A I don't know how wide it is.

Q Is it a fifty or seventy-five foot lot? A I don't know, I couldn't tell you.

30 Q What is next to that house? Is it attached or detached? A Separate, not attached.

Q What is next to that house? A There is another house.

Q What is next to that one? A There is a house all the way through.

Q How many houses is Harping's house from the corner? A I don't really know. About two or three; I don't recall.

40 Q You have already mentioned three and you haven't mentioned Harping's house. Where is

Walter Matis, direct.

Harping's house? A I think it is three or four houses from the corner, about three.

Q Is it the fourth or fifth? A I don't really know now, I haven't the least idea.

Q So, you were mistaken when you said it was 300 feet away from the corner? A I don't know, I say about. 10

Q Could it be 300 feet? A I don't really know. Just about.

WALTER MATIS, sworn in behalf of defendant.

Direct examination by Mr. Chance.

20 Q What was your job on October 28, 1922, the date of the accident? A Helper on the Castles Ice Cream truck. 20

Q At the time of the accident where were you? A On the tailboard.

Q What were you doing on the tailboard? A Filling up boxes with ice.

Q Did you see the approach of the Ford car before the accident? A I did not, I was standing backwards to it.

30 Q What was the first you knew an accident was happening? A I was threw out. 30

Q Where did you fall? A Down on the opposite side and when I got up I seen two bodies laying alongside of me.

Q To what side of Castles Ice Cream truck were you knocked? A My salt barrels are on the right-hand side and that's were I got hit and I was laying up again the salt barrels.

Q Were you knocked unconscious? A No, sir. 40

Walter Matis, direct.

Q Did you get up and look around? A Yes, sir.

Q What did you see as to the position of the automobiles? A Why, Trubin's Ford was, I don't know how many feet, but it was away down the street up against the curb on the left-hand side.

Q How about the Castles Ice Cream truck, where did that stop? A I don't know. When he stopped he was facing the sidewalk.

Q Did he slow up or stop at Broad street? A No, he did not.

Q What damage did you observe to the Castles Ice Cream truck? A He almost knocked the tailboard over and he put a big dent in the side of the truck.

Q The side of which truck? A The Castles Ice Cream truck.

Q Where was that dent? A There is a rail we carry our cans in and there was a half an inch iron on that and there was about an inch dent in the side of the iron there; it was dented in.

Q How far from the back of the car? A Back of the truck?

Q Yes. A About a foot from the tailboard.

Q Did you notice the condition of the right-hand side of the Ford car? A I did not, I wasn't on the lookout.

Q Can you approximate how far down from the corner this Ford truck was when it stopped? A About 200 feet.

Q On which side of the road? A On the left.

Emma A. Wood, direct.

Cross examination by Mr. Levitan.

Q You were on the back of the wagon, on the back of Castles Ice Cream truck salting some ice cream? A Yes, sir.

Q You could not see anything of what happened? A No, sir.

Q You saw nothing of the accident whatever? A No, sir, I did not.

EMMA A. WOOD, sworn in behalf of defendant.

Direct examination by Mr. Chance.

Mr. Chance: May I read in evidence D. 1 for identification? First I will offer it in evidence.

(D. 1 for identification is marked Exhibit D. 1.)

(Exhibit D. 1 read to jury.)

Q You were in the neighborhood of Bergen Place and Broad street on the 28th of October, 1922, were you not? A Yes, sir.

Q Where were you? A Sitting in the car twenty-five feet from the corner.

Q On which street was this car? A On Broad street.

Q As you were sitting there was anyone with you? A No, sir.

Q What were you doing as you were sitting there? A When I first was in the car, starting to read.

Q As you were sitting there reading did either of these automobiles attract your atten-

Emma A. Wood, direct.

tion? A Yes, sir, the Castles truck attracted
my attention and I looked up and it was cross-
ing the road. He just started to come from
Bergen Place onto Broad street and he raised
his hand like that (indicating) and held it up
and he started to cross the street and Trubin
10 came down on the left side of him and they were
driving very fast.

Mr. Levitan: I object to that and ask
that it be stricken out, the characterization
of how they were driving.

The Court: I will not strike that out.

A They were driving very fast, and they went
out just a little south past me and hit the Castles
20 Ice Cream Company truck.

Q Which car reached the intersection first,
the Castles Ice Cream truck or the Ford car?

A Castles car was half way across on Bergen
Place before Trubin's came. Trubin's car, when
it passed me, was very close to me and when it
threw the bodies out of Trubin's car they lay
right in front of my car and I was right at the
curb.

Q How far was it between the back of the
30 Castles Ice Cream truck and the side of the
street did it pass when this accident happened
(withdraw the question). Can you tell us on
this blackboard—this is Broad street and this
is east and this is west (indicating)? Can you
indicate on there where you were sitting? A
Just about here (indicating), twenty-five feet
from this corner (indicating).

Q Put your initials there. This "E" indi-
40 cates the place where you were sitting? A Yes,
sir.

Emma A. Wood, direct.

Q Indicate the place where the accident was,
where the two cars actually came together. A
Just about here (indicating).

Q (By the Court.) Is this an X you put
where the accident happened? A Yes, sir.

Q (By Mr. Chance.) Was there anything in
10 between the back of the Castles Ice Cream truck
and the side of the street over which it had
passed? A Nothing whatever.

Q What in your judgment is the distance in
respect to the width of the cars, how many cars
could have passed in between the back of the
Castles Ice Cream truck and this side (indicat-
ing) of the street? A They could all three.

Q Did the Castles Ice Cream truck stop at
the intersection of the street there? A No, it
20 did not stop at all.

Q Is there a depression there of any kind?
A Yes, sir, there is there where it slants down
where the water runs down the street, just a little
slant on Broad street.

Q Did the Castles Ice Cream truck slow or
stop in that depression? A No, sir, it did not.

Q How far did the Castles Ice Cream truck
continue after the time of the collision? A
30 About twenty-five feet.

Q Where did the Ford car go? A That
went down the street and across on the left-hand
side and stopped quite a distance down.

Q Which was going the faster at the time
of the collision? A Trubin's.

Q Can you approximate the hours per mile?
A No, but I know it was fast.

Q Was there any car coming in the opposite
direction, or the way your car was faced, which
would have interfered at all with Trubin's hav-
40

Emma A. Wood, cross.

ing passed around to the rear of that Castles Ice Cream truck? A No, sir, there was not.

Q Did you notice any slackening of speed on the part of Trubin's car at the time it ran into the Castles truck? A Yes, sir, after it went by me he tried to turn out a little ways.

10 Q You were how many feet away from the place where the accident happened? A Twenty-five feet.

Q About how far do you think it was away from you before he swerved that little bit? A I would say about ten feet; I know he went by me a little distance.

Cross examination by Mr. Levitan.

20 Q Your car was facing south, was it not? A Yes, sir.

Q You were sitting in your car while it was parked waiting for some time? A Yes, sir.

Q What were you doing in the car? A Reading.

Q You were not paying any attention to the road except your book or newspaper or whatever you were reading? A No, not all all. My attention was drawn to the Castles truck.

30 Q The first you saw of Trubin Brother's car was when it was about twenty-five feet from the corner up beside your car? A Right past me.

Q You didn't know what happened before that? A No.

Q At that moment the Castles truck was how far across Broad street? A At the time it passed me?

40 Q At the time Trubin's car passed you parked here (indicating) how far was the Castles truck across Broad street? A It must have been past half-way.

Emma A. Wood, cross.

Q It was rolling along, going? A Yes, sir.

Q You looked up and saw that it was going?

A I was watching it.

Q What attracted your attention to it, the passing of the Trubin's car? A No, a whistle or horn, I couldn't tell which it was.

10 Q For a second or two before the accident you heard a whistle or a horn? A No, I heard that on the corner.

Q You then looked up? A Yes, sir, and watched it cross.

Q You do not know whether Trubin's car was coming or not? A I didn't know until it passed my car.

Q How much time elapsed between the time you heard the horn or the whistle and Trubin's car came beside your car? A I couldn't say. 20

Q You just were sitting there watching the truck? A Yes, sir.

Q How far would you say you were from the corner with reference to this room? Suppose I start to walk down and you tell me when to stop, when I reach the distance you say your car was parked from the corner of Bergen Place and Broad street? A I should think a little further than that (indicating).

30 Q About here? A A little further than that, about twenty-five feet, I don't know.

Q The front wheels of the truck were how far across the roadway of Broad street? A The front wheels must have been on Bergen street when it struck, that is at this time.

Q Right on Bergen Place? A Yes, sir, it was right in front of me.

Q Are you sure the truck did not stop before the collision? A After it passed me?

40 Q Yes. A No, sir, it did not.

Emma A. Wood, re-direct.

Q Were you watching it all the time? A I was watching it all the time.

Q You were reading, weren't you? A I was at first, but I wasn't after I started to watch the truck cross the road.

10 Q There was no special feature about watching the truck cross the street, was there? A Well, I watched it.

Q Was there anything special that made you watch it? A No, I don't know as there were, but I simply watched it crossing the road.

Q There is quite a depression in the roadway. A Yes, a little slant.

20 Q Had the truck passed the one on the east side when you first saw it? A It was just about stopping at that corner when I first saw it.

Q Had it reached the second one when the collision occurred? A Yes, sir.

Q Just got into that, had it? A No, it was really past that.

Re-direct examination by Mr. Chance.

30 Q You said something about having heard some horn, which car was it that blew the horn? A It was the Castles Ice Cream truck that attracted my attention by either a horn or a whistle; I couldn't tell which.

Albert E. Newman, direct.

ALBERT E. NEWMAN, sworn in behalf of defendant.

Direct examination by Mr. Chance.

10 Q You are a police officer in Red Bank and were on the day of the accident involved in this suit, October 28, 1922, were you? A Yes, sir.

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

Q You got there at what time? A Five after twelve.

20 Q At the time you got there what was the condition of the Castles Ice Cream car and what was the condition of your car? A The Ford car had its right side sliced right out and the roof was hanging down about two feet lower on the left. The Castles Ice Cream truck all I could see was two hinges broken and a dent in the panel of the body about seven inches in front of the rear stanchion.

Q Where were the hinges you mentioned? A On the tailboard.

Q What is the width of Broad street at that place? A The measurement is forty-one feet.

30 Q What is the width of Bergen Place? A Thirty-eight feet six inches.

Q From curb to curb? A From curb to curb, yes, sir.

Q Where was the Castles Ice Cream truck with respect to the intersection of the street when you arrived there? A Thirty feet west of Broad street.

Q Where was the Ford car when you arrived there? A Seventy paces south of the impact on the left side of the street.

40 Q How far is there in one of these paces you mention? A Three feet.

Harry H. Clayton, direct.

Q Which side of the road was the Ford car on? A The left side.

Q Whereabouts with respect to the side of the road? A The east side of Broad street.

Q Where, in respect to the curb? A Along-side of the curb.

10 Q In the street? A In Broad street.

Cross examination by Mr. Levitan.

Q This Ford was a light delivery truck? A Yes, sir, panel body.

Q The ice cream truck was a heavy, five and a half ton heavy truck? A Yes, sir.

Re-direct examination by Mr. Chance.

20 Q The statement was made to the chief, not to you? A Not to me, to the chief.

Q (By the Court.) Was there any name on that Ford truck? A I don't believe there was, I don't believe it had been painted yet. I couldn't tell.

30 HARRY H. CLAYTON, sworn in behalf of defendant.

Direct examination by Mr. Chance.

40 Q Did you take this statement, which has been marked D. 1, of Herbert Dwight? A I came to the office after that statement was made. I think I was there before Dwight was taken away, but I am not so positive I was there at the time it was written or not, but I read the statement over and looked at it before Dwight went out. I

Harry H. Clayton, direct.

am not positive I was there at the office when he made it.

Q Did you take it up at all with Dwight? A Yes, sir, I did.

Q As to his befuddled condition, was he so befuddled he didn't know what he was talking about? A I don't think so. 10

Q Was there any evidence of such a condition? A No, sir.

Q Did he talk with you intelligently? A Yes, sir.

Q No coercion was used to get the statement, was there?

Mr. Levitan: I object as leading.

Q Was there any? A I didn't get the question. 20

Q When you were discussing that statement with Mr. Dwight, did he make any complaint as to any imposition upon him in getting that statement?

Mr. Levitan: I object to that as improper.
The Court: Sustain the objection.

30 Q Did you come to the scene of the accident after Officer Newman or before? A I got there a little after Officer Newman.

Q You do not know anything in addition to what he has told us. A No, sir, I went direct to the hospital.

Q Did you observe the position of the Ford car on the street? A Yes, sir.

Q Where is it your recollection the Ford car was situated? A May I show you on the board? 40

Nels Mathiasen—Walter Matis, direct.

Mr. Levitan: I object as irrelevant and immaterial, if it is proposed to show its original position.

The Court: Sustain the objection.

10 Mr. Chance: May I withdraw this witness to ask another witness if it had been moved between the time of the collision and the time Chief Clayton got there?

The Court: Yes.

NELS MATHIASEN, recalled in behalf of defendant.

20 *Direct examination by Mr. Chance.*

Q Were you at the scene of the accident when Officer Newman arrived there? A Why, no, sir.

Q Were you there when Chief Clayton arrived? A I spoke to the chief.

Q Were you there at the scene of the accident when the chief arrived? A No, sir.

30 WALTER MATIS, recalled in behalf of the defendant.

Direct examination by Mr. Chance.

Q Were you at the scene of the accident all the time between the time when it happened and the time when Chief Clayton arrived? A Yes, sir.

40 Q Had the truck of Castles been moved between the time when it came to rest after the

Walter Matis, cross.

accident? A No, sir, I stood there and watched it.

Q And the time the chief of police arrived?

A No, sir.

Q Had Trubin's car, the Ford car been removed, or its position changed after the time it came to rest up to the time when the chief of police arrived there? A No, I don't think it did.

Q Don't you know? A Well, I know all right, because I was sitting there. Of course, the driver went up to the Court House.

Q Had the Ford car been moved or had it not, or don't you know? A No.

Q What is no, had it been moved or had it not or don't you know? A No, the car had not been moved.

Cross examination by Mr. Levitan.

Q You were under the truck after the accident, weren't you? A Yes, sir.

Q You were not paying any attention as to whether or not the Ford car was moving or not, were you? A When the chief of police came down there I was sitting on the curb.

Q You were dazed after your fall? A I was dazed, and put him in the car.

Q You had your own troubles, didn't you? A My own troubles, but I know the Ford car wasn't moved.

Q How do you know that? A When we were pulling away from there the Ford car was still there yet.

Q Who put the Ford car there, the Trubin car? A It was standing there the same place it stopped after the accident.

Q Did you see it coming to a stop? A No.

Harry H. Clayton, direct.

Q How do you know how it got there? A What?

Q You say you helped the chief to pull the truck over? A Yes, sir.

Q How did you help pull that truck? A Because it was out in the road.

10 Q The Castles truck? A Yes, sir, and he told me to pull it a couple of feet off the road.

Q Where was the Castles truck standing? A It was standing in Bergen Place already.

Q The Castles truck was standing just where it was hit? A No, sir.

Q Where was it standing? A It was apast Bergen Place and Broad street.

Q Is that where it was hit? A It was hit on Broad street.

20 Q How far from the place where it was hit was it standing? A About thirty feet, I guess.

Q Why did they have to move it from that place?

Mr. Chance: I object.

The Court: Sustain the objection.

Q Where did you help the chief move the truck to?

30 The Court: I will overrule that question on my own motion.

HARRY H. CLAYTON, recalled in behalf of the defendant.

Direct examination by Mr. Chance.

40 Q Tell us the distance these two cars were from the corner when you arrived there. A

Harry H. Clayton, cross.

When I arrived there Trubin's car was over here in this position (indicating), I didn't measure it, but around 200 feet. This is a concrete road here (indicating) with a concrete wing. Mr. Trubin's car was here, about 200 feet from the corner, I didn't measure it; and the Castles truck was over here (indicating). This is a concrete road with about an eight-foot wing into Bergen Place, which is a gravel road or was at that time, now concrete. The Castles truck, the rear was about twenty-five feet from this corner here (indicating).

Q What kind of a depression or ditch was there at the intersection of these two streets? A A little. I would say about four inches.

Q Four inches in how far? A Running back possibly eight or ten feet each way. 20

Cross examination by Mr. Levitan.

Q How long have you been police chief in Red Bank? A Eleven years.

Q You are familiar with that neighborhood around Bergen Place and Broad street? A Yes, sir.

Q How many feet north of the corner is Harping's house, do you know? A Mr. Harping's house is either the fourth or the fifth from the corner of Broad and Bergen on Broad. 30

Q About how many feet would you say that is from the intersection? A Those lots would average seventy-five to 100 feet.

Q That would make, in your judgment, between 300 and 350 feet from the intersection? A Yes, sir.

Q Did you see any name on this Ford truck? A No, sir.

DEFENDANT RESTS.

Herbert S. Dwight, direct.

HERBERT S. DWIGHT, recalled in behalf of the plaintiff in rebuttal.

Direct examination by Mr. Levitan.

10 Q Do you recall being present in the police station or at the Town Hall after the accident and hearing a conversation between someone and Mr. Mathiasen the driver of the Castles Ice Cream truck over the telephone? A Yes, sir.

Q Please tell the Court and jury what you heard Mr. Mathiasen say over the phone? A I heard him ask for someone.

Mr. Chance: I object.

The Court: Sustain the objection.

20 Q Did you hear Mr. Mathiasen ask for anything over the telephone?

Mr. Chance: I object.

The Court: Sustain the objection.

30 Q You heard Mr. Mathiasen testify that he did not make any statement about a dog or his brakes being jammed or the dog of his brakes being jammed?

Mr. Chance: I object as immaterial whether he heard it or not.

Q Did you hear him make any such statement at that time? A What kind of a statement?

Q (Question read.) Answer yes or no. A Still, I don't understand it.

40 Q (Withdraw the question.)

Herbert S. Dwight, cross.

Q When Mr. Mathiasen was talking over the telephone to someone did you hear him say that his brake was jammed or the dog of his brake on his truck was jammed, or words to that effect? A He called up on the telephone and asked for someone and then he said—

10

Mr. Chance: I object.

Q Did you or not? A He said the dog caught and he had to hit it with a wrench and pull at it.

Q This truck you were driving, did that have any name on it? A I don't recall if it did or not.

Q (By the Court.) Who owned that truck? A As far as I know Mr. Trubin owned the truck. 20

Q You did not own it? A No, sir, I don't know who owned it.

Q Who was to pay you the \$4? A Mr. Gluck was to pay me the \$4.

Q On that trip were you to do anything else besides drive the truck? A No, sir.

Q You were not to do anything else, just simply drive from there and back? A Yes, sir. 30

Q He was to give you \$4 for doing that? A Yes, sir.

Cross examination by Mr. Chance.

Q You did not have any relations of any kind with Mr. Trubin, did you? A No, sir.

Q Your relations were entirely with Gluck? A Yes, sir.

40

Isadore J. Trubin, direct—cross.

Re-direct examination by Mr. Levitan.

Q Did you say to Mr. Mathiasen at the police station that you were going kind of fast?

Mr. Chance: I object.

10 (Withdraw it.)

ISADORE J. TRUBIN, sworn in behalf of plaintiff, in rebuttal.

Direct examination by Mr. Levitan.

Q Where do you live? A Red Bank.

20 Q What is your business? A Phonographs, pianos and office supplies.

Q Do you remember this day, the 28th day of October, 1922? A I do.

Q Do you remember where your truck was going on that day? A I do.

Q Where? A Long Branch.

Mr. Chance: I object to this as not rebuttal.

30 Q Who is the owner of that truck? A I am.

Q Was your name on it? A Yes.

Q What was the name on the truck? A Trubin's, Office Supplies, Phonographs and Pianos.

Cross examination by Mr. Chance.

40 Q Did you rent this truck to Mr. Gluck? A I haven't loaned it to him, it was a business arrangement.

Isadore J. Trubin, re-direct.

Q On the date of this accident was the driver of that truck in your employ? A He was not.

Q Was it part of your business arrangement that you would let Mr. Gluck have that truck to use in his business and him to hire a chauffeur for it? A To use in my business.

Q In Gluck's business? A Gluck was only my business. 10

Q Was Gluck an independent contractor? A He was.

Q As such independent contractor you loaned this car or permitted Mr. Gluck to have this car? A Yes, sir.

Q Had you any control whatever over what the driver of that car did at the time of the accident? A None.

Q Was that a matter solely for Mr. Gluck and the driver? 20

Mr. Levitan: I object as leading.

The Court: Sustain the objection.

A I didn't know Mr. Gluck had a driver.

Q You did not know Dwight was going to drive? A No. I saw Dwight around, but I didn't know he was going to drive.

Q You knew you were not going to pay whoever did drive? A I knew that. 30

Re-direct examination by Mr. Levitan.

Q In your working arrangement there was an arrangement between you and Gluck for the compensation of the chauffeur of this car? A There was not. Could I be permitted to state exactly what the arrangement was? Mr. Gluck came to ask my permission for twenty per cent. of all sales for the use of his truck. On the 40

Motion for Direction of a Verdict.

Monday of the week he came to ask he explained to me his truck was not able to be used and he should use my truck and the arrangement was fifty per cent. and he uses my truck.

Q (By the Court.) Was there anything said about a chauffeur? A Nothing whatever. He was to have my truck.

Re-direct examination by Mr. Levitan.

Q Gluck was to use that for your exclusive business? A Yes, sir.

Q Gluck had nothing else to do except work for you? A Work for me.

Plaintiff rests.

20 Defendant rests.

Mr. Chance: I respectfully move for the direction of a verdict on the ground that it appears from the evidence of the document, the letters of administration offered in evidence that there was no proper administrator for two years from the date of the deceased's death, and that this case was not properly instituted.

30 Also on the ground that there has been an adjustment between Trubin Brothers and the plaintiff as appears by the document in the case and on the further ground there is a variance in that the allegation of the complaint is that the truck of the Castles Ice Cream Company was operated and propelled at a high rate of speed, and so forth.

40 On the fourth ground there is no evidence at all of negligence on the part of the defendant.

Charge to Jury.

And on the fifth ground there is contributory negligence clearly shown here on the part of the driver of this car, who was the employee of Gluck.

The Court: The motion will be denied.

Defendant's counsel prays an exception to this ruling of the Court. 10

Exception noted as ground of appeal.

Mr. Chance sums up for the defendant.

Mr. Levitan sums up for the plaintiff.

COURT'S CHARGE TO JURY.

The Court charges the jury as follows: 20

MOUNTAIN, J.

The action which has been tried before you is an action brought under a statute in this State known as the Death Act. I will explain that act to you a little later.

The plaintiff is the administratrix *ad prosequendum*, that is, the representative of the deceased for the purpose of prosecuting this action against the defendant, Castles Ice Cream Company, on the theory that the defendant by its employees or servants was negligent and the negligence of those servants of the defendant proximately caused the death of Emil L. Gluck and further than that, that there was no contributory negligence on his part. 30

The real bone of the trial is negligence; negligence in the operation of motor vehicles and that will be the subject of your inquiry. To prove that, the plaintiff, after filing certain pleadings in court upon which issue has been joined, has 40

Charge to Jury.

adduced certain evidence of facts before us. The plaintiff alleges that Emil Gluck was on October 28, 1922, in the business of selling victrolas on a commission, and at the time in question he was at Red Bank, New Jersey. The accident which resulted in his death took place at the intersection of Broad street which runs north and south in Red Bank and Bergen Place, which runs east and west. It has been related to us that Emil Gluck desired to go to Long Branch. In the narration of the testimony you must not take my memory of it if yours differs with my recollection, because you are to decide all questions of fact. For the purpose of going to Long Branch, Mr. Gluck, who was employed by one Isadore J. Trubin, borrowed Mr. Trubin's Ford truck, a light truck and hired a man named Herman S. Dwight to drive it and on the date in question with the truck which he had borrowed from his employer and with Mr. Dwight at the wheel he proceeded in a southerly direction on Broad street in Red Bank. When they came to the intersection of that street with Bergen Place this truck came into collision with an ice cream truck of the defendant and Emil Gluck was killed. How did the collision take place according to the plaintiff's story? One of the witnesses called on behalf of the plaintiff was the man at the wheel, the man whom Gluck had hired at \$4 a day to take him to Long Branch and bring him back; his name was Herman S. Dwight and he said that at that time there were four men in the car, Kantor, DeMarco, Gluck and himself; that it was about twenty minutes of twelve, almost noontime, and that as he approached Bergen Place and Broad street driving in a southerly direction he was going at a speed which he estimated was twenty-five miles an

Charge to Jury.

hour. He testified that he made an observation to the right and left and in connection with that observation he said he looked to the left and he saw nothing and then he looked to the right. When he did see the Castles Ice Cream truck, according to his testimony, it was directly in front of him going in a westerly direction. He testified that there was a certain distance between the rear of the Castles Ice Cream truck and the easterly side of Broad street and then, as to what happened he said that he ran into the tailboard of this truck and that his machine went across the street, that is, to the easterly side of Broad street and stopped at the left-hand curb. He gave us his estimation of the distance between the defendant's truck and the automobile when he first saw the truck as a distance of twelve feet nine and one-half inches. He told us that he thought the truck stopped within about two feet. He also told us that Broad street was wide enough for five cars and he testified that two cars could have passed between the rear of the truck and the part of the street over which the defendant's truck had passed as he approached it.

Let us now turn to what the defendant has to say. The defendant was driving a truck and Mr. Mathiasen was the chauffeur in charge of it. It was a five and a half ton Packard truck and he said he was going west on Bergen Place at about ten or twelve miles an hour. That he made an observation and he saw the Ford automobile coming towards him, but that he had plenty of time to cross the street and proceeded to cross it and held his hand out as a signal. He said the front of his truck was half way over the streets and on the left-hand side when

Charge to Jury.

it was struck. He gave as his estimation the distance between his truck and the Ford when he first saw it as 200 to 220 feet. He also testified, I think, that he traveled in his opinion thirty-five feet while this Ford traveled 220 feet. Mathiasen testified that he saw no lessening in the speed of this Ford car and McCarron, another witness called by the defendant who was driving another car on the street and was passed by this Ford, testified that he saw no lessening of the speed of the Ford car. McCarron also tells us that the defendant's truck was coming across the intersection of these two streets slowly and that it was half way across when the accident occurred and that the Ford hit the corner of the tailboard of the truck.

Another witness called by the defendant was sitting in an automobile which I understood was parked near the intersection of these streets; that witness was Emma A. Wood. She said she was reading and her attention was attracted by the approach of the Castles Ice Cream truck and she looked at it as it crossed the road, that is, as it crossed Broad street. She said she saw the driver of that truck raise his hand and she saw the driver of the Ford car, in which the deceased was riding, coming very fast towards the truck, and she said the Castles Ice Cream truck as half way across when the accident happened, and she states, as I recollect her testimony that she heard a whistle or a horn or signal which she thought was given by the driver of the Castles Ice Cream truck. She also testified that the truck did not stop before the collision; my recollection is that the driver of this Ford car, Mr. Dwight, told us that this truck did stop before the collision.

Charge to Jury.

The mere happening of an accident never should be the basis of a successful suit at law unless negligence is proved. The plaintiff in this case has the burden of proving that the defendant, by its servants or employees, in the management and operation of that truck at that time and at that place, was negligent. The burden of proof being upon the plaintiff, what is the law which governs the case? What has the plaintiff to prove? The common law which exists in this State today requires the driver of every vehicle, as it required the drivers of those vehicles which were in this accident, to exercise such care as a reasonably careful and prudent man would have exercised under similar conditions. That was the duty which reposed upon Mathiasen and reposed upon Dwight. The common law, which I have referred to, has additional duties imposed upon it by legislative action and specifically by a statute passed in 1915, which we know in this State as the Traffic Act and that act provides, among other things, that in places where the houses are on an average of less than one hundred feet apart in the built-up portion of the city or town a speed twelve miles an hour shall not be exceeded. That act provides that every driver of a vehicle approaching the intersection of a street or public road shall grant the right of way at such intersection to any vehicle approaching from his right, but, gentlemen of the jury, this section of the Traffic Act which I have last referred to does not give an automobile driver approaching from the right an arbitrary right of way; it does not relieve him from his duty of using reasonable care to avoid colliding with another automobile should its driver disregard such right; in other words, this section of the

Charge to Jury.

Traffic Act is not intended to provide an exclusively hard and fast rule applicable to all hazards and in all situations regardless of actual conditions and thus liberate from responsibility one who adheres to the regulation and is otherwise reckless and indifferent.

- 10 Now, let us turn to the facts for a moment, bearing in mind also that a mere infraction of the Traffic Act is not of itself negligence. If both of these drivers had to exercise reasonable care in view of the duty imposed upon them by common law and the obligations imposed by the legislature, how are you going to search to find out whether or not they did? Well, there are many things you will consider and probably among others you will remember that apparently
- 20 it was almost midday, and there is no question as to visibility; you will recall exactly how the place was described where the accident happened as indicating what observation a man could make and how far he could see as he approached the cross roads. You will take into consideration the speed of these two vehicles as they approached the cross roads as indicating reasonable care or otherwise. You will take into consideration whether or not signals were given;
- 30 you will take into consideration probably, under the evidence, the question as to which vehicle reached the crossroads first, because generally a vehicle that reaches the crossroads first, if all things are equal, has the right of way. You will take into consideration how far these two vehicles went after the collision as indicating how fast they were going, or perhaps how recklessly they were being driven. You will take into consideration how the two drivers were maneuvering the two vehicles at the time of the collision.
- 40 Among other things required in the exercise of

Charge to Jury.

reasonable care, of course, is reasonable observation and naturally your inquiry will be directed towards the observation made by the two drivers. If we refer to the testimony we find that Herman S. Dwight, who was driving this Ford car gives testimony, among other things as to his looking to the right and looking to the right and then seeing this Castles Ice Cream truck directly in front of him at a distance he estimates as twelve feet nine and one-half inches. What was the character of his observation if he looked to the left and he looked to the right and then, or perhaps shortly thereafter saw this truck at the distance I have indicated directly in front of him? Did he look or was the observation he made inefficiently and did the speed at which he was driving have anything to do with it? Where was he on the road? If his car was under control and his observation was efficient why wasn't it possible for him to have passed in the rear of this truck with the room that has been indicated?

On the other hand, turning to the defendant's employees, you have and should make the same test as to reasonable care, the test as to the observation made by the driver of the defendant's truck and whether it was or was not an efficient observation. He testified he thought he saw this Ford and he testified as to the distance from the intersection or from his truck to the Ford and the fact that he thought he had plenty of time to go over. Then, there was testimony that may indicate to you that he thought the Ford was not lessening its speed and he put his hand out. From what he did you must determine as to his speed and as to whether he maneuvered his employer's truck in a reasonably careful and prudent manner.

Charge to Jury.

I have detailed this testimony, as I recall it, because as I said in the beginning negligence is the gist of this action and the negligence of the two drivers are particularly subject to your scrutiny and both of the drivers, operation as indicating or not indicating negligence, are im-
 10 portant, because of the relationship which Herman S. Dwight bore to Emil Gluck. Emil Gluck had a borrowed car. Emil Gluck hired Dwight at \$4.00 a day. He was going to Long Branch and I think Dwight was hired for two days. This was the second day of his employment. This was a casual engagement between Gluck and between Dwight in which Gluck was the employer and Dwight was the employee; in which Gluck was the master and Dwight was the servant and if
 20 Dwight, in the operation of that Ford car was negligent, Gluck's widow in this case or Gluck's administratrix cannot recover a cent, because the negligence of Dwight is imputed to Emil Gluck. Why is that? Well, if a man hires a chauffeur and he runs into someone else and he concludes to sue the person with whom he has had the accident, you can easily see that the defendant, if he or she can prove that the chauffeur was negligent, can foreclose that man's right to recover anything because the master is responsible for
 30 the servant's lack of care. If I employ a chauffeur and he runs into an automobile owned by you I cannot recover if my chauffeur is negligent. He is under my employ, under my direction. I do not tell him how to run the car; I hire him for that purpose; I may tell him when to start and when to stop and where to take me, but the operation of the car is for him acting as my servant or employee.

40

Charge to Jury.

If you find as a matter of fact, I charge you, that Herman S. Dwight was negligent in the operation and control of this Ford car, that disposes of this action at once and your verdict must be for the defendant. Obviously, if you find that Herman S. Dwight was negligent and the operator of the defendant's truck was negli-
 10 gent your verdict must be for the defendant. The burden of proof is upon the defendant to prove the contributory negligence of Herman S. Dwight.

Now to come to the act under which this suit is brought. At common law, in a case like this there would have been no remedy whatever, but by statute both in England and in this country and most of the States the law now is that where a person comes to his or her death under cir-
 20 cumstances which would have given a right of action in his or her favor if the accident had not resulted in death, the personal representative—in this case the administratrix—may sue on behalf of the widow and next of kin to recover what? To recover your estimate of the probable pecuniary loss inflicted upon them by the death of the deceased in dollars and cents. You cannot allow any damages for sentiment or grief, or anguish or pain or suffering. What would the
 30 deceased have been worth to the widow and children in this case pecuniarily if death had not ensued at that time? The widow is now forty-one years old, and I think at the time of his death there was testimony that Emil Gluck was thirty-five. I understand there are now two children, one fifteen and the other seven and a half years of age. There is testimony that at one time Gluck earned \$100 a week and at that time he gave \$90 a week, I think, to his wife, and at another time he earned \$75 a week and I think
 40

Charge to Jury.

it was his latter employment when he gave \$60 a week to his wife. What is the sum which during the joint lives of these people would have come to them from Emil Gluck? Of course, you can see that it is full of uncertainties and it is. Emil Gluck might have died a week later from some other cause, or he might have lived until the present time, but these uncertainties must be taken into account by you, and if you find for the plaintiff, in the course, then, of your deliberations I presume you will arrive at some sum of money. A moment's thought and you will realize then that that sum of money is too large, because it represents the sum which would have come to Fannie Gluck and these two children during the joint lives of themselves and Emil Gluck and that sum must be commuted to a capital amount which will represent the present value of that future expectation and that is the sum to which the plaintiff is entitled if she has made out a case and is entitled to anything.

I have been asked to charge on behalf of the respective parties some requests. I will take up the plaintiff's requests first.

I will deny the first, second, third and fourth requests of the plaintiff. I will charge the fifth.

5. "If you find that one or more of the employees of the defendant or either of them was guilty of negligence, then the negligence of the servant or employee is construed as the negligence of the defendant."

6. "The evidence is uncontradicted in this case as to the plaintiff's pecuniary damages." That is, not that the plaintiff is entitled to pecuniary damages, but as to the amount indicated by Mrs. Gluck when she testified.

Charge to Jury.

The seventh request of the plaintiff to charge appears to have been withdrawn. The eighth I will deny.

I have been asked to charge on behalf of the defendant and do charge as follows:

1. "Mere proof that Mr. Gluck died as the result of a collision does not entitle plaintiff to a verdict."

The second request to charge I have charged. The third I will deny. The fourth I will charge.

4. "If the driver of the car in which Mr. Gluck rode was his employee, any negligence on the part of such driver would be imputable to Mr. Gluck, and if such negligence on the part of the driver of the car in which Mr. Gluck rode contributed to the accident, it would prevent recovery by the plaintiff in this action."

The fifth I will deny. The sixth I will charge.

6. "The plaintiff is not entitled to recover any damages if any negligence on the part of Mr. Gluck contributed to the proximate cause of the collision involved in this action."

The seventh I will charge.

7. "In determining whether the Ford car in which Mr. Gluck rode was being driven at a dangerous and unlawful speed you may consider the distance that car traveled after the collision before it stopped."

The eighth I will charge.

8. "In determining whether the Ford car in which Mr. Gluck rode was being driven at a dangerous and unlawful speed you may consider the damage done to it by its striking defendant Castles Ice Cream Company's car, as well as all other evidence bearing on the violence of the collision."

Exceptions to Charge.

The ninth and tenth I will deny. The eleventh I will charge.

10 11. "The fact that the Court has stated the rules of law relating to damages in cases of this kind must not be taken by you as an indication that the law requires you to give damages in this case."

The twelfth I will charge.

20 12. "The fact that the Court has denied motions for a non-suit and for direction of a verdict should not influence you in arriving at a verdict. These decisions do not mean that the plaintiff is entitled to a verdict. Their significance so far as you are concerned is that the Court held that the case presents questions to be determined by the jury."

The thirteenth I will charge.

13. "The plaintiff has the burden of proof. She must prove the case by a preponderance of the evidence."

(The jury retires.)

30 Mr. Levitan: I respectfully pray an exception to your Honor's refusal to charge the plaintiff's first, second, third, fourth and eighth requests to charge.

Exception noted as ground of appeal.

Mr. Levitan: I respectfully pray an exception to that part of your Honor's charge wherein your Honor stated, "then, he thought that the Ford was not lessening his speed and he put his hand out," referring to the testimony of Mathiasen, the driver of the Castles ice cream truck.

Exception noted as ground of appeal.

40 Mr. Levitan: I respectfully pray an exception to your Honor's charge wherein you refer to the

Exceptions to Charge.

relationship of Dwight and Gluck wherein your Honor stated that Gluck was the master and Dwight was the servant and if Dwight was negligent that Gluck could not recover, the negligence of Dwight being imputed to Emil Gluck. With reference to that the Court also stated in its charge, to which I except, "That I charge you if Dwight was negligent then your verdict must be for the defendant; also if both were negligent the driver of the truck and Dwight, your verdict must also be for the defendant."

Exception noted as ground of appeal.

Mr. Chance: I respectfully pray an exception to your Honor's refusal to charge the third request to charge of the defendant.

Exception noted as ground of appeal.

20 Mr. Chance: I respectfully pray an exception to your Honor's refusal to charge the fifth request of the defendant.

Exception noted as ground of appeal.

Mr. Chance: I respectfully pray an exception to your Honor's refusal to charge the ninth request to charge of the defendant, and the tenth request to charge.

Exception noted as ground of appeal.

30 Mr. Chance: I respectfully pray an exception to that part of the Court's charge where it was said in effect that the negligence, or absence of it on the part of the defendant's driver must be determined from what he said and did. The point of this exception being it leaves out of consideration what the other witnesses have said.

Exception noted as ground of appeal.

Plaintiff's Requests to Charge.

PLAINTIFF'S REQUESTS TO CHARGE.

1. If you find that both drivers are equally guilty of negligence in this case, then you must find your verdict for the plaintiff and assesses the damages. Denied.
- 10 2. If you find that both drivers are guilty of negligence but you cannot determine the degree of each particular one, then I charge you that your verdict must be for the plaintiff. Denied.
3. If you find that the accident was caused by the negligence of one driver through the contributory negligence of the other one, then I charge you that your verdict must be for the plaintiff. Denied.
- 20 4. If you find that the defendant's driver was guilty of negligence without the other driver contributing thereto, then I charge you that your verdict must be for the plaintiff against the defendant who was negligent. Denied.
5. If you find that one or more of the employees of the defendants or either of them was guilty of negligence, then the negligence of the servant or employee is construed as the negligence of the defendant. Charged.
- 30 6. The evidence is uncontradicted in this case as to the plaintiff's pecuniary damages. Charged.
8. You must find that the plaintiff's intestate in this case was in no way guilty of contributory negligence. The only question as to negligence that you must decide is was the truck driver negligent. Denied.

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Defendant's Requests to Charge.

DEFENDANT'S REQUESTS TO CHARGE

1. Mere proof that Mr. Gluck died as the result of a collision does not entitle plaintiff to a verdict. Charged.
2. The provision of the Traffic Law requiring drivers of vehicles approaching the intersection of a street to give the right of way to a vehicle coming from the right relieves drivers of no duty of care imposed on them before the passage of that law. One approaching a crossing must still look to the left with reasonable care as well as to the right and if the vehicle approaching from the left reaches the crossing first it has the right of way. The statute can only apply when the two cars reach the crossing simultaneously and when one car is already at the crossing the other has no right to run into it. 10 20
3. The driver of the car in which Mr. Gluck rode was negligent if he did not have his car under such control as to be able to stop it, or to immediately slacken its speed, if that was the only way a collision with another vehicle could be avoided. Denied.
4. If the driver of the car in which Mr. Gluck rode was his employee, any negligence on the part of such driver would be imputable to Mr. Gluck, and if such negligence on the part of the driver of the car in which Mr. Gluck rode contributed to the accident, it would prevent recovery by the plaintiff in this action. Charged. 30
5. If the automobile in which Mr. Gluck rode was driven at a dangerous and unlawful speed and such speed was the proximate cause of the collision, Mr. Gluck was guilty of negligence 40

Defendant's Requests to Charge.

which bars the right of his widow to a verdict, if he failed to protest to the driver at the speed of the automobile in which he was riding.

Denied.

10 6. The plaintiff is not entitled to recover any damages if any negligence on the part of Mr. Gluck contributed to the proximate cause of the collision involved in this action. Charged.

7. In determining whether the Ford car in which Mr. Gluck rode was being driven at a dangerous and unlawful speed you may consider the distance that car travelled after the collision before it stopped. Charged.

20 8. In determining whether the Ford car in which Mr. Gluck rode was driven at a dangerous and unlawful speed you may consider the damage done to it by its striking defendant Castles Ice Cream Company's car, as well as all other evidence bearing on the violence of the collision. Charged.

30 9. If the proximate cause of the collision involved in this case was inability on the part of the driver of the Ford car in which Mr. Gluck rode to stop his car, and such inability to stop it was due to the fact that the car was comparatively new and worked hard, the plaintiff is not entitled to a verdict against the defendant Castles Ice Cream Company. Denied.

10. If the evidence is not more consistent with negligence on the part of the Castles Ice Cream Company than with the absence of it, then the plaintiff is not entitled to a verdict against the defendant Castles Ice Cream Company.

Denied.

Defendant's Requests to Charge.

11. The fact that the Court has stated the rules of law relating to damages in cases of this kind must not be taken by you as an indication that the law requires to give damages in this case. Charged.

10 12. The fact that the Court has denied motions for a non-suit and for direction of a verdict should not influence you in arriving at a verdict. These decisions do not mean that the plaintiff is entitled to a verdict. Their significance so far as you are concerned is that the Court held that the case presents questions to be determined by the jury. Charged.

20 13. The plaintiff has the burden of proof. She must prove the case by a preponderance of the evidence. Charged. 20

VERDICT.

The jury returned a verdict in favor of the defendant Castles Ice Cream Company and against the plaintiff Fannie Gluck, administratrix *ad prosequendum*, etc.

Notice and Grounds of Appeal.

NOTICE AND GROUNDS OF APPEAL.

Filed September 13, 1927.

NEW JERSEY SUPREME COURT

ESSEX COUNTY

10

FANNIE GLUCK, administratrix
ad prosequendum of the Es-
 tate of EMIL GLUCK, deceased,
Plaintiff-Appellant,
 vs.
 CASTLES ICE CREAM COMPANY,
Defendant-Respondent.

*Action
 at Law.
 Notice and
 Grounds
 of Appeal.*

20

To Kellog & Chance, Attorneys for Defendant.

Sirs:

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

30

1. Because the Supreme Court erred in rendering judgment for the defendant instead of the plaintiff, in that,

A. The Court erroneously excluded the following evidence:

Mr. Herbert S. Dwight, a witness sworn in behalf of the plaintiff, was asked by Mr. Levitan on re-direct examination:

40

You say you made another statement to some company, someone representing the Castles Ice Cream Company?

Notice and Grounds of Appeal.

Mr. Chance objected and Court sustained the objection. (See page 47 of state of case.)

Exception noted as ground of appeal.

Mr. Herbert Dwight was then asked the following question by Mr. Levitan:

10

Did you say you made a statement to some Insurance Company? I don't know what Insurance Company it was. He said he wanted it for insurance.

Mr. Chance: I object to that, and ask that it be stricken out. That has no bearing on us at all and there is nothing shown to connect the Castles Ice Cream Company at all.

The Court: Sustain the objection, if the statement is not in court. (See page 48 of state of case.)

20

Exception noted as ground of appeal.

Q Is that a correct copy of everything you said? A It was a typewritten copy and I told him to make corrections on it.

Q In whose handwriting are those corrections? A This one here is mine (indicating) and the rest I told someone to put in.

Q They were made under your direction? A Yes, sir.

30

Mr. Levitan: I offer the statement in evidence.

Mr. Chance: I object to his offer as nothing has been asked this witness about this statement.

The Court: How is that evidential on re-direct or if it was direct.

Overrule the offer.

Exception noted as ground of appeal.

40

Notice and Grounds of Appeal.

B. The Court erroneously admitted certain evidence.

Mr. Nells C. Mathiasen, a witness sworn in behalf of the defendant was asked by Mr. Chance:

10 Did Mr. Dwight make a statement that his car was a new car and that it worked hard therefore preventing him from stopping in time to avoid the accident?

Mr. Levitan: I object to that.

The Court: I will admit it.

(See page 57 of state of case.)

Exception noted as ground of appeal.

20 Frank McCarron, a witness sworn in behalf of the defendant was asked by Mr. Chance the following question:

Did you see any lessening of speed on the part of the car driven by Mr. Dwight before the collision?

Mr. Levitan: I object as leading.

The Court: I will admit it.

(See page 69 of state of case.)

Exception noted as ground of appeal.

30 C. The Court erroneously refused to charge the plaintiff's first, second, third, fourth and eighth requests, which are as follows:

1. If you find that both drivers are equally guilty of negligence in this case, then you must find your verdict for the plaintiff and assesses the damages.

40 2. If you find that both drivers are guilty of negligence but you cannot determine the degree of each particular one, then I charge you that your verdict must be for the plaintiff.

Notice and Grounds of Appeal.

3. If you find that the accident was caused by the negligence of one driver through the contributory negligence of the other one, then I charge you that your verdict must be for the plaintiff.

4. If you find that the defendant's driver was guilty of negligence without the other driver contributing thereto, then I charge you that your verdict must be for the plaintiff against the defendant who was negligent. 10

8. You must find that the plaintiff's intestate in this case was in no way guilty of contributory negligence. The only question as to negligence that you must decide is was the truck driver negligent.

Exception noted as ground of appeal. 20

D. The Court erroneously charged as follows:

Mr. Levitan: I respectfully pray an exception to that part of your Honor's charge wherein your Honor stated, "then he thought that the Ford was not lessening his speed and he put his hand out," referring to the testimony of Mathiasen, the driver of the Castles Ice Cream truck.

Exception noted as ground of appeal. 30

Mr. Levitan: I respectfully pray an exception to your Honor's charge wherein you refer to the relationship of Dwight and Gluck wherein your Honor stated that Gluck was the master and Dwight was the servant and if Dwight was negligent that Gluck could not recover, the negligence of Dwight being imputed to Emil Gluck. With reference to that the Court also stated in its charge, to which I except, "That I charge 40

Notice and Grounds of Appeal.

you if Dwight was negligent then your verdict must be for the defendant also if both were negligent the driver of the truck and Dwight, your verdict must also be for the defendant." Exception noted as ground of appeal.

10 Dated: September 12, 1927.

LEVITAN & LEVITAN,
Attorneys for Plaintiff-
Appellant.

ABRAHAM LEVITAN,
Of Counsel.

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New Jersey Court of Errors and Appeals

FANNIE GLUCK, administratrix
ad prosequendum of the Es-
tate of Emil Gluck, deceased,
Plaintiff-Appellant,

vs.

CASTLES ICE CREAM COMPANY,
Defendant-Respondent.

*On Appeal
from the
Supreme
Court.*

APPELLANT'S BRIEF.

Statement of Facts.

This is plaintiff's appeal from a verdict in the Supreme Court in favor of the defendant.

The facts in this case briefly are as follows:

The plaintiff's intestate, Emil Gluck, was employed as a salesman of phonographs by Trubin Brothers, under an agreement whereby Emil Gluck was to receive fifty per cent. gross commission of all sales and also have the use of Trubin Brothers' automobile. Out of this fifty per cent. commission, decedent, Emil Gluck, was to pay for the chauffeur, gasoline and other expenses for operating the car.

On the 28th day of October, 1922, Emil Gluck, while delivering some phonographs for Trubin Brothers, was riding in Trubin Brothers' automobile, driven by one Dwight, when it collided with defendant's ice cream truck.

As a result of the collision, Emil Gluck sustained fatal injuries of which he died a short time after the accident.

This suit is brought by the administratrix *ad prosequendum* of Emil Gluck, against the defendant for negligence resulting in fatal injuries to the decedent. The case was tried before a jury in the Essex County Circuit, and resulted in a verdict for the defendant, from which verdict this appeal is taken.

POINT I.

The Supreme Court erred in the exclusion of certain evidence offered by the plaintiff.

A.

Herbert S. Dwight, a witness sworn in behalf of the plaintiff was asked by Mr. Levitan on re-direct examination:

“You say you made another statement to some company, someone representing the Castles Ice Cream Company?”

Mr. Chance objected and the Court sustained the objection (p. 47, l. 25, State of Case).

If the statement referred to above, was demanded and made at the request of the defendant-respondent, surely it would be binding on this defendant and therefore this question was material and relevant to the issues involved in this case and should have been allowed. This statement was also evidential to correct testimony given by this witness on cross examination.

Such statement if made at all to the defendant company was made under circumstances which would show that it was not brought about or induced by acts or declarations of the plaintiff-appellant or anyone representing her.

B.

Herbert Dwight was then asked the following question:

“Did you say you made a statement to some insurance company? I don't know what insurance company it was. He said he wanted it for insurance.”

Mr. Chance: I object to that, and ask that it be stricken out. That has no bearing on us at all and there is nothing shown to connect the Castles Ice Cream Company at all.

The Court: Sustain the objection, if the statement is not in court (pp. 47 and 48, Case). Exception noted as ground of appeal.

It was proper to ascertain, if possible, whether any statement had been made by the witness, Herbert S. Dwight, to the insurance company or the defendant company, or its representative, for the purpose of explaining testimony of the witness, showing the conditions under which said statements were made.

C.

Herbert S. Dwight, a witness, was then shown a statement and asked (p. 49, Case, l. 20):

“Is that a correct copy of everything you said?”

It was a typewritten copy and I told him to make corrections on it.

In whose handwriting are those corrections?

This one here is mine (indicating) and the rest I told someone to put in.

They were made under your direction?

Yes, sir.

Mr. Levitan: I offer the statement in evidence.

Mr. Chance: I object to his offer as nothing has been asked this witness about this statement.

The Court: How is that evidential on re-direct, or if it was direct.

Overrule the offer.

Exception noted as ground of appeal.

If the witness were permitted to state that the document shown him was a statement he had made concerning the issues involved, it would be material and evidential, and probably decisive in the minds of the jury. At any rate the jury should have been permitted to see what that statement was and have that evidence before them in determining the issues involved. To exclude it therefore was clearly error.

POINT II.

The Supreme Court erred in admitting evidence which should have been excluded.

A.

Nels C. Mathiasen, a witness sworn on behalf of the defendant, was asked on direct examination on top of page 57, Case:

“Did Mr. Dwight make a statement that his car was a new car and that it worked hard therefore preventing him from stopping in time to avoid the accident?”

Mr. Levitan: I object to that.

The Court: I will admit it.

Exception noted as ground of appeal.

This question was objectionable on several grounds:

1. It was leading.
2. It called for a declaration which was not binding on the plaintiff's intestate.
3. It called for a conclusion.

4. If it was asked with the purpose of contradicting the plaintiff's witness, then it was objectionable on the ground that no proper foundation had been laid for it.

It is respectfully urged that this ruling was so flagrantly erroneous and greatly prejudicial to plaintiff's case that it requires no further argument.

B.

Frank McCarran, a witness sworn on behalf of the defendant was asked by counsel on direct examination on page 69, Case, line 14:

“Did you see any lessening of speed on the part of the car driven by Mr. Dwight before the collision?”

Mr. Levitan: I object as leading.

The Court: I will admit it.

Exception noted as ground of appeal.

This question was objectionable on the following grounds:

1. Because it was leading.
2. It called for a conclusion.
3. There was no foundation for the qualification of the witness as an expert on speed. Undoubtedly the answer “No, sir, I did not,” line 22, was greatly prejudicial to plaintiff's case and the ruling was therefore erroneous.

POINT III.

The Supreme Court erred in refusing to charge the plaintiff's following requests.

Among plaintiff's requests to charge were the following (p. 112, Case):

1. If you find that both drivers are equally guilty of negligence in this case, then you must find your verdict for the plaintiff and assess the damages.

2. If you find that both drivers are guilty of negligence, but you cannot determine the degree of each particular one, then I charge you that your verdict must be for the plaintiff.

3. If you find that the accident was caused by the negligence of one driver through the contributory negligence of the other one, then I charge you that your verdict must be for the plaintiff.

4. If you find that the defendant's driver was guilty of negligence without the other driver contributing thereto, then I charge you that your verdict must be for the plaintiff against the defendant who was negligent.

8. You must find that the plaintiff's intestate in this case was in no way guilty of contributory negligence. The only question as to negligence that you must decide is was the truck driver negligent.

All of the above requests were denied (pp. 108, 109, Case, also 112).

There is testimony in this case tending to show that the driver, Herbert S. Dwight, was either a fellow servant of Emil Gluck, having been impliedly employed by Trubin Brothers, or he was engaged by Gluck as an assistant to drive the car at Trubin Brother's expense, which came out of Gluck's commission, for the exclusive use of Trubin Brothers. In other words, Gluck was engaged in the business of selling Trubin Brother's phonographs, collecting the money for them and remitting half of the proceeds to Trubin

Brothers. Dwight was engaged in the business of assisting Gluck, in the carrying out of this contract, by driving the car which permitted Gluck to deliver the phonographs. The inference here is perfectly clear that both Dwight and Gluck were engaged in the same enterprise, for the same master (Trubin Brothers), and the compensation for both came from the same source (Trubin Brothers).

On page 21, Case, lines 29 to 33, Herbert S. Dwight was asked and answered the following:

“Q Do you remember the day of Mr. Gluck's death? A Yes, sir; I do.

Q Where were you on that day? A I went to work that morning to drive for Mr. Gluck.

Q Where were you driving? A I was driving a car that Mr. Gluck used, to Long Branch.

On page 22, Case, lines 3 to 22, he was also asked the following:

“Q Do you know where you were going? A Yes, sir.

Q Who gave you the address? A We didn't have any address, but we were down there the day before.

Q You knew where you were going when you started out? A Yes, sir.

Q Who was driving the car? A I was driving the car.

Q What, if anything, did Gluck have to do with driving? A Mr. Gluck didn't have anything to do with driving.

Q You were in control of the car? A Yes, sir.

Q From where did you start from Long Branch? A We left Trubin's store.

Q Where is Trubin's store? A Located on Broad street.”

The testimony further shows that Trubin Brothers allowed the decedent so much percentage of his commissions to pay the chauffeur

and other expenses, therefore in the last analysis Dwight was employed by Trubin Brothers.

On page 96, line 30; on page 97, lines 3 to 18, and on page 97, line 38 to end, Isadore J. Trubin testifies as follows:

“Q Who is the owner of that truck? A I am.

Q Was your name on it? A Yes.

Q What was the name on the truck? A Trubin's Office Supplies, Phonographs and Pianos.

Q Was it part of your business arrangement that you would let Mr. Gluck have that truck to use in his business and him to hire a chauffeur for it? A To use in my business.

Q In your working arrangement there was an arrangement between you and Gluck for the compensation of the chauffeur of this car? A There was not. Could I be permitted to state exactly what the arrangement was? Mr. Gluck came to ask my permission for twenty per cent. of all sales for the use of his truck. On the Monday of the week he came to ask he explained to me his truck was not able to be used and he should use my truck and the arrangement was fifty per cent., and he uses my truck.

Q (By the Court.) Was there anything said about a chauffeur? A Nothing whatever. He was to have my truck.”

Re-direct examination by Mr. Levitan.

“Q Gluck was to use that for your exclusive business? A Yes, sir.

Q Gluck had nothing else to do except work for you? A Work for me.”

Taking up the proposition that Herbert S. Dwight was a fellow servant it is a well settled rule of law that the negligence of the chauffeur Dwight could not be imputed to the defendant, because under our statute today the Fellow Servant Doctrine has been abolished and the negligence

of one fellow servant can no longer be imputed to another.

Brockstadt v. Meltzer, 111 Atl. page 812.

It is therefore respectfully urged that Dwight's employment under the testimony above stated, although technically engaged by Gluck, practically Dwight was the employee of Trubin Brothers as the fellow servant of Gluck; both being engaged in a common venture on Trubin Brother's business at the time, both delivering phonographs for Trubin Brothers. The only feature that existed here which might be open for question was the fact that Gluck paid Dwight. But actual payment of money for services is not the proper test of employment, or the necessary requisite for the establishment of the relation of master and servant. Trubin testifies that the reason he agreed to pay Gluck fifty per cent. commission was because Gluck's truck could not be used that day, so Trubin furnished his truck. But the truck needed a driver and the driver needed compensation, so the selection of the driver and the amount of compensation was left to Gluck. But it clearly was included in his fifty per cent. contract, because when Gluck was through with the payment and expenses for operating the car and the wages to Dwight, his commissions were much less than the fifty per cent., so that Dwight at all times was legally employed by Trubin Brothers, and that for all practical purposes Dwight and Gluck were fellow-servants.

It is also a well settled rule of law that the relationship of master and servant may exist without any actual contract existing between the parties.

In the case of *Missel v. Hayes*, reported in 91 Atl., page 322, Justice White, speaking for the

Court of Errors and Appeals, on page 323A, says as follows:

“To constitute the relation of master and servant as to third person, it is not essential that any actual contract should subsist between the parties or that compensation should be expected by the servant. While the relation of master and servant in its full sense invariably and only arises out of a contract between the servant and the master, yet such contract may be either expressed or implied. The real test as to third person, * * * is whether the act is done by one for another, * * * with the knowledge of the person sought to be charged as master with his assent, expressed or implied, even though there was no request on his part to the other to do the act in question.”

This doctrine was followed in the State of Pennsylvania, where it was applied to a case analogous to the one *sub judice* and where the Court said on page 671, *Kirk v. Showell-Fryer & Co.*, 120 Atl. 670:

“The real matter requiring solution is the responsibility of the master for the acts of the third party, called by the servant to aid in the business of the former. If this was done by reason of some emergency, can implied authority to employ and bind be inferred.”

“It is a rule universally recognized that the relation of master and servant cannot be imposed on a person without his consent, express or implied. It is upon the exception to this general rule, which is quite as well settled as the general rule itself, that the plaintiff relies to establish the relation of master and servant in this case. The exception is that a servant may engage an assistant in the case of an emergency where he is unable to perform the work alone.” *Byrne v. Pittsburgh Brewing Co.*, 259 Pa. 357, 361, 103 Atl. 53, 54 (L. R. A. 1018 C. 1198).

In the case of *Ottmer v. Perry*, reported in 108 Atl., page 369, Mr Justice Minturn, speaking for the Supreme Court, approves of the definition of master and servant given by *Cyc.*

“The relation of master and servant exists whenever the employer retains the rights to direct the manner in which the business shall be done, as well as the result to be accomplished, or in other words, not only what shall be done, but how it shall be done.” 26 *Cyc.*, 966, and cases cited.

It is respectfully urged that since there was a dispute in the testimony as to whether or not Herbert S. Dwight was a fellow servant of Emil Gluck the decedent, an independent contractor, or an employee of Gluck, it was clearly a question for the jury and the Court should not have passed upon this question as it did in refusing to charge the plaintiff's requests.

In all the requests to charge, the jury was required to pass upon the question of whether or not Dwight was employed by Trubin Brothers or Gluck, or what his employment was. This it will be observed was a very vital issue in the case and the Court committed prejudicial error when it took that question from the jury by refusing plaintiff's requests to charge.

In the case of *Tischler v. Steinholtz*, 122 Atl., page 880, decided by the Court of Errors and Appeals, Mr. Justice Trenchard speaking for that court says on page 882A:

“If, however, the evidence is contradictory or reasonably subject to contradictory interpretations, the question of liability is for the jury.” *Doran v. Thomsen*, 76 N. J. Law 754, 71 Atl. 296, 19 L. R. A. (N. S.) 335, 131 Am. St. Rep. 677; *Missel v. Hayes*, 86 N. J. Law 348, 91 Atl. 322; *Mehan v. Walker* (N. J. Err. & App.) 117 Atl. 609.

Therefore there was error in the Court's refusal to charge the first, second, third, fourth and eighth requests to charge.

POINT IV.

The Supreme Court erred in that it erroneously charged the jury as follows:

A.

The Court in its charge says on page 105, Case, line 34:

"Then, there was testimony that may not indicate to you that he thought the Ford was not lessening its speed and he put out his hand."

To this charge exception was taken on page 110, Case, line 33.

It seems quite apparent that the jury was misled by this language of the Court. There is no explanation by the Court that he was quoting the testimony of a witness and from all appearance the jury undoubtedly could have been lead to believe that those were the facts in the case as found by the Court. The error was therefore clearly harmful to the plaintiff and the verdict should be reversed on this ground.

B.

The Court in its charge to the jury among other things said on page 106, Case, lines 15 to 24:

"Gluck was the master and Dwight was the servant and if Dwight was negligent that Gluck could not recover, the negligence of Dwight being imputed to Emil Gluck."

It was clearly a question of fact in this case as to whether or not Gluck was the master or

Trubin Brothers, and therefore the Court should have left this question to the jury and not instructed the jury as it did.

C.

The Court in charging the jury said as follows (p. 107, Case, ll. 1 to 11):

"If you find as a matter of fact, I charge you, that Herman S. Dwight was negligent in the operation and control of this Ford car, that disposes of this action, at once and your verdict must be for the defendant. Obviously, if you find that Herman S. Dwight was negligent and the operator of the defendant's truck was negligent your verdict must be for the defendant."

An exception to this was taken on page 111, Case.

This charge by the Court was clearly erroneous and prejudicial to the plaintiff. The Court did not give the jury an opportunity of deciding the fact of the employment of Dwight, and stated in so many words to the jury that their verdict should be for the defendant which was highly prejudicial to the plaintiff.

The mere fact that Dwight was negligent did not entitle the defendant to a verdict. If the jury found that Dwight was a servant of Trubin Brothers the negligence of Dwight could not be imputed to the decedent; if the jury on the other hand found that Dwight was a fellow servant of Gluck, then again the negligence of Dwight could not be imputed to the decedent Emil Gluck.

All these questions should have been left for the jury to decide.

Conclusion.

It is therefore respectfully urged that the judgment should be reversed and a new trial awarded the plaintiff.

Respectfully submitted,

LEVITAN & LEVITAN,
Attorneys for Plaintiff.

ABRAHAM LEVITAN,
Of Counsel.

New Jersey Court of Errors and Appeals

FANNY GLUCK, Administratrix ad
Prosequendum of the Estate of
EMIL GLUCK, deceased,

Plaintiff-Appellant,

vs.

CASTLES ICE CREAM COMPANY,
Defendant-Respondent.

*On Appeal
from the
Supreme
Court.*

BRIEF FOR DEFENDANT-RESPONDENT

This is an appeal from a judgment in favor of the defendant in a cause tried at the Essex Circuit before Judge Mountain and a jury.

FACTS

The case involves an automobile collision that took place on October 28th, 1922, as a result of which plaintiff's intestate Emil Gluck died (case, page 17, line 28, page 51, line 1). He was riding in a car driven by Herbert S. Dwight which collided with this defendant's car. Appellant's brief and respondent are not agreed as to what the evidence shows the relationship was between plaintiff's intestate Emil Gluck and Herbert S. Dwight, who drove the automobile in which he rode. That the court may see that Emil Gluck was an independent contractor and Herbert S. Dwight was then the employee of Emil Gluck, we shall quote testimony.

Herbert S. Dwight testified:

Q Where were you on that day? A I went to work that morning to drive for Mr. Gluck.

Q Where were you driving? A I was driving a car that Mr. Gluck used, to Long Branch. (Case, page 21, lines 31 to 35.)

Q Did you say you were working for Mr. Gluck on this day? A Yes, sir; I worked for Mr. Gluck.

Q In other words, Mr. Gluck was your employer? A Yes, sir. (Page 26, lines 34 to 38.)

Q How many days prior to the accident had you been working for Mr. Gluck? A Mr. Gluck spoke to me one night in the week, and asked me if I wanted to drive for him, and I said, "Yes." I think it was Thursday night; he told me to come to work Friday, and told me—

Q Were you out several times? A Yes, sir.

Q You were engaged for just those two days? A Yes, sir.

Q You haven't received your pay; that is, Gluck never lived to pay you? A No, sir. (Page 46, lines 31 to 40; page 47, lines 1 and 2.)

Q How much did Gluck pay you a day for driving that car that day? A He didn't pay me, but I would receive \$4.00 for that day and the day before.

Q That is the agreement you made with Mr. Gluck, was it? A Yes, sir. (Page 42, line 37 to page 43, line 2.)

Herbert S. Dwight, recalled, testified:

Q Who was to pay you the \$4.00? A Mr. Gluck was to pay me the \$4.

Q On that trip were you to do anything else besides drive the truck? A No, sir.

Q You were not to do anything else, just

simply drive from there and back? A Yes, sir.

Q He was to give you \$4. for doing that? A Yes, sir.

Q You did not have any relations of any kind with Mr. Trubin, did you? A No, sir.

Q Your relations were entirely with Gluck? A Yes, sir. (Page 95, lines 25 to 30.)

Isadore J. Trubin testified:

Q Did you rent this truck to Mr. Gluck?

A I haven't loaned it to him, it was a business arrangement.

Q On the date of this accident was the driver of that truck in your employ? A He was not.

Q Was it part of your business arrangement that you would let Mr. Gluck have that truck to use in his business and him to hire a chauffeur for it? A To use in my business.

Q In Gluck's business? A Gluck was only my business.

Q Was Gluck an independent contractor? A He was.

Q As such independent contractor you loaned this car or permitted Mr. Gluck to have this car? A Yes, sir.

Q Had you any control whatever over what the driver of that car did at the time of the accident? A None.

Q You did not know Dwight was going to drive? A No. I saw Dwight around, but I didn't know he was going to drive.

Q You knew you were not going to pay whoever did drive? A I knew that.

Q In your working arrangement there was an arrangement between you and Gluck for the

compensation of the chauffeur of this car? A There was not. Could I be permitted to state exactly what the arrangement was? Mr. Gluck came to ask my permission for twenty per cent. of all sales for the use of his truck. On the Monday of the week he came to ask he explained to me his truck was not able to be used and he should use my truck and the arrangement was fifty per cent. and he uses my truck.

Q (*By the Court.*) Was there anything said about a chauffeur? A Nothing whatever. He was to have my truck.

(Page 96, line 38, to page 98, line 10.)

The trial judge also took the view of defendant-respondent as appears from the charge to the jury wherein it is said:

"Emil Gluck hired Dwight at \$4.00 a day. He was going to Long Branch and I think Dwight was hired for two days. This was the second day of his employment. This was a casual engagement between Gluck and between Dwight in which Gluck was the employer and Dwight was the employee; in which Gluck was the master and Dwight was the servant."

(Case, page 106, lines 11 to 19.)

Just how the accident happened is not an issue on this appeal. However, it may be noted that the place of accident was Broad Street and Bergen Place, Red Bank (case, page 22, line 38); that Gluck's driver Dwight did not see Castles Ice Cream truck approaching the place where the accident happened (case, page 27, line 1) although there was nothing to obstruct his view of the approach of the Castles Ice Cream truck (page 28, line 30) until he was too close to stop without hitting Castles' truck. And the testimony of Mr. Me-

Carron (page 71) and Mrs. Emma Wood (page 62) indicates that the car in which Gluck rode, driving rapidly, ran into the Castles Ice Cream Company truck.

The action was originally started by Fanny Gluck, administratrix appointed by the Surrogate's Court of Kings County, New York, against Castles Ice Cream Company, a corporation, and Trubin Brothers, a corporation (see Complaint, page 1). Upon objection being urged by the defendants that such an administratrix had no standing in this State and was not a proper party plaintiff to such a suit, an amended complaint was filed December 30th, 1924 (over 24 calendar months after Gluck's death, October 28th, 1922), in which said Fanny Gluck sued as administratrix ad prosequendum of Emil Gluck, deceased, against Castles Ice Cream Company, a corporation, and Trubin Brothers, a corporation (amended complaint is at page 5 of State of Case). Answer was filed by both defendants and the case came on for trial November 8th, 1926, at which time counsel for the plaintiff announced that the case had been discontinued as against the defendant Trubin Brothers. The trial proceeded against the defendant Castles Ice Cream Company. The formal discontinuance as to Trubin Brothers was not actually filed until November 17th, 1926. Verdict was for the defendant. Plaintiff appeals.

GROUNDS OF APPEAL

The questions raised by grounds of appeal of plaintiff-appellant are (1) as to the exclusion of certain evidence offered by the plaintiff, (2) the admission of certain evidence offered by the defendant, (3) the refusal of the court to charge certain things requested by the plaintiff, and (4) as

to whether the trial judge erred in making certain statements in the charge as delivered. The details of the pertinent grounds of appeal will be taken up in the argument of the points to which they relate.

DEFENDANT-DESPONDENT'S POINTS

FIRST POINT: THERE WAS NO ERROR IN THE EXCLUSION OF THE EVIDENCE MENTIONED IN APPELLANT'S FIRST POINT.

SECOND POINT: THERE WAS NO ERROR IN THE ADMISSION OF THE EVIDENCE MENTIONED IN APPELLANT'S SECOND POINT.

THIRD POINT: THERE WAS NO ERROR IN THE REFUSAL TO CHARGE THE MATTERS MENTIONED IN APPELLANT'S THIRD POINT.

FOURTH POINT: APPELLANT'S OBJECTIONS TO THE TRIAL JUDGE'S CHARGE ARE WITHOUT MERIT.

ARGUMENT

FIRST POINT: THERE WAS NO ERROR IN THE EXCLUSION OF THE EVIDENCE MENTIONED IN THE APPELLANT'S FIRST POINT.

The matter argued under appellant's first point is the exclusion by the trial court of the following question: "You say you made another statement to some company, some one representing the Castles Ice Cream Company?" (page 47, line 25).

This question was asked of Herbert Dwight, a witness sworn in behalf of the plaintiff by plaintiff's counsel on re-direct examination. On objection it was excluded and properly so. It will be sufficient to justify the ruling of the court to men-

tion the fact that this statement contained an unwarranted assumption of fact, in that the question assumes that the party to whom Dwight is supposed to have made a statement was "someone representing the Castles Ice Cream Company." Dwight said nothing of the kind. What he really said was that he made a statement to an insurance man (page 30, line 24). In view of the discontinuance as to Trubin Brothers it is easy to see that plaintiff's counsel might like to make the jury believe the insurance man in question represented the Castles Ice Cream Company, but as there is nothing in the evidence to connect the Castles Ice Cream Company with him, it was improper for plaintiff's counsel to assume in his question that the man to whom the alleged statement was made, represented Castles Ice Cream Company. Questions assuming facts not admitted or proved are improper (40 Cyc., 2433). Furthermore, the fact that plaintiff's witness Dwight had said something to somebody as to how the accident happened would not make what he said evidence against the Castles Ice Cream Company. There are also the further faults that it is really no question as all, but an assertion, that it is too general, that it would contravene the rule against a party impeaching his own witness if it was intended to bring out that Dwight had testified untruthfully on cross-examination, and if asked for the purpose of bringing out a different statement, no proper foundation was laid for the question. Furthermore, the question construed in the light of its context would only refer to a written statement as written statements were the subjects under discussion at the time the question was asked. As to a written statement of course the statement itself would be the best evidence if it were admissible at all. Hence this exclusion was not error.

The next excluded question involved is: "Did you say you made a statement to some insurance company? A I didn't know what insurance it was, he said he wanted it for insurance" (page 47, line 70). In his brief appellant misquotes the answer the witness started to make. The foregoing quotation is taken from the State of the Case. Defendant's counsel objected. "I object to that and ask that it be stricken out. That has no bearing on us at all. There is nothing shown to connect the Castles Ice Cream Company at all" (page 47). This question was properly over-ruled as it contains objectionable features pointed out in respect of the question last discussed and was irrelevant and immaterial.

The next exclusion complained of was the exclusion of an unsigned paper said to be a copy of a written statement signed by the plaintiff's witness at the office of plaintiff's attorney (Case, page 49, line 32). Upon the offer of this copy of alleged statement the court asked, "How is that evidential on re-direct or if it was direct?" (Case, page 49, line 30.) Plaintiff's counsel made no response to this question by the court. On the principle that one cannot complain on appeal of a matter on which he does not make clear to the trial judge the ground of his exception, the plaintiff should not now be heard to make this objection.

It should be remembered that the paper was only claimed to be a copy, and as admission or rejection of secondary evidence is a question addressed to the discretion of the trial court (*Longstreth vs. Korb*, 64 N. J. L., 112; *Johnson vs. Arnwine*, 42 N. J. L., 451) its rejection is no valid ground of appeal.

Even if its exclusion could be deemed error (which we deny) nothing in the record shows that the plaintiff was prejudiced by the exclusion. The

plaintiff did not even have the paper marked for identification and it is not in the State of the Case. To justify reversal it must appear that an error was prejudicial to the complaining party, which cannot appear on the record in this case.

Furthermore the suggestion that the alleged copy of a statement should have been admitted on re-direct examination overlooks the purpose of re-direct examination. Re-direct examination is to rebut or qualify matters brought out on cross-examination, but so far as this copy of statement is concerned the cross-examination elicited nothing that required rebuttal or explanation by the plaintiff. The witness said in substance that he had told in court the truth, the same as in the copy of statement (Case, page 45, lines 16 and 17). In view of that circumstance it would have been merely cumulative to have admitted on re-direct a copy of a statement showing the same as the witness had testified. Appellant accordingly was not prejudiced by the refusal of the court to permit secondary evidence on re-direct to the same effect as the witness had already testified on direct and cross-examination.

There is the further consideration that although there was some inquiry on cross-examination as to the conversation when the copy of the alleged written statement was made, there were no questions asked the witness about the contents of the alleged written statement and no part of the alleged written statement was put in evidence by the defendant after the cross-examination. It is, therefore difficult to conceive on what theory the plaintiff could complain of the exclusion of secondary evidence (the alleged unsigned copy) especially when he made no effort to produce the primary evidence (the original statement), or to account for its non-production and did not even have the alleged copy

marked for identification, or made any part of the record so this court could see what the discussion was about. Clearly there is no ground for reversal in the exclusion of the alleged copy of statement.

POINT 2. THERE WAS NO ERROR IN THE ADMISSION OF THE EVIDENCE MENTIONED IN APPELLANT'S SECOND POINT.

Appellant objects to the admission of the question at the top of page 57. "Did Mr. Dwight make a statement that his car was a new car and that it worked hard, therefore preventing him from stopping in time to avoid the accident?"

Appellant's objection that it was leading amounts to nothing, as leading questions are in the discretion of the court. The objection that it called for a declaration not binding upon the plaintiff's intestate is false for it called for nothing of the kind, and so is the objection that it called for a conclusion. Its design was the contradiction of the plaintiff's witness and the objection that no proper foundation was laid for it overlooks the fact that such foundation was laid by asking Dwight, "Did you say to him that your car was a new car and that it worked hard, therefore, preventing you from stopping in time to avoid the accident?" (Page 36, line 16 to line 19.)

Appellant's next exception is to the question asked Frank McCarron (page 69, line 14), "Did you see any lessening of speed on the part of the car driven by Mr. Dwight before the collision?"

When the question was asked plaintiff's counsel objected to it as leading. Now he argues that the question was objectionable because it was leading, called for a conclusion and because McCarron was not qualified as an expert on speed. Of course ap-

pellant has no right to urge objections now that he did not make at the trial, which is sufficient answer to the second and third objections now raised. However, those objections are all frivolous, as leading questions are in the discretion of the court, and no conclusion or expert opinion was asked. All that was asked was a fact to which any witness could testify. One does not have to be an expert on speed to tell whether he sees a moving automobile lessen its speed.

POINT 3. THERE WAS NO ERROR IN THE REFUSAL TO CHARGE THE MATTERS MENTIONED IN THE APPELLANT'S THIRD POINT.

Under his third point the appellant objects to the refusal of the court to charge the first, second, third, and eighth requests to charge.

The first, second, third and eighth requests are as follows:

"1. If you find that both drivers are equally guilty of negligence in this case, then you must find your verdict for the plaintiff and assesses the damages.

"2. If you find that both drivers are guilty of negligence but you cannot determine the degree of each particular one, then I charge you that your verdict must be for the plaintiff.

"3. If you find that the accident was caused by the negligence of one driver through the contributory negligence of the other one, then I charge you that your verdict must be for the plaintiff.

"8. You must find that the plaintiff's intestate in this case was in no way guilty of contributory negligence. The only question as to

negligence that you must decide is was the truck driver negligent."

(Case, page 112.)

It will be observed that all of these requests exclude from consideration by the jury the proposition that Dwight was the employee of Gluck, because these several requests do not permit negligence on the part of Dwight to bar the action, while it is beyond question that if Dwight was Gluck's employee, negligence on his part should be imputed to Gluck and would thus bar the action.

At the beginning of this brief under the head of facts are excerpts from the testimony showing that Dwight was the employee of Gluck. For example there is the following testimony by Mr. Dwight:

Q Did you say you were working for Mr. Gluck this day? A Yes, sir. I worked for Mr. Gluck.

Q In other words, Mr. Gluck was your employer? A Yes, sir.

(Page 26, lines 34 to 38.)

Q Who was to pay you the \$4.00? A Mr. Gluck was to pay me the \$4.00.

(Page 95, line 25.)

Q You did not have any relations of any kind with Mr. Trubin, did you? A No, sir.

Q Your relations were entirely with Gluck?

A Yes, sir.

(Page 95, lines 35 to 40.)

Also Mr. Trubin was asked and answered as follows:

Q Had you any control whatever over what the driver of that car did at the time of the accident? A None.

Q You did not know Dwight was going to

drive? A No. I saw Dwight around but I did not know he was going to drive.

Q You knew you were not going to pay whoever did drive? A I knew that.

(Page 97, lines 18 to 30.)

And there is other testimony to the effect that Dwight was the employee of Gluck, quoted in the early part of this brief.

In view of this state of the record it is obvious that the first, second, third and eighth requests which would prevent the jury from giving any force to this evidence that Dwight was Gluck's employee should not have been charged. It was not error by the court to refuse to charge those requests. In fact the appellant's counsel recognizes that there was evidence that Dwight was an employee of Gluck when he says, "there was a dispute in the testimony as to whether or not Herbert Dwight was * * * an employee of Gluck." The admission that there was evidence that Dwight was an employee of Gluck destroys his argument that the trial judge erred in not making charges which would not permit the jury to consider Dwight an employee of Gluck.

It seems superfluous to answer appellant's argument about what is the law as to barring an employee's action against a third party because of the negligence of a fellow servant. Such law has no bearing here, because there is no testimony in the case to which it could relate. The testimony quoted at the early part of this brief shows that Gluck was an independent contractor. Some of that testimony appearing at Case, page 97, line 10 to page 98, line 10, is repeated:

Q Was Gluck an independent contractor?

A He was.

Q As such independent contractor you loaned this car or permitted Mr. Gluck to have this car? A Yes, sir.

Q Had you any control whatever over what the driver of that car did at the time of the accident? A None.

Q Was that a matter solely for Mr. Gluck and the driver?

Mr. Levitan. I object as leading.

The Court. Sustain the objection.

A I didn't know Mr. Gluck had a driver.

Q You did not know Dwight was going to drive? A No. I saw Dwight around, but I didn't know he was going to drive.

Q You knew you were not going to pay whoever did drive? A I knew that.

Re-direct examination by Mr. Levitan.

Q In your working arrangement there was an arrangement between you and Gluck for the compensation of the chauffeur of this car? A There was not. Could I be permitted to state exactly what the arrangement was? Mr. Gluck came to ask my permission for twenty per cent. of all sales for the use of his truck. On the Monday of the week he came to ask he explained to me his truck was not able to be used and he should use my truck and the arrangement was fifty per cent. and he uses my truck.

Q (*By the Court.*) Was there anything said about a chauffeur? A Nothing whatever. He was to have my truck.

The testimony in the case clearly shows that Dwight was Gluck's employee, hired by Gluck, to be paid by Gluck, that he was not under control

of Trubin Brothers, in fact Trubin Brothers didn't know he was to drive and that he had no relations with Trubin Brothers but only with Gluck, an independent contractor. Thus the best answer to appellant's argument as to the law is to say that it has no bearing on the facts of this case.

The other request to charge, the fourth, in substance means that if the sole negligence of the defendant's driver caused the accident, the defendant was liable. Of course, this is good law. However, it was not incumbent upon the court to adopt the words or phraseology of this request to charge, providing the court charged the substance. The court did in fact charge the substance as will be seen by an examination of the charge.

FOURTH POINT: APPELLANT'S OBJECTIONS TO THE TRIAL JUDGE'S CHARGE ARE WITHOUT MERIT.

In the typewritten copy of brief served upon respondent the charge is quoted: "Then, there was testimony that may *not* indicate to you that he thought the Ford was not lessening his speed and he put his hand out." In the charge as it appears in the State of the Case, page 105, lines 34 to 36, the word *not* italicized in the preceding quotation is absent. On the face of the language of the court, the criticism of appellant that the court did not explain that he was quoting the testimony, is not correct. The court told the jury that there was testimony that may indicate certain things to them but he did not say that it must be given any particular meaning. Furthermore, in the charge the trial judge said: "In the narration of the testimony you must not take my memory of it if yours differs with my recollection, because you are to decide all questions of fact." (Page 100, lines 14 to 17.)

The next part of the charge objected to is at page 107, lines 1 to 11:

“If you find as a matter of fact, I charge you, that Herman S. Dwight was negligent in the operation and control of this Ford car, that disposes of this action at once and your verdict must be for the defendant. Obviously, if you find that Herman S. Dwight was negligent and the operator of the defendant’s truck was negligent your verdict must be for the defendant.”

The objection urged against this is in substance that it did not permit the jury to decide the employment of Dwight. There was no error in this because the evidence quoted at the beginning of this brief unquestionably shows that Dwight was the employee of Gluck. Both the witnesses Dwight and Trubin make this clear. Any presumption that Dwight was Trubin’s agent that might have arisen from the fact that Trubin Brothers owned the car could be wiped out by proof to the satisfaction of the court that the driver was not the agent of the owner of the car. *Mahan vs. Walker*, 97 N. J. L., 304. It was wiped out in this case by the testimony of Mr. Dwight and Mr. Trubin. Thus under the decision last cited the matter was for the court to charge as it did. There was no basis in the evidence for a jury to find anything contrary to the statement made by the trial judge. Accordingly there was no error in his charge.

CONCLUSION

From the foregoing considerations it appears that the judgment should be affirmed for the reason that no error in the record has been shown, as well as for the further reason (recognized in *Kargman vs. Carlo*, 85 N. J. L., 632, syl. 8) that after examination of the whole case it will appear that there is nothing which has injuriously affected any substantial rights of the appellant.

The judgment should be affirmed.

Respectfully submitted,

KELLOGG & CHANCE,

*Attorneys for and of counsel with
Defendant-Respondent.*

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