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TESTIMONY FOR PLAINTIFF.

TESTIMONY FOR DEFENDANTS.

Summons.

State of New Jersey, }
Bergen County, } ss.:

The State of New Jersey to the (SEAL) Sergeant-at-Arms of said Court, or any constable of said County: SUMMON Demarest Bros. Company, a New Jersey corporation and John Dotson, to appear before the District Court of the First Judicial District of the County of Bergen, to be held at the City Hall, Englewood, in said County, on the 28th day of June, One thousand nine hundred and twenty-eight, at nine-thirty o'clock in the forenoon, to answer unto Isaac Vaniewsky, in an action upon tort. Demand four hundred fifty ($450) dollars. Hereof fail not.

WITNESS, ARTHUR M. AGNEW, Esq., Judge of the District Court of the First Judicial District of the County of Bergen, at Englewood, aforesaid, the 19th day of June, in the year One thousand nine hundred and twenty-eight.

FRANK H. MALONEY, JR.,
Clerk.

Demarest Bros. Company,
Main Street, Closter, New Jersey.

Summons.

No. 13517.

DISTRICT COURT

of the

FIRST JUDICIAL DISTRICT

of the County of Bergen

Isaac Vaniewsky,

Plaintiff,

v.

Demarest Bros. Company, a New Jersey Corporation, and John Dotson,

Defendants.

SUMMONS UPON TORT

Returnable June 28 A. D. 1928
9:30 o'clock A. M.

Demand	$500.00
True Am't	450.00
Court Costs	4.00
Mileage	.40

Seufert & Elmore,
Attorneys for Plaintiff.

A true copy.

State of Demand.

(Filed June 19, 1928.)

DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE COUNTY OF BERGEN.

ISAAC VANIEWSKY, *Plaintiff*, *v.* DEMAREST BROS. COMPANY, a New Jersey corporation, and JOHN DOTSON, *Defendants.*	In Tort. State of Demand.

The plaintiff residing in the Borough of Leonia, County of Bergen and State of New Jersey, demands of the defendants the sum of five hundred dollars ($500) for that, whereas:

FIRST COUNT.

1. On or about the twenty-first day of November, 1927, the defendant, John Dotson, was driving a certain automobile truck, registration license No. 117711 New Jersey, 1928, owned by the defendant, Demarest Bros. Company, in a northerly direction on a public highway, known as White Street, in the Borough of Closter, County of Bergen and State of New Jersey.

2. That the defendant, John Dotson, was driving said truck of the defendant, Demarest Bros. Company, as agent and servant in and for the business of Demarest Bros. Company.

State of Demand.

3. That plaintiff was at the above mentioned date and is still the owner of a plot of land and building thereon, located on the northerly side of Main Street in the Borough of Closter, County of Bergen and State of New Jersey, directly opposite White Street.

4. That the defendant, John Dotson, and the defendant, Demarest Bros. Company, by its agent and servant, aforesaid, that at said time and place drove said truck negligently and carelessly with great force and violence into and against said building of plaintiff.

5. At the said time and place said defendant, John Dotson, and said defendant, Demarest Bros. Company, by its agent and servant, John Dotson, did carelessly and negligently drive said truck at a high, dangerous and excessive rate of speed without having proper control thereof, without having the same in proper repair and without giving heed or attention to the manner of its driving and without using proper precautions with respect to property lawfully located on said highway, known as Main Street.

6. That because of said collision as described in paragraphs four (4) and five (5). Plaintiff's building was entered into by said truck of defendant and damaged in that: windows, window frames, door, floor and other parts of said building of a technical nature of which the plaintiff is not familiar were destroyed and demolished.

7. That because of said collision plaintiff was forced to spend large sums of money to repair and have the building in its original state. Wherefore plaintiff demands as damages the sum of four hun-

dred and fifty dollars ($450) together with lawful interest and costs of suit.

SECOND COUNT.

1. Plaintiff was on or about the twenty-first day of November, 1927, and now is the owner of a lot of land and building thereof, located on the northerly side of Main Street, in the Borough of Closter, County of Bergen and State of New Jersey, directly opposite White Street.

2. That defendant, John Dotson, and defendant, Demarest Bros. Company, by its agent and servant, John Dotson, on or about the twenty-first day of November, 1927, broke and entered the close of the plaintiff thereon existing with a certain truck of the defendant, Demarest Bros. Company, and driven by the defendant, John Dotson, as agent and servant of the defendant, Demarest Bros. Company, in and for the business of the defendant, Demarest Bros. Company, and other wrongs and injuries then and there committed to the damage of the plaintiff, in the sum of four hundred and fifty dollars ($450) wherefore the plaintiff demands of the defendants the sum of four hundred and fifty dollars ($450) together with lawful interest and costs of suit.

SEUFERT & ELMORE,
Attorneys for Plaintiff.

Transcript of Clerk's Docket.

DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE COUNTY OF BERGEN.

ISAAC VANIEWSKY,
Plaintiff,

v.

DEMAREST BROS. Co., a New Jersey corporation, and JOHN DOTSON,
Defendants.

In Tort.

No. 13517.

Seufert & Elmore, Esqs., plaintiff's attorneys.
Harley, Cox & Walburg, defendants' attorneys.

COSTS.

Summons	$2.10
Service of extra summons	.40
Trial fee	1.50
Mileage	.40

A summons was issued June 19, 1928, served June 22, 1928, returnable June 28, 1928, at ten o'clock in the forenoon.

The sergeant-at-arms returned the summons as follows: viz:

I served the within summons on June 22, 1928, on John Dotson, the defendant, by reading the same to him and delivering to him a copy thereof.

WILLIAM A. OLIVER,
Sergeant-at-Arms.

The defendant, Demarest Bros. Co., could not

be found and I served the within summons on the 22nd day of June, 1928, by leaving a copy thereof at the place of abode in the presence of Arthur Durie, over the age of fourteen, whom I informed of the contents thereof.

WILLIAM A. OLIVER,
Sergeant-at-Arms.

Plaintiff's demand was filed June 19, 1928. This cause was called for trial June 28, 1928, at ten o'clock in the forenoon and adjournments taken at various times unto October 25, 1928, at ten o'clock in the forenoon.

On October 25, 1928, the plaintiff appearing and the defendants appearing, the trial of the cause was proceeded with as follows:

Witnesses—Isaac Vaniewsky, Ralph Heoten, Frank H. Thompson, John Dotson, William H. Bell.

H. Richard Woebse, stenographer, sworn.

At the end of the plaintiff's case, motion was made by the attorneys for defendants for a nonsuit, on behalf of both defendants. Motion made based on the first count; denied as to both defendants. Motion based on second count, laid in trespass, was granted as to both defendants.

At the end of the case motion made by the attorneys for the defendants for a direction of verdict as to both defendants on the first count. Motion denied.

Other motions made on behalf of the defendant, Dotson, for a direction of verdict as to both counts. This motion was granted. Judgment entered in favor of the defendant, John Dotson, and judg-

ment entered in favor of the plaintiff against the defendant, Demarest Bros. Co., a corporation, for $363.95 and costs on the first count.

Notice of appeal filed November 1, 1928.

Bond of appeal filed November 1, 1928.

I, FRANK MALONEY, Clerk of the District Court of the First Judicial District of Bergen County, do hereby certify that the above is a true copy of the records of the above-mentioned cause. Signed and sealed this 11th day of December, 1928.

FRANK H. MALONEY, JR.,
Acting Clerk.
(Original)
(SEAL)

Notice of Appeal.

(Filed November 1, 1928.)

DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT

OF THE COUNTY OF BERGEN.

ISAAC VANIEWSKY,
Plaintiff,

v.

DEMAREST BROS. COMPANY, a New Jersey Corporation and JOHN DOTSON,
Defendants.

In Tort.
Notice of Appeal.

To Messrs. Seufert and Elmore, attorneys for Isaac Vaniewsky.

SIRS:

TAKE NOTICE, that the defendant, Demarest Bros. Co., a New Jersey corporation, hereby appeals to the New Jersey Supreme Court from the judgment of the District Court of the First Judicial District of the County of Bergen rendered in the above-stated action on October 25, 1928.

Respectfully,

HARLEY, COX & WALBURG,
Attorneys of Defendant,
Demarest Bros. Co., a New Jersey Corporation.

Dated November 1, 1928.

Service of notice of appeal acknowledged November 1, 1928.

SEUFERT & ELMORE,
Attorneys of Plaintiff.

Opinion.

(Filed December 19, 1929.)

NEW JERSEY SUPREME COURT.

#421 JANUARY TERM, 1929.

ISAAC VANIEWSKY,
Plaintiff-Respondent,

v.

DEMAREST BROS. COMPANY, a New Jersey corporation, and JOHN DOTSON,
Defendants-Appellants.

Submitted January Term 1929. Decided December , 1929.

On appeal from Bergen County District Court.

For Appellant: HARLEY, COX & WALBURG.

For Respondent: SEUFERT & ELMORE.

Before—Justices TRENCHARD, KALISCH and LLOYD.

LLOYD, J.

This action was brought by Isaac Vaniewsky to recover for the damage done to a building owned by him in the Borough of Closter by a truck of the defendant company running into and knocking down a portion of the walls; the truck at the time being operated by John Dotson, president of the Demarest Bros. Company, and one of the defendants. The allegation of negligence was that "said defendant John Dotson, and said defendant, Demarest Bros. Company, by its agent and servant John Dotson, did carelessly and negligently

drive said truck at a high, dangerous and excessive rate of speed without having proper control thereof, without having the same in proper repair and without giving heed or attention to the manner of its driving and without using proper precautions with respect to property lawfully located on said highway."

The plaintiff's proofs simply established that the truck ran over the sidewalk and into the building and that at the time it was being driven by the defendant Dotson.

At the conclusion of plaintiff's proofs, motions for nonsuit were made on behalf of both defendants. These motions were refused. Defendant Dotson then testified that he was president of the company, that he was driving the truck at the time and that he lost consciousness, in consequence of which he did not know what thereafter occurred. This comprises the whole of the testimony as to negligence.

At the conclusion of the entire case a motion was made for the direction of a verdict in favor of both defendants on the grounds that there was no proof of negligence and no proof of any negligent acts which were the proximate cause of the accident; as to the defendant Dotson that there was no proof of the allegation set forth in the complaints and as to both defendants that the proofs showed that the accident was unavoidable. The court granted the motion as to Dotson, denied it as to Demarest Bros. Company and thereupon awarded a judgment in favor of the plaintiff against that company for the amount of the plaintiff's damages.

It will be observed that the whole negligence, if any, alleged or proved in the case was in the oper-

ation of the truck by Dotson as the agent of the Demarest Bros. Company. It is, therefore, entirely apparent that no liability could exist as to the company unless by and through the negligence of Dotson.

The case was heard by the judge sitting without a jury and we therefore have the anomalous situation of the judge sitting as a jury finding as a fact that no negligence existed in the case and yet rendering a verdict for the plaintiff against one of the defendants. With what show of logic or reason such a result could have been reached we are unable to discover.

From the rulings of the judge directing a verdict for the defendant Dotson, the plaintiff does not appeal. The Demarest Bros. Company appeals from the judgment rendered against it.

The question here involved was discussed by Justice Katzenbach in the case of Dunbaden *v.* Castle's Ice Cream Co., 103 N. J. L., 427, though in that case the precise point did not arise. That action was against master and servant with a verdict against the master only, but with no finding by the jury as to the servant. It was therefore said that the case as against the servant remained yet undetermined. To like effect was Fury *v.* Reid Ice Cream Co., 2 Misc., 1008.

These cases, however, are far from controlling here. What different juries may do in different cases or possibly in the same case on different trials is by no means analogous to the case where, as here, the action is one against both defendants in which a single complaint is filed alleging the negligence of the driver as the basis of liability against both driver and master and a verdict is rendered at one and the same time exonerating

the servant and holding the master. In the case of New Orleans & Northeastern Railroad Co. *v.* Jopes, 142 U. S. Sp. Ct., 18, it was said by that high tribunal that "it would seem on general principles that if the party who actually causes the injury is free from all civil and criminal liability, therefore, his employer must also be entitled to a like immunity." In practice the great weight of authority is as stated in 39 C. J., 1367, that "where a master and servant are sued jointly in an action based solely on tortious conduct of the servant, and the servant is acquitted, there can be no verdict against the master. A verdict against the master and acquitting the servant is equivalent to a finding that no cause of action exists and will not support a judgment against the master; and such a verdict should be set aside or judgment for the master entered notwithstanding the verdict," citing a long line of cases, beginning with the case above noted, and continuing with like rulings in numerous states.

The liability of the servant is primarily due to his wrongful act; that of the master is derivative and predicated wholly upon such primary liability. Courts are for the administration of justice; it is their duty so to administer the law as to effectuate justice within the bounds of adjudicated rules. By implication the judge in the present case found that there was no negligence; none in the servant because it acquitted him of all responsibility, and by implication, therefore, none in the master because such negligence could only exist if the servant had been guilty. It would be a travesty on justice if courts were powerless to set aside a result so illogical and unjust.

If it be suggested that the plaintiff should not

suffer because of the wrongful action of the judge, the answer is that he could have himself appealed from the finding in favor of Dotson. A finding which deprives him of the benefit of the liability of the servant, on which alone the liability of the master could be predicated, and a similar finding that such master was nevertheless liable could certainly be brought before this court for review upon the same logical principles that we are now invoking on the legal phases of the case as they are here presented. If he neglects to avail himself of the means to protect his rights he cannot complain of the final result which deprives him of all remedy.

The judgment is set aside and judgment rendered for the defendant Demarest Bros. Company.

Dissenting Opinion.

(Filed December 19, 1929.)

NEW JERSEY SUPREME COURT,

No. 421—January Term, 1929.

Isaac Vaniewsky,
Plaintiff-Respondent,

v.

Demarest Bros. Company, a New Jersey corporation, and John Dotson,
Defendants-Appellants.

On appeal from Bergen County District Court.

Before—Justices Trenchard, Kalisch and Lloyd.

For the Appellant: Harley, Cox and Walburg.

For the Respondent: Seufert and Elmore.

Kalisch, J. (Dissenting): I find myself unable to concur in the views expressed in the prevailing opinion of the court. The ground of my dissent, stated as succinctly as is practicable, is predicated chiefly upon the uncontroverted fact, as disclosed by the evidence, that the relation of master and servant did not exist between Dotson, in whose favor the trial judge gave judgment, and the Demarest Bros. Company, a corporation, against which company judgment was awarded. Dotson was not the servant of this company, but was its president, and at the time of the happening of the

accident, he was engaged in the execution of an agency in the conduct of the affairs of his company, by driving one of its trucks on behalf of, and for the benefit of the company's business. In performing such service he was the *alter ego* of the company and not its servant.

The doctrine of *respondeat superior,* therefore, invoked by the learned author of the prevailing opinion is obviously inapplicable to a situation where the wrong-doer is the principal, as is the case here. The state of demand filed by the plaintiff, in the District Court, sets forth in the first count thereof, in addition to the allegation of negligent operation of the truck, the further allegation that the truck was being operated "without having the same in proper repair."

It has been repeatedly held by the decisions of this court, that pleadings in the District Court need not be as formal as they are required to be in the higher courts. The fact that the state of demand alleges Dotson to be the agent and servant of the defendant company was a matter of cautious pleading to meet either a relationship of master and servant, or, that of principal and agent, as might be developed by the testimony.

Even if this were a case in which the relation of master and servant existed between the defendants, the fact that the truck jumped the curb, crossed the sidewalk and ran into the front of the building, raised the presumption of negligent driving, or that the truck was out of repair, or both.

The testimony adduced in the cause most strongly supports the judgment against the appellant company. That the accident occurred in the manner as stated is admitted. The only defense offered and relied on by the defendants, was, that

the accident was inevitable. The conceded facts in the case, *prima facie* established a trespass *quare clausum fregit.* The front of the truck had entered the front of the building, of which the plaintiff was the owner.

The burden rested upon the defendants to satisfactorily explain, in order to exonerate themselves from liability, to adduce proof of such facts and circumstances as would constitute a legal excuse for the damage done. One of the allegations in the plaintiff's state of demand is, as has been stated, that the truck was out of repair. There is not a scintilla of testimony offered by the defendants, to be found anywhere in the case that meets the plaintiff's allegation that the truck of the defendant-appellant was out of repair, by a denial from either of them.

No attempt was made by the defendant company to show the truck was in good repair. The truck was in the custody of, and under the control of the defendants at the time of the accident. It surely was incumbent upon them to explain the circumstance, why the truck jumped the curb and went over the sidewalk and struck, and entered the building of the plaintiff.

The defendants relied solely upon the assertion of Dotson, who was operating the truck, that by reason of an attack of acute indigestion, he lost consciousness, and therefore was unable to state how the accident happened.

There is an utter absence of proof at what point, at any time, during the journey, Dotson became unconscious. Whether his illness began just at the moment when the truck jumped the curb, and was crossing the sidewalk, which naked circumstance would raise a permissible inference, in the

absence of any explanation that the truck was out of repair; or whether Dotson became unconscious when he was made aware of his peril after the truck jumped the curb; or whether he was rendered senseless by force of the impact of the truck with the building, is not disclosed by the testimony; at any rate, they were factual questions for the trial judge to determine. It seems to me to be clear, that under the evidence, the trial judge was warranted in finding from the circumstance that the truck jumped the curb, that such abnormal movement was due to the truck being out of repair, and was not the result of negligent operation of it, by Dotson. As this was a permissible view that the trial judge could take under the evidence, he was warranted in exculpating Dotson of negligent conduct, and in finding the defendant company to have been negligent for permitting its truck, when out of repair, to be operated upon a public highway.

The foregoing views are based upon the theory adopted in the prevailing opinion, that the case is one of master and servant, to which the doctrine of *respondeat superior* is strictly applicable; but even upon that theory there is no incongruity in finding the servant not guilty, and holding the master liable, under the allegation in the state of demand, that the truck was out of repair.

In Goekel and Samuel Savage, respondents, *v.* Erie Railroad Company, 100 N. J. L., page 279, Chancellor Walker, who wrote the opinion for the Court of Errors and Appeals, in a headnote to the opinion, says: "Although two defendants are sued as for a joint tort, yet if the jury negative the negligence charged against one, a verdict against the other is not objectionable; but whether so in a

case where *respondeat superior* applies and the master is responsible for the particular act of negligence of the servant, where both or neither would be liable, *quaere.*

In Dunbaden *v.* Castles Ice Cream Co., 103 N. J. L., page 427 (Court of Errors and Appeals), the late Justice KATZENBACH, speaking for the court, at page 429, after discussing the rule of *respondeat superior* in a case of master and servant, as adopted in some jurisdictions, said: "In other jurisdictions it has been held, that in an action against master and servant jointly, based solely upon the doctrine of *respondeat superior,* the master may be held liable, although the servant is exonerated. The reason assigned for this rule is that the plaintiff is entitled to the verdict given by the jury, and for the failure of the plaintiff in obtaining a verdict against another equally responsible, the plaintiff may have a grievance, but the defendant adjudged responsible has none." The learned justice cites in support of this statement leading cases in some of our sister states.

Upon the assumption that the instant case is one of master and servant, to which the rule of *respondeat superior* applies, the important fact cannot be ignored, that counsel, of defendants, appearing for both master and servant, moved the judge to exonerate Dotson, which request was granted. He also moved to exonerate the master, which request was refused. We have, therefore, the rather peculiar situation of a master appealing from a judgment against him, because the trial judge did not also give a judgment against his servant, though it was at the request of the master's counsel that the servant was exonerated.

It is difficult for me to comprehend that even

if in the finding of the trial judge, that the servant was not guilty, and the master guilty, there is a palpable incongruity under the doctrine of *respondeat superior.* I am unable to perceive how, and in what respect, the master was injuriously affected by the acquittal of the servant, since there was testimony from which the trial judge could properly find that the damage done to the plaintiff was the result of negligence, for which the master was answerable, as well as the servant.

Moreover, section 27 of the new practice act, provides: "No judgment shall be reversed or new trial granted on the ground of misdirection, or the improper admission or exclusion of evidence or for error as to matter of pleading or procedure, unless after examination of the whole case, it shall appear that the error injuriously affected the substantial rights of a party." P. L. 1912, page 382.

I am decidedly of the opinion that the facts in the instant case do not present the relationship of master and servant, but rather that of principal and agent—the agency, however, being of a higher type than such as is usually to be found in the ordinary relation of principal and agent. While it is true that the doctrine of *respondeat superior* is recognized by distinguished authors of text books on the subject in hand, and by the decisions of our courts, to be applicable to the relation of principal and agent upon the grounds of public policy, it seems, however, that the application of that doctrine is limited to where the agency is of such a nature as has superimposed upon it the relation of master and servant.

In American Soda Fountain Company *v.* Stolzenbach, 75 N. J. L., page 721, Judge Dill, speaking for the Court of Errors and Appeals, at page 726,

says: "The fallacy of the argument of the defendant in error is, that it fails to note the distinction between the corporate act performed through the intermediation of a person specially empowered to act as its agent or its attorney, and a like act done immediately by the corporation through its own administrative officers, its inherent agencies. The right of an artificial person to empower and employ agents or attorneys is identical with that of a natural person—each is governed alike by the law of principal and agent."

"The fundamental difference between the natural and artificial person, is that the latter, even when not acting as a principal through the intermediation of an agent, acts through some agency inherent in its corporate form."

"Normally such agency inheres in the natural person who holds and administers the offices of the corporation. * * * Hence, when a corporation does not go outside of its corporate machinery and capacity in doing a corporate act, it is a confusion of terms and ideas to say it is acting through an agent when the fact is, it is *acting* through an agency, and in chief."

"This distinction is not merely verbal, and hence trivial, but on the contrary marks the wide difference that exists between acting for oneself by an inherent faculty and the employment of another person to act for one and in one's stead."

"In this, as in all cases, loose terminology implies and conduces to loose reasoning. The maxim *'qui facit per alium facit per se'* requires and should be applied only when the agent the *alius* is not the principal acting for himself."

In the instant case the defendant corporation was operating its business through its president.

He had been driving the truck for years as part of the business of the corporation. Upon his redirect examination he testified that he was one of the firm of Demarest Brothers, that it was a corporation, and he its president.

It is a matter of some significance, that the trial judge, in giving judgment, said: "There will be a judgment entered in favor of the defendant as to Mr. John Dotson, *individually,* and a judgment will be entered in favor of the plaintiff against the defendant, Demarest Bros. Company, a corporation for $363.95.

It is a matter of proper conjecture that the trial judge in view of the fact that Dotson was the president of the corporation, and that a trespass had been committed by Dotson while in the execution of an agency of the company, and he being the *alter ego* of the company, his act became, and was the act of the corporation. It also becomes evident that the liability of the corporation cannot be properly designated as a derivative liability, resulting from the tortious act of Dotson, as would have been the case if the relation of master and servant had existed between him and his company, for such liability rests wholly upon the basis that the act of Dotson was the tortious act of the company.

As has already been pointed out, the trial judge was warranted to find from the facts of the case that the trespass complained of, was the result of the truck being out of repair, and not due to any negligent operation of it by Dotson. It was not necessary for the plaintiff to establish that there was negligence in the operation of the truck by Dotson. Even if the trial judge gave credence to Dotson's statement that he became unconscious

while operating the truck, that in itself does not furnish a legal excuse.

The action being one of trespass, it was wholly unimportant that the trespass was or was not the result of negligence, or that the perpetrator lacked the intent to commit the trespass, or was in a state of unconsciousness at the time of its commission. Reich *v.* Delaware, Lackawanna & Western Railroad Company, 63 N. J. L. page 635, and Friedman *v.* Snare & Triest Company, 71 N. J. L. page 605; both cases being decided by our Court of Errors and Appeals, and are authority for the proposition that an infant, though of an age so as not to comprehend that in going upon the land of another, it is committing a wrong, nevertheless, it is in law, a trespasser.

If a sonambulist, while in a sonambulistic state, should wander from home and go into, his neighbor's garden, and uproot rose bushes or commits other acts of destructiveness in law, he is guilty of a trespass, and answerable for damages, but, if, while in the act of despoliation he shoots and kills a person he is not guilty of murder, because his act lacked the essential element of intent, in order to constitute a crime. So, if a lunatic enters a neighbor's close without leave or license, he is a trespasser, and liable to the land owner in a civil action, for any damage committed by him.

I do not think it is necessary to pursue the discussion any further, since under the evidence, it was also open to the trial judge to find that the accident was not an inevitable or unavoidable one, and that the defendant company was answerable for the trespass and damages resulting therefrom, to the plaintiff. I therefore vote to affirm the judgment of the court below.

Notice of Appeal and Grounds of Appeal.

(Filed April 28, 1930.)

NEW JERSEY SUPREME COURT.

ISAAC VANIEWSKY,
Plaintiff,

v.

DEMAREST BROS. COMPANY, a New Jersey corporation, and JOHN DOTSON,
Defendants.

Action at Law.
Notice of Appeal and Grounds.

To: HARLEY, COX AND WALBURG, Esqs., Attorneys of Defendants, or TO WHOM IT MAY CONCERN:

SIRS:

PLEASE TAKE NOTICE that the plaintiff in the above entitled cause appeals to the Court of Errors and Appeals of last resort in all causes in New Jersey from the whole of the judgment entered in this cause on the following ground, to wit: Because the Supreme Court erred in giving judgment to the defendant instead of to the plaintiff.

Dated April 24, 1930.

Respectfully yours,

SEUFERT & ELMORE,
Attorneys of Plaintiff.

Service of the within notice is hereby acknowledged this 25th day of April, 1930.

HARLEY, COX & WALBURG,
Attorneys of Defendant.

Testimony.

DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE COUNTY OF BERGEN.

ISAAC VANIEWSKY,
Plaintiff,

v.

DEMAREST BROS. CO., a New Jersey corporation, and JOHN DOTSON,
Defendants.

Englewood, New Jersey,
October 25, 1928.

Before—Hon. ARTHUR M. AGNEW, J.

APPEARANCES:

SEUFERT & ELMORE, Esqs. (by LELAND F. FERRY, Esq.), for Plaintiff.
HARLEY, COX & WALBURG, Esqs. (by HARRY E. WALBURG, Esq.), for Defendants.

(H. RICHARD WOEBSE, stenographer, sworn.)

ISAAC VANIEWSKY, the plaintiff, called as a witness on his own behalf, being first duly sworn, testified as follows:

Direct examination by Mr. Ferry:

Q. Mr. Vaniewsky, you are the plaintiff in this action? A. Yes, sir.

Q. Are you the owner of the building in question that is involved in this suit? A. Yes.

Q. That building is located in the Borough of Closter? A. Yes.

Q. On the main street in Closter? A. Yes.

Q. You were the owner of this building on the 21st day of November? A. Yes, sir.

Q. Can you tell the Court what happened on that date? A. I had a telephone on the 21st of November from the police. Then one of my tenants called me up.

Mr. Walburg: I object to what his tenant called him up about.

The Court: Just tell us what you saw.

A. I did not see the accident. I came over there the next morning. I saw the windows all smashed, in the stores of the building, the plate glass, two big ones were smashed. The copper was broken, the brick work was all knocked down. The show windows in the store were knocked down, the door was all broken up.

Q. Did you have this damage repaired? A. Yes, sir.

Q. I will ask you now, Mr. Vaniewsky, what is your occupation? A. I am a builder.

Q. How long have you been a builder? A. Since 1905.

Q. Can you give us a rough estimate of how many houses you have built during that time? A. Oh, I built a good many of them, two or three hundred buildings.

Q. How many? A. Two hundred at any rate.

Q. About two hundred buildings? A. Yes, sir.

Q. As a part of your business as a builder, it includes the purchase of building materials and the hiring of labor? A. Yes, sir.

Q. As a result of the damage that was done to this store, did you have this place repaired? A. Yes.

Q. Who repaired it? A. Well, when I was finished with that building, I didn't have anybody working for me at the time. It was going towards winter. I did not have anybody working for me. I knew a couple of good boys in Palisades Park, McGee and Thomson, which I knew they are reasonable boys. I said, "Boys, fix it up. If you don't overcharge me—"

Mr. Walburg: I object to what he told Thomson.

A. (Continued.) They went and fixed it up. They gave me a bill. I can't say it is too much because they didn't charge too much.

Q. How much was the bill?

Mr. Walburg: I object. There is no testimony as to what work was done or what this bill consists of. I do not think the witness is qualified to say it is reasonable.

By the Court:

Q. Did you pay the bill? A. No, I didn't pay the bill at the time.

Q. Have you paid it yet? A. Yes.

Q. How much did you pay? A. They had a judgment against me for that, because I refused to pay.

Q. Why didn't you pay, Mr. Vaniewsky? A. Because I was notified by the insurance company that the bill is three hundred and some odd dollars from Thomson.

Q. How much did you pay for the damage? A. I paid $400.

Q. How much?

Mr. Ferry: $351.

Mr. Walburg: I object to counsel testifying. I think the witness ought to testify. He has the bills here.

Mr. Ferry: I will show the Court the state of demand upon which the judgment was recovered, $351.95. That was the case that was tried before your Honor about a month ago, I believe.

By Mr. Ferry:

Q. You paid this judgment, Mr. Vaniewsky? A. Yes.

Mr. Walburg: May I see it?

The Court: How much was it?

Mr. Ferry: $351.95, with costs.

Mr. Walburg: Of course, you can't charge us with costs, I suppose, because he won't pay his bills.

The Court: The bill is $351.95.

Mr. Walburg: I withdraw any objection on that.

Q. Have you ever made demand, Mr. Vaniewsky, on Demarest Brothers, or John Dotson, for payment? A. I wrote them about a dozen letters.

Q. What did they reply to you? A. They said they are insured by the insurance company.

Mr. Walburg: I object, and move to strike the answer out.

The Court: We are not concerned with any insurance company. You must not bring that in your testimony.

Q. Did they ever pay you, Mr. Vaniewsky? A. No.

Isaac Vaniewsky, cross.

Cross examination by Mr. Walburg:

Q. You do business under the name of the Van Realty Company? A. Yes.

Q. Does the Van Realty Company own this building, or do you own it? A. I own it.

Q. You own it? A. Yes.

Q. You were quite a big builder, weren't you? A. Yes.

Q. You built three hundred buildings in how many years? A. I didn't build for a year or so, then I started again.

Q. When was the last time you built a building? A. I am building now.

Q. You didn't undertake to repair this store yourself, even if you are a builder? A. No.

Q. You hired somebody else? A. Yes.

Q. What were you doing at that time? A. Nothing.

Q. That is the only business you have, building, is it? A. No, I have got some other business, real estate, selling and buying.

Q. This was a store front where the accident happened? A. Yes.

Q. The store was vacant at the time, wasn't it? A. Yes.

Q. You yourself, of course, examined this building after the accident, didn't you? A. Yes.

Q. You saw what was damaged, didn't you? A. Yes.

Q. You saw what was repaired? A. Yes.

Q. On this state of demand that is the bill that was submitted to you on which judgment was taken against you? A. Yes.

Q. Now, I notice on the bottom it says store front, kalsomine and glass, $180. That is the glass, plate glass, in the store? A. Yes.

Q. You had plate glass insurance on the property at that time, didn't you? A. Yes.

Q. You were paid by your insurance company for the plate glass, weren't you? A. No, sir.

Q. Weren't you paid by the Fidelity & Casualty Company of New York for the plate glass? A. No.

Q. Didn't you put a claim in for that? A. No, sir.

Q. Although you carried insurance? A. No, sir.

By the Court:

Q. Why didn't you ask the insurance company for the money for the plate glass? A. I expected that there is people wrote, somebody wrote. I did ask the insurance man what shall I do? The insurance company would not pay me.

By Mr. Walburg:

Q. You had plate glass insurance? A. Yes, sir.

Q. You have never collected anything from them on that? A. No, sir.

Q. You put this plate glass in, did you not? A. At what time, when, the first time or the second time?

Q. After the accident? A. I think Louis Max, I am not sure.

Q. These fellows McGee and Thomson didn't put the plate glass in? A. No.

Q. Have you got the plate glass bills showing what it cost? A. No.

Q. You haven't got those? A. No.

Q. Did you ever ask McGee and Thomson to find out how much the plate glass cost? A. No.

Q. Do you know what this kalsomining means on there? Where was this kalsomining done, around the windows? A. I don't know, I couldn't tell you.

Q. Do you know how much of that $180 was for glass? A. I think the whole business was for glass.

Q. There is kalsomining on the bill alongside of it? A. Maybe some little patching around the gutter.

Q. You don't know how much of the bill was for glass and how much for kalsomining? A. I couldn't say.

Q. Have you been to the store after it was repaired? A. Yes.

Q. The store inside around the windows was not painted at the time of the accident, it was raw wood there? A. Before the accident?

Q. Yes, I mean around the show windows, it wasn't finished? A. It was completed.

Q. Inside? A. Yes.

Q. Was any of this damaged material used for the repairs that you made after the accident? A. No.

Q. You have been there, you can see that if that had been done? A. Yes.

Q. You could see if they put the old wood back instead of new? A. Yes.

Q. They didn't do that? A. No, sir.

Q. What is down there, fifteen per cent. of cost, $45.95, is this one of those cost plus jobs? A. Yes, I think I am entitled to it.

Q. Is that your profit on it ? A. No, that is their profit.

Q. You are sure it isn't yours? A. No, sir.

Q. You say it was done by men named McGee and Thomson? A. Yes.

Q. I see this bill is made out by Thomson Bros.? A. They call themselves Thomson Bros. They are partners.

Q. It says $10 for painting on this bill. Do you know where the painting was done? A. Yes.

Q. Where? A. On the doors, and the platform in the show window.

Q. How many doors were there in the store? A. One door. I think they painted two doors, because it is a double door, two stores, double doors. It is one frame.

Q. Painted on the inside? A. Outside and inside.

Q. What else? A. Platform.

Q. How much? A. Of the show window. The platform is five or six feet.

Q. They have a charge on there for truck, $25. What is that for? A. Carting brick, bringing over brick and different things.

Q. How many trips did they make there? A. I don't know, I can't say.

Q. When you went to McGee and Thomson about this work, what did you say to them about the job? A. Go ahead and fix it up.

Q. Did you take them down there first and show it to them? A. Yes, I did.

Q. Did you ask them how much they were going to charge you? A. No.

Q. You just told them, "Go ahead and fix it up, boys"? A. Yes.

Q. You were satisfied with that? A. Yes, I knew them.

Q. You didn't enter into any written contract? A. No.

Q. You didn't enter into any agreement as to what it would cost? A. I do a lot of times that way.

Q. Thomson Bros. are still in business? A. Yes.

Q. Where do they come from, Palisades Park, New Jersey? A. Yes.

Q. Have you got them here in court, either McGee or Thomson? A. Yes; there they are (indicating).

Q. You didn't pay this bill until they collected and took a judgment against you? A. Yes.

Q. Did you complain about it because it was too much? A. No.

Q. You wouldn't pay it anyhow? A. No, that wasn't the reason.

Q. What was the reason? A. The reason was because you people claimed it is too high. I said, "Boys, I wouldn't pay it until you convince the insurance company that this is the right bill." Then they sued me. Then I notified you people. They said if the bill is too high, go and convince the judge. You people didn't show up.

Q. You sent three or four bills into Demarest Bros., didn't you? A. Yes.

Q. You sent them one bill for $351.95, didn't you? A. Yes.

Q. Then you sent them another bill for $401.95, didn't you? A. Yes.

Q. Then you sent them another bill for $50 for temporary use of 2 by 4's? A. That wasn't temporary use, they used them.

Q. You see the three bills, look at them. You gave this to Demarest Bros., didn't you, this one for $401.95? A. These two are one.

Q. $401.95? A. These two are one.

Q. You sent this bill for $401.95? A. That is right.

Mr. Ferry: Just a minute. There is no need of trying to get things mixed up. These bills were not submitted by Mr. Vaniewsky; they were made by Thomson Bros., and sent to Vaniewsky. He sent them on.

Mr. Walburg: All right.

Mr. Ferry: He forwarded those bills to Demarest Brothers.

By Mr. Walburg:

Q. Where did you get this bill from, $401.95? A. From Thomson Bros.

Q. And you sent that on to Demarest Bros., didn't you? A. Yes.

Q. Later on, when they sued you, they only sued you for $351.95; that is right, isn't it? A. That is right.

Redirect examination by Mr. Ferry:

Q. Mr. Vaniewsky, this charge of $351.95, did you consider it a reasonable charge? A. Yes.

Q. For the work that was done and the materials furnished? A. Yes.

Q. Was there any other labor performed there besides that performed by Thomson Bros.? A. Yes, I had my truck there, cleaning up, and I had some flooring which they used, which I had in the store at the time; they used it for the show windows.

Q. How much flooring? A. Well, they used about 100 feet.

Q. Five hundred feet? A. 100 feet.

Q. How much is that? A. That is worth about—

Mr. Walburg: I object. That is not redirect.

A. (Continuing.) About eight dollars.

Mr. Walburg: He is trying to prove more damages.

The Court: You are supposed to put your case in.

Isaac Vaniewsky, recross.

By Mr. Ferry:

Q. What was the value of that lumber that you contributed, Mr. Vaniewsky? A. Eight dollars for flooring.

Q. Eight dollars for the lumber? A. Yes, and fifteen dollars worth of lumber, 2 x 4's, that they had to use.

By the Court:

Q. Is it $8 or $15? A. Eight dollars for flooring, and 2 x 4's another $7, about $7. Then two days I had a man over there with the truck to clean up the glass and rubbish around there.

By Mr. Ferry:

Q. What did you pay that man per day? A. Paid him $3 a day.

Q. That was $12 for the man's salary? A. Yes.

Q. Was the truck your own truck? A. Yes.

Q. Did you rent that truck out? A. No.

Q. Just used it yourself? A. Yes.

Q. It was used two days? A. Yes.

Recross examination by Mr. Walburg:

Q. You were not doing any business, you said at that time, but you hired a man anyway to clean up? A. I had kept the man. He is working for me all the time.

Q. Even when you have no building going on, you still have this fellow and this truck? A. Yes.

Q. What did you use this flooring for? A. Platform.

Q. Platform where? A. In the show windows.

Q. Did you build that? A. No.

Q. Or did McGee and Thomson? A. McGee and Thomson.

Q. You furnished this lumber? A. It was in the store, some left from the building.

Q. It was left from the building? A. Yes.

Q. How much was this flooring in the show windows, how many square feet? A. About 10—12—about 10 feet by 7, something like that.

Q. And you used 100 feet of flooring in these two windows? A. Yes.

Q. Was all the flooring in these two windows damaged? A. Yes, sir.

Q. How much does that flooring cost a foot? A. About eight cents.

Q. You paid this man how much a day? A. Six dollars.

Q. Did he do any other work for you? A. Yes.

Q. What does he do for you? A. He drives the truck and cleans around the buildings.

Q. Have you any other employees besides that man? A. At the time I didn't, no.

Q. If he wasn't at this job, I suppose he would be somewheres else doing work for you? A. Yes.

Q. That whole thing cost you about $25, that flooring? A. The flooring cost, all expense, cost me $50.

Q. So you sent a bill into Mr. Seitz for use of my materials, flooring, 2 x 4's and also use of man, $50? A. Yes.

Q. Did you say anything about a truck in that bill? You have seen it, haven't you? Look at it. A. No.

Q. You made it out? A. I didn't say about the truck.

Q. You are figuring a profit on that, aren't you? A. No, I did not add a profit.

Ralph S. Heaton, direct.

RALPH S. HEATON, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination by Mr. Ferry:

Q. Mr. Heaton, what is your occupation? A. Police officer.

Q. Of the Borough of Closter? A. Yes.

Q. Do you remember the 21st day of November, 1927, anything unusual occurring on that day? A. Yes.

Q. Will you tell the Court what you know, what occurred at that time, what you saw? A. I was on Main Street, Closter. I heard a crash. I turned around. I seen a truck drove into the front end of the Central building.

Q. The Central building is the building that has been testified to here? A. It is owned by Mr. Vaniewsky.

Q. Whose truck was it that went in there, Officer? A. The name of the truck was Demarest Brothers Co.

Q. Who was driving that truck? A. A man by the name of Dotson.

Q. Do you know of your own knowledge that he is a driver for Demarest Bros. Co.? A. Yes.

Mr. Walburg: We admit it.

Q. How far into the window did this truck go? A. The front end of the truck.

Q. How far into the window did it go? A. I would say two feet or a little better, maybe three.

Q. The truck went up over the curb to get to the window? A. Yes.

Q. How high was the curb? A. Six inches.

Q. What is the distance from the curb to the window? A. About ten feet on the sidewalk.

Q. In other words, that car went up on the sidewalk and traveled thirteen feet before it stopped? A. I would say about that.

Q. Did you see this brick wall that was testified to? A. Yes.

Q. You saw that it was broken down by the impact of the truck? A. Part of it was, yes.

Cross examination by Mr. Walburg:

Q. Mr. Heaton, you of course did not see the actual accident, did you? A. No, sir.

Q. You went up there when you heard the crash? A. Yes.

Q. When you got to the truck, did you see Mr. Dotson there? A. Yes.

Q. You know the gentleman, don't you? A. Yes.

Q. Where was he? A. Behind the wheel.

Q. What was his condition at that time? A. He was slumped down in his seat.

Q. Was he conscious or unconscious? A. Unconscious, apparently.

Q. What did you do with him? A. Pulled him out from behind the wheel.

Q. Where did you take him? A. To the doctor.

Q. Did he walk or how did you take him? A. Carried him.

Q. Did he say anything to you? A. No.

By the Court:

Q. Was the plate glass window broken? A. Yes.

Redirect examination by Mr. Ferry:

Q. This was a brand new store, wasn't it? A. It had just been completed.

Q. Was that truck loaded? A. No, sir.

Q. What kind of a truck was it? A. If I remember correctly, I think it was an Overland.

By the Court:

Q. Did you ever ask Mr. Dotson, after the accident, how it happened, or did he speak to you about it? A. No, I just got his number, that was all, sir.

Q. Was the weather dry or wet that day? A. It was dry, sir.

Q. About what time did the accident happen, do you know? A. In the morning, sir; about half-past nine, I should say.

The Court: That is all, Officer.

FRANK H. THOMSON, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination by Mr. Ferry:

Q. What is your occupation, Mr. Thomson? A. Builder.

Q. Where are you located? A. 22 Broad Avenue, Palisades Park.

Q. Did you do the repairing or renovating of this building after the accident? A. Yes, sir.

Q. At whose request? A. Mr. Vaniewsky's.

Q. As a result of that work, did you render a bill to Mr. Vaniewsky? A. I did.

Q. What was the amount of that bill? Was it as testified to here and the amount you sued for? A. The first bill was sent for four hundred and one dollars and some odd cents by a typographical error. Then I sent five days afterwards

a corrected bill. On the corrected bill I put $351.95 and I put "Corrected bill" on it.

Q. Is that the right amount, $351.95? A. That is it.

Q. Now, Mr. Vaniewsky sent you up to look at that building. Will you tell the Court just what the condition of it was when you got there, when you first examined it? A. When I got there I noticed that the entire front, plate glass door and platform in the show window was completely demolished.

Q. Is this charge of yours of $351.95, a reasonable charge? A. Yes, sir.

Cross examination by Mr. Walburg:

Q. Mr. Thomson, the first bill you sent to Mr. Vaniewsky is that bill (indicating)? A. $401.95, yes.

Q. Then you sent one for $351? A. Yes.

Q. That was just $50 out of the way? A. Yes.

Q. You didn't by any mistake pay Vaniewsky's claim for $50? A. No, sir. I never saw that.

Q. I show you this bill for $351. You sent that to Vaniewsky, didn't you? A. Yes, sir.

Q. Is there any place on there where it says it is a corrected bill? A. No. This is dated February, 1928. I sent one in November and December and also January, before this one was mailed out.

Q. I show you this store front, kalsomine and glass, $180? A. Beg pardon, it does not say Kalsomine; it says kalomine, that means construction.

Q. How much did the glass cost? A. $180 with the kalomine, setting it and the glass.

Q. What is the kalomine? A. That is the sill

that holds the glass, in other words, transom bar, head piece.

Q. You put the glass there? A. I had it set by my glazier, also the kalomine work.

Q. Who was the glazier? A. David Max.

Q. That included the copper work? A. Yes.

Q. That is what kalomine means, copper setting? A. Yes.

Q. You paid $180 to your glazier for that, did you? A. Yes.

Q. After you have an item of masons' material and lumber, $25? A. Yes.

Q. You had a truck in your business, I suppose? A. Yes.

Q. Do you charge so much for each trip? A. We charged as the truck is left on the job. It was left there for two and a half days.

Q. What was it doing on the job? A. To bring the men their materials.

Q. That was standing outside all day? A. Yes.

Q. How many days? A. I believe it was two and a half days.

Q. You charged $25 for that? A. Yes, sir.

Q. Did you do any painting in there? A. Yes.

Q. Where? A. On the door frames. I don't recall any other spot.

Q. You charged $10 for that? A. I made two trips on two separate days from Palisades Park.

Q. In this bill you put in, that includes the $180, that is with the kalomine and everything, you put your trucking charge there, paid your other labor charges including the money for your carpenters and it comes to $306? A. Yes.

Q. Then you have fifteen per cent. of that, of the cost, you added $45.95. What is that fifteen per cent.? A. As my profit on the job.

Q. Are you charging a profit for your truck standing out on the street, you are charging a profit for the man putting in the plate glass, too? A. I always have.

Q. That is included in your bill? A. Yes.

Q. When Mr. Vaniewsky came to you about this job, did he ask you to give any estimate on it? A. No, sir.

Q. You went right to work? A. Yes, sir.

Q. Didn't you tell him what it was going to cost? A. Didn't tell him what kind of a job it was to begin with.

Q. Even after you saw it, you didn't tell him? A. No, sir.

Q. You never told him about what the cost would be until the work was completed? A. Yes.

Q. You did the mason work, too? A. Yes.

Q. How many men did you have working on this job? A. I believe I had two carpenters. I believe I had one mason and a laborer.

Q. How many days did the carpenters work? A. I believe there were two days and a half, or two days, I am not sure. I can't say for sure.

Q. Did you see Mr. Vaniewsky's colored man around there to clean up? A. No, sir; I did.

Q. Was the place all cleaned up when you got there? A. I took all the debris that was left from my work away. I wasn't there at the completion of the job, when it was done.

Q. When you started to work, were you there? A. I went up there and investigated the job and told my foreman what to do.

Q. Did you use all your materials on the work? A. Except the platform for the show window.

Q. Was that new or old? A. New lumber.

Q. Did you use any old lumber? A. No.

Q. You yourself didn't do the work? A. No, sir.

Q. How far had the job progressed when you saw it for the last time? A. Beg pardon—what?

Q. How far had the work progressed when you saw it for the last time? How much had been completed? A. I have not seen that job from the date I investigated it.

Q. That is the time the work started? A. Yes, I saw what was needed and told my foreman. That was the end of it.

Q. You weren't there at all, then? A. No, sir.

Q. So, you made up this bill, I suppose, from what your foreman told you? A. Yes.

Q. You didn't see any of the actual work done? A. No, sir.

(Plaintiff Rests.)

Mr. Walburg: At this time I should like to move for a nonsuit on behalf of the defendants.

First, on the ground that there is no proof of any negligence on the part of either of the defendants.

Secondly, there is no proof of any negligence on the part of the defendants that was the proximate cause of the accident.

That is as to both counts.

I wish to make a motion on behalf of the defendant, Demarest Bros., a corporation as to the second count for a nonsuit on the ground that that count is laid in trespass, and the law is well settled in this State that a corporation cannot be held for the trespass of its agents or servants, unless they

have been authorized by the corporation to commit that trespass.

The Court: I deny the first motion on the ground that the evidence has now established a prima facie case where, under the circumstances, negligence would be almost presumed.

Mr. Walburg: I wish to take an exception to the denial of that motion.

The Court: Exception granted.

(Argument.)

The Court: I will grant the second motion—

Mr. Ferry: Exception.

The Court: —as to the second count.

Exception granted.

JOHN DOTSON, called as a witness on behalf of the defendants, being duly sworn, testified as follows:

Direct examination by Mr. Walburg:

Q. Mr. Dotson, you are one of the defendants in this suit? A. Yes, sir.

Q. On November 21, 1927, were you working for Demarest Bros.? A. Yes.

Q. You were driving one of their trucks? A. Yes.

Q. What kind of a truck was it? A. Overland.

Q. How large a truck? A. Oh, a half-ton truck.

Q. On what street were you driving? A. White Street, I think is the name of the street. I came down White Street.

Q. As you come down White Street, is that a hill? A. A small hill, yes.

Q. A slight hill? A. Yes.

Q. How fast were you going at that time? A. Oh, I never drive very fast.

Q. Never mind at other times. This time? A. I don't think I was going very fast. If I did, I would have went clean through the building.

Q. What happened as you came down the hill? A. As I came down the hill I must have got an acute attack of indigestion. I didn't remember anything else.

Q. Were you conscious or unconscious? A. Unconscious. I didn't remember anything else.

Q. Did you— A. (Interrupting.) I didn't see anything.

Q. Did you faint? A. I must have, I didn't know anything. I went out.

Q. There is no doubt about that? A. No, sir.

Q. When you came to, where were you? A. Over in the doctor's office.

Q. You didn't know anything from the time you went "out" as your truck was going down the hill, until you woke up in the doctor's office? A. No, I didn't.

Q. Did you have any attacks that morning before you left, anything to indicate that you were going to get sick? A. No, I felt just as good that morning as this morning.

Q. Since that time, have you had any fainting spells? A. I had one home the other night. It was not the same thing.

Q. You didn't know anything about your truck running into the building or what happened? A. No, sir; I didn't know anything about it.

Cross examination by Mr. Ferry:

Q. Mr. Dotson, how long have you been working for Demarest Bros.? A. I am one of the firm.

Q. How long have you been in business then? A. For thirty-five years.

Q. How old are you? A. Oh, fifty-eight, I think it is.

Q. Did you ever have any fainting spells before? A. No, that was the first.

Q. Did you ever have indigestion before? A. Not that I know.

Q. You certainly would know if anybody would? A. Yes, that is no lie.

Q. You don't recall ever having had an attack of indigestion before? A. No.

Q. Did the doctor treat you for your condition? A. He did.

Q. Did he give you any idea as to what caused it? A. He thought it was stomach trouble. He told me afterwards.

Q. Now, this White Street you say you were driving on— A. Down on White Street.

Q. Do I understand correctly that White Street ends— A. (Interrupting.) On Main Street.

Q. That building is right on the end of White Street? A. Yes.

Q. You say there is a hill there. Is that a very steep hill? A. No.

The Court: I do not think we ought to waste any more time. There is liability there. There is no use going on with the case. I think your adversary will agree with you. We can't blame the property owner, no matter how an accident of this kind occurred.

Mr. Walburg: I do not agree with that. This was an unavoidable accident. This man says he fainted and that was the last thing he knew.

The Court: The courts have held that there is liability no matter what happened. We have had a number of cases in Fort Lee where all kinds of trucks have gone into all kinds of buildings and the Circuit and Supreme Courts have held there is liability on the driver.

Mr. Walburg: They have alleged specific acts of negligence. I think they have to prove them. It is not a *res ipsa loquitur* case. I think the burden is on them to prove the negligence.

By Mr. Ferry:

Q. Your truck was not loaded? A. No.

Redirect examination by Mr. Walburg:

Q. You say you were a member of the firm? A. Yes.

Q. Is Demarest Bros. a corporation? A. Yes.

Q. What is your office? A. I am president.

WILLIAM H. BELL, called as a witness on behalf of the defendants, being duly sworn, testified as follows:

Direct examination by Mr. Walburg:

Q. Mr. Bell, what is your business? A. General building contractor.

Q. How long have you been a general building contractor? A. Forty-seven years.

Q. You have built houses? A. Yes.

Q. Have you built stores? A. Yes.

Q. Have you repaired damaged stores? A. Yes.

Q. Did you see this damaged store of Mr. Vaniewsky? A. Yes.

Q. After the accident? A. I did.

Q. Before it was repaired? A. Yes.

Q. Did you see it before the accident? A. Yes.

Q. Did you inspect the repairs that had been made to it? A. No, I did not after—well, not thoroughly—as you go along, as you walk by, going down the street, I occasionally looked at it.

Q. Will you please tell us what in your opinion would be a reasonable charge for repairing that damaged store?

Mr. Ferry: I object. I do not think he has testified that he has had an opportunity to form a belief as to the reasonable value. He never testified that he examined it closely.

By the Court:

Q. Did you examine the property close enough to figure up exactly how much it would cost to repair it, with the glass, copper work, painting and carpenter work? A. Yes, sir.

Mr. Ferry: He testified that he walked past it. I would like to cross examine.

The Court: All right.

Preliminary cross examination by Mr. Ferry:

Q. Did you go in the building before it was repaired? A. Yes, sir.

Q. Upon how many occasions? A. Right after the accident.

Q. Did you take measurements of the window then? A. Not then.

Q. When did you take the measurements of the window? A. Well, shortly after the job was done when the bills commenced to come in. I don't know just when. Mr. Seitz asked me to look at

it to see what I thought it would cost to put that business back in the way it was in the beginning.

Q. When you made your estimate, had the work been completed? A. Yes; and he had already received the cost, the price of it, and I guess they thought it was a little too large and they asked me to look it over, and I did.

Q. That was after the work was all finished? A. Yes.

Mr. Ferry: I don't see he is qualified to testify as to the cost of repairing this building.

Mr. Walburg: Let me ask him some more questions.

Direct examination (resumed) by Mr. Walburg:

Q. After the accident when the truck was in, did you go in this store? A. Yes.

Q. Did you see what part of the store was damaged? A. Yes.

Q. Did you see what glass was broken? A. I seen it; I didn't make an estimate at that time from seeing it and making an estimate as to what the thing cost.

Mr. Ferry: I think this witness is not qualified to testify what it would cost to repair that building.

The Court: I understand he did that after his first visit, unless I am wrong.

Mr. Ferry: He testified after it was finished that he made an estimate.

The Witness: After it is finished.

Mr. Ferry: I don't see he is competent to testify.

The Court: He inspected it and then he

examined it afterwards. He might be able to tell us what he thinks, having his experience in mind.

By Mr. Ferry:

Q. Do you mean you would do it the same way that Thomson did? A. If it was knocked out this afternoon, I would put it back.

By the Court:

Q. Would you do the job just the same as they did it if you were doing it yourself? A. I don't know that I would do it a whole lot better. The rest of the building does not call for it.

Q. You would do it about the same? A. Yes.

By Mr. Walburg:

Q. What, in your opinion, would be a reasonable charge for repairing the damage to that building? A. I have a statement that I figured up at that time. May I offer it in evidence?

Q. Suppose you read it off to us. A. Well, it is an honest to God bid. I would like to know if I have figured it properly. There were 100 brick used in the window ledger.

By Mr. Ferry:

Q. Did you count them? A. I did.

By Mr. Walburg:

Q. Assume that there were 100 brick used, that was all that was there. Give us your estimate on them. A. Now then, I have given the top price, seven cents apiece, $7. Mason and laborer, $28. Cement and sand, $5. That completes the mason work. Now there is I think—there was the statement made awhile ago that 100 feet of flooring

was laid; I can't seem to make it out at that. That window bench, if I recollect properly, is 5 feet by 10, five times ten is fifty. There is a strip of wainscoting under this show window bench, 18 inches high and 10 feet long, that is another 15 feet. Now the way we estimate these things would be labor, with a profit and material constructed at 50 cents a square foot. I should say the floor would be $60. Fifteen square foot of wainscoting at 50 cents would be $7.50. There is 22 lineal feet of Kalomine sash bar or sash molding at $1 a foot. That is molding and glass. There is 15 feet. What have I got here? This is the whole transom. I notice after this accident happened that there is a big transom there and the glass there and the car went through, this transom was hanging there, and the glass also hanging there. I saw where the light was knocked out. I noticed after the job was done that they used battered out—straightened out this transom bar. Now I allowed $5 for that straightening out of the old transom bar. I was not certain at the time that I estimated it whether they used the steel sash and frame in the center underneath the show window. However, I allowed them $5 for it.

Q. How much would a new one cost? A. Five dollars.

Q. You allowed them for a new one? A. Yes, I allowed them five dollars. Now then, I don't know whether I ain't mistaken I heard somebody remark awhile ago $10 for paint. I don't know where there was any painting there.

Q. Assume that is so. Put that on the bill, $10. A. No, I won't. Well, all right, then, we will do that.

By the Court:

Q. Would you have to paint the door? A. Well —the door was painted at the time it was just primed and the place was rented to the Eagle Grocery.

Q. You would have to paint the doors, to make a good job? A. You would have to paint, but there is only one door. It is not worth any $10. Mr. McGee charged $10.

Q. You can't get painters to do much for $10? A. No.

Q. You put down $10? A. We gave them $10. We gave them $10 for trucking. I can't see here where there is any other charge.

Q. What is that total, Mr. Bell? A. $140.

Q. How about the glass? A. I have not figured the glass.

Q. What would the glass cost? A. I should imagine the glass in that place would cost, it was two lights of plate glass. The transom was nothing more than common window glass. I should not think that that glass would cost over $85 set.

Mr. Ferry: I would like to say at this time that this witness has been recollecting and imagining quite a bit in connection with his estimate.

Q. How much did you say that glass would be worth about? A. $85.

Cross examination by Mr. Ferry:

Q. What was the size of that glass, Mr. Bell? A. I didn't measure it. I don't want you to take my testimony on that at all.

Q. You say it would cost $140 without the glass? A. Without the glass.

Q. In that $140 you allowed for the metal set up with the glass? A. Yes.

By the Court:

Q. Did you get any price on glass from a glass man? A. No.

By Mr. Ferry:

Q. This included your profit, the $140? A. Yes, absolutely.

By the Court:

Q. Did you add 10 or 15 per cent.? A. No, sir. You can't rob the people.

By Mr. Ferry:

Q. What was the size of this glass? A. I have told you I didn't measure it.

Q. How did you figure what it was? A. I told you before that I didn't think it would cost any more than $85.

Q. How did you arrive at that? A. Well, it is just an idea, that is all. It might cost—

Q. They have a charge here of $180. A. They can charge anything.

Q. That includes the copper and the glass? A. That includes the copper and the glass.

Q. You say that price is high? A. If I was going to figure the glass, I would figure exactly $1 a square foot and take a Brodie that I would win or lose.

Q. You are taking a Brodie on all of these things? A. No, sir.

Q. In other words, you know that you won't have to do the job for $140? A. Well, I will do it tomorrow for that if you will go and knock one out.

Q. You allowed $10 for the truck, Mr. Bell, didn't you? A. Yes, that is enough.

Q. What did you base that calculation on? A. $10?

Q. Yes. A. One day, to load all the stuff for there and bring it over.

Q. Did you see all the stuff? A. I heard one man testify—

Q. Just answer my question. Did you or did you not see what that truck did? A. I did not.

Q. Did you see how many days it was there? A. I did not.

Q. Did you see all the debris it took away? A. There wasn't much to take away in it.

Q. You didn't see it. How do you know? A. 100 brick—

The Court: That is all.

Mr. Walburg: The defendant rests.

At this time I wish to move for a direction of a verdict in favor of both defendants on the first count on the ground that there has been no proof of negligence against the defendants, no proof of any negligent acts on the part of these defendants which were the proximate cause of the accident.

I wish also to make a motion on the second count on behalf of the defendant Dotson for a direction of a verdict on the ground that there is no proof of the allegations set forth in the complaint.

I had better separate my motions. I will make my motion on the first count on behalf of both defendants for a direction of a verdict on the ground that the accident was unavoidable and was not caused through any negligence of the defendants.

The Court: I will deny the first motion and grant you an exception.

Mr. Walburg: I make a motion on the second count in behalf of the defendant Dotson for a direction of a verdict on the ground that the accident was not caused by any negligence on his part and also on the ground that it was unavoidable.

The Court: I will grant the motion as to the defendant Dotson.

Mr. Walburg: On the second count, your Honor?

The Court: Yes, for both counts as against Dotson.

(Argument.)

The Court: There will be a judgment entered in favor of the defendant as to Mr. John Dotson individually, and a judgment will be entered in favor of the plaintiff against the defendant Demarest Bros. Co., a corporation, for $363.95.

I, ARTHUR M. AGNEW, Judge of the District Court of the First Judicial District of Bergen County, do hereby certify that the foregoing is a transcript of the evidence given upon the trial of the cause of Isaac Vaniewsky *v.* Demarest Bros. Co., a New Jersey Corporation, and John Dotson, on October 25th, 1928, as certified by H. Richard Woebse, the stenographer appointed to report such evidence stenographically.

[SEAL] IN WITNESS WHEREOF, I have hereunto set my hand and seal this day of November, 1928.

I, H. RICHARD WOEBSE, a stenographer duly appointed to report stenographically the evidence given before the District Court of the First Judicial District of Bergen County, in the case of Isaac

Vaniewsky *v.* Demarest Bros. Co., a New Jersey Corporation, and John Dotson, do hereby certify that the foregoing is a true and correct transcript of the evidence given on the 25th day of October, 1928, before Honorable Arthur M. Agnew, Judge of the District Court of the First Judicial District of Bergen County, in said matter.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this day of November, 1928. [SEAL]

H. RICHARD WOEBSE.

Specification of Determinations.

(Filed December 19, 1928.)

NEW JERSEY SUPREME COURT.

ISAAC VANIEWSKY,
Plaintiff,

v.

DEMAREST BROS. CO., a New Jersey corporation, and JOHN DOTSON,
Defendants.

Action at Law.

Specification of Determinations of the District Court with Which Appellant is Dissatisfied in Point of Law.

The following is a specification of the determinations of the District Court with which the appellant is dissatisfied in point of law:

1. The Court erred in refusing to grant the motion for a directed verdict in favor of the defendant, Demarest Bros. Company, said motion being made on the ground that:

Specification of Determinations.

(1) No negligence had been established against this defendant;

(2) That the damage alleged to have been sustained by the plaintiff was the result of an unavoidable accident;

(3) That there was no proof of the allegations of negligence set forth in the plaintiff's state of demand.

2. The Court erred in entering judgment in favor of the plaintiff and against the defendant, Demarest Bros. Company.

HARLEY, COX & WALBURG,
Attorneys for Defendants.

Service acknowledged this 17th day of December, 1928.

SEUFERT & ELMORE,
Attorneys of Plaintiff.

New Jersey Court of Errors and Appeals

ISAAC VANIEWSKY,
Plaintiff-Appellant,

v.

DEMAREST BROS. COMPANY, a New Jersey Corporation, and JOHN DOTSON,
Defendants-Appellees.

Action at Law.
On Appeal from New Jersey Supreme Court.

BRIEF OF PLAINTIFF-APPELLANT.

This appeal is from a judgment of the Supreme Court which reversed a judgment of the District Court of the First Judicial District in the County of Bergen in favor of the plaintiff-appellant, Isaac Vaniewsky, and against the defendant-appellee, Demarest Bros. Company.

Opinion of Court S. C., page 10; dissenting opinion S. C. page 15.

Statement of Facts.

The plaintiff-appellant, Isaac Vaniewsky, was the owner of a building on Main Street, in the Borough of Closter, Bergen County, New Jersey. On the first floor of said building were stores with plate glass windows.

The defendant-appellee, Demarest Bros. Company, is a New Jersey Corporation.

On November 21, 1927, John Dotson, the president of the Demarest Bros. Company (S. C. p. 47, line 24) was driving an Overland truck belonging to

the defendant-appellee (S. C. p. 44, line 32), and when he reached approximately White Street, he ran over the sidewalk and into the stores of the plaintiff-appellant, the store being about ten (10) feet from the curb, doing considerable damage (S. C. p. 37, line 20).

The plaintiff-appellant proved the ownership of the building by the plaintiff (S. C. p. 26, line 37) and the condition of the building and damage done (S. C. p. 26, line 20), and the amount he paid for repairs (S. C. p. 28, line 24).

The plaintiff-appellant also proved the ownership of the truck by the defendant (S. C. p. 37, line 25).

Ralph S. Heaton, a witness (S. C. p. 37, line 18, *et als.*), testified that he heard a crash and saw a truck drive into the front end of the Central Building, and that the truck was being driven by Dotson, the president of the company.

Both defendants, Demarest Bros. Company, and John Dotson, the driver of the truck and the president of the company, were both made parties and were represented in the action by the same attorney; and, at the close of the plaintiff's case, Mr. Walburg, attorney for both defendants, made a motion for a nonsuit of both defendants on the First Count and in favor of the defendant, Demarest Bros. Company on the Second Count. The trial court denied the motion as to both defendants on the First Count and granted the motion as to the defendant, Demarest Bros. Company, as to the Second Count.

At the close of the defendants' case a motion for a directed verdict for both defendants on the First Count and John Dotson on the Second Count was made by counsel on the ground that no negligence had been shown on the part of the defendants, and that the damage sustained by the plaintiff was a result of an unavoidable accident.

The trial court granted the motion for a directed verdict for the defendant, John Dotson, on both counts and denied the motion of the Demarest Bros. Company on the First Count (S. C. pp. 54 and 55). Following the denial of this motion, the Court entered a judgment in favor of the plaintiff-appellant against the defendant-appellee, Demarest Bros. Company, for three hundred sixty-three dollars and ninety-five cents ($363.95).

On appeal, the Supreme Court reversed the decision of the District Court by a divided court in which the court held, briefly, that in view of the fact that the trial judge dismissed the cause of action against John Dotson, the president of the defendant, Demarest Bros. Company, the trial judge must have found the said Dotson free from negligence and that by implication, therefore, the master was free from negligence because the said master could only be guilty if the said Dotson had been guilty of negligence.

From this decision Justice KALISCH dissented (See dissenting opinion, S. C. 15).

POINT I.

The liability of the defendant, Demarest Bros. Company, is not necessarily predicated upon the theory of respondeat superior because the Court may have found the Demarest Bros. Company, only, guilty of negligence and the president of the Company, John Dotson, free from negligence.

The trial judge, sitting without a jury, entered judgment as follows:

> "There will be a judgment entered in favor of the defendant as to Mr. John Dotson indivi-

> dually, and a judgment will be entered in favor of the plaintiff against the defendant Demarest Bros. Co., a corporation, for $363.95."

The allegation of negligence in the State of Demand is as follows (S. C. p. 4, line 19):

> "Said defendant, John Dotson, and the defendant, Demarest Bros. Company, by its agent and servant, John Dotson, did carelessly, and negligently drive said truck at a high, dangerous and excessive rate of speed without having proper control thereof, *without having the same in proper repair,* and without giving heed or attention to the manner of its driving and without using proper precautions with respect to property lawfully located on said highway, known as Main Street."

The plaintiff's proof established that the truck ran over the sidewalk and into the building of the plaintiff-appellant and that at the time it was being driven by the defendant, John Dotson, *the president of the defendant-appellee.* This is uncontroverted; and it is equally true that the plaintiff-appellant's stores were damaged.

The Supreme Court found that the whole negligence, alleged or proved, in the case was the operation of the truck by Dotson and that, therefore, it was entirely apparent that no liability could exist as to the company unless by and through the negligence of Dotson (S. C. p. 11, line 40). It is submitted that the learned Court in rendering its opinion overlooked the fact that the complaint alleges that the car was driven *without having the same in proper repair* (S. C. p. 4, line 24); and that, therefore, the trial court may have considered and found as a fact that the accident was not due to any negligence on the part of the driver of the car, Dotson, but was entirely due to the fact that the Demarest Bros. Company had not maintained the car in a proper state of repair.

An examination of the testimony discloses no proof on the part of the defendant-appellee, Demarest Bros. Company, that the car was in a proper state of repair. It seems unnecessary to point out the fact that in the operation of an automobile, or any vehicle of any kind, that there are many accidents which might arise which are not the result of any negligence on the part of the driver, but might be due entirely to the negligence of the owner. Such a class of cases might be a defective steering apparatus which might be discoverable by an ordinary inspection and yet might not appear to the driver of the automobile; there might be defective brakes which might not be known to the driver and yet might be discovered by an ordinary inspection. The two instances mentioned in the case of automobiles is sufficient to show that many accidents have happened and will happen due to the carelessness of the owner or the person charged with inspection, which might be unknown to the actual operator, so that he would be free from negligence.

In the case before us, we have the president of the company, who was driving the car, stating that he had a fainting spell and did not remember anything about the accident. He does not state when he had this fainting spell. That might have been just before he crashed into the building, it might have been at the curb of the sidewalk, or it might have been some distance up Main Street, and that is the only explanation for the accident. It is respectfully submitted that the trial court, sitting without a jury, may have found that the accident arose, not through the negligence of Dotson, but through the negligence of the Demarest Bros. Company in not having its car in proper repair.

There seems to be no decision in this State as to the liability of the master on a dismissal of the

case against the servant; and nowhere have we been able to find any case which relieves the master from liability upon exoneration of the servant, except only where the action is based solely on the wrongful acts of the servant who is acquitted, and even in many jurisdictions the master is not exonerated upon the exoneration of the servant, and this is for the reason that, if the plaintiff is entitled to his verdict against two tort feasors, but the jury appears to agree as to only one of them and gives a verdict accordingly, the plaintiff may be aggrieved, but not the defendant.

And in the states where the rule is recognized that the exoneration of the servant relieves the master from liability, it is only in cases where the servant alone is negligent and the master becomes liable because of the relationship of master and servant. In discussing the matter, *Corpus Juris* states the rule as follows:

> "The foregoing principles have no application except in cases where the liability of the master is based solely on the wrongful acts of the servant who is acquitted. If the liability is not so based, a finding that the act of the particular servant was not wrongful does not prevent the rendition of a verdict against the master based on the acts of other servants shown to be wrongful and for which the master is liable on the doctrine of respondeat superior. So a verdict against the master and an acquittal of the servant will be sufficient to sustain a judgment against the master where the act resulting in the injury complained of was committed under the express command of the master, or where the master and servant are sued jointly for injuries resulting from the negligence of both and there *is evidence of negligence on the part of the master distinct from the alleged negligent act of the servant.* In these circumstances a verdict of acquittal of the servant is not incon-

sistent with a verdict holding the master liable, and not does vitiate it." (39 *Corpus Juris*, p. 1368.)

POINT II.

If the defendant-appellee, Demarest Bros. Company, finds itself injured because of the entry of the judgment in favor of its president, Dotson, individually, it is the result of its own act.

Both defendants, Demarest Bros. Company and John Dotson, were represented by the same counsel (S. C. p. 25, line 25) and the judgment which was entered in behalf of the president of the company, Dotson, was the result of a motion made in his behalf by Mr. Walburg, the attorney for both Demarest Bros. Company, and Dotson (S. C. p. 54, line 22, *et als.*).

We have, then, the peculiar situation of the defendant-appellee making a motion through its agent and attorney for the exoneration of the driver of the truck and president of the company, John Dotson, and then coming before an appellate court after having had its motion granted to complain that an injustice was done it because its own motion had been granted by the trial court. In other words, we have the situation of one coming into court for relief and, having obtained the relief, complaining that the court erred in granting the relief and insisting on a reversal of the judgment because the trial court had granted a motion made in its behalf. In other words, the master appeals from a judgment against it because the trial judge did not give a judgment against its servant, although it was at the request of the master that the servant was exonerated.

POINT III.

The driver, Dotson, was the president of the company and as such was not the servant of the company in the ordinary sense of the word and the doctrine of respondeat superior does not apply.

John Dotson was the president of the company and as such he was driving one of its trucks in behalf of the company. The state of demand states that he was the servant and agent (S. C. p. 3, line 38).

Being the president of the company he was the highest executive officer, and as such officer, he controlled largely the affairs of the company subject to the direction of the Board of Directors and, in driving one of its trucks on behalf of the company he could not, by so doing, reduce his position to that of a mere servant, but at all times he remained the president of the company and as such and in driving the truck, he acted for the company itself, and as pointed out in the dissenting opinion of Justice KALISCH (S. C. p. 16, line 9), in performing such service he was the alter ego of the company and not its servant.

There is nothing in the testimony that shows exactly what were the duties of Dotson, president of the company, and it is equally true there is nothing that shows that Dotson was not acting in performance of his usual duties; and, where the president of a corporation acts within the scope of his authority, the act is not the act of a servant, but the act of the corporation itself. This is generally recognized. Speaking of this situation, *Corpus Juris* expresses the rule as follows:

"Where he acts within the scope of his authority, his acts are the acts of the corporation" (*Corpus*

Juris, Vol. 14-A, at p. 337). This rule is recognized in both England and in the United States and, while we have been unable to find any case exactly in point, the principle of law seems to be well established.

In the case of *American Soda Fountain Co.* v. *Stolzenbach* (75 N. J. L. 721), the Court of Errors and Appeals in an opinion by Justice DILL held that the execution of an affidavit in the foreclosure of a chattel mortgage by the Vice-President of the corporation, was the affidavit of the corporation, itself. The Court in this well-considered opinion, exhaustively went into the authorities and discussed the difference between the acts of servant and agent, and the acts of the corporation, itself. Among other things the court said:

> "The English decisions, drawing a distinction between the act of an administrative officer in behalf of the corporation and the act of the corporation by an attorney or agent, hold, in the case of the officer, that the act of the corporation is *per se,* but that the act of the corporation through an agent or attorney is *per alium.*"

And in conclusion the Court pointedly remarked:

> "Tested by these rules, the affidavit of the vice-president was the affidavit of the corporation, the holder of the mortgage, and it was unnecessary that it should appear that the vice-president was authorized, *virtute officii* or otherwise, to make the affidavit."

A more recent Delaware case is *Northern Assurance Co.* v. *Rachlin Clothes Shop, Inc.,* 125 Atl. Rep. 184. This was a suit on an insurance policy and the question involved was whether the authority of the general manager of the assured corporation in instigating a fire was the act of the corporation and precluded recovery on the policy.

In discussing this, the Court, at page 188, stated as follows:

> "The main proposition so earnestly contended for by the counsel for the plaintiff below may be readily accepted. This proposition is that the extent of a corporation's liability for the tortious acts of its agents is to be measured by the rule of respondeat superior, by which it is to be understood that a corporation like any other principal is answerable for the acts of its agent only when the same are done within the scope of his authority actual or apparent.
>
> "Before accepting this proposition, however, as controlling in the case at bar, it is necessary first to consider whether under the evidence Rachlin was an agent of the plaintiff below. He was an officer. That is clear. In fact, he was the only acting officer. He also acted as the board of directors, the governing body of the corporation. But was he in the matters here involved an agent? Generally speaking, officers of a corporation are often spoken of as its agents. That in certain activities officers may be mere agents is beyond question, but in certain other of their activities they are more than mere agents. We conceive that in matters of superior control and management and in matters having to do with the ultimate direction of its affairs, *the officers who possess the governing control are to be regarded as the corporation itself.* A corporation being a purely metaphysical creature, having no mind with which to think, no will with which to determine and no voice with which to speak, must depend upon the faculties of natural persons to determine for it its policies and direct the agencies through which they are to be effectuated. The individuals within its organization who perform for it these functions are generally its directors. In this state the general corporation law, under which the plaintiff below was incorporated, provides that the directors shall manage

the business of every corporation created under that law. The stockholders are without authority to do this. How can it be said that in performing this managerial duty for the corporation the directors act as agents? They act rather in the place of the corporation itself. If we speak of an agent, we necessarily connote the compliment of a principal. We further necessarily imply some sort of instructions which define the scope of the agent's authority. If this be so, when an agent of a corporation is referred to, it means that some one has selected him, has laid out for him his task and defined the limits of his authority. Who does this? Manifestly the corporate creature, the *fictio legis,* does not because it cannot. Such activities require the exercise of functions which only natural persons possess. To suggest the idea, therefore, of an agent for a corporation is but to emphasize the existence somewhere in its organization of natural persons who are themselves acting not as agents but in the office of principal for the corporation itself. These persons who exercise for the corporation what we may call its primary powers, whether of the kind just mentioned or others, formulate and express for it its corporate will and purpose. *They are the ultimate source from which flows the authority for all the corporate activity. They stand in the corporation's place and are, so to speak, its alter ego.* Machen in his work on the Modern Law of Corporations speaks of them as vice-principals and as analogous to managing partners or to the Legislature of a state. Volume 2 §§1399, 1435. In Thompson on Corporations, Vol. 2, §1787, the executive and administrative officers are spoken of as 'inherent agencies,' as the 'means of the hands and the head by which the corporation normally acts.' In Burrill *v.* Nahant Bank, 2 Metc. (Mass.) 163, 35 Am. Dec. 395, the directors are characterized by Chief Justice SHAW as constituting the corporation. *'They do not,'* says he, *'exercise a delegated author-*

ity in the sense in which the rule applies to agents.' Likewise in Hoyt v. Thompson's Ex'r., 19 N. Y. 207, their powers are spoken of as 'original and undelegated.' In Goodspeed *v.* East Haddam Bank, 22 Conn. 530, 58 Am. Dec. 439, the directors are said to be 'the mind and soul of the body politic and corporate, and constitute its thinking and acting capacity.' Expressions such as these may be gathered from other text writers and adjudicated cases. See Fletcher, Cyclopedia of Corporations, vol. 3, §§1740, 1741. It is unnecessary to lengthen this opinion with an extensive collection of them. They are, so far at least as they may be said to be contemporaneous with the modern conception of the corporate nature, all to the same effect as those above referred to.

"This distinction between the acts of an *individual acting as agent for a corporation and the acts of persons who in the exercise of undelegated powers act in the primary role of the corporation itself, is to be extracted from the following cases*: Varderman *v.* Penn Mutual Ins. Co., 125 Ga. 117, 54 S. E. 66, 5 Ann. Cas. 221; American Soda Fountain Co. *v.* Stolzenbach, 75 N. J. L. 721, 68 Atl. 1078, 16 L. R. A. (N. S.) 703, 127 Am. St. Rep. 822; Glucose Sugar Refining Co. *v.* St. Louis Syrup & Preserving Co. (C. C.) 135 Fed. 540; Bank of Toronto *v.* McDougall, 15 U. C. C. P. 475."

Applying the above principles to the case at bar, it appears that Dotson, being the president of the corporation, was acting not as a mere servant, but his act was the act of the corporation itself.

POINT IV.

In an act complained of being an act of trespass no negligence need be proved.

The plaintiff's State of Demand alleges (S. C. p. 3) that the plaintiff was the owner of the land,

and then in paragraph four alleges that the defendant, John Dotson, and the defendant, Demarest Bros. Company, by its agents, servant, etc., aforesaid, at said time and place drove said truck negligently and carelessly with great force and violence into and against said building of plaintiff.

Paragraph 6 of the State of Demand states that plaintiff's building was entered into by said truck of the defendant and damaged, in that windows, window frames, door, floor and other parts of said building of a technical nature, with which the plaintiff is not familiar, was destroyed and demolished. In other words, the State of Demand alleges a case of trespass as well as a case of negligence and the words "negligently and carelessly" could very easily be stricken from the State of Demand and a cause of action would still remain.

The facts of the case clearly prove trespass for which the defendant is responsible. The admitted fact is that the building of the plaintiff-appellant was damaged because the truck of the defendant-appellee ran into it about two or three feet, and, in driving the truck into the store, the defendant, Demarest Bros. Company, was guilty of trespass regardless of whether or not the truck was negligently driven.

> "Every unauthorized entry on land of another is a trespass, even if no damage is done, or the injury is slight" (38 Cyc. p. 995).
>
> "The intent or motive with which an act of trespass is done is immaterial as regards the doer's liability therefor" (38 Cyc. p. 1002).

A lunatic or an infant so young as not to comprehend what he was doing may both be guilty of trespass but, manifestly, there can be no intent. (*Reich* v. *Delaware, Lackawanna & Western Rail-*

road Co., 61 N. J. L. p. 635; *Freidman* v. *Snare and Triest Co.*, 71 N. J. L. p. 605.)

"It is well settled that an infant is civilly liable for his torts unconnected with his contract, unless in the commission of the tort there is required to exist some element which the infant is not presumed to possess." (31 *Corpus Juris*, p. 1090, citing the following cases):

(J) Trespass:

Scott *v.* Watson, 46 Me. 362, 74 AmD 457;
Monumental Bldg. Assoc. No. 2 *v.* Herman, 33 Md. 128;
Ferguson *v.* Bobo, 54 Mass. 121;
Conway *v.* Reed, 66 Mo. 346, 27 AmR 354;
Munden *v.* Harris, 153 Mos. A. 652, 134 SW 1076;
Milton School Dist. No. 1 *v.* Bragdon, 23 N. Y. 507;
McCabe *v.* O'Connor, 4 App. Div. 354, 38 NYS 572 (aff. 162 N. Y. 600 mem, 57 NE 1116 mem);
Bullock *v.* Babcock, 3 Wend. (N. Y.) 391;
O'Leary *v.* Brooks El. Co., 7 N. D. 554, 75 NW 919, 41 LRA 677;
Gillespie *v.* McGowan, 100 Pa. 144, 45 AmR 365;
Humphrey *v.* Douglass, 10 Vt. 71, 33 AmD 177;
Priest *v.* Hamilton, 2 Tyler 44;
Huchting *v.* Engel, 17 Wis. 230, 84 AmD 741.

"There can be no distinction as to the liability of infants and lunatics, between torts and nonfeasance and of misfeasance—between acts of pure negligence and *acts of trespass. The ground of the liability is the damage caused by the tort.* That is just as great whether caused by negligence or *trespass.* (Williams *v.* Hays, 143 N. Y. p. 442).

"But in the limited and confined sense * * * it signifies no more than an entry on another man's ground without a lawful author-

> ity, and doing some damage, however inconsiderable, to his real property. For the right of meum and tuum, or property in lands, being once established, it follows as a necessary consequence, that this right must be exclusive; that is, that the owner may retain to himself the sole use and occupation of his soil; every entry therefore thereon, without the owner's leave, and especially if contrary to his express order, is a trespass or transgression" (3 Blackstone Com. 208).
>
> "The right to land is exclusive and every entry thereon and without the owner's leave or the license or authority of law is trespass" (3 Blackstone Com. 209).

It is clear from considering the above that no negligence is necessary to support an action in trespass, and that it is no defense to the action for the defendant to say that he is not guilty of negligence, for the fact remains that he did trespass on to the property of the plaintiff and caused considerable damage.

POINT V.

In a case arising in the District Court the pleadings need not be as formal as are required in the higher courts and no judgment should be reversed for error as to matter of pleading or procedure unless it, by error, injuriously affected the substantial rights of the party.

Section 27 of the Practice Act provides as follows:

> "No judgment shall be reversed or new trial granted on the ground of misdirection, *or the improper admission or exclusion of evidence or for error as to matter of pleading or pro-*

> *cedure,* unless after examination of the whole case it shall appear that the error injuriously affected the substantial rights of a party" (P. L. 1912, p. 382).

It has repeatedly held that the pleadings in the District Court need not be as formal as required in the higher courts. (*Josephine Kennell* v. *Gershonovitz Bros.*, 84 N. J. L. 577; *John Mack* v. *American Electric Telephone Co.*, 79 N. J. L. 109; *O'Donnell* v. *Weiler*, 72 N. J. L. 142.)

The facts clearly show that the plaintiff was the owner of the building, and that the front of the said building was smashed into and entered by the truck owned by the defendant-appellee, Demarest Bros. Company, and driven by the president of the company, John Dotson; further, that if the defendant-appellee, Demarest Bros. Company, is injured because of the dismissal of the suit against the president of the company, it is a result of its own motion and done at its request.

It is, therefore, respectfully submitted that the judgment of the Supreme Court in reversing the judgment of the District Court in favor of the plaintiff, should be reversed.

Respectfully submitted,

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Of Counsel.

New Jersey Court of Errors and Appeals

ISAAC VANIEWSKY, *Plaintiff-Appellant,* *vs.* DEMAREST BROS. COMPANY, a New Jersey corporation, *Defendant-Appellee.*	ACTION AT LAW. ON APPEAL FROM SUPREME COURT.

BRIEF OF DEFENDANT-APPELLEE.

This appeal is from the judgment of the Supreme Court which reversed the judgment entered by the District Court of the First Judicial District of the County of Bergen in favor of the plaintiff and against the defendant.

Statement of Facts.

On November 21st, 1927, the defendant, John Dotson, an employee of the defendant, Demarest Bros. Company (S. C. 44, ll. 30-31) was operating an Overland one-half ton truck (S. C. 44, l. 34) on White Street (S. C. 44, ll. 37-40) in the Borough of Closter, Bergen County. White Street is a dead-end street at Main Street (S. C. 46, ll. 22-26) and has a down-hill grade in the direction in which Dotson was driving (S. C. 44, ll. 38-40).

The plaintiff, Isaac Vaniewsky, is the owner of a building located on Main Street (S. C. 26, ll. 1-3) in the Borough of Closter, apparently at the foot of the White Street grade (S. C. 46, ll. 27-28).

On the day above set forth the truck driven by the defendant, Demarest Bros. Company, went up over the curb at the foot of the White Street grade and struck the front part of the building owned by Vaniewsky, damaging it considerably (S. C. 37, ll. 16-20). The plaintiff did not see the accident. He appeared on the scene for the first time the following morning (S. C. 26, ll. 16-20).

The plaintiff produced a witness, one Ralph S. Herton, a police officer of the Borough (S. C. 37, ll. 10-12) who was on Main Street at the time. He did not see the accident, but heard the crash and on turning around saw the Demarest Bros. Company's truck against the front end of the plaintiff's building (S. C. 37, ll. 14-20).

The above constitutes all the testimony offered by the plaintiff as to the liability of the defendants.

The defendant, Dotson, then testified that while proceeding down the grade on White Street he became unconscious (S. C. 45, ll. 11-22) and remembered nothing until he came to in the doctor's office (S. C. 45, ll. 23-27). He further asserted that he felt well that morning before he left his place of business and that he had no indications of illness before he became unconscious (S. C. 45, ll. 27-39). On cross-examination he said he was fifty-eight years of age and that this was the first "fainting spell" he had ever suffered (S. C. 46, ll. 8-10). The doctor treated him for his condition and advised him that the ailment was "stomach trouble" (S. C. 46, ll. 10-21).

The police officer who testified for the plaintiff corroborated Dotson's story. On cross-examination he admitted that when he arrived at the scene of the accident Dotson was behind the wheel of the truck slumped down in the seat, ap-

parently unconscious. He "pulled Dotson out from behind the wheel" and carried him to the doctor's (S. C. 28, ll. 18-32).

The state of demand filed by the plaintiff contained two counts, the first grounded in negligence and the second in trespass (S. C. 3-5). At the close of the plaintiff's case motions for nonsuit were made in favor of both defendants on the negligence count and in favor of the defendant, Demarest Bros. Company, on the trespass count. The Court denied the motion as to both defendants on the negligence count on the ground that "the evidence has now established a *prima facie* case where, under the circumstances, negligence would be almost presumed." The motion on the trespass count was granted as to the defendant, Demarest Bros. Company.

At the close of the defendant's case, motions for a directed verdict for both defendants on the first count and for the defendant, Dotson, on the second count were made on the ground that no negligence had been shown on the part of the defendants and that the damage sustained by the plaintiff was the result of an unavoidable accident.

The Court granted the motion for a directed verdict in favor of the defendant, Dotson, on both counts and denied the motion made in behalf of the defendant, Demarest Bros. Company, on the first count. Following the denial of this motion, the Court entered a judgment in favor of the plaintiff and against the defendant, Demarest Bros. Company, for $363.95, and in favor of the defendant, Dotson, and against the plaintiff.

The defendant, Demarest Bros. Company, appealed from this judgment and the Supreme Court reversed it and entered judgment for the defend-

ant. It is from this judgment of reversal that the present appeal has been taken.

The argument advanced in the Supreme Court by Demarest Bros. Company was divided into four parts:

I. The liability of the defendant, Demarest Bros. Company, was predicated upon the theory of *respondeat superior* because of the relationship of master and servant existing between it and the defendant, John Dotson. Since the Court exonerated the servant, Dotson, he should also have exonerated the defendant, Demarest Bros. Company.

II. There was no proof in the case of any negligence upon the part of the defendants.

III. The plaintiff, having pleaded specific acts of negligence in his state of demand, waived his right to rely on the doctrine of *res ipsa loquitor.*

IV. The defendants, having explained away by uncontroverted evidence the presumption of negligence which existed at the close of the plaintiff's case, the Court should have entered a judgment in favor of the defendant, Demarest Bros. Company.

These points are repeated in this brief with such additional ones as are made necessary by the variout contentions of the appellant.

The Supreme Court in the prevailing opinion by Justice Lloyd substantially adopted the first point above set forth. Justice Lloyd in the course of his opinion said:

> "What different juries may do in different cases or possibly in the same case on differ-

ent trials is by no means analogous to the case where, as here, the action is one against both defendants in which a single complaint is filed alleging the negligence of the driver as the basis of liability against both driver and master, and a verdict is rendered at one and the same time exonerating the servant and holding the master. In the case of New Orleans and Northeastern Railroad Co. *v.* Jopes, 142 U. S. Sp. Ct., 18, it was said by that high tribunal that 'it would seem on general principles that if the party who actually causes the injury is free from all civil and criminal liability, therefore, his employer must also be entitled to a like immunity.' In practice the great weight of authority is as stated in 39 C. J. 1367, that 'where a master and servant are sued jointly in an action based solely on tortious conduct of the servant, and the servant is acquitted, there can be no verdict against the master. A verdict against the master and acquitting the servant is equivalent to a finding that no cause of action exists and will not support a judgment against the master; and such a verdict should be set aside or judgment for the master entered notwithstanding the verdict,' citing a long line of cases, beginning with the case above noted, and continuing with like rulings in numerous states.

The liability of the servant is primarily due to his wrongful act; that of the master is derivative and predicated wholly upon such primary liability. Courts are for the administration of justice; it is their duty so to administer the law as to effectuate justice within the bounds of adjudicated rules. By implication the judge in the present case found that there was no negligence; none in the servant because it acquitted him of all responsibility, and by implication, therefore, none in the master because such negligence could only exist if the servant had been guilty."

POINT I.

The Supreme Court did not err in ruling that the liability of the defendant, Demarest Bros. Company, was predicated upon the theory of respondeat superior, because of the relationship of master and servant existing between it and the defendant, John Dotson, and that since the District Court exonerated the servant Dotson, he should also have exonerated the master, Demarest Bros. Company.

The liability of the master for the acts of his servant rests fundamentally on the doctrine of agency. *Qui facit per alium facit per se.* It is too well settled universally to admit of question that a master is responsible for all the tortious acts of his servant which are done within the scope and in the course of the servant's employment. It would be a work of supererogation to attempt a review of the decisions on this point. It seems sufficient to cite a few in which it is propounded.

In *Michael* v. *Southern Lumber Co.,* 101 L. 1 the Supreme Court, speaking through Justice Trenchard, said:

> "For all acts done by a servant in obedience to the express orders or direction of the master, or in the execution of the master's business, within the scope of his employment, and for any acts in any sense warranted by the express or implied authority conferred upon him, considering the nature of the service required, the instructions given and the circumstances under which the act is done, the master is responsible."

Again in the case of *McGuire* v. *Grant,* 25 L. 356, the Supreme Court ruled:

> "A master is responsible for the tortious acts of his servants which were done in his service. The responsibility grows out of, is measured by, begins and ends with his control over them."

Of course, the liability of the master for the acts of his servant within the scope of the employment is determined and measured by the legal responsibility of the servant for them, and further by his power of control over them (*McGuire* v. *Grant,* 25 L. 356; *Doran* v. *Thomsen,* 76 L. 754; *Evers* v. *Krouse,* 41 Vroom 653).

In the present case the relationship of master and servant between Demarest Bros. Company and John Dotson was admitted. The plaintiff is seeking to hold the defendant, Demarest Bros. Company, responsible for the damage to his building, caused by the alleged tort of Dotson, on the doctrine of respondeat superior which is applicable because of this relationship. In the state of demand the plaintiff says:

> "2. That the defendant, John Dotson, was driving said truck of the defendant, Demarest Bros. Company, as agent and servant in and for the business of Demarest Bros. Company.
>
> 4. That the defendant, John Dotson, and the defendant, Demarest Bros. Company, by its agent and servant, aforesaid, that at said time and place drove said truck negligently and carelessly with great force and violence into and against said building of plaintiff."

The tort for which the plaintiff is seeking redress from the defendant, Demarest Bros. Company, arises out of the alleged negligent operation of its truck by its servant Dotson, causing it to run into and damage the plaintiff's building.

At the trial the Court granted a motion to direct a verdict in favor of the servant Dotson, on the

ground that no negligence had been established against him and that the plaintiff's damage was the result of an unavoidable accident. However, he declined to grant such a motion made on identical grounds in behalf of the master, Demarest Bros. Company.

The liability of the master in such a case as the present is derivative. It exists in contemplation of the law, because someone acting for him, for his benefit, as his *alter ego,* so to speak, is negligent to the damage of some third person. If, therefore, there is a judicial declaration of no liability on the part of the principal actor, that is, the one through whose action or non-action the third person suffered damage, it seems but a logical corollary that the master whose liability exists by operation of law and because of the action or non-action of the person who has been exonerated on the charge of negligence, should automatically be likewise exonerated.

While there does not seem to be any decision in New Jersey in identity with the present situation, the general trend of opinion seems to favor the principle that *exoneration* of a servant under such circumstances also exonerates the master.

In 18 R. C. L. 776, under the title "Master and Servant," Sec. 236, the following appears:

> "And accordingly it is held that where a master and servant are sued to recover damages for a personal injury occasioned by the negligence of the servant and there is a verdict *exonerating* the servant but holding the master liable, such verdict should be set aside, as the exoneration of the servant in such a case enures to the benefit of the master."

Again in 39 *Corpus Juris,* 1365, under the title "Master and Servant" this doctrine is set forth:

> "Where a master and servant are joined in an action for injury based on the negligence of the servant, the dismissal of the action against the servant is a dismissal of the action against the master."

Further in 39 C. J. 1367, under the same title, sec. 1602:

> "A verdict against the master and acquitting the servant is equivalent to a finding that no cause of action exists and will not support a judgment against the master; and such a verdict should be set aside or judgment for the master entered notwithstanding the verdict. *So also if an action against a master and servant is based solely on the theory of respondeat superior and the court directs a verdict for the servant, it is error to submit the issue of the negligence of the master.*"

The United States Supreme Court has affirmed this principle. In the case of *New Orleans and N. R. Co.,* v. *Jopes,* supra, Justice Brewer, speaking for the Supreme Court, said:

> "It would seem on general principles that if the party who actually causes the injury is free from all civil and criminal liability, therefore, his employer must also be entitled to a like immunity."

A New York case, that of *Pangburn* v. *Buick Motor Co.,* 105 N. E. 423; 211 N. Y. 228, is practically in identity with the situation at bar. There the opinion of the Court of Appeals, per Hiscock, J., is as follows:

Hiscock, J. (424).

> "The appellant was the owner of the car and Grounsell, who was driving the same at the time of the accident, was its employee.

If there was any negligence in the operation of the car, it was that of Grounsell, and the only possible theory of liability on the part of the appellant was that it was responsible for his negligence because he was its employee and engaged in its business. If Grounsell was not negligent and liable in this action, there was no conceivable basis for a recovery against the appellant, although if certain issues were decided in its favor, it was possible to exonerate the appellant while holding Grounsell. All this, in substance, was duly said by the court in its charge to the jury.

Notwithstanding these instructions, as the result of confusion or misplaced sympathy and logic, the jury rendered a single verdict of no cause of action in favor of Grounsell and of $5,000. against the appellant. * * *

We think the verdict as a whole was equivalent to one finding no cause of action against the appellant. *As has already been pointed out, the only claim of liability against it was based on the alleged negligence of its employee.* The primary and absolutely essential facts to be found by the jury before any liability could be visited upon the appellant were that the driver of the machine was negligent, and that the plaintiff was free from negligence. The two defendants did not stand on the same plane of liability as might sometimes happen where an action had been brought against two alleged tort feasors, and where a verdict might with entire propriety be rendered relieving either one and holding the other. The appellant's liability was purely of a derivative or secondary character on the theory of *respondeat superior,* and when the jury found that the employee was free from torious conduct, or that the plaintiff was guilty of negligence, the facts were settled which necessarily led to a verdict of immunity so far as appellant was concerned, and the verdict should have been in its favor. There was then left no support for, or consistency in, a verdict against the employer."

The case of *Spigenir* v. *Seaboard Air Line,* 98 S. E. 330 (Supreme Court, South Carolina) is illuminating. There the Court asserted:

> "Where a servant is united with the master in an action for damages for tort, and the allegation and proof shows that the tort complained of was the tort of this servant alone, then a verdict against the master alone cannot stand, because if this servant did not commit the tort complained of then there was no tort, and a verdict against the master alone cannot stand."

Again in *Jones* v. *Southern Railway Co.,* 90 S. E. 183 (S. C. South Carolina) we find an analogous situation. The plaintiff sued the railroad company and three of its agents and servants for damages caused by the bite of a cat allowed to be on the company's premises, while he was there transacting business. Court directed a verdict in favor of one agent and submitted the balance of the case to the jury. The jury returned a verdict against the railway company alone.

Hydrick, J.

> "Under the recent decisions in Sparks *v.* R. R. Co., 104 S. S. 266; 88 S. E. 739 and Jenkins *v.* R. R. Co., 89 S. C. 478; 71 S. E. 1010, the verdict is illogical and cannot stand as no delict of the company was proved other than through the agency of Parks and Gillard, one or both. The company's liability is predicated solely upon the acts or omissions of one or both of them, and if either of them is liable, it necessarily follows that the company is liable; and if neither of them is liable it necessarily follows that the company is not."

The appellant now sets forth in his brief in this court that the doctrine of *respondeat superior* has no application to this case since the relation

between Dotson and Demarest Bros. Company was not that of master and servant but since Dotson was the president of the corporation, his operation of the automobile truck was that of the corporation *per se.*

The very state of demand upon which the defendant was brought into court specifically alleges the relationship of master and servant. It says: "Said defendant, John Dotson, and the defendant, Demarest Bros. Company, by its agent and servant, John Dotson, etc." It is respectfully contended that the case was tried and considered by the court on this theory created by the plaintiff and that a new basis for liability of the defendant cannot now be urged on appeal. We believe it to be settled beyond peradventure that an appellate court will not treat a case on appeal upon a theory which was not advanced in the trial court.

Irrespective of this contention, a study of the appellant's argument will reveal it to be sophistical. Even assuming that the doctrine of *respondeat superior* does not apply in its strictest legal sense, it is difficult to understand how a different result than that arrived at by the Supreme Court could be reached.

A corporation can only act through its officers or servants. The legal entity which the law recognizes as separate from the stockholders who compose the corporation, of itself cannot act. It is easy to understand but rather difficult to explain the high form of agency which exists between the officers of a corporation and the corporation itself. The best explanation of this relation our search has disclosed appears in the case of *American Soda Fountain Co.* v. *Stolzenbach,* 75 L. 721, where the Court of Errors and Appeals said:

> "The right of an artificial person to empower and employ agents or attorneys is identical with that of a natural person—each is governed alike by the law of principal and agent.
>
> The fundamental difference between the natural and artificial person is that the latter, even when not acting as a principal through the intermediation of an agent, acts through some agency, inherent in its corporate form.
>
> Normally such agency inheres in the natural persons who hold and administer the offices of the corporation."

Whether the relation between the officers of a corporation be that of principal and agent or master and servant or some *sui generis* agency inherent in the form of the corporation, it is certain that if the corporation is to be held responsible for the act of the officer, the officer himself must have committed some actionable wrong.

The *American Soda Fountain case, supra,* in describing the relation between the officers and the corporation pictured an analogy between a natural body having a head and members and a corporation and its officers and declared that the law recognizes the officers to be "the means, the hands, the head by which the corporation acts." It follows as a corollary that where the means, or the hands, or the head by which the corporation acts has committed no legally cognizable grievance and this is so declared by a legal tribunal, then the corporation whose liability is sequential cannot be held responsible.

Assuming that the contention of the appellant is well founded in law (even though it presents a theory totally inconsistent with that upon which the case was tried) and that the act of Dotson, the president of the defendant corporation was the act of the corporation, he is in no better position.

For the trial court declared that Dotson was not guilty of negligence. If his act was the act of the corporation as sought to be established by the appellant, then the corporation itself was not guilty of negligence.

There is one case in this State in which a verdict in favor of the servant and against the master was sustained by the Court of Errors and Appeals. This case, *Goekel* v. *Erie Railroad Co.*, 100 L. 279, however, is easily distinguishable from the one at bar.

The plaintiff, Goekel, instituted suit against the Erie Railroad Company and Herbert E. Weyant, its locomotive engineer, for injuries sustained by him. The jury returned a verdict in favor of the plaintiff and against the railroad company and in favor of the defendant, Weyant, and against the plaintiff.

The railroad company obtained a rule to show cause why the verdict should not be set aside and a new trial granted. This rule contained a reservation of the exceptions taken at the trial. It, however, argued these exceptions on the hearing of the rule to show cause. The rule was then dismissed. Subsequently, an appeal was taken on the reserved exceptions to the Supreme Court, which appeal was also dismissed on the ground that the reservation of exceptions had been waived by their inclusion in the reasons filed for a new trial on the rule to show cause.

An appeal was taken to the Court of Errors and Appeals and it was then urged that as judgment was rendered in favor of the engineer Weyant, but against his employer, the Erie Railroad Company, and as Weyant stood exonerated from all negligence in operating and managing the engine, therefore, the judgment against the railroad company was without legal foundation. The Court

in considering the matter pointed out that this contention had been one of the reasons urged for a new trial on the rule to show cause and that, therefore, since it could not have a dual review of precisely the same question, it was only considerable *as error apparent on the face of the record.*

It was then explained that the complaint charged diverse duties against the defendants and set forth a good cause of action against both or either. Therefore, on an appeal of this character, *the evidence not being at all considered, it being assumed that the proof justified the verdict of the jury,* and it being only necessary to find that the verdict was justified strictly on the record and the complaint charging breaches of duties owed by the defendant railroad company to the plaintiff distinct from those charged against the servant and owed to the plaintiff by him, the Court ruled that the verdict was legally unobjectionable.

The inclusion of the reserved exceptions in the reasons under the rule to show cause, therefore, precluded the railroad company on appeal from having reviewed the one question which was undoubtedly the most important in the case, namely, whether there was any evidence offered and received at the trial in support of the allegation of breach of those duties which were said to be owed to the plaintiff by the railroad company separate and apart from those owed by the locomotive engineer to the plaintiff.

In the present case the entire matter is before the Court on appeal and the entire evidence adduced at the trial may be reviewed. A perusal of this evidence will convince beyond cavil (1) that the appellant was sought to be held solely on the theory of *respondeat superior* and (2) that there is not one scintilla of proof either of a duty

owed to plaintiff by the appellant separate from that owed to the plaintiff by the defendant Dotson or of a violation of any such duty.

In the plaintiff's case the only proof of negligence was that Officer Herton heard a crash and on turning around saw the Demarest Bros. Company's truck over the sidewalk and in front of the plaintiff's building. The defendant Dotson's explanation was that while going down the hill he suddenly became unconscious. Under these circumstances, it being possible to hold the defendant, Demarest Bros. Company, only by applying the principle of *respondeat superior,* the exoneration of the servant naturally effects immunity in the master.

The *obiter dicta* in the Goekel case seems to indicate that New Jersey would follow the decisions cited *supra,* if the precise question were ever raised. The Court said:

> "It may be that where two are sued as joint tort feasors, and the doctrine of *respondeat superior* applies, and the duty of care is identical in the case of each defendant, as for instance, where the servant is driving the motor car of his master in the latter's business and carelessly and negligently collides with a third person, causing damage, the master being responsible for the servant's act is liable, as well as the servant; but where the master has some duty of care imposed upon him, which is not cast upon the servant, and the accident happened by the neglect of the master to perform his duty, disassociated from neglect of the servant to perform any duty resting upon him, a verdict in favor of the servant, and against the master, would be valid, and a judgment entered thereon would be good in law."

As set forth above, there is no proof in this case of any neglect of the master to perform any

duty owed the plaintiff disassociated from the neglect of the servant to perform his duty to the plaintiff.

The appellant attempts in his brief to build up an argument that this issue is within the Goekel case, by adopting the theory set forth in the dissenting opinion by Justice Kalisch. The allegation in the state of demand that the truck of the defendant was driven "without having same in proper repair," which was referred to by Justice Kalisch is set forth and it is urged that because of this allegation the trial court may have found the defendant, Demarest Bros. Company, guilty of some negligence disassociated from any conduct of Dotson's.

It is fundamental that an allegation such as this one is not proof or evidence in support of a claim. It amounts to a charge which, of itself, has neither efficacy nor weight until supported by evidence. To adopt such a theory would be to remove from the body of substantive law the principles relating to the burden of proof. If the case of a plaintiff could legally be supported by the allegations of his pleadings without proof to support them, then any defendant could be convicted without a trial. To state such a proposition is to refute it.

There is not one scintilla of evidence in the case that this truck was out of repair or that the Demarest Bros. Company was guilty of any conduct, independently of the acts of Dotson, which would justify a finding of negligence against it alone. Justice Lloyd recognized this in writing the prevailing opinion. He said:

> "It will be observed that the whole negligence, if any, alleged or proved in the case was in the operation of the truck by Dotson as the agent of the Demarest Bros. Company. It is, therefore, entirely apparent that no li-

ability could exist as to the company unless by and through the negligence of Dotson."

It is, therefore, respectfully urged that the Supreme Court did not err in holding that the exoneration of the defendant, Dotson, also exonerated the defendant, Demarest Bros. Company, and in reversing the judgment of the district court.

POINT II.

The legal question of whether the act of Dotson constituted an actionable trespass is not before this Court on this appeal.

The appellant argues as point two in his brief that where an act complained of constitutes a nuisance, no negligence need be proved. We assert (and we believe our assertion to be supported by the record) that this matter is not now before the court on the present appeal.

The state of demand filed by the plaintiff contained two counts—the first based upon negligence, the second upon trespass (S. C. 4-6). At the close of the plaintiff's case, a motion for nonsuit as to Demarest Bros. Company on the trespass count was granted (S. C. 43, ll. 20-40; 44, ll. 1-20). At the close of the entire case a motion for a directed verdict in favor of the defendant, Dotson, on both counts, namely, negligence and trespass, was granted (S. C. 55, ll. 1-20).

The plaintiff, who is appellant here, took no appeal from the granting of these motions and cannot now be heard in asserting that it was error for the trial court to do so, or that his cause of action is legally supportable on that ground of trespass.

If the plaintiff felt himself aggrieved by the action of the trial court in this respect, he should have presented his complaint to the Supreme Court on appeal. Certainly his failure to do so cannot be charged against the defendant-appellee, who has diligently prosecuted his cause. Justice Lloyd's appreciation of the plaintiff's position is made clear in his opinion:

> "If it be suggested that the plaintiff should not suffer because of the wrongful act of the judge, the answer is that he could have himself appealed from the finding in favor of Dotson. A finding which deprives him of the benefit of the liability of the servant, on which alone the liability of the master could be predicated, and a similar finding that such master was nevertheless liable could certainly be brought before this court for review upon the same logical principles that we are now invoking on the legal phases of the case as they are here presented. If he neglects to avail himself of the means to protect his rights he cannot complain of the final result which deprives him of all remedy."

POINT III.

Where a cause of action is set forth in two counts and the theory which forms the basis of one count is excluded by the Trial Court, a judgment given on the remaining count, which proves to be erroneous cannot be supported upon the theory which was rejected.

The appellant argues in point five of his brief and inferentially in point four that since no formal pleadings are required in the district court and since the Practice Act provides that judg-

ments are to be reversed only for errors in substance and since the first count of his state of demand would be grounded in trespass, if the words "negligently and carelessly" were removed from paragraph 4 and (necessarily, although he does not assert it) all of paragraph 5 stricken out, the judgment of the district court can be sustained by this court, on the theory of trespass, and that of the Supreme Court reversed.

This specious suggestion presents a very ingenious method of doing indirectly what might have been accomplished directly if the appellant had taken an appeal from the granting of the motions for nonsuit and directed verdict on the trespass count of the state of demand.

As set forth above, the plaintiff's cause of action was very definitely divided into two parts, the first count sounding in negligence and the second in trespass. Both theories were considered by the trial court and that of trespass was rejected. Therefore, even if the judgment which was given for the plaintiff on the negligence count could be sustained on the trespass count, this court would not under the law accept the theory which the trial court discarded and discard that which the trial court adopted in order to affirm the judgment.

This principle has been declared by the Court of Errors and Appeals in many cases. In *Flammer* v. *Morelli,* 100 L. 314-316 (E. & A.), Justice Parker said:

> "The case is submitted on briefs, and the argument in respondent's brief is based wholly on the fundamental proposition that the infant plaintiff was invited to ride on the truck, and consequently, that a duty of care was raised. *But this theory of the case is not before us; it was excluded by the trial judge;*

and the rule is settled that a verdict erroneous on the theory adopted in the trial court cannot be sustained on a theory excluded in that court, and which the jury had no opportunity to consider."

Again in *Barnes* v. *Wallington and Co.,* 78 L. 490 (E. & A.) it was held:

"Where a plaintiff's case is rested at the trial on two theories, the first of which is supported by legal evidence, and the second in material part by evidence illegally admitted, and the case is submitted to the jury on the second theory alone, a judgment for the plaintiff cannot be sustained on the ground that the evidence lawfully received would have justified a finding for the plaintiff on the first theory."

See also:

Doran v. *Thomsen,* 76 L. 754 (E. & A.);
Fielders v. *No. Jersey St. Ry. Co.,* 68 L. 343 (E. & A.);
Donohue v. *Campbell,* 98 L. 755 (E. & A.);
Hayes v. *Adams Express Co.,* 74 L. 537 (E. & A.).

To adopt the appellant's contention would require, first, an amendment of the first count of the state of demand, which amendment would change the theory of that count from negligence to trespass and create two counts in the state of demand for trespass and, secondly, would render it necessary to consider the case upon a theory which was very definitely excluded by the trial court. This, it is submitted, cannot be done under the above decisions.

In addition, such an amendment, if allowed, would substitute a new cause of action for that

set forth in this count. While the courts have broad power of amendment generally, we do not believe the rule has ever been so enlarged as to permit the substitution of an entirely new cause of action (15 R. C. L. 580).

POINT IV.

There is no proof in the case of any negligence on the part of the defendants.

The uncontradicted and uncontroverted evidence adduced at the trial establishes that the defendant, Dotson, while operating the automobile truck of the defendant, Demarest Bros. Company, on White Street in the Town of Closter, suddenly became unconscious with the result that the truck went over the curb on Main Street, which is at the foot of White Street, and ran into and damaged the front of a building owned by the plaintiff. The evidence further showed that Dotson had never become unconscious before and that on the day in question before the accident, he had absolutely no warning or indication that such an exigency might or would arise.

It is the appellee's contention that these facts make out a case of pure accident, that is, an occurrence which arose unexpectedly, undesignedly and could not have been foreseen, and cannot be said to constitute negligence in any sense of the term. In 20 R. C. L. 17, sec. 12, under the title "Negligence" this interesting note appears:

> "It has long been recognized that no action will lie for injuries attributable to what is termed inevitable or unavoidable accident. In other words, if no fault or negligence is chargeable to either of the parties to the oc-

currence upon which the action is founded, the loss and injury will be allowed to remain where it has fallen."

And on page 18, citing Judge Story:

> "By the term 'accident' as is here intended is not merely inevitable casualty or the act of Providence, or what is technically called *vis major,* or irresistible force, but such unforeseen events, misfortunes, losses, acts or omissions, as are not the result of any negligence or misconduct of the party."

The defendant, Dotson, certainly could not have foreseen that he would become unconscious while driving down this hill. Especially, since it had never happened before and he had no warning or indication prior to the actual occurrence. It was something absolutely and indisputably beyond his control. By no stretch of the imagination can Dotson's unconsciousness be brought within that definition of negligence laid down by this court in *Evers* v. *Davis,* 86 L. 196, that "danger reasonably to be foreseen is the established test of negligence."

To hold these defendants responsible here would be to disaffirm the well-settled rule that men are not insurers of their acts in the operation of motor vehicles and to create the absolutely incompatible theory of absolute liability. As is said in 20 R. C. L. 8:

> "But the law, generally speaking, knows no absolute liability—no man is made an insurer of his acts; he is liable only for injury arising from a failure to act with the degree of forethought and intelligence that characterizes the conduct of prudent men in general."

The plaintiff-appellant certainly did not adduce the proof of negligence required by the Court of

Errors and Appeals in the case of *Migliaccio* v. *P. S. Ry. Co.*, 130 A. 9, that "in negligence cases it is necessary for a plaintiff to prove that the defendant did an act or omitted to do an act, which a person of ordinary prudence could foresee might naturally and probably produce the injury complained of and that such an act or omission did actually cause the injury."

Furthermore, even where a defendant has been found guilty of negligence, where the damages which resulted from such negligence are not the natural effects of the delinquency, that is such as might reasonably have been foreseen, such as occur in an ordinary state of things, the law relieves the tort feasor. *Smith* v. *P. S. Corp.*, 78 E. 478. Bearing this rule in mind it would indeed be a travesty on Justice to hold the defendants here responsible where the defendant, Dotson, not only could not have foreseen his loss of consciousness, but in addition, was without power of control over it.

The language of Justice Trenchard in the *Migliaccio case, supra,* seems to be apropos at this point:

> "It might be that the application of the principles above enunciated may in the present case seem harsh, but the letting down of the bars and departing from settled and well-established rules always results in worse evils."

The appellee, therefore, respectfully contends that the damages sustained by the plaintiff are *damnum absque injuria.*

POINT V.

The appellant having pleaded specific acts of negligence in his state of demand, waived his right to rely on the doctrine of res ipsa loquitur.

The state of demand filed by the plaintiff is as follows:

> "5. At the time and place said defendant, John Dotson and said defendant, Demarest Bros. Company, by its agent and servant, John Dotson, did carelessly and negligently drive said truck (1) at a high, dangerous and excessive rate of speed; (2) without having proper control thereof; (3) without having the same in proper repair and (4) without giving heed or attention to the manner of its driving and (5) without using proper precautions with respect to property lawfully located on said highway, known as Main Street." (Numbers ours.)

By charging these defendants with specific acts of negligence in the pleading, the plaintiff in effect asserts that the has definite knowledge of the defendants' conduct immediately prior to and at the time of the accident, and that that conduct constituted negligence, as a result of which he sustained damage. It was, therefore, incumbent upon him to establish these acts of negligence as a condition precedent to a finding of liability against the defendants.

The theory of *res ipsa loquitur* is that where a plaintiff sustains injury or damage through an instrumentality which is peculiarly within the control of the defendant and which would not occur in the ordinary course of events were the defendant exercising due care, the happening of the acci-

dent itself bespeaks negligence and is sufficient to create a *prima facie* case against the defendant. This doctrine was established by the courts to enable a person who received an injury through an instrumentality under the sole control of the defendant and who, because of such fact, is unable to establish specific acts of negligence, to cast the burden of explaining the happening of the accident on the defendant and showing by way of explanation that it occurred without any negligence on his part. It would seem, therefore, that the theory should only be invoked where the injured person has no knowledge of what caused the accident or at least where the injured person has no knowledge of specific acts of the defendant, which constitute negligence. If the reason for the rule is to enable a plaintiff to carry his case beyond the nonsuit stage of a trial, because of his lack of knowledge of the defendant's actions which caused the injury, when he asserts that he has such knowledge by charging the defendant with specific violations of duty in the pleadings, then the reason for the rule should disappear and with it the rule itself.

There is one case in this State which is applicable to this situation. In *Cook* v. *American Smelting and Refining Company,* 99 L. 81, Chancellor Walker, speaking for the Court of Errors and Appeals, says:

> "The plaintiff, having thus alleged negligence on the part of the defendant, carried the burden of proving it by circumstances from which the defendant's want of due care would be an ultimate inference. This the plaintiff failed to do and, therefore, the doctrine of *res ipsa loquitur* did not apply."

This rule of law has been more definitely propounded in some other jurisdictions. In *Byland*

v. *Dupont Powder Company,* 93 Kans. 288; 144 Pac. 251, it was held that where in an action founded upon negligence the plaintiff alleges specifically the negligent acts of the defendant upon which he relies to recover, he must prove the negligence alleged and will not be allowed to make a *prima facie* case relying upon the doctrine of *res ipsa loquitur.* Porter, Judge, said:

> "Manifestly the person injured in such a case was not obliged to allege or prove negligence upon the part of the workman; and the rule of *res ipsa loquitur* applied; but that doctrine has no application to the present case for two reasons:
>
> First: The plaintiff pleaded specifically the causes of the explosion and must prove the acts of negligence which he alleged and that such negligence was the proximate cause of his injury. He cannot be allowed to make a *prima facie* case relying upon the doctrine that the accident speaks for itself. (Root *v.* Cudahy Packing Company, 88 Kans. 413; 129 Pac. 147.) The opinion of that case quotes with approval the following language from Orcutt *v.* The Century Building Company, 201 Mo. 424; 99 S. W. 1062: 'If the plaintiff possesses knowledge of the facts and is able to plead them specifically and in detail, the reason for the rule disappears and with it the rule itself.' "

Again in *Lone Star Brewing Company* v. *Willie* (Tex. 114 S. W. 186), the Court rules:

> "This is not a case where the doctrine of *res ipsa loquitur* applies; for the plaintiff having specifically alleged the acts of defendant's negligence, cannot make out a *prima facie* case without direct proof of actionable negligence, but he must prove the acts of negligence which he averred, and that such negligence was the proximate cause of his injury."

In *West Chicago Street Railway Company* v. *Martin,* 154 Ill. 523; 39 N. E. 140, it was held that where the plaintiff did not proceed upon the theory of presumptive negligence, but charged in his declaration specific acts of negligence and introduced evidence tending to prove his charges, an instruction which told the jury in effect that proof that plaintiff was a passenger, and was injured while being carried raised the presumption of negligence on the part of the carrier, should not have been given.

In *Chicago Union Traction Company* v. *Leonard,* 126 Ill. App. 189, the Court again propounded the rule that the doctrine of *res ipsa loquitur* does not extend to cases in which specific acts of negligence specifically described are the gist of the declaration; and the Court said that it did not agree with the contention of the plaintiff that in such cases it devolves upon the defendant to disprove the specific acts of negligence with which he is charged in the declaration.

So, too in *Norton* v. *Galveston H. & S. A. R. R. Company* (Tex. 108, S. W. 1044), it was held that if a passenger injured by a derailment wishes to avail himself of the presumption of negligence arising from derailment, he should plead negligence generally and not specify the particular matters in which he claims the defendant to have been negligent.

This legal principle upon which the defendant asserts that there was no evidence of negligence in the case sufficient to carry it to the jury over the defendants' motion to nonsuit and to direct a verdict, is probably better settled in Missouri than in any other jurisdiction. The Missouri Appellate Court, in the case of *Todd* v. *Missouri P. R.,* 126 Mo. App. 684; 105 S. W. 671, stated:

> "The rule is too well settled in this State to cite precedents to show that where a plaintiff, in his petition and instruction, relies upon certain specific allegations of negligence he will not be entitled to recover for other or different causes of negligence or upon the theory of *res ipsa loquitur.*"

The reason for the rule is thus stated in the case of *Roscoe* v. *Metropolitan Street R. R. Company,* 202 Mo. 576; 101 S. W. 32:

> "General allegations of negligence are permitted because the plaintiff, not being familiar with the instrumentalities used, has no knowledge of the specific negligent act or acts occasioning the injury, and for a like reason the rule of presumptive negligence is indulged. But, if the plaintiff, by his petition is shown to be sufficiently advised of the exact negligent acts causing or contributing to his injury, as to plead them specifically, as in this case, then the reason for the doctrine of presumptive negligence has vanished. If he knows the negligent act and he admits that he does so know it, by his petition, then he must prove it, and, if he recovers, it must be upon the negligent acts, pleaded, and not otherwise."

Even a cursory reading of the testimony will satisfy that the plaintiff did not prove any of the specific allegations of negligence pleaded and that the only proof was of the happening of an accident. Since the defendant's explanation did not furnish any proof of negligence, it would appear that the motions to nonsuit and for a directed verdict for both defendants on the ground that no negligence had been established should have been granted by the district court, as to both defendants.

POINT VI.

The defendants having explained away by uncontroverted evidence the presumption of negligence which existed at the close of the plaintiff's case, the District Court should have entered a judgment in favor of the defendant, Demarest Bros. Company.

Even assuming that the pleading of specific acts of negligence did not waive the plaintiff's right to rely on the theory of *res ipsa loquitur,* the best that can be said for the plaintiff's case is that a presumption of negligence on the part of the defendant had been established by the proof of the happening of the accident. In this posture of affairs the defendants were required to explain the accident. This burden which they shouldered was not, however, one of exculpation, it was merely explanation (*Hughes* v. *Atlantic City et R. R. Co.,* 85 L. 212, E. & A.).

The defendants met this issue by explaining the cause of the accident and this explanation of unavoidable accident stood uncontradicted and uncontroverted. The Court was, therefore, required to direct a verdict for the defendants on such an application.

No citation of authority is required to support the statement that the burden of proof in these cases is upon the plaintiff and that in the last analysis of the case he must have established affirmatively by the preponderance of the evidence that these defendants were guilty of negligence. The right of the defendants to have the plaintiff assume and meet this burden is a substantial one (*Hughes* v. *Atl. City R. R. Co., supra*). As the Court said in the case of *McKettrick* v. *Public Service Ry. Co.,* 128 A. 226:

> "In an action of negligence, the burden of proving the negligence of the defendant is upon the plaintiff and as a proposition for the jury's guidance at the close of the case, it never shifts to the defendant. This right of the defendant to have the plaintiff bear the burden of the affirmative is a substantial one, the denial of which is injurious error."

The plaintiff permitted his case to rest entirely upon the presumption of negligence which he thought obtained and even after the explanation of the defendants, did nothing in furtherance of the burden which the law says must be ultimately borne. Under the circumstances the appellee feels that not only has the accident been explained, but also that the explanation effectively dispelled the presumption of negligence and further that the burden of proving the defendants' negligence by the greater weight of the evidence has not been sustained. For this reason, a judgment should have been entered for both defendants.

The appellant asserts two or three times in his brief that if the defendant felt himself aggrieved by the action of the trial court, it was the result of his own act. This obviously is not so. Similar motions were made for both defendants in the case; certainly the failure of the court to grant the motions in their entirety cannot be charged to the defendant, Demarest Bros. Company.

It is, therefore, respectfully urged that the Supreme Court did not err in reversing the trial court and that the judgment of the Supreme Court should be affirmed.

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