

INDEX.

	PAGE
Notice of Appeal.....	1
Grounds of Appeal.....	2
Summons	4
Complaint	5
Answer	7
Reply	8
Postea	9
Motion for Non-Suit.....	59
Motion for direction of Verdict.....	87
Charge to Jury.....	89
Plaintiff's Rule to Show Cause.....	102
Defendant's Rule to Show Cause.....	103
Order	105
Statement	106

TESTIMONY FOR PLAINTIFF.

James H. Lowrey,	
direct examination	11
cross "	16
John Gaffney,	
direct examination	18
cross "	21
Frank J. Cox,	
direct examination	42
cross "	48
Thomas Mullaney,	
direct examination	53
cross "	53

TESTIMONY FOR DEFENDANT.

	PAGE
William F. Cone,	
direct examination	57
Sylvanus Allehin,	
direct examination	62
cross "	68
John Connor,	
direct examination	75
cross "	77
William H. Illingworth,	
direct examination	82
cross "	84

Notice of Appeal.

Notice of Appeal.

Filed November 23, 1916.

Essex County Circuit Court.

10

JOHN GAFFNEY,

Plaintiff,

vs.

WILLIAM H. ILLINGWORTH,

Defendant.

*Action at
Law.*

*Notice of
Appeal.*

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TO GROSKEN & MORIARTY, ESQS.,
Attorneys of Plaintiff.

Sirs:—

Take notice that the defendant appeals to the Court of Errors and Appeals from the whole of the judgment entered in this cause.

Dated November 16, 1916.

M. CASEWELL HEINE,
Attorney for Defendant.

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*Grounds of Appeal.***Grounds of Appeal.**

Filed December 21, 1916.

New Jersey Court of Errors and Appeals

10

 JOHN GAFFNEY,
Plaintiff-Respondent,
vs.
 WILLIAM H. ILLINGWORTH,
Defendant-Appellant.

*Action
at Law.**Grounds
of Appeal.*

The appellant states the following grounds of appeal:

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1. That the Court herein made an Order dated March 23, 1916, setting aside the verdict of \$192.00 in favor of the plaintiff on plaintiff's motion, and ordering a new trial on the question of damages only, with the proviso: "That if the defendant shall pay to the plaintiff the sum of Four Hundred Eighty Dollars and Fifty Cents (\$480.50) within ten days from the date of service of this Order upon him or his attorney, then the plaintiff's rule to show cause shall be discharged."

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2. That the Court refused to strike out the testimony of witness Frank J. Fox, as to the distance of the automobile from the curb on the ground that the accident happened in 1914 and the witness paced off the distance in 1916. (S. M. pp. 8 and 9, Tuesday, February 1, 1916).

3. That the Court refused to strike out witness Frank J. Fox's answer "Good, lively gait,

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Grounds of Appeal.

I cannot judge the speed" (S. M. pp. 9 and 10, Tuesday, February 1, 1916).

4. That the Court denied defendant's motion for a non-suit.

5. That the Court overruled the defendant's counsel's objection to plaintiff's attorney's question directed to the defendant on cross examination: "Did you promise to pay all the doctor bills?" (S. M. pp. 57 and 58, Tuesday, February 1, 1916). **10**

6. That the Court denied defendant's motion for direction of the verdict in favor of the defendant.

Dated December 19, 1916.

M. CASEWELL HEINE,
Attorney for Defendant-Appellant. **20**

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Summons.

Summons.

(Filed January 11, 1915.)

ESSEX COUNTY CIRCUIT COURT.

THE STATE OF NEW JERSEY,

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To WILLIAM H. ILLINGWORTH. You are summoned to answer the annexed complaint of John Gaffney in an action at law in the Essex County Circuit Court. And take notice that

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unless you file your answer to said complaint with the clerk of the said court, at Newark, within twenty days after service upon you of this writ and the annexed complaint, the plaintiff may proceed in the suit and judgment may be entered against you.

WITNESS, FREDERIC ADAMS, Judge of the said court, at Newark, this seventh day of January, 1915.

JOSEPH McDONOUGH,
Clerk.

GROSKEN & MORIARTY,
Attorneys.

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Complaint.

Complaint.

ESSEX COUNTY CIRCUIT COURT.

JOHN GAFFNEY, <div style="text-align: center;"><i>Plaintiff,</i></div> <div style="text-align: center;"><i>vs.</i></div> WILLIAM H. ILLINGWORTH, <div style="text-align: center;"><i>Defendant.</i></div>	}	<i>Action at Law.</i> <i>Complaint.</i>	10
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Plaintiff, John Gaffney, residing at 2 Railroad place, Newark, N. J., says that,

1. On November 19th, 1914, plaintiff was lawfully walking upon and across a public street known as Market street in the City of Newark, N. J., near Railroad place. 20

2. On that day defendant, by his servant, carelessly and negligently operated and ran an automobile in and along said street and thereby ran into and struck down the said plaintiff. Whereby the plaintiff's right ankle was sprained and his right knee so severely bruised that an extravasation of blood through the soft tissue thereof and a swelling of said knee due to the formation of water about the joint was caused, and plaintiff also received severe abrasions on the left knee, his nervous system was severely shocked and he then and there received other painful injuries by reason of being struck down as aforesaid. 30

3. Plaintiff was then a stationary fireman or night engineer, receiving a salary of \$16.50 per week. 40

Complaint.

4. By reason of said injuries, plaintiff has suffered and undergone great pain and in the future will suffer and undergo great pain and was hindered and prevented for a long time from attending to his business and thereby lost his earnings for a long time, and in the future will
10 be hindered and prevented for a long time from attending to his business and thereby lose his earnings for a long time, and has expended large sums of money for medical and surgical attendance and medicine and in the future will be compelled to expend large sums of money for medical and surgical attendance and medicine because of said injuries.

5. Plaintiff demands \$5,000 damages.

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GROSKEN & MORIARTY,
Attorneys for Plaintiff.

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Answer.

Answer.

Filed February 15, 1915.

ESSEX COUNTY CIRCUIT COURT.

JOHN GAFFNEY,

Plaintiff,

vs.

WILLIAM H. ILLINGWORTH,

Defendant.

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*Action
at Law.*

Answer.

Defendant, residing at 477 Mt. Prospect avenue, Newark, New Jersey, says that:

1. He denies each and every allegation contained in the complaint in the above entitled cause.

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DEFENSE:

Defendant avers that the accident alleged in the said complaint was contributed to by the carelessness and negligence of the plaintiff.

M. CASEWELL HEINE,
Attorney for Defendant.

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Replication.

Reply.

(Filed February 23, 1915.)

ESSEX COUNTY CIRCUIT COURT.

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JOHN GAFFNEY,

Plaintiff,

vs.

WILLIAM H. ILLINGWORTH,

Defendant.

*Action
at Law.*

Reply.

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In reply to the answer of the defendant the plaintiff says that he denies that he was guilty of carelessness or contributory negligence.

GROSKEN & MORIARTY,
Attorneys for the Plaintiff.

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*Postea.***Postea.**

ESSEX COUNTY CIRCUIT COURT.

JOHN GAFFNEY, <div style="text-align: right;"><i>Plaintiff,</i></div> <div style="text-align: center;"><i>vs.</i></div> WILLIAM H. ILLINGWORTH, <div style="text-align: right;"><i>Defendant.</i></div>	}	<i>Action at Law.</i> Verdict by a jury.	10
		Judgment for Plaintiff. Amount, \$190.25 Costs, 67.39	
		<hr style="width: 100px; margin-left: auto; margin-right: 0;"/> Total, \$257.64	

Grosken & Moriarty, attorneys of plaintiff.

This action was tried before Judge Nelson Y. Dungan with a jury at the Essex County Circuit Court on November 1, A. D. 1916. 20

The cause having been heard and submitted to the jury, they returned their verdict as follows: They found in favor of the plaintiff, John Gaffney, and assessed the damages against the defendant, William H. Illingworth at the sum of \$190.25.

Whereupon, it is adjudged that the plaintiff recover of the defendant the sum of \$190.25 and costs, which are taxed at the sum of \$67.39, making in the whole the sum of Two Hundred Fifty-seven Dollars and Sixty-four Cents. 30

Judgment entered and signed February 1, 1916.

WILLIAM S. GUMMERE,
Judge.

Certificate of Clerk.

ESSEX COUNTY CIRCUIT COURT.

JOHN GAFFNEY,

Plaintiff,

vs.

WILLIAM H. ILLINGWORTH,

Defendant.

10

I, Joseph McDonough, Clerk of the Essex County Circuit Court, do certify that the foregoing is a true copy of the judgment in the above stated cause as the same remains in my office.

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In testimony whereof, I have hereunto set my hand and the seal of the said court at Newark this 1st day of December, 1916.

JOSEPH McDONOUGH,
Clerk.

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James H. Lowrey, direct.

ESSEX CIRCUIT COURT.

Monday, January 31, 1916.

JOHN GAFFNEY,

Plaintiff,

vs.

WILLIAM H. ILLINGWORTH,

Defendant.

*Action
at Law.*

10

Before Hon. Nelson Y. Dungan, Judge, and
a jury.

Grosken & Moriarity, for plaintiff.

M. Casewell Heine, for defendant.

Mr. Moriarity opens for plaintiff.

20

Mr. Heine opens for defendant.

Mr. Moriarity. May I put Doctor Lowrey
on so he can get away?

The Court. Is there any objection to that?

Mr. Heine. No. I would be glad to ac-
commodate Dr. Lowrey, here, but I would
like to have my own physician here.

JAMES H. LOWREY, sworn in behalf of plain- 30
tiff.

Direct examination by Mr. Moriarity.

Q Doctor, are you a regular licensed physi-
cian in the State of New Jersey? A I am.

Q Where is your office? A 79 Congress
street.

Q Do you remember the 19th day of Novem-
ber, 1914, when Mr. Gaffney was hurt? A I
recall that, something about an accident.

40

James H. Lowrey, direct.

Q Were you called in on that case? A I was.

Q Where did you find Mr. Gaffney? A In Mr. Malloy's saloon.

10 Q Who was there at the time? A Mr. Illingworth, his chauffeur and a policeman, and there was quite a crowd of men in the saloon at the time.

Q Did you have any conversation with Mr. Illingworth? A Mr. Illingworth spoke to me, yes.

Q What did he say?

Mr. Heine. Is Dr. Lowrey a witness of the facts or as to the medical testimony?

The Court. I understood as a medical expert.

20 *Mr. Moriarity.* I also want him to testify as to these facts, just as to the conversation.

Mr. Heine. Then the proper foundation has not been laid.

The Court. If the proper foundation is not laid you may move to strike out, Mr. Heine.

Q Then did you speak to Mr. Illingworth?

30 A I did.

Q And what conversation took place between yourself and Mr. Illingworth?

Mr. Heine. I object to it on the ground that it does not appear how soon after the accident this conversation took place, and I object to it as immaterial, irrelevant and incompetent, and too remote.

The Court. He has said that it was on the day of the accident.

James H. Lowrey, direct.

Witness. It was at the same time, shortly after the accident.

The Court. Suppose you go ahead, first, and find out what the doctor knows about the accident.

Q Where did you find Gaffney? A Sitting in a chair in Mr. Malloy's saloon. 10

Q What was his condition at that time? A He was complaining of his knee feeling bad and his ankle, and he was pretty well shaken up at that time.

Q Were you requested to treat him? A Mr. Illingworth said that I should take care of him and render my bill to him when everything was over.

Q And you did treat him from that time on? A I did treat him, yes. 20

Q What was your diagnosis of the trouble at that time? A As the result of the injury received?

Q Yes. A Suffering a contusion of the right knee, producing water on the knee, as you call it; a sprain of the right ankle, and also, I believe, he had several small abrasions on the left knee, on the skin.

Q (*By the Court.*) By abrasions you mean scratches? A Yes. 30

Q And by contusions you mean bruises? A Several bruises.

Q (*By Mr. Moriarity.*) What was your treatment for that condition? A I had the man go to bed and remain there a number of days, and applied, for a number of days, liquid applications, also an icebag and kept him off his feet entirely until a great deal of the swelling had subsided in the right knee. After that it took about two weeks. 40

James H. Lowrey, direct.

Q (*By the Court.*) Is there a technical name for the condition of water on the knee? A Yes; synovitis, a diffusion of fluid into the joint.

Q (*By Mr. Moriarity.*) Well? A When I applied a plaster cast and left that cast on for a few weeks, removed it, and then put on a very
10 firm, tight bandage; and after that this bandage was removed, in turn, and massage used, applied to the knee. Various liniments were used. Both of the injuries were to the right knee. The other parts healed up very nicely, very quickly. The other abrasions were properly disinfected, and the right ankle was bandaged, and with the cast and the bandaging that healed.

Q Well, that was on the 19th day of November, 1914, that you first saw Mr. Gaffney? A
20 Yes.

Q You continued to treat him down to the time he resumed work? A About that time, off and on.

Q About how long was that? A I believe Mr. Gaffney went to work the early part of March.

Mr. Heine. I object to the recollection of the witness as to this. We will have Mr. Gaffney's own testimony.

30 Q (*By the Court.*) Do you know positively? A Except what Gaffney told me.

Q (*By Mr. Moriarity.*) You did treat him up to the 1st of March? A Off and on up to that time he went to work.

Mr. Heine. I move to strike out that part of the conversation when he went to work.

The Court. Strike it out.

40 Q After that time did you treat him? A Yes, I have treated him off and on since.

James H. Lowrey, direct.

Q What is the amount of your bill? A I believe it is about \$45.

Mr. Heine. I move to strike out that last answer unless the usual testimony with regard to the reasonable value of the services is applied. I do not object to the amount of your bill at all, but to the method of having it go in. 10

Q What is the reasonable value of your services rendered to Mr. Gaffney?

Mr. Heine. I object, unless the services are described in detail, and not on March 1st and since.

By the Court.

Q What services did you render, doctor? A The first few days I made visits to see him, that was \$2 a visit. Then when I applied bandages at his house, that was extra, for the bandage, of my time, and that was \$3. When I applied the plaster cast, I charged \$5. When the man came to my office I charged \$1 in my office, and it amounts to \$45 altogether. 20

Q Were those visits necessary or desirable for this treatment? A The visits were absolutely essential to watch the condition of this thing, whether it was coming on to a condition of supuration or whether it was coming down without complications. 30

Q What have you to say as to the reasonableness of the charge for services rendered? A I think it was reasonable, myself.

By Mr. Moriarity.

Q Doctor, when did you advise Mr. Gaffney to return to work? A That was in March. 40

James H. Lowrey, cross.

Mr. Heine. I object to the form of the question as irrelevant and immaterial.

The Court. Yes; the question is when he was able to and not when he went to work.

Q When was Mr. Gaffney able to go to work?

10 A In March, I think, he was able to go to work.

Q Then, as you said before, he came back afterwards? A He returned after working a while and said the knee still troubled him; he couldn't follow his work.

Mr. Heine. I object.

Cross examination by Mr. Heine.

Q How many visits do all these items of yours cover? A Can I use a little memorandum?

20 Q Yes. Is it a memorandum taken from your books? A Yes. I use cards. This is not a complete memorandum. This is when the accident happened. On the 19th, \$2; 20th, \$2; 21st, \$2; 22d, \$3; \$23d, \$2.

Q Just take the number of days. A Fourteen visits.

Q Between the 9th of November, 1914— A And the 13th of December, 1914.

30 Q And since that date? A Well, it has been four visits up to the 19th of December, 1914; it was visits to Mr. Gaffney's home.

Q (*By the Court.*) How many? A I said fourteen. I believe, since that Mr. Gaffney has come to my office.

Q (*By Mr. Heine.*) And the date of the last visit to your office? A I have not got that on this card. On this card it says "January 16th."

40 Q Was that (indicating) an examination? A No, Dr. Satchwell was there after that.

James H. Lowrey, cross.

Q What was the last day of actual treatment, not examination? A Why, I can not recall that; about the latter end of January, I should imagine, 1915. Dr. Satchwell came after that.

Q You haven't seen him since that except for Dr. Satchwell's examination? A Yes; I saw him in March. 10

Q That was in March, 1915? A Yes.

Q Was that the last time? A That was about the last time, yes.

By Mr. Moriarity.

Q You have seen him later than that for a little boil which appeared? A Yes; I have seen him; not for the original knee condition; but I saw him for an infection of one of the knees, on the same side, about three weeks ago. 20

By Mr. Heine.

Q What was the cause of that infection? A I don't know what the cause was, superficial; it had nothing to do with the internal structure of the knee.

Q Is this condition of synovitis, in his case, one which arose in your opinion, from the accident, or is it chronic and aggravated by the accident? A I think it arose entirely from the accident. 30

Q You think it was traumatic, entirely? A Yes.

Q That is usually more easily removed than a case of chronic synovitis, is it not? A Yes, but they oftentimes become chronic; acute oftentimes becomes chronic.

Q He always has a better chance of recovery from a blow than where they become chronic? A Yes; if it don't become chronic. 40

John Gaffney, direct.

By Mr. Moriarity.

Q Did you notice in your treatment whether his nervous system was affected in any way?

Mr. Heine. I object. The physician has not qualified as a nerve specialist.

10 *The Court.* You are starting on a new line of the medical examination and it is rather irregular.

By the Court.

Q You may answer the question, what you observed with reference to the condition of his nerves? A After receiving the injury—that is, the first thing I am now speaking of—I believe the man did receive a shock. He was very pale and shaky and acted quite nervous at that time.

20 Q (*By Mr. Moriarity.*) He was in bed a good part of the time?

Mr. Heine. I object.

The Court. Objection sustained.

JOHN GAFFNEY, plaintiff, sworn in his own behalf.

Direct examination by Mr. Moriarity.

30 Q Mr. Gaffney, where do you live now? A 20 Railroad place.

Q Where did you live on the 19th day of November, 1914? A No. 2 Railroad place.

Q What were you working at at that time? A Fireman.

Q For whom? A Pell & Sons.

Q Where is their place? A On Herman street, on Herman and Tichenor street.

Q Do you remember the 19th day of November, 1914? A Yes, sir.

John Gaffney, direct.

Q What happened on that day? A When I was going to work that night—

Q What time did you go to work? A Around twenty minutes after 5, around, about twenty minutes after 5, or a little more.

Q Did you leave 2 Railroad place for work?

A Yes, sir.

10

Mr. Heine. I object to counsel leading any more than he has to.

Q Where did you go from there? A Went right straight to Market street.

Q And where in Market street did you go?

A I had to cross over to get a car.

Q Opposite where were you on Market street when you started to cross? A About a short block.

20

Q How near to the Pennsylvania Railroad station was it that you started to cross? Were you opposite the Pennsylvania Railroad station?

A Yes, right opposite.

Q And you started to cross over where? A Yes.

Q Why did you cross the street?

Mr. Heine. I object. That calls for a conclusion of the witness.

30

The Court. Objection overruled.

A I got to cross for to get over to get the car.

Q What car were you going to take? A Springfield avenue car.

Q What happened when you were crossing the street? A I started to cross the street. Just about ten or fifteen feet—around that—I was hit.

Q What hit you? A An automobile.

40

John Gaffney, direct.

Q Before you started to cross the street what did you do? A I looked both sides before I started to cross.

Q Why did you do that? A You have got to do it around there.

10 Q Why did you? A It is because of automobiles. There are lots of them coming all roads at you there.

Q Did you see any other automobile or any other vehicle coming in either direction toward you? A No, sir.

Q What kind of a night was it? A Rainy.

Q (*By the Court.*) Did you have an umbrella? A No.

20 Q (*By Mr. Moriarity.*) How far could you see? A Not very far, about, as I could say, about half a block, I guess.

Q Did you hear any signal? A No, sir.

Q Where did the automobile hit you? A In the back.

Q Then what happened to you? A Then all I know about it it threw me down. I don't know anything more. I was picked up.

Q Did you see Mr. Illingworth that night? A Yes, sir.

30 Q Where did you see him? A I saw him where they took me to, at home, in the house.

Q Did you see his chauffeur? A Yes, sir.

Q What happened after you were thrown by the car? A Why, it threw me; that is all I know.

Q Where did they take you? A They took me back home, to the house.

Q To where? A To No. 2 Railroad place.

40 Q Was it there the doctor attended you? A Yes, sir.

John Gaffney, cross.

Q What did you do after the doctor saw you? A Well, after he explained me, then I went to bed.

Q About how long a period did you remain in bed? A I was in bed; I didn't get up; the doctor was with me the next morning; I couldn't walk on it. 10

Q About how many weeks were you in bed? A I don't know how many weeks.

Q How many weeks were you out of work altogether?

Mr. Heine. I object, if your Honor please.

Q (*By the Court.*) How long were you in bed? A I guess, about four weeks or over. I can not remember now.

Q (*By Mr. Moriarity.*) How long were you out of work altogether? A Nineteen weeks. 20

Q About 19? A Around that.

Q How much did you get a week before you were hurt? A \$16.50.

Q Did you pay anything for medicine and bandages? A Sure.

Q How much? A About \$5 or \$6.

Q Why did you stay away from work 18 or 19 weeks? 30

Mr. Heine. I object.

A Why did I stay away?

Q Yes. A I couldn't go to work; I was not able to work.

Q Why weren't you? A I couldn't walk on my leg; I couldn't walk on it.

Cross examination by Mr. Heine.

Q You went to work some of the 19 weeks, didn't you, Mr. Gaffney? A Yes. 40

John Gaffney, cross.

Q How many weeks did you work during that 19 weeks that you weren't working? A About two weeks.

Q Where did you work at that time? A The same place.

Q Went back to the place? A Yes.

10 Q Do you work at the place now? A No, sir.

Q Where are you working now? A I am not working at the present time.

Q How long have you been out of work? A Two weeks.

Q Who did you work for when you worked last? A Mr. Pell.

Q Why did you leave them two weeks ago? A The party that was there came back.

20 Q And they let you go off? A Yes.

Q They took you right in the automobile and took you down to your house, did they, on the night this happened? A Yes, sir.

Q They put you right in it up there? A Yes, sir, after the doctor—

Q After the doctor looked you over? A Yes, sir.

30 Q Didn't they take you at any time into this saloon over on the other side of the street, where the doctor said he examined you? A Yes, that is the same building where I boarded.

Q In the same building? A In the same building, yes, sir.

Q So that when you say they took you home you mean that he treated you downstairs in the saloon before they took you up to bed? A Yes; I had a room.

Q Did the doctor look at you downstairs in the main room, before he looked at you upstairs?

40 A That is all he done that night.

John Gaffney, cross.

Q The next morning he came up and fixed you up in bed? A Yes.

Q When you were going across the street that night you say you were looking both ways?

A Yes.

Q Where were you standing when you looked both ways? A On the curb.

10

Q What part of the curb? Right on the edge? A Yes. Well, as I stepped out I looked up and down.

Q Where did you come up along Market street? You came from Railroad place? That is from the north or east a little? A That is from the west.

Q Which direction, in relation to the Pennsylvania Railroad, were you coming from? A From the west.

20

Q Can you describe to this jury where the house which you lived in at 2 Railroad place is in relation to where the Pennsylvania Railroad main line runs through there? A It is a block and a half.

Q A block and a half which way? Toward New York or toward Elizabeth? A From the railroad.

Q From the railroad? A It is only the very width of the street from the railroad.

30

Q It is on the other side of the railroad track, isn't it? A No, sir; on this side.

Q This side? Where does it begin? A Railroad place?

Q Yes. Where does it begin? A It begins at River street—Canal street—River and Canal.

Q And runs up this (indicating) way, how far? A It is only a block.

Q What I want to get at is, from that point of Market street that you were at when you

40

John Gaffney, cross.

started to cross, do you know where the runway run in from the Adams Express Company, to the west, just before you get to the Pennsylvania station? A Yes.

Q You know where the runway comes in at the west end of the station? A Yes.

10 Q Where, on the other side of Market street, were you, in relation to this runway?

The Court. That is Alling street, from Market street in to the express company's office?

Witness. Yes.

Q (Continuing.) You were further down toward the track, on the north side of Market street? A Yes.

20 Q How far down toward the railroad were you when you started to cross?

Q (*By the Court.*) Railroad place runs from Market street to the canal, or River street? A Yes.

Q Runs right down along the Pennsylvania Railroad, doesn't it? A Yes.

Q On the side toward Broad street—on this (indicating) side? A Yes.

Q Just two blocks long, isn't it? A It is only about a long block.

30 Q But Commerce street is in between, isn't it? A Yes.

Q The first street that you come to after leaving Market street is Commerce street? A Yes.

Q The next street is River street or Canal? A Railroad place is the next street when you cross Commerce street.

Q Isn't that all Railroad place all the way from Market street down to River street? A
40 Market street runs around to Commerce street.

John Gaffney, cross.

Mr. Heine. May we not have a map of the district?

The Court. I have one here. It is not large enough for the jury to see, but you may use it if you wish. Suppose you draw Market street there on the blackboard from this map. Begin with Market street and the Pennsylvania Railroad. 10

(Mr. Moriarity proceeds to draw a sketch on the blackboard from the court's map.)

Q (*By Mr. Moriarity.*) So it was about at that (indicating) point anyway, whether we call it Market street or Railroad place—we will say it is the railroad station, over here (indicating) running up this way—so it was about here?

Mr. Heine. I object. Counsel can not testify. 20

Q (*By Mr. Heine.*) Now, where were you at the time when you started to Railroad place? You walked down along this (indicating) part of the street here? A Yes.

Q Will you indicate, please, where you stepped on the curb stone, of the curbing and looked up and down Market street? A Right around here, a little; around up from there.

The Court. Indicating the point marked X. 30

Q This place, on the corner? A A little bit around from the corner.

Q Right there (indicating)? A Yes.

Q That is where you stopped and looked up and down Market street? A Yes, sir, as far as I know of.

Q What part of the Pennsylvania Railroad or Adams Express Company's runway is that?

A Opposite the station. 40

John Gaffney, cross.

Q When you are opposite the station you are on Railroad place, are you? A You are on Market.

Q Why didn't you see this automobile that hit you? A I didn't see it.

10 Q Why didn't you, if you looked? A I looked and I didn't see it.

Q (*By the Court.*) Can you indicate on that map the direction that you were going when you were hit? A Yes.

Q (*By Mr. Heine.*) Just take that pointer and indicate the direction you were going when you were hit? A This (indicating) is the way I started to cross Market street.

Q That (indicating) is where you looked? A Yes.

20 Q Then you started straight across? A I started right across to the depot.

Q Where were you when you were hit? About ten or fifteen feet, you say? A Yes.

Q Going in this (indicating) direction? A Going straight ahead.

Q Going this (indicating) way or toward the east? A Right straight across to the depot.

30 Q How far were you when you were at that place away from the corner of Railroad place, away from this (indicating) corner, where the street comes around?

Mr. Moriarity. There is no corner there. It is just on the curve there.

Q How far were you away from where that curve begins? A About ten feet, I guess; maybe a little more than that; I couldn't say.

Q What would be your best estimate? A About ten feet, around there, or more.

40 Q Where the curve begins? A Yes.

John Gaffney, cross.

The Court. The curve begins away up between Exchange alley and Alling street.

Q When you were standing there on the street, in this direction, around into Railroad place, could you see? A Not that far.

Q Well, how far? A About half a block.

Q Could you see half way to Commerce street? A About half way to Commerce street. 10

Q And how many feet would that be, around Commerce street there, all the way around? A This much (indicating).

Q How long a block is it? One hundred feet? Two hundred feet? A It is a short block.

Q How far would you estimate the distance to be that you could see around there when you say that you could see half way to Commerce street? A About one hundred feet, I guess; maybe more. 20

Q In that one hundred feet could you see the roadway there? Would you have seen any vehicle coming in either direction? A Yes; you could see it.

Q Was it very misty or not? A Not so very misty; it was raining.

Q That made it a little clearer? A Yes.

Q You could see at least one hundred feet? A About that, I guess. 30

Q When you looked, did you look first in the direction of Railroad place or did you look west on Market street? A I looked both ways.

Q But you didn't look both ways at the same time? Which way first? A I looked up Market street first.

Q You didn't see anything up there? A No. 40

John Gaffney, cross.

Q How far could you see up Market street?

A I could see over one hundred feet up there; I could see a good block up there.

Q There are more lights on Market street, too? A Yes.

10 Q Do you know how the lights are on Railroad place? A Yes; there is a light around at Commerce street.

Q It is just as light on Railroad place or Market street up to Commerce street, as it is west on Market street, isn't it, in that plaza? It is on the public square there. Isn't that just as light as it is on Market street? A Yes, but I was on Market street.

20 Q When you looked up Railroad place way it was just as light for you to see as it was when you were looking in the other direction? A It was as light but that was a curve comes around; couldn't see as clear with the curve crossing there.

Q You couldn't see as clear around? A No.

Q How far away from you was the automobile when you first saw it, before it hit you?

A I didn't see it before it hit me.

30 Q How many steps did you take in from the curbstone like this (illustrating) before it hit you? A I couldn't say how many steps I guess it was about ten or fifteen feet from the curb.

Q You take about two feet or two and a half feet to a step? A About two feet, I guess.

Q You took four or five steps, I guess? A I think about two feet to a step.

Q How many steps did you take? A I couldn't say how many steps.

40 Q How do you figure then how far you were from the curbstone when you were hit, if

John Gaffney, cross.

you don't know anything about the distance at all after you were struck, after you picked yourself up? A I just thought about the looks of it, where it was. I know where it hit me.

Q When the car hit you how far did it throw you? A It threw me about ten feet or over.

Q The car didn't go over you at all? A No, 10
sir; it threw me off the street.

Q It threw you ahead of it and then stopped behind you? A No, sir; it was right opposite me when I seen it, when I was picked up; I don't know anything else.

Q I understand that. But the point I am getting at was, when you were hit and thrown forward you were going along, not thinking very much of anything, and the car came along, and it didn't run over you, did it? A It hit 20
me and threwed me.

Q But after it hit you the machine didn't run over you, did it? A It didn't go through me; it was right up against me when I seen it.

Q When you came to rest on the sidewalk the automobile was right beside you, stopped? A Yes.

Q It was still behind you, though? A Yes.

Q When you got up— A The officer picked 30
me up.

Q Was this automobile, when it was stopped, after you had stopped—was it nearer to the north side or the south side of Market street? A It was nearer to the south side.

Q Nearer to the south side, that is, over by the Railroad station? A No.

Q On the north side? A On the north side.

Q How far over from that north curve— you know the one I mean, the one away from the railroad station—was that automobile, was 40

John Gaffney, cross.

the right side of the automobile, as it was stopped, after hitting you? A I couldn't say.

Q Can you estimate? In your best judgment, I don't mean you to give it to me in inches.

10 Q (*By Mr. Moriarity.*) You were carried away about that time, weren't you? A Yes; I didn't take notice of this.

Q (*By Mr. Heine.*) Can you figure how far away from the north curve the right side of that automobile was when it was stopped, when you were picked up, when the policeman picked you up? A No.

Q How far away from the curb were you when the officer picked you up? A I guess about ten feet, ten or fifteen feet.

20 Q Do you know which side of this automobile hit you? A It hit me in the back.

Q I don't mean which side of you, which side of the automobile hit you? A I don't know which side it was hit me.

Q Do you know whether the left side, or the right side of the front, or the middle of the front, hit you, when it struck you? A It must have been—I don't know.

30 Q You don't know anything about that? A Which side of it hit me?

Q Well, did you tell your counsel, in answer to questions which we gave to you, that the left side of the front of the automobile hit you? Did you ever tell that to your counsel? A I don't know if I did; I don't remember if I did; I don't think that.

40 Q Where did your counsel get the information from that the left front of this automobile hit you? A From the witness, I guess.

John Gaffney, cross.

Mr. Moriarity. I object to the form of the question, asking where we got the information from.

The Court. He may not know where his counsel got it from. You can ask him if he told his counsel.

Q Did you ever tell your counsel that the left front side of this automobile hit you? A No, sir; I didn't know which side of it it was hit me. 19

Q Did you sign interrogatories and swear to the interrogatories in this case? (No response.)

Q I show you a paper, is that your signature, Mr. Gaffney? A Yes, sir.

Q Did you make an affidavit in this case? (Reads.) "John Gaffney, of full age, being duly sworn, on his oath says, that he is the plaintiff in the suit in which the foregoing answers to the said interrogatories are made, and that the facts set out in the said answers and that the statements made therein are the truth, to the best of his knowledge and belief." 20

Q Do you remember swearing to that? A Yes, sir.

Q Before Mr. Tyack? A Yes, sir. 30

Q William Tyack, Junior? A Yes, sir.

Q When you swore to that did you know anything about interrogatory number 13, where the question asked was, "By what part or parts, of the said automobile, was plaintiff struck?" and your answer was, "By the left front of said automobile." A I cannot say which, whether it was the front—

Q So that when you swore to this you were mistaken as to this particular question? A 40

John Gaffney, cross.

Well, it was the front, anyhow, that hit me, that is all.

Q What confuses me—I couldn't understand how you would know what hit you, if you were hit from behind. I couldn't understand, unless you were looking backwards, how you could tell
10 that you were hit by the left front. Now, this machine was nearer to the left curbstone than you were when you were lying on the curbstone. Was it closer in to the curb than you were? A I couldn't say; I couldn't answer on that.

Q After you were thrown and hit the pavement you were lying in nearer to the curbstone, or further away from the curbstone, I mean—that is, the north curb—than you were
20 when you were struck? A I couldn't say.

Q Did it throw you nearer to or further away from the curb? A I couldn't say, because I didn't know anything when I was thrown; I didn't take notice of anything.

Q You tell me, you were 15 feet away from the curbstone when the officer picked you up?
A Yes.

Q Weren't you able to figure out whether the automobile was nearer to the curb than when
30 you were picked up? A I was alongside the front of the automobile.

Q Which side were you, alongside the north or south side of the automobile—that is, the right or left, as it stood there in the roadway?
A I was on the left side.

Q That is nearer the Pennsylvania station?
A Yes.

Q So that you were further out after you were picked up than you were at the time you were struck? A Yes.
40

John Gaffney, cross.

Q And when you were picked up you were about 10 or 15 feet from the curbstone when the officer helped you? A Yes.

Q Weren't you closer than that to the curbstone? A I couldn't say.

Q Didn't you just estimate the distance that you were, from the curbstone, when you were picked up, at 10 or 15 feet? A Yes; but I cannot tell about the automobile. 10

Q But you are sure about this, that you were 10 or 15 feet away when you were picked up? A I think about that.

Q That would be your best judgment? A That is all I could say, yes.

Q When you looked up Market street that night to the west didn't you see any other vehicles or cars coming down there? A No; there was nothing at the time. 20

Q There was nothing in the street in sight? A No, nothing in sight.

Q Now, you looked up Market street. You said you could see a good deal further than you could look around the curve. Did you look up Market street? Did you see a car or vehicle of any kind in Market street? A Yes; I could see cars and all in Market street.

Q Where were the cars? A On the other side of the street. 30

Q Did you see a car there? A You could see all cars on the other side of the street.

Q Where was the nearest car? A On the other side of the street.

Q Right opposite you? A Yes, that is where you have to get the car.

Q Did you see a car out on Market street there, opposite you, or off away to the west?

A Yes, I see the cars coming down. 40

John Gaffney, cross.

Q Where was the nearest car? How far away from you? A On the other side of the street, right at the back.

Q Right opposite to you? A Yes.

Q Standing there still? A Some of them; more going ahead.

10 Q How many cars were going through there?
A I couldn't say.

Q Were there cars coming to the station there? Were there some on the inside track?

A Yes.

Q Were there some on the main track going on through to Ferry street? A It was on the main track I took notice, and I couldn't tell you how many there were on there.

20 Q What is your best recollection as to the number of cars that were standing right opposite when you stood there and looked? A I couldn't tell you; maybe two or three.

Q Were there any cars coming around the loop? A I didn't see any at that time.

Q How far away was the nearest car to the west end, then, on Market street? A About 100 feet, I guess.

Mr. Heine. What is the next street up there?

30 *The Court.* After Alling street?

Q Is that Alling? A No; Railroad place is standing right on top.

Q I mean to the west? A Allen street.

Q After Alling, Lawrence? A Yes.

Q Was the nearest car that you saw on Market street east or west of Lawrence? A It was east.

40 Q About 100 feet away from you? A Yes, I guess about that; maybe more.

John Gaffney, cross.

Q Outside of cars did you see any other vehicle on Market street, to the west? Was there any wagon or automobile? A I didn't see anything on the other side when I started to go across.

Q Except cars? A Except cars coming across.

10

Q Couldn't you, as you looked down Market street from that point—couldn't you see a wagon or automobile? Not a single vehicle in the roadway? A Sure, yes.

Q You could? Well, were there any there that night? A No things there at that time.

Q There wasn't a single automobile or wagon in sight, looking west on Market street? A I didn't see any on the other side.

Q There wasn't a single one in sight? A Not at that time, no.

20

Q Looking the other way did you see any vehicles other than cars under the railroad bridge or on down Market street, east? A I wasn't looking that way; I didn't see anything there.

Q When you were looking east do you mean to tell me you didn't look toward the railroad bridge, toward the junction at Market street?

A You couldn't see under that bridge unless you were over against it.

30

Q But you looked toward the bridge? A Yes.

Q This was after you looked west that you looked under the bridge? A Yes.

Q While you were looking around this curve you looked also toward the railroad bridge? A I looked around the curve after I looked up Market street. I looked around the curve and then I saw nothing and I started to go over.

40

John Gaffney, cross.

Q After you looked around the curve did you look over toward the railroad bridge? A Yes, I was watching both sides of me, then, across there.

Q Just about as you stepped out you got this blow from behind—just after you stepped out? A I was going west—I think I was about ten or fifteen feet over, that is what I think I was, then.

Q Do you figure that out, that you were 10 or 15 feet away from the curbstone when you were hit, by the place you were when you were picked up afterwards, or do you know exactly where you were? A I think it was about 15 feet from the curb.

Q But you are more certain about where you were when the officer helped you up than you are about exactly the moment you were hit? A I was thinking about the way he threw me. He threw me right toward the west from where he hit me.

Q But you know where you were picked up by the officer? You were 10 or 15 feet from the curb? A I think so; I think it was about 10 or 15 feet away from it when I was hit; he threw me straight up.

Q You are certain about where you were when helped up by the officer, that you were 10 or 15 feet away when picked up? A I guess so.

Q You figure out from that, that since he threw you right forward you must have been about ten or fifteen feet away from the curb when you were hit?

The Court. I do not think the statement of the witness justifies that assumption, Mr. Heine.

John Gaffney, cross.

Q So that your recollection is more clear as to where you were when you were helped up by the officers than it is as to where you were when you were struck? A That is all I can go by.

Q That is how you figure it up? A Yes.

Q Because you weren't looking and weren't expecting to be hit, were you? A No, sir. 10

Q You weren't paying any particular attention to what part of the street you were on before you were hit, were you? A I was going right straight across.

Q You weren't measuring how far you could get, from the curbstone, as you walked along, were you? (No response.) You weren't keeping track how far away from the curbstone you were before you were hit? A I guess it was about that far off. 20

Q But you weren't keeping any particular track of how far you were away from the curbstone? Your object was to get across the street and get on a trolley car? A Yes.

Q So you weren't keeping any particular eye on the distance that you were keeping away from that other curb just before you were hit?

A Not particular—

Q You might have been nearer or further away than 10 or 15 feet, is that the idea? A Yes. 30

Q The way you figure it is by figuring back from where you were when you were picked up? A Yes.

Q Did you have your collar up and hat pulled down to keep the rain away from your face? A No, sir; I had nothing but a derby hat on.

Q Which way was the rain coming; from which direction? A I couldn't say. 40

John Gaffney, cross.

Q Was it a northeast storm or a northwest storm? A I couldn't say which way the rain was coming from.

Q Couldn't you tell, when you were walking south on Railroad place or that junction of Market street—can't you tell whether the rain was at your face or back? A I think it was westerly.

Q A westerly storm? A Yes.

Q That is the rain would be coming in your face as you turned into Market street? A Yes.

Q As you were crossing the street did you try to avoid the rain in your face by pulling your cap down or holding your head sideways against the rain? A No, sir; it wasn't so bad as that; it wasn't raining so bad as that.

20 Q Wasn't it a driving hard storm? A Not so very hard, no, sir.

Q You said there were about three cars standing opposite to you, is that the estimate? I want to be correct. A Yes, about three.

Q Did any of those cars start to come around the loop while you were looking? A Yes.

Q None of them started around the loop. Are you sure? Can you be sure whether there was not a car on the loop? That loop at the east end, the one which turns around on that loop, at the east side of it, when you were looking? A There might be, up further.

Q I don't mean under the bridge, I mean coming around the loop there, at the east end of that loop there, were there any cars coming around there? A Not at that time.

Q Was there any car turning in from the main track into that loop track inside the station? A Not that I saw.

John Gaffney, cross.

Q What car were you going to take? Any car on Market street? A The Springfield avenue car.

Q Which way were you going to go, east or west? A East.

Q Those cars stop on the main track? A Yes. 10

Q Was there a Springfield avenue car on that track opposite to you, there, where you started to cross? A No, sir; there was none there, then; I don't think so.

Q Were you able to look and see, before you started to cross, that there wasn't a Springfield avenue car standing there? A I didn't see whether there was a Springfield there or not; I couldn't tell what there was.

Q Couldn't you see from the side you were on whether the sign "Springfield avenue" was up on the side of the car? A I could, but I would want to be half-ways across the street before I could see it. 20

Q Were you walking in the direction of these standing cars or were you walking straight across? A Straight across.

Q About into Alling street? A Right straight in front of the depot.

Q You know what I mean by Alling street, that comes out in front of the Adams Express Company? A Yes. 30

Q You were east of that? A Yes.

Q What part of the depot were you opposite when you started to cross? A Right opposite.

Q Opposite the main building? A Yes, pretty near.

Adjourned to Tuesday, February 1, 1916,
at 10 o'clock. 40

John Gaffney, cross.

SECOND DAY.

Tuesday, February 1, 1916.

Met pursuant to adjournment.

Present, counsel as before stated.

10 JOHN GAFFNEY resumes the stand.

Further cross examination by Mr. Heine.

Q Are you married? A No, sir.

Q Never been married? A Yes, sir.

Q Wife died? A Yes, sir.

Q How long ago did she die? A About three years.

Q That would be in 1913, about a year before this accident? A Yes, sir.

20 Q How long had you been living over this Malloy's saloon in 20 Railroad avenue?

The Court. 2 Railroad place.

A I guess January six months at that time, I think, as near as I can go.

Q You voted from there? A No, sir.

Q Never have voted from there. Have you voted from that place since? A No, sir, I have not.

30 Q Did you vote last election? A No, sir.

Q Register? A No, sir.

Q Never signed anybody's petition for any office down there? A No, sir.

Q Did you take your meals there, any meals served? A Yes, sir.

Q Had you had your supper there that night? A Yes, sir.

Q Before you left? A Yes, sir.

40 Q Did you take a drink that night before you left? A Drink of coffee, that is all.

John Gaffney, cross.

Q You didn't have a highball or glass of whiskey or anything like that before you left, a rainy night like that? A No, I just got out of bed.

By Mr. Moriarity.

Q Mr. Gaffney, on cross examination by Mr. Heine you said that you didn't see what part of the automobile hit you? A No, sir. 10

Q That is right? A Yes, sir.

Q Do you remember the time these interrogatories were served? Do you remember the time I sent for you to come to the office to answer questions to interrogatories which Mr. Heine had served on me? You remember the time? A I remember the time, but I can't tell you the date.

Q I don't want to know the date. Do you remember coming there with your witnesses? A Yes, sir. 20

Q You remember signing this paper, didn't you? A Yes, sir.

Q Can you tell me or explain in any way how you came to say in here when asked what part hit you and not what part did you see hit you, but what part hit you? Can you explain how that answer came in there, "The left front side?" A I don't know. I can't say, only the way I was thrown, only the way I could go on that. 30

Q Did anybody tell you what side hit you, any of your witnesses? A Yes, I have heard that the left side.

Mr. Heine. I move to strike out what the witness told him.

The Court. It explains the statement in the interrogatories. 40

Frank J. Cox, direct.

Q Do you know which witness told you that?

The Court. That is not the point. The only purpose that could possibly have is to explain why he should make such an answer in the interrogatories.

By a Juror.

10

Q I would like to ask the witness if he could tell us whether there was any signal given by the driver of that automobile?

The Court. He has already said he did not hear any.

Mr. Moriarity. Because there was some confusion of location of streets. I think this helps here and I think it will be of some help to us if Mr. Heine will consent to let it go in, plate No. 1.

20

The Court. It may be used for the purpose of illustration.

FRANK J. COX, sworn for the plaintiff.

Direct examination by Mr. Moriarity.

Q Mr. Cox, do you know Mr. Gaffney? A Yes, sir.

Q How long have you known him? A About
30 three years, I guess, not personally.

Q Where do you live now? A 323 Market street.

Q What is your business? A I am a rubber worker by trade.

Q Do you remember the 19th of November, 1914? A I don't remember the date.

Q Do you remember the night that Gaffney was hit? A Yes, sir.

Q Will you tell us what you saw on that
40 night? A Well, I tell you. I stood in front

Frank J. Cox, direct.

of 351 Market street waiting for the storm to get over so I could go up to the lodging-house and when I stood there this automobile came around the corner, and I said to a friend of mine—

Mr. Heine. I object to what he said to his friend. 10

The Court. Just what you saw.

Mr. Moriarity. That is part of the *res gestae*.

The Court. I presume from that you desire an exception noted to the ruling of the Court.

Mr. Moriarity. Yes.

The Court. Exception may be noted.

By the Court. 20

Q Just what you saw? A I stood in front of 351 Market street and I seen this automobile coming around the corner. And I said, "Jim, there is going to be—"

Mr. Heine. I object to what he said.

The Court. That will be stricken out.

Q You saw the automobile come around the corner. What next did you see? 30

By Mr. Moriarity.

Q How was the automobile coming around the corner? A It was swinging around into Market street.

By the Court.

Q In which direction? A It was going, when it comes around the corner it was going up Market street. 40

Frank J. Cox, direct.

Q Coming out of what street? A It was on Market street there because Market street ends there at the corner of Commerce street.

Q It was coming from Commerce street? A No, sir, it was around the corner. Market street ends at Commerce.

10 Q Was it coming from Commerce street? A It was coming towards the depot.

Q Then it was coming away from Commerce street? A Yes, sir.

By Mr. Moriarity.

Q Was it coming fast or slow? A I can't judge the speed of it. It was going a good gait.

Q Did you see Gaffney? A I didn't see him until after I heard some of them holler, "Somebody is going to get killed," or something like that.

20 *Mr. Heine.* I object to what somebody hollered and ask that it be stricken out.

The Court. It will be stricken out.

Exception noted.

By the Court.

Q Did you see Mr. Gaffney struck? A I didn't see him struck. He got hit on the left side of the machine and the right side was towards me.

30

Mr. Heine. I move to strike out he was on the left side. The witness has stated he didn't see Gaffney hit.

The Court. The answer will stand he did not see him hit. The machine was between him and the man.

Mr. Heine. The portion that he was hit on the left side will be stricken out.

40 *The Court.* Yes.

Frank J. Cox, direct.

By Mr. Moriarity.

Q After the accident what happened? A After the accident I can't tell you. I was so excited myself I don't remember that.

By the Court.

Q Did you see Mr. Gaffney before he was struck? A No, sir. 10

Q You didn't see him at all before he was struck? A No, sir.

Q How soon after he was struck did you see him? A It was right opposite. I couldn't see him because the machine stopped me from seeing him get hit, because he was on the opposite side of the machine from me.

Q After the collision did you walk over towards the machine? A I walked over and I walked right away again, because I thought the man was killed. 20

Mr. Heine. What the witness thought I move to strike out, that part of his answer.

The Court. It will be stricken out.

Q Did you see him there, did you see Gaffney there? A I saw a man standing there. I can't swear who it was.

Q About how far away was that from the curb? 30

Mr. Heine. I object to that.

Q How far was the machine away from the curb? A I can't come right down to the measurement of it, but I paced it off and I went ten paces. I should judge it was about 18 or 20 feet, yes, sir.

Frank J. Cox, direct.

By Mr. Moriarity.

Q When did you pace that off? A I paced it off last night.

10 *Mr. Heine.* I move to strike that out on the ground that this accident happened in 1914. A man can't pace off in 1916 with any accuracy that is worth anything.

By the Court.

Q In pacing to what point did you pace? A I paced from the curb.

20 Q To what point, when you paced it last night to what point did you pace it? A To the point where the machine stopped, from the curb to where the accident happened at. I paced off ten paces and I should judge it would be about 18 or 20 feet.

Q You remember exactly where it did happen? A Yes, sir.

The Court. I think that will stand.

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

(Exception noted as ground of appeal.)

By Mr. Moriarity.

30 Q Will you give the jury some impression of the rate of speed at which the automobile was traveling?

Mr. Heine. I object to that on the ground this witness's impression is not proper evidence.

By the Court.

40 Q Do you know the rate of speed? A I can't express myself to any rate of speed, but I know he was going a good lively gait.

Frank J. Cox, direct.

Mr. Heine. I object to the witness answering this question. He said he couldn't judge. I move to strike out, "Good gait," as a conclusion of the witness and on the ground that this witness said he could not judge.

Q What do you mean by a good gait? It was going fast or slow or moderate gait? A Good lively gait. I can't judge the speed. 10

Mr. Heine. I move to have that stricken out.

The Court. It may remain.

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

Exception noted as ground of appeal.

Q Did the driver of the automobile sound the horn? A I didn't hear any. 20

By Mr. Moriarity.

Q Did the car stop as soon as it struck Gaffney?

Mr. Heine. I object to that as leading.

The Court. How soon did it stop?

Q How soon did the car stop? A He stopped as soon as he could, but it slid as soon as it hit the asphalt. 30

Q How far did it slide? A I should judge about 7 or 8 feet.

Q After it hit the asphalt? A Yes, sir.

Q Will you just give a description as near as you can of the car? A Well, a canopy top machine as far as I know or as far as I can express myself.

Q Did it have any curtains on it? A I think there was a storm curtain in front and 40

Frank J. Cox, cross.

an ising glass in front of that. It was stormy and he had it all closed in.

Q Did you hear any signal? A No, sir.

Cross examination by Mr. Heine.

10 Q You walked out and saw this man lying in the street and went right away? A I was so excited and I thought the man was hurt.

Q You went away? A Certainly I went back.

Q Where did you go? A 351 Market street.

Q Did you stand right there then? A Yes, I stood there until he was taken away.

Q How long did you stand there? A Stood there ten or fifteen minutes.

20 Q Did the automobile stand out in the street and that man lie in the street that ten or fifteen minutes? A No, he was taken away.

Q Who took him away? A The automobile took him away.

Q Did you ever see the automobile again after that time? A No, sir.

Q When you went back and stood on the curbstone you were nearer to Commerce street than the automobile was? A I was on Market street.

30 Q You were nearer towards the direction of Commerce street, you were back towards Commerce street? A No, I was on Market street and I crossed on back to Market street.

Q You were standing east of the automobile when you were standing on the curb? A I was standing back by the house.

Q When you walked back onto the sidewalk the automobile, you said, slid 6 or 7 feet? A Yes, sir.

40 Q When you walked up you walked behind it? A I walked around to see if the man was

Frank J. Cox, cross.

hurt badly and when I seen the condition he was in I walked away.

Q When you walked back the automobile was further up Market street than you were? A Yes, sir.

Q Do you remember seeing that automobile since? A No, sir. 10

Q When it passed you that night on the street you were standing on the curb? A I was standing on the doorway waiting for the rain to go over so I could go to the lodging-house.

Q You were not paying any particular attention to the automobile? A I couldn't help to see it when it came around the corner. This is not a corner, it is a bend.

Q You were just watching as it came around the bend? A I couldn't help seeing it. 20

Q But you didn't pay any particular attention to it? A Not any particular attention, no, sir.

Q Not any more than you would to a wagon driving around? A Certainly, no, sir.

Q Just noticed it? A Yes, sir.

Q Did you notice whether the horn was on the left side or right side of that automobile? A I didn't take particular notice of that. 30

By the Court.

Q On which side did the driver sit or don't you know? A I can't swear to that.

By Mr. Heine.

Q Did you notice whether there was a driver in the car as it passed you? A There was a driver there. 40

Frank J. Cox, cross.

Q Where was he, on which side? A I can't swear to that.

Q Do you know whether there was a tool box on the side next to you as it passed you? A I didn't take notice.

Q Didn't notice that? A No, sir.

10 Q Did you notice whether there were any side curtains on the automobile on the side next to you as it passed you? A I can't say.

Q But you are sure there was a curtain up in the front? A There was a curtain in the front, storm curtain.

Q You are also sure there was isinglass in that curtain? A Yes, sir.

Q You can't remember anything about the sides as to curtains? A No, I can't.

20 Q The only thing that you can remember about that automobile is that they had a curtain up in front? A The curtain in front.

Q That is the main thing that impressed your mind? A To protect the driver.

Q You were not around in front of that automobile after the accident? A I didn't go in front of the automobile.

Q You went back of the car to go back? A I went over to the sidewalk.

30 Q Did you notice whether there was any tires strapped to the back or to the side of the car? A I can't say to that.

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

Q How is it you are able to remember so particularly about this curtain in front and can't remember anything else about that automobile? A Because, after the man was hit he had to take the curtain down to get out.

40 Q Did you look for the curtain in front or did somebody tell you about it? A Nobody told me.

Frank J. Cox, cross.

Q Did you ever have any conversation with Mr. Grosken or Mr. Moriarity about this accident? A I talked to him last night.

Q Did you ever have any talk with him before that? A Yes, sir.

Q When? A The night of the accident.

Q Where did you talk to him last night? A 10
Talked to him down there, showed him where the accident happened.

Q Were you in Malloy's place last night? A Yes, sir.

Q Talking to Malloy? A Yes, sir.

Q Talking to him about the accident? A I generally do a little extra work around there.

Q Malloy is a friend of yours? A Not particularly.

Q You don't room there in that place over Malloy's? A No, sir, I room 323 Market street. 20

Q Was Mr. Grosken down with you to Mr. Malloy's? A No, sir.

Q Or was it Mr. Moriarity? A Mr. Moriarity and I was on Market street and I showed him where the accident was, but he wasn't in Malloy's with me.

Q Where did you talk to him then? A This was in Mr. Malloy's, 2 Railroad place.

Q Did Mr. Malloy introduce you to Mr. Moriarity? A No, sir. 30

Q Who introduced you to Mr. Moriarity? A I was in there at the time they came in. I went over there and I got in conversation with him.

Q At the time he came in, you mean the night of the accident? A Yes, sir, the night of the accident.

Q Then you went to Malloy's place after they took Gaffney in there? A Yes, sir.

Q How soon after that were you introduced to Mr. Moriarity? A I can't judge the time. 40

Frank J. Cox, cross.

Q Was it the same night? A The same night, yes, sir.

Q Was he in there that night? A Yes, sir.

Q Was he there when you went in or did Mr. Malloy send for him? A I can't say about that.

10 Q Was he there when you went in? A I was in there sitting down.

Q Was Mr. Moriarity in there? A He came in afterwards.

Q You didn't know whether Malloy sent for him or not? A I do not.

Q Did you talk to him about the accident, did you take him out that night and show him where it was? A Not that night.

20 Q Did you tell him anything about this front curtain that night? A I think I did, yes, sir, to the best of my knowledge.

Q After this car passed you how far did it travel before it stopped altogether? A I should judge about 6 or 7 feet.

Q Then it stopped, the pavement was slippery that night, wasn't it? A Yes, sir, it was raining.

30 Q The horn might have been blown and you not heard it? A It might have been. I can't swear to it but I didn't hear it.

Q You can't swear on your oath that he didn't blow that horn? A I didn't hear it.

By Mr. Moriarity.

Q Are you sure it was the night of the accident I went down to see you? A I think it was, I ain't positive but I think so.

Thomas Mullaney, direct-cross.

THOMAS MULLANEY, sworn for the plaintiff.

Direct examination by Mr. Moriarity.

Q Where do you live? A Ward street, 18 Ward street.

Q What is your business? A Brass polisher. 10

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

Q Where were you standing? A Standing in the same place, 351 Market street.

Q Is that 351? A Yes, sir.

Q Did you see the accident? A Yes, sir.

Q Will you tell us what happened? A Well, I was standing there, I didn't see anything until the automobile hit Mr. Gaffney. I didn't see it until it hit him. When it hit him it threw him on his face, as far as I could see. 20

Q About how far was the automobile from the curb when it hit Gaffney? A I judge about 15 or 16 feet.

Q How far did it go after it hit Gaffney? A That I can't say. It slid along, I don't how far it went.

Q Did you hear any signal? A No, sir, I did not. 30

Cross examination by Mr. Heine.

Q Did you see the automobile come in contact with Mr. Gaffney? A No, sir, I didn't see it until the man was hit.

Q After he was laying on the street you saw him? A When he was hit I saw the automobile.

Q Did you see the automobile hit him? A Yes, sir.

Q You didn't see the automobile until it did hit him? A No, sir, I did not. 40

Thomas Mullaney, cross.

By the Court.

Q What part of the automobile hit him? A It was on the left hand side of the automobile he got hit.

Q Left hand corner of the front or side? A
10 The front of it.

By Mr. Heine.

Q What were you doing on the corner there or on the bend? A I was in there getting a drink in Sam Shapiro's saloon. I was going out and I thought it was raining, best to go home and I stood in the doorway.

Q That is right on the corner of the bend next to Market street there? A Not exactly
20 on the corner, no, sir.

Q Where is it, around towards Commerce street more? A No, on Market street.

Q You were in the doorway there? A Yes, sir.

Q Were you looking right straight out across Market street? A Yes, sir.

Q Did you see any automobile go by? A
No, sir.

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

Q What attracted your attention to the automobile when it hit Mr. Gaffney? A I seen the man walking across the street. I didn't see nothing until I see the automobile hit him.

Q Where was the man walking across the street? A Market street.

Q How far from the point, the corner of the point, how far away from that was he when he was walking in the street? A I can't judge. It
40 must have been 85 feet, 75 feet.

Thomas Mullaney, cross.

By the Court.

Q How far was he from the curb? A About 15 feet, I judge, or more, I don't know. I never measured it.

By Mr. Heine.

Q When you first saw the man walking away was he on the sidewalk or in the street? 10
A On the sidewalk.

Q Did he keep walking right along off the sidewalk out into the street? A He kept right on the sidewalk, he kept right on going on the sidewalk.

Q How far along on the sidewalk did he walk? A About 10 feet. I never measured it.

Q On the sidewalk? A Yes, sir.

Q You understand what I mean. He was walking on the sidewalk about 16 feet while you were looking at him? A Yes, sir. 20

Q And then did you see him go up the sidewalk into the street? A No, sir.

Q You didn't see him do that? A No, sir.

Q At no time between the time that you first saw him and the time you saw him struck was he off the sidewalk? A No, sir.

Q Then, did the automobile come up on the sidewalk and hit him, is that right? A I would not say it came up on the sidewalk. 30

Q Don't you know whether this man was on the sidewalk or on the street when he was hit?
A On the sidewalk.

By Mr. Moriarity.

Q Do you understand what Mr. Heine is asking you?

Mr. Heine. I object to that.

Thomas Mullaney, cross.

Q 351 is around the corner here (indicating), isn't it, on Market street from Railroad place, it is around the corner here? A Yes, sir.

Q How many houses, about, from that corner is it, from this corner (indicating)—you know where the corner comes around? A

10 Where he got hit?

Q No, how many houses—you knew where 351 is? A Yes, sir.

By the Court.

Q How many houses between 351 and the corner? A There is one on the corner, next is 351.

By Mr. Moriarity.

20 Q Where was Mr. Gaffney when you first saw him? A When I first seen him he was going across the street.

Q He wasn't on the sidewalk? A 351 or a little past it.

Q He started across the street in front of you at 351?

Mr. Heine. I object to counsel's leading his own witness. He is putting it right into his mouth.

30 Q Does No. 351—

Mr. Heine. I object to counsel leading.

Q Where did you see him first, where did you see Mr. Gaffney? A At 351. I was standing there, I don't know whether you call it the sidewalk or around the corner.

The Court. Is there a crosswalk?

49 *Witness.* I can't say whether there is a crosswalk there or not. I don't believe there is. Up further there is one.

William F. Cone, direct.

Q The question is just this. When Mr. Gaffney was hit by this automobile was he up on the sidewalk or was he out in the street? A He was out in the street.

Q How far out in the street from the curb?
A About 16 feet.

By Mr. Heine.

10

Q How do you know that? A That is what I judge it to be.

Q How long did you see him walking that night? A How long?

Q Yes, where was he when you first saw him? A He was on the sidewalk.

Q Right in front of 351? A Yes, sir.

Q How far along the sidewalk did he walk, not out in the street where he was hit, but how far on the sidewalk did he walk while you were looking at him? A I seen him walking, that is all.

20

Q Did he keep right on walking? A Yes, sir.

Q He didn't stop? A No, sir.

Q Kept right on from the time he was on the sidewalk in front of 351 until he was out of the street where he was hit? A Yes, sir.

Mr. Moriarity. In order to have these photographs in will your Honor permit them to go in by consent of counsel? I would like to have the photographer explain them.

30

WILLIAM F. CONE, sworn on behalf of the defendant.

Direct examination by Mr. Heine.

Q Are you in business here in Newark? A Yes, sir.

40

William F. Cone, direct.

Q Ordway building? A Yes, sir.

Q Photographer? A Yes, sir.

Q Will you explain this photograph which I show you, where you took it from? A This is a photograph made at Market street and Railroad place in front of the Pennsylvania Railroad station looking to the northeast.

10

By Mr. Moriarity.

Q What part of the railroad station was your camera set? A The curb line in front of the entrance.

Q Which entrance? A The main building.

By the Court.

Q The northwest entrance? A It would be the east entrance.

20

By Mr. Heine.

Q Did you measure the distance between the electric light pole on this corner and this electric light pole at the head of the horse in the picture? A I did.

Q What did you make it? A 122 feet.

Mr. Heine. I offer this photograph in evidence.

30

Photograph marked D. 1.

Q I show you another picture and I ask you from what point you took that? A This photograph was made at the intersection of Commerce street and Railroad place on the crosswalk about 10 to 15 feet in the street.

Q Looking in what direction? A Looking to the southwest.

Q That is the Pennsylvania station? A That is the Pennsylvania station.

40

Motion for Non-Suit.

Q Showing the stretch of Railroad place or most of the stretch of Railroad place between Commerce and Railroad place and Market street between Commerce street from the railroad? A Yes, it shows three-quarters of the distance.

Q Did you measure the block from that electric light pole to Commerce street? A Yes, sir. 10

Q What did you make that? A 100 feet.

By Mr. Moriarity.

Q You set your camera how? A On the center of the easterly side.

Q That set inside of the arch of the railroad? A Yes.

Q Looking at this picture, this second picture, at what point in this second picture, indicate the place where you set your camera for the first picture? A It is right there at the mail box. 20

Q At the mail box shown in the picture? A Yes, there is a trolley pole there, too.

Q What time did you take those pictures? A Half-past eight this morning.

Mr. Moriarity. I would like to offer the interrogatories and the answers to the interrogatories, interrogatories served by us on the defendant's attorney in evidence. 30

Mr. Heine. They all go in.

PLAINTIFF RESTS.

Mr. Heine. I move for a non-suit on the ground of contributory negligence on the part of the plaintiff. It appears on the plaintiff's own testimony that he came to a point on the curb line of Market street, northerly curblin and according to his own 40

Motion for Non-Suit.

testimony, he stopped and looked in both directions, first to the west, then in the direction of this curve, north or northeast, or east or northeast; that he could see a half a block to the west; that he could see 100 feet to the east; that although it was raining the lights there enabled him to describe both of those distances. He says that he took what he estimates a dozen steps out from the curb in a direction straight across Market street, which he estimates to be 15 feet or a few paces when he was struck from behind and thrown 10 feet, and that when he came to rest, when his body came to rest on the pavement after being thrown 10 feet the automobile did not run over him, did not pass him. It was beside him. I have forgotten whether he said it was on the right or left but the front of the automobile was beside him as he lay on the ground. He also says that the method by which he arrived at that statement of having proceeded 15 feet out from the curb when he was struck is that he knows he was about 15 feet from the curb after he was struck when his body came to rest on the pavement and he considers he was thrown straight ahead by the automobile and, therefore, he must have been 15 feet away from the curb at the time he was struck. Now, if a pedestrian attempts to cross a street on which vehicles are moving it is his duty to look and to look with a seeing eye, with an observation which is intelligent and which will see objects if they are within the range of vision, and I submit that inasmuch as he was struck almost immediately, within a few paces out

Motion for Non-Suit.

from the curb line that that automobile must have been within his range of vision when he looked to the east and the proof of that is that that distance has not been disputed by any of the witnesses for the plaintiff; that automobile did not travel more than 6 to 10 feet after striking Gaffney, therefore, on a wet pavement which caused a rubber tire to slide and that machine did not travel more than 6 or 7 feet, the last witness said 7 or 8 and one said 7. I think this Court should take judicial notice that that machine was not traveling at a speed that was so great as to take it beyond the knowledge and vision of this man when he looked to the east. It would require a speed of eight to nine miles an hour to have that automobile only 50 or 60 feet away and while Mr. Gaffney was taking those four or five steps, taking perhaps four seconds, that automobile could not have traveled more than 8 or 9 feet a second and it could not have been more than 40 or 50 feet or 60 feet at the most from where this man looked and he said he could see a hundred feet. On the very facts in the case while he was walking those few paces that automobile was traveling about twelve miles an hour.

The Court. I think perhaps in this case in view of the conditions of the night and the peculiar conditions of locality the Court ought not to say as a matter of law Mr. Gaffney was guilty of contributory negligence. It was a rainy night and that is to be borne in mind. It is not a case of a man crossing a street where he has to look in two directions. This man was crossing a

Sylvanus Allchin, direct.

10 bend where he had to make observation in three directions. He had to look east and west and he also had to look to the north. He says he looked and I imagine in view of the peculiar condition existing there as to location and the weather conditions and so forth, make it a question for the jury to say whether or not he was exercising that caution a man under such circumstances should exercise.

Motion for non-suit is denied.

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

Exception noted as ground of appeal.

20 SYLVANUS ALLCHIN, sworn in behalf of defendant.

Direct examination by Mr. Heine.

Q Where are you employed at the present time? A Pierce-Arrow Motor Car Company.

Q For whom were you working on the night of November 19, 1914? A Mr. William Illingworth.

30 Q How long had you been working for Mr. Illingworth? A A year and four months.

Q How long have you been in the business of driving cars, chauffeur? A Ten or fifteen years.

Q Have you ever had an accident before this accident?

Mr. Moriarity. I object.

The Court. Objection sustained.

40 Q You recall the night in question when this accident occurred? A Yes.

Sylvanus Allchin, direct.

Q I ask you to look at Exhibit 2. Do you recognize that locality? A Yes, sir, very well.

Q Look at Exhibit 1, do you recognize that? A Yes.

Q Do they correctly set forth the physical conditions of the place at the time of the accident? A Yes, sir. 10

Q Will you point out if you can on one of these pictures where this accident took place? A Yes, sir.

By the Court.

Q How did you mark it? A With an X.

Q Before you reached the corner? A Yes, sir.

By Mr. Heine.

Q That mark which you have made on Exhibit D. 2 is on the curbstone. The accident didn't happen on the sidewalk? A No, sir, it happened in the street. 20

Q Opposite that mark? A Yes, sir.

Q Where were you coming from that night? A I was coming from North Kinney and Mt. Prospect avenues.

Q Did you come through Commerce street? A Yes, sir, on Railroad place. 30

Q You were going where? A I was going to the Pennsylvania station to meet Mr. Illingworth.

Q As you were proceeding to Railroad place or that place on Market street which comes to the curb what, if anything, did you do in relation to making a warnnig of your approach? A I blew my Klaxon every few seconds all the way. 40

Sylvanus Allchin, direct.

Mr. Moriarity. I object to this. That is leading the witness.

Q How many lights were there on your car on that night? A Four headlights and one rear light.

10 Q What was their condition as to whether or not they were lit when you came around there that night? A The condition was good.

Q Were they or were they not lit? A They were lit.

Q How far from your machine were those lights effective?

Mr. Moriarity. I object to that as calling for a conclusion.

The Court. Objection overruled.

20 A 50 feet.

Q Did you notice as you approached the electric light, the corner of Railroad place, did you notice whether that electric light was lighted?

A I should say it was.

By the Court.

Q How is that? A I think it was.

By Mr. Heine.

30 Q That is, your best recollection that it was?

A Yes.

Q The light at the Plaza was in its usual condition as you have observed it on other nights before and since? A Yes.

Q At what speed were you proceeding after you left Commerce street and came from Railroad place or Commerce street toward the depot?

A I came through River street that night.

40 Q At what speed? A About eight miles an hour, eight to ten miles an hour.

Sylvanus Allchin, direct.

Q Will you state just what occurred as you came along Railroad place before and at the time of the accident? A The night of the accident?

Q Yes, the night of the accident. Tell the jury what occurred? A I was coming around Railroad street at a normal speed, between eight and ten miles an hour. It was raining very hard at the time. I had an absolutely clear vision. I had the wind shield open. I had the curtains up, but only on the rear. I saw Mr. Gaffney step off the curb. I blew my Klaxon and he paid no heed. I was at a speed where I could pull up very shortly. He stepped up and I turned out, I swerved to the left and he walked clean into my machine and the next thing I knew the man was on the ground.

Q What part of your machine did Mr. Gaffney come in contact with? A The right front wheel.

Q What part of his body, if you saw, came in contact with your wheel? A I think his knee.

Q Hit your wheel? A Yes.

Q Did he go down on the ground? A Yes.

Q How long did he remain on the ground? A He remained on the ground a very few seconds.

Q What did he do then? A Before I could get out he was up on his feet.

Q What did he do then? A Made tracks for the sidewalk.

Q At the time of this accident and just before you came to Railroad place what was the condition of the front of your car as to wind shield and curtain? A The wind shield was open and there was no front curtain but the rear curtains were up.

Sylvanus Allchin, direct.

Q The rear curtains were the only ones that were up? A Yes, sir.

Q They ran down from the top? A No, they are jiffy curtains, sliding curtains.

Q So that the rear of the car was covered, the front was open? A Yes, sir.

10 Q Was Mr. Gaffney at any time directly in front of the right or left hand side of the middle of your car? A No, sir.

Q Did your car, any part of the front of it, right or left lamp or radiator in front strike Mr. Gaffney and throw him any distance? A No, sir.

Q How far did your car move after Mr. Gaffney struck the side of your rear wheel, the front wheel? A How far did it move?

20 Q Yes. A Well, practically to a standstill when it struck him.

Q And this all occurred, looking at Exhibit D. 2, this all occurred before you reached that electric light pole? A Yes, sir.

Q Did you see anybody else after this accident standing on the curb in that vicinity? A I did not.

Q Excepting Mr. Gaffney? A No, sir.

30 Q Where are your front headlights, the large ones, the search lights? A On the mud guards.

Q Were those headlights in any way damaged by the accident? A Absolutely not.

Q Any glass broken? A No, sir.

Q The mud guard neither in no way was broken? A None whatever, sir.

Q After the accident what took place? Did anyone come around? A Yes, sir, an officer came around.

40 Q From over Market street? A Yes, sir.

Sylvanus Allchin, direct.

Q What did he do? A He asked me what occurred and I explained to him and we put him in the machine and we took him to Malloy's cafe.

Q Who requested you to go around there?
A The officer.

Q After going around to Malloy's what happened then? A I told the officer— 10

Mr. Moriarity. I object to what he said.

Q What happened?

The Court. Was it said in the presence—

Q Was it said in the presence of Mr. Gaffney? A I said nothing in the presence of Mr. Gaffney.

Q I mean this conversation between you and the officer, was Mr. Gaffney there? A Yes, sir, I think he was there. 20

Q What did you say to the officer? A I told the officer that I would meet Mr. Illingworth.

Q Did you go over to the station? A I went over to the station with the officer to meet Mr. Illingworth.

Q When you got over there you and the officer were in the machine together? A Yes, sir.

Q What did you state to Mr. Illingworth?

Mr. Moriarity. I object. 30

Q What did you and Mr. Illingworth do? A I came back to the cafe with the officer.

Q You and Mr. Illingworth and the officer all came back to Malloy's? A Yes, sir.

Q How long did you all stay at Malloy's? A I think we was there practically an hour.

Q And while you were there the doctor came?
A Yes, sir, they 'phoned for the doctor.

Q Who sent for him? A I think Mr. Malloy 'phoned for him. 40

Sylvanus Allchin, cross.

Q Did Mr. Gaffney say anything in regard to a doctor at that time? A I had no conversation with him whatever.

Q Mr. Gaffney was walking around there? A Just limping around.

10 Q What particular part of his body, if any, did he complain about? A His knee and his ankle.

Q What was he doing? A Just rubbing his knee.

Q After remaining there that length of time what did you do? A I remained there with the officer.

Q Where did you go after you left there? A I think the officer asked Mr. Gaffney—

Mr. Moriarity. I object to that.

20 *The Court.* Mr. Gaffney was there, was he?

Q This was addressed to Mr. Gaffney? A He asked Mr. Gaffney if he was willing to let the man go. He said, "Yes."

Q By the man he meant whom? A Yes.

Q You? A Mr. Illingworth and I went home.

Cross examination by Mr. Moriarity.

30 Q You say Mr. Gaffney was walking around and rubbing his knee? A Yes, he wasn't exactly walking around and rubbing his knee. He was limping around and complaining his knee was hurt.

Q Then, why did you think it was necessary to send for a doctor?

Mr. Heine. I object. The witness didn't say he sent for a doctor. He said Malloy sent for a doctor.

40 *The Court.* That is correct.

Sylvanus Allchin, cross.

Q Why did you stay there for a whole hour?

A We waited for the doctor to come.

Q Why did you think it was necessary to wait for a doctor to come?

Mr. Heine. I object to the witness' conclusion on that as not binding on the defendant. 10

The Court. Why did you wait for the doctor is the question.

A I waited for the officer's relief. I could not go without the officer relieving me.

Q All this time you waited an hour, you and Mr. Illingworth, for a doctor to come so as the officer might relieve you? A Well, I could not go until the officer said I could go. The officer had me there. 20

Q Apparently there was nothing the matter with Mr. Gaffney.

Mr. Heine. I object.

A I didn't know what was the matter with him.

The Court. That is a very proper question, I think.

Q I say apparently there was nothing the matter with Mr. Gaffney? A He complained his knee hurt him. 30

Q He wasn't sitting on a chair, was he? A He was part of the time, the rest of the time he was limping around and around.

Q Didn't you help him into the machine? A No, I think the officer help him into the machine.

Q Didn't you help him? A I was there.

Q Didn't you help him. A I might have helped the officer with him. 40

Sylvanus Allchin, cross.

Q Didn't you help Mr. Gaffney to get into the machine? A I got into the machine first and Mr. Gaffney was next and the officer helped him up from behind. I might have given a little assistance.

10 Q Why was it necessary to give him a little assistance? A You would give anybody a little assistance if they were a little hurt.

Q If they were a little hurt. He was hurt enough to give him a little assistance? A I didn't know how much he was hurt. If I see a man that is in need of help I am willing to help him, give him a little assistance.

Q You helped him out of the machine? A Only natural I would help him out of the machine.

20 Q You took him into the saloon? A No, I think the officer took him into the saloon. The officer had hold of his arm. He wasn't hurt that much he couldn't walk.

Q Then why did you help him? A All three couldn't get through the little small door at once. There was only one little door open.

Q So that is why you didn't, because three men couldn't get through a small door at a time? A I didn't say I helped him because three couldn't get through there.

30 Q Why did you help him? A I never said I helped him through the door.

Q Now, you didn't help him? A Not through the saloon door. The officer helped him.

Q You helped him up the car? A Naturally I would help anybody up, any lady or gentleman.

Q Where was Gaffney when you first saw him? A He was approximately two or three feet across the road. He stepped from the sidewalk, or he stepped off the sidewalk, or he was

Sylvanus Allchin, cross.

in my vision but he was practically three feet from the sidewalk.

Q He was two or three feet off the sidewalk when you first saw him? A I saw him step off the sidewalk.

Q Didn't you say a minute ago when you first saw him he was two or three feet from the curb? A I say I saw him step off the sidewalk and then he was in the vision of my lamps. 10

Q Didn't you say you saw him when he was two or three feet from the curb? A Naturally I saw him.

Q Isn't that when you first saw him. When I first saw him he was on the sidewalk.

Q How far was he from the curb? A When I first saw him he was on the sidewalk stepping off. 20

Q Now, he is on the sidewalk? A Yes.

Q Where were you then? A I was coming down Railroad place.

Q How near were you to him when you first saw him? A I should say a matter of about twenty feet.

Q How far did Mr. Gaffney walk before you hit him? A I should say he would be about eight feet from the curb when he came in contact with the machine. I didn't hit him, he came in contact with the machine. How could I hit him when he struck my front wheel. 30

Q Where did you say you were when you first saw him, he was how far? A He was on the sidewalk.

Q Stepping off it? A Stepping off, just stepping from the sidewalk.

Q Then he walked eight feet you say? A I didn't say he walked eight feet. I didn't say how many feet he walked. 40

Sylvanus Allchin, cross.

sible distance within which you could stop the machine? A The shortest possible distance, considering the weather, the time, the rate of speed I was traveling, the distance I pulled up in would be about a length and a half.

Q What was the length of your car? A The length was twelve feet. 10

Q You stopped within about eighteen feet? A Yes, I broke the chains by doing so. I broke the non-skid chains by doing so. I had to apply my brakes for all I was worth.

Q Did you have chains on that night? A I did, sir. I never run in wet weather without chains.

Q You say you did break your chains or that by stopping that short you would have broken them? A I broke the chains, links, by stopping short. 20

Q You actually did? A Yes, I actually did break the links by stopping short.

Q (*By Mr. Moriarity.*) What rate of speed were you going at the time? A I was going between eight and ten miles per hour.

Q How do you know you were going between eight and ten miles per hour? A A man driving a machine for fifteen years can tell without looking at the speedometer. 30

Q You suppose now that was the rate you were going at? A Yes, I was.

Q Did you look at your speedometer? A I couldn't look at my speedometer in the dark.

Q Were you looking at it? A I couldn't look at it and the direction in which I was going.

Q Were you looking at it? A Certainly not.

Q That is your impression? You were going from eight to ten miles an hour? A Yes. 40

Sylvanus Allchin, cross.

Q And yet you broke your chain? A A couple of stones there, no asphalt.

Q Were you subpoenaed here this morning? A Yes, I have it in my overcoat there.

Q In what direction was Mr. Gaffney going at the time? A He was just crossing the street.
10 I don't know why. There was a blank wall in front of him.

Q He was just crossing over to the blank wall? A That is all he was doing. He might have been going across to go down the wall. I don't know.

Q As soon as you saw him you say you put on the brakes? A Yes, sir.

Q Precisely. You said in your direct examination you said you kept blowing your Klaxon all along? A Yes.
20

Q Where did you start to blow your Klaxon? A I blew my Klaxon all the way down from the time I left the freight yards all the way around because I travel that four or five times a week. That is a practice for me to do so.

Q Why do you make a practice here? A Because it is a dangerous place after dark.

Q It was a dark place? A It certainly was.

30 Q It is a dark place after dark? A It certainly is. It couldn't be dark in the day time.

Q You kept your Klaxon going all the way? A I didn't keep it going. I had it going at intervals.

Q From where? A From the freight yards all the way around.

Q (*By the Court.*) Did you come down River street? A Yes.

40 Q (*By Mr. Moriarity.*) Did you sound your Klaxon before you put on your brake? A Yes.

John Connor, direct.

Q Did you sound it after? A Yes, the Klaxon was in a position I could blow it with my knee. I didn't have to use my hand to do it. My hands were free to use my brakes and drive.

By Mr. Heine.

Q During the hour you were in Malloy's saloon waiting for the doctor did you see Mr. Moriarity there? Did he come in while you were there? A No, sir. 10

JOHN CONNOR, sworn for defendant.

Direct examination by Mr. Heine.

Q Mr. Connor, do you remember the night of November 19, 1914, when Mr. Gaffney had this accident? A Yes, sir. 20

Q Whom do you work for? A Public Service.

Q Where were you? Did you see this accident? A Just as it happened.

Q Where were you standing at the time? A I was standing at the southeast corner of the elevation underneath the bridge.

Q Can you point out on either one of these pictures, D. 1 and D. 2, about where you were? A These don't show where I was. I was under the elevation. 30

Mr. Heine. The witness indicates he was off this way towards the elevation.

Q (*By the Court.*) You mean by that you were not to the side of the track? A To the side of the tracks south of the elevation, underneath the elevation, southeast pillar. There is about four poles under there, about the fourth one. 40

John Connor, direct.

Q (By Mr. Heine.) You were under the arches here where Market street goes under the railroad? A Yes.

Q What were you doing underneath? A The fourth pillar.

10 Q From there could you see up Railroad place and Market street where this accident took place? A Just see the corner where the lamp pole is.

Q Just tell the jury what you saw of this occurrence. A I was standing there. I happened to look over at the corner. I heard a lot of horns blowing around. I just happened to look over there. I seen a man get knocked down in front of the automobile.

20 Q That was Mr. Gaffney? A I didn't know then who it was. The policeman stands there. He happened to be looking down Ferry street. I told him, I said, "A man just got hit over here." He started right over there. Then it was near time for me to go to work, so I went down the other side of the railroad and went in.

Q Did you give Mr. Grosken or Moriarity a statement as to how this accident happened? A Oh, yes.

30 Q Did they talk to you about it? A Yes, sir.

Q You made a statement stating what you are saying on the stand now? A Just what I say.

40 Q Could you see from where you were whether there was, where this man was in relation to the machine or whether he was in front of it or on the side of it? Could you see that from where you were? A From where I was I seen him get knocked down in front.

John Connor, cross.

Q How long before the man was knocked down had you seen this automobile? A How long before?

Q I mean how long before? A It must have been about a second, then I heard a lot of horns blowing around and happened to look over there.

Q Anything further happen? Do you know anything about the condition of the light on that machine? A No, the street light was on. 10

Q There is an electric light on the corner? A Yes.

Cross examination by Mr. Moriarity.

Q Who did you first speak to about this accident? A The policeman told me about it.

Q Did you ever speak to Mr. Heine about it? A Never seen him until this morning.

Q Did you ever speak to anybody besides myself about it? A No, sir. 20

Q How do you account for being called as a witness?

Mr. Heine. I object. He has a subpoena.

Q How do you account for being subpoenaed? A How do I account for it?

Q Yes. A On account of giving you a statement, I suppose, all I know.

Q Do you know Mr. Jones? A No. 30

Q Do you know the chauffeur in this case? A No, never seen him.

Q Do you know Mr. Illingworth? A No, sir.

Q Do you remember when I saw you one night down at the Public Service carhouse? A Yes.

Q Do you remember telling me the story down there that you heard no horn blowing? A I said I heard horns blowing. 40

John Connor, cross.

Q Didn't you tell me there was none? A I told you there was horns blowing but I couldn't tell which one was blowing.

Q Didn't you tell me that there was no horn blowing and that if there was one you thought you would have heard it? A I heard a lot of
10 horns blowing all around that night. It was a rainy night and there was a lot of automobiles going and the place was congested, people going to cars.

Q Where do you say the accident happened? A I was on the southeast corner under the elevation.

Q You were here (indicating)? A Yes, on the other side of the railroad.

Q When you saw the automobile where was
20 it? A Right on the corner.

Q This corner here (indicating)? A Yes.

Q The reason you looked over there—why did you look over? A The reason I looked over?

Q Yes. A On account of horns blowing around.

Q Did you look over as soon as you heard the horns? A Just happened to look over
30 casually.

Q Just as soon as you heard the horns? A I can't tell which one it was.

Q As soon as you did hear the horns you saw the automobile standing there? A No, as I looked over it hit a man and knocked him down.

Q You saw it hit the man? A Yes, knock him down flat on the street.

Q Knocked him on his face? A Seemed to
40 be knocked on the side.

John Connor, cross.

Q Did you see him after the automobile hit him? A No, I didn't go over. It was time for me to go to work.

Q You told an officer to go over? A I told an officer. He went over.

Q Could you see from where you were standing here, down here (indicating)? A No, there is a stone abutment there. 10

Q Could you see how fast the machine was going? A No, it was only a second. I couldn't say how fast he was going.

Q That was the time you heard the horns? A Yes.

Q You didn't hear any horns before that? A Oh, yes.

Q Didn't you say a minute ago you looked over as soon as you heard the horns? A It seemed to be unusual. 20

Q As though somebody was signalling for help to come over? A It seemed to be more.

Q Do you remember the time I went down to see you? A I think I do, a little.

Q Did anybody else get a statement from you? A No, sir; nobody at all.

Q You say it was a rainy night? A Rainy night, raining.

Q You saw Mr. Gaffney after the automobile hit him? You saw him after he fell? A No, I didn't see him after he fell, didn't go over there to see him. 30

Q What kind of a machine was it? A Seemed to be a covered machine.

Q (*By the Court.*) What part of the machine hit him? A Seemed to be he was at the wheel, would be the right side, seemed to be inside the forward right mudguard and the edge of the radiator. 40

John Connor, cross.

Q (*By Mr. Moriarity.*) I want to show you this paper. Is that your signature? A Yes.

Q Will you read that to the jury?

Mr. Heine. I object to the witness being confronted with this paper unless it is offered in evidence.

10

The Court. I sustain the objection.

Mr. Moriarity. I will offer this statement in evidence.

Mr. Heine. No objection if the pencil writings which are on there will be erased.

The Court. It will be received.

Statement read into evidence.

Mr. Heine. I move to strike out that part of the statement which refers to the opinion.

20

The Court. The jury should be instructed to disregard the opinion of the witness and I so instruct the jury that those things should have no weight.

Mr. Moriarity. The statement as a whole goes in.

The Court. The statement goes in.

Mr. Heine. In whose handwriting is this?

Mr. Moriarity. This is in my handwriting.

30

Q Did you read this? Did I write this in your presence? A Yes; you asked the questions and I answered them.

Q Did I not offer it to you afterwards to read it? A I don't remember if I did or not.

Q Would you have signed it if I hadn't? A You just passed it over to sign here.

Q Didn't I wait there until you signed it?

A What, if I read it?

Q Didn't you say you wanted to make sure
40 everything was right before you signed it? A

John Connor, cross.

I just signed it. I knew it was all right when you put it over for me to sign.

Q Is it all right? A All I seen is all right.

Q Did you hear any horns blow? A I heard a lot of horns blow.

Q When you say here that you didn't hear any horns blow is that true or not? 10

Mr. Heine. I object to that. The document speaks for itself.

The Court. Objection overruled.

Defendant's counsel prays an exception to this ruling of the Court, and the same is allowed and signed and sealed accordingly.

Judge.

Q Is this statement here true or not? 20

Mr. Heine. I object to that.

A I can't say whether it was that horn or not.

The Court. Call his attention to the particular statement.

A It was an unusual noise that you wouldn't look for.

Q Is this statement here true, "That he did not hear any horn blow and that he believed he would have heard it if one had been blown? Is that true or not? A Over there probably I did. 30

Q Is that statement true? A Close to me I heard the horn blow. Standing where I was it was kind of dangerous, automobiles. I just happened to look over there.

Q Then you heard an automobile horn blow?

A Close to me, yes. 40

William H. Illingworth, direct.

Q The statement here that you did not hear any horn blow is not true, is it? A That is true.

Q Did you or did you not hear any horn blow? A Yes, I heard horns blow. That is what made me look around. You happened to
10 come around to get my statement. I might have been a little excited.

Q You are not excited now? A Now, yes, I ain't calm. This is unusual for me. This is my sleeping hour.

Q The only explanation you have of this now is that you were a little excited at the time you made it? A That there?

Q Yes. A Yes.

20 WILLIAM H. ILLINGWORTH, sworn in his own behalf.

Direct examination by Mr. Heine.

Q You are the defendant? A Yes, sir.

Q Owner of this car? A Yes, sir.

Q On the night of this accident when did you first see the car? A Why, they drove up to the station just as I came out of the door.

Q Who was in the car? A The chauffeur and policeman.

30 Q Did you observe how many lights were on that car at that time? A I noticed they were lighted. I don't remember how many.

Q What are the lights on your car? A Electric lights.

Q How many are there? A Four on the front and two on the back.

Q You observed they were lighted? A The lights were lighted, yes.

40 Q Did you observe whether or not there were any chains on the car? A No, I did not.

William H. Illingworth, direct.

Q Did you observe whether or not, what was the condition on the front of the car as to curtains or windshield? A He didn't have any curtains in the front.

Q You are sure of that? A Yes.

Q Was there a horn on your car that night?
A Yes. 10

Q Do you know whether it was in good order, did you hear it used afterwards? A He blew it on the way to my house.

Q After you met the car with the policeman and Mr. Allchin, where did you go? A To this saloon.

Q Did you go in there? A Yes.

Q Did you see Gaffney there? A Yes.

Q What was he doing? A Well, his knee seemed to hurt him. He was rubbing his knee. 20

Q How long did you stay in there? A I should say about three-quarters of an hour.

Q During that time was a doctor called?
A Yes, sir.

Q Who sent for the doctor? A The man that ran the place, the saloon.

Q Malloy? A I guess that is his name, yes.

Q Why did you stay there about three-quarters of an hour? A We were waiting for the doctor to come. That is what made us wait so long. He didn't show up. They insisted on getting their doctor and there didn't seem to be any other doctor around to get so we had to wait until he came. 30

Q Did you suggest to Gaffney or anybody else there that you get any doctor? A I believe I did. He said he would be there every minute and every minute kept putting it off and off and it got later. 40

William H. Illingworth, cross.

Q Were the lights or the glass in the lights on the front of the car scratched or broken that night? A No, sir.

Q Was the mudguard or any part of the front of the machine bent? A No.

10 Q What particular injury or pain did Gaffney complain of while you were in the saloon?
A He seemed to be in the knee, right on his knee.

Cross examination by Mr. Moriarity.

Q You waited three-quarters of an hour for a doctor? A I should say it was about three-quarters of an hour or an hour.

Q You say the curtains were not down? A There were no curtains in the front.

20 Q Was there a wind shield there? A Wind shield, yes.

Q You say the lights were all lit? A He had lights lit. I can't tell you how many but he had lights lit. As he came around I remember the glare shining in my face as he made the turn where I was waiting at the station.

Q You remember that? A I remember that, yes.

Q Is that your signature? A Yes, sir.

30 Q You swore to the statement in this? A As I heard you read them I do, yes.

Q I call you attention in particular—of course, you understand these answers were made in answer to the questions here?

Mr. Heine. I object to the witness understanding—

Q (Question repeated.) A Yes, sir.

40 Q Now, I call your attention to interrogatories 21 which says, "How many lamps were on defendant's automobile at the time it struck

William H. Illingworth, cross.

the plaintiff? A Four lights on the front and two on the back. One is a little bit of a number light." That is the answer you made in the interrogatory, four front lamps and two rear lamps? A Yes, that is right.

Q The 22d interrogatory is: "What kind of lamps were they?" A Electric. 10

Q And your answer is, "Electric." A Yes.

Q Now, your 23d interrogatory, "How many were lit? A I can't say." A The lights were lit. I can't tell you how many were lit.

Q Didn't you say they were all lit? A I don't think so, they were lit.

Q They flared in your face? A They flared in my face. They must have been lit, the big one, and I don't know whether the little ones were lit or not. 20

Q Now, did you answer as to the 23d interrogatory "How many were lit? A Defendant did not notice." A I didn't notice how many.

Q When you said "defendant did not notice" what did you mean by that? A Didn't notice how many lights were lit.

Q Did you notice the lights? A I noticed there were lights lit.

Q If you noticed the lights how is it you didn't notice how many were lit? A I don't know why, because they flared in my face. 30

Q Then, you did notice lights? A I noticed lights on the car, yes, sir.

Q Did you notice that one was lit? A I didn't notice any particular number.

Q Did you know one was lit? A All I know, as he turned around there the light flared in my face.

Q Did you notice there was one lit? A There was at least one lit. 40

William H. Illingworth, cross.

Q Why didn't you say there was at least one lit? A I didn't know of any reason why I should.

Q Did you think there was two lit? A Did I think there was two lit?

10 Q Did you think there were any more? A I didn't know.

Q Why didn't you answer when you were asked if there was lights lit on the car why didn't you say at least two? A I don't know why.

Q You did notice two? A I know there was a light. I was in front of the car as he turned around. It flared in my face. That is the only reason I know.

Q Was there one or two? A I can't say.

20 Q You know there was at least one? A One light is almost as good as two in those big lights.

Q Didn't you talk to Dr. Lowrey? A Yes, when he came down to the place there.

Q What did you say to him? A I asked him if he was hurt.

Mr. Heine. I object.

The Court. I will sustain the objection.

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

Exception noted as ground of appeal.

Q Did you promise to pay all the doctor bills?

Mr. Heine. That is irrelevant, immaterial and incompetent; outside of the issue in this case.

The Court. I will overrule the objection.

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

40 Exception noted as ground of appeal.

Motion for direction of Verdict.

Q Did you promise to pay Dr. Lowrey his bill? A I don't think so.

Q Did you say, "Do what you can for the man and I will make it good." A I told him I was insured and my hands were tied. I couldn't do anything but the insurance company would reimburse him. I didn't know whether he knew this man or knew Malloy or anybody else. 10

PLAINTIFF RESTS.

Mr. Heine. I move for a direction of verdict on the ground that there appears throughout the whole case contributory negligence on the part of the defendant. The evidence as to negligence of this man must be taken on the question of contributory negligence. The weight of the evidence of both the plaintiff and defendant shows that this man stepped out from the curbstone either without looking or else so carelessly looking that he brought himself in a position of danger by reason of his own fault and failure to perform the duties which the law imposes upon him. The testimony of the plaintiff is that he advanced 10 or 12 feet and the automobile was not traveling at a speed which prevented its traveling in a distance so short as to indicate conclusively that the speed must have brought it within his range of vision at the time he left the curb. The utmost speed testified to of the automobile would bring it 70 feet away and if that man looked as his own testimony states he did, although that is not corroborated by his witnesses—he says he walked straight ahead—if he looked he must have seen that moving vehicle 70 feet 20
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Motion for direction of Verdict.

10 ahead of him, and whether he walked into
 the side of it is immaterial. The negligence
 was in failing to observe what must have
 been absolutely conclusively shown within
 his range of vision. The automobile couldn't
 have been beyond his range of vision and
 have struck him when it did. He was guilty
 of contributory negligence in stepping out
 in front of it. The right of the automobile
 is not inferior or superior; neither were
 his rights there. It was a right of which
 a pedestrian must be held to know that on
 nights of that kind when it is raining and
 wet an automobile can't be handled with
 the same ease as when it is dry. I think
 we all know of the difficulty of a machine
 20 skidding and a pedestrian who looks to the
 right or left must look, his own observation
 must be more particular on wet nights than
 it is on a dry night. If he observed the
 machine within 70 feet of him he had as
 much right to look out for that machine
 as the driver of the machine had to look
 out for him and with this undisputed testi-
 mony that the machine was within his range
 of vision and he did not see it under condi-
 30 tions which the courts have held he should
 have seen it, under the evidence of the wit-
 nesses I think a motion for a direction
 should be granted.

The Court. Motion will be denied.

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

Exception noted as ground of appeal.

*Charge to Jury.***Charge to Jury.**

The Court charges the jury as follows:

DUNGAN, *J.*

Gentlemen. The plaintiff in this case alleges 10
by his complaint that on the 19th day of No-
vember, 1914, while he was walking on Market
street opposite the Pennsylvania Railroad sta-
tion he was struck from behind by the defend-
ant's automobile, being then operated by an
employee of the defendant in and about the
defendant's business, and through the negligence
of the driver was knocked to the ground and
received the injuries for which he seeks to re-
cover compensation in this suit. This suit, you
will observe from what I have already stated 20
about the negligence of the defendant's driver,
is founded on negligence. Although the plaintiff
was knocked down and received injuries, yet,
if the driver of this automobile was not negli-
gent, if he was not doing anything he should
not have done, or if he showed the care he owed
to the plaintiff in this case, the plaintiff cannot
recover. It must appear before the plaintiff
can recover that the automobile at that time
was operated in a negligent manner. 30

Now, let us consider for a moment what the
duty of the driver of that automobile was. In
this state we have what is known as a Motor
Vehicle Act, which defines the duty of drivers
of automobiles in a great many instances, and
one of the duties is to have upon the automobile
a plainly audible signal horn and, of course,
when it is necessary to use that horn for warn-
ing pedestrians upon the street of the approach
of the automobile, if it is not sounded then that 40

Charge to Jury.

is negligence on the part of the driver of the automobile, provided in its application to this case the failure to sound the horn is the cause of the accident. The automobile act to which I have alluded also provides for the rate of speed which a person may travel upon the public highways and streets of this state. While it does not appear in this case that the driver of this automobile was operating it at a higher rate of speed than the statute permits, yet this statute uses these words; after defining the rate of speed at which people may run their automobiles under various circumstances in different localities, "provided that nothing in this section contained," that is, which provides the rate of speed at which they may run, "shall permit any person to drive an automobile vehicle at any speed greater than is reasonable having regard to the traffic and use of highways or so as to endanger the life or limb or to injure the property of any person," notwithstanding people are permitted to run at certain rates of speed, twenty-five miles an hour in the open country, fifteen miles an hour at the intersection of prominent cross streets and twelve miles an hour in built-up sections of cities; yet even if that rate of speed is unreasonably fast, having regard to the traffic and the use of the street by other people, then a person running at that rate of speed, if an accident occurred by reason of their having run at that rate of speed and having failed to exercise reasonable care, would be negligent."

Now, it was the duty of the driver of this automobile in running along the public street to make observation of people who were in the path of the automobile, or likely to be in the path of the automobile, and to have his auto-

Charge to Jury.

mobile under such control as to be able to stop it, or to divert it from its course in order to avoid a collision, if by the exercise of reasonable care and prudence he could have done so. Let us consider for a moment the testimony upon this point which has been given in this case and see whether or not the conduct of the chauffeur, the driver of this automobile, measured up to the standard which I have indicated; and I may say further, to sum up all I have said about the duty of this chauffeur, that it was his duty to operate his automobile as a reasonably, careful and prudent man would have operated it under the same circumstances and conditions. As it now stands, let us consider the testimony and see whether or not the conduct of the chauffeur in driving his automobile measured up to that standard. If it does not measure up to that standard, that is, if he did not operate his automobile as a reasonably careful and prudent person would have operated it under the circumstances and conditions, he was negligent. One of the conditions which you should take into consideration is the kind of a night it was. It appears from the undisputed testimony in this case that it was a rainy night, and it was after dark. From the testimony on the part of all the witnesses, who testified on that point, it appeared that in that location the street is well lighted, there being electric lights at various places, some of which are shown upon the photographs, which are produced here in evidence. Mr. Gaffney, himself, says that he boarded at that time at No. 2 Railroad place, and that about a quarter after five to five-twenty that evening he left his boarding place and came southerly on Railroad place until he got to a point on Market street which

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Charge to Jury.

he has designated on the map shown upon the blackboard there with an X. He says that when he came to the curve of the street—you will remember he said he was going to take a Springfield avenue car which runs on Market street in an easterly and westerly direction near the Pennsylvania Railroad station. He says when
10 he arrived at the point marked X on the diagram on the blackboard he stepped to the curb and looked both ways and not seeing anything he proceeded to cross the street to the Springfield avenue car, and when he had proceeded as he says 10 or 15 feet he was struck in the back by this automobile. He says that he heard no signal made by the person operating the automobile. There is perhaps some little confusion about his testimony, because he says that he
20 had not noticed this automobile which was coming southerly to Railroad place, the same direction substantially from which he had been coming. He said he had not noticed it coming, which would be from the near side of Market street from which he was proceeding and he says that he was sober. Then he was 10 or 15 feet away from the curb. However that may be you may take all his testimony into consideration in determining how far he had proceeded
30 from the curb when he was struck, in determining the question of negligence, both of the chauffeur and Mr. Gaffney, which I shall presently mention.

Mr. Frank J. Cox, a witness produced in behalf of the plaintiff, says he was standing in front of 351 Market street, which he says was the building next to the corner. That building is indicated on the diagram upon the board, and you may also see that building upon one of the
40 photographs taken opposite the Pennsylvania

Charge to Jury.

Railroad station. He says that he saw the automobile coming around the corner from Commerce street at a good gait. He said he didn't see Mr. Gaffney before he was struck, or at the instant he was struck, because he was on the north side of Market street and he said the machine was between him and Mr. Gaffney at the time the plaintiff was struck. If that be true it will be for you to say whether or not it was the right or the left side of the machine, if that be important, which struck Mr. Gaffney. He says that at the time the automobile struck Mr. Gaffney the automobile was 18 or 20 feet from the curb, and he says that he didn't hear any signal horn, but he does say first the automobile stopped within 7 or 8 feet and then he says within 6 or 7 feet. Mr. Mullaney, another witness for the plaintiff, said that he was standing in the same place, which appears to have been a saloon, because he said he had been in the saloon getting a drink, and had come out and was waiting there on account of the heavy storm, and he says he saw the accident, and he said that the place where the accident took place was 15 or 16 feet from the curb, and that it was the left side of the front of the automobile that hit Mr. Gaffney and threw him forward on his face, and he says that he did not hear any signal.

On the part of the defendant a witness is produced, a Mr. Connor, and Mr. Connor says that the plaintiff was knocked down by this automobile by being struck with the right front fender and corner of the radiator, and he says that the automobile was about on the corner when it struck him, and you will remember his point of observation. He says he was under the railroad bridge, the southeast embankment

Charge to Jury.

he says, when he observed this. He said the forward right mud-guard and the edge of the radiator hit him, and he says that the point at which he was struck was 15 feet from the sidewalk. He says that what attracted his attention there was a number of horns blowing, but he does not say that the horn of this automobile was blowing; in fact, it appears from his statement, which is offered in evidence, that what he then said was that he didn't hear any signal, did not hear any horn. However, it will be for you to say whether or not he meant to say by that statement that he didn't hear this automobile blow any horn. Of course, you should reconcile the testimony if it can be done. That statement appears to be under oath just the same as his present testimony has been given under oath.

Now, on behalf of the defendant, in addition to Mr. Connor, Mr. Allchin, the chauffeur is produced as a witness, and he tells a very different story as to the happening of this accident. He says that the accident did not happen where the plaintiff and his witnesses say it did. He says it did not happen where Mr. Connor says it did. The witnesses for the plaintiff, if you will remember, point to the corner at the point marked X while Connor places it directly opposite on the corner, to Mr. Allchin, the chauffeur, who marked it with an X upon the photograph, you will remember where that is, and that is up from Market street, around the corner, or, as some have called it, Railroad place, an entirely different location. He says that while he marked the X on the curblin he says it did not occur at the curb, that it was about 8 feet out in the street from the curb. He says he was

Charge to Jury.

going to the Pennsylvania station to meet Mr. Illingworth, the defendant in this case, and that as he came down River street and down Railroad place he blew his Klaxon, sounded his Klaxon frequently, every few seconds he says, and he says the lights were lighted on the car and that these lights were effective for 50 feet ahead of the car and he says he was going then at the rate of eight to ten miles an hour, that because of the rain the wind shield was down and that there were no front curtains on and here is what he testifies to as to the happening of the accident itself. He says that he saw Mr. Gaffney, the plaintiff, just as he was stepping off the curb; that he saw him on the curb and saw him just as he was stepping off the curb; that at that time his automobile was 20 feet away and that as soon as he saw him step off the curb he commenced to put his brake on, and he says that he put the brake on so hard that it snapped the chains, which were on his rear wheel, and that at the time of the collision, which he said happened about 8 feet out from the curb his automobile was about at a standstill. He says, if you will recollect, that while he sounded his horn that the plaintiff appeared to pay no attention to him and that then he swerved to the left 2 or 3 feet and that the plaintiff, instead of being struck by the automobile, walked right into the front wheel of the automobile and in that way received his injury. He said that opposite where the plaintiff was starting to cross was a blank wall. Now, where testimony differs, as it does in this case, you have a right to consider the probabilities of the case. Was it probable that the plaintiff if it be true that he was going to take a Springfield avenue car, would have crossed at a place

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Charge to Jury.

where the chauffeur said he did? Why was he crossing over towards this blank wall? That may be a question of some consequence for you to consider. Is it probable that he was crossing at the point that the chauffeur said he did over towards this blank wall, or is it more probable
10 that he was crossing at the point he and Mr. Connor said that he was crossing in order to reach the Springfield avenue car? Of course, when you can reconcile testimony you should reconcile it if you can. If you cannot reconcile it you have a right to consider probabilities and determine which story is the more probable and which witnesses are the more creditable. After considering all of this testimony as to the place where the accident occurred, and the conditions,
20 then it is for you to say whether the driver of this automobile was operating his automobile as a reasonably, careful and prudent person would have operated it under the circumstances and conditions that then existed. If you find that a reasonably careful and prudent man would have taken greater care than he did then he was negligent. If you find, on the contrary, that he did all that a reasonably careful and prudent man ordinarily would do under those
30 circumstances then he was not negligent and so your verdict must be for the defendant in this case. But if you decide that the defendant's chauffeur was negligent, the defendant is responsible for the acts of this chauffeur, admittedly he was in the employ of Mr. Illingworth and was acting within the scope of his authority and Mr. Illingworth is responsible for the acts and omissions of his chauffeur. If you decide that the chauffeur was negligent then you consider whether Mr. Gaffney was negligent for the
40 same duty or a similar duty as devolved upon

Charge to Jury.

the chauffeur of this automobile devolved upon Mr. Gaffney. Each had to take care for his own safety. They had equal rights in the street. Mr. Gaffney had a right to cross to take the trolley-car and Mr. Allechin had a right to operate his automobile in the very spot where that accident took place, so I say a duty devolved upon Mr. Gaffney to conduct himself as a reasonably prudent and careful man would have done, and if in walking across the street he was negligent even though this chauffeur was negligent he cannot recover. 10

I have already stated to you it was the duty of the chauffeur to make a reasonably careful observation of persons likely to be in the path of his car, likely to be in the path of its progress, likewise it was the duty of Mr. Gaffney before going out into a street as much used as this street is, or, in fact, any street, to make observation to discover whether or not vehicles were approaching which might be a menace to his safety and he must not only look but he must look in such a way as to make looking effective. That is, he must not just glance but he must make a reasonably careful observation to see whether automobiles are approaching, and it will be for you to say whether or not in view of the rate of speed at which this automobile was running and the distance which Mr. Gaffney was from the curb when he was struck whether or not he did make a reasonably careful observation under the circumstances and conditions. In considering this you may consider the rate of speed at which automobiles run. The chauffeur said he was running at eight or ten miles an hour. Now, at eight miles an hour he would run almost 12 feet per second and at ten miles per hour he would run 14 $\frac{2}{3}$ feet per second. 20
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Charge to Jury.

You may also take into consideration the condition there. It was a rainy night and the plaintiff says that he could see about half-way to Commerce street when he made his observation in that direction, but the map which is in evidence shows that is a comparatively short distance. In addition to this at a place of this kind there is a great deal for a person crossing the street to observe. There is a loop there, a trolley loop. It is necessary to make observations not only up Commerce street but a person crossing there must make observation both ways, east and west on Market street. Now, if you find in this case that Mr. Gaffney failed to make proper observation and stepped out in front of this automobile when it was so close that by the exercise of reasonable care on the part of the driver of the machine it could not be stopped or diverted from its course a sufficient distance in time to avoid a collision then Mr. Gaffney was negligent and, notwithstanding that you may find that the driver of the automobile was negligent yet he cannot recover. To sum up what I have said, if both of these people were negligent, or to go back a little further if neither of them were negligent, if you find that both of them were taking that degree of care which I have indicated to you then it was an unavoidable accident for which no one is responsible; neither party can recover from the other, or if you find that both of them were negligent and that their negligence resulted in this accident or contributed to this accident then Mr. Gaffney cannot recover, but if you find that the chauffeur of the automobile was negligent in operating it, if you find that he did not do what a reasonably careful and prudent man would do under the circumstances and if you

Charge to Jury.

find, on the other hand, that Mr. Gaffney did do what a reasonably careful and prudent man would have done under the circumstances then the plaintiff is entitled to your verdict. Then you come to a consideration of damages. However, damages are not to be considered at all unless you have so found. If the plaintiff is entitled to recover he is entitled to be compensated for the injuries and for the pain and suffering which he underwent as a result of the collision. This is an element of damages which cannot be accurately measured. It must be such sum as you gentlemen believe will be a return in money to him for the pain and suffering which he had undergone as a result of his injuries. No sum must be awarded in damages to the plaintiff by way of punishment of Mr. Illingworth for the negligent act of his driver, if you find that he was negligent, but your damages must be limited to proper compensation, what will be a return in dollars and cents to Mr. Gaffney for his pain and suffering. On this point I should call your attention to what the doctor says these injuries were. He said he had a severe contusion. That means a severe bruise on the right knee that produced water on the knee, synovitis. He said he had a sprained right ankle and had small abrasions or scratches on the right knee. He said all these things except the knee healed up nicely and quickly, but it appears from plaintiff's testimony that it was nineteen weeks before he could go to work permanently, and for this pain and suffering and for discomfort during this period he is entitled to recover if he is entitled to your verdict at all. If he is entitled to your verdict he is also entitled to be reimbursed for the amount of money he spent for medicine,

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Charge to Jury.

10 which he says is \$5 or \$6 and for the amount of money he owes to the doctor for medical attendance, which Dr. Lowrey says is \$45, and if he is entitled to recover he is entitled to recover for loss of wages. He says he was getting \$15.50 a week and it was nineteen weeks before he could go to work, which would be \$294.50, but he admits on cross examination that he was working two weeks of that time which would be \$31, making a deduction of \$31 from that amount, leaving \$263.50.

Now, gentlemen, these are the elements of plaintiff's damage and are to be considered by you if you determine as I have indicated that the chauffeur was negligent and that Mr. Gaffney was free from any negligence.

20 (The jury retires.)

30 *Mr. Heine.* I object to that portion of the charge in which the Court speaks of the place of the accident and states in substance that the place as testified to by the witness, Connor, was not the same place as the place at which the chauffeur, Allchin, places him. The second place is where the Court says the testimony was that he could see half-way up to Commerce street, I mean that the testimony was he could see in an easterly direction which would be toward Commerce street looking to his left 100 feet and that his view to the right was a half block which was towards Lawrence street, and also the further question there when he was looking in a direction from which this automobile came that hit him the loop was in his view which should have been observed because the physical situation

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Charge to Jury.

shows the loop to be well to the west of the point where he was crossing to in the testimony, consequently the loop and the cars that might be on it to necessitate a looking out for traffic there would not be involved in his view to the east from which the automobile came.

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(Jury returns into court.)

The Court. Gentlemen, my attention has been called by the attorney of defendant to a misstatement of fact which is corroborated by my notes when I come to make an examination of them. Of course, it is inexcusable for the Court to misstate the evidence to the jury. I told you that the plaintiff said that when he came to the curb and looked both ways he said he could see half-way up to Commerce street. That is not strictly correct. He said he could see in that direction about 100 feet. That was his statement, not that he could see half-way up Commerce street but that he could see a half a block in the other direction. I just had the situation reversed.

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Juror. Can I ask a question? Was that doctor's bill paid, the \$45?

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The Court. That is not pertinent whether it was paid or not because if the plaintiff in this case is responsible for it then if it is not paid it is an element of compensation for you to consider in this case. I think there is no testimony that it has been paid but that would make no difference. If the plaintiff is responsible for it it may be considered and if he can recover in this case it should be allowed.

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Plaintiff's Rule to Show Cause.

Plaintiff's Rule to Show Cause.

Filed February 4, 1916.

ESSEX COUNTY CIRCUIT COURT.

10	JOHN GAFFNEY, <div style="text-align: right; padding-right: 20px;"><i>Plaintiff,</i></div> <div style="text-align: center; padding: 0 10px;"><i>vs.</i></div> WILLIAM H. ILLINGWORTH, <div style="text-align: right; padding-right: 20px;"><i>Defendant.</i></div>	}	<i>Action at Law.</i> <i>Rule to Show Cause of Plaintiff.</i>
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20 Application having been made to the court within four days after the verdict in the above stated cause for a rule to show cause why a new trial should not be granted because the damages are inadequate.

30 It is on this 4th day of February, 1916, ordered that the defendant show cause before this court on Friday, the third day of March, 1916, at two o'clock in the afternoon, why the verdict in the above stated cause should not be set aside in respect of damages and a new trial ordered on the question of damages only, the verdict to stand good in all other respects.

NELSON Y. DUNGAN,
Circuit Court Judge.

On motion of

GROSKEN & MORIARTY,
Attorneys for Plaintiff.

Let this rule be entered.

*Defendant's Rule to Show Cause.***Defendant's Rule to Show Cause.**

Filed February 29, 1916.

ESSEX COUNTY CIRCUIT COURT.

JOHN GAFFNEY,

*Plaintiff,**vs.*

WILLIAM H. ILLINGWORTH,

*Defendant.**Action at
Law.**Rule to
Show Cause
of Defendant.*

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Application having been made within six days after the rendering of the verdict in the above entitled cause, now on motion of M. Casewell Heine, Esquire, attorney for defendant, it is on this 29th day of February, 1916.

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ORDERED, that the plaintiff show cause before this Court on Friday, the 17th day of March, 1916, at two o'clock in the afternoon, why the verdict in the above stated cause should not be set aside and a new trial ordered, the defendant expressly reserving the following points:

1. That the Court refused to strike out the testimony of witness, Frank J. Fox, as to the distance of the automobile from the curb on the ground that the accident happened in 1914, and the witness paced off the distance in 1916. (S. M. pp. 8 and 9, Tuesday, February 1, 1916.)

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2. That the Court refused to strike out witness, Frank J. Fox's answer, "Good, lively gait, I cannot judge the speed." (S. M. pp. 9 and 10, February 1, 1916.)

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Defendant's Rule to Show Cause.

3. That the Court denied defendant's motion for a non-suit.

4. That the Court overruled the defendant's counsel's objection to plaintiff's attorney's question directed to the defendant on cross examination, "Did you promise to pay all the doctor bills?" (S. M. pp. 57 and 58, Tuesday, February 1, 1916.)

5. That the Court denied defendant's motion for direction of the verdict in favor of the defendant.

Let this rule be entered in the minutes.

NELSON Y. DUNGAN,
Circuit Court Judge.

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*Order.***Order.**

(Filed March 27, 1916.)

ESSEX COUNTY CIRCUIT COURT.

JOHN GAFFNEY,	}	<i>Plaintiff,</i>	<i>Action</i>	10
vs.			<i>at Law.</i>	
WILLIAM H. ILLINGWORTH,	}	<i>Defendant.</i>	<i>On Rule to</i>	
			<i>Show Cause.</i>	
			<i>Order.</i>	

A rule having been granted the defendant in the above-entitled cause on February 29, 1916, that the plaintiff show cause why the verdict in the above stated cause should not be set aside and a new trial ordered; and the court having heard the arguments of the respective parties, by their respective counsel, in reference to said rule to show cause and, after consideration, being of opinion that said rule should be discharged, it is ORDERED, on motion of Grosken and Moriarty, attorneys for plaintiff, that the said rule to show cause be and the same is hereby discharged.

And a rule to show cause having been granted the plaintiff on the 4th day of February, 1916, that the defendant show cause why the verdict in the above stated cause should not be set aside in respect of damages and a new trial ordered in respect of damages only, the verdict to stand good in all other respects, and the court having heard the arguments of the parties, by their respective counsel, in reference to said rule to show cause and, after consideration, being of opinion that the damages are inade-

Statement.

quate, it is ORDERED, on motion of Grosken and Moriarity, attorneys for plaintiff, that the verdict in the above stated cause be, and the same is hereby set aside in respect of damages and a new trial be, and the same is hereby ordered on the question of damages only, the verdict to stand good in all other respects; provided, however, that if the defendant shall pay to the plaintiff the sum of \$480.50 within ten days from the date of service of this order upon him or his attorney, then the plaintiff's rule to show cause shall be discharged.

Let the foregoing order be entered.

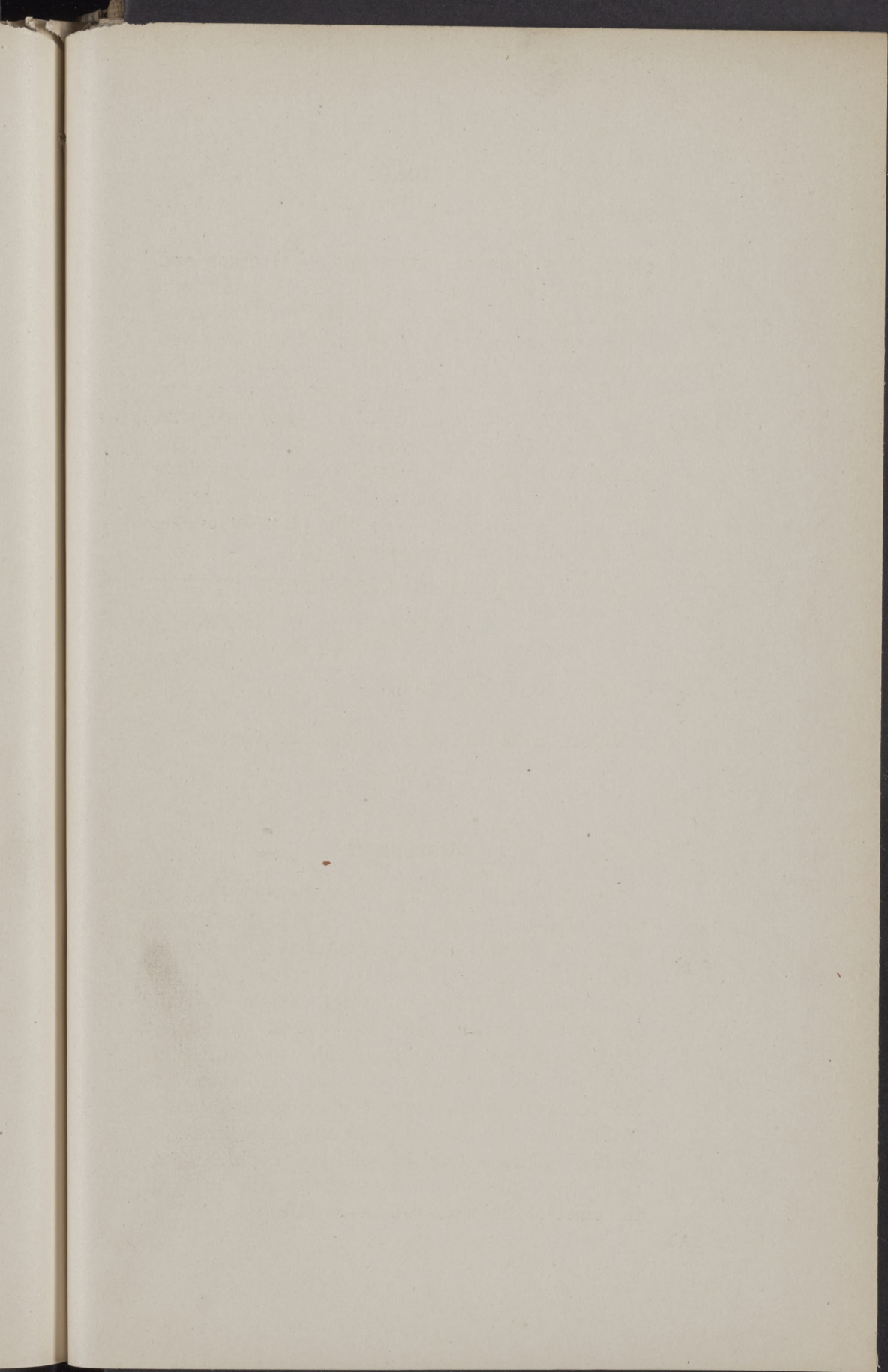
NELSON Y. DUNGAN,
Circuit Court Judge.

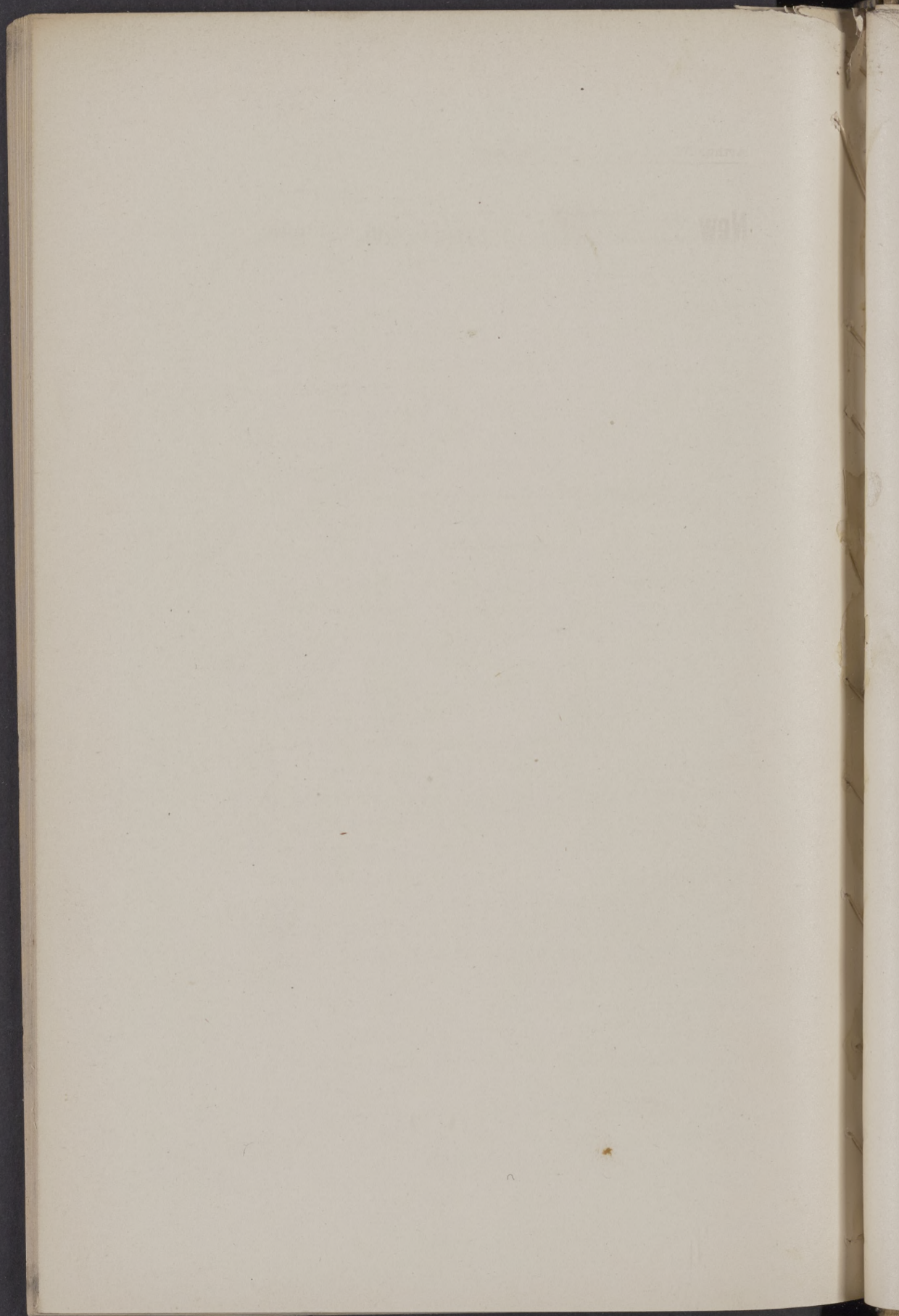
Dated March 23, 1916.

Objection noted as a ground of appeal.

Statement.

The defendant did not comply with the condition imposed by the Court in its Order filed March 27, 1916, and failed to pay the \$480.50 within ten days. Thereupon the case came on again for trial before Honorable Nelson Y. Dungan and a jury on the 14th day of November, 1916, upon the question of damages only and said trial resulted in the jury finding a verdict in favor of the plaintiff and against the defendant for the sum of \$525 and costs taxed at \$67.64, making a total of \$592.64 for which judgment was entered on November 14th, 1916, in the office of the Clerk of Essex County.





New Jersey Court of Errors and Appeals

JOHN GAFFNEY,

Plaintiff-Respondent,

vs.

WILLIAM H. ILLINGSWORTH,

Defendant-Appellant.

Action at Law.

On Appeal.

Brief of Defendant-Appellant.

Statement.

This action was brought in the Essex County Circuit Court for damages for personal injury suffered by the alleged negligence of defendant.

The action was tried before Judge Nelson Y. Dungan on November 1st, 1916, and resulted in a verdict for the plaintiff and against the defendant in the sum of one hundred ninety dollars and twenty-five cents (\$190.25) and costs.

Rules to show cause were then taken out by plaintiff and defendant respectively and upon argument the Court discharged defendant's rule and made an order (Case, pp. 105-6) granting to plaintiff a new trial as to damages only, provided that if defendant paid \$480.50, within ten days the plaintiff's rule should be discharged.

The defendant did not make the payment, and a new trial was thereupon awarded by the order.

Defendant's objection being duly taken to the order of the Court the sole question raised upon this appeal is the propriety of the Court's action in making this order with its condition or provision.

Brief of the Argument.

Defendant contends—

(1) That the Court had no power to set aside the verdict as inadequate, and to grant a new trial as to damages only.

(2) It will also be contended, that the verdict as it stands is adequate and proper, and evidences no prejudice or partiality on the part of the jury.

(3) That the Court had no power to impose the condition that, if defendant would consent to pay a greater amount than the amount of the verdict, the plaintiff's rule would be discharged, as it thereby substituted its opinion for that of the jury, in a tort action involving unliquidated damages.

Point I.

THE COURT ERRED IN SETTING ASIDE THE VERDICT AS INADEQUATE AND IN GRANTING A NEW TRIAL AS TO DAMAGES ONLY, AND SHOULD HAVE GRANTED A NEW TRIAL, IF AT ALL, UPON THE WHOLE CASE.

The first modification of the common law by which courts interfered with the amounts of verdicts was in reducing those that were clearly excessive, and was exercised generally in contract cases, where the excess was calculable. The extension of the practice to actions for personal injury and other tort actions has met with opposition, and, while it is undoubtedly done, its propriety and correctness have been challenged in the case of *Phillip D. Heinz v. Delaware, Lackawanna and Western Railroad Company*, now *sub judice* in this court.

The courts seem to proceed in scaling down personal injury verdicts upon the principle of declaring an amount—a maximum—anything beyond which they would consider excessive.

It can be contended with force, that this action should only be taken in cases where the excess is calculable from undisputed evidence or pursuant to some rule of law.

“Where the evidence furnishes some standard for valuation of damages, a verdict wholly disregarding such standard, ought not to stand.” *Jackson v. Traction Co.*, 59 N. J. L. 28.

The courts were much slower to interfere with verdicts claimed to be inadequate and have less frequently set them aside on this ground, particularly in personal injury and other tort actions involving unliquidated damages.

It is, of course, arguable that if the Court can give plaintiff an option to take less or have the verdict set aside, it can also give defendant the option of paying more, or having the verdict set aside.

I have, however, failed to find a case where the Court has offered defendant an option such as that in the case at bar to submit to a new trial for damages only, or to pay a larger amount than that of the verdict.

There are decisions and in some States there are statutes which hold and provide that verdicts in personal injury actions and other tort actions may not be set aside on the ground of inadequacy. 37 *Century Dig.* New trial. Sec. 152. *Hamilton v. Pittsburgh, etc., Ry. Co.*, 104 Ill. App. 207.

While superficially there may appear to be no difference between setting aside a verdict as excessive or as inadequate, there is in fact a dif-

ference and the cases and statutes above referred to recognize it. In personal injury cases it is but human and natural that sympathy should tend to influence the amount of verdict, and as a result the court set aside verdicts and gave plaintiffs options to remit an excess portion thereof long before they felt warranted in setting them aside for inadequacy.

Jurors are unlikely to belittle personal injury or loss—such an attitude is contrary to human nature—and a small tort verdict generally has some good and sufficient reason in the case to account for it, and the courts have respected it.

The true rule seems to be that when the verdict, whether excessive or inadequate, is such as to shock the sense of justice, considering it in the light of the undisputed evidence, and the applicable rules of law, it will be set aside. The cases demonstrate that excessive verdicts greatly preponderate in number over those that are inadequate.

“In actions where there is no definite measure of damages, and especially in actions for injury to the person, the inadequacy of the recovery must be very apparent, to justify the allowance of a new trial.” 29 Cyc. 849.

“The court will not interfere with this assessment” (by the jury) “unless they have clearly abused this discretion.” *Sherman v. Redfield*, 6th Ed. on Neg., Vol. III, p. 2046.

“In general the courts will not disturb verdicts merely for inadequacy, unless the verdict clearly indicates passion, partiality, prejudice, mistake or misapprehension.” *Fulmele v. Forest* (Del.), 86 Atl. 733.

Abbott's Civil Trial Brief, p. 521.

Benton v. Collins, 47 L. R. A., 33 note (pages 39-42).

Doody v. B. & M. Railroad, 89 Atl. 487, (33 A. & E. Annt. cases, p. 850 note).

The conclusion therefore is, that a verdict to be successfully challenged as inadequate, must show that the jury was influenced by passion, prejudice, partiality, mistake, and misapprehension—that they clearly abused the discretion reposed in them and that the inadequacy is, in a word, gross.

If the inadequacy be gross in the opinion of the Court, there is but one course open, and that is a new trial upon the whole case. If the jury has failed to perform its function; has shirked its duty on one branch of the case, *i. e.*, damages, can it properly be allowed to pass upon the other branch of the case, *i. e.*, liability?

No matter how clearly the Court may charge, the two questions are never entirely separate in the minds of the jury. Who can say that they might not have found against liability, rather than to award proper damages, or that they brought in a small verdict because they were in doubt as to liability. There is no means of separating the functions which were properly performed, and ascertaining upon what subject matter they acted, from those that were improperly performed, and the subject matter upon which they acted. We submit it is impossible, if a jury has abused its function, to separate the reasoning and motives, which operated in relation to damages, from those which operated in relation to liability. If the jury is not good enough for the plaintiff on damages it is not good enough for the defendant on liability.

This has been recognized in New Jersey. In *Miller v. D., L. & W. R. R. Co.*, 58 New Jersey

Law, 428, a woman suffered serious injury to the knee ligaments. The jury found a verdict of six cents. Beasley, *C. J.*, says: "This result of the trial in this case cannot be explained on any ground, that will harmonize with justice or common sense. Counsel's argument that the jury thought there was no cause of action, but in a spirit of favoritism found for a woman against a corporation, is suicidal as it proved the jury distinctly in the wrong, and on that account their action should be annulled, for so unscrupulous a body should not be allowed to settle the rights of plaintiff or defendant."

"In *Caswell v. North Jersey Railroad*, 69 N. J. L. 226, the court said * * * 'Where the inadequacy is so great as to indicate passion or prejudice on the part of the jury, a new trial should be granted on the whole case.'"

In the case of *Springett v. Balls*, 7 Best and S. 477, the court held, where the verdict for the plaintiff was very small, that a new trial should be granted on the whole case on the ground that the jury had shirked the duty of deciding the issue.

"In a personal injury action, where the award of damages is so inadequate as to indicate, that the jury disregarded the instructions of the court, a new trial should be granted, but it should be granted on all of the issues where it is apparent that the denial of a new trial on the question of liability might work injustice." 39 L. R. A. (New Series), p. 488, note.

If "the jury were influenced by passion and prejudice in rendering the verdict, which the court found to be excessive to so great an extent, there were sufficient grounds for

holding that the entire verdict, and all the questions in the case were likewise influenced." *Murry v. Leonard*, 75 N. W. Rep. 272.

"The court concludes that the jury was influenced by passion or prejudice or both, because they found such excessive damages, and yet allows their findings covering the major propositions of the case, upon which damages are consequent, to stand. Why should a verdict be in part retained, if the jury were really influenced by passion or prejudice? Where their estimate is rejected and another substituted, is the latter a verdict?" Vol. I, *Sutherland on Damages*, pp. 108 to 114.

If the courts are to promote justice in the exercise of their discretion, we submit that there should be considered in connection with an application to set aside for inadequacy and to award a new trial for damages only, that such a trial, as a practical matter, delivers the defendant over to slaughter, regardless of how the court will charge. The jury starts with the proposition, "he ought to pay"—"they did not soak him enough last time, let us take care of him."

The second jury does not see the liability witnesses; their possible shiftiness on the stand; does not get the atmosphere of the whole case, which must have had its effect upon the first jury. The first jury starts with the proposition—"if he is liable, he must pay," and for some reason they give him little. The second jury starts with the atmosphere of money—"he ought to pay, and he ought to pay more." We are prepared to submit as a practical proposition, that in cases for personal injury, a new trial

should never be granted as to damages only, for the reason, that the practical working-out of such a trial is unjust and unfair to the defendant.

It is submitted therefore that the action of the Court in the case at bar, in awarding a new trial for damages only, was improper in law and tended to work an injustice to the defendant, assuming that it was properly set aside for inadequacy, which would require the inadequacy to be gross.

Point II.

THE VERDICT WAS NOT INADEQUATE AND SHOULD NOT HAVE BEEN SET ASIDE.

The evidence as to damages is very brief. The doctor's bill amounted to \$45.00 (Case, p. 15, line 20). The plaintiff expended for medicine, \$6.00 (Case, p. 21, line 28). This makes a total of \$51.00, which is undisputed and, if the verdict had been less than \$51.00, we concede it would have been properly held to be grossly inadequate.

In regard to wages, plaintiff testifies that he was out of work for "nineteen weeks"—

"Q About nineteen?

A Around that."

(Case, p. 21, line 20.)

On cross examination he said—

"Q You went to work some of the nineteen weeks, didn't you, Mr. Gaffney?

A Yes.

Q How many weeks did you work during that nineteen weeks that you weren't working?

A About two weeks."

(Case, p. 21, line 40, and p. 22, line 1.)

“Q How long were you in bed?

A I guess about four weeks or over. I cannot remember now.” (Case, p. 21, l. 16.)

“Q About how many weeks were you in bed?

A I don't know how many weeks.” (Case, p. 21, l. 11.)

His wages were \$16.50 per week. (Case, p. 21, l. 24.)

Note that the witness is not definite and certain, “around nineteen weeks”—“around that”—“about two weeks”—“I cannot remember now”—“I don't know how many weeks.” The jury were entitled to consider the indefiniteness of the statement, the manner of the witness while making it, the dropping of his eye, or uneasiness in his manner while making these important estimates in his own favor. They were entitled to consider it in connection with his testimony on Case, page 30, when asked about which side of the automobile it was that hit him, when he said, “I don't know which side it was hit me,” and when he was confronted with his sworn statement that “by what part or parts of said automobile was plaintiff struck?” *Answer.* “By the left front of said automobile.” (Case, p. 31, line 35.) If the plaintiff contradicted himself in one or more cases and brought no corroboration of the time that he did not work, the jury were entitled, as practical men, to appraise his veracity, his self-interest, and to find, what in their judgment, was probably the correct number of weeks that he was unable to work.

“The jury may use their own knowledge and judgment in estimating damages, without testimony in dealing with matters of common experience, such for example as the value of future services.” *Shearman and Redfield on Neg.*, Vol. III, p. 2046.

The jury in this case used this knowledge and judgment in appraising plaintiff's damage by reason of inability to work.

The same is true as to the damages claimed by plaintiff for personal injury.

Therefore, taking the verdict of \$190.25 the jury, if they did not abuse their discretion, must have found at least \$51.00 for the plaintiff, as actually expended because of the accident. The balance of \$139.25 was apportioned between loss of wages and pain and suffering—both matters of appraisal and judgment by the jury and peculiarly within their province. We submit that the jury was justified, in view of the entire testimony of the plaintiff, and in view of his testimony particularly as to damages, to scale down both wages and pain and suffering because in their sound judgment as practical men, they believed the plaintiff was exaggerating.

If they believed that the time he guessed he was in bed "four weeks or over," represented his loss of wages, that would amount to \$66.00, and still leave \$73.25 for pain and suffering, which on the evidence it is submitted the jury could have found with entire propriety.

After passing the items of \$51.00, the case becomes one in regard to which no calculation can be made from the evidence or from the rule of law governing damage. It was a sphere into which the Court had no right to intrude. (See authorities cited, *supra*.)

The Court, so far as the part of the verdict which cannot be calculated, is concerned, may not substitute its judgment for that of the jury.

"Where the amount is indefinite or uncertain, it cannot be determined by the court without assuming the province of the jury."

Moffett v. Sackett, 18 N. Y. 528.

Cassin v. DeLaney, 38 N. Y. 181.

It is submitted that the verdict is adequate and should not have been interfered with by the Court.

Point III.

THE CONDITION IMPOSED BY THE COURT, THAT THE DEFENDANT PAY AN AMOUNT IN EXCESS OF THE VERDICT, OR SUBMIT TO A NEW TRIAL AS TO DAMAGES ONLY, WAS UNWARRANTED AND IMPROPER.

Under the authorities referred to above, we submit that if the Court decided that the verdict was inadequate, he had but one course open, namely, to award a new trial on the whole case. The Court's attempt to fix a figure over and above the money loss proved was an invasion of the province of the jury, and dealt with matters of unliquidated damages for personal injury, which the jury alone could appraise.

We have failed to find any case, in which an option such as this, which is offered to the defendant in the case at bar, has ever been tendered to any defendant. Further the character of the condition attached, namely, that unless the larger amount were paid, the new trial would be as to damages only and not on the whole case, amounted to a positive threat to the defendant and worked him a great injustice. He was confronted with the practical situation above referred to, either you will pay an amount which the Court has no right to fix, or else the Court will deliver you over to the jury with instructions to take your money and be sure to get enough.

It is respectfully submitted that the order made herein should be set aside and that all proceedings taken thereafter, and pursuant thereto, and the judgment entered upon the second trial, should be vacated, declared null and void and reversed, and that the judgment entered on February 1st, 1916, should be reinstated and confirmed as and for the judgment in this cause, or that a new trial should be granted on the whole case.

Respectfully submitted,

M. CASEWELL HEINE,
*Attorney for and of Counsel
for Defendant-Appellant.*

New Jersey Court of Errors and Appeals

JOHN GAFFNEY,

Plaintiff-Respondent,

vs.

WILLIAM H. ILLINGSWORTH,

Defendant-Appellant.

*Action at
Law.*

On Appeal.

Brief of Plaintiff-Respondent.

Statement.

At the trial of this action in the Essex County Circuit Court, the jury awarded the plaintiff damages in the sum of \$190.25 for personal injuries suffered by reason of the negligence of the defendant.

The defendant's rule to show cause why a new trial should not be granted was discharged. (S. C. page 105.) On the plaintiff's rule to show cause why the verdict should not be set aside in respect of damages and a new trial ordered in respect of damages only, the verdict to stand good in all other respects, the Court granted such new trial as to damages only, providing that if the defendant should pay to the plaintiff the sum of \$480.50 within ten days from the date of service of the order upon him or his attorney, the plaintiff's rule to show cause should be discharged. (S. C. pp. 105-6.)

The defendant did not make said payment. Thereupon the case came on again for trial before Honorable Nelson Y. Dungan and a jury on November 14, 1916, upon the question of damages only. (S. C. page 106.) Said trial,

in which both parties participated, resulted in a verdict and judgment for the plaintiff and against the defendant in the sum of \$525 and costs. The testimony given by the witnesses on said new trial, under direct examination by the plaintiff's attorneys and cross examination by defendant's attorney, is omitted from the state of the case. We assume that, inasmuch as it pertained merely to damages, the defendant's only purpose in failing to include it, was to decrease the expense of printing and the bulk of the state of the case.

The defendant now appeals.

The only ground urged by the defendant in his brief is stated in his grounds of appeal as follows:

“That the Court herein made an order dated March 23, 1916, setting aside the verdict of \$192.00 in favor of the plaintiff on plaintiff's motion, and ordering a new trial on the question of damages only, with the proviso: ‘That if the defendant shall pay to the plaintiff the sum of four hundred eighty dollars and fifty cents (\$480.50) within ten days from the date of service of this order upon him or his attorney, then the plaintiff's rule to show cause shall be discharged.’” (See Grounds of Appeal, Ground 1, State of Case, p. 2.)

Further, the defendant at the conclusion of his brief (see page 12 of defendant's brief) submits “that the order made herein should be set aside and that all proceedings taken thereafter, and pursuant thereto, and the judgment entered upon the second trial, should be vacated, declared null and void and reversed, and *that the judgment entered on February 1st, 1916, should be reinstated and confirmed* as and for the judgment in this cause, or that a new trial should be granted on the whole case.”

Brief of Plaintiff-Respondent's Argument.

Plaintiff contends that the defendant-appellant's appeal should be dismissed for the following reasons:

(1) The defendant-appellant's first ground of appeal does not specifically point out the errors complained of.

(2) Defendant-appellant has waived his right to appeal.

(3) The Court had power to set aside the verdict rendered in the first trial in respect of, and grant a new trial as to damages only.

(4) The verdict in the first trial was inadequate.

(5) The trial Court in granting a rule to show cause why a new trial should not be had, may prescribe terms.

(6) Defendant-appellant was not injured by the proviso contained in the order granting a new trial as to damages only.

Point I.

THE DEFENDANT-APPELLANT'S FIRST GROUND OF APPEAL DOES NOT SPECIFICALLY POINT OUT THE ERRORS COMPLAINED OF.

Defendant-appellant should have specifically stated the ground of his objection. It is not sufficient to object generally to the order granting a new trial as to damages only, but the defendant should state the point on which he objects so that the Court and the plaintiff may be apprised of the precise objection he intends to make.

In *Donnelly v. State*, 26 N. J. L. 463 (affirmed by this Court in 26 N. J. L. 601), the Supreme

Court, quoting from the case of *Elwood v. Deifendorf*, 5 Barb. S. C. R. 398, said "the party objecting must put his finger on the very point to apprise the Court and his adversary of the precise objection he intends to make." Further, at page 512 of the same case, the Court said, "So in the assignment, the grounds of error should be specified. The adverse counsel are entitled to know what the exception is, and the Court are not required to search for errors not definitely pointed out."

Point II.

DEFENDANT-APPELLANT HAS WAIVED HIS RIGHT TO APPEAL.

This appeal should be dismissed for the reason that defendant-appellant, by appearing at and participating in the new trial as to damages only, waived his right to appeal.

When the Court made an order granting a new trial as to damages only, the defendant-appellant had one of two courses to pursue. He could have abandoned his case at that point and appealed from the order of the Court granting a new trial or he could have proceeded with the new trial. He cannot be permitted to speculate as to the outcome of a new trial as to damages only, and if that proves unfavorable to him, appeal from the order granting a new trial. He is required to make an election as to what course to pursue. He elected to accept the ruling of the Court and submitted to a new trial, thereby waiving his right to appeal.

Davis v. Davis, 8. Mo. 56.

Samuel v. Morton, 8 Mo. 633.

Andrews v. Youngstown, 35 Ohio 218.

2 Cyc. 647.

The unreported decision of this Court on a motion to dismiss the writ of error in the case of *Harris v. D. L. & W. R. R. Co.*, which was argued before this Court on May 14, 1909, is quite in point. There this Court dismissed a writ of error brought to review a judgment of the Supreme Court reversing the judgment of the Morris County Court of Common Pleas and awarding a *venire de novo*, upon the ground that the plaintiff, by giving notice of trial in the Morris County Common Pleas, after the judgment of the Supreme Court, had elected to accept the judgment and waived his appeal.

By appearing at and participating in the new trial as to damages only, the defendant-appellant enjoyed the benefit of the order of the Court, of which he now complains.

One cannot enjoy the benefits of an order of the Court and yet appeal from it.

Krauss v. Krauss, 74 N. J. Eq. 417. (E. & A. 1908.)

Point III.

THE COURT HAD POWER TO SET ASIDE THE VERDICT RENDERED IN THE FIRST TRIAL IN RESPECT OF, AND GRANT A NEW TRIAL AS TO DAMAGES ONLY.

P. L. 1912, p. 397, rule 73; S. C. R. 1913, rule 132, provides that "When a new trial is ordered because the damages are excessive or inadequate, and for no other reason, the verdict shall be set aside only in respect of damages, and shall stand good in all other respects."

Point IV.

**THE VERDICT IN THE FIRST TRIAL
WAS INADEQUATE.**

The amount of damages awarded by the jury in the first trial was certainly inadequate. The plaintiff in this suit is entitled to damages that will compensate him for his pain and suffering, the injury to his nervous system, and also the actual pecuniary loss he suffered, that is, loss of wages and the cost of curing himself.

The uncontroverted testimony of the plaintiff was that at the time of the injury complained of, he was employed by A. Pell & Sons, as a fireman (S. C. page 18); that he was receiving a weekly wage of \$16.50 (S. C. page 21); that a period of 19 weeks elapsed from the time of his injury until he was able to return to work permanently (S. C. page 21); that he worked two weeks during said period of 19 weeks (S. C. page 22); leaving a period of 17 weeks in which he was not able to work.

Plaintiff also testified that he spent \$5.00 or \$6.00 for medicines and bandages (S. C. page 21.)

The testimony of Dr. Lowrey, the physician who treated the plaintiff for his injuries, was that he was called in the case November 19, 1914, the day the plaintiff sustained the injuries (S. C. pages 11 and 14); that he treated the plaintiff up to March 1st (S. C. page 14); that the plaintiff was able to return to work in March, that plaintiff returned after working a while and said the knee still troubled him, he couldn't follow his work (S. C. page 16); that the charges for his services were \$45 and that such services were necessary and said charges were reasonable. (S. C. page 15.) This shows that the amount of actual pecuniary loss suf-

ferred by the plaintiff was the loss of 17 weeks at \$16.50 a week or \$280.50, \$45 for doctor's services and \$5 for medicines, making a total of \$330.50. As this evidence was uncontradicted, the jury was bound to accept it and should have rendered a verdict for at least that sum.

Baldauf v. Russell, Inc. et al, 88 N. J. L. 303, 96 At. R. 96.

The defendant-appellant in his brief (page 10) attempts to justify the verdict of \$190.25 by saying that the jury must have found at least \$51 for the plaintiff, as actually expended because of the accident, and that the balance of \$139.25 was apportioned between loss of wages and pain and suffering. On this basis, if nothing whatever were allowed for pain and suffering, the balance of \$139.25 would compensate the plaintiff for less than eight and one-half weeks loss of wages at \$16.50 a week.

The defendant complains that, although the plaintiff testified (S. C. page 21) that he was out of work all together 19 weeks, the fact that he later, in his testimony (S. C. page 21), used such indefinite words as "around that," etc., warranted the jury in finding that he was out of work only eight and one-half weeks, and this, in spite of the fact that there was no contradictory testimony on this point, and in spite of the fact that Dr. Lowrey's testimony was that the plaintiff was able to work in March and returned afterwards for further treatment, because he could not follow his work (S. C. page 16), corroborates the plaintiff's testimony that his disability extended over a period of 19 weeks, only two weeks of which he was able to work. Of course, in addition to being compensated for this loss of wages, the plaintiff was entitled to compensation for his pain and suffering.

The defendant (at page 9 of the brief) complains of the fact that, although the plaintiff, answering interrogatories served on his attorneys, in answer to the question, "By what part or parts of said automobile was plaintiff struck?" said, "By the left front of said automobile," the plaintiff said at the trial, "I do not know which side it was hit me." The defendant, however, fails to call attention to the fact that the plaintiff in answer to the following question (S. C. page 30) "Where did your counsel get the information from, that the left front side of this automobile hit you?" said "From the witnesses, I guess," and that the plaintiff, when asked, "Did anybody tell you what side hit you, any of your witnesses?" replied "Yes, I have heard that the left side." (S. C. page 41.)

THE VERDICT, BEING FOR \$190.25, SHOWS THAT IT WAS INADEQUATE ON ITS FACE.

In an action for personal injuries, where the undisputed evidence shows that the plaintiff has paid out an amount considerably in excess of the amount awarded to him by the jury, the verdict will be set aside as inadequate at the instance of the plaintiff.

Caswell v. North Jersey St. Ry. Co., 69 N. J. L. 226. (S. Ct. 1903.)

Wilson v. Morgan, 58 N. J. L. 426. (S. Ct. 1895.)

The case of *Caswell v. North Jersey St. Ry. Co.*, was an action by a husband and wife for personal injuries received by the wife. The jury rendered a verdict of \$500 in favor of the wife, and of \$100 in favor of the husband. The plaintiffs contended that the amounts allowed

by the jury were inadequate. The Supreme Court permitted the verdict in favor of the wife to stand, but, in setting aside the verdict for the husband, said, "It is clearly inadequate. The undisputed evidence in the case shows that he had either paid out or is legally liable to pay out, for medical attendance to his wife, necessitated by her injuries and for other expenses rendered necessary thereby a sum considerably in excess of the amount allowed by the jury. The verdict in favor of the husband, should, therefore, be set aside and a new trial allowed to him."

Point V.

THE TRIAL COURT, IN GRANTING A RULE TO SHOW CAUSE WHY A NEW TRIAL SHOULD NOT BE HAD, MAY PRESCRIBE TERMS.

Supreme Court Rules 1913, Rule 122 provides as follows:

"Where either of the parties to a trial at the circuit shall desire a rule to show cause why a new trial shall not be granted, he shall apply to the judge before whom the trial took place for such rule. The judge to whom such application is made shall exercise the same discretion in granting such rule as is now exercised by the Court, and shall prescribe the terms; and if the case in his opinion requires it, he may grant a rule to take testimony or any other rule proper for expediting the cause."

Point VI.

DEFENDANT-APPELLANT WAS NOT INJURED BY THE PROVISIO CONTAINED IN THE ORDER GRANTING A NEW TRIAL AS TO DAMAGES ONLY.

If the trial Court has discretion to allow a plaintiff in whose favor an excessive verdict is rendered to remit part of the amount or suffer a new trial (*N. J. Flax Cotton Wood Company v. Mills*, 26 N. J. L. 60; *Newell v. Clark*, 46 N. J. L. 363; *McKenna v. North Hudson R. Company*, 64 N. J. L. 106; *Vonderbeck v. Paterson*, 68 N. J. L. 584, why has it not the discretion to allow a defendant against whom an inadequate verdict is rendered to elect to pay what may be considered by such Court to be an adequate amount or suffer a new trial?

In such case it would seem that the plaintiff is the only party who might object, inasmuch as he might desire to have the damages assessed by a jury.

The plaintiff in the present case, however, did not appeal from the provisional order of the Court for a new trial and the defendant did not elect to pay the damages fixed by the Court. Instead, he preferred to have the damages fixed by a jury. Where has he been injured? In that event the defendant was not prejudiced by the Court's granting him the option of having the order for a new trial denied by the payment of the stipulated amount, and, as to him, there was no error.

A party cannot assign error upon the ruling of the Court, which, if erroneous, was in his favor.

Willis v. Farnold, 33 N. J. L. 206.

Rogers v. Colt, 21 N. J. L. 704.

For the reasons above given, we respectfully submit that the appeal in this case should be dismissed.

Respectfully submitted,

GROSKEN & MORIARTY,
Attorneys for and of Counsel
with Plaintiff-Respondent.