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Notice of Appeal.

NOTICE OF APPEAL.

Filed October , 1923.

New Jersey Supreme Court

UNION COUNTY CIRCUIT.

10

CHARLES BARRY,	}	<i>On Appeal to the N. J. Court of Errors and Appeals.</i>
<i>vs.</i>		
BORDEN FARM PRODUCTS Co., a cor- poration,	}	<i>Notice of Appeal.</i>

Plaintiff,

Defendant.

To Charles Barry, plaintiff, or Robert Newton Crane, attorney for plaintiff, Plainfield, N. J. 20

PLEASE TAKE NOTICE that the defendant herein appeals from the whole of the judgment entered in the above-entitled cause to the Court of Errors and Appeals of New Jersey, the last resort in all causes.

Dated, October 10, 1923.

Respectfully yours,

HEINE, BRADNER & LAIRD, 30
Attorneys for Defendant.

Service acknowledged October 12, 1923.

ROBERT NEWTON CRANE,
Attorney for Plaintiff.

40

Grounds of Appeal.

· GROUNDS OF APPEAL.

Filed November , 1923.

New Jersey Court of Errors and Appeals

10

CHARLES BARRY,

Plaintiff-Respondent,

vs.

BORDEN FARM PRODUCTS Co.,

Defendant-Appellant.

*On Appeal
from the New
Jersey Supreme
Court.*

Union County.

*Grounds of
Appeal.*

20

The above-named defendant-appellant, Borden Farm Products Co., a corporation, assigns the following grounds of appeal from the judgment of the New Jersey Supreme Court, in the above cause:

FIRST: Because the Trial Court refused to grant the defendant's motion for non-suit upon the evidence given at the trial.

SECOND: Because the Trial Judge refused to direct a verdict in favor of the defendant against the plaintiff.

Dated November 13, 1923.

30

HEINE, BRADNER & LAIRD,

Attorneys for Defendant-Appellant.

40

Summons.

SUMMONS.

THE STATE OF NEW JERSEY TO THE BORDEN COMPANY, a New Jersey Corporation,
 (L. S.) BORDEN'S CONDENSED MILK COMPANY, a
 New Jersey Corporation, and BORDEN'S FARM PRODUCTS
 COMPANY, INC., a New York Corporation, licensed to trans- 10
 act business in the State of New Jersey. YOU AND EACH
 OF YOU ARE SUMMONED to answer the annexed complaint of
 CHARLES BARRY, in an action at law in the Supreme Court.
 And take notice that unless you file your answer to said
 complaint with the Clerk of the Supreme Court, at Trent-
 on, within twenty days after service upon you of this
 writ and the annexed complaint, the plaintiff may pro-
 ceed in the suit and judgment may be entered against
 you.

WITNESS, WILLIAM S. GUMMERE, Chief Justice of the 20
 Supreme Court, at Trenton, this nineteenth day of Octo-
 ber, nineteen hundred and twenty-two.

ENOCH L. JOHNSON,
Clerk.

ROBERT NEWTON CRANE,
Attorney.

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Complaint.

COMPLAINT.

New Jersey Supreme Court

UNION CIRCUIT.

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CHARLES BARRY,

Plaintiff,

vs.

THE BORDEN COMPANY, a New Jersey
Corporation,

BORDEN'S CONDENSED MILK Co., a New
Jersey Corporation,

*Action at Law.
Complaint.*

and

20

BORDEN'S FARM PRODUCTS Co., INC., a
New York Corporation, licensed to
do business in the State of New
Jersey,

Defendants.

The plaintiff residing at Plainfield, Union County, New Jersey, says:

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1. On the twenty-eighth day of January, 1922, the defendant, THE BORDEN COMPANY, was a corporation of this State engaged in the retailing of dairy products in Plainfield and elsewhere.

2. On the same date the defendant, BORDEN'S CONDENSED MILK COMPANY, was a corporation of this State engaged in the retailing of dairy products in Plainfield and elsewhere.

3. On the same date the defendant, BORDEN'S FARM PRODUCT'S COMPANY, INC., a New York Corporation li-

40

Complaint.

censed to do business in this State was engaged in the retailing of dairy products in Plainfield and elsewhere.

4. At three-thirty o'clock in the morning of the twenty-eighth day of January, 1922, the defendants, or one of them, was the owner and operator of a large milk truck which was then and there being driven along a street known as Plainfield avenue which is a public highway leading from Plainfield to South Plainfield in Union and Middlesex Counties and while driving said milk truck, by its agents and servants it became and was the duty of the defendants, or one of them, to have the same lawfully lighted and to drive the same to the right of the center of the road. 10

5. At the same time and place the plaintiff was lawfully driving an automobile along the same highway in an opposite direction.

6. Defendants, or one of them, disregarded their or its duty as aforesaid and did on the said morning of the twenty-eighth day of January, 1922, by its agent and servant, so negligently and carelessly drive and operate the said milk truck along the highway known as Plainfield avenue, aforesaid, without lights thereon and on the wrong side of said highway so that as a direct and approximate cause of said carelessness and negligence the said milk wagon collided with the said automobile owned and driven by the plaintiff, whereby the said plaintiff was thrown out of his automobile on to the ground and rendered unconscious and his automobile was broken and damaged. 20 30

7. Said plaintiff was not guilty of any negligence that in any wise contributed to his injuries or damage.

8. Said plaintiff, by reason of said injuries, lost a great quantity of blood, broke his leg and became sick, sore, lame and disordered and his face was cut and bruised and he has suffered from the results of said injuries ever since that time and will continue to so suffer 40

Complaint.

at all times in the future, being made a cripple for life,
and his automobile was wrecked and demolished.

Plaintiff demands as damages the sum of \$25,000.00.

ROBERT NEWTON CRANE,
Attorney of the Plaintiff.

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Answer and Counter-claim.

**ANSWER AND COUNTER-CLAIM OF DEFENDANT,
BORDEN'S FARM PRODUCTS CO.**

NEW JERSEY SUPREME COURT.

UNION CIRCUIT.

CHARLES BARRY,

Plaintiff,

vs.

THE BORDEN COMPANY, a N. J. Corporation, BORDEN'S CONDENSED MILK Co., a N. J. Corporation, and BORDEN'S FARM PRODUCTS Co., a corporation,

Defendants.

10

Action at Law.

*Answer of
Defendant,
Borden's Farm
Products Co.*

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The defendant, Borden's Farm Products Co., Inc., answering the plaintiff's complaint herein says that

1. It denies the allegations of paragraph 1 except that the Borden Co. was a corporation.
2. It denies the allegations of paragraph 2.
3. It admits the allegations of paragraph 3.
4. It denies the allegations of paragraphs 4, 5, 6, 7 and 8 of said complaint.

30

FIRST DEFENSE.

This defendant says that the plaintiff, Charles Barry, was guilty of contributory negligence.

By way of counter-claim against the plaintiff, Charles Barry, this defendant says:

1. On or about January 20, 1922, the defendant was the owner of a certain horse-drawn milk truck which was

40

Answer and Counter-claim.

being driven and operated along Plainfield avenue, between Plainfield and South Plainfield, Union County.

2. On or about said time at said place the plaintiff, Charles Barry, was the owner and operator of a certain automobile which was being driven along said highway in the opposite direction.

10 3. On or about said date the plaintiff, Charles Barry, so carelessly and negligently drove and operated his said automobile as to cause the same to run into and strike one of the horses drawing aforesaid truck belonging to the defendant.

4. The carelessness and negligence of the plaintiff, Charles Barry, consisted in this:

a. Said automobile did not have appropriate lights thereon in accordance with the Traffic Acts of the State of New Jersey.

20 b. Said automobile was driven at an excessive rate of speed.

c. Said automobile was driven on the wrong side of the road, contrary to the Traffic Laws of the State of New Jersey.

d. No warning was given of the approach of said automobile.

e. Said automobile was not maintained under proper and careful control by the said plaintiff.

30 5. Because of the carelessness and negligence of the plaintiff, Charles Barry, aforesaid, the said defendant's horse received severe injuries from which he died, thereby damaging the defendant greatly.

Wherefore, defendant will claim damages in the amount of \$500 together with costs of suit.

HEINE, BOSTWICK & BRADNER,

*Attorneys for Defendant,
Borden's Farm Products Co.*

Answer to Counter-claim.

**ANSWER TO COUNTER-CLAIM OF BORDEN'S FARM
PRODUCTS CO.**

NEW JERSEY SUPREME COURT.

UNION COUNTY.

CHARLES BARRY,

Plaintiff,

vs.

THE BORDEN COMPANY, a N. J. Corporation, BORDEN'S CONDENSED MILK Co., a N. J. Corporation, and BORDEN'S FARM PRODUCTS Co., a corporation,

Defendants.

10

Action at Law.

*Answer to
Counter-claim
of Borden's
Farm Products
Co.*

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The plaintiff answering the counter-claim of Borden's Farm Products Company says:

1. Paragraphs No. 1 and 2 of the counter-claim are admitted.
2. Paragraphs No. 3 and 4 a, b, c, d and e, and paragraph No. 5, are denied.

FIRST DEFENSE.

The defendant, by its agent and servant, was guilty of contributory negligence in the driving of the said truck and in failing to keep proper lights on the same.

ROBERT NEWTON CRANE,

Attorney of Plaintiff.

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Reply to Answer to Counter-claim.

**REPLY TO ANSWER TO COUNTER-CLAIM OF
BORDEN'S FARM PRODUCTS CO.**

NEW JERSEY SUPREME COURT.

UNION COUNTY.

10	CHARLES BARRY,	<i>Plaintiff,</i>	<i>Action at Law.</i> <i>Reply to</i> <i>Answer to</i> <i>Counter-claim</i> <i>of Borden's</i> <i>Farm Products</i> <i>Co.</i>
	<i>vs.</i>		
	THE BORDEN COMPANY, a N. J. Corporation, BORDEN'S CONDENSED MILK Co., a N. J. Corporation, and BORDEN'S FARM PRODUCTS Co., a corporation,	<i>Defendants.</i>	
20			

The defendant, Borden's Farm Products Co., by way of reply to the first defense of the plaintiff's answer to the defendant's counter-claim says that

It denies each and every allegation of said first defense.

HEINE, BRADNER & LAIRD,
Attorneys for Defendants.

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*Postea.***POSTEA.**

CHARLES BARRY,

*Plaintiff,**vs.*

THE BORDEN COMPANY, a N. J. Corporation, BORDEN'S CONDENSED MILK Co., a N. J. Corporation, and BORDEN'S FARM PRODUCTS Co., a corporation,

*Defendants.**Action at Law.* 10*Postea.*

This case was tried before Judge Peter F. Daly, with a jury, at the Union Circuit on October 2, 3 and 4th, 1923.

The jury rendered a general verdict against the defendant, Borden's Farm Products Co., a corporation, and in favor of the plaintiff for twenty-five thousand (\$25,000) dollars. 20

PETER F. DALY,

Judge.

30

40

Edward S. Lewis, direct.

Q At my request did you go to the scene of an accident on Plainfield avenue, just outside the City of Plainfield, on the morning of January 28, 1922, and make a survey of the street there? A To make some measurements of the scene—at the scene of the accident.

Q Have you got your notes with you that you took at that time? A I have. 10

Q I show you a map and ask you if you prepared this sketch from the notes that you made on the ground there that morning? A I did.

Mr. Crane. May we have this put on an easel? I want to offer the map?

Mr. Heine. I have no objection at this time to the map as to the street, but there is on the map a measurement of the truck, the position of the truck on the roadway, and until that is established to have been as it was at the time of the accident, I should object to the map going in. 20

The Court. We will use it for the present for illustration purposes alone.

Mr. Crane. All right, sir.

The Court. There will be no objection. You may renew the offer afterwards.

Mr. Heine. Yes, sir.

(The map was adjusted on an easel.) 30

Q Mr. Lewis, will you just indicate to the jury the compass directions of the map? A This would be the north (indicating), in that direction, north pointing that way.

Q Will you indicate on the map, if it were extended, in what direction the City of Plainfield would be? A It would be to the north.

Q And if the map were extended, will you indicate on the map the general direction that South Plainfield 40

Edward S. Lewis, direct.

would be? A South Plainfield would be south (indicating).

Q Now I notice on the map three paralleling lines. Will you just explain to the jury what those three paralleling lines are to represent? A The easterly line would be the edge of the concrete pavement. This line
10 down to here is the center line of the measurement taken half way between the two edges. This is the west edge of the pavement (indicating).

Q I notice on the map, at the north and south ends of the lines indicating Plainfield avenue, there are two numbers 20's. What do those numbers indicate? A That is the distance—the width of the pavement.

Q Now I also notice two parallel lines within which there are the words "Rahway Avenue" marked. What do those lines indicate? A That is Rahway avenue, a
20 street that is mapped on a map of the Field property.

By the Court.

Q Is it open? A Roughly graded.

Q Fenced on each side? A Not fenced.

By Mr. Crane.

Q Will you tell the jury, if you know, what the grade of Plainfield avenue is, going south, for five or six hundred feet, to the north of Rahway avenue? A Well,
30 south of Rahway avenue the grade from here on (indicating) is fairly flat. North of Rahway avenue, from Marion avenue, which is the city line, you have a grade coming up to about Rahway avenue.

Q How much of a grade, would you say? A It would be hard to estimate without levels.

Q From Pemberton avenue, that you refer to as the Plainfield city line, going south towards South Plainfield, is Plainfield avenue straight? A No. There is a
40 curve, and it curves to the left.

Edward S. Lewis, direct.

Q Where does the curve start, Mr. Lewis; do you know? A Well, I couldn't say exactly. It is further down—approximately right near the city line.

By the Court.

Q How far is that city line from Rahway avenue? A From Rahway avenue the city line, I should judge, about six or seven hundred feet. 10

Q And Pemberton avenue is— A Marion avenue. The city line runs in Marion avenue. Pemberton avenue is another block north.

Q And Marion avenue is about six or seven hundred feet from Rahway avenue? A Yes, from Rahway avenue.

Q Where did you say this curve was? A Well, the curve would start back here, about at Marion avenue, and curve right on past Rahway avenue. 20

By Mr. Crane.

Q And you say, going south, that the curve was a curve to the left? A Yes.

By Mr. Heine.

Q A curve to the left, is that east or west, please? A That would be east.

Q Towards Plainfield? A Towards—the left-hand—west—east. It would be curving toward the east. 30

Q I mean as you go north.

The Court. As you go south?

A As you go south.

Mr. Heine. Yes.

Mr. Crane. Before I ask this question I might say that I am going to show, if the Court please, by another witness, when Mr. Lewis arrived, that the conditions remained the same as they were im- 40

Edward S. Lewis, direct.

mediately after the accident, and unless I connect up this testimony with the testimony I refer to, of course it will be improper; but of course, I cannot do everything at once.

By Mr. Crane.

10 Q Now, Mr. Lewis—

Mr. Heine. I will accept counsel's promise to connect, and if he does not connect, that this testimony shall be stricken out, and the jury disregard it.

The Court. Yes.

Mr. Heine. I do not want to be captious about it.

20 Q Mr. Lewis, I call your attention to two parallel, dotted lines shown on the map upon which there is marked the words, on either line, "Wagon track." Will you just take your indicator and explain to the jury what you intended to represent on the map by those lines? A When I came on the ground I found the wagon, the wagon track, came over here (indicating).

Q Wait. We want to get that on the record. A Coming from South Plainfield, north, about there, about this point (indicating), they are plainly visible, where the truck itself had turned.

30 Q Now, the westerly track as indicated there on the map, did you find that to be to the left of the center of the road going north? A Yes; that is—the westerly track would be on the left-hand side of the road, or the west side of the road.

40 Q I notice on the track that I have just referred to, the westerly track, what appears to be six feet. Will you just explain to the jury what you intended to represent by that indication on the map? A That was the six feet, the distance taken from the edge of the pavement to this westerly wagon track.

Edward S. Lewis, direct.

Q Now there appears to be, further to the north than the wagon tracks, the sketch of the truck or wagon. What did you intend to indicate by that? A The position of the truck as I found it at that time.

Q Calling your attention to the west rear wheel, what have you to say as to whether or not, at the time you found the truck there, that wheel was to the left of the center of the road? A The distance taken to it shows that it is the west side of the center. 10

Q Did you make any measurements of the track itself? A I took the size of the truck. That would be six feet between the center of the wheels, and twelve feet six inches in length.

Q Did you take a measurement of the height of the truck? A I took a distance up to the light.

Q How high was that? A Seven feet, from the pavement up to the light. 20

Q Seven feet. Now you were familiar with Plainfield avenue before you were called there by me to make this sketch, were you not? A I was.

Q At Rahway avenue, how near together were the houses at that time? A There was a house over—that would be about in there (indicating). Probably two or three hundred feet down here there was another house at that time (indicating).

Q And to the south, how far apart are the houses? A Widely scattered. 30

Q What have you to say as to how Plainfield avenue was lighted at that time? A Electric lights; possibly about three hundred feet in between them.

Q All on one side of the street? A That I couldn't say.

Q From your knowledge of the locality do you know whether or not there was a light at the northeast corner of Rahway avenue and Plainfield avenue? A I didn't observe it at that time. 40

Edward S. Lewis, cross.

Q Can you tell the jury what kind of lights these were that were along Plainfield avenue? A The ordinary—I should judge about 25-watt lights.

Q Where were they suspended from? A From a pole, an arm sticking out from the pole.

By Mr. Heine.

10

Q With a shield over it? A A shade over it.

Mr. Crane. You may take the witness, Mr. Heine.

Cross examination by Mr. Heine.

20

Q The westerly wagon track which you show there does not lead to the rear wheel. Why did you not show the track of the rear wheel? A For the simple reason that the impact of the collision had thrown the wheels around and thrown the track off the wagon, off that wagon track at that point.

Q Who told you that the shock of the collision had done that? You did not observe it? A I could observe it. You could see where the wheel had scraped on the pavement.

Q Which wheel, the front or rear? A The rear wheel there, where he had scraped on the pavement of the left track.

Q Scraped the pavement in which direction, going to the east or west? A Toward the east.

30

Q Did you observe any other wagon tracks on the highway at that point? A There were some coming around down here (indicating).

Q Going to the east of the wagon? A Going to the east.

Q Any other wagon tracks to the west? A No other wagon tracks.

Q Did this track that you showed there—did you follow it right up to that reversed front wheel? A I followed it back here for a ways, to the south (indicating).

40

Edward S. Lewis, cross.

Q No. Did you follow it toward the reversed front wheel? A This swung around, in other words.

Q Yes. In other words, as I understand this, the two front wheels were on either end like that, were originally in that position, pointing forward, north, and they swung around like that (indicating)? A Yes, sir.

Q So that you now have them in that position? A 10
Yes.

Q This being normally the right-hand wheel, front, turned right around like that (indicating); is that right? A That is the idea.

Q You found them in that turned position? A In that turned position.

Q Then did you follow the track of this left-hand wheel of the truck as you have shown it on the map, around like that? A Yes. The left-hand wheel shows the track going right around like that (indicating). 20

Q Did you follow the track of the right-hand front wheel, this one here (indicating)? You did not indicate that. A There was no track there.

Q There was no track there? A No.

Q Did not that show anywhere back here (indicating)? A They were evidently in the same track as the rear wheel to that point of the collision.

Q To that point (indicating)? A Yes, sir.

Q Were the front wheels narrower? A No; same distance part. 30

Q You said the front wheels of the wagon and rear wheels were exactly in line? A Yes.

Q Sure of that? A I have my notes here.

Q Did you measure the distance between the treads of the two front wheels? A Six feet.

Q The front wheels? A The front wheels and back wheels, both.

Q Did you measure the tread of the rear wheel? A The back wheel, six feet. 40

Edward S. Lewis, cross.

Q The same? A Same thing.

Q How far back does this represent, about eighteen feet? A No. That would be about twelve feet back.

Q About twelve feet back? A Yes.

Q Are those tracks visible any further back than that? A Visible, yes.

10 Q Were they visible as far back as seventy-five feet?

A I couldn't say to that.

Q You did not follow them any further back than here (indicating)? A I went back about fifty feet.

Q Were they visible back all the way, fifty feet? A Fifty feet they were visible.

Q Why did you not plot them on back fifty feet? A From the scene of the accident; I plotted them as they approached to the scene of the accident.

20 Q Who told you to begin to plot them here? A Nobody.

Q Mr. Crane gave you directions about what you had to do there, what you were to measure, did he not? A I plotted the map and showed it to him. Nobody told me where to stop them or where to start them off at.

Q I know, but Mr. Crane asked you to come there? A Yes.

Q What time did he call you up? A He called up the office at 7:30 in the morning.

30 Q And you went right out there and got there about eight o'clock? A No. I got there about a quarter to eight.

Q And did he tell you what he wanted measured? A No. He showed me the wagon tracks and did not tell me exactly what to measure.

Q Showed the wagon track? A Yes.

Q He did not tell you to stop at twelve feet? A He did not tell me to stop anywhere.

Q You just stopped there, then, of your own accord? A Yes.

40

Edward S. Lewis, cross.

Q Were the tracks astride the center of the road back as far as you could see them or were they to the east or west of the center? A They were to the west of the center.

Q To the west of the center, further west than you have shown? A Yes.

Q Further west than you have shown here? A Yes. 10

Q And how far back did they go, that you were able to see? A Oh, about fifty feet.

Q And after that they disappeared? A I couldn't say. I didn't see them further back than that.

Q Why did you not continue to show them back on the map here? A Because in here the truck started to—the object was to show where the truck had started to come over to get on the right side of the road.

Q Did you see the location of the automobile? A Yes.

Q When you got there? A Yes. 20

Q How many feet south of the truck was the automobile? A About seventy-five feet, I should judge.

Q And on which side of the road? A Up against the tree, on the west-hand side of the road.

Q On this side of the road (indicating)? A Yes.

Q Did you observe the tracks of the automobile? A Not until it left this point here (indicating); not after it left the truck.

Q Which point? A After it collided with the truck. 30

Q Which way did it go; which side of the truck, east or west, did it go? A I couldn't say as to that.

Q Did you not see its tracks? A They were not plainly visible there because there were many automobiles came along after that.

Q Other automobiles came along which way, east or west? A They went along on the east side of the wagon.

Q That wagon was three feet from the hard edge of the road. Do you mean to say all the traffic went east of it? A Yes. You can travel on the dirt part there. 40

Edward S. Lewis, cross.

Q Is it hard sand there? A Hard dirt.

Q Hard dirt. Is that true on both sides, west and east of the hard surface? A Yes, sir.

Q How wide is the dirt on either side until you get to what would be the curb? A It is an eighty-foot street there, and it would be approximately ten feet, each side.

10 Q That is— A It is an eighty-foot street between fence line.

Q Between the building line? A That is what we call the building lines.

Q That includes sidewalks? A That includes sidewalks. That would be about forty feet, between—

Q That would be about ten feet on either side of this dirt road? A Right.

Q Which would be hard dirt on which cars would drive? A Yes. It is graded.

20 Q Graded. So that at this point it is fairly open, flat country, is it? A Flat, open country.

Q And the ten feet of hard dirt on either side here is, except in very wet weather, just as good to drive on as the concrete? A Concrete, yes.

Q Do you remember testifying in this case on the 16th of October, 1922? A I do.

Q Do you remember answering the following question?

30 *Mr. Crane.* Where are you reading from?

Mr. Heine. Page 47.

Q (Continuing.) “This point here, at which the six feet is measured, is how far from the rear of the truck? Six inches would be eighteen feet? A Eighteen feet, approximately.”? A Well, six inches—the scale is three feet to the inch. Six inches back would be eighteen feet.

Q I am asking you if you remember answering that question by “Eighteen feet, approximately”? A I don't recall answering that question.

40

Edward S. Lewis, cross.

Q Will you swear that you did not answer the question?

Mr. Crane. If your Honor please, is it not eighteen feet, approximately, according to the scale shown on the map?

Mr. Heine. I am agreeable to that. I am asking him whether he answered it was eighteen feet then. 10

The Court. Scale it.

Mr. Heine. Your Honor—

The Court. Then he is simply mistaken in his sight observation as to the distance, because he said twelve feet.

The Witness. I am estimating, looking at that from here.

The Court. Oh, give it to us accurately.

The Witness. If you have a scale here I will measure it. 20

Mr. Heine. I am not interested in scaling that. I am asking whether he answered "Eighteen feet."

The Witness. I do not recall that.

Q You would not say you did not? A I would not say I did not; I would not say I did.

Q Do you remember having the following question asked you: "Did you measure these tracks any further back than this?" and making the answer, "No, I did not."? 30

Mr. Crane. Now, one moment. May it please the Court, what does that contradict? I object to the question on the ground that it contradicts nothing the witness has said and lays the foundation for nothing.

The Court. Well, he is under cross examination. He may be asked if he said that. 40

Edward S. Lewis, cross.

(Discussion.)

Mr. Heine. I want to be fair with the witness. I want to give him the entire examination leading up to a further question.

The Court. All right, if that is your purpose.

10 Q Do you remember making that answer? A I don't recall that answer at all.

Q Will you deny that you made it? A I don't deny it.

Q Do you remember being asked the further question: "Did you notice, as you took these measurements, or where you observed these tracks, where these tracks ran down here?" and making the following answer: "That question I wouldn't want to answer, because I didn't take any measurements, or take any notes."

20 *Mr. Crane.* What was that now?

Q The question was, "Did you notice, as you took these measurements, or where you observed these tracks, where these tracks ran down here?" and your answer— A "Ran down here"; I don't get that. I don't know what that would say.

Q You did not say that? A What I want to know is, "Ran down here." Ran down where?

30 Q Must have been referring to the map. Do you remember making this answer to that question. "That question I wouldn't want to answer, because I didn't take any measurements, or take any notes."? Did you so answer? A I don't get that question at all. I can't say, "Ran down where," where it refers to.

Q I ask you now whether you made that answer which I have just read you? A I don't recall it.

40 Q "That question I wouldn't want to answer, because I didn't take any measurements, or take any notes." Did you or did you not make that answer to that question I just read? A I don't recall that.

Edward S. Lewis, cross.

Q Will you swear you did not? A I won't swear—

Mr. Crane. If your Honor please, the witness is under oath. He is swearing constantly. I object to the form of the question.

The Court. Proceed, yes.

Q Will you say whether or not you made that answer; 10
yes or no? A I couldn't say.

Q You were asked the following question: "They were not clear back further?" and your answer was, "They were not." Do you remember making that answer? A I said that here; they were not clear further back than fifty feet.

Mr. Crane. Will you speak a little louder?

A (Continuing.) I said they were not clear back further than fifty feet so I could observe them.

Q Did you answer the following question? The fol- 20
lowing question was asked you: "Why did you measure them eighteen feet back of the truck, instead of fifty feet back of the truck?" and you answered, "Because they were clear there." Did you make that answer? A They were clear there, yes; I remember that.

Q The question was asked then: "They were clear there?" and your answer was, "They were clear." You were then asked: "They were not clear back further (referring to the eighteen feet position)?" and your answer, 30
"They were not." Do you remember making that answer? A They were not clear back further than fifty feet.

Q Do you remember making the answer I have just read you? A I don't remember making the answer.

Q You do not remember making any of these answers?
A No. It is so long ago, I don't remember.

Q But you would not deny that you made them? A I wouldn't deny, and I wouldn't say yes or no.

Mr. Heine. That is all. 40

Cornelius J. McCarthy, direct.

CORNELIUS J. McCARTHY, called as a witness on behalf of the plaintiff, being duly sworn, testifies as follows:

Direct examination by Mr. Crane.

Q You are the Chief of Police at South Plainfield?

10 A Yes, sir.

Q And you were the Chief of Police. You have been the Chief of Police there for how long? A Five years.

Q How long have you been the Chief of Police? A Five years.

Q Do you remember receiving a telephone message from someone early in the morning on the 28th of January, 1922, that there had been a serious accident at Plainfield and Rahway avenues, in your township? A Yes, sir.

20 Q Where did you receive that message? A Plainfield Police Headquarters.

Q And did you go to the scene of the accident? A Immediately; yes, sir.

Q Who accompanied you? A Officer John Hurley.

Q About what time did you arrive at the scene of the accident? A About 3:30 A. M.

30 Q What were the weather conditions that morning, chief? A Well, very cold. I believe it was below zero. The wind was blowing very hard.

Q Was there any snow on the ground? A There was some snow on the ground.

Q I call your attention to the map and ask you if you recognize the map as being Plainfield avenue? A To the north is Plainfield.

Q And to the south is Plainfield? A The two outside parallel lines representing the improved portion.

Q Of Plainfield avenue? A Yes, sir.

40 Q Do you recognize the map now; do you understand it? A Yes, sir.

Cornelius J. McCarthy, direct.

Q Will you just take the indicator and show the jury which way you came to the scene of the accident? A This is South Plainfield here (indicating). This is the way I came from South Plainfield to the accident, down Plainfield avenue (indicating). Right here is Rahway avenue (indicating). This accident happened about fifty feet south of Rahway avenue.

10

Q When you got to the scene of the accident what did you see? A When I arrived there I found Charles Barry lying in the road with a—he was lying on a robe in the road, and the milk wagon in the center of the road, the milk truck. The horse was lying on the road, and this automobile was up against a tree on the left of the road.

By Mr. Heine.

Q By the left you mean west of the road? A On the west side of Plainfield avenue.

20

By Mr. Crane.

Q Did you observe any light on the truck when you got there? A No, sir.

Mr. Heine. Do not lead.

Q Whom besides Barry did you see there? A George Miller, driver for the Borden Company.

30

Q What did you notice about the horses that were attached to the truck? A One horse was tied to the front of the truck, and the other horse was lying on the east side of the road.

Q What, if anything, did you do toward trying to light the truck as soon as you got there? A Mr. Miller had a lantern, and the wind was blowing very hard, and we tried to light it. I had a sedan car, and I took the lantern into the car to light it, and I lit the lantern, and it immediately went out after I lit it.

40

Cornelius J. McCarthy, direct.

10 Q What did you then do with the lantern that you have just referred to? A I gave the lantern back to Miller, and I told him I was going to take Barry to the hospital. Miller had already told me that they had telephoned for the ambulance, and I waited several minutes and did not see the ambulance coming, so I put Barry into my car and I took him to the hospital myself, accompanied with Hur-

ley.

Q Whom did you leave in charge— A Nobody was left in charge. I simply told Miller not to move or touch anything until I returned.

Q How long were you gone? A Possibly about twelve minutes, fifteen.

Q When you got back who was there? A Miller was still there.

20 Q Now, after you got back there how long did you remain at the scene of the accident? A After I returned to the scene of the accident?

Q Coming from the hospital. A I got back there possibly about ten—a quarter or ten minutes to four in the morning, and I remained there until eleven o'clock, 10:30 or eleven o'clock the same morning.

30 Q From the time that you first arrived at the scene of the accident until you left the scene of the accident at ten or eleven o'clock in the morning, what have you to say as to whether or not the truck or the automobile had been moved? A No, sir; there was nothing touched at all.

40 Q What did you do with reference to directing traffic at the scene of this accident? A Well, I carry a large spotlight in my car, and I took this spotlight out, which is used by hand. I brought the spotlight back with me when I returned to the accident. When I first went there I didn't have it. I drove back up here as far as Park avenue, South Plainfield, stopped at the Police Station, got this spotlight and brought it along with me to use it to handle the traffic on that road.

Cornelius J. McCarthy, direct.

Q Did you observe where the truck stood when you got to the scene of the accident, with reference to the center of the road? A Yes, sir.

Q Where was the truck? A The truck stood right in the middle—it stood about in the middle of the road.

Q And how about the front of the truck? A The front of the truck, it stood a little to the east of the road. 10

Q Do you remember meeting Mr. Crane and Mr. Pickel of the defendant company, out there that same morning, something after eight o'clock? A I did, yes, sir; I do.

Q And at that time did you have in your possession the lantern that you have already referred to, the one that would not stay lit? A Yes, sir.

Q What were you requested to do by Mr. Crane? A I stood there with the lantern in my hand, and Mr. Crane asked me to have the light marked for identification. The light was marked by Mr. Pickel with the initials "L. P.", and Mr. Crane marked it "R. N. C.", and I marked my initials on the bottom of it, "C. J. M." 20

Q And I now show you a lantern so marked and ask you if that is the lantern that you refer to? A No, sir.

Q Will you just look at it, please? A That is not the lantern.

Q Well, look at it. A That is not the light. There is another one there.

Q They are both the same. I show you this lantern and ask you if that is the lantern you refer to? A Yes, sir; that is the lantern. 30

Q Where did this other lantern come from? A This other lantern came from a driver for the Borden people who came to the accident about 4:30 A. M. and said he wanted to move the truck, and I told him no, that I had just sent Officer Hurley to telephone to the hospital, and that Barry's condition was reported very serious, and I said I would not allow the truck or anything to be moved until I had figures and measurements taken of the acci- 40

Cornelius J. McCarthy, direct.

dent; and when he was there I asked him for a light to help us to protect the road. It was a very heavy traveled highway. And he left me this lantern here (indicating).

Q I notice that this lantern is also initialed "L. P.," "C. Mc." and "R. N. C." Were those initials put on there in your presence? A Yes, sir. Both lanterns were
10 marked at the same time.

By Mr. Heine.

Q Well, which is which? A This lantern here is the lantern that was on the truck (indicating). This is the lantern that Miller had.

Q How do you know that? A How do I know? Because it was—I got the X on the back of it. This lantern is marked "No. 6" (indicating); this the driver for the Borden people brought to me.

20 *By Mr. Crane.*

Q The lantern that was on the truck driven by Miller—
A Has got a yellow X on it.

By Mr. Heine.

Q That is what I was getting at, how you got which was which. You marked a 6 on the one that you got? A No; I didn't mark anything. They were on there.

Q The 6 was on there? A Yes, sir; and the X was on.

30 Q The X was on the other one? A Yes, sir.

By Mr. Crane.

Q Chief, how long have you been familiar with Plainfield avenue from the Plainfield city line on toward South Plainfield, beyond Rahway avenue, beyond the scene of the accident? A All my life.

Q Will you tell the jury what the condition of the road is from where you leave the Plainfield city line, going south toward South Plainfield, as to grade? A Well,
40

Cornelius J. McCarthy, direct.

that—you want me to explain the avenue as to where this accident took place, just in the vicinity of it?

Q From the Plainfield city line. A From the Plainfield city line to South Plainfield?

Q To the scene of the accident? A Oh, to the scene of the accident. Well, from the Plainfield city line there is an upgrade there, there is a hill, coming from Plainfield to South Plainfield, possibly a rise of about twenty feet; and along from that to where the accident took place, which is about two thousand feet, you go along—it is an improved portion of the road, twenty feet wide, from concrete to concrete. Now there is a concrete border on each side of this road, four inches wide. The rest of the road is built on a concrete base, and tar on the top. Right about along where this accident is here there is a slight bend in the road. It starts about at Rahway avenue, in the center of Rahway avenue. Well, it is a little bit before you get to Rahway avenue. There is a bend in the road which bends more to the east.

Q While driving along that part of the road which you have just been speaking of, going south, have you had occasion to observe where your headlights show? A The headlights—

Mr. Heine. I object to that until the location and position of the headlights are identified, that they were those of the plaintiff's car, or some other means of comparison.

Mr. Crane. Take the witness.

I want to offer the light with the X on the back of it, that was on the truck at the time of the accident, in evidence. I think that will be my Exhibit 2. The map is 1.

(Lantern marked Exhibit P. 2.)

Cornelius J. McCarthy, cross.

Cross examination by Mr. Heine.

Q Where has this light been since you got it from Miller? A My possession.

Q You have not been lugging it around with you, have you? A Well, it has been locked up in the Police Station.

10 Q No one has had access to it? A No, sir.

Q Is that true of the other light with the 6 on the back? A Yes, sir.

Q That you got from the other driver? A Yes, sir.

Q And this road is a main artery, is it not; there is a great deal of traffic up and down this Plainfield avenue?

A Yes, sir.

Q At all times of the night and day? A No, sir; I wouldn't say at all times of the night; more so during the day.

20 Q And you had talked with Miller about fifteen minutes before this accident, had you not, down in South Plainfield? A Not to my knowledge; no, sir; I don't remember.

Q You would not deny it, would you? A Well—

Mr. Crane. One moment. If it please the Court, I object. It would not be material, I suppose, had he talked to him fifteen minutes before the accident. What relevancy could that have to the accident, or to this witness' testimony?

30

The Court. I do not know. I do not think so. However—

A (Continuing.) Fifteen minutes before this accident I was about four miles further. I was away. I had just returned and heard the telephone ring.

Q You knew Miller? A Yes, sir.

Q And this accident happened about 3:30, or something like that? A Yes, sir. Three o'clock I was in Oak Tree.

40

Cornelius J. McCarthy, cross.

Q That is down the road about four miles? A Yes, sir.

Q Towards South Plainfield? A No, west of—east of Plainfield.

Q Oh, yes. Do you know where the hotel is in South Plainfield? A Yes, sir.

Q Did you see Miller at that hotel on the night of this accident? A I don't remember that I did. 10

Q You might have? A Well, I might have, yes. I saw those drivers every night there.

Q Is it not a fact that you talked with Miller when he was bringing his load of milk out of the Lehigh Valley there at the hotel, or in front of the hotel, in South Plainfield? A I am going to tell you that I didn't stop and talk to anybody that night on the street. I will tell you that, because I was in my own car, and it was very cold, and my car was froze up, and I wanted to get down to get some alcohol for the car. 20

Q You cannot remember, then, one way or the other— A No; I know I didn't talk to Miller now.

Q —whether or not you talked to Miller? A I know I did not talk to him that night.

Q You are sure about it? A I am positive.

Q Did you see that truck that was involved in the accident on that night? A Yes, sir.

Q Where did you see it last before the accident? A I saw it at the accident. I do not remember—I don't remember seeing it that night. 30

Q Did you see it at South Plainfield that night when it was coming up with its load? A I don't take any particular notice of the trucks that pass through.

Q I understand you are busy with other things, but did you on that night see it? A No, sir.

Q At no time, in South Plainfield? A No, sir.

Q You are sure of that? A Positive.

Q You remember testifying in this case on the 16th of October, 1922, do you? A Yes, sir. 40

Cornelius J. McCarthy, cross.

Q Did you give the following answer to the question I will now read: "Was there a lantern on the truck?" Your answer, "No, sir." Did you so answer? A What is that question?

Q "Was there a lantern on the truck?" A Where?

Q Your answer was, "No, sir." A There wasn't any
10 lantern on the truck at the time—at the accident; no, sir.

Q Then you gave that answer before, did you? A I gave that answer when this accident; yes, sir.

Q Then you were asked the question: "Where was the lantern, if any?" and your answer—did you answer, "The lantern, Miller had it in his hand."? A Right at the accident; yes, sir.

Q You gave that answer? A Yes, sir.

Q And you were then asked: "Who is Miller?" and you said, "The driver of the truck." Is that right? A
20 Yes, sir.

Q You were then asked the question: "What was he trying to do with it?" and you gave the answer, "Why, he was trying to direct traffic in the road with it, once or twice, and the light wouldn't stay lit." Is that right? A Yes, sir; the light went out, and I went into my car to light it.

Q It was lighted while he was trying to direct the traffic, though, was it not? A Just for a minute. It
30 went right out. And I took the light into my sedan car to light it.

Q It was lighted, though, when he was trying to direct the traffic, was it not? A No, sir. He just lit the lantern as I arrived there. He stood with his coat around it and held the lantern, and it immediately went out after that; and I tried the same thing over again in my car.

Q When you said he was trying to direct traffic with it, what did you mean? A Well, he was trying to protect the road.

Q And with a lantern? A Yes, sir.
40

Cornelius J. McCarthy, cross.

Q And he was trying to protect the road? A When I arrived there there wasn't any light at all, what I seen.

Q You said here he was trying to direct traffic in the road; what was he doing when he was trying to direct traffic in the road? A He was trying to light the lantern to direct traffic.

Q Did you see the lights on the other two Borden trucks following Miller up the road? A No, sir. 10

Q When you got to the scene of the accident? A No, sir.

Q Did you see the two Borden trucks following Miller after you got to the scene of the accident? A No, sir.

Q You did not see those pass? A I did not. I understand they passed about two or three minutes before I returned to the accident.

Q You came traveling north to the scene of the accident? 20

Mr. Crane. No.

A Yes, sir; I was traveling north, yes.

Q From South Plainfield? A From South Plainfield.

Q To the scene of the accident? A Yes, sir.

Q And they had passed before you arrived? A No, sir; they had not come yet. Those trucks were in the rear. But while I was gone to the hospital and left the hospital and returned to get these lights, those trucks had just passed before I returned. 30

Q When you went to the hospital, of course, you went north? A I went north about two blocks and turned off east.

Q Turned off into West Seventh street? A No, into Randolph Road, right straight down to the hospital.

Q Did you see these two other Borden trucks? A I did not see them.

Q On your return? A I didn't see them. 40

Cornelius J. McCarthy, cross.

Q They had already passed the road when you came back? A Already passed; yes, sir.

Q You do not know, of course, how many other wagons had passed? A Not at that time.

Q Or automobiles, while you were over at the hospital? A No, sir.

10 Q You took the light from Miller into your sedan? A Yes, sir.

Q And you left the light with him there when you went to the hospital, when you could not light it? A I left the lamp that was out then.

Q Left the lantern with him to do the best he could? A Yes, sir.

Q And you do not know whether he was able to light it while you were away at the hospital or not? A It was not lit when I returned.

20 Q You do not know whether it had been lighted in between? A I don't know. I couldn't tell anything what happened from the time I left there.

Q Did you try, after you got back, to light it? A I sure did.

Q Was there oil in it? A Yes, sir.

Q Was the wick short? A There wasn't very much oil; just a little bit.

By the Court.

30 Q Was the wick short? A I don't know. I didn't examine it. I tried to light it and it wouldn't light, and I didn't bother with it after that.

By Mr. Heine.

Q You did not bother? A No, I didn't bother. I had a good spotlight then. I didn't bother with it.

Q Where did the lantern hang on the truck? A I do not know where the lantern hung. I didn't see it on the truck.

40

Cornelius J. McCarthy, cross.

Q You did not see it on the truck. You are familiar with where the Borden people carry the lantern, are you not? A Yes, I am familiar with where Borden people carry them.

Q They carry them, as you saw these trucks every night, on which side, right or left? A Now they are carrying their lights different.

10

Q No, at that time? A At that time they carried a lantern. The hanger was seven feet from the pavement high, a hook on the left-hand side.

Q Left-hand or right? A Left-hand side.

Q Left-hand side? A Yes, sir.

Q And the bull's eye swung out from the side of the wagon so that the red bulls eye showed to the rear? A Yes, sir.

Mr. Crane. I move that that last question and answer be stricken out because counsel is not referring to what was the situation at the time of the accident. That is quite apparent. It is a question of what the custom of the defendant company was in maintaining its lighting system.

20

The Court. The application is granted; the answer is struck out.

Q Did you see the hook on the left-hand side of the wagon on which Miller's lantern hung that night? A I don't know whether it hung there or not that night.

30

By the Court.

Q Did you see the hook? A There was a hook there; yes, sir. There is a hook on all those trucks.

By Mr. Heine.

Q You were asked the following question at the previous trial, beginning the last question on page 27. This is the question you were asked before: "Referring again to your report, as follows: 'At 8:30 A. M. Mr. Pickel,

40

Cornelius J. McCarthy, cross.

10 manager for Borden's, appeared and said that he also wished to have measurements and photographs taken. I told him that he could do so if he wished. He asked me not to move the truck, or allow anything to be touched, until same was done. While I was talking to Mr. Pickel Mr. Crane came over to me and asked me to have both
 10 the lanterns, the one that was used on Miller's truck, and also the one that the driver had left me, marked for identification. The lanterns were marked by Mr. Pickel and Mr. Crane, witnessed by myself.' Now, I would like you to explain to the jury what you meant in your direct examination when you said there was no lantern on the truck, and only one lantern there, and one in Mr. Miller's hands?" And did you give the following answer— A Well, I supposed that this—

20 Q One minute. Listen to what I am saying to you. Did you give the following answer to that question: "This lantern that was in Mr. Miller's hands evidently was used on the truck, because no airship brought it there, and when I got there Miller had this lantern in his hands, and he told me that it was on the truck; and the second lantern, as I explained before, this was brought there by Borden's driver of the second truck, which came to take the milk away." Did you so answer? A Yes, sir.

Q Was it a moonlight night or an ordinary starlit night? A It was very dark; it was cloudy.

30 Q A cloudy night? A Yes, sir.

Q Snowing? A No. It snowed the next morning, or the same morning rather. It started in about ten o'clock.

Mr. Heine. That is all.

Mr. Crane. With the Court's permission, Mr. Heine and I have agreed to call the doctors in this case somewhat out of turn, because they want to get back to their business.

Charles F. Lufburrow, direct.

CHARLES B. LUFBURROW, called as a witness on behalf of the plaintiff, being duly sworn, testifies as follows:

Direct examination by Mr. Crane.

Q Doctor, you are a practicing physician in the City of Plainfield? A I am. 10

Q And your office is right next to where the Leland School used to be, is it not? A Yes, sir.

Mr. Crane. You will admit his qualifications, will you not, Mr. Heine?

Mr. Heine. Having gone to Leland School, we will admit the doctor's qualifications.

Q Doctor, do you know Charles Barry? A I do.

Q And approximately how long have you known him? A The first time I ever saw him was, I think, the day after this accident. I happened to see him in a bed in the hospital next to a patient of mine. 20

Q Who was his physician at that time, do you know? A Doctor Hughes.

Q From time to time did you receive a report of the case? A Why, I just heard in ordinary hospital talk that this man had an—

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

A (Continuing.) I didn't get any official report of his condition. 30

Q Later did Barry consult you as an expert physician to give him an examination and find out what his condition was? A He did.

Q Before you started in to conduct that examination did you get the history of the case as to what his injuries came from? A I did.

Q What did he tell you? A He told me that he was in collision with a truck that belonged to the Borden Company, and that he had sustained a— 40

Charles F. Lufburrow, direct.

Mr. Heine. I object to the statements of the plaintiff—

The Court. The objection is sustained.

Mr. Heine. —on the ground that it is self-serving.

10 *The Court.* I sustain the objection. He gave a history of the case; now go on.

Q After you got the history of the case, doctor, what did you do? A I proceeded to examine him.

Q And do you recall when the first time was that you made an examination? A Sometime last spring; early in the spring.

20 Q What did your examination consist of? A Just looked at the thigh and then examined it with my hands, and measured the thigh, and observed the position of the foot with relation to the thigh; observed the amount of shortening in the injured leg; observed his manner of walking; and observed the degree of his disability.

Q Now, in getting this history of the case did he tell you that he had had some operation performed?

Mr. Heine. I object to that form of question, arriving at the same end that the question your Honor overrules is directed to.

The Court. I do not see how that is competent.

30 *Mr. Crane.* Very well, sir; I will withdraw it.

Q Do you know of your own knowledge, aside from what Barry told you, as to whether or not he was operated on— A I do.

Q —for this injury, by anyone? A Not before the injury, I do not know that he was ever operated on. Before the injury I don't know; I couldn't say.

Q I mean before he came to you for examination? A Oh, he had been before he came to me, yes.

40 Q Where was that operation had, do you know? A Muhlenberg Hospital.

Charles F. Lufburrow, direct.

Q Who performed it, do you know? A Dr. Albee of New York, Fred Albee.

Q Who is Dr. Albee? A Well, Dr. Albee is Professor of Orthopedic Surgery over in the Post-Graduate Hospital, New York, and perhaps the foremost man on bone surgery in America.

Q You say that you examined Barry in the spring. Did you examine him since that time? A Last Saturday. 10

Q Just tell the jury what your examination consisted of at that time? A The same as before, inspection to examine his limb, look at it with my eyes, feel of it, measure it, and so forth.

Q Did he bring you any X-ray negatives which he had had taken at the hospital? A He did.

Q Did you examine those? A I did.

Q Now, in connection with the X-rays and the examination that you made, what injury is he now suffering from in the injured leg? A He is suffering results, the disability that is associated with an ununited and unhealed fracture of the right thigh bone. 20

Q Will you just explain a little more fully if you can, doctor, in layman's lingo, just exactly what you mean? A This man had a break of the thigh bone; that is the main bone that runs between the hip and the knee, this big bone of the leg, thigh; and when that bone is broken, the muscles that control the leg and give the leg its action arise up here in the pelvis, and they are attached down low. 30

The Court. Doctor, would you kindly stand up so that they can see?

(Witness stands.)

A (Continuing.) These muscles arise up here (indicating) and are attached down at the knee; and as soon as the break occurs in the bone, the ends of the bone override, so in most cases it is not humanly possible to get 40

Charles F. Lufburrow, direct.

those two bones back in that position, even under an anaesthetic, and with a pulley arrangement, or with screws fast to a table, powerful screws, it is not possible, in many instances, to get these bones in perfect apposition and perfect alignment; that is, so that the ends of them come together, and so that they line up straight; so what happens is that the bones override, and frequently some of the muscles are pushed in between these two ends of the bones, making it impossible to get them up where they belong. So that he had this bone operation, what is called a bone operation, performed by Dr. Albee, in order to replace these two bones and put them exactly in apposition and in proper alignment, so that the thigh bone would be straight all the way down. And then there was a graft. In order to make this firm and to secure its stability, there was what is called a bone graft, a sliding bone graft, that was slid down. This graft is slid down to immobilize it, like a carpenter would put in—I don't know just what they call it—they slide a piece of wood down into it to make a brace for it. And then the parts are sewed up; that is, the incision is sewed, and then the whole thing is covered with a plaster cast extending from the chest right down, including his thigh and his leg, below the knee, and his whole foot; and he keeps that on for seven or eight weeks, or ten weeks, and finally it is taken off. That is the operation that he had.

Just now he has no union; the bones did not unite in his thigh. He has what we call a fibrous union; that is, he has got a hinge there in his thigh, these two bones being stuck together by a sort of gristly fibre, part tissue, and they wobble all over and turn in almost any direction. It is just like a leather joint. For instance, if you have an iron hinge on a door, that hinge is rigid, and the door will open; but if you have a leather one on it, it will sag, and wobbles all over; it is unstable, insecure. And his leg, his right leg, is about, approximately, three inches shorter than has left leg.

Charles F. Lufburrow, direct.

Q Did you notice, doctor, while making any of these examinations this morning in the anteroom, that there is a pronounced bowing of the leg? A I did.

Q Will you tell the jury what causes that? A This bone, this great bone in the thigh, is the bone that supports the weight of our body as we stand. Inasmuch as he has this poor union—no union at all—it is just a leathery sort of union, a fibrous union, when he stands up, with this superimposed weight on it, it bows; it bows out about like that (indicating). This leg, thigh bone, instead of setting straight up and down to support a weight—a column, for instance, is always built straight up and down; it is never built like this (indicating). But as he stands on it, it is bowed this way (indicating). You have observed that when he walks. Anyone can see that. 10

Q Now, doctor, in your opinion as a physician, will this bowing condition that you have just described improve any as time goes on; that is, will his leg straighten any or will it tend to get more crooked? A Tend to get more crooked if he walks on it. 20

Q Will you just tell the jury briefly, summarizing your testimony, what permanent disabilities Barry is suffering from as a result of this break that you have described?

Mr. Heine. I object to the form of the question unless it includes the reasonable certainty that the doctor's opinion must have. 30

By the Court.

Q What, in reasonable certainty, is the permanent disability, the result of this break? A It certainly will never get any better left alone like it is.

By Mr. Crane.

Q What? A It certainly cannot improve, because there is no means by which it can improve now. The callus is thrown out over the ends of that bone. There is no bony repair taking place at all, and, as he walks on it, it 40

Charles F. Lufburrow, cross.

10 bows and stretches more and more and more. I think if he kept off it, didn't use it at all, that at the end of another year it would be just the same as it is now; but I think as he walks on it more and more—that if you have a weight, a bearing column that is straight up and down, it will stay straight, and if you have it like this, and keep putting more weight on it, it has a tendency to bow it down, keeps bowing it more and more. It is a permanent thing. It would endure, of course, as long as he lives.

Q How much shortening did you say there was of the leg? A Approximately three inches.

Cross examination by Mr. Heine.

Q Did you measure, doctor? A Yes, sir.

20 Q Find two and a half or three? A Approximately three. I am not certain whether it is three and a quarter or three, but it is approximately three inches.

Q That measurement was made when? A How is that?

Q That measurement was made when? A Saturday, and last spring, too.

Q Measurement approximately the same on each occasion? A About the same, yes.

Q You would not say, doctor, would you, that there was no union? A Yes, no bony union; yes, sir.

30 Q No bony union? A No bony union at all.

Q That is a different thing from saying there is no union.

The Court. He did not say there was no union. He said there was a gristly union.

Mr. Heine. As I took the notes down, he said there was no union, a fibrous union.

The Witness. A fibrous union, a gristly fibrous.

Mr. Heine. I wanted to eliminate the flat statement that the doctor made, that there was no union.

Charles F. Lufburrow, cross.

The Court. He was talking with relation to the bone then. However, it is all right.

Q That, as I understand it, is fibrous. . . There is some union, such as you have described, as a fibrous union? A No valuable union. This fibrous union is a valueless thing; it is perfectly worthless. Bony union is the only thing that we want.

10

Q The driving of a taxi, a man sitting, driving a taxi, would not have any weight brought on that leg, would he?

A To push down on a brake?

Q No, with the ball of the foot or with the heel. A He gets his whole strength to push hard with that foot from his body, don't he? And if that bone is broken, it would bow just the same. He can bring a certain amount of pressure to bear with his toe, but he can't put any considerable weight on anything with that leg.

Q There would be a difference, though, in the muscular contraction, if he pushed with the toe or pushed with the heel, would there not? A How is that?

20

Q There would be a difference in the muscular reaction if he pushed with the toe than if he pushed with the heel? A No; I think he could do better with his toe than with his heel.

Q But there would be a difference. Did you observe the thickness of the heel which the man wears? A Yes.

Q What is it? A That is, that shoe, you mean?

Q Yes. A About three inches; approximately three inches.

30

Q Does that correct the difference in the length of the legs substantially? A No, it don't correct it.

Q There would still have to be some accommodation of the pelvis, even with the shoe? A Not as much as there would be if he did not have that shoe. That helps to take up some of the tilt of his pelvis, the pad on his foot.

Q And that accommodation is something that is complete now, or will it continue to accommodate itself more

40

Charles F. Lufburrow, cross.

to the situation the longer he lives? A Oh, that is only to enable him to walk now. You see, if one leg is three inches shorter than the other, if he did not have that pad on it, he could not touch that foot to the ground at all as he walks.

10 Q But the pelvis will continue to accommodate itself, will it not? A Oh, the pelvis always tilts when you have a shortening of any bone in the thigh.

Q Was there a bony graft used by Dr. Albee to secure a bony union? A I didn't see the operation. I understood so.

Q You understood there was such? A I understood so. I may be misinformed. I couldn't say.

Q In the event that there was not, could such an operation now be performed? A Oh, yes.

Q It could be performed? A Oh, yes.

20 Q And that would secure a permanent bony union? A Might.

Q Well, of course, might. The operating chances would be good? A I should say they would be reasonably fair, reasonably. That is the only chance you ever have got to get a bony union in it.

By the Court.

30 Q Is there any danger to such an operation now, doctor? A Yes, sir.

Q What is the danger? A Mighty serious danger of infection. The man may lose his thigh and all, and may lose his life as a result of infection.

Q Doctor, this gristly union that you speak about as being invaluable, suppose that broke, where would the top part of that thigh bone go, if you know? A You mean the lower end of the upper fragment?

Q Yes. A The lower end of the upper fragment has a tendency always to go forward and upward.

40 Q And upward? A Forward, upward.

Charles F. Lufburrow, re-direct—re-cross.

Q Instead of going down? A Yes, sir. These guy lines that are attached to these muscles pull it up, forward.

By Mr. Heine.

Q That same risk of infection, of course, was in the first operation? A Yes, sir.

Q And there would be no greater risk in this second operation? A No, sir.

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Re-direct examination by Mr. Crane.

Q In view of the fact that the first operation was unsuccessful, what makes you think that the second one might be? A I didn't think it would. I did not say it was.

Q I understood that to be your testimony? A No, sir; I said that is the only chance he had. At least, that is what I meant to imply, the only chance toward having bony union was by an open operation. One couldn't say, the first one having failed, done by one of the best men you could find, and done carefully—it is implied it was done carefully—failed. I would not say that the second one could be successful. It might or might not; I don't know. The only way to do it would be to try it.

20

Q In the first operation you are unable to state—

The Court. You were examining him on the assumption that there had been a bony graft.

30

Re-cross examination by Mr. Heine.

Q That you are unable to state, doctor? A What?

Q You do not know of your own knowledge whether or not there was a bony graft in the first? A I do not know of my own knowledge; no, sir. I was not present at the operation at all.

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Norman W. Currie, direct.

NORMAN W. CURRIE, called as a witness on behalf of the plaintiff, being duly sworn, testifies as follows:

Direct examination by Mr. Crane.

Q Doctor Currie, you are a practicing physician in the City of Plainfield? A I am.

10 Q Practicing physician in the City of Plainfield? A I am.

Q How long have you been in practice? A Twenty-eight years.

Q Are you connected with the staff of the Muhlenberg Hospital in Plainfield? A I am.

Q Do you know Charles Barry? A Yes.

Q How long have you known him? A Oh, four years; between three and four.

Q Did you know him before he met with the accident? A Yes.

20 Q Will you just tell the jury what you observed of his physical condition before the accident? A Before the accident?

Q Yes, sir. A Why, it was that of a normal man, a man enjoying the best of health, active.

Q Crippled in any way? A Beg pardon?

Q Crippled in any way? A No.

Q You were the house surgeon at the hospital at the time this case came in there, were you not? A Yes.

30 Q But did you take the case? A I was ill at that time. I was a patient myself in the hospital, or I would have had the case.

Q But you knew that Barry was there at the hospital, did you, later? Later did you see him there? A Yes.

Q Did you learn that Doctor Albee, the noted bone specialist, had been called in to perform an operation on Barry's leg? A Yes.

40 Q Now, did you examine Barry in the fall—or in the spring of 1923, last spring? A Why, I have examined him several times.

Norman W. Currie, direct.

Q About how many times, doctor? A Well, three, four.

Q And the latest time you examined him was this morning, in the anteroom, in company with the defendant's physician? A This morning, yes.

Q Will you tell the jury in as plain laymen's English as possible, just what Barry is suffering from today as the result of this accident? A He has an un-united fracture of the right thigh, about in the center of the bone. This is about—there is about three inches shortening. There is no bony union, and there is a fibrous or gristly union. The upper fragment shows that it is surrounded in a callus formation like so that the fragments can't—you can't feel the two fragments move; you can't get the grating that you usually do if it was a fresh or a recent fracture. He has considerable bowing when he bears his weight on the limb, with about three inches shortening. 10 20

Q How long will it be before Barry entirely recovers from the disability he is suffering as a result of the non-union of these two bones? A I would say that he would—that he will always have the disability unless another operation is successful. But he will always have the shortening.

Q At the present time, in his present condition, how much loss of function is Barry suffering from as a result of the non-union of the bones that you have described? 30

Mr. Heine. I object to the question as containing the non-union. The doctor has stated it is a fibrous union.

The Court. Non-union as he has described, meaning the lack of a bony union.

Mr. Heine. All right. If that is in the question I am satisfied.

(Question read.) 40

Norman W. Currie, direct.

A Well, he can't walk. When he—he does walk, but he can't walk any distance without suffering pain. He can't stand any length of time without considerable pain. If it was a clerical position, or a desk position, he could do considerable work, but as far as manual labor, or labor, as we will call it, work that requires to be on the feet, why, he is not equal.

10 Q You say that the only possibility of remedying this fibrous growth between the two bones that you have described is another operation? A Yes.

Q Are you prepared to say what the probabilities are of success with another operation? A It would be reasonably safe.

Q I do not think you understood my question. What are the probabilities of success, of obtaining a good union there, if another operation was performed? A Well, considering that the first one was not a success, his chances of the second is not as good.

20 Q And in order to perform the operation that you refer to, just what would be necessary to do? A It would be another open operation, cutting down on the part, freshening up the surfaces, and introducing another graft, bony—

Q Do I understand you, they would have to cut the leg open down to the bone? A Yes.

30 Q And what would be done with the fibrous growth on either end of the fracture? A That would be scraped out, making fresh surfaces, and then putting in the two parts, in alignment, and then introducing a sliding graft, or a graft taken from the other side.

Q And assuming that the operation were successful, would the shortening in the leg be greater or less? A It would be about the same. I think it would be about a little more.

Q Greater? A It will be a little more.

40 Q Will you tell the jury what the risks are connected with the operations that you have described? A There

Norman W. Currie, cross.

is always risk to any operation, infection. If he gets a severe infection it might be serious.

Mr. Heine. I move to strike out what might be.

The Court. Oh, I do not know, unless—

Mr. Heine. There is no probability of infection in modern operative methods. 10

The Court. It is perfectly proper. What is the law on it? Does a man have to go under an operation?

Mr. Heine. I think not.

The Court. No.

Mr. Crane. Take the witness.

Cross examination by Mr. Heine.

Q Do you know, doctor, whether or not a bone graft was used by Doctor Albee? A Not positively. I have been told there was. 20

Q You assume that? A I have been told that.

Q Did Doctor Albee continue to take care of this case after his operation? A I don't know.

Q Do you know who took care of Mr. Barry? A Doctor Hughes was in charge.

Q Doctor Hughes? A Yes. 30

Q You mentioned the fact that the upper fragment shows callus. That is some evidence of beginning of a bony union, is it not? A Well, not so much as the upper fragment, but it is all around. It is more pronounced in the lower, where the callus surrounding the lower—as I said, the upper fitting in this cup-like shape.

Q That observation you made from an examination of an X-ray? A Yes.

Q How recently were those X-rays taken that you examined? A Beg pardon? 40

Norman W. Currie, cross.

Q How recently were the X-rays taken that you examined? A That I don't know. Sometime during the spring.

Q During the spring? A Yes.

Q Then you are testifying to a condition there of last spring? A Latest X-ray.

10 Q So far as the X-ray indications went? A Yes.

Q Is it not a fact that the presence of callus indicates some bony union? A Well, it showed that nature had attempted to make repair.

Q Started out? A To make repair, yes.

Q And the operation now, which you have described, if the graft were successful, and the bony union with the surrounding callus resulted, it would make the shaft as strong as before, would it not? A I wouldn't say it would be as strong.

20 Q What? A I wouldn't say it would be as strong as it was before the accident.

Q Yes. You would not say? A No.

Q Well, it would make it sufficiently strong. Is it not probable that it would be sufficiently strong so as to prevent any bowing? A Yes.

Q You would have a shaft strong enough so that it would not bow? A Yes.

Q And the shortening would simply remain as the present condition? A Yes.

30 Q But the bowing would be eliminated? A Yes.

Q And the man would have a firm limb? A Yes.

Q So far as the length of the limb went, after the operation? A Yes.

Q You feel such an operation, in your opinion, would be reasonably safe? A I would advise it.

Mr. Crane. Do you want to put in your medical testimony now, Mr. Heine, so that we have it all together?

40 *Mr. Heine.* Yes.

Irving M. Vanderhoff, direct.

IRVING M. VANDERHOFF, called as a witness on behalf of the defendants, being duly sworn, testifies as follows:

Direct examination by Mr. Heine.

Q Doctor, you are a practicing physician, licensed in the State of New Jersey? A Yes, sir. 10

Mr. Crane. I will admit the doctor's qualifications.

Q You made the examination of Mr. Barry here this morning? A Yes, sir.

Q Will you state what you found? Just state to the jury what you found on that examination. A The man has had a fracture of the right femur.

Q Femur; you mean the big bone of the leg? A The bone of the thigh. The fragments have united in a bad position, with a bowing outward. The point of the bow is seven inches above the knee. I measured this morning and found my measurement was two and a quarter inches of shortening. I felt that that was about right, because I measured the shoe also, and the heel has been raised $2\frac{1}{8}$ inches; so I would feel that the shortening—my measurement was right, because when the man stands, his pelvis, as near as I can judge, when he is standing on this heel, standing on both feet, the pelvis seems to be level. 20 30

There is considerable callus about the fragments, showing to me that I would feel that this is not absolutely fibrous union, but that it is partly bony; and that callus there means nature has tried to unite the bones; so that it would seem, if these bones were in good position, that they would unite.

Q What would be your idea in regard to treatment—
A I think—

Q —of such a situation as you found? A I think that the operation should be performed and the bones 30

Irving M. Vanderhoff, cross.

placed in position, and a bone graft inserted, which would probably be found on operation to be the best means of holding the bones into position.

Q What would be your opinion as to the relative safety or danger of such an operation? A There is always some danger, but relatively small danger, present-day operations.

10 Q A good deal less danger in an operation involving a limb, such as this would involve, as compared with an operation, abdominal, or operation on the chest? A Well, that would depend on the operation. The danger is infection, and, of course, infection can be entered anywhere; but that is no greater now than it was before; just the same as before.

Q Are such operations now performed by surgeons in hospitals as a general part of their surgical practice? A Yes, done very frequently; particularly since the war.

Q And there are many others besides Doctor Albee to perform such operations, to your knowledge? A Yes. He is one of the best, but there are many others.

Q Between this vicinity and Plainfield and Newark? A Yes, sir—there are in Newark. I don't know about Plainfield.

Cross examination by Mr. Crane.

30 Q Doctor, did you ever examine Barry before this morning? A No, sir.

Q How long were you in there examining him? A I really did not time myself. I don't know.

Q Did I understand you to say that there was a bony union of this leg? A I said there is some bony union.

Q And by some bony union, what do you mean? A I mean if I feel callus there—the callus, I should say, is three and a half or four inches wide; three and a half inches anyway—it means that nature has attempted bony union; and I feel there is some bony union or the man

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Irving M. Vanderhoff, cross.

could not walk on it, and put his full weight, as much as he does.

Q If there was a bony union, could Barry just flop his leg around as though it were tied with a piece of string? A No, he couldn't do that.

Q Did you try that out this morning and see how far around you could turn the leg? A I did. 10

Q How far could you turn it? A It flops in, but when you come to flop out, it won't go out, so the bone must hold it there.

Q You did not study the X-rays, did you, this morning, doctor? A No, sir. Those were not—

Q And you arrive at the point where you say there is some bony union because you cannot push the leg out? A Yes, sir; and because I feel all this callus there which is—callus is new bone. 20

Q Do you mean to tell the jury that, assuming this operation were performed and worked, that the bone would not have formed from the callus union, that you speak of, if it were ever going to? A I don't get that question.

(Question read.)

A This was one form. This callus has formed there.

Q Doctor, if it is bone, why does it bend? A Because it is faulty union. 30

Q Pardon me, sir. A I would call it faulty union. I think it should be corrected.

Q You are quite confident that another operation would be an entire success, that the bones would come in the proper position, and the bowing would disappear? A I—

Q Answer the question. I say you are quite confident that that is so? A I am quite confident, not positive. I am quite confident also he would not flop it around. 40

Irving M. Vanderhoff, cross.

Q I think you already said you would recognize Doctor Albee as the leading orthopedic surgeon in the United States, and perhaps in the world?

The Court. He did not say that.

Q Did you not?

10 *The Court.* He said one of the best.

Q You recognize him as best, do you not? A No, sir.

Q One of the best? A One of the best; yes, sir.

Q What makes you think that if Doctor Albee were unsuccessful in performing this operation, that someone else would be? A Because I feel this way. I don't know what Doctor Albee did, but I don't believe that Doctor Albee continued this treatment personally, or I don't think he would have permitted all this bowing in the leg; and it is the bowing, of course, which makes the leg so much shorter.

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Q But do you not know the fact to be, doctor, where there is a fracture of a bone, that the fracture is healed by taking the substance from the two broken parts of the bone? Do you not know that to be the fact? A No, sir. That is very new to me.

Q Very new? A Very new; yes, sir.

Q Do you not know that after three or four attempts at having a fracture healed and the bones unite, and it is unsuccessful, that it cannot be accomplished because the material necessary is not present in the system? A Three or four—possibly we would imply, if he had three or four. In this case the material is present, as shown in this callus. Nature is doing all it can do. But sometimes you have to help out and put the bones in position. Then nature can make that grow fast.

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Q How did you measure the shortening of the leg? You said it was two and a quarter inches. A I measured it with a steel tape measure, measured in three different

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Irving M. Vanderhoff, re-direct.

ways, measuring from the bone up here at the pelvis, the anterior superior bone, to the end of the tibia; and I measured from the middle of the pubis to the end of the tibia; and also the umbilicus, the navel—

Q Where was the last place? A The navel.

Q Oh, yes. A To the end of the tibia.

10

Q You got the same answer every time? A Yes, sir. And then I measured the shoe, and I found that is $2\frac{1}{8}$ inches, raised $2\frac{1}{8}$ inches.

Q Were you able to ascertain the directions that the two un-united bones are taking at the present time? A Yes; the bowing is outward.

Q Will you stand up, please, doctor, and show the jury? A Yes, sir. When the man puts weight on the leg, the bowing is this way, or whether he does or not, there is bowing this way (indicating), outward; and I can feel the end of one of the fragments right there. Apparently it is the lower end of the upper fragment, right at the point of the bow.

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Q Now, doctor, without an operation, or assuming another operation was had and was unsuccessful, is it not a fact that, in your opinion, as a physician, this man is crippled for life? A Yes, sir.

Re-direct examination by Mr. Heine.

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Q The shortening would be there? A Yes; unless something is done for the shortening, the shortening is going to remain.

Q And success of a bone graft, the second bone graft, assuming the first one to have been bad, would result in the strengthening of the shaft so that the bowing would be stopped? A Straightening that; yes, sir; make the shaft or the bone straight, and get rid of the bowing. That will lengthen it.

40

John Hurley, direct.

Re-cross examination by Mr. Crane.

Q One moment, doctor. Do you say this operation would lengthen this man's leg? A Yes, sir.

Q How much? A If you take—couldn't tell that, sir, ahead of time. I can't tell that. But if you have something that is crooked, and straighten it, it is longer; 10 that is, from end to end.

Q Is there any possibility, if this operation was successful, that the crippled leg would be longer than the other one? A I wouldn't assume that, sir, unless he breaks the other leg.

Q There is no way that you or any other doctor can lengthen a man's leg; the shoemaker does that, does he not? A Well, I do not agree with you. We do lengthen the leg sometimes.

Q Is that so? A Not a normal leg, but an injured 20 leg.

Q You would not care to undertake to correct this man's injury so as to make his leg the same length as the other one, would you? A I would attempt to correct his injury, and make it much better than it is. I wouldn't say positively how short it would be later, but I do think that the leg would be lengthened by getting rid of the bowing.

Q You cannot say how much? A I can't say how much until it is done. 30

Q And you cannot say, even if your operation is successful, whether or not the man would die; could you? A No.

Q During the operation? A No.

JOHN HURLEY, called as a witness on behalf of the plaintiff, being duly sworn, testifies as follows:

Direct examination by Mr. Crane.

Q Mr. Hurley, where do you live? A Plainfield, 40 sir; North Plainfield, rather Somerset County.

John Hurley, direct.

Q How long have you lived there? A About two years.

Q During January of 1922 were you a special officer in Piscataway Township? A I was Sergeant of Police of the Lehigh Valley Railroad.

Mr. Heine. What?

The Witness. Sergeant of Police for the Lehigh Valley Railroad. That takes in Piscataway Township, my territory.

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Q Your starting point on your work for the Lehigh Valley, was that South Plainfield? A South Plainfield; yes, sir.

Q Did you ever do any special work for the Township of Piscataway where Chief McCarthy is chief? A Yes, sir.

Q Do you recall the night in January, 1922, when there was an accident between an automobile driven by Charles Barry and the Borden milk truck, on Plainfield avenue, near Rahway avenue? A Yes.

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Q As a result of a conversation that you had with the Chief of Police did you get in his automobile and continue to the scene of the accident?

Mr. Heine. I object to leading. Ask him what he did.

The Court. Oh, well, it is just to hurry it, that is all.

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A Yes.

Q What was the answer?

The Court. "Yes."

Q Now, Mr. Hurley, I want to call your attention to this map, and I want to give you a word of explanation about it. These three parallel lines are the improved part of Plainfield avenue; to the north is the City of

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John Hurley, direct.

Plainfield; to the south is South Plainfield. These two parallel lines, within which are the words, "Rahway Avenue," are supposed to represent Rahway avenue. When you and Chief McCarthy arrived at the scene of the accident, will you just tell the jury what you saw? A Well, when we were coming from South Plainfield, of course,
 10 we were coming to the rear end of the truck, and we knew it was on Plainfield avenue; and I said to the chief, "Go careful now," because we couldn't see no lights, and "It is on the road somewhere here."

Mr. Heine. I object to the witness' reasons for saying it.

The Court. Yes, strike it out.

Mr. Crane. Strike out that part of it.

A (Continuing.) When we arrived at the truck we seen
 20 a man laying in the road back of the truck. I jumped out, the first thing, out of the car, and examined him, and I saw who it was, Charles Barry. Miller, the driver of the truck, was standing beside him. The body was laying in a blanket, and groaning. I asked him what happened, and he couldn't answer me.

Q He made no answer? A Then—

Q Now, did you see the truck there? A Yes, sir.

Q Was there any light on it? A No, sir; there was
 30 not.

Q Did you see anything in Miller's hand? A I seen a lantern. I can't say whether, when I seen it first, whether it was in Miller's hand or in the Chief of Police's, now. They had the lantern between them. I believe Miller was in the act of lighting it, and it wouldn't stay lighted; and Chief McCarthy took it to his car and tried to light it, and it would light up, probably two or three seconds, and go out. Now, I had a flash light of my own, and I tried the lantern and it wouldn't; and I made
 40 the remark to Miller, that was one good lantern—

John Hurley, direct.

Mr. Heine. I object to what he said to Miller.

The Court. Yes.

Mr. Crane. That may go out.

Q Did you, in company with the chief, take Barry to the hospital? A Yes.

Q After you had taken him to the hospital, what did you then do? A We notified his mother first, and then we came right back to the scene of the accident. 10

Q When you got back to the scene of the accident were the truck and the automobile and the dead horse in the same positions they were when you left? A Yes, sir.

Q Did you have occasion to observe where the milk truck was with relation to the center of the road when you got to the scene of the accident? A Yes, sir; I did. 20

Q And where was it? A It was over on the—on his left-hand side. The rear of the truck was a good deal over on the left-hand side, and the front of the truck, where it got hit, just pulled it cata-corner, across. The front of the truck was laying probably about in the middle of the road, but faced to the right.

Q Did you have occasion to observe from what direction with relation to the center of the road, the tracks of the truck came from? A Well, at the time I was there— 30

Mr. Heine. I object, if your Honor please, to the testimony of this man as to observation of the tracks, unless it is shown that other vehicles had not passed, and so on, between the time of the accident and the time of their arrival there. There has been plenty of testimony that this road was a road of heavy traffic, and there was an interval of time between the accident and the arrival of the chief and this witness; and tracks on that kind of roadway, under weather conditions as they now 40

John Hurley, cross.

appear in evidence, it seems to me, must be accounted for more closely for that interval of time. I am perfectly satisfied that the vehicles remained in the same general positions, but the tracks on the road, on a dry day, under the situation the evidence now is, I think, ought to be connected right up to the time of the accident.

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The Court. What you just said may be a matter of proper cross examination or argument before the jury, but this question is, did you notice the tracks of this truck?

The Witness. Yes, sir.

Q Where were the tracks, Mr. Hurley? A Why, they were on the left of the road. The tracks of the milk truck were on the left of the road. There was only one track that you could very well take notice of, and that was from the rear wheel, because it is a big, wide tire, and it left a track on the road because the road was frosty, a raw, cold night, and there was just a little dampness along with the frost.

20

Q How long did you remain at the scene of the accident? A About twenty minutes after getting back from the hospital.

Q And then you went where? A I went back to South Plainfield, to my own office.

30 *Cross examination by Mr. Heine.*

Q Did you see the tracks of the taxi? A I didn't notice them, no.

Q Why? A Well, I was not very interested in it at the time, and I had only a light, a flash light. I had only a flash light; there was nothing else to see; and you couldn't see very well, a flash light, in the side of the road, in the gutter. The taxi was not on the road when I seen it; it was in the gutter.

40

Q The taxi was on its left-hand side of the road?

John Hurley, cross.

Mr. Crane. He did not say so at all.

A When I seen the taxi, it was on its right-hand side of the road.

Q On its right-hand side? A Yes, sir. It was up against a tree on the right-hand side of the road.

Q How was it facing, right angle or parallel? A No; it was facing parallel off the right. It was partly facing toward South Plainfield, the way he was going. 10

Q Which way was he facing; give the compass direction? A Facing partly south, south by west.

Mr. Crane. South by west, the witness said.

The Witness. South by west.

Q South by west? A Yes.

Q Did you see the tracks of the taxi cross the road? A No, sir, I did not. I did not take any notice of them. 20

Q Did not take any notice? A No.

Q The only track you were interested in looking up was the Borden truck, was it? A I was interested in just seeing where the truck was placed. I could see it without looking at the track. I could see that the truck was on the left-hand side of the road.

The Court. You are only being asked about the tracks. How do you know these were the truck's tracks? 30

The Witness. I put the light on it, and it was leading right to the rear wheel of the truck.

Q Which rear wheel? A The west rear wheel.

Q How far back from that west rear wheel did you follow that track with your searchlight? A I followed probably ten or fifteen feet.

Q How close to the center line of the road did you say the track was? A Why, it was—off the center, it was four or five feet. 40

John Hurley, cross.

Q Four or five feet off the center? A Off the center of the road, yes.

Q The road is twenty feet wide, is it? A I don't really know how wide the road is.

Q And was there any track from the right rear wheel of the truck? A I didn't take any notice.

10 Q You did not take any notice of that at all? A No, sir, I did not.

Q Why not? A Well, I suppose I didn't do it, that was all. I can't account for why I didn't do it.

Q Did you see the tracks of the front wheel? A No, I did not.

Q Did the track which you followed with your little flashlight, lead right up to the left rear wheel tire of the milk truck? A Yes, sir.

20 Q So that the diagram made by the surveyor here, which shows that the track did not lead up—the track that he mapped out did not lead up to the left rear wheel, is wrong, is it?

Mr. Crane. I object to that.

The Court. The objection is sustained.

Q Well, you are certain, are you, that this left track, left rear wheel track, for the distance you followed it, led right up to the tire of the wheel on the road? A
30 No; I couldn't say it led right up to the tire.

Q You want to change that, do you? A No, I don't want to change that at all.

Q You just said it did. A I would have to get down underneath, get under the tire; but I said it led up to—it was—

Q You just said it led up to the rear tire of that wheel. A I said—

Q And you said that under oath. Do you want to change it? A No, sir, I don't want to change anything.
40

John Hurley, cross.

Q Do you want to leave it that way? A What I meant was, it led up to the rear wheel. I didn't mention the tire; I said the rear wheel.

Q You mentioned the tire.

Mr. Crane. If it please the Court, I do not think counsel ought to argue with the witness. 10

Mr. Heine. The witness says one thing, and now he says he did not.

Mr. Crane. He is well able to take care of himself.

The Court. Never mind; go on. Finish your examination.

Q Why the smile? A No smile.

Mr. Crane. I object to that comment. There is no reason why the witness should cry. 20

The Witness. You can't say—you are trying to ball me up, that is all.

Mr. Heine. You are trying to ball me up.

Q Did you see the track on the road, anywhere, between the point where the impact occurred and the point where the automobile was resting on the side of the road, of that automobile? A No, sir, I did not.

Q Could you see the tracks on the road, of that automobile? A If I waited for daylight, I suppose I could. 30

Q You made no effort then to find it? A No, sir, I did not.

Q Did you have any idea at that time of how this automobile—which side of the automobile had struck which side of the truck? A Only what the driver of the truck told me.

Q The driver told you what? A He told me that he came along and he didn't know anything until the automobile loomed up in front of him, and he said that he 40

John Hurley, cross.

pulled his horses to the right; and I asked him how he escaped; he said he jumped.

Q The automobile loomed up in front of him. Did he say on which side of the road the automobile loomed up in front of him? A I don't know. That I can't say.

10 Q Did you see the driver with a lantern in his hand when you got there? A Now I don't know whether it was him or the Chief of Police had it in their hand. That I couldn't say.

Q Did you see the other Borden trucks when you got there first? A No, sir, I didn't.

Q Following along after Miller's truck? A No, sir; I did not. I did not notice them.

Q Did you not pass them on your way up there? A I don't really know. I didn't take any notice.

20 Q Did you see any other tracks on the roadway except the track of this one left wheel? A No, sir; that is the only track I could make out with my light.

Q That is the only one you could see? A Yes, sir.

Q The front wheels were turned around, were they not, on the milk truck? A Turned around, yes, sir.

Q Did you make any examination of the track of the front wheel? A No; I couldn't find any.

Q You could not find that? A No.

30 Q Did you look for it? A No; that I don't know, whether I did or not. I couldn't say whether I did look for any.

Q You could not say whether you did look for any or not? A No, I could not.

Q But you certainly did not look for any tracks of the automobile? A I couldn't find any, I believe, if I did look; I would have to have daylight.

Q Well, did you look? A No, I didn't look. I knew I couldn't find any if I did look. A rubber tire don't leave no tracks in a hard surface that I know of.

40 Q They will not? A No.

John Hurley, cross.

Q On a frosty night, when it is moist, an automobile tire will not leave tracks; do you mean to tell this jury that is what your opinion is?

Mr. Crane. I object to the witness' opinion.

Q Your observation?

Mr. Crane. I object to the question because he said he did not see any automobile tracks, did not look for them. 10

Mr. Heine. He has undertaken to say that he can see automobile tracks on a hard surfaced road when there is frost on it.

Q Let us get back to where we started. You did not look for any automobile tracks? A No.

Q Did not care anything about that? A (No answer.)

Q Were you helping the chief investigate the accident? A I didn't do any help except to help take the injured man to the hospital. That is the only help the chief asked me to do. 20

Q To take the man to the hospital, and find this left rear wheel with your searchlight? A I did that without the chief's orders.

Q And that was the extent of your interest? A Yes.

Q What was the distance—what would you estimate the distance from the side of the road, the west side of the road, of the hard surface of the road, to that track? A Oh, to the rear wheel, where I met the track— 30

Q This one track you have been talking about. A probably two or three feet.

Q What? A Maybe about two or three feet.

Q Two or three feet? A From the hard surface, from the edge of the concrete.

Q So that the wheel track was two or three feet from the west edge of the hard surface of the road? A Probably about that. 40

John Hurley, cross.

Q Is that right? A I didn't measure it. I can't give no measurements, because I didn't measure it.

Q Would you be surprised if it were ten feet?

Mr. Crane. Now, if it please the Court, we do not want to surprise this witness. He is here to testify. I object to the question.

10

A I would be surprised if it was ten feet.

Q And how close to the east side was the front, the right front wheel of the Borden truck, as you saw it there?

A The way I looked at the truck when it was—

Q Just answer that question. A The center of the—

Q How far was the right front wheel from the east side of the hard surface of the road? A It was about two feet from the center of the road.

Q Two feet from the center of the road? A Yes.

20

Q Now you know what I mean; I do not want you to go explaining again afterward; the right-hand front wheel?

A Oh, the front wheel? No; I meant the rear wheel.

Q Did you not listen to my question? A I meant the rear wheel.

The Court. He has told you now that he meant the rear wheel.

A (Continuing.) The front wheel was practically facing the east side of the road, but I didn't measure.

30

Q Listen to me for once. How far from the east side of the edge of the hard road, the east side of it, was the nearest front wheel of the Borden truck? A I couldn't tell you.

Q Can you not estimate it? A No; I would not do it, because I don't really know. I didn't make any observations of it at all, so I couldn't tell you.

Q All you observed was the distance of the rear wheel from the west side? A The rear of the truck is all I observed.

40

John Hurley, cross.

Q Was the truck standing paralleling the road or was it switched to the east of the road? A It was switching to the east.

Q And how far over was it switched? Was it switched so that it was at right angles to the road or was it switched so that it was still partly parallel? A It was partly parallel.

10

Q Tangent? A Yes.

Q How much over was it? A Oh, I don't know; probably about a quarter.

Q Take this book, and say this is the road (indicating); here is your roadway (indicating). A There is the road (indicating).

Q No, no, I am talking about this one. Here is the road; you are driving up toward—

Mr. Crane. Pardon me. Is this for the record?

Mr. Heine. Yes.

20

Mr. Crane. It will not mean a thing.

Q Taking this line of the witness box here, going in that direction, there is your road, and here is your hard surface here (indicating). Now that truck, the left rear wheel, you say, was three feet from this west side here (indicating); is that right? A Probably about three feet.

Q And the extreme right-hand side of the front wheel, the furthest over front wheel, was about how far from this east edge? A I don't know; I couldn't tell you.

30

Q How far was the truck across the road? A Somewhere around that (indicating).

Q Put your stick down on it; indicate the angle.
A About that way (indicating).

The Court. Why do we go into this thing? You said you had no question about the location of the truck.

Mr. Heine. This witness is giving an entirely different location from his own surveyor.

40

Charles Barry, direct.

The Court. But you said before that there was no question about the location of the truck, that the truck had not been moved from the time of the accident. Here we have a surveyor that has gone there and actually put it on the ground. Why take up this time then?

10 *Mr. Heine.* This witness' testimony is so different from the surveyor's that I am going into it.

The Court. It is of no consequence as long as you admit that the truck was not changed. If the jury believes the engineer, that he made an accurate measurement, then they are going according to that, together with the map, to say where the truck was. At least it seems so to me. I am not stopping you.

20 *Mr. Heine.* Of course I do not waste time, but it is at variance with the map, so we will let it go.

That is all.

CHARLES BARRY, the plaintiff, called as a witness in his own behalf, being duly sworn, testifies as follows:

Direct examination by Mr. Crane.

Q Mr. Barry, you are the plaintiff in this case? A Yes, sir.

30 Q Whereabouts do you live? A South Plainfield.

Q How old were you in January, 1922? A 26 years old.

Q Can you not speak up a little louder? A 26 years old.

Q What has been your business for the past several years? A Why, taxicab business, hiring business, hiring cars, taxicab business.

40 Q Whereabouts is your place of business in Plainfield? A North avenue, 159 North avenue.

Charles Barry, direct.

Q Is that right about opposite the westbound Central Railroad station? A Yes, sir.

Q On the night of January 28th were you working at night? A Yes, sir.

Q What time did you get through work at your office? A About 2:45, 2:47.

Q What kind of an automobile were you driving? A 10
I was driving a large Renault limousine, a big seven-passenger limousine.

Q What was the lighting system on this car? A Why, I had two big, large oil electrics, see; I had oil lights in place of electric lights, and headlights were a large headlight with gas lights, acetylene gas tank, a large, big light.

Q Do you remember seeing anyone as you started away from your office that night in Plainfield? A Yes, 20
sir.

Q Whom did you see? A Officer Kelly.

Q Now just tell the jury what course you took to go to your mother-in-law's home in South Plainfield. A Well, I was all through; we made the last train, and I left the officer at the station. I drove out Park avenue, which is in Plainfield, to Seventh street, and turned left on Plainfield avenue, which is about a couple of miles from Plainfield.

Q One minute. What sort of a night was it? A It was very cold; one of the coldest nights of the winter; 30
and a very dark night.

Q As you proceeded south along Plainfield avenue, and after you left Pemberton avenue, will you tell the jury what the conditions of Plainfield avenue were at that time? A Why, Plainfield avenue was a slight grade on the road, and the road is about twenty feet wide, and there was ice and snow on the ground at that time, but not in the road; the road was clear.

Q And what have you to say as to whether or not, 40
between Pemberton avenue and some five or six hundred

Charles Barry, direct.

feet to the south of Rahway avenue, Plainfield avenue is straight? A No. It is on a turn to the left. At Rahway avenue, just before, previous to getting to Rahway avenue, the road turns to the left.

Q By turning to the left, you mean, I assume, that the turn is generally to the east? A Yes, an easterly turn.

10 *By the Court.*

Q A turn to the left going to South Plainfield? A To South Plainfield. The turn is to the left going to South Plainfield.

By Mr. Crane.

Q Now, as you came up the hill that you have indicated or referred to, and started along Plainfield avenue toward Rahway avenue, how fast were you going?

A About twenty to twenty-five miles an hour.

20 Q Where were your headlights showing as you rounded the turn there?

Mr. Heine. I object, if your Honor please, to the form of the question as assuming the character of turn not in evidence. The map is in evidence. The map does not show any rounding or rounded turn at the place preceding this accident. I think the question is unfair as attempting to insinuate a corner instead of a slight deflection from a straight line.

30

(Question read.)

The Court. I think he can reframe that. Where were your headlights showing, we will say, following the curve of the road?

The Witness. On the right of the road, and the trees and bushes.

Q As you approached Rahway avenue, what part of the road were you traveling on? A On the right-hand side of the road.

40

Charles Barry, direct.

Q And just after you passed Rahway avenue, just tell the jury what occurred? A I was coming along about twenty to twenty-five, on the right-hand side of the road, and my lights showing on the right of the road, and the trees and bushes. About ten to twelve feet in front of me loomed this big wagon with a couple of big horses hooked to it, with no lights. I immediately—the wagon was on the wrong side of the road. I immediately turned the wheel—I only had a couple of seconds to use my head—to the left. In doing so, I seen the driver grab the lines in a drowzed condition, and jerk the horse, or pull the lines sharp, turning into the side of my car. I didn't put on my brake. You see, I tried to escape him. I stepped on the gas. But this large car— 10

Mr. Heine. I move to strike out what he tried to do, as a mental operation. 20

The Court. Yes. 30

A (Continuing.) Well, I tried to pass him on the left, and I seen him grab the lines and pull the horse to me. That is all I remember.

Q The next that you did remember, you were in this hospital; is that right? A Yes, sir.

Q And how long were you in the hospital? A I was in the hospital about forty or forty-two days, and about thirty days in the bed, home. I went home then. 30

Q In connection with your other testimony did you take some photographs yourself of this point in Plainfield avenue? A Yes, sir. 30

Q I show you P. 3, P. 4, P. 5, P. 6 and P. 7, for identification, and ask you if these are the photographs that you took? A Yes, sir.

By the Court.

Q When were they taken? A They were taken after I got out. I don't know—they were taken from what happened there, just where it happened. 40

Charles Barry, direct.

Q When were they taken, I asked you? A Well, I couldn't really tell you.

The Court. Proceed. Mark them for identification.

(Photographs marked Exhibits P. 3, P. 4, P. 5, P. 6 and P. 7 for identification.)

10

By Mr. Crane.

Q Do you know of your own knowledge whether or not there has been any change made in the surface of Plainfield avenue, from Pemberton avenue, say, on toward South Plainfield, between the time of the accident and the time that you took those photographs? A No; there is no change, as far as I know.

20

Mr. Crane. I offer them to Mr. Heine. I do not think he objects, because it will assist the jury in getting the situation; merely a picture of the road.

The Court. Proceed with your examination.

Q Now, you said you were in the hospital forty-one day or forty days, was it? A About forty-two or forty-three, I don't remember; and then they took me home; and I was in bed the rest of the time.

30

Q While you were at the hospital did you have an operation performed on you? A Yes, sir.

Q Who performed the operation? A Doctor Albee.

Q How soon, if you know, after you were received in the hospital, was the operation performed by Doctor Albee? A Well, I should say about eight or ten days after.

40

Q After you were discharged from the hospital—by the way, did you pay your hospital bill? A Yes, sir; I have the bill here. I forgot to give it to you.

Charles Barry, direct.

Q I show you those bills and ask you if they refresh your recollection as to the amount of money you paid the hospital? A Well, that is the last bill; and I got two more bills here (handing papers to Mr. Crane).

Q How much did you pay the hospital? A \$193.60 at one time, and \$13.00 at another time; \$7.40 another time; here is another one, \$127.00 another. 10

Q How much did you pay Doctor Albee for performing this operation? A \$350.00.

Q And your family doctor, Doctor Hughes, did he render you a bill? A Yes, sir; \$127.00.

Q And did you pay Doctor Hughes.

Mr. Heine. I object to Doctor Hughes' bill unless there is some evidence of the services rendered, and, of course, the reasonable value of them. The others I do not object to. 20

Q Did you pay it? A Well, there are a few dollars left. I do not know. It is almost paid up. But all the rest of them are paid. We give Doctor Albee \$150 on January 26th—September 26th.

Q How long were you home after you came from the hospital? A Well, I was home till about pretty near May, before I attempted to go out. It was about the 25th of April, something like that, when I went out my first time.

Q Before the accident what was your physical condition? A Before the accident I was never sick in my life. I was never laid up a day for anything. 30

Q Before the accident were you working at your business of taxicab driver? A Yes, sir. I worked every day, Sundays and every day, about twelve to fifteen hours a day; and if I was rushed I worked more.

Q When did you attempt to do any work around your office? A Oh, it was away in—I don't know—about August or September. I would come down and stay down at the office a few hours and go on back because, so long 40

Charles Barry, direct.

a time laying in bed, the perspiration would come out on me, and I would be all in in a few hours, and would have to go back and lay in bed all night, and maybe a couple of hours the next day, until I finally got out a little better.

Q Will you just step down from the witness chair a minute, and step down in front of the jury here? A
10 (Witness leaves the stand.)

Q Step right over here please (indicating). A (Witness stands before jury.)

Q Now, the bowing that the doctors have referred to, will you just show the jury where that is? A Well, I will tell you. This is the nearest way I can show it to you, see. It is right here, see (indicating). Look. When I lay my weight on it, there is when I change it. When I put my weight on it there, it sets right out there (illustrating). I can't take this foot off the ground without I fall, see (illustrating)? If I fall, now that is the way I got to go. There is all the bowing, see (illustrating); you can put your hand on it. There is the way it goes when I walk, see (illustrating).
20

Q So the jury might see what you mean, will you just stand over at the end of the table there and walk toward the jurybox? A Yes, sir.

Q And hold your coat back so that they will have an opportunity to see. A See; that is the way it goes (illustrating).

30 Q Just take the witness stand again. I notice also that you have a specially made shoe on the lame foot. A Yes, sir.

Q Was that put on by the urgent advice of some physician? A No. I put it on myself. I didn't have any advice from any physician. I put it on myself.

Q Does that help you any? A Well, it don't help me in my leg, any better, but it makes me look better walking. You have just as—

40 Q Are you able at this time, or at any time since the accident, to manipulate the pedals of your automobile

Charles Barry, direct.

with your lame foot? A No. I can't put on the brake or the clutch; but I will tell you what I can do. I can push the gas, see; and I drive a Nash car. It has a big emergency brake, and I use that, see, all the time, just pull down my hand. On the outside, I put my foot on with the brake, and there is a stinging pain comes up the leg, if I put any weight on it.

10

Q Have you consulted Doctor Albee since he performed the operation? A No, not yet.

Q Did you not go to New York to see him just the other day? A Yes; we went to New York, and we were ten minutes late, and he just stepped out, and the man was so busy he was gone. He could not wait for us. The ferry stopped us and made us late. We expect to go next week.

Q During the time you were in the hospital did you suffer any pain? A I suffered agony, all kind of pain. I will tell you where I suffered it most, when after the operation I had plaster cast up to here (indicating), and I laid two months and nine days with this cast on me, and I couldn't even roll one way or the other, laying on the flat of my back for two months and nine days without moving; and the gas pains which you get from the effect—what they put you to sleep with—I forget the name of it.

30

Mr. Heine. Ether.

A (Continuing) Ether, caused me to swell up afterwards against this plaster cast so bad that I really wanted to die. I didn't want to live any longer. And I had that about four days without a minute's let up. And that left me—well, I couldn't eat nothing for a long while. It was practically a month or six weeks before I could even as much as move my arms a bit, or care to move them. I was just laying there; that was all.

40

Charles Barry, direct.

Q Now, when you left the hospital and went home, during the months that immediately followed that, did you suffer any pain? A I suffered pain most every day.

Q Do you now suffer pain? A I suffer pain yet today; the change of weather; or even if I sit down here long enough and have my leg bent, and I want to step
10 down, it is just the same as if your foot went asleep; you know how it feels when you step down; you get a stinging pain there. Well, if I walk about fifteen or twenty minutes, it kind of loosens up, and I sit down again—I can't walk very far. If I walk far it starts to pain me, and get it right about here, about down along the knee, right here; I get it there (indicating). And I can stand about fifteen minutes, and you have got to find some place to sit down, if you have to sit on the ground.

Q Is it part of the duty of a taxicab driver to take
20 care of the hand baggage of patrons, and take it from the cab to the house? A Yes, sir.

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

The Court. I do not think it is important.

Q Have you noticed whether or not the bowing that you have been talking about, and have shown to the jury, has been increasing or decreasing since you have been discharged from the hospital? A Well, I think it
30 has increased about an inch. I wouldn't say—an inch or three-quarters of an inch. But you can see—it was worse than when I first started out; and I went with crutches most of the time, and then with a cane; and in driving a car you don't like to carry a cane here with you and there with you, and I manage to get along without it. But the cane feels good, you know, when you walk.

Q I meant to ask you, Mr. Barry, what grade did you go to in school? A Sixth grade.

Q Sixth grammar grade? A Yes, sir.
40

Charles Barry, direct.

Q And do you know any other business than taxicab driving? A No, sir.

Q Have not any trade? A No, sir, never learned any trade. I used to drive a hack, and then I drove a taxicab, since I was about fourteen years old.

Q Are you married? A Yes, sir.

Q Any children? A I have two children. 10

Q Now, how much did you pay for this automobile that you had? A Well, I will tell you.

Mr. Heine. Objected to.

A (Continuing.) I swapped in an Overland car.

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

The Court. Why?

Mr. Heine. Not paid. The reasonable value of the automobile before the accident is the proper testimony, but not the mere amount paid. 20

Mr. Crane. I am going to supplement it, Mr. Heine, with other testimony.

Mr. Heine. I think the rule of damage as recently announced is the reasonable value before and after. The condition of the car really enters into that situation.

The Court. What enters into it?

Mr. Heine. The condition of the car and so on, as an element of value, a reasonable time before the accident. It is a foreign car. 30

The Court. You have other evidence?

Mr. Crane. I have an expert whom I have under subpoena, and I assume he is here.

The Court. Yes.

Q After the accident what was done with the car?
A Why, I junked the car. It was practically gone because it was such a— 40

Charles Barry, cross.

Mr. Heine. I object to the reasons, if your Honor please.

Mr. Crane. Yes; we are not interested in the reason.

Q I asked you what you did with the car? A I junked it.

10 Q By "junked it" you mean sold it to— A A junk man.

Q How much did a junk man pay you?

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

The Court. Well, he junked it.

Mr. Heine. That is the answer. The Chief Justice said that what happened to the wreck afterwards does not make any difference, if it is a total wreck, junk.

20

Mr. Crane. But you would be entitled to credit for the amount of money.

The Court. Well, he evidently does not want the credit; if it is junk it is junk.

Mr. Crane. But we got money for the junk.

The Court. As long as he objects, you have it now before the jury that it was simply junk, unless it is contradicted.

30

RECESS TO 1:30 P. M.

AFTER RECESS.

Mr. Crane. Take the witness.

Cross examination by Mr. Heine.

Q You drove up and down this road every night, did you not? A Well, not every night.

40

Charles Barry, cross.

Q Pretty nearly every night during that time immediately preceding the accident? A No, not every night, I wasn't out that late; but I have driven up and down that street lots of times, but not every night.

Q You live at your mother-in-law's there in South Plainfield? A Yes.

Q And you went home from Plainfield where you worked every day? A Well, there is two ways of going, 10
Park avenue—and, of course, if I have a fare up that way I go this way; if I have a fare in the other end of the town, I go the other end of the of the town.

Q You could go down Park avenue? A Absolutely.

Q Past the hospital? A Yes, sir.

Q On this night you came out Park avenue? A No, Plainfield avenue that night.

Q But you came out Park and over Seventh street and down Plainfield? A Yes, sir. 20

Q Instead of going out Park? A Yes, sir.

Q Did you do that because of the little better road, Plainfield avenue? A Plainfield was cleared up. Park avenue was snow and ice, and Speyer's have a big bus that they clear the road up with.

Q As you came to Rahway, you were familiar there; you have been over it enough times to know about where the lights are? A Well, I don't exactly know where all the lights are but—

Q You remember there is one there on the northeast corner of Rahway avenue and Plainfield? A Yes, sir. 30

Q Are light; I mean an incandescent light? A Street light.

Q With a shade over it? A I don't know about the shade. I know there is a street light there.

Q That is on the northeast corner? A Corner toward Plainfield.

Q On your left as you were going down? A Yes, sir.

Q Looking at this Exhibit 1, it would be on this corner here (indicating)? A Yes, sir. 40

Charles Barry, cross.

Q That is looking toward Plainfield, and it is on a pole there? A Yes, sir.

Q The lights on your car, you had no battery on the car? A No, we were—

Q At the time of the accident you had no battery? A No. There was no battery in it then. There was oil lights and Presto lights.

Q On the front of your car— A Yes, sir.

Q —there are two headlights; what was their location? A Why, about—see, this car had no radiator there; the radiator was in the back of the dash, see; it was opposite the running-board, about where any other light would be on a car.

Q Opposite the running-board on the framework of your— A On the framework of the car.

Q On your windshield? A No, on the front of the car, where any ordinary headlight is, only it is on the frame of the car.

Q How far off the ground would they be? A Oh, about, I should say, a foot.

Q Were these low lights from the acetylene? A They were Presto lights; that is what they call them.

Q Presto lights? A Yes, sir.

Q They are lit with acetylene gas? A Yes, sir.

Q Where is your acetylene gas tank? A Why, it is— I forget what side of the car it is on now; I couldn't say. I think it was covered up. I am not sure—

Q Did you have these Presto lights put on the car after you bought it, or were they on it? A No, sir; they were already on it. They came with in on.

Q This a French make? A Yes, sir.

Q High-powered car? A Why, no; it was 22.32 something, horse power. It was a four-cylinder motor, a long stroke.

Q That is where they develop the power? A Yes.

Q Made in France? A Yes, sir.

Charles Barry, cross.

Q When you left Plainfield that night, do I understand you, that the two Presto lights were on either side of the front of the car and were lighted? A Yes, sir.

Q And those lights are not regulated as the electric lights are, to different degrees of power? A No; you just turn them on.

Q Turn them on and they are there? A And they are there. 10

Q What kind of glass was on those lights that night? A Oh, they show a fair distance up the road; maybe a hundred feet.

Q What kind of glass, corrugated glass or white or yellow, or what? A Well, at that time they had a—them there glasses that observes the law, that you are supposed to have in.

Q Were they white or colored or yellow glass? A They were white glass, I think. 20

Q White glass. Can you be sure about it? A No, sir; they were white glass; I wouldn't say colored.

Q Would not say what? A I wouldn't say colored. I am sure they were white.

Q Then the low lights you spoke of on the car, where were they located? A On the side of the car, right near the front.

Q That is up back, just back of your windshield? A Yes, sir.

Q Like the lights on the side of a coach? A No; they were further up front, see, right near the front. 30

Q What kind of body was this car? A It was a limousine.

Q And you sat outside of the glass part of the car when you were driving? A It was a right-hand drive. That is the way they drive over there. It is not a left-hand drive. It is a right-hand drive.

Q That is, they pass to the left in France instead of to the right? A Yes. It is a right-hand drive over here, what they call it. 40

Charles Barry, cross.

Q And the limousine, the enclosed part of the car, was behind your seat, the driver's seat; you sat in front of it?

A The enclosed part was behind.

Q And the lights were on the front of that enclosed part of the car; were they the oil lights? A They are at the side, just above that.

10 Q Yes, at the side, so that, sitting— A They were just above; when you sat in it, they were just above your head, you know, in front of you.

Q Was there one of those on either side or only on the right-hand side of the car? A There was one on each side, and they were both lit.

Q What kind of light did you use in those? A Oil light.

Q With a wick? A Yes, sir.

Q Were those lit when you left Plainfield that night?

20 A Absolutely, they were lit.

Q And the road, as you drove on that night, was visible ahead of you for how many feet? Did you say a hundred feet or more? A About a hundred feet.

Q About a hundred feet? A Yes, sir.

Q And it was cold? A Very, very cold.

Q Was there a frost, as you drove over the road? A Yes, sir.

Q And that made this concrete, with the dust and frost, rather slippery?

30

Mr. Crane. I do not know that there is anything in the case that shows any dust on the road.

Mr. Heine. Well, your man Hurley said that the moisture and the frost and the dust made the tracks there clear.

Mr. Crane. I do not remember it.

Mr. Heine. The Court will recall that.

Q Well, that frost on that concrete renders the road slippery? A No, I don't think so.

40

Charles Barry, cross.

Q You do not think so. You had no chains on? A No.

Q You testified, as I understood, that there was just a few seconds between the time you first saw this car and when you were twelve feet away from it— A Yes, sir.

Q —and the time of the impact. You mean the truck, do you not, not the car? A The truck, yes, ten or twelve feet in front of me. 10

Q That was the first that you saw it? A Yes, sir.

Q And you were traveling then about twenty to twenty-five miles an hour? A Yes, sir.

Q What time was the last train that night for which you waited in Plainfield? A 2.47, and it was on time.

Q Did you leave immediately after the 2.47 came in because there were no passengers? A Well, it took a few minutes for the train to pull out, you know; you stick around a couple of minutes; and then I drove off. 20

Q And you made no stop between leaving and the time of the accident? A No. I just kept going along.

Q Under the bridge and straight out Park avenue? A Yes, sir.

Q And along Seventh street? A Along Seventh street.

Q Turned to your left, down Plainfield avenue? A Absolutely.

Q When you saw this truck loom up in front of you, why did you not stop? A Why, it would be impossible to stop because, going at twenty or twenty-five miles an hour, a truck in front of you, why, you couldn't stop in ten or twelve feet; it will certainly hit your horses head-on; so I swung to my left, as the best thing could be done. 30

Q I see. That is all.

Mr. Crane. I want to offer these photographs that I had marked for identification, in evidence.

Mr. Heine. Mr. Crane had photographs on the previous trial which were taken at the same time 40

Charles Barry, cross.

10 that our photographs were taken, that morning. I have no objection to them. The photographs which he offered for identification, taken at a time which is not identified, and under conditions which are different from conditions existing at the time of the accident, and without the place where the accident occurred being definitely located on them, I object to, as improper and not properly showing the facts and circumstances so as to be helpful to the jury.

20 *Mr. Crane.* Perhaps I had better follow Mr. Heine's suggestion and identify the scene of the accident on the various photographs. The testimony is, and can be further supplemented, that there has been no change in Plainfield avenue from the time of the accident until the photographs were taken, until the present time. The purpose of the offer is to show the road as it appears, and indicating the curve in the road, to further supplement the testimony of the engineer who said that there was a curve in the road but, owing to the short space shown on the map, the curve did not appear to be a very large one. The only purpose of the offer is to show the curve in the road that they referred to.

30 *Mr. Heine.* Mr. Crane has photographs which show the position of the vehicles as they were immediately after the accident, on the road where the accident occurred, and I object to photographs taken at an unidentified time, with the weather conditions different from the conditions at the time of the accident. I think they are improper.

The Court. Let me look at them.

40 *Mr. Crane.* Keep in mind, if your Honor please, the purpose of my offer, to show the curve in the road.

Charles Barry, cross.

Mr. Heine. But you have photographs which showed these things in relation to the road.

Mr. Crane. You might like those better, Mr. Heine, but I do not know how you are to control my proof if the Judge says they are competent.

By the Court.

10

Q Do you not know when these were taken? A It was in the winter, I know.

Q Well, how long— A Well, next winter after that.

Q The next winter after the accident? A 1923, next year. This year.

Q And where were they taken? A Right where the accident happened.

Q How far away was your camera from the accident, the place of the accident? A Well, some of them I took away from it, and some of it just where it happened, so that you could see. A couple of them I took in back of where it happened, and a couple of them in front of where it happened, and then one right up close.

20

Q Did you focus to hit the spot of the accident in each case? A No. I just took the picture where it was—just about where it happened.

The Court. As it stands, I will have to sustain the objection to the photographs.

Mr. Crane. With the Court's permission, I would like to examine the witness further about these photographs because I intend to supplement this proof, showing that there has been no change in this road from the time of the accident right until today; and the only purpose of the offer is to show the contour and the turn in that road.

30

It seems to me if I went out this afternoon with a photographer and had a picture taken of the road, and could prove that the conditions were the same,

40

Charles Barry, re-direct.

that there had been no change in the physical conditions there, that the offer would be proper.

10 *Mr. Heine.* Yes, but, if your Honor please, you must realize if a man goes there a year afterward without anything to identify the situation, and attempts to pick out approximately the spot where this accident happened, under the conditions of weather and other conditions, that manifestly must have been different at that time.

Mr. Crane. Have I the Court's permission to further examine the witness about the photographs?

The Court. Yes.

Re-direct examination by Mr. Crane.

20 Q I show you P. 3 for identification, and ask you where you stood and which way your camera was facing when that picture was taken. A When this one was taken, I stood about here (indicating).

Q Indicating the northerly end of Plainfield avenue as shown on the map.

The Court. A distance of how far from where there was the impact between your car and the truck?

30 *The Witness.* Well, that must be about sixty feet; maybe more; up to there (indicating). I don't know how this goes, but—

Q For your information, the map is scaled three feet to one inch. A Well, that is about it. It is about sixty or seventy feet, I should say.

By the Court.

Q Well, you know distances, do you not? A Yes; about sixty feet, I will say.

40 Q Without reference to the map you know where you put your camera; about how many feet away was it from

Charles Barry, re-cross.

the place where there was the impact between your car and the truck? A About sixty feet.

Q You are indicating a great deal more than sixty feet on that map. A Well, it must be about eighty feet.

By Mr. Crane.

Q Referring to P. 4 for identification, which way was your camera facing when that photograph was taken, toward Plainfield or toward South Plainfield? A This one was toward Plainfield. 10

Q I call your attention to a telegraph pole with a sign on it shown in this photograph, and ask you what that sign is? A Rahway avenue, I should think.

Q And where on the photograph, will you make a pencil mark, as near as you can remember, did the accident happen? A It happened over on this side (indicating). 20

Q I see. Just make a pencil mark there. A (Witness marks.)

Mr. Crane. I will not go any further with the photographs, if these two are admitted. They will be sufficient for my purpose. I will supplement this proof with another witness.

The Court. Are there any questions, Mr. Heine?

Re-cross examination by Mr. Heine. 30

Q Where is this pencil mark on here? Did you make a pencil mark on here, Mr. Barry? A I did make it. It ain't strong enough.

Q It is not. I do not see it. Just point out where it is. A Here is the one; there was the lamp post—

Q Where is the pencil mark? A The pencil mark is right about here; the accident somewhere about—

Q Where do you say it is? Make it so I can see it. Did you mark the pencil mark on there? A Yes, sir. 40

Charles Barry, re-cross.

I didn't make it strong enough. Now this one I can make a better one on, see (witness marks).

Mr. Heine. I object to the offer.

Mr. Crane. I have not made an offer yet, Mr. Heine.

10 *Mr. Heine.* I thought you had.

Mr. Crane. No, I have not made an offer.

The Court. Well, let us dispose of it right away. Make the offer.

Mr. Crane. I want to supplement the proof, if your Honor please.

20 *The Court.* There is no question—as I understand it, you do not question the fact that the road has been changed since the time of the accident, do you, as to its course?

Mr. Heine. But the location, the weather conditions, taken a year later, apparently after a snowstorm, while there is still snow on the main part of the road, changed the contour of that road, and apparently it has been plowed out. My objection is that it does not show the conditions as they existed at the time of the accident, taken a year later.

30 *The Court.* In other words, you think there are so many things on the photograph that it might be deceiving as to the point under consideration?

Mr. Heine. Where the snowplow went it might show the curve might begin on the actual concrete, or it might include part of the hard road on the side.

The Court. Yes; I see what you mean.

40 *Mr. Crane.* Certainly, if your Honor please, the weather conditions near the snowplow would not change the curve in that road.

Richard E. Mosher, direct.

Mr. Heine. Yes, your snowplow.

Mr. Crane. Taking the whole photograph together, you can see the trees, hedges and bushes, and the way they have grown, and the line of telegraph poles.

The Court. We have the oral testimony that there was a curve in the road. What is the need of photographs? 10

Mr. Crane. To assist the jury; that is all.

The Court. I know.

Mr. Crane. That is all, Mr. Barry.

RICHARD E. MOSHER, called as a witness on behalf of the plaintiff, being duly sworn, testifies as follows:

Direct examination by Mr. Crane.

Q What is your business? A Garage business. 20

Q Where? A 214 West Second street.

Q Plainfield? A Yes, sir.

Q Do you know Charles Barry? A Yes, sir.

Q How long have you known him? A About seven years.

Q Do you recall the fact that he was hurt one night in January, 1922? A Yes, sir.

Q Did he stop at your garage early on the morning of the day that the accident happened? A Yes, sir. 30

Q About what time, do you recall? A Around 2.30.

Q What did you do for him? A I gave him gas.

Q Did you observe what style car he was then driving?

A Yes, sir.

Q What kind of a car was it? A A Renault.

Q Did you observe whether or not at that time the car had lights on it? A Yes, sir.

Q What kind of lights did it have? A It had two oil lamps in the front, and two gas lamps on the front of it— 40

Richard E. Mosher, direct.

that is, two oil lamps on the side and two gas lamps on the front.

Q Which, if any, of those lights were lighted? A All of them.

Q Did you go to the scene of the accident sometime later in the day of the 28th of January, with your so-called
10 ambulance, and bring the Renault car back to your garage?

A I went there, but I didn't bring the car back.

Q In connection with your garage, what experience have you had in buying and selling second-hand automobiles? A Well, quite a little.

Q Had you had occasion to look over this Renault car of Barry's prior to the accident? A Before the accident happened?

Q Yes, sir. A Did I look it over?

Q Yes, sir. A Yes, sir, I seen the car before the
20 accident.

Q What sort of a car was it? A A Renault.

Q Do you know the year? A I don't know the year, no, sir.

Q Do you know what its value was before the accident?

Mr. Heine. I object to that, if your Honor please. This witness has not properly qualified to testify to market value of Renault cars at the time specified, just before the accident.
30

Mr. Crane. Oh, well, if your Honor please, I will not urge it. The Renault car is so insignificant in this case, I will not urge it at all.

Take the witness.

By the Court.

Q What was the condition of that car when you saw it after the accident? A The whole front end was all—

Q Speak to the jury. A Excuse me. The whole front
40 end of the car was all stove in, the back of the driver's

John Kelly, direct.

seat where the pole of the milk wagon had went through it; the hood and everything was all torn off of it.

Cross examination by Mr. Heine.

Q How far ahead would those gas lights show on the road? A Oh, I should judge a hundred or one hundred fifty feet.

10

Q And the oil lights on the side would not throw a light very far, would they? A No, sir; they would not. You could see the oil lights on the side, but they would not throw a light.

Q They would not throw any light? A They would not throw any light, no, sir.

Q They were the gas lights that would throw the light? A Yes, sir.

Q Would they throw the light to the height of four or four and a half feet for a hundred or two hundred fifty feet? A The gas lights?

20

Q Yes. A Yes, sir.

Mr. Crane. That is all.

By the Court.

Q Have you ever had any experience with Renault cars, in the buying and selling of them? A No, sir.

JOHN KELLY, called as a witness on behalf of the plaintiff, being duly sworn, testifies as follows:

30

Direct examination by Mr. Crane.

Q Officer Kelly, you are a member of Plainfield's Police Department, the finest in the East, are you? A Yes, sir.

Q And how long have you been a member? A About nineteen years.

Q Do you know Charles Barry? A Yes, sir.

Q How long have you known him? A Since he was a little boy.

40

John Kelly, direct.

Q Your post for a great many years has been in the business section of Plainfield, has it? A Yes, sir.

Q And in the general part of the town that you are on duty, is that where Barry's taxicab office is? A Yes, sir.

10 Q Prior to the time that he met with this accident, will you tell the jury what you know of his physical condition as you could see it? A Good, healthy young man.

Q Do you recall the incident of the accident that he had on Plainfield avenue? A I recall the night.

Q Did you receive a report that he had been injured? A When I reported off duty in the morning, about four o'clock.

20 Q Before you reported off duty, and while you were on duty, what part of Plainfield were you patrolling? A Around North avenue, and North avenue station, the railroad station.

Q Is it a part of the patrolman's duty and your duty that night, to meet the trains as they come in from New York? A Yes.

Q Did you meet the last train that came in at night? A I did.

Q Do you recall what time the train arrived? A It was due there at 2.48, going to New York.

30 Q Was it on time? A I think it was.

Q After the train had pulled out of the station and left for New York, did you see Charlie Barry? A I seen the car at the curb, before the train come in.

Q Did you notice what kind of lights it had on it? A I did.

Q What sort of lights did it have? A It had two lights on the side and two in front, and one in the rear.

40 Q Which, if any, of those lights were lighted? A They were all lighted.

John Kelly, cross.

Cross examination by Mr. Heine.

Q You say it is your duty to meet all the trains that come into Plainfield when you are on duty? A Yes, sir.

Q Welcome them or pick them up, which? A I beg your pardon?

Mr. Crane. I object to the question. It does not mean anything. 10

Mr. Heine. It does if they get picked up.

Q What called your attention to Barry's car particularly that night at 2.48, on a cold, winter night? A Now the reason I was attracted to that particular car on that night—I come up to the station, and the car stood by the curb. There was nobody in the car and, of course, it is our duty to kind of look around. I didn't know the car, and I looked around it.

Q You did not know the car? A I didn't know the car. 20

Q You did not recognize it as Barry's car? A No, I did not. I wondered who it belonged to, so I looked into the station, and I seen Barry in there. Of course, I then see it was Barry's car and I knew it was all right.

Q How did you find out it was Barry's car? A I seen him in there.

Q And a good looking car outside and he inside means that he owns the car; is that it? A Well, he came out and walked up to the car. 30

Q Did he look it over? A When the train come in he got into the car.

Q You saw him do all that? A (Witness nods head in the affirmative.)

Q While the car was standing there were all headlights lighted as well as the side lights? A All lights were lighted.

Q The headlights threw a glare a distance of how far down the street? A Well, there was no glare. The 40

John Kelly, cross.

two front ones, that is, the gas lights, seemed to be kind of—

Q Headlights, yes. A Seemed to be kind of dim; didn't throw it down a street, because it was facing a wall, a corner like.

10 Q The brick wall at the side of the station? A Yes, sir.

Q Faced in there? A Facing in that direction.

Q What kind of a light did these two gas headlights throw on the wall; did you see the bright spot? A Just saw the lights, yes.

Q How high from the ground did that light on the car strike? A About the ordinary.

Q About four or four and a half feet? A I should say so, about that; four feet or so.

20 Q The side lights did not throw any particular light? A The side lights set higher, you know.

Q They do not throw light forward? A I don't think they would.

Q But the headlights would throw the light forward on the— A On the wall, yes.

Q Did you ever see that car before that? A Why, I don't think I ever noticed that car before with Barry.

30 Q What attracted your attention to it as you went along, a nice looking car? A No. But my attention was attracted to it because it was standing there. There was nobody in it.

Q It is part of your duty to see whether there is anybody in these cars at that time of night? A Well, we observe those things as we go along.

40 Q Usually the cars standing out there at night have their headlights off and just burn side lights when they are standing, do they not? A That was the only car there that night on that particular side. The rest had gone home.

Joseph Harlow, direct.

Q Is it not usual for cars to throw off their headlights? As an officer, you observe the cars throw off their headlights? A Sometimes they do.

Mr. Crane. One minute. I object to it.

Mr. Heine. That is all.

JOSEPH HARLOW, called as a witness on behalf of the plaintiff, being duly sworn, testifies as follows:

10

Direct examination by Mr. Crane.

Q Where do you live, Mr. Harlow? A 670 West Fourth street, Plainfield, New Jersey.

Q How long have you lived at that address? A Two years.

Q Before you moved there where did you live? A South Plainfield.

20

Q Do you drive an automobile? A Yes, sir.

Q At the time that you were living in South Plainfield, how often did you go from Plainfield to South Plainfield with your automobile, after dark. A Mostly every night.

Q Do you know where the Plainfield city line is? A Yes, sir.

Q Do you know where Rahway avenue is? A Yes, sir.

Q As you drove your automobile southerly on Plainfield avenue, from the Plainfield city line toward Rahway avenue, what part of the road would the lights show on?

30

Mr. Heine. Objected to, if your Honor please, unless identity of arrangement of lights as on the plaintiff's car is established, as to height from ground, radiator lights, and position of reflector, and so on. Lights throw at all kinds of angles.

The Court. You will have to qualify him along that line.

40

Joseph Harlow, cross on qualifications.

Q What kind of a car do you drive, Mr. Harlow? A Studebaker Big Six.

Q And are the lights on your Studebaker Big Six approximately in the same position as they were on the Renault, if you know? A Yes, sir, about the same, with the exception of the two top lights; they are right at the
10 bottom of the windshield.

Q I am talking about the headlights. A The headlights are about the same.

Q Now I ask you the same question again. What part of the highway did your lights show on as you left the Plainfield city line and went toward Rahway avenue?

Mr. Heine. I would like to have an opportunity of examining him further on qualifications.

The Court. All right; go on.

20 *By Mr. Heine.*

Q Do you know the model Renault that Barry had?

A I don't know what year it was, no.

Q Do you know how high above the ground the lights on Barry's Renault were? A I should judge about two feet; between two feet and a half and three feet.

Q That is, the center of the light? A The two headlights on the front of the car.

Q What? A The two front headlights.
30

Q When you say two and a half feet, do you measure from the center of the light or to the bottom rim? A Why, about to the center of the light?

Q Did you ever measure it? A Never measured them, but just—

Q Simply an estimate? A Just an estimate.

Q Do you know what kind of reflector was in the— A I don't know what kind of reflector he had.

Q Do you know what the Presto light is? A I know what the Presto light is, yes.
40

Nellie C. Barry, direct.

Q What they call a Presto light or Presto light search-light? A Something like the Rushmore.

Q Similar to the Rushmore light? A Yes.

Q Do you know what the relation is of the center of the flame to the axis of the reflector? A No, I don't.

Q You do not know how this Presto light or search-light was on Barry's car, in that regard? A I don't know just how they were in that regard, no. 10

Q You do not know how it was installed on Barry's car? A No.

Q You do not know whether the position of the lights was as when the car was new, or whether through accident or otherwise they had been bent forward or back? A No, I do not.

Q So as to change the angle of the light projected? A I don't.

Mr. Heine. If your Honor please, I renew my objection on the ground that there is not sufficient familiarity with the installation on the plaintiff's car to enable him to make a comparison with his Studebaker. 20

The Court. I sustain the objection.

Mr. Crane. That is all.

NELLIE C. BARRY, called as a witness on behalf of the plaintiff, being duly sworn, testifies as follows: 30

Direct examination by Mr. Crane.

Q Mrs. Barry, you are the wife of Charles Barry? A Yes, sir.

Q How long have you been married? A Three years.

Q How long did you go with your husband before you married him?

Mr. Heine. I object to that as too remote, if your Honor please. 40

Nellie C. Barry, direct.

The Court. I will allow it.

Mr. Heine. Your Honor will allow me an exception.

The Court. Yes.

Q About how long did you go with him, Mrs. Barry?

10 A Six years.

Q And how long had you been married to him before the 28th of January when he met with this accident? A About a year and a half.

Q Now, then, during your entire acquaintance with him, and especially during the time that you were married to him, before the accident, what have you to say as to physical condition? A Why, he was always perfectly well. He never was sick a day that I know of.

20 Q Will you speak a little louder? A He was perfectly well. He was never sick a day. He was always out working when he was not out with me.

Mr. Heine. When he was not what?

The Court. "When he was not out with me."

The Witness. When he was not home.

Q When you were notified that he had met with this accident and got to the hospital, I suppose you went to see him? A I did.

30 Q And during the forty-six days that he was in the hospital, how often did you go to see him? A I went every day.

Mr. Heine. Objected to as immaterial, your Honor.

Q Were you able to observe from your husband's actions while he was in the hospital, whether or not he was suffering pain while there? A He was, because when I—

40 *Mr. Heine.* I object.

Motion for a Non-suit.

The Court. Objection sustained. As it stands, it is undisputed that he suffered pain.

Q After he was taken from the hospital and to his home, and after he had gotten out and around, did you notice any change as to his ability to perform his work?

A Yes. He didn't stay out. He went out for four or five hours, or six hours, maybe, and come back again and laid around the house, went to bed, and laid down. 10

Mr. Crane. Take the witness.

Mr. Heine. No cross examination.

Mr. Crane. Plaintiff rests.

Mr. Heine. If your Honor please, I move for a non-suit on the ground that there appears affirmatively, from the testimony of the plaintiff, contributory negligence, in that he testifies that while traveling down a public highway, at a speed of twenty to twenty-five miles per hour, with two gas lights that would throw or project light for a hundred feet (that was the minimum distance testified to), he came within twelve feet of a truck on the roadway while traveling at this speed, and that such conduct in itself is contributory negligence, under the weather conditions existing, on a night when it was cold and when the concrete roadway was frosty; that it has been held in the cases, had he looked, as he must be assumed to have looked, if he were exercising due care, he could have seen this object, assuming it to have been on the wrong side of the road, at somewhere about a hundred feet away, within plenty of time for him to either stop or manipulate his car in such other manner as would be consistent with care to the other persons on the road; but he says that he came, although he was equipped with these four lights, lighted, at this speed of twenty to twenty-five miles an hour, 20
30
40

Motion for a Non-suit.

within twelve feet of another person using the highway, another vehicle using the same highway, without seeing him, thereby placing himself and the other party, both, in a situation in which the accident was practically certain, an accident of some kind was practically certain, to happen.

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The testimony shows that there was a hard surface of ten feet on either side of the concrete, twenty feet in the center of the roadway, and that therefore there was a space on the right in which he might have operated his car without coming into contact with the Borden truck, but that he turned to the left, again violating the law of the road, in the emergency which was created by himself, by inattention, in traveling at that rate of speed, until he got so close to another vehicle on the road, and that we have a situation, where his action is necessarily, on his own testimony, the approximate cause, or a very material contributing cause, to a collision, even upon the admission of negligence, for the purpose of this motion, on the part of the defendant.

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It is clear that a driver, who must be held to the duty of looking out for other vehicles on the highway, must not, although the other party may violate the law of the road, himself operate the vehicle in such a manner as to produce a situation which practically insures an accident; that a driver who is guilty of that is guilty conclusively of contributory negligence on his own case. And on the subject of the negligence, it nowhere appears in the plaintiff's case, except on one statement of the plaintiff, that a light was not on the defendant's truck.

(Argument.)

40

Matthew J. Austin, direct.

Furthermore, the State of New Jersey Traffic Act provides that within two hundred feet of a horse-drawn vehicle, an automobile shall not proceed at a greater rate of speed than a mile in four minutes; and we have the confessed statement of Barry that he was driving at twenty to twenty-five miles an hour until he got to within twelve feet of the horses and wagon, which should have been visible in the glare of his headlights, for at least a hundred feet, if they were in front of him, approaching him on the wrong side of the road, and directly opposite him. 10

I respectfully submit, if your Honor please, contributory negligence is so conclusively apparent as to require a non-suit.

The Court. The motion is denied.

Mr. Heine. Your Honor will allow me an exception. 20

DEFENDANT'S CASE.

MATTHEW J. AUSTIN, called as a witness on behalf of the defendants, being duly sworn, testifies as follows:

Direct examination by Mr. Heine.

Q Mr. Austin, whom do you work for? A Borden Farm Products Company. 30

Q Keep your voice up; I cannot hear you. A Borden Farm Products Company.

Q Do you remember this Barry accident that happened on the 28th of January? A I do.

Q Where were you when the accident happened that night? A I was on my way to Plainfield.

Q What is your job for Borden's? A Driver.

Q And on that night of the accident, were you driving a truck along Plainfield avenue towards Plainfield?

A Yes, sir. 40

Matthew J. Austin, direct.

Q Had you seen Barry load up his wagon at South Plainfield?

Mr. Crane. You mean Miller?

Q I mean Miller. A I loaded Miller.

Q Did you see Barry himself in South Plainfield that night? A I loaded Miller in South Plainfield.

10 Q What? A I loaded him in South Plainfield.

Q You loaded Miller? A Yes, sir.

Q Did you see Miller's truck when you loaded it? A Yes, sir.

Q Was there any light on it? A Two good, bright lights on it.

Q Where were they? A One on each—one on the left side and one on the right side.

Q Were those lights lighted? A They were when he left there.

20 Q What time did he leave there, about? Well, as near as you can fix it. A I guess it must have been around one or after one, half-past one, or one, something like that.

Q Was there any other Borden truck loading there that followed Miller out? A Yes, sir.

Q Who was that? A Herman Carter. He loaded after; he loaded second.

Q And did you load last? A I loaded last, yes.

30 Q Did you see the Borden truck after the accident on the road? A No, sir. I seen it after the accident; I seen it.

Q After the accident. You followed along? A Yes, sir; I seen the truck about half a mile down the road. I seen the rear lights on the truck. I said to Carter, "There is Miller down the road."

Mr. Crane. One moment. I move that it be stricken out.

Mr. Heine. I consent that it be stricken out.

Matthew J. Austin, direct.

Q You cannot tell what you said, only what you saw. How far ahead of you was Miller's truck when you saw this red light? A About half a mile.

Q And was Carter's truck ahead of you? A Yes, sir.

Q Could you see past Carter's truck? A Carter had made the bend, and I was coming around the bend.

Q And you could see past Carter's truck? A Sure. 10

Q Did you see Carter's truck go by the Barry truck after the accident? A Yes, sir.

Q I mean the Miller truck? A Yes, sir.

Q What part of the road was the Miller truck on when Carter passed him? A Why, the front was facing the east end, setting on the right-hand side of the road.

Q As you were going toward Plainfield? A Yes, sir.

Q And was there or was there not room for Carter's truck to pass Miller's truck on the hard surface of the hard concrete? A There was, because if you got off that concrete you could not get back on it no more. 20

Mr. Crane. I move that the last part of the answer be stricken out.

The Court. Stricken out.

Q Did you see Carter's truck ahead of you go by Miller's truck? A Yes, sir.

Mr. Crane. Please do not lead him. I do not like to object. 30

Q What part of the road did Carter's truck go by Miller's truck on? A Left-hand side.

Q And what part of the road did it pass on? A He passed him on the left-hand side.

Q And in passing him on the left-hand side, did it go off the concrete or not? A No, sir.

Q Then did you pass? A Yes, sir.

Q Did you pass Miller's truck? A Yes, sir.

Q What side of Miller's truck did you pass? A Left-hand side. 40

Matthew J. Austin, direct.

Q Did your truck go off the concrete or not, when you passed Miller? A No, sir.

Mr. Crane. Do not lead him.

Q Did you see Miller when you passed? A Yes. I pulled ahead and stopped; came back.

10 Q Where was Miller? A Miller was standing alongside his truck.

Q Did he have anything in his hand? A No, sir.

Q Did you see any lights? A A light on the truck.

Q Which side of the truck? A Left-hand side.

Q Was it lighted or not? A It was lit.

Q Did you see Barry there, the man who was in the— A Wrapped up, laying on the side of the road.

Q Which side, east or west? A On the west.

Q Left hand, as you went toward Plainfield; on your left hand? A Yes.

20 Q What was the distance between the Borden truck, Miller's, and Barry, where he was lying on the road? A Well, I don't know exactly the distance. I think it was about as far as from here to those first seats.

Q About as far as from here to the first seats? A Yes, sir.

Mr. Crane. Indicating about what, twenty-five feet?

30 *The Court.* About twenty-five feet.

Mr. Heine. Twenty-five or thirty feet, yes.

Q Where was Barry's automobile? A On the left hand of the road, facing up—well it is a little along the street now, but it was facing up in the field, facing west, up in the field.

Q How near was Barry to that automobile? A Well, I imagine about three feet.

40 Q Did you see anybody else there besides—who else did you see there, if anybody? A A lady—I mean the man.

Matthew J. Austin, cross.

Q Anybody else? A That is all; myself and Carter and Miller.

Q How big a wagon is yours, about the same size as Miller's? A Same size, yes, sir.

Cross examination by Mr. Crane.

Q You think that Miller left South Plainfield about one or one-thirty o'clock in the morning? A Just about that. 10

Q Do you know how far it is from where you load your milk at South Plainfield to Rahway avenue on Plainfield avenue? A About a mile and a half.

Q Do you know that this accident is supposed to have happened at three-thirty o'clock in the morning? A (No answer.)

Q Do you know that? A Supposed, yes.

Q What do you suppose Miller was doing during these two hours, going that mile and a half? A Well, he was supposed to make that trip in an hour, you know. 20

Q But you ought to know; you were right back of him? A I was third man, see. Miller served milk in South Plainfield, and then gets on his way home.

Q Well, how much start did Miller have over you, as a matter of time? A Well, he must have had three-quarters of an hour, maybe less than that; about three-quarters of an hour.

Q Three-quarters of an hour? A Yes.

Q This red light that you say you saw up the road, about a half a mile, where were you when you first saw that? A Making a bend, coming into Plainfield avenue from the lake. 30

Q How did you know it was Miller's light? A I figured it was Miller's light.

Q How did you know it was Miller's light? A Well, it reflected real bright.

Q It was a real bright light that he had, brighter than an automobile tail-light? A Well, some, yes; some automobiles, those lights are brighter, a better reflector. 40

Matthew J. Austin, cross.

Q The turn that you are talking about is the turn after you come over the lake and turn up John Geary's place; is not that the turn you are talking about? A Yes, sir.

Q How long a look did you have at this light? A I just saw it, and I hollered to Herman, "I bet that is
10 Miller up in the road."

Q Why did you say that? A I figured it was Miller by the light.

Q You knew it was Miller, did you not? A I could tell by the light.

Q From the time that you lost sight of this light, how much time elapsed until you got to the scene of the accident? A About, maybe over twenty minutes fifteen or twenty minutes.

20 *The Court.* Speak out. These men have to hear you.

A (Continuing.) No more than about fifteen or twenty minutes; I guess less than that.

Q Do you not know it is over a thousand feet from the corner where you say you saw the lights and the scene of the accident? A A thousand feet?

Q Yes. A I don't know whether it is a thousand feet. I know it is a good distance. I should judge a good
30 half a mile anyhow, where I saw that red light.

Q Did any automobiles pass you that night? A Did not.

Q Either way? A Not until after we had got to Miller and was there about ten minutes; the suburban bus passed us going to South Plainfield.

Q About what time was it that you saw this light, Miller's? A I don't know exactly what time it was.

Q Have not any idea? A No.

Q Well, it was a very still, cold, winter's night, was it not? A It was cold, yes.
40

Matthew J. Austin, cross.

Q Now, you just tell the jury everything that you remember, either seeing or hearing, from the time you say you saw Miller's light and the time you got to the scene of the accident. A Well, I saw—when I made the bend, why, this red light, so Herman was ahead of me, and I hollered to Herman. I said, "There is Miller up in the road."

10

Q Yes. Go ahead. A Then we approached Miller and we saw this—first I saw this automobile up in the field.

Q That is all you remember, is it? A Yes, that is all—

Q That is all you remember? A After we pulled around him, then we stopped and came back.

Q I am talking now, from the time you last saw Miller's tail-light and the time you arrived at the scene of the accident. You have told us everything you heard and saw? A That is all.

20

Q You did not hear a crash, did you? A I didn't hear no crash, no. It must have been all over. But I seen a light. It was all over, but I seen a light.

Q You did not hear any crash? A No, I didn't hear no crash.

Q All right. Now we have you to the scene of the accident. You were following him, and drove ahead, and through to the scene of the accident. What did you do for Barry, the man who was lying there in the road? A Didn't do anything, I didn't.

30

Q Why? A Well, I just didn't.

Q Look at me; look at me. Why did you not do something for the man who was lying there dying in the road? A They said the ambulance was coming, so I didn't bother.

Q What did you do for Miller? A Nothing at all.

Q Did you wait for the ambulance to come there? A I did not.

40

Matthew J. Austin, cross.

Q Do you mean to tell this jury that, being interested in your employer's business, as you must have been, and arriving at the scene of this terrible accident, that you merely walked back and said, "Hello, Miller," or words to that effect, and drove on? A Oh, we just asked him how it happened; that is all.

10 Q That is all? Where did you say you lived? A Plainfield.

Q Now, whom have you talked this case over with, about what you were to testify to here today? A I have not talked it over with anybody, not since the thing happened.

Q Never said a word to anybody? A No.

Q Did you not tell your employer that you had driven past there, saw Barry lying in the road on a blanket, saw the horse lying in the road dead? A Well, outside
20 of that.

Q You did not tell them that? A Oh, outside of that.

Q When did you tell your boss that? A The next morning.

Q You have not talked to anybody about it since? A No, sir.

Q Not a soul? A No.

Q Have you not talked with anyone during the last couple of days? A No, I have not.

30 Q Do you know how the counsel for the defendant knew what he was to interrogate you about, what he was to ask you about? A I didn't.

Q What? A I didn't.

Q You do not know how he got the information you were a witness at all? A Only the boss know it, I was along at that time. I hadn't talked with him.

Q You did not see Chief McCarthy there, did you? A No. He was not there when I got there.

40 Q And you did not see Officer Hurley there? A No.

Herman Carter, direct.

Q Did the ambulance pass you while you were proceeding on toward Plainfield? A Not between the accident and Randolph Road.

Q It must have taken you half an hour to get to Randolph Road at the rate you were proceeding; is not that so? A Oh, no, not that long.

Q Will you not take your hand down from your mouth and talk so the jury can hear you? A Not a half an hour; make Randolph Road in about fifteen minutes. 10

Q Will you please let me have your address again? A 302 Fillmore avenue.

Q Three hundred and two Fillmore avenue? A Yes.

Q Plainfield? A Yes.

HERMAN CARTER, called as a witness on behalf of the defendants, being duly sworn, testifies as follows: 20

Direct examination by Mr. Heine.

Q Where do you live, Mr. Carter? A Plainfield, 422 John street.

Q Whom do you work for? A Borden's Milk Company.

Q Do you remember this Barry accident on the 28th of January, 1922? A I do.

Q Did you load up in South Plainfield that night? A I did, yes, sir. 30

Q With milk? With milk? A Yes, sir.

Q Did you see Carter load up—I mean Miller, load up? A Yes, sir. I helped to load him.

Q You helped him load? A Yes, sir.

Q Then this last man who was on the stand, Austin, was there and followed you? A Yes, sir.

Q How long before you left did Miller leave with his load? A I should judge he left about three-quarters of an hour before we did. 40

Herman Carter, direct.

Q Do you know whether he drives straight up or whether he serves any route in South Plainfield? A He has four customers to serve.

Q In South Plainfield? A Yes, sir.

Q Did you see Miller's wagon again after he left? A Not until I started home.

10 Q Started up yourself? A Yes, sir.

Q Where were you on the road when you saw Miller's wagon again? A Well, I was pretty near up to him. I was about, I should judge, three hundred feet from him when I seen his wagon. He was making a curve. Then I couldn't see it.

Q Did you observe whether or not there were lights on Miller's wagon when he was loading in South Plainfield? A It was, yes, sir.

Q Where was it? A It was on the left-hand front.

20 Q What kind of a light was it? A Well, an ordinary oil light, or lamp.

Q Same as you had on your truck? A Same as I had.

Q Did you have the same kind of a truck that Miller had? A Same kind.

Q One light like this? A A light like this, yes, sir.

Q Suppose this is the front of your wagon; show the jury how they are placed on your wagon. A Well, setting on the front, that way (indicating). That is the front, setting so far from the front, on the side (indicating).

30 Q Pointing toward the front of the wagon, this way (indicating)? A Yes, sir.

Q And this red light shows alongside of your wagon, to the rear? A 'To the rear; yes, sir.

Q Did you or did you not see the light on Miller's wagon again after he left South Plainfield? A I seen the light when I got pretty near the accident; about three hundred feet from him, I seen the light.

40 Q What else did you see as you approached this scene of the accident? A Well, it was a car off to the side, and

Herman Carter, direct.

Mr. Barry, he was there, but he was covered up, and I did not take the covers off him to see who it was even.

Q You saw the man covered up with a blanket? A I seen the man was covered up, yes, sir.

Q Was there anybody else there? A Only Mr. Miller, when I got there.

Q What did you do with your wagon when you got there to the scene of the accident? A Well, I stopped and I got down. 10

Q As you approached Miller's wagon, what did you do? A Well, I stopped before I passed his wagon.

Q Well, did you pass him? A I did, yes, sir.

Q Which side? A The left-hand side, going toward Plainfield.

Q What part of the roadway did you travel over as you passed him? A I was on the hard road.

Q All of your wagon wheels on the hard road? A Yes, sir. 20

Q After you passed him, what did you do? A Well, I went on in then, went on in to Plainfield.

Q Went on in? A Yes, sir.

Q And did this other man Austin come there while you were there? A He did. He was right on—he was in back of me. We both got there at the same time.

Q What did he do when he got there at the scene of the accident? A He got down; nothing we could do; so we went on to Plainfield. 30

Q Did you see Austin's wagon pass Miller's? A No, I didn't see his wagon pass.

Q You did not see that? A No, sir. I passed first, and I kept right on.

Q Did you see the chief there when you got there and passed Miller's wagon? A No, sir; he wasn't there when I got there, no, sir.

Q Did you meet the ambulance before you got to Randolph Road or not? A I did not, no, sir. 40

Herman Carter, cross.

Q When you passed Miller's wagon did you see the light? A I did, yes, sir.

Q Where was it? A Miller had the light off. He had taken the light off when I got there. We went around to look at the horse. He had the light in his hand when I left.

10 Q What had he done with the horse? A One horse was tied to the truck, and the other was laying inside of the road.

Q Which side? A On the left-hand side going towards South Plainfield.

Q Going toward South Plainfield; that was east or west? A I guess that was the west side, wasn't it? On this side of the road (indicating).

Q When you are going toward Plainfield, your right-hand is east. A Well, the horse was on the east side then.

20 Q That is, the dead horse? A The dead horse, yes, sir.

Q And the other was tied where? A He was tied to the front of the truck, if I remember right; I think.

Q What was Miller doing? A Well, Miller was not doing nothing. He was standing there when I got there.

Q What was he doing with the light, did you say? A Well, he had—afterwards—you mean when I left there?

30 Q Yes. A Well, he was—I left him there—we went down to look at the horse. Well, then, I went on in, and I left Miller standing there.

Q Was this light lighted at that time? A It was, yes, sir.

Cross examination by Mr. Crane.

Q Did I understand you to say that you followed Miller within three hundred feet? A No, I did not.

40 Q How near to Miller's wagon were you just before the accident? A Oh, I guess I was in South Plainfield when the accident occurred.

Herman Carter, cross.

Q You were in South Plainfield when the accident occurred? A I guess I was, yes.

Q Then when was it that you observed Miller's lantern proceeding on down Plainfield avenue?

The Court. When he got about three hundred feet away, he said.

Q Was that before or after the accident, do you know? A After the accident. 10

Q This fellow, the witness who just proceeded you, what was his name?

Mr. Heine. Austin.

Q Was Austin in back of you? A He was, yes, sir.

Q What assistance did you attempt to render to Barry when you got there? A I didn't see anything that I could do. 20

Q Did you ask him if you could do anything? A No, because he was covered up. I didn't uncover him. It was a cold night.

Q Did you know whether he was dead or alive? A I know he was alive because I could hear him groaning.

Q Did not attempt to go and telephone for a doctor and an ambulance? A Well, it had been did; Miller had did that already.

Q I said you did not? A No.

Mr. Heine. He said it had been "did." 30

Mr. Crane. I got that.

Q Did you attempt to render any assistance to Miller?

A Well, I didn't see where he needed any.

Q Answer my question. A No.

Q Did you attempt to render any to him? A No, I did not.

Q Where was this light that you say you saw? Was it on the truck? A When I first seen it, it was on the truck. 40

Herman Carter, cross.

Q Was that before or after the accident? A After the accident.

Q Did you see Miller take it off the truck? A I did.

Q When did he take it off the truck, when you got there? A When I got there. We went around to look at the horse.

10 Q You do not know how much time transpired, or how much time elapsed between the time of the accident and the time you got there, do you? A No, I don't.

Q Whom have you talked this case over with? A Talked it over with?

Q Yes. A I don't know of anyone, only the jurymen here, what I just said.

Q You do not mean that, do you, Carter? A Well, that is all I talked it over with. I didn't have anything to talk over.

20 Q Do you mean to tell this jury that you have not talked of this case, not once, but many times, with the investigator of the Borden Company? A I have not. He has not said a word to me concerning the case, only I was subpoenaed here on this trial. That is the first I had anything to say.

Q When you got down to the station or the depot in Plainfield, did you tell anybody about what you had seen? A Oh, I told them about the accident, but it wasn't talked over.

30 Q Do you mean to tell these people, as sensible men, that you were called here to the witness stand without any intimation as to what you were going to testify about? A No; no one has told me anything.

Q Do you know this gentlemen here with the glasses? A Well, I seen him once before on this case, to my knowledge.

Q Oh, I do not mean that you were long acquainted. Have you not talked with him in the court house here during the last two days? A I have not, no, sir.

Herman Carter, re-direct.

Q You have not? A No, sir.

Q Did you ever sign any statement for anybody about the case? A I have not, no, sir.

Q Ever make any written report about it? A I have not.

Q You know Mr. Pickel, do you not? A I know Mr. Pickel; yes, sir. 10

Q He is the local manager of Borden's, is he not? A Yes, sir.

Q Have you talked to him about the case? A I have not. I have not talked anything over.

Q Did he talk to you about the case? A He have not, no, sir.

Q Carter, do you mean to tell this jury, with an important case like this, that your employer, knowing that you knew something of the accident, did not talk to you about it? A No, sir. 20

Q Did not? A (Witness shakes head in the negative.)

Re-direct examination by Mr. Heine.

Q You reported the accident to the plant at Plainfield, did you not? A Miller did that himself.

Q Yes.

Mr. Crane. That is not "yes." He said Mr. Miller did; he did not. 30

Mr. Heine. Are you going to testify, too?

Mr. Crane. Yes.

Mr. Heine. When you get through I will ask the witness a question.

Q You received your orders from Mr. Pickel; he is the manager there in Plainfield? A Yes, sir.

Q And you told him, did you not, that you had passed Miller, and told him the facts about the case? 40

Herman Carter, re-direct.

Mr. Crane. I object to the question on the ground that it is leading. The witness says he told no one, including Mr. Pickel.

The Court. I will allow it.

10 Q Is not that correct? A Well, I told—I didn't talk anything over:

By the Court.

Q What do you mean by that expression, you did not talk anything over? A He asked me did I talk the case over with anyone. Of course, we told them about the accident, not we, but Miller told him. I had nothing to tell. It wasn't my accident.

By Mr. Heine.

20 Q When you have an accident, you make out an accident report, do you not?

Mr. Crane. I object to the question.

A We do, yes, sir.

The Court. I will allow it.

Q This was Miller's accident, and not yours? A Not mine.

30 *Mr. Crane.* If it please the Court, I object to Mr. Heine leading the witness. He is his witness.

The Court. I know.

Q And it is a fact, is it not, that you let your superiors know in the Borden Company that you had passed Miller's truck and that this other man, you two drivers had passed Miller's truck and come on into Plainfield? Did you not furnish them this information?

40 *Mr. Crane.* I object to that on the ground that the witness already said he did not, and the question is grossly leading.

Hans Ansen, direct.

The Court. It is grossly leading.

Mr. Heine. Well, it is an immaterial point.

Mr. Crane. If it is immaterial do not urge it; do not waste time.

Mr. Heine. Do not misquote the testimony.

Q You know Mr. Blue here, the representative of Borden? A Yes, sir, I do. 10

Q Have you talked with him about the case? A No, sir, I have not.

Q Just with your people in Plainfield? A That is all.

Mr. Crane. May it please the Court, I object to that. The witness has not said so.

The Court. Is there anything else from this witness?

Mr. Heine. I think that is all. 20

HANS ANSEN, called as a witness on behalf of the defendants, being duly sworn, testifies as follows:

Direct examination by Mr. Heine.

Q Mr. Ansen, where do you live? A Linden.

Q I want the jurors to hear you, so if you will just keep your voice up and talk loudly enough. Where do you live, in Linden? A Linden.

Q Where? A 527 Washington avenue. 30

Q Where did you live on the 28th of January, 1922? A South Plainfield.

Q Where? A Plainfield avenue.

Q Do you remember an accident happening early in the morning, two or three o'clock in the morning, on the 28th of January? A Yes, sir.

Q Now, just tell this jury what attracted your attention to this accident, what you heard and saw. Tell it in your own way. Just tell what happened. A If I understand my English— 40

Hans Ansen, direct.

Q Never mind your English; bring the truth out. We will pardon your English. A I hear a crash and I went to the window.

Q You were in bed then, were you? A And I saw Miller jump off the truck with a lantern in his hand, and he started for my house. Then he turned right around again and went up the street. I ran downstairs immediately, and I saw Barry laying on the road. He said to me—

The Court. Who?

Q Barry? A Barry. "I feel very cold." Miller was not there at the time. "I feel very cold," he said, "Will you take the blanket in the back of my car and cover me up?" I went back to the house after a pillow and a fur coat, and I also took the blanket in the back of the car and covered him up, together with my wife. I went back again to the house and telephoned for the ambulance, and I wake up Mr. Niles, and then I went back again to Mr. Barry; and then Mr. Miller came down the street. This here took quite a while; I will say about twenty minutes, before that—and I didn't see any ambulance. I went back again to the house and telephone to Muhlenberg Hospital the second time. In about a half an hour the Police Chief of South Plainfield came.

Q That is Police Chief McCarthy? A Yes, with another man. I told him then that—

Mr. Crane. One minute. I object to what he told the Chief of Police.

Q You cannot tell what you told the Chief of Police?
A Ain't that good enough?

Mr. Crane. No, that is not good enough.

Q Now, when Miller came back down the road again, after you telephoned and after you got Mr. Niles, did he have a lantern in his hand, when he came back down the

Hans Ansen, direct.

road? A He came back and he put that on the back of the truck, and it was still lit.

Q It was lighted when you saw him get off the truck, and it was lighted when he came back with it? A Yes, sir.

Q You do not know where he went, do you? A He went up to the next house, he told me; and then he and I went back to Barry; and I said to Barry, "Anything I can do for you?" I was afraid of lifting him up, under the condition that he was in. So he said, "No. I am—how is my car?" Mr. Miller answered him and said, "It is pretty well shot." 10

Q What did you see on the roadway about the Borden truck and horse and so on? A The truck was standing more to the left side of the road, with the front end swinging a little towards the right, and I also saw where the automobile had passed alongside of the road. 20

Q Which side of the automobile had passed? A On the left-hand side, you know; on the left-hand side of the road, it passed the truck.

Q Passed the truck? A Yes.

Q Which would that be, east or west side of the roadway? A That I couldn't tell, but it is on the left-hand side of the truck, that I know, coming from Plainfield, going to South Plainfield.

Q Left-hand side of the truck going toward South Plainfield? A Yes. 30

Q That would be the east side? A Yes; or, in other words, the wrong side.

Q Where did these tracks, the automobile tracks, lead to? A That was going right out in the bushes. Then it was turned over again, and crossing the street.

Q Was that Barry's automobile? A Yes, that was Barry's automobile.

Q How long did you stay there? A I stood there to—oh, I don't know; about twelve o'clock the next day, I guess, because I was living there. 40

Hans Ansen, cross.

Q You say your wife came out and brought the pillow?

A Yes.

Q She was there, too? A Yes.

Cross examination by Mr. Crane.

10 Q Just a minute, Mr. Ansen. About what time was the accident, do you remember? A I couldn't exactly say. I would say around three o'clock in the morning.

Q Were you working nights? A No. I was sound asleep.

Q And the house that you were living in was about opposite Rahway avenue, was it not? A It was about a hundred feet away from the truck.

20 Q About a hundred feet away from the truck and about one hundred and fifty feet away from the road? A No. I am about seventy-five feet away from the road, and this accident was twenty-five feet up from my house, up the avenue.

Q And what part of the house were you sleeping in?

A On the side towards South Plainfield.

Q You were sound asleep? A I was in bed, but I heard the crash.

Q And this crash woke you up? A If I was awake or woke me up, I couldn't say, but anyway—

30 Q The first thing you knew of the accident was the crash? A Yes. And I looked right out through the window, and I saw Miller jumping off the truck, and anyway he was not further away from the truck than two feet.

Q What made it possible for you to look from your bedroom window, which is some seventy-five feet north on Plainfield avenue, from the scene of the accident, and the front of the house twenty-five feet back from the road, to see this man jumping off the truck into darkness? A Because there was a light right there over the truck, a big street light.

40 Q A big street light; do you mean that? A Yes, sir.

Hans Ansen, cross.

Q Which side of the truck did Miller jump off? A On the left-hand side, and running towards my house; couldn't run off on the other side.

Q Why not? A I couldn't see it then; he had to run around the truck.

Q In order for you to see it, he would have to get off on the left side? A Of course, he— 10

Q When you got out to the scene of the accident, I suppose you took at least time to get dressed before you got out there? A I went out with a pair of pants on and a bath robe.

Q Slippers? A Yes. And wasn't I cold. I had to go home again and get shoes on.

Q You are lucky to have shoes. When you got there you found that the truck was substantially in the position as shown on that map; is not that so? A No.

Q That is wrong? A Yes. 20

Q Now, besides Miller, whom else did you see there, after the accident? A There was a couple of trucks come along later on.

Q How much later? A I would judge about twenty minutes, something like that. I couldn't exactly say that, but about twenty minutes.

Q And you saw Chief McCarthy there that night, did you not? A He come about a half an hour after.

Q But I say you saw him? A Yes. I spoke to him.

Q And do you remember Chief McCarthy asking you to give him a statement of what you knew of this accident so he could complete his police report? A No, he did not. 30

Q He did not ask you that? A No, sir. There was—

Q And did you not refuse to give him any statement whatever? A No, sir. There was a lawyer hanging around there, but I did not give him any satisfaction.

Q Well, I am not talking about lawyers hanging around. They are usually hanging around; that is about all they do. I am talking about what you refused to 40

Hans Ansen, cross.

give to Chief McCarthy. Did you not refuse to give him a statement? A I didn't give anybody any statement.

Q Did you not give the Borden Company a statement?

A No, sir.

Q You did not? A No, sir.

Q Did you talk this case over with anyone before you came into court? A Why should I?

10

The Court. Well, did you?

Q That does not answer the question. Did you? A No, I didn't.

20

Q There are lots of reasons why you should. Do you mean to say that when you changed your address from Plainfield avenue to 527 Washington avenue, over in Linden, that you did not tell the Borden Company of your then address? A I did not. They looked me up, and they had to look for a long while before they found me.

Q But they did not know that you knew anything about it, did they? A Yes, they did.

Q How? A Because he came up there the day of the accident, the same as you did. I spoke to you that morning, too. You remember it? But no more.

30

Q But you do not answer my question, sir. How did the Borden Company know that you knew anything about the accident if you did not tell them? A Maybe they asked somebody, because they know I have covered Mr. Barry up.

Q How would they know that? A Somebody there must have told them there; somebody must have told them.

Q You are getting paid for being here in court today, are you not? A Me?

Q You, yes. A No, siree; no, no. No; I am no lawyer.

40

Q No, I can see that. What do you do when you work? A I am an inventor.

Hans Ansen, cross.

Q Employed at the present time? A No, sir. I am working—

Q How long since you have been employed? A About—oh, I would say about three years.

Q How long is that? A Three years, I guess.

Q Now, who was it that first notified you to come here into court today or yesterday? A One employee from Borden's. 10

Q Bring you a subpoena? A Yes, sir.

Q Did he say anything to you? A No. He came one time before, and I told him that I had been in Plainfield, and I—he didn't—that is the first time he ever was in my house.

Q Well, was there anything said about paying you for coming here to testify? A I think I would feel this way about it—

Q No, no. Please answer my question. Was there anything said by this man who came to see you, about paying you to come here to court to testify, paying you for your time? A There ain't nobody paying me. 20

Q Did they not give you any money at all? A Fifty cents.

Q Did they not give you fifty cents for today? A Yes, they give me fifty cents when he came down there. He did not say what it was for.

Q Did you not know what the fifty cents was for? A No. 30

Q What did you think, he was trying to buy a share in your inventions, or pay your subpoena fee? A Oh, no. I put it in my pocket anyway.

Q I want to ask you once again if you will not stop and try to think, if you did not refuse to give Chief McCarthy any statement about this accident at all? A I didn't.

Mr. Heine. I object. The witness has answered that at least twice. 40

Archie G. Niles, direct.

Q Since you have been in the court house, yesterday or today, you have not talked to anybody about what you were going to testify about? A I am living too far away from anyone.

10 Q I say, did you do that, either yesterday or today, talk to Mr. Blue or any of his corps of assistants or counsel? A Not a single word, because I come here too late today, and if—

Q You would have talked if you got here earlier; is that it? A No; I did not get here early; I was late.

ARCHIE G. NILES, called as a witness on behalf of the defendants, being duly sworn, testifies as follows:

Direct examination by Mr. Heine.

20 Q Where do you live? A 163 Kline Boulevard, Dunellen, New Jersey.

Q Keep your voice up, Mr. Niles, so that we can hear you at the end of the jury box here. Where did you live on the 28th day of January, 1922? A On Plainfield avenue.

Q Do you still live there? A No, sir.

Q Do you recall this accident that happened— A Yes, sir.

Q —to Mr. Barry early in the morning of the 28th?

A Yes, sir.

30 Q Where were you at that time when this happened?

A I was in bed.

Q What was the first thing that called your attention to it? A Mr. Ansen came down and knocked on the door and said there was an accident outside.

Mr. Crane. I move that it be stricken out, what Mr. Ansen said.

The Court. Oh, well, Mr. Ansen came there; as a result he got up.

The Witness. Yes, sir.

Archie G. Niles, direct.

Q When you got up, what did you do? A I dressed and went out.

Q Where is your house in relation to where this accident occurred? A Oh, I should think it is about fifty feet away from the road.

The Court. A little louder.

A (Continuing.) Fifty feet away from the road. 10

Q Away from which road? You mean fifty back from Plainfield avenue? A Plainfield avenue.

Q What? A Plainfield avenue.

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

Q On the west side. In relation to Rahway avenue, was it north or south of Rahway avenue? A It is north, northwest.

Q About how far from Rahway avenue? A About twenty-five feet.

Q About twenty-five feet? A Well, that is straight across, going over to the corner, I should say about fifty feet, I should think, if not more than that. 20

Q Is there or is there not a light on the corner of Rahway avenue and— A There is one.

Q Which corner is that light? A The further corner.

Q The northeast corner? A Southeast corner.

Q When you came out that night, Mr. Ansen was with you? A No; he was out in the road.

Q Now, just tell the jury what you saw. A Well, when I went out—when I got out on the stoop I looked over, and I saw the truck standing right under that light, so I went out; and I next—Mr. Ansen met me then, and I said, “Who is hurt?” 30

Mr. Crane. One moment. I object to what was said.

Q There is a rule of evidence you cannot tell what you said to different people, except to Mr. Barry or to the Borden man, but just what you saw. A Well, I went 40

Archie G. Niles, direct.

out then, and I went down and seen Mr. Barry laying on the ground, and I said, "Is there anything we can do?"— I can't tell who told me anything about that, I do not suppose.

10 Q Where was the truck, on the roadway in relation to the east and west sides of the road? A Well, it was on towards the east side.

Q Was it in a position that parallel the sides of the road, or was it at an angle? A It was on a little angle.

Q Are you familiar with a map sufficiently to read a map or to look at a diagram there? A Yes.

Q Do you see the— A That is pretty near the position of the wagon.

Q This is the side line and this is the center line (indicating)? A Yes, sir.

20 Q And the position of the wagon is shown there? A Just like that.

Q You say that was substantially the position of the wagon? A Yes.

Q Where was the horse? A Which one?

Q The Borden, the one that was dead, that was killed? A I should judge about five feet back of the truck, laying on the side.

Q On the east side? A On the east side, yes, sir.

Q Where was the other horse? A Standing up in front of the wagon.

30 Q Did you see Miller there, the driver? A Yes, sir.

Q Where was he? A He was running all around there with a lantern.

Q And was that lantern lighted or not? A It was.

Q What did Miller do while you were there? A When I come out, he was just coming back from telephoning, and then he walked around there and looked around there, different things.

Q Did you see any other trucks of Borden's that night while you were there? A I did, sir.

Archie G. Niles, direct.

Q What did they do? A Well, they came on then and stopped a few minutes, and then went on.

Q Did they stop toward South Plainfield or toward Plainfield, in relation to the truck of Miller's? A I think they stopped—they went by and then stopped.

Q They passed Miller? A Yes, sir.

Q On which side of Miller's truck did they pass? A 10
On the left-hand side, coming from South Plainfield.

Q Did you see on what part of the hard roadway they passed when they passed Miller's truck? A On the hard roadway there, on the left-hand side.

Q Were they about the same size trucks as Miller's?
A Yes, sir.

Mr. Heine. I will offer these photographs, one of Plainfield avenue at the bi-section of Rahway avenue, looking north.

(Photograph marked Exhibit D. 1.) 20

Mr. Heine. Plainfield avenue, south of the bi-section of Rahway avenue, looking north.

(Photograph marked Exhibit D. 2.)

Mr. Heine. Plainfield avenue, showing the southeast corner of Plainfield avenue and Rahway avenue, looking east, in the general direction of east.

(Photograph marked Exhibit D. 3.)

Mr. Heine. No. 4 is a view of Barry's car facing 30
west, on the west side of Plainfield avenue.

(Photograph marked Exhibit D. 4.)

(Photographs handed to the jury.)

Q What was the distance between the Borden wagon and the place where Barry's car was when you came out?

A About seventy-five feet.

Q How much? A About seventy-five feet.

Q About seventy-five feet? A Yes, sir.

Q Was Barry lying on the road, in relation to his own car, near his own car? A Yes, sir; when I seen him. 40

Archie G. Niles, cross.

Q How was he covered up? A He was covered up.

Q Did you see them cover him up or not? A No, sir; I was not out there at that time.

Q Have a pillow under his head? A Yes, sir.

Q Did you have any conversation with him? A I did not.

10 Q How long was it after you got out there that the chief appeared on the scene? A Well, it seemed to be quite a while; about twenty-five minutes.

Q Did you remain out there until the chief took him away in the car? A Yes, sir. I opened the door of his car when they put him in.

Q Have you signed any statement? A No, sir.

Q For anybody in this case? A No, sir.

Q Have you been requested to sign any statement?

A Not as I know of; no, sir; I don't think so.

20 Q And you came here under subpoena? You came here under subpoena? A Yes, sir.

Q You knew Miller, the driver of the Borden truck?

A I didn't know him; no, sir.

Q Before that time? A No, sir.

Q You talked to him at that time? A Yes; I listened to him.

Q And you talked to Chief McCarthy at that time? A No, sir; I don't think I ever spoke to him.

30 Q You did not talk to him? A No.

Q He knew you, however? A I don't know whether he knew me or not.

Q Both the chief and Mr. Miller knew that you lived in this house on the road there? A I suppose they did. Miller did.

Q Saw you go in and out? A Yes.

Cross examination by Mr. Crane.

40 Q You say, Mr. Niles, that the position of the truck as described on the map, is substantially as you saw it

George M. Miller, direct.

when you got there? A Pretty near about the same way, I think it was.

Q From what you now know of the accident, how much time would you say elapsed between the time that you first knew of the accident and the time that you got to the scene of it; fifteen or twenty minutes? A About ten minutes. 10

Q Of course you do not know whether or not the light was lit on the truck immediately before the accident? A I know there was one light lit on the truck.

Q Before the accident? A Oh, before the accident—

Q You know nothing about that at all? A No, I don't know nothing about that at all.

Mr. Crane. I offer these photographs in evidence.

Mr. Heine. No objection. 20

(Photographs marked Exhibits P. 8, P. 9, P. 10 and P. 11.)

GEORGE M. MILLER, called as a witness on behalf of the defendants, being duly sworn, testifies as follows:

Direct examination by Mr. Heine.

Q Mr. Miller, where do you live? A 945 South Second street, Plainfield. 30

Q Whom do you work for? A Borden Farm Products Company.

Q Were you working for them on the 28th of January, 1922? A Yes, sir.

Q Keep your voice up so that the last juror there can hear you. Never mind me. Talk to the gentlemen here. How long had you been working for Borden before this accident? A Oh, I guess, probably a year and a half, or more.

Q Had you driven before that? A Oh yes. 40

George M. Miller, direct.

Q How many years' experience? A Well, I was brought up amongst horses, driving.

Q How long had you been driving on this particular highway, Plainfield avenue? A Practically about a year and a half.

10 Q What are the traffic conditions there as you observed them while you went up and down each night?
A Well, they are very reckless on that thoroughfare there.

Q I mean as to number; a lot of vehicles? A Yes, sir; there is quite a few.

Mr. Crane. I move to strike that out.

Mr. Heine. I consent that it be stricken out.

Q What kind of vehicles are there that you meet there at night? A Automobiles, mostly.

20 Q As you observed that traffic for the year or year and a half preceding the accident— A Yes, sir.

Q —how are these automobiles driven, as to speed?

Mr. Crane. I object to that, if your Honor please. I do not see what difference it makes.

Mr. Heine. I am not attempting to fasten anything on this driver Barry. I am simply attempting to show conditions as they existed on that road, as an artery of traffic, over which the traffic proceeds at a fast rate of speed.

30

Mr. Crane I object to it, and I object to counsel's remarks.

The Court. Objection sustained.

Mr. Heine. May I have your Honor's permission to make one statement in argument of that?

The Court. Yes.

Mr. Heine. If it were necessary for me to show the conditions of traffic on Broad street here, that the traffic is gradual and congested, and slow, it

40

George M. Miller, direct.

would give a jury passing on an accident, involving that location, some idea. Here you have an open roadway where the traffic is fast. The only object is to show the conditions as opposed to the conditions such as we would have here in the city.

The Court. At three o'clock in the morning?

Mr. Heine. At three o'clock in the morning; yes, sir. 10

The Court. Well, narrow it.

Q Did you drive that road during that year and a half every night at about the same time? A Not about the same time all during the year, because we change the time.

Q During what period do you drive over there at three o'clock in the morning? A About the 15th of next month we change our service, and we start out at twelve o'clock. 20

Q November? A Yes. We have what we call "Daily Service."

Q And did this accident happen during "Daily Service"? A Yes, sir

Q You did that every night for what period? A Well, I—

Q How many months? A About four months, I suppose.

Q Four months? A Yes. 30

Q This is before the accident now. During the four months that you were giving daily service there and leaving South Plainfield about midnight, or one o'clock, and driving to Plainfield, what was the character of the automobile traffic? A Well, it was not so much of it on there; there was some. What it was was fast; that is all.

Q I do not understand you. A I say there was some traffic on there. There was not—

Q At that time in the morning? A Yes. 40

George M. Miller, direct.

Q What is the character of that traffic as to speed? A They travel over that road right alone. They do ride. And they still do it.

Mr. Crane. I move that the last part of the answer be stricken out.

The Court. It is stricken out.

10

Mr. Heine. I consent to it.

Q On this particular morning, what kind of a day was it; what kind of a morning was it? A Why, it was very cold and windy.

Q Was it clear? A Well, it was cloudy

Q Could you see along the road? A Oh, yes.

Q About what time did you leave South Plainfield? A Well, I imagine it must have been about, probably, 2:30; about that.

20 Q Did you have anything to do in South Plainfield before you made this late drive? A Yes, sir.

Q What? A I had four stops to make to deliver milk.

Q Did you make those on that night? A Yes, sir.

Q Were these other two men, Austin and Carter, who have testified here, there and loading up the same time you were? A They were still over at the car, loading.

Q You started first? A Yes, sir.

Q Do you know Chief McCarthy? A Yes, sir.

30 Q Did you meet the Chief that night as you were leaving South Plainfield? A I did.

Q Where? A Right over near Thornton's saloon.

Q Is that one of the places you deliver milk to? A Yes, sir; I served it. I was off the truck there.

Q And you delivered milk there that night? A Yes, sir.

Q Did you have any conversation with the chief there that night? A I did. I said to him, "It is very cold." He said it was very cold.

Q Was he in his car? A No, sir; he was walking.

40

George M. Miller, direct.

Q Walking? A Yes, sir.

Q How long did that conversation last? A Just while I delivered the bottle of milk and went back on the truck.

Q Did you have any lights on your truck when you left South Plainfield? A Yes, sir.

Q Where were they located? A On the side. 10

Q Which side? A On the left side.

By Mr Crane.

Q You did not mean "lights," did you? You mean "light"? A Light.

By Mr. Heine.

Q How many did you have on it; how many? A One.

Q One? A Yes, sir.

Q On which side? A On the left side, the front. 20

Q One like this (showing lantern)? A Yes, sir.

Q Could you pick out now—one of these lights is marked X on the back, and one is marked 6 on the back?

A This one is my light (indicating).

Q That one is your light? A Yes, No. 6; yes, sir; my light.

Q How can you identify this light as the one that you had on your wagon when you left South Plainfield? A Because we have our lights numbered. Each and every truck has their own lights. 30

Q What was your number at that time? A 6. Here it is right here (indicating).

Q Was that number 6 on your light? A Yes, sir.

Q That night? A Yes, sir.

Q Did you start out from South Plainfield with this particular light here? A Yes, sir.

Mr. Heine. I will offer this in evidence for the defense.

(Considered marked Exhibit D. 5.)

George M. Miller, direct.

Q When Chief McCarthy testifies that this one with the X on was the light that was on your wagon; is that correct; or is he mistaken? A He is mistaken. That was left by the other truck.

Q Now, how was this light fixed or put on your wagon? How was it that night? A It was set on in
10 this manner, right on the side, on the front (indicating).

Q Left side? A Yes, sir.

Q Does this show this red hole here along the side of the truck? A Yes, sir.

Q Can you see it from behind? A Yes, sir.

Q Now, just tell the jury in your own way, after you passed the time of night with the chief and started up Plainfield avenue, what happened? A Well, I was proceeding along at about where the accident happened, and
20 the first I noticed Barry's car coming was when the reflection of the electric light where I was in front of thrown on his windshield. He had absolutely no light at all on his car, and I would not have seen it then, but he made sort of a swerve. He was coming down straight on the right-hand side of the road, but he made a swerve as though he was going to go into that street, and as he did so—

30 *Mr. Crane.* I move that the last part of the answer be stricken out.

The Court. Oh, no.

A (Continuing.) He made this swerve as though he was going to go down into this street. As he did so, I pulled on my line, on the one horse, and it pulled him over. He was going at a fast rate of speed at the time.

Q Now, what part of the roadway were you in, were you driving in, as you came up, just before the collision?
A I was on the right-hand side. I had about, probably,
40 three feet, three feet and a half from the curb.

George M. Miller, direct.

Q Will you look at that map there, sketch, survey? This is the side line, west side line of Plainfield avenue, the lower line here. I mean this is the east side line—excuse me. This is going toward Plainfield, and this is the west side (indicating), and you are coming up from South Plainfield. A Yes, sir.

Q Now, when you were approaching this place, the point of the accident, where were the left wheels, your left front and left rear wheels, in relation to the center line of Plainfield avenue? A Probably about—about near the center of the road. 10

Q Your left wheels were? A Yes, sir.

Q Now, after the accident, the surveyor, you saw him come there, did you? A Yes, sir.

Q He came there? A Yes, sir.

Q Made measurements, and places the truck in that position. Can you state whether or not that correctly shows it after the accident? A The truck was swerved around then, after the accident. The rear end swung around the pole—the rear end swung around. 20

Q The automobile, as I understand, engaged your pole? A The automobile—the pole went right through the door. His engine struck my horse, my right-hand horse, and took him completely right on, and the car right straight on through the side, and he dropped off at the rear of my truck. He took the harness off the other horse, and the other horse never moved from the place. He stood right still. There wasn't a bit of harness left on him. 30

Q Where did Barry's car go afterward? A It continued on down for aways, and it swerved across the road, and it stopped when it hit the embankment there.

Q At this time of collision was this light lighted or not? A Yes, sir; it was so.

Q Did you hear Chief McCarthy testify about the light, the difficulty in lighting it, going out, and so on? A Yes, sir. 40

George M. Miller, direct.

Q After he got there? A Yes, sir.

Q How long was it before he got there? A Oh, it was approximately—probably forty-five minutes, because I had quite some time in getting anybody up to telephone; I was fully fifteen minutes.

10 Q After you were struck, and the horse carried down this way, what did you do? Just tell these men with as much detail as you can, what you actually did, not what you said to people, but what you did? A As this man struck me, he pulled in there. I seen it was going to be a collision, he could not avoid it. I pulled on the line. At the same time I jumped off the side of the truck.

Q Which side? A On the left side.

Q And you landed in the road? A Yes, sir. I injured my knee a little bit.

20 Q What did you do? A I went right straight back to Barry, where he was. I found him lying back there. I didn't know whether he was in the car or where he was at the time. In the meantime I found him on the right side of the road going toward South Plainfield, and very nearly the center, and his car was about fifteen foot off in the ditch, after it had made the turn.

Q Was he conscious then? A Yes; he talked to me.

30 Q Did he say anything to you? A I said to him, "How bad are you hurt, Charlie?" I knew him well. And he says to me, "To hell with me," he said, "How is my car?" That was the first thing he said to me. Then I said, "Oh, well." He said,—well, then he followed it up, and he said, "Get a doctor," and I said, "All right." I went right straight down the street, and I tried to make a run, taking the first, you know, in this man's house, and then I thought—

Q You mean Ansen's? A Yes. I don't know what his name is.

Q That man who testified? A Yes. But, anyway, I thought, well, maybe there was no telephone in there;

George M. Miller, direct.

and I went down to this corner house, and I got that man up. He got up, but he didn't come out. He just said that he had no telephone. I told him it was a big accident, and I would like to get word to the police, and the ambulance; and he said, "Well, across the street down there." And that is probably a hundred or one hundred fifty feet down the road, Newman's.

10

Q Toward Plainfield? A Toward South Plainfield. I went in there, and I fell probably three or four times, running across the ice. It was all ice in this yard. And I hollered and pounded, and everything else, at the door, and finally I got him up, and he came down to the side window; and I asked him if he wouldn't please call up the Plainfield police, and he did so; and I asked him to call up an ambulance; and then I went back.

Q When you got back what did you find? A This lady and man was out there with Barry, and they had him with the pillow—

20

Adjournment taken to tomorrow morning, October 4, 1923, at 9:30 A. M.

Elizabeth, N. J., October 4, 1923.

TRIAL RESUMED.

GEORGE M. MILLER, resumes the stand and testifies as follows:

30

Direct examination by Mr. Heine (continued).

Q After you got back, Mr. Miller, and found the man and woman who had put a pillow under Mr. Barry's head there, how long was it before Chief McCarthy appeared?

A Oh, it was possibly twenty to twenty-five minutes.

Q And you stayed there after the chief arrived? A Yes, sir.

40

George M. Miller, direct.

Q Went around with him? A Yes, sir.

Q The chief took Barry over before the ambulance came? A Yes. He waited a few minutes, and we had told him that the ambulance was sent for. In the meantime this lady went in again and telephoned, and this lady at the hospital, or whoever it was answered the phone,
10 told her that—hadn't it got there yet? And she said no. So—

Mr. Crane. Of course, you know this is immaterial.

Mr. Heine. Yes.

Q You do not know what was said at the other end of the telephone? A No.

Mr. Crane. It is not material anyway.

Mr. Heine. What was told is not material.

20 Q The chief finally took him over. How long was the chief gone from the scene of the accident? A I imagine about twenty minutes.

Q When your truck was struck, when the collision occurred, what happened to the truck, as to its movement on the road? A Why, it struck the pole, see, and the horse at the same time.

Q How long is that pole? A I guess about eight foot, eight or nine feet.

30 Q Did it stick out in front of the horses with the breast trees on? A Yes, sir.

Q And the taxi, Barry's car, hit that pole? A The pole hit the side door, see, went right straight through that door.

Q And then— A He hit the horse, and took the horse and the harness and everything right straight along with him, and pulled the pole right around in that direction, swung the wheels around, and the pole snapped off, and continued on in his car. It went on up the street and
40

George M. Miller, direct.

made the turn around into the embankment on the other side.

Q Now, as the pole was pulled around that way, and the horse dragged around, was the truck that you were on moved in any way? A Yes, sir. It swung around. See, it brings the hind end around. The axis of it turning, it brings the rear end around. 10

Q It swung the front of your truck to the east? A No; it swings it to the west; it swung the rear end toward the west.

Q The rear end? A Yes, sir.

Q Swung the front? A Toward the east.

Q Toward the east, and shoved your rear— A Toward the west.

Q So that the truck, when it came to rest, was at an angle such as they represented there on the diagram? A Yes, it is that angle, yes, sir. 20

Q When the chief came back did you make any examination with him of Barry's car? A Yes, sir.

Q What did you find? A Why, first we went over, and we looked it over, and I says, "He didn't have any lights on."

Mr. Crane. I object to this.

Q Just what you saw there, what you and the chief saw. 30

The Court. Strike it out.

A We went over the lighting system, and he couldn't find any tank on the side for the car—for lights on the car, Mr. McCarthy and I. And then he tried some buttons there. He was pushing them, one thing and another. We could not get no lighting effect. And we went up and felt of the front headlights, and he says, "Well, they are not warm."

Mr. Crane. I move that that be stricken out. 40

George M. Miller, direct.

Mr. Heine. Yes, I consent that it be stricken out.

The Court. It is stricken out.

Q What about the oil lights? A The oil lights were up on the side of the car, but they were not lit.

10 Q What did you find when you looked at them then?
A Well, we didn't find anything at all. We didn't look at them, in fact.

Q Were they lighted or not? A No, sir.

Q Then you stayed there until they came and took your milk off? A Yes, I was there.

Q Where did the truck come from that took the milk off the wagon? A It went into the branch and unloaded and came back, and then backed up, went around and backed up to my wagon, and we unloaded the milk and cream.

20 Q Did you continue there at the scene of the accident?
A I stayed there until nine o'clock the next morning.

Q And the position of Barry's car and of the truck was kept just as they had been right after the accident? A Yes, sir.

Q Were you there when these photographs were taken?
A No, I was not there when they were taken.

Q You were not there? A No, sir.

30 Q What use was made by the chief of this lantern?
A Why, we took the lantern—he instructed me to take the lantern and set it in front of the truck, a distance of about twenty-five or thirty feet.

Q Did you do that? A Yes, sir.

Q Was the lantern lighted? A Yes, sir.

Q Did it stay lighted? A Yes, sir.

Q And did you get another lantern from one of the other trucks? A Yes, sir; I got the other lantern from the other truck, when it came back to unload my milk.

40 Q What did you do with that? A We had that there, and it continually went out, several times there, standing

George M. Miller, cross.

in the wind and we took it in Chief McCarthy's car and tried to light it two or three times, and it still went out.

Q That was the lantern you got from the other truckman? A Yes, sir.

Q Do you know what his number was, and what the mark on his lantern was? A Yes, sir.

Q What was it? A X.

10

Q That number 6, you say, was your lantern? A That is my light, yes, sir.

Q And this one, X— A Yes, sir, that is Mr. Carter's light.

Q That X was Carter's number? A Yes, sir.

Q And that was the one he brought back? A Yes, sir.

Cross examination by Mr. Crane.

Q The route that you were running was known as the Express Route, was it not? A Yes. It is an express route.

20

Q And the route that Carter and the colored man— what was his name, Austin? A Yes, sir.

Q They, too, were running routes known as Express? A No, sir.

Q No? A No, sir.

Q What were their routes known as? A Never known as Expresses. Only one is known as that, that is supposed to be Express, supposed to come in the minute— immediately after it was loaded; that was with the cream on.

30

Q That was the route that you were driving, that Express? A Yes, sir.

Q Do you remember Chief McCarthy asking you what the X meant on the back of the lantern that he says he took off your truck, or took out of your hand? A Mr. McCarthy never asked me nothing.

Q Did not Mr. McCarthy ask you what the X, marked on the back of this lantern, in yellow paint, meant, and did you not say that it meant Express? A No, sir.

40

George M. Miller, cross.

Q Well, it did mean Express, did it not? A No.

Q What did it mean? A That is just Mr. Carter's own number, that he has on his lantern. It doesn't mean Express at all.

Q It does not? A No, sir.

Q You did not tell Chief McCarthy that? A No, sir.

10 Q What sort of a night was this, Miller? A Why, it was a dark night, and very windy and cold, very cold.

Q It was one of the coldest nights of the winter, was it not? A Well, I can't say it was the coldest. It was cold. It was real cold, I will say that, very cold.

Q And the wind was very high? A It was high, yes, sir.

Q And the wind was coming from the north; that is, the wind was blowing in your face, was it not? A Well, I can't say it was blowing in my face, no.

20 Q How were you dressed that night? A How was I dressed?

Q Surely. A I had an overcoat on.

Q What sort of an overcoat? A A brown overcoat.

Q I mean did you have a big collar that you could turn up? A No.

Q What sort of a hat did you have on? A I had one of those—just an ordinary cap, that I always wear.

Q You mean that came down over your ears? A No.

30 Q What was there in the front of your truck to protect you from the wind, anything? A Nothing.

Q How long had you driven this Express Route? A Why, I only drive it on the nights off, see. I drive every man's night off—I drive it every Friday night.

Q This team that you were driving, how long had that team been in the express service, if you know? A Well, it had been since we had the strike.

Q Of course, we do not know when that was. A Well, that was—

Q Approximately how long before the accident? A Oh—

George M. Miller, cross.

Q Maybe I can help you. The strike was in August, 1921. Would that refresh your recollection now? A Yes, sir. About five or six months, probably.

Q And this team had been going over to the platform in South Plainfield and hauling loads of milk and cream to the depot in Plainfield, nightly, for five or six months; is that right? A Yes, sir.

10

Q Now, after you had made that last stop in South Plainfield, what was there for you to do until you got to the depot in Plainfield? A Drive in.

Q You did not have to drive this team of horses in, did you? A Yes, sir, I did; certainly have to drive.

Q Do you mean to tell this jury that a team of heavy horses like this, going at a walk, over a route that they had traveled for five or six months, continually, that you had to drive them? A Why, absolutely.

Q Why? A Why, you have to do it. You have to drive a team of horses.

20

Q Did you have to keep a tight rein on them? A Yes, certainly, you do.

Q Why, Miller? A Why, because I got a heavy load, and the road is very frosty and slippery, and we have to keep tight reins on them because they slip.

Q The horses knew the way home, did they not? A I don't know as they did. I never had found that out.

Q You do not mean to tell the jury that you drove this team of heavy horses at a walk as though you were driving chariot racers with the lines taut, from the time you left South Plainfield until you got to Plainfield, or the scene of the accident? A You have to hold a tight line on them to keep them from going down on the pavement. It is slippery out there, the least little bit of frost.

30

Q Were not the horses shod? A No.

Q They were not shod? A No, they were not.

Q When it was not slippery you did not have to keep a tight rein on them, did you? A Well, no. When it was not slippery, no, we didn't have to keep a tight rein on

40

George M. Miller, cross.

them; but you have to keep the lines in your hand all the time. You can't go to sleep with them horses.

Q You cannot? A No, sir.

Q What time had you gone to work on the 27th? A Twelve o'clock that night.

Q Twelve o'clock at night? A Yes.

10 Q What had you done during the day of the 27th? A I slept.

Q Until twelve o'clock at night? A No, not until twelve o'clock.

Q I do not suppose that you were a bit drowsy or sleepy? A Absolutely.

Q As you came along there at three o'clock in the morning? A No.

Q And this cold wind, the extreme cold weather did not tend to make you drowsy? A I don't think you could sleep very well that night.

20 Q Will you please answer the question, sir? A Yes, sir.

Q I say the cold wind and extreme cold weather did not tend to make you drowsy? A No, sir.

Q Are you familiar with the map over there, Mr. Miller? A Yes.

Q Do you see the part of the map marked Rahway avenue? A Yes, sir.

30 Q Will you just indicate to the jury on which corner of that street the street light is? A Yes, sir. The street light is directly on this corner, right here (indicating).

Q That is indicating the northeast?

Mr. Heine. Northeast corner.

Q Northeast corner? A Yes, sir.

Q And will you tell the jury about the style of the light that is there? A Well, it is one of them ordinary street lamps they had.

40 Q Had a shade on it? A It has just that shade—underneath that you have the shade.

George M. Miller, cross.

Q Overtop, you mean? A Yes, overtop, reflector.

Q Are you able to give me any estimate as to how far away from the street light the collision took place? A Why, I imagine about twenty feet. I imagine I was about even with this corner here (indicating), and my pole extended out probably pretty near to the center of this road. When I pulled off, or when I was struck, I was directly at the corner. 10

Q All right. You may sit down. How many thousand pounds of milk did you have on the truck that night? A Oh, I can't imagine just—

Q How many cans of milk did you have? A I think I had about, probably, six or eight cans.

Q Six or eight? A Yes. They vary, see. We get six or eight or ten some nights. They vary. I don't remember exactly just how many there was on it that night, but I imagine there might have been about three, three tons and a half, and four tons, probably, on. 20

Q You mean including your cases? A That is just the milk, yes, not including the truck. I don't mean the weight of the truck.

Q That includes the case milk, the milk in cases? A Yes.

Q These were not cases; cans, were they not? A Cases, cases. And I had about from six to eight cans also on. 30

Q So that your whole load probably would weight 4,500? A Well, including wagon?

Q Including the truck and the cases, and all? A Including the truck, I imagine it would go five ton or more.

Q Five tons? A Five ton or more.

Q Now, you made a statement in this case to Chief McCarthy, did you not? A Made a statement?

Q Yes. A Never made a statement—I went over the case with him, but I never made a statement to him, or sign anything. 40

George M. Miller, cross.

Q I do not recall your testimony. Did you testify that you were driving on the right-hand side of the road? A Did I testify?

Q Yes. Yesterday, did you testify to that? A Yes. I was up to about the center of the road. I said my truck was up to about the center of the road.

10 Q Now, when the collision took place, what did you do? A Why, just as it was hit, I went, you know—I seen him coming. He come in this fashion (indicating), over toward me. It looked as though he was going to make that turn in Rahway avenue.

Q Yes, you told us that A And I pulled on the line, and at the same time I jumped off of the truck right there.

Q When you saw this unlighted automobile of Barry's coming toward you, it was on the right side of the road, was it not? A Yes, it was, but he made that curve there.

20 Q And he apparently saw you about the same time that you saw him; was that it? A Well, possibly he did. I couldn't say that.

Q Now, when the impact came, when the crash came, what did you do? A Well, the only thing I done, as I said, I pulled the line—on the line, and I jumped off the truck.

30 Q That is what I was getting at. At the moment the impact came, you tried to protect yourself and your horses and jump off the truck? A Yes, sir; when I see that it couldn't have been avoided.

Q You saw Mr. Ansen, the inventor, on the witness stand there, at the scene of the accident? A Yes.

Q After the accident, did you go into his house? A No.

Q Do you know how far his house is away from the scene of the accident? A Oh, I imagine it is about a hundred feet back there.

40 Q You mean by that that his house sets about a hundred feet back from the street? A Possibly that.

George M. Miller, cross.

Q It might be more; it might be one hundred fifty feet, might it not? A No, I don't think it was that far.

Q Well, it is well back from the street? A Well, it is about a hundred feet, I imagine.

Q Between the place where the accident happened and Mr. Ansen's house, there are a great many trees, are there not? A Yes, sir; there is quite a number. 10

Q Old trees; they are large ones? A No, I don't know as—ordinary trees.

Q Now, Mr. Ansen said that after he was awakened by this crash, he looked out of the window and saw you jump off the truck. Had you gotten back on the truck after you got off that the first time? A No.

Q The other gentleman who lived further down the street—

Mr. Heine. Niles.

Mr. Crane. Yes; thanks. 20

Q —Mr. Niles, how far is his house back from the road? A He lives in the same house with the other gentleman.

Mr. Heine. It is a two-family house.

A (Continuing.) On the other side, I think. I don't know whether it is on the other side or on the same side.

Q Oh, I see; they were occupying this house. A No, different families. There are two or three different families, I guess, in there. 30

Q Where was it you went to get the telephone number?

A The telephone number?

Q Yes. A I started to go in there, and I happened to think—I said, "Well, I don't think there is a telephone in there," and I rushed back, and I went to the house on the corner there; I don't know who it is; I don't know what the man's name is; but I got him up, and he said he had no telephone. He told me, "Across the street." And I didn't know that Newman lived there at the time, 40

George M. Miller, cross.

but I found out afterward; and I went over there, and I kicked at his door, and hollered and everything, and got him down. He came down, and I asked him if he would telephone for the police and ambulance, and a doctor.

10 Q From your knowledge of traveling over Plainfield avenue, from Rahway avenue down toward the Plainfield City line, there is quite a grade going down, is there not, toward Plainfield? A No, not toward Plainfield. The grade comes—there is a hill, a slight hill there, and then the grade comes into Rahway avenue, very slight, a very slight grade.

Q What I am trying to get at is, where is the hill, as you know it? A The hill is probably five hundred feet or so more on from the other side of the accident.

20 Q At that part of Plainfield avenue there is quite a turn in the road, is there not? A Well, I imagine it is about, probably, an eighth turn, something like that.

Q I did not get that. A About an eighth, I should imagine, turn.

Q An eighth? A Yes, to that effect. It is not a sharp turn; just a—it is a long—

Q Gradual, long turn? A Gradual, long turn.

30 Q And that turn turns when you are going south; that is, towards South Plainfield, it is a gradual turn to the east, is it not? A Yes, it is a slight turn, not very much. You can see from Geary's place all the way up around that turn, especially in the winter; there is no leaves or anything there.

Q Do you know how far it is from Geary's turn, as you call it, at South Plainfield, to the scene of the accident? A Oh, I imagine about a mile.

Q And how soon after the accident did Austin and Carter come up? A Well, I can't say exactly about how soon. I imagine it was about forty-five minutes or so afterward.

40 Q Forty-five minutes when they came up? A About that.

Herman Carter, direct—cross.

Q Did I understand your testimony, that as soon as you got off the truck, you took your lantern off of the hook on the side of the truck and went back to see what you could do for Barry; is that right? A Not at first.

Q How soon did you take the lantern off the hook? A I came right back and got it. I went up that way first, and then I came right straight back, and then got the lantern and went to him. 10

Q Miller, about how much time elapsed after the accident before you took the lantern off the truck? A Oh, not—possibly a minute.

Q Austin testified that he saw two lanterns on the truck when he got there, one on either side, hanging on the hook, and that they were burning brightly. Did you put any other lanterns on the truck after the accident? A No. 20

HERMAN CARTER, recalled for the defendants, testifies as follows:

Direct examination by Mr. Heine.

Q Mr. Carter, do you make a mark, any kind of a mark, to identify the lights or other things that you use on your truck? A Yes, sir

Q What is your mark? A I mark mine X.

Q Will you look at those lanterns there and see if you can pick out your lantern? A Yes, sir. This is it (indicating). 30

Q That is yours with the X on the back of it? A Yes, sir.

Q That is the one you used? A (Witness nods in the affirmative.)

Cross examination by Mr. Crane.

Q Nobody else has a lantern with X on it? A No. We all mark them to identify them, sir. If I break 40

Charles Barry, direct.

another fellow's light—I will know I break mine, see, if I smash mine.

Q Each truck only had one light? A No. We have three lights on. We had two then. That night Miller only had one of his on.

10 Q What makes you think that that is the light that you handed over? A Why not? Because mine is the only light out there with the mark X.

Q But you have three of them. A I know, but all three of mine bear the same mark, see.

Q That is the way you know that is yours? A Yes, sir; the way I know that is my light.

Q Where are they kept, in the stable? A We have a locker for them.

Q A locker? A Yes, sir.

20 *Mr. Heine* Defendant rests.

PLAINTIFF'S REBUTTAL.

CHARLES BARRY, the plaintiff, recalled in his own behalf in rebuttal, testifies as follows:

Mr. Crane. I neglected to ask Mr. Barry a question. I should have asked in direct. With the Court's permission, I am going to interrogate him now.

30 *The Court.* Proceed.

Direct examination by Mr Crane.

Q Mr. Barry, before this accident, when you were actively engaged in taxicab driving, how much money did you make a week? A Averaged about sixty to seventy-five dollars a week.

Q And that was what you made after paying your running expenses, buying your gas and oil, and so forth? A Yes, sir.

40

Cornelius J. McCarthy, direct.

Q Miller testified here yesterday that when you lay in the road, immediately after the accident, with your leg broken, that he came up to you and said, "Are you hurt?" and you said, "To hell with me, how about my automobile?" Did you say that to him? A I didn't say nothing.

Q What makes you think that you did not say anything? A I was unconscious. 10

Q And with relation to the time that the wagon pole jammed through the front door of your automobile, when did you lose consciousness? A Immediately.

Cross examination by Mr. Heine.

Q Have you ever been convicted of traffic violations in your taxicab business?

Mr. Crane. One moment. I object to that.

The Court. Objection sustained. 20

Mr. Heine. That is all.

CORNELIUS J. McCARTHY, recalled as a witness on behalf of the plaintiff, in rebuttal, testifies as follows:

Direct examination by Mr. Crane.

Q Chief, were you at the scene of the accident before Mr. Ansen got there? A I believe I was.

Mr. Heine. I move to strike out the witness' belief, unless he is prepared to swear to it. 30

A (Continuing.) I saw Mr. Ansen coming there.

Q When it got to be daylight, did you ask Ansen to give you a statement of what he knew of the accident?

A I did; yes, sir.

Q And what did Ansen say to you? A I spoke to Ansen and his wife, both of them, and I asked him for a statement. He told me they knew nothing about the accident. 40

Cornelius J. McCarthy, direct.

Q Were you on the scene of the accident when Mr. Niles got there? A I was on the scene. Mr. Niles came there about 5:45 or a quarter to six, I believe, about that time. It was daylight.

Q Now, how far is the house, where Mr. Niles and Mr. Ansen lived, from Plainfield avenue? How far back
10 from the street is this house? A Ansen's house sets 130 feet from the road.

Q And how far would that be from the scene of the accident? A From the scene of the accident (referring to paper) it is 370—let us see. Just a minute.

Mr. Heine. What are you testifying from?

The Witness. From a memorandum which I took at that time.

By Mr. Heine.

20 Q How soon after the accident? When you made the measurements? A Yes, sir.

Q Was that at the time of the accident? A Yes, sir.

Q How soon afterward? A The same day.

Q How much later in the day? A I don't know just what time it was. It started to snow.

Q What time did it start to snow? A I don't know; around ten or half-past ten.

30 Q You do not know what time. The house was still there, though, when you took your measurements? A Yes, sir. It is still there today.

By Mr. Crane.

Q How far is it from the scene of the accident, chief? A It is 225 feet from the scene of the accident; that is an air line across.

40 Q Now, then, between the Ansen house on Plainfield avenue, where this accident occurred, what have you to say as to trees or other obstructions between the point

Cornelius J. McCarthy, cross.

of the accident and Ansen's house? A There are several trees there, about five or six trees, and a lot of underbrush.

Mr. Heine. A lot of what?

The Witness. Underbrush; brush that is growing up, five or six feet high.

10

Q How far is it, chief, from the scene of the accident to what has been referred to as Geary's corner? I believe the right name of the locality is Chamberlain's corner. A We have a speed trap in there, between Rahway avenue and the corner, and it is just 7/10 of a mile from Rahway avenue to Chamberlain corner.

Q In the morning, when it got daylight, did you ask Miller what the yellow X meant on the back of the lantern that you say he had in his hand trying to light when you came up to the accident? A We were talking about this lantern, so I said to him, and asked him what he thought was wrong with it. He said he didn't know. And through the conversation, I said to him, "This X, what is that for?" He said, "That is for Express, our express that carts milk," and number 6 was the number of a route which delivers the milk.

20

Cross examination by Mr. Heine.

Q You were there when these photographs were taken?

A I have not seen the photographs.

30

Q Never saw any of them? A No, sir.

Q You were there when both photographers came, and took them, were you not? A I was there when two photographers came; yes, sir.

Q That is Ansen's house, is it not, shown in Exhibit D. 2? A Yes, sir.

Q Is there any underbrush there? A Yes, sir.

Q Where? A (Indicating.)

Q Five or six feet high? A Well, then, four feet, possibly; maybe more; it might be five.

40

Cornelius J. McCarthy, cross.

Q This is not in front of that house, is it? A Yes, sir.

Q Where? A Can't see it; the car is in the way. Still, today it is seven feet, today.

Q That is a hundred feet south of Rahway avenue, is it not? A No, sir; it is not.

10 Q Fifty feet south? A No, sir.

Q How far would you say it was? A I would say that is possibly ten feet south of Rahway avenue.

Mr. Heine. (To jurors.) Witness points to the underbrush that he says is hidden by this car. You, gentlemen, can see.

The Witness. The underbrush is still there today.

20 *Mr. Heine.* (To jurors.) This is Ansen's house (indicating on photograph), and the four or five feet underbrush is hidden by these cars down here, apparently. You heard his estimate of the distance.

That is all.

30 *Mr. Crane.* If your Honor please, before I rest my case, I desire to make a motion and be permitted to amend the damage clause of the suit. When the suit was started we had every hope that the operation which had been performed by Doctor Albee would be successful, and in the light of the medical testimony yesterday, I desire at this time to amend my complaint from twenty-five to forty thousand dollars.

Mr. Heine. I object to the amendment, if your Honor please.

The Court. Objection sustained.

Mr. Crane. Plaintiff rests.

Hans Ansen, direct—cross.

DEFENDANT'S SUR-REBUTTAL.

HANS ANSEN, recalled as a witness on behalf of the defendants, in sur-rebuttal, testifies as follows:

Direct examination by Mr. Heine.

Q Mr. Ansen, did you hear Chief McCarthy testify that he asked you for a statement and you said you knew nothing—you told him at that time that you knew nothing about the accident? A If he asked me, I didn't hear it. 10

Q Were you close enough? Was he close enough to hear you? A I was talking to him that morning, and we were over in the woods on the other side of the road, and picking up different things fell off the car as he was passing through there, like a pocket, a part of the coat was hanging on the bush there; but he didn't ask me for any statement or anything like that, not that I—I am positive he didn't. 20

Q Did you refuse to give him any information which you had at all during that morning? A No, sir.

Q You answered all the questions he asked you, told him everything you knew? A He didn't ask me any questions. The only thing—he didn't ask me any questions at all. We was just talking. He didn't ask me anything.

Q You were talking about the accident? A Yes, of course, we were talking about the accident. He wasn't talking about anything else, and how cold it was. 30

Cross examination by Mr. Crane.

Q Did you get your fifty cents for today's attendance?

A I got 'em yesterday.

Q Oh, you got paid in advance? A Yes, sir.

Mr. Crane. That is all.

BOTH SIDES REST.

Motion for Direction of Verdict.

Mr. Crane. If your Honor please, I move for a non-suit on the counter-claim because no damage has been proved.

The Court. That is granted. Proceed.

10 *Mr. Heine.* If your Honor please, I move for the direction of a verdict on the ground that the case, as it now stands, conclusively shows contributory negligence on the part of the plaintiff.

20 Assuming the position of the Borden truck to be as claimed by the plaintiff, from his own testimony, no matter on what side of the road it might have been, the plaintiff says that he was traveling on a road which was subject to the action of frost, on a cold night, at three o'clock in the morning, about twenty-five miles an hour, twenty to twenty-five miles an hour, with four headlights, according to his story, two of which were oil, and two Presto or acetylene lights on the front of the car, lighted, and which showed the highway in front of him for (I have forgotten the testimony) certainly from fifty to a hundred feet. My recollection is that the testimony was a hundred or one hundred fifty feet; to put it conservatively, from fifty to a hundred feet. The roadway, as shown in the exhibit photographs and on the plaintiff's Exhibit 1, the map, is of such a shape that if the lights on the front of that Renault car showed the road for
30 fifty to a hundred feet ahead of it, the plaintiff must have seen this truck, and would have had, at that distance, some opportunity to have stopped his car and avoided the accident; but his testimony is that while his lights were lighted and showing the road, and while he continued to travel on that frosty surface at a speed of twenty to twenty-five miles an hour, he did not pay enough attention to conditions of traffic on that highway until he got to within ten or twelve feet of this truck, and at that point it was impossible to avoid a collision. The
40 collision was the result, on the testimony as it stands,

Charge to Jury.

of negligence on the part of this plaintiff which directly contributed to the happening of this accident.

(Argument.)

The Court. Your motion is denied.

Mr. Heine. Your Honor will allow me an exception.

Mr. Heine summed up the case to the jury.

10

Mr. Crane summed up the case to the jury.

The Court charged the jury as follows:

CHARGE TO JURY.

The Court. Gentlemen of the Jury: On the early morning of January 28, 1922, last year, the plaintiff in this case was in an accident on the Plainfield road running from South Plainfield to Plainfield and, as a result of that accident, he was maimed for life. I am using the term "accident" in the ordinary, practical sense in which it is used, in the sense that what did happen was not due to the deliberation of either the one side or the other, but was something that neither one wanted done.

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You are to determine whether that accident which caused this very serious injury to the plaintiff was the result of the sole and exclusive negligence of the driver of the truck of the defendant corporation; and as has been properly argued by each of the counsel, you are to determine that question according to the law, without sentiment, and simply through your clear, cool reasoning on the facts of this case, as applied to the law as the Court will give you the law.

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In most of these cases, gentlemen, we naturally expect that when it comes to the details of a happening there will be a wide disparity in the stories told upon the witness stand. It seems to be human nature. You twelve

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Charge to Jury.

men go out and see something happen on Broad street, and then it will be remarkable to see what differences there will be in your recital of just what happened, on some details. But when it comes to the heart of the thing, when it comes to the essentials, there is no difference when you are telling the truth. It seems so to me.

10 But in this case, gentlemen, while we would not be surprised, because we have had human experience, in finding this difference or disparity in the incidentals of this occurrence, yet there are vital differences in the recital of the essentials of this happening as told by the one side and told by the other, and this, mind you, under oath. So that it seems to me (I do not know how it impressed you) that some one has been deliberately perjuring himself because, as I have stated, this is not a matter of mere details or incidents; it is as to the gist of the thing

20 that they differ.

For example, was that lantern lighted? Was there a lantern on this milk truck that was lighted? How could there be a difference about that if they were telling the truth? I do not know. And there are so many other things. Could there be any honest difference, if they are telling the truth, as to which side of the road this milk truck was on? We have it admitted that the milk truck is delineated on that sketch in the same location as it was immediately after the impact. Where was it before the

30 impact? I do not know. That is for you to pass upon; and you have to know that, it seems to me, in order to make a proper conclusion of the facts in this case, which conclusion is necessary, to determine the legal liability, if any, in this case.

The driver of this truck says that he was on the right-hand side of the road; that he had a lantern, lighted. Now, if he had a lantern, lighted, was on the right-hand side of the road, where was there any negligence upon his part, if that is true? If he is telling the truth, this case

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Charge to Jury.

is all over, as a matter of law. He says that he was on the right-hand side of the road, almost to the middle of the road, and that he had this lighted lantern.

In determining whether or not there is negligence what are you going to consider? There must be a duty; there must be a failure to perform the duty, and there must be the damages resulting from the failure to perform the duty. This driver of the milk truck had the duty of driving that truck in the way that a reasonably prudent man would have driven it, under the time, place and circumstances. He had a duty at this time of driving it, for there was no other reason to be on any other side of the road, to be on the right-hand side of the road, and there was a duty there of seeing that it was so lighted as to give reasonably warning to any one else using that road at about the same time, place and circumstances. Now, if he did those things, then he lived up to his duty; and in order to hold this company responsible, the defendant corporation responsible, the burden of proving that he did not do his duty is upon the plaintiff. You must be satisfied that there is such a preponderance of proof as sustains the burden of proof which the law always puts upon the plaintiff, to prove negligence.

Suppose you find that there was negligence to your own satisfaction, from the evidence in this case, upon the part of the driver of this milk truck. Is that enough? No. You have not settled it yet, because, gentlemen, there may be negligence upon the part of the defendant, and yet, if there was such negligence upon the part of the plaintiff as contributed to the accident, to that which caused the injury, he cannot, under the law, recover.

It seems to me, when you come to the question of determining the fact as to whether there was negligence upon the part of this driver of the milk truck, and then whether or not there was negligence upon the part of the plaintiff, that you will first find out for yourselves where the milk truck was. What side of the road was it on?

Charge to Jury.

Was it on the left-hand side of the road when it should have been on the right-hand side of the road, under the laws of the road, as Barry says it was, and the reason why you see it on the map that way is that he, the driver of the milk truck, was endeavoring to get upon the right-hand side of the road; or was it upon the right-hand side of the road, as Miller, the driver of the milk truck, says, and the reason why it is shown on that sketch as it is, the location after the impact, was because Barry actually drove into the front, the side front of his truck and turned it around that way? That is going to be your first question, is it not, of fact?

Now, it becomes a question, no matter where this milk truck was, even though it was on the wrong side of the road, why did not Barry see it? Why did not Barry see it? Mind you, Barry had the same duty of handling his car as a reasonably prudent person would have handled it, under the time, place and circumstances, as Miller, the driver of the milk truck, had the duty of doing, in relation to the driving of his truck which, of course, as you know, was propelled by horses instead of motor; and he had a duty to make the observation ahead of him that a reasonably prudent man would be expected to make.

He says that, as I remember the testimony, his lights were lit; he had four of them. He had the front lights which were for the purpose, as I get the testimony, of showing the road ahead. Then there were side lights which are not specifically for that purpose, side front lights; and he said he could see from fifty to a hundred feet. If he could see from fifty to a hundred feet ahead of him, as I remember his testimony, fifty to a hundred feet, why was it, if he was exercising proper observation, that he did not see this truck until it was within ten or twelve feet of him? I do not know. Now you know, a man is required, under our law, to make such observation ahead of him as is reasonably effective, and if he does not do that, even though that with which he comes

Charge to Jury.

into collision is handled by one that is negligent, even being on the wrong side of the road, it might be even without a light, yet, if that person does not exercise his obligation of vision with the reasonable effectiveness required from a reasonable man, under the time, place and circumstances, and that lack of a reasonable effectiveness of vision contributes to the accident, then he cannot recover. Now why did he not see it? 10

What does he say? He says that when he was driving along this road there was a curve to this road, and that while his lights threw from fifty to a hundred feet, yet, following that curve, it threw his lights off on the side of the road and into the bushes, and he was on top of this truck, as I get his testimony, before he knew it—within ten or twelve feet.

So, then, gentlemen, you have to consider all of those things. I cannot help you in reaching the determination of fact. But I know there is something that you are going to do. At least I am confident that you are. You are going to do what the counsel on both sides have asked you to do—be fair about this. It is a pretty hard job you have. Here is Barry, as I have stated, maimed for life; no question about that. There is no fake about his physical condition. And that exercises your sympathy as warm-blooded, wholesome men. But we would have a queer country if you are going to take money away from a defendant who is not legally responsible, if you find that he is not legally responsible, simply because somebody has sued him, and your intense and natural sympathy because of the condition of that somebody. You are going to take the facts in this case and decide it according to law. 20 30

If you find that this driver was solely and exclusively negligent in the making of this accident, then this defendant company is liable, but if you find that the driver of the milk truck was not negligent, then the company is not liable, the defendant is not liable; or if you find 10

Charge to Jury.

that although the driver of the milk truck was negligent, yet Barry was also negligent, and negligent in such a way as contributed to the accident, then you cannot find against the defendant company.

10 While I have explained generally about negligence, this is the illustration for you to pass on in determining whether or not there is negligence. What is negligence, after everything is said and done? If a man fails to do that which a reasonably prudent man would have done, under the time, place and circumstances, that is negligence. Or if a man does that which a reasonably prudent man would not have done, under the time, place and circumstances, that is negligence.

20 Now was this accident due to the sole and exclusive negligence of the driver of the milk truck? If it was, then it is your duty to find a judgment against the defendant. If this accident was not due to his negligence, then, of course, there is no cause of action against the defendant; or if this accident was due to the joint negligence of both the driver of the milk truck and the driver of the automobile, the plaintiff, then there is no cause of action against the defendant.

30 Suppose you find that this accident was due to the sole and exclusive negligence of the driver of this milk truck; then what are the damages? You cannot give any damages simply for sympathy, strong as you may feel sympathy. You have to measure it in dollars and cents, gentlemen. Barry has been under an operation—he says he was under an operation. Whatever that operation was, performed by Doctor Albee, there has not been a joining of the bones where the break occurred. Two of the doctors, as I remember it, said that there is a sort of gristly hinge like there. Another doctor says that he feels that there is such a growth around there as shows that there is a partial joining of the bones. Be that as it may, you saw it, Barry, and the effect of it. Now there
40 has been some suggestion about another operation. One

Charge to Jury.

doctor was asked if he would be certain that death would not result if there was another operation. He says no. Barry is not required to go under another operation if there is any serious danger, even though the probabilities are that it might be performed with every reasonable chance of success and without any danger. No man is required to run any chance of death. No man is forced to go under an operation where there is any risk of death or serious injury. So you find him as he is; and what is the effect? He is entitled to pecuniary compensation for the pain and suffering he has already endured. He is entitled to compensation for the expenses that he has been put to. There has been no dispute about the fairness, no objection to the doctors' bills, with the exception of that of his family physician, Doctor Hughes, and that was protested against because there was not any affirmative proof as to the reasonableness of the bill, and you will have to ignore that bill for that reason. But he is entitled to pecuniary compensation, in case this defendant is liable, for the pain and suffering that he has endured, for the expenses, with the exception that I have spoken about, of the doctors that he has had, and the hospital, of which there was no dispute; and he is also entitled to compensation for the permanent injury.

There has been argument here about his age and probabilities of life. We have no affirmative proof about that. But suppose you gentlemen begin to figure and estimate, "Well, this young man might live so long." You cannot do that wildly. You must be reasonable about it. But when it comes to fixing your sum, remember this, if you go to that point, that he is going to get that all together; if he gets anything, he is going to get it right away. Now he says he is making about fifty-five or sixty dollars a week, as I remember his testimony. This is gross. That is gross so far as his expenses are concerned, not so far as gas and oil of the automobile are concerned, but he has to pay for that. He has to support himself out of

Charge to Jury.

that, clothe himself, feed himself, all or those things. However, he makes that much money, and that is undisputed.

10 You may say, "We will figure this young man is going to live twenty or twenty-five or thirty years, and there are so many weeks in that twenty, twenty-five or thirty years, and we feel that he is losing because of this, so many dollars a week as a result of this accident, as a result of his physical impairment," and figure it right up and say, "that is the sum." You are forgetting that whatever you may give him, if you give him anything, he is getting in a lump sum, whereas the other way he would only be getting it in installments, and he would be waiting along.

20 Then there is another thing you have to think of when you are figuring up damages. I hope not—this young man might die in a month, might die in six months, might die in six years; he might become sick. All of those things have to be considered, and it is so difficult for men to do it; but the law says you must take into consideration all those things. So that it is not an easy task, if you reach that point. I do not say that you are going to reach that point, but I am saying these things to you in case you do, so that they may assist you and guide you in determining what is a fair and proper, pecuniary compensation to this plaintiff for the injury which he suffered as
30 a result of this accident, provided first, you find that, according to the law as I have given it to you, that accident was the result of the sole and exclusive negligence of Miller, the driver of the milk truck.

There was one thing that I was requested to charge, and that is:

40 "A speed of one mile in four minutes within two hundred feet of any horse or any beast of draught or burden upon the same street, highway, provided, however, that such speed does not exceed

Defendants' Requests to Charge.

thirty miles per hour, shall be lawful in the open country as may be necessary in order to pass a vehicle traveling in the same direction, but the speed shall be diminished forthwith, if necessary, to comply with the provisions of this act."

That is one of the sections and one of the provisions of the Motor Vehicle Act of New Jersey. You are required to recognize that such a provision as that is in existence and, of course, if you see a horse coming along, why you are required to pull down your speed so that in passing that horse you will not go more than one mile in four minutes within two hundred feet of the horse. But you must remember in this case he says he did not see the horses. However, a violation of any of the provisions of the Motor Vehicle Act of New Jersey, gentlemen, is not in itself negligence, but simply an element, factor or circumstance for you to consider in determining whether or not there is negligence. Negligence is what I have already explained it to be to you, as a matter of law.

(The jury retired at 11:53 A. M.)

Mr. Heine. I take an exception to the Court's refusal to charge as requested the requests numbered 1 and 2.

The defendants' requests to charge are as follows:

1. If you find that the lights on the front of the plaintiff's car were lighted, as he says, the Borden truck must have been within his vision, if he had looked, while he was from 50 to 100 feet away from it, and the fact that he did not see it, as he says, until he was within 10 or 12 feet of the truck is a demonstration that he did not look with reasonable effectiveness such as was required of him under the circumstances while traveling at a speed of 20 to 25 miles per hour, and he was therefore guilty of contributory negligence and cannot recover.

Defendants' Requests to Charge.

2. If you find that plaintiff's lights on the front of his car were lighted, as he states, and showed the road ahead of his car for a distance of from 50 to 100 feet and that he did not see the Borden truck until he was within 10 or 12 feet of it he conclusively establishes that he did not then make the observation which duty required him, because if he had done so he would undoubtedly have discovered the Borden truck upon the road and would have been able to avoid the collision, and failing in this duty he is guilty of contributory negligence and cannot recover.

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New Jersey Court of Errors and Appeals

CHARLES BARRY,
Plaintiff-Respondent

—vs.—

BORDEN FARM PRODUCTS
CO., a corporation
Defendant-Appellant.

Action At Law

On Appeal from
Supreme Court

(Union County)

Brief of Respondent

Statement of Facts

This case was tried before Honorable Peter F. Daly and a jury at the Union Circuit on October 2nd, 3rd and 4th, 1923, and resulted in a verdict in favor of the plaintiff and against the defendant, Borden Farm Products Co., a corporation for \$25,000. damages.

According to the plaintiff and his witnesses, the accident happened substantially as follows: Plaintiff was driving his automobile on Plainfield Avenue in Plainfield, in the direction of South Plainfield. It was about 3.00 o'clock in the morning, and the lights on his automobile were burning. It was

a very dark cold night. The automobile was going between twenty and twenty-five miles an hour and was being driven on the right of the road. The road was about forty feet (40') in width, twenty feet (20') of which, in the center of the road was concreted, and ten feet (10') on either side thereof was dirt and unimproved. A day or so before the accident there was a heavy snow. Later in the afternoon and early in the evening of the night before the accident, snow plows had cleared the improved portion of the road for about twenty feet (20') in the center of it, and the snow thus removed was pushed to either side of the improved part of the road on to the dirt and left there in piles. At the point where the collision took place the country was what is commonly called "open country," the houses being several hundred feet apart.

The defendant was the owner of a large horse-driven milk truck then carrying approximately eight tons of milk, and was proceeding in the opposite direction on the wrong side of the road without lights. At the point where the accident took place the road was somewhat up-grade some 500 or 600 feet to the north, and curved to the plaintiff's left as he proceeded toward South Plainfield, which caused the head lights of his automobile to show ahead of him to the right of the road and along the trees, fences and bushes on the right side of it. Suddenly, a short distance ahead of him he saw the unlighted horse-drawn milk truck on the wrong side of the road. He could not stop his automobile in time to avert a head-on collision. In the instant he had to consider what was best to do, he thought he could not pass on the right because of the snow, and he decided that it was best to try

to go around the truck to the left. At the same time the team driver pulled his horses to the left; the wagon pole stove through the front of the automobile and through the plaintiff's right leg between the hip and the knee.

He was horribly injured as a result of the collision. At the time of the accident he was 26 years of age and was then earning between \$60.00 and \$75.00 weekly. (Case page 152, lines 35-40). All of the medical testimony was agreed upon fact, that as a result of the injuries he was crippled and maimed for life. (Medical testimony, case pages 39-58). However, this court is not called upon to pass upon the amount of the plaintiff's award, as this question is not raised by the appellant.

THE GROUNDS OF APPEAL ASSIGNED ARE:

- (a) Refusal to non-suit.
- (b) Refusal to direct a defendant's verdict.

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The accident happened about 3.00 A. M. on the morning of January 28th, 1922, on a public highway leading from Plainfield to South Plainfield. This highway runs generally from the north at Plainfield, to the south at South Plainfield. The centre of the road was paved with concrete to a width of twenty feet (20') with dirt for ten feet (10') on either side of the paved part of the road. A heavy snow storm occurred the day before the ac-

cident and only the twenty feet (20') paved center of the road had been ploughed and cleared.

Proceeding south on Plainfield Avenue 500 or 600 feet north of Rahway Avenue, there is a grade coming up to about Rahway Avenue (point of collision) and proceeding in that direction from Marion Avenue toward Rahway Avenue there is a curve in the road, the curve being to the left, or to the East. (Edward S. Lewis, Surveyor, case page 13-15). That part of Plainfield Avenue is what is known as "open country," the houses being several hundred feet apart. (Case page 31, lines 8-22).

The plaintiff testified that he was proceeding along Plainfield Avenue from Plainfield, in a southerly direction toward South Plainfield, at a speed of twenty to twenty-five miles an hour, which is permitted in open country. That because of the upgrade and the curve in the road, the head lights of his automobile were showing on the right of the road in the trees and bushes along the right hand side of the road. (Case page 72, lines 10-40) The plaintiff's verbatim explanation of the happening of the accident is as follows:

"Q. And just after you passed Rahway Avenue, just tell the jury what occurred? A. I was coming along the road, and my lights showing on the right of the road, and the trees and bushes. About ten or twelve feet in front of me loomed this big wagon with a couple of big horses hooked to, with no lights. I immediately—the wagon was on the wrong side of the road. I immediately turned the wheel—I only had a couple of seconds to use my head—

to the left. In doing so, I seen the driver grab the lines in a drowzed condition, and jerk the horse, or pull the lines sharp, turning into the side of my car. I didn't put on my brake. You see, I tried to escape him. I stepped on the gas. Well, I tried to pass him on the left, and I seen him grab the lines and pull the horse to me. That is all I remember." (Case page 73, lines 2-25.)

Cross examination:

"Q. When you saw this truck loom up in front of you, why did you not stop? A. Why it would be impossible to stop because, going at twenty or twenty-five miles an hour, a truck in front of you, why, you couldn't stop in ten or twelve feet; it will certainly hit your horses head-on; so I swung to my left, as the best thing could be done." (Case page 28, lines 28-34).

MILK TRUCK WAS UNLIGHTED

Chief of Police McCarthy testified (Case page 27, lines 36-40) as follows:

"Q. What, if anything, did you do toward trying to light the truck as soon as you got there? A. Mr. Miller (driver of defendant's truck) had a lantern, and the wind was blowing very hard, and we tried to light it. I had a sedan car, and I took the lantern into the car to light it, and I lit the lantern and it immediately went out after I lit it."

John Hurly testified as follows: (Case page 60, lines 30-40).

“Q. Was there any light on it? A. No, sir; there was not.

Q. Did you see anything in Miller's hand? A. I seen a lantern. I can't say whether, when I seen it first, whether it was in Miller's hand or in the Chief of Police's, now. They had the lantern between them. I believe Miller was in the act of lighting it, and it wouldn't stay lighted; and Chief McCarthy took it to his car and tried to light it, and it would light up, probably two or three seconds, and go out. Now, I had a flash light of my own, and I tried the lantern and it wouldn't; and I made the remark to Miller, that was one good lantern——”

See plaintiff's testimony quoted above.

MILK TRUCK WAS ON THE WRONG SIDE OF THE ROAD.

John Hurley also testified (Case page 62, lines 15-25):

“Q. Where were the tracks, (tracks of milk truck) Mr. Hurley? A. Why, they were on the left of the road. The tracks of the milk truck were on the left of the road. There was only one track that you could very well take notice of, and that was from the rear wheel, because it is a big, wide tire, and it left a track on

the road because the road was frosty, a raw, cold night, and there was just a little dampness along with the frost."

Edward S. Lewis testified (Case page 16, lines 34-40) as follows:

"Q. I notice on the track that I have just referred to, the westerly track, what appears to be six feet. Will you just explain to the jury what you intended to represent by that indication on the map? A. That was the six feet, the distance taken from the edge of the pavement to this westerly wagon track."

See plaintiff's testimony quoted above.

THE TRIAL COURT PROPERLY REFUSED
THE DEFENDANT'S MOTION FOR
A NON-SUIT

The testimony showed that the plaintiff, while rounding the curve in the road with his lights showing to the right of the road and along the trees, fences and bushes on the right side thereof, suddenly came upon the LARGE UNLIGHTED MILK TRUCK, drawn by a team of large horses, proceeding in the opposite direction on the wrong side of the road.

"How a prudent man would act in the face of concurrent and distracting dangers must, in the nature of things, be a question of fact for the jury."

CONNELLY vs. TRENTON PASSENGER
RAILROAD CO. 56 N. J. L. 700.

WESTON vs. PENNSYLVANIA RAILROAD CO. (Err. & App) 65 Atl. 1065.

“Where different minds may honestly draw from the testimony different conclusions as to the cause of an accident, the settled rule is that such material question remaining in substantial dispute belong to the province of the jury.”

FERGUSON vs. CENTRAL RAILROAD OF NEW JERSEY. 71 N. J. L. 647.

“If it clearly appears that plaintiff’s negligence contributed to his injury, the court should direct a non-suit; but, if the question be fairly debatable it should be left for the jury.”

PENNSYLVANIA RAILROAD vs. RIGHTER. 42 N. J. L. 180.

In BRIDGEN vs. PIROZZI, (Err. & App. 1922) 117 Atl. 602, this Court re-affirmed the principles as laid down in Central Railroad vs. Moore, 24 N. J. L. 824; Pennsylvania Railroad vs. Righter, 42 N. J. L. 180; Mahnken vs. Freeholders, 62 N. J. L. 404, and from which I quote at length.

“KATZENBACH, J. On October 20, 1920, at 8.25 P. M., George I. Bridgen, the plaintiff, was driving his automobile on Union Avenue, in Bound Brook in the direction of Somerville. It was dark. The lights upon his car were burning. The road was improved with amesite. The car was a left-hand drive. Upon the right-hand front seat sat a young girl, an employee in the household of Bridgen, who was being taken to her home. The car was traveling at the rate of

approximately 17 miles per hour and was being driven on the right-hand side of the road, with the left-hand wheels of the car a short distance to the right of the center of the road. The defendants were the owners of a truck which had been proceeding on the road in the same direction as the plaintiff's car. The gasoline supply for the truck had failed, and the driver of the truck had gone for gasoline, leaving the truck standing in the road, in an oblique position toward the right-hand side of the road, with its left-hand rear wheel just off the center line of the improved surface. The truck substantially covered all the improved surface of the road to the right of the center line. According to the testimony of several witnesses, the lights upon the truck, including the red tail light, were unlighted. As the plaintiff approached the rear of the truck, an automobile approached in the opposite direction. The approaching car was equipped with nonglare lights. Roman lenses. The lights cast a side glow as the car was passing the plaintiff's car. At this moment the plaintiff saw ahead of him the truck. He could not stop his car in time to avert a collision, and struck the rear of the truck, badly damaging his car. To recover the loss occasioned him by the accident, Bridgen instituted the present action. The case was submitted to the jury, which found a verdict for the plaintiff. From the judgment entered thereon the defendants below have appealed.

(1) The basis for the appeal is the refusal of the trial court to nonsuit the plaintiff, or direct a verdict for the defendants upon the grounds that the plaintiff was guilty of contrib-

utory negligence, and that the proximate cause of the accident was the plaintiff's negligence. The argument advanced by the appellant's counsel is that the plaintiff was traveling when it was dark at 17 miles per hour; that the headlights of his car permitted him to see the road for 250 feet ahead of his car; that when he saw the truck he was only 15 to 25 feet from it, and did not have time to put on his brakes to avoid the collision; that the plaintiff was either proceeding without looking ahead, as he should have been done, or he was blinded by the glare of the headlights of the approaching car to such an extent as to be unable to see the truck ahead of him, and that under such circumstances he should have checked or stopped his car instead of running it ahead in the darkness, and that his failure to do so was the proximate cause of the accident as well as contributory negligence. There is perhaps, no principle of law better settled than that if it clearly appears that the plaintiff's conduct did contribute to the accident, then the court should exercise control of the case and grant a nonsuit or direct a verdict for the defendant, but if the case presents a fairly debatable question whether the negligent act of the plaintiff did so contribute to the accident, then the question of the plaintiff's contributory negligence is one for the determination of the jury. *Central Railroad Co. vs. Moore*, 24 N. J. Law 824; *Pennsylvania Railroad Co. v. Richter*, 42 N. J. Law, 189; *Mahnken v. Freeholders of Monmouth*, 62 N. J. Law, 404, 41 Atl. 921.

(2) From the testimony given in the present case it was possible for a jury to have found

that the plaintiff should have seen with the lights upon his car the truck within time to have averted the collision by the application of his brakes, or that he was negligent in proceeding at the speed he admits if the lights of the car approaching in the opposite direction so blinded him that he could not see where he was going, and that his carelessness was the proximate cause of the accident which befell him, and for this reason to have found a verdict for the defendants. On the other hand, it was equally possibly for the jury to find that the proximate cause of the accident was the defendant's failure when stopping the truck to draw it to the side of the road in accordance with the provisions of the traffic act (chapter 156, Laws 1915, pt. 2 Sec. 9), or the failure to have the red light on the rear of the truck burning, as required by law. A jury could also find from the testimony that the side glow of the lights of the passing car did not so obstruct the vision of Bridgen that he should have stopped his car and waited until the approaching car had passed, although this would have avoided the collision with the truck. Other questions are suggested by the evidence, but those alluded to will suffice to show that the plaintiff's negligence was a fairly debatable question, and that the trial court rules correctly in submitting the case to the jury and in refusing to grant the defendant's motion to nonsuit the plaintiff and direct a verdict for the defendants.

In view of the foregoing the trial court very properly refused the defendant's motion for a nonsuit.

Defendant's Case

Matthew J. Austin, an employee of the defendant company, testified that the milk truck of the defendant was proceeding along the east side of the road leading north (to Plainfield) to the right of the center of it. That there were TWO LANTERNS ON EITHER SIDE OF THE TRUCK burning brightly, in brackets on the side of the front of the truck, six or seven feet from the ground. (Case P. 104 L. 10-20.)

George Carter, another employee, testified as follows:

“Q. Was there a light on it? A. It was on the left-hand front.”

“Q. What kind of a light was it? A. Well, an ordinary oil light or lamp.” (Case page 112, lines 18-25.)

George Miller, driver of defendant's truck testified that the truck he was driving was equipped with one oil lantern on the left-hand side, which showed a white light in front and a red light on either side. (Case page 135, Line 15-25.)

Miller also testified, (Case page 136, lines 17-40) as follows:

“Q. Now, just tell the jury in your own way, after you passed the time of night with the chief and started up Plainfield Avenue, what happened? A. Well, I was preceeding along at about where the accident happened, and the first I noticed Barry's car coming was when the

reflection of the electric light where I was in front of thrown on the windshield. He had absolutely no light at all on his car, and I would not have seen it then, but he made sort of a swerve. He was coming down STRAIGHT ON THE RIGHT-HAND SIDE OF THE ROAD, but he made a swerve as though he was going to go into that street, and as he did so — —

(Continuing) He made this swerve as though he was going to go down into this street. As he did so, I pulled on my line, on the one horse, and it pulled him over. He was going at a fast rate of speed at the time."

"Q. Now, what part of the roadway were you in, were you driving in, as you came up, just before the collision? A. I was on the right-hand side. I had about, probably, three feet, three feet and a half from the curb."

There were other witnesses who testified as to the position of the vehicles after the accident, the weather conditions, etc., which only had an incidental bearing on the main issue.

When the case was closed, disputed questions of fact only remained in the case. If the jury believed the plaintiff and his witnesses, as it must have, its verdict was entirely justified. If, on the other hand, they had believed the defendant's witnesses, its verdict could not have been for the plaintiff.

AT THE CLOSE OF THE ENTIRE CASE THE DEFENDANT MOVED FOR A DIRECTION OF A VERDICT ON THE GROUND THAT THE CASE AS IT STOOD CONCLUSIVELY SHOWS CONTRIBUTORY NEGLIGENCE ON THE PART OF THE PLAINTIFF.

There was nothing in the defendant's case showing contributory negligence on the part of the plaintiff, other than might have been inferred from the plaintiff's own case, so that the motion for a direction of a verdict was merely the renewal of the motion to non-suit. How can it be said that the plaintiff's contributory negligence (if any) was established beyond fair debate?

TURNER vs. HALL, 74 N. J. Law 214.

In fact, the instances are so rare where the court takes the case away from the jury because of the plaintiff's contributory negligence where there is a dispute in the material facts, that further argument along that line would be presumptuous.

The trial court did not err in refusing to non-suit the plaintiff for his contributory negligence, or in refusing to direct a verdict because of his contributory negligence.

It is respectfully submitted that the judgment under review be affirmed and the appeal dismissed.

ROBERT NEWTON CRANE,

Attorney and of Counsel with
Plaintiff-Respondent.

New Jersey Court of Errors and Appeals

Plaintiff-Respondent Defendant-Appellant	Action at Law In Rem New York Superior Court
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BRIEF OF APPELLANT

Statement

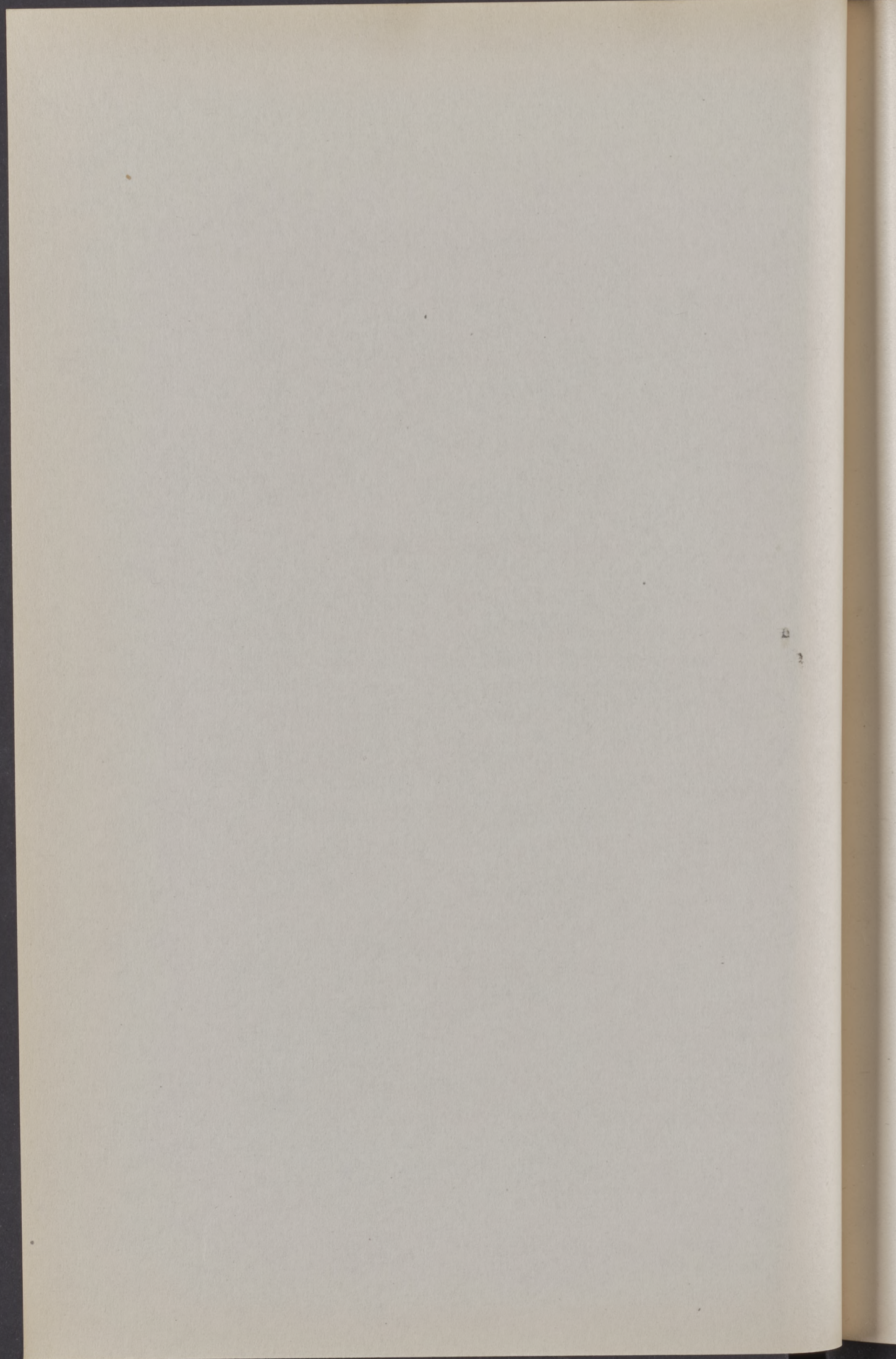
This case is based upon a judgment of the New Jersey Superior Court, Hudson County Circuit, in an action charging the defendant with negligence in causing injury to the plaintiff, Charles Barry, in a collision between a motor car, owned by the plaintiff, and one of defendant's motor cars, owned by defendant's agent, Plaintiff and South Park, Inc.

The case was tried before the Honorable Judge P. J. McClellan, Circuit Judge, and a jury on October 2nd, 1923, and resulted in a verdict in favor of the plaintiff, Charles Barry, for \$2,000.00, plus interest thereon from the date of the accident, and the defendant appeals the same.

Grounds of Appeal

First. Because the Trial Court refused to grant the defendant's motion for new trial upon the evidence given at the trial.

Second. Because the Trial Judge refused to direct a verdict in favor of the defendant against the plaintiff.



New Jersey Court of Errors and Appeals

CHARLES BARRY,

Plaintiff-Respondent,

vs.

BORDEN'S FARM PRODUCTS CO. INC.,

Defendant-Appellant.

Action at Law.

*On Appeal
from New*

Jersey

Supreme Court.

(Union

County.)

BRIEF OF APPELLANT.

Statement.

This is an appeal from a judgment of the New Jersey Supreme Court, Union County Circuit, in an action, charging the defendant with negligence in causing injury to the plaintiff, Charles Barry, in a collision between a taxicab, driven by the plaintiff, and one of defendant's wagons, on the highway between Plainfield and South Plainfield.

The case was tried before the Honorable Peter F. Daly, Circuit Judge, and a jury, on October 2nd, 3rd, and 4th, 1923, and resulted in a verdict in favor of the plaintiff, Charles Barry, for \$25,000, upon which judgment was entered, and the defendant appeals therefrom.

Grounds of Appeal.

"First: Because the Trial Court refused to grant the defendant's motion for non-suit upon the evidence given at the trial.

Second: Because the Trial Judge refused to direct a verdict in favor of the defendant against the plaintiff."

Facts.

On January 28, 1922, the defendant, by one of its servants, was operating a certain horse-drawn milk truck along Plainfield avenue, proceeding northerly from South Plainfield to Plainfield in Union County.

At the same time the plaintiff, Charles Barry, was operating his taxicab in a southerly direction from Plainfield toward South Plainfield along the same highway at the point where the two vehicles were in collision at between two and three o'clock in the morning. The accident happened just south of the intersection of Rahway avenue with Plainfield avenue.

The improved or hard concrete portion of the roadway is twenty feet in width (Case, p. 14, l. 15).

Proceeding from Plainfield toward South Plainfield the road curves slightly to the left (Case, p. 31, ll. 18-21; p. 150, l. 25), beginning near the city line and continuing six or seven hundred feet to the place of the accident and beyond (Case, p. 15, l. 10) (see photo exhibits annexed hereto).

There are 25-watt incandescent lights along Plainfield avenue (p. 18, l. 5) about 300 feet apart (p. 17, l. 32). One of these lights was located at the northeast corner of Rahway and Plainfield avenues (p. 81, l. 30).

Miller, the driver of the defendant's milk truck, had been driving this road for a year and a half (p. 131, l. 39; p. 132, l. 5). It was a cold, cloudy morning, and he left South Plainfield about 2:30 A. M. (p. 134, l. 18). He had loaded up his truck with milk cans and cases and had a lighted lantern on the left front side of his wagon (p. 135, l. 20; p. 135, l. 37). The lantern showed a white light to the front and through a hole in the reflector shield a red light to the rear (p. 136, l. 12). His attention was first called to the plaintiff's taxi coming toward him by the rays of the electric light at the corner of Rahway and Plainfield avenues, upon the windshield of the taxi (p. 36, l. 20). There was, he said, no light on the taxi. As the

plaintiff's taxi approached him it swerved while traveling at a fast rate of speed (p. 136, ll. 30-40). Defendant's driver was then driving his milk truck on his right-hand side from three to three and one-half feet from the easterly edge of the concrete (p. 136, l. 40), with his left-hand wheels near the center line of Plainfield avenue (p. 137, l. 10).

After swerving, the plaintiff's automobile struck the pole of the defendant's wagon and the hood of his automobile struck the right-hand horse and carried him to the rear of the truck, at the same time stripping the harness from the other horse (p. 137, ll. 25-30), continued on down the road and crossed again from the east to the west side, hitting the embankment on that side (p. 137, l. 35).

The impact of the automobile with the pole and truck swung the pole and front wheels around to the east and broke the pole off and carried it, stuck into the right side of the taxi, down the road (p. 141, ll. 10-20).

The effect of the blow was to turn the front of the truck at an angle slightly to the east (p. 141, l. 20). Immediately after the accident plaintiff says he and the Chief of Police were unable to find any lighting system on the car and that the headlights were not warm (p. 141, ll. 30-40), and that the oil lights on the automobile were not lit (p. 142, l. 5).

The plaintiff says that he had oil lights on either side of his car in front and large headlights supplied by an acetylene gas tank (p. 71, l. 15); that there was ice and snow on the ground, although the road was clear (p. 71, l. 38); that he was proceeding at from twenty to twenty-five miles an hour along Plainfield avenue just before the scene of the accident (p. 72, l. 20), on his right-hand side (p. 72, l. 40) and "I was coming along about twenty to twenty-five, on the right-hand side of the road, and my lights showing on the right of the road, and the trees and bushes. About ten to twelve feet in front of me loomed this big wagon with a couple of big horses hooked to it, with no lights. I immediately—the wagon was on

the wrong side of the road. I immediately turned the wheel—I only had a couple of seconds to use my head—to the left. In doing so, I seen the driver grab the lines in a drowsed condition, and jerk the horse, or pull the lines sharp, turning into the side of my car. I didn't put on my brake. You see, I tried to escape him. I stepped on the gas." "Well, I tried to pass him on the left and I seen him grab the lines and pull the horse to me. That is all I remember" (Case, p. 73, ll 1-20).

The witness said he had "Presto lights which were lighted, one on either side of the front of the car (Case, p. 83, l. 1; p. 84, l. 15) and that they showed up the road for 100 feet (Case, p. 83, l. 12; p. 84, l. 20); that the glass in these lights was white glass (p. 83, l. 20); that the car was a right-hand drive limousine (p. 83, l. 33).

He emphasizes the fact that the road as he drove that night was visible ahead of him about 100 feet (p. 84, l. 22). He had no chains on (p. 85, l. 1).

He reiterates that the truck was only ten to twelve feet in front of him when he first saw it (p. 85, l. 10) and that he was then traveling about twenty to twenty-five miles an hour (p. 85, l. 12); also "Q When you saw this truck loom up in front of you, why did you not stop? A Why, it would be impossible to stop because going at twenty or twenty-five miles an hour, a truck in front of you, why you couldn't stop in ten or twelve feet."

BRIEF OF THE ARGUMENT.

There is only one question of law urged by the appellants in this appeal, namely: that the plaintiff was guilty of contributory negligence as a matter of law.

POINT I.

The acts of the plaintiff at the time of the accident were negligent and contributed as a proximate intervening cause to the collision between his taxicab and defendant's wagon and the resultant injuries sustained by plaintiff.

It should be noted that the plaintiff himself is the sole witness on his side as to how the accident happened. The testimony of the other witnesses is to the position of the vehicles afterwards, and subject to all the infirmities resulting from unexpected or unusual effects upon vehicles in collision when one or both were traveling at high speed.

The plaintiff's conduct, therefore, on the night in question when the accident occurred is ascertained by no inference or other indirect testimony, but out of his own mouth and by his positive and reiterated statement as to what he did and the existing conditions at the time he acted. We therefore quote the material testimony verbatim.

Weather Conditions.

It was winter, January 28th, about 3:00 A. M. "It was very dark; it was cloudy" (Case, p. 38, l. 28).

"Well, very cold. I believe it was below zero; the wind was blowing very hard" (Case, p. 26, l. 28).

"It was very cold—one of the coldest nights of the winter, and a very dark night" (Case, p. 71, l. 30).

"There was ice and snow on the ground at that time, but not in the road; the road was clear" (Case, p. 71, l. 38).

"It left a track on the road because the road was frosty—a raw, cold night, and there was just a little dampness along with the frost" (Case, p. 62, l. 20).

The Highway.

The road in question, running south from Plainfield to South Plainfield, has a center section of concrete pavement twenty feet wide (Case, p. 14, l. 15; p. 31, l. 15), and

“Q Hard dirt—is that true on both sides west and east of the hard surface? A Yes, sir.”

Q “How wide is the dirt on either side until you get to what would be the curb? A It is an eighty feet stretch there, and it would be approximately ten feet each side” (Case, p. 22, ll. 1-5).

“Q And the ten feet of hard dirt on either side here is, except in very wet weather, just as good to drive on as the concrete? A Concrete, yes” (Case, p. 22, ll. 20-25).

“Q Which would be hard dirt on which cars could drive? A Yes, it is graded” (Case, p. 22, l. 18).

“Q Graded so that at this point it is fairly open, flat country, is it? A Flat open country” (Case, p. 22, l. 20).

“Q Do you mean to say all the traffic went east of it (the wrecked wagon of defendant)? A Yes, you can travel on the dirt part there” (Case, p. 21, l. 40).

and the inference is fair that you could also travel on the other or west side of the concrete.

The accident occurred just south of the bi-section of Plainfield avenue and Rahway avenue.

Lights on the Highway.

“Q What have you to say as to how Plainfield avenue was lighted at that time? A Electric lights; possibly about 300 feet in between them” (Case, p. 17, l. 31). “I should judge about 25-watt lights.”

“Q Where were they suspended from? A From a pole, an arm sticking out from the pole.”

“Q With a shield over it? A A shade over it” (Case, p. 18, ll. 1-10).

“Q You remember there is one (an electric light) there on the northeast corner of Rahway avenue and Plainfield? A Yes, sir.”

“Q Arc light; I mean an incandescent light? A Street light.”

“Q With a shade over it? A I don't know about the shade. I know there is a street light there.”

“Q That is on the northeast corner? A Corner toward Plainfield.”

“Q On your left as you were going down? A Yes, sir” (Testimony by the plaintiff, Case, p. 71, ll. 31-40).

The So-called Curve in the Road.

Plainfield avenue going out of Plainfield curves to the left (Case, p. 14, l. 40). The curve starts approximately right near the city line (Case, p. 15, l. 3). The city line is six or seven hundred feet from Rahway avenue, which is approximately the scene of the accident (Case, p. 15, l. 10). (See photos annexed to brief.)

The chief of police, witness for plaintiff, says, speaking of the scene of the accident: “Right about along where this accident is here, there is a slight bend in the road. It starts about at Rahway avenue, in the center of Rahway avenue. Well, it is a little bit before you get to Rahway avenue. There is a bend in the road which bends more to the east” (Case, p. 31, ll. 18-21).

“Q And what have you to say as to whether or not between Pemberton avenue and some five or six hundred feet of Rahway avenue Plainfield avenue is straight? A No, it is on a turn to the left. At Rahway avenue just before, previous to getting to Rahway avenue, the road turns to the left.”

“Q By turning to the left you mean, I assume, that the turn is generally to the east? A Yes, an easterly turn” (Case, p. 71, l. 40; p. 72, ll. 1-5).

The plaintiff's endeavor throughout the trial was to accentuate, and even exaggerate, this easterly turn of the road, as for example, page 72, line 20, where plaintiff's counsel asks:

“Q Where were your headlights showing as you rounded the turn there,”

and defendant's objection to this as an unwarranted assumption of the character of the turn not in evidence, was sustained by the Court.

It is submitted that the best evidence of how much the road curves is furnished by the photographs of both sides annexed to this brief, upon which the defendant completely relies to show the actual physical condition in this respect.

Traffic.

The chief of police, when he arrived at the place of the accident, immediately got a light "to use it to handle the traffic on that road" (Case, p. 28, l. 40; see also p. 34, l. 38; p. 35, ll. 1-10). The same police chief says: "I asked him for a light to help us to protect the road; it was a very heavy traveled highway" (Case, p. 30, l. 1).

"Q And this road is a main artery, is it not—there is a great deal of traffic up and down this Plainfield avenue? A Yes, sir" (Case, p. 32, l. 13).

The surveyor says, speaking of his observation of tracks at the scene of the accident:

"Q Did you not see its tracks? A They were not plainly visible there because there were many automobiles came along after that" (Case, p. 21, l. 32).

Defendant's Vehicle.

The defendant's milk wagon was a four-wheeled, two-horse vehicle, 6 ft. wide; 12 ft. 6 in. long, and 7 feet from the pavement up to the driver's seat (Case, p. 17, ll. 15-20).

Plaintiff's Vehicle.

The plaintiff's vehicle was a taxicab; "a large Renault limousine, a big seven-passenger limousine" (Case, p. 71, l. 10). "A right-hand drive" (Case, p. 83, l. 35). "Made in France" (Case, p. 82, l. 40).

Chains.

The plaintiff testifies:

"Q You had no chains on. A No."

Lights.

Plaintiff says:

"I had oil lights in place of electric lights and the headlights were a large headlight with gas lights,

acetylene gas tank, a large, big light" (Case, p. 71, l. 15). "Prest-O-Lites were on either side of the front of the car and were lighted" (Case, p. 83, ll. 1-3).

"There was one on each side and they were both lit" (Case, p. 84, l. 13).

The lenses were white glass, as well as the plaintiff can recollect (Case, p. 83, l. 20).

"Q And these lights are not regulated as electric lights are to different degrees of power? A No, you just turn them on."

"Q Turn them on and they are there? A And they are there" (Case, p. 83, l. 10).

"Q What kind of glass was on those lights that night? A Oh, they show a fair distance up the road, maybe a hundred feet" (Case, p. 83, l. 12).

Plaintiff's View of the Road Ahead.

"I was going along about 20 to 25, on the right-hand side of the road, and my lights showing on the right of the road, and the trees and bushes" (Case, p. 73, ll. 2-8).

"Q And the road, as you drove on that night, was visible ahead of you for how many feet—did you say a hundred feet or more? A About a hundred feet."

"Q About a hundred feet? A Yes, sir" (Case, p. 84, l. 21).

The plaintiff's witness, Mosher, a garage man, testifies to having looked over the plaintiff's car before the accident (Case, p. 22, l. 16), and testifies:

"Q How far ahead would those gas lights show on the road? A Oh, I should judge a hundred or a hundred and fifty feet."

"Q And the oil lights on the side would not throw a light very far, would they? A No, sir; they would not. You could see the oil lights on the side, but they would not throw a light" (Case, p. 93, ll. 8-12).

These headlights were about four or four and a half feet from the ground (Case, p. 96, l. 18).

"Q They were gas lights that would throw the light? A Yes, sir."

“Q Would they throw the light to a height of four or four and a half feet for a hundred or a hundred and fifty feet? A The gas lights?”

“Q Yes. A Yes, sir” (Case, p. 93, ll. 15-20).

Plaintiff's Speed.

Plaintiff says, in answer to his own counsel:

“Q How fast were you going? A About 20 to 25 miles an hour” (Case, p. 72, l. 19).

“I was coming along about 20 to 25” (Case, p. 73, l. 3).

“Q And you were traveling then about 20 to 25 miles an hour? A Yes, sir” (Case, p. 85, l. 12).
(See also p. 85, l. 30.)

We submit also that this Court will take judicial notice on the question of speed of the admitted physical facts produced by the collision.

At the moment of collision the pole of the heavy milk truck pierced the body of the limousine on the right front, as appears from the photographs. The limousine with the pole stuck through it continued to the left or east of the truck, swinging the pole and the two horses around to the east, broke the pole off, stripped the harness off the west side horse, carried the east side horse on the radiator and dumped him behind the truck a distance of fifteen feet or so, as shown in the photographs, and then proceeded about seventy-five feet down the road on the east side (plaintiff's wrong side) and crossed the road at an angle from east to west and smashed into a tree in the west gutter (back on his own right side). We submit that these physical results are irrebuttable evidence of a speed much greater than that of 25 miles an hour (Case, p. 21, l. 21; p. 27, l. 15; p. 62, l. 38; p. 63, ll. 1-12; p. 27, l. 33, and photograph exhibits annexed to this brief).

Plaintiff Passed to the Left of the Defendant's Truck Approaching him from the opposite direction.

“Well, I tried to pass him on the left” (Case, p. 73, l. 21).

“So I swung to my left” (Case, p. 85, l. 34).

*Room to Pass on
Plaintiff's Right.*

See testimony under "The Highway," page 6.

Plaintiff's Familiarity with the Road.

"Q You drove up and down this road every night, did you not? A Well, not every night."

"Q Pretty nearly every night during that time immediately preceding the accident? A No, not every night, I wasn't out that late; but I have driven up and down that street lots of times, but not every night."

"Q You lived at your mother-in-law's there in South Plainfield? A Yes" (Case, p. 81, ll. 1-8).

*Plaintiff's Ineffective Observation
of the Road.*

"About ten to twelve feet in front of me loomed this big wagon with a couple of horses hooked to it with no lights. I immediately—the wagon was on the wrong side of the road. I immediately turned the wheel. I only had a couple of seconds to use my head—to the left. * * * I didn't put on my brake. You see I tried to escape him. I stepped on the gas" (Case, p. 73, ll. 8-15).

"Q You testified, as I understood, that there was just a few seconds between the time you first saw this car and when you were twelve feet away from it? A Yes, sir."

"Q And the time of the impact—you mean the truck—you don't mean the car? A The truck, yes, ten or twelve feet in front of me."

"Q That was the first that you saw it? A Yes, sir."

"Q And you were traveling then about 20 to 25 miles an hour? A Yes, sir" (Case, p. 85, ll. 5-15).

"Q When you saw this truck loom up in front of you why did you not stop? A Why, it would be impossible to stop, because going at 20 to 25 miles an hour, a truck in front of you, why, you couldn't stop in 10 or 12 feet; it will certainly hit your horses head-on, so I swung to my left, as the best thing could be done" (Case, p. 85, ll. 28-35).

These facts present the plaintiff's statement of his case fairly and fully, and after diligent search of the record

we can find no other facts which would in any way modify those above set forth.

Assuming, for the purpose of this argument, that the defendant's milk wagon *was* on the wrong side of the road and without lights, in effect that it was an obstruction on the highway as a result of defendant's negligence, nevertheless, the plaintiff's acts just prior to and at the time of the collision are as a matter of law an intervening, proximate cause contributing to the accident, and his acts are negligent judged by the same standard of negligence as would be applied to the defendant, and the defendant is therefore relieved from any liability by reason of the plaintiff's contributory negligence. We submit that this is the only conclusion which can reasonably be found upon a fair consideration of the plaintiff's case and testimony.

Traveling upon this highway at the time and under the conditions described it was the duty of the plaintiff to operate his taxi at no greater speed that would enable him to have it under control so as to avoid collision with other objects on the road, and if he operated his taxi at a speed of 25 miles an hour, with his lights showing the road 100 feet ahead and came within 12 feet of the defendant's truck before he saw it so that he was unable to stop or avoid the collision, as he describes, he either failed in his duty to observe the road ahead of him, as a reasonably prudent driver should; or, if he could not see the road he failed in his duty to reduce speed sufficiently to enable him to stop if necessary within the distance that he *could* see the road.

The plaintiff further fails to account in any way for his failure to observe the defendant's truck by the light of the street light suspended on an arm from the pole at the northeast corner of Rahway avenue, which was between him and the defendant's truck as he approached it.

This Court, in *Osburn v. DeYoung*, 1 N. J. Ad. Rep. 1573, at page 1577, through Mr. Justice Kalisch, has laid down the rule:

"It is firmly settled that it is only where the plaintiff's act is a negligent one and proximately

contributes to the defendant's negligence that caused the plaintiff's injury that the latter is debarred of a recovery."

In *Menger v. Laur*, 55 N. J. L. 205, Mr. Justice Depue says, at page 215:

"In this State the established rule is, that if the plaintiff's negligence contributed to the injury so that if he had not been negligent he would have received no injury from the defendant's negligence—the plaintiff's negligence being proximately a cause of the injury—he is without redress unless the defendant's act was a wilful trespass or amounted to an intentional wrong, and in such case the comparative degree of negligence of the parties will not be considered."

We will therefore proceed to consider the plaintiff's acts as testified to by himself in this double aspect: First, were his acts negligent? Second, did they amount to a proximately intervening, responsible, contributing cause?

(a) We submit that the plaintiff's acts were negligent.

The standard test of negligence *vel non* is "the common experience of mankind, its existence implying the want of that care and diligence which ordinarily prudent men would use under the circumstances of the particular case." Shearman & Redfield on Neg., Vol. 1, Sec. 9-B, page 16.

These text-writers hold that negligence denotes a quality attributable to acts or omissions which in its last analysis is a constructive mental attitude in particular relation or under particular circumstances where harm has resulted, direct evidence of which is always difficult and even impossible, and generally quite unreliable. Hence manifestations by conduct are relied on and are in truth far more reliable than direct evidence itself.

Viewing the plaintiff's conduct in the light of this basic principle the words out of his own mouth condemn him. He was called upon to operate a heavy, high-powered limousine taxicab on a cloudy, cold night, with the road

in a frosty condition, with full knowledge of the traffic conditions existing on the road over which his course lay, namely, a concrete surface 20 feet wide, with hard graded dirt 10 feet on either side of it, or a total driving surface of 40 feet. He proceeded without chains, with large headlights which showed the road 100 feet ahead of him. He proceeded at a speed of 20 to 25 miles an hour until he was with 12 feet of defendant's milk truck, which he claimed was to its wrong side of the center line of the road (which would make it more readily visible), and which he failed to see until he was within 12 feet of it. Then instead of turning to his right he turned to his left without putting on his brakes, stepped on the gas, tore the harness from the horses, carried one horse to the rear of the wagon and went 75 feet down the road and crossed, into the ditch.

In judging this conduct of the plaintiff in the light of the legal principle stated above regard must also be had to the present era as compared to the duty which might have been required under traffic conditions of former days, and as the same learned text-writers have stated in Sec. 12, page 21, of their work on Negligence, many acts are now grossly careless which a few years ago were not culpable at all.

The era of the automobile, involving the operation of taxicabs and other motor vehicles over the same road upon which horse-drawn vehicles are operated, undoubtedly now requires a higher degree of care in the operation of the fast-moving vehicles than previously.

We submit that the mere statement by plaintiff of the way in which the accident happened convicts him by the common experience of mankind of culpable acts in the operation of his taxicab just prior to the time of the accident.

This Court has approved the statement of the Chief Justice in *Hammond v. Morrison*, 90 N. J. L., page 15, at page 16:

“No man is entitled to operate an automobile through a public street blind-folded.”

That is in effect what the plaintiff did if he proceeded at 25 miles an hour and could not see, or if he did not look.

This plaintiff took the chance of finding the way clear and ran blindly into defendant's truck, and having seen fit to do this he cannot escape responsibility for his reckless conduct.

When plaintiff asserts that his lights showed 100 feet but that he did not see defendant's truck until he was within 12 feet of it comes clearly within the rule laid down in *Brown v. R. R. Co.*, 68 N. J. L. 618, and *Ruggieri v. P. S. Ry. Co.*, 92 Atl. 61; *McGrath v. N. J. St. Ry. Co.*, 37 Vr., p. 312, that if just before the accident he had not been inattentive to his surroundings he must have seen the defendant's truck before he did, and in time to have avoided the accident. In other words, the only inference is that he did not look, although the truck must have been within his vision, if he had looked, and that he did not see it, was a demonstration that he did not look with reasonable effectiveness, such as was required of him under the circumstances, and was therefore guilty of such contributory negligence as required a non-suit.

"Our Courts have said that if his vision was temporarily destroyed it was his duty to stop his car and endeavor to so adjust his means of vision that his vision was restored."

This statement was approved by this Court as one of legal accuracy.

Osburn v. DeYoung, supra.

Furthermore, the plaintiff, by his speed and failure to observe the road for the 100 feet which his lights showed, created for himself an emergency when he was 12 feet from the defendant's truck, and even then, having created this, he proceeded again to violate the laws of the road by turning to his left. It is contended that defendant's truck was on the wrong side of the road. There is no contention, however, that it was not on the concrete, so that there was 10 feet of hard dirt on which automobiles can travel and did travel to plaintiff's right of defend-

ant's truck. He did not attempt to use this, which might have spelled safety for him, but in violation of the laws of the road turned to his left, and in so doing spiked his taxi on its right side upon the pole of defendant's wagon, which was pulled to its right.

In *Fabiano v. Berckes*, 1 N. J. Misc. Rep. 407, the Supreme Court held that from the fact that a child was dragged after being struck by an auto a distance of 20 feet the jury could reasonably infer that the auto was driven at an excessive rate of speed, and *a fortiori* from the facts in the case at bar, not only must the jury have inferred excessive speed on the part of the plaintiff's taxicab from the physical results of the collision, but they could come to no other conclusion than that it was proceeding at a very high rate of speed, and this conclusion therefore becomes a matter of law to be found by the Court in this case.

The old case of *Butterfield v. Forrester*, 11 East. 60, decided in 1809, cited in *Menger v. Laur*, *supra*, page 208, is very close in principle. In that case the defendant had placed an obstruction in the highway by which the plaintiff, who was driving along the road, was thrown from his horse and injured. The plaintiff was riding violently and did not observe the obstruction. Lord Ellenborough, in the King's Bench, denying a new trial, said:

“One person being in fault will not dispense with another's use of ordinary care for himself. Two things must concur to support this action: An obstruction in the road, and no want of ordinary care to avoid it on the part of the plaintiff.”

We submit it conclusively appears that there was want of ordinary care on the part of the plaintiff if his lights showed 100 feet of the road and he did not see the truck until he was within 12 feet of it; and further, if, when he observed the truck and had room to pass it on his right, he turned to his left. There is further no explanation why the plaintiff did not see the defendant's wagon by the electric light on the corner of Rahway avenue, which was between him and the defendant's truck. The

negligence of the plaintiff is such as a matter of law, because there are no facts varying by the narration of opposing witnesses; there is no conflict in the evidence but the single uncontradicted statement of the facts by the plaintiff himself.

Seibert v. Goldstein Co., 1 N. J. Ad. Rep. 1497, at page 1499;

N. Y., etc., Ry. Co. v. Ball, 53 N. J. L. 283, at page 289.

(b) The plaintiff's conduct as a matter of law proximately contributed as an intervening responsible cause to the plaintiff's injury.

In *Opreska v. Shapiro*, 1 N. J. Adv. Rep. 1466, this Court, speaking through Justice Black, expressly approves the conclusions on the subject of proximate cause by Mr. Justice Depue, in *Del., &c., Ry. Co. v. Salmon*, 39 N. J. L. 299, in which leading case Wharton's rule is stated:

"The only rule to which we can resort is that causal connection ceases where there is interposed between the negligence and the damage an object which if due care had been taken would have prevented the damage."

The same doctrine is laid down by this Court in *Powers v. Standard Oil Co.*, 119 Atl. 273, where Justice Minturn, for the Court, at page 274, says:

"The efficient proximate or intervening cause in such a situation is tantamount in law to the force or operating factor without which the accident could not have happened. Such a power must have been active, operative and carrying and containing within itself the possibility and potentiality for harm."

The learned Justice also approves and cites from *Menger v. Laur, supra*. In this last-named case, at page 209, Justice Depue, reviewing the authorities, beginning with *Davies v. Mann*, cites Baron Parke in that case:

"That the negligence which would preclude a plaintiff from recovery must be such as that he

could by ordinary care have avoided the consequences of the defendant's negligence."

And he concludes, page 215, with the rule established in this State, which we have cited above, page —, supported by *N. J. Exp. Co. v. Nichols*, 4 Vr. 435; *Penna. R. R. v. Righter*, 13 Vr. 180, and says at page 216:

"In the trial of cases of this kind where it appears that both parties were at fault the primary consideration is whether the faulty act of the plaintiff was so remote from the injury as not to be regarded in a legal sense as a cause of the accident. Or, whether the injury was proximately due to the plaintiff's negligence as well as to the negligence of the defendant. If the faulty act of the plaintiff simply presents the condition under which the injury was received and was not in a legal sense a contributory cause thereof, then the sole question will be whether under the circumstances and in the situation in which the injury was received it was due to the defendant's negligence; but if the plaintiff's negligence proximately, that is directly, contributed to the injury it will dis-entitle him to the recovery, unless the defendant's wrongful act was wilful, or amounted to an intentional wrong."

In the case of *Powers v. Standard Oil Co.*, *supra*, this Court, through Mr. Justice Minturn, says that the definition of the term proximate finds apt expression in the observation of the Supreme Court of Maine in *Moulton v. Sanford*, 51 Me. 134:

"Ordinarily that condition is usually termed the cause whose share in the matter is most conspicuous and is * * * immediately preceding and proximate to the event."

Certainly in the case at bar the negligent acts of the plaintiff were proximate and intervened after the defendant's negligence (conceded for this argument), as an operating factor which was active, operative and contained within itself the possibility and potentiality for harm without which the accident could not have happened. The enumeration in detail of plaintiff's acts clearly bring them within the rule laid down by this Court in the case

of *Powers v. Standard Oil Co.*, *supra*. Justice Depue, in the case of *D., L. & W. v. Salmon*, 39 N. J. L. 299, says, at page 309:

“That a person whose negligence may have been one of the antecedents or conditions of an event is relieved juridically from liability if such negligence is applied to the particular event by the intervening negligence or malice of a third party.” (Citing a pamphlet by Wharton.) * * * “Of course the same immunity will follow where the intervening negligent act is that of the plaintiff, so that it becomes contributory negligence, without which the loss would not have happened.”

The case at bar is unlike the case of *Marshall v. Sub. Dairy Co.*, 114 Atl. 750, and the cases there cited, for in that case the efforts of the plaintiff just prior to the accident resulted from an emergency in which he was placed by the defendant's action. The proximate cause in the aspect of closeness of causal connection was the defendant's negligence, which put a situation up to the plaintiff in which no negligence could be charged to him.

In the case at bar, however, the emergency created when the taxicab was within 12 feet of the wagon was proximately caused or created by the negligent contributing action of the plaintiff intervening upon the defendant's negligent act, and actively contributing to produce the situation; in other words, the closest causal connection was not the original negligence of the defendant, but the reckless driving of the plaintiff which brought him into a position within 12 feet of defendant's truck while his taxi was traveling at 25 miles an hour. *The emergency was of his own creating.*

Referring to the principle stated by the Court in the above case, at page 752, the faulty act of the plaintiff did not simply present the condition under which the injury was received, but actively contributed to the situation which resulted in his injuries.

By no process of reasoning can the acts of the plaintiff in the case at bar be considered as merely a condition, or

creating a condition—a static upon which the negligence of the defendant was operative. The negligence of the plaintiff in the case at bar was active, was a contributing factor without which the accident would not have happened. It was the culpable act of a human being legally responsible for such act, and thereby became a responsible intervening cause, sufficient to discharge the original wrong-doer. Shearman & Redfield, Vol. 1, Sec. 33, page 67; Sec. 38-A, page 75.

The plaintiff was therefore guilty of contributory negligence.

In *Grand Trunk Ry. Co. v. Jones*, 144 U. S. 429, the Court says:

“Although the defendant’s negligence may have been the primary cause of the injury complained of, yet an action for such injury cannot be maintained if the proximate and immediate cause of the injury can be traced to the want of ordinary care and caution in the person injured. Subject to this qualification which has grown up in recent years that the contributory negligence of the party injured will not defeat the action if it be shown that the defendant might by the exercise of reasonable care and prudence have avoided the consequences of the injured party’s negligence.”

This is the same modification to which Justice Depue referred in his examination of the authorities, and it need only be stated to absolve the defendant in the case at bar, as, after the plaintiff’s taxicab was within 12 feet of him, proceeding at a speed of 25 miles an hour and turning to its left or wrong side, the defendant had no opportunity whatsoever to act, and the only testimony in the case is that of the plaintiff, who says that the defendant’s driver pulled to his right (Case, p. 73, l. 12 and l. 21).

The plaintiff's contributory negligence was a matter of law, upon which the Court should have acted.

As was said in *Savage v. P. S. Ry. Co.*, 99 Atl., p. 383, by this Court, speaking through Chancellor Walker, in answer to a contention that disputed questions of fact relating to contributory negligence took that question to the jury:

"The doctrine here invoked has no application to the facts of the case at bar, for when it was rested in the Trial Court there were no disputed questions of fact; and on the facts the plaintiff's contributory negligence—but for which the accident would not have happened—was all apparent. It is only when the question of contributory negligence is placed in the realm of uncertainty and doubt and presents the form of a debatable question that its solution is committed to a jury. *Monroe v. P. R. R. Co.*, 85 N. J. L. 688-692."

"When the facts are clearly settled and the course which common prudence dictated can be so clearly discerned that only one inference can be drawn, it is the duty of the Court to direct a verdict for non-suit. *Union Pac. v. McDonald*, 152 U. S. 262; *Shearman & Redfield on Negligence*, Vol. 1, Sec. 56, p. 113."

"There is perhaps no principle of law better settled than that if it clearly appears that the plaintiff's conduct did contribute to the accident, then the Court should exercise control of the case and grant a non-suit or direct a verdict for the defendant."

Brigden v. Pirozzi, 117 Atl. 602;

Schnackenberg v. D., L. & W., 86 N. J. L. 517;

Saunders v. Smith R. R. Co., 84 N. J. L. 276;

Hoff v. P. S., 91 N. J. L. 641;

James v. D., L. & W., 92 N. J. L. 149;

Healy v. Braisted, 120 Atl. 12.

As was said in the case of *McGrath v. N. J. St. Ry. Co.*, *supra*:

"The plaintiff, attempting to cross Market street, was bound to be careful; that the evidence tended to show that he was not careful, and that it pointed

so plainly to this conclusion that the jury, if the case had gone to them, could not reasonably have reached the opposite conclusion."

The situation at the close of the defendant's case was no better for the plaintiff. His conduct was in no way helped or mitigated by testimony brought out by the defense—in fact, the only other eye-witness, the driver of defendant's truck, charges that the taxicab was practically upon him when he first saw it, and that he, the driver, was then on his right-hand side of the road, that his attention was called to the taxi by the rays of the electric light on the corner of Plainfield and Rahway avenues reflected upon the windshield of the taxi (Case, p. 26, l. 20), and that the taxi swerved to its wrong side, and that further it carried no lights.

POINT III.

It is submitted that the Court below erred in failing to non-suit the plaintiff or to direct a verdict for the defendant, and that the judgment should be reversed and judgment of non-suit entered, or a judgment directed in favor of the defendant.

Respectfully submitted,

HEINE, BRADNER & LAIRD,
Attorneys of Defendant-Appellant.

M. CASEWELL HEINE,
Of Counsel.

Judgment.

NEW JERSEY SUPREME COURT.

CHARLES BARRY,

Plaintiff,

vs.

BORDEN FARM PRODUCTS Co., a corp.,

Defendant.

Action at Law.

On Postea.

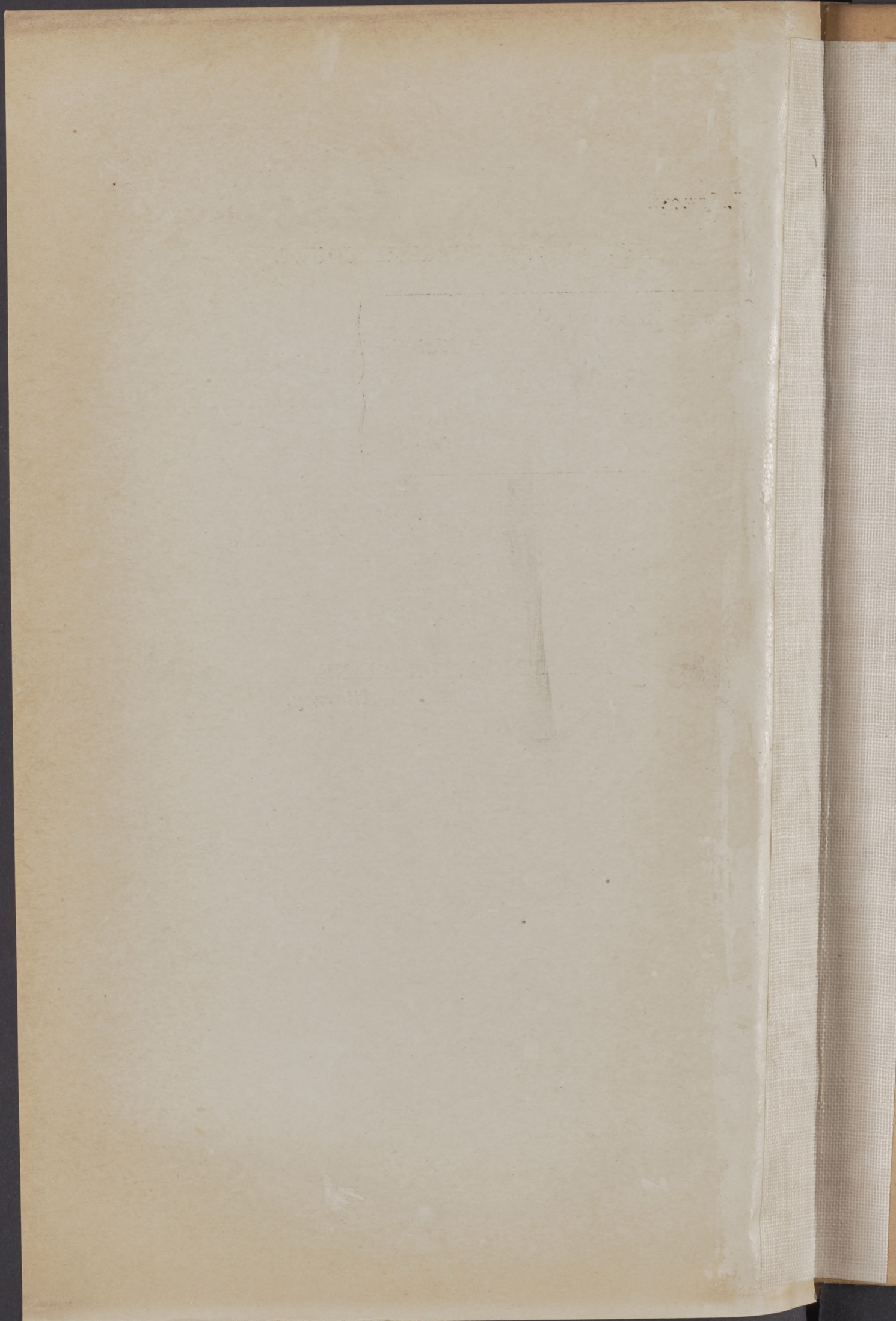
It is ORDERED that judgment of \$25,000 be and the same hereby is entered in favor of the plaintiff and against the defendant with costs to be taxed.

Entered October 18, 1923.

On motion of

ROBERT NEWTON CRANE,

Attorney.







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SPENCERFIELD, N. Y.
FOLIO 210B10



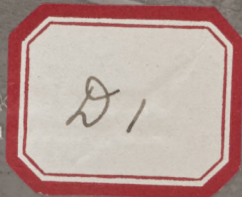
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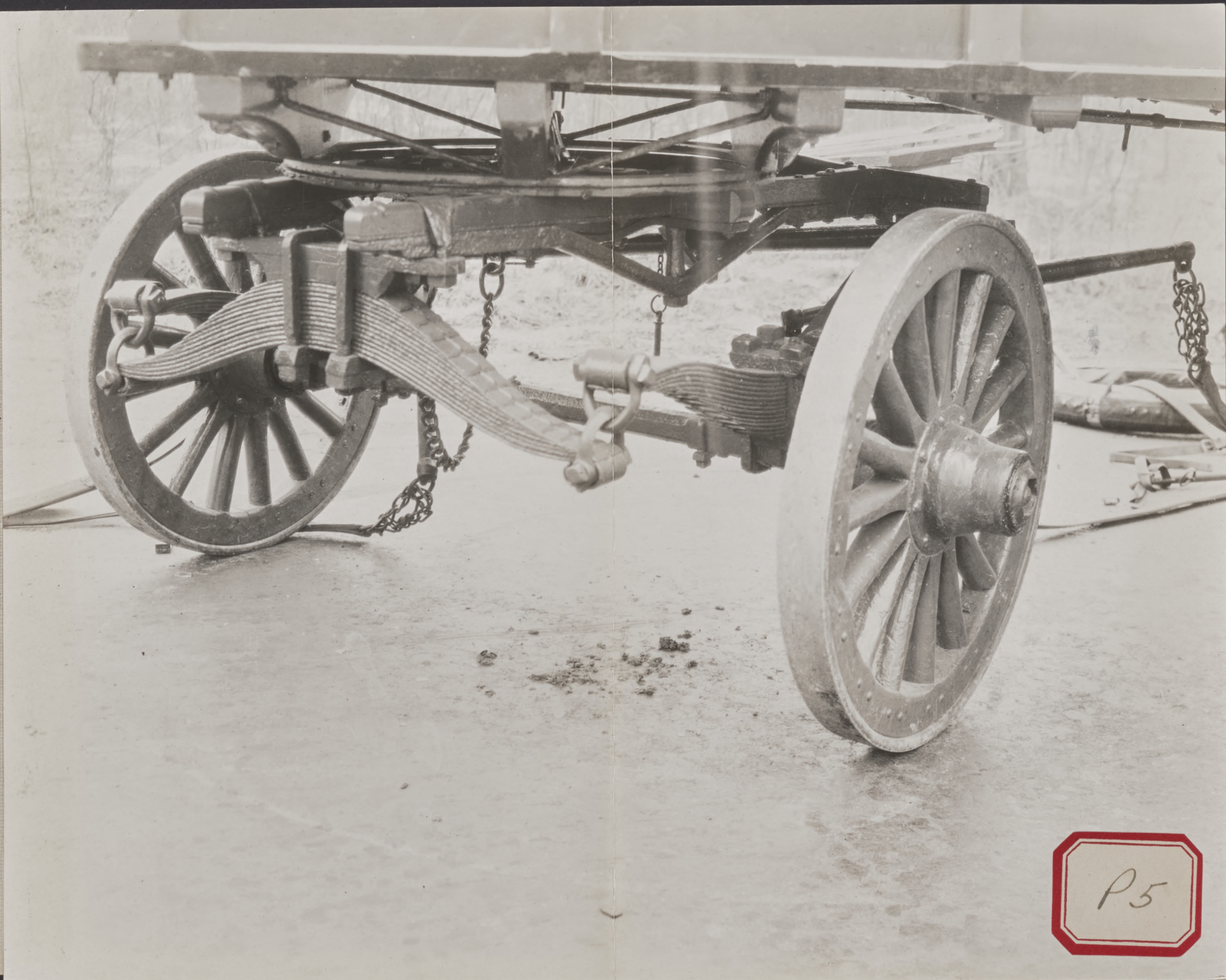
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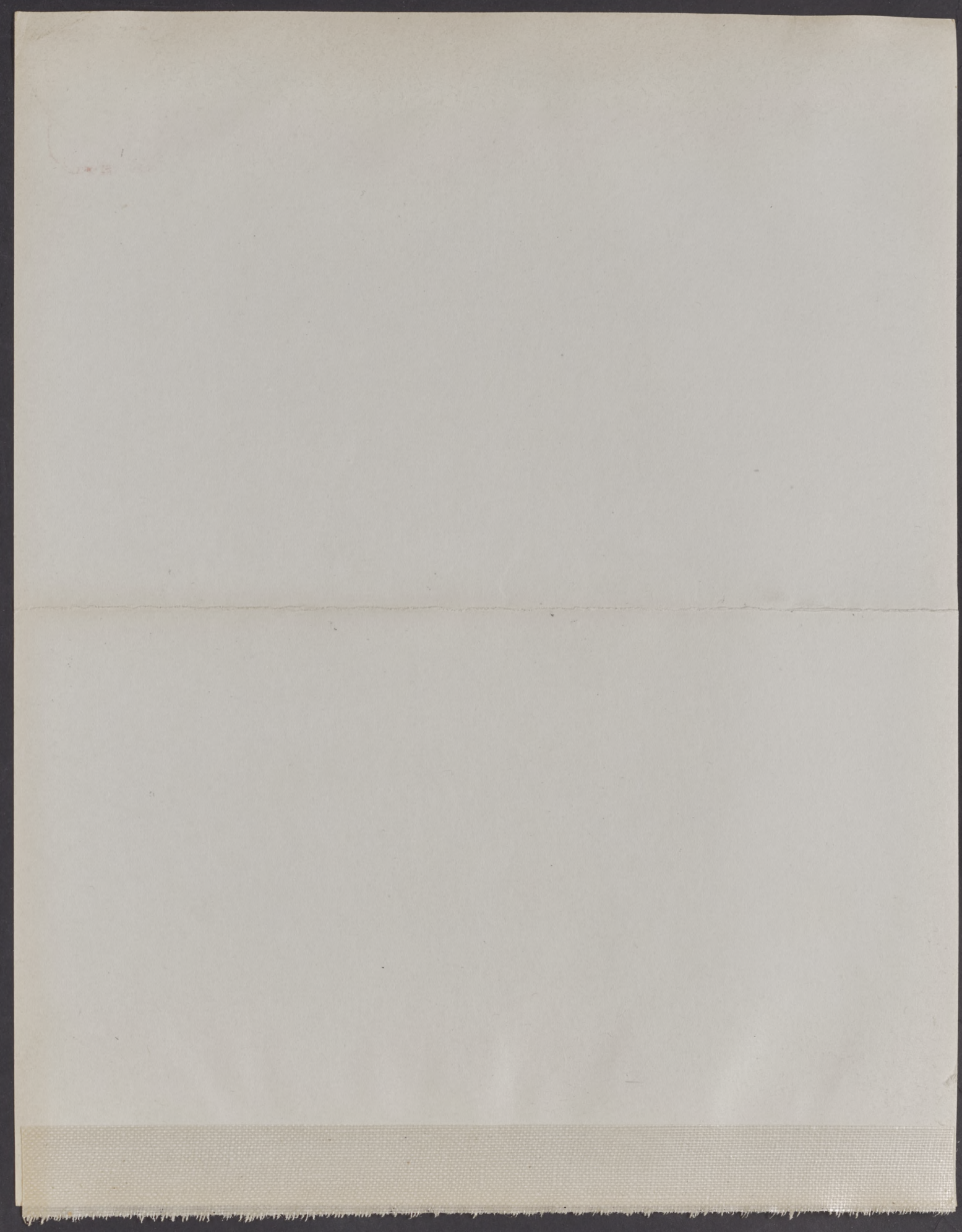
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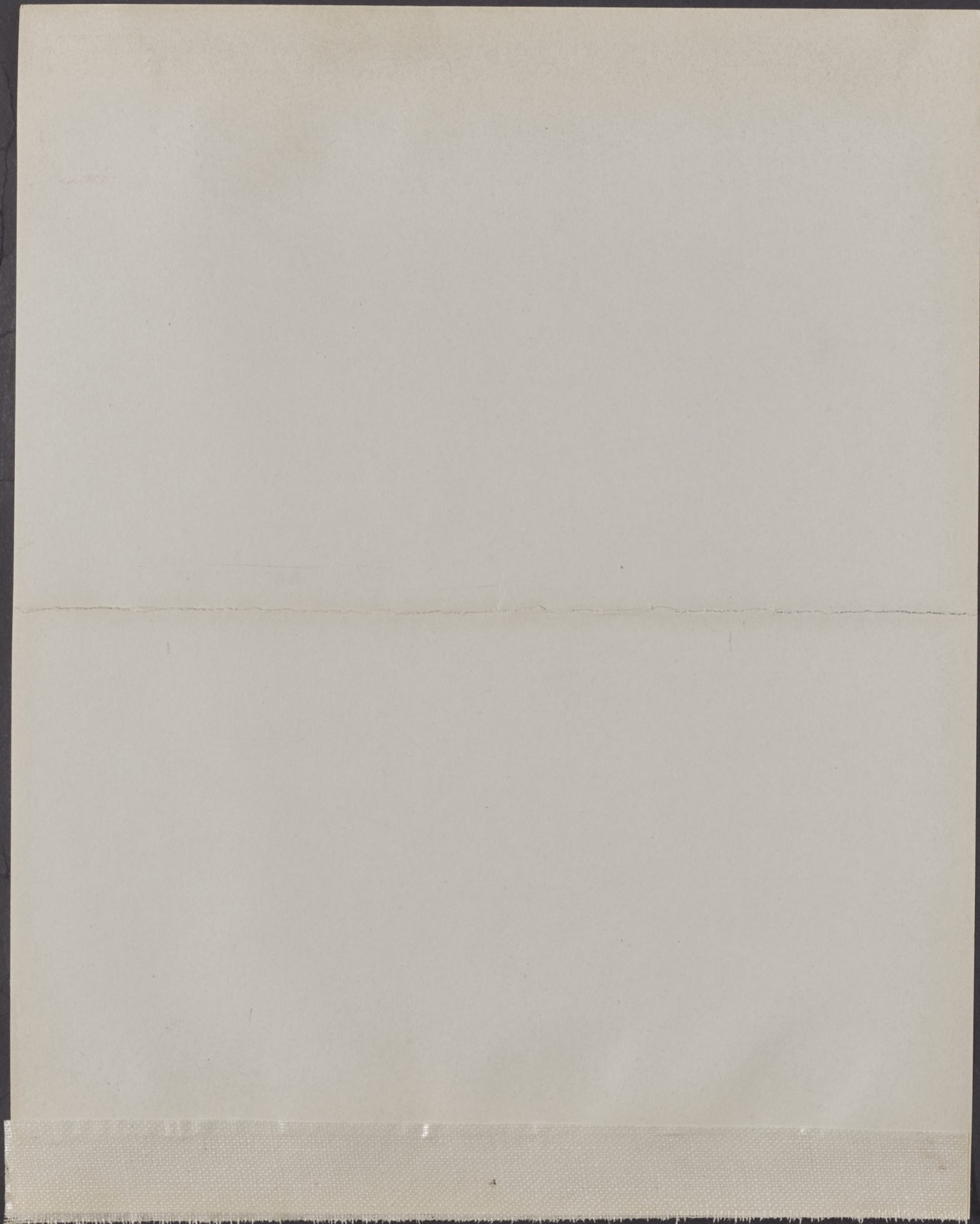


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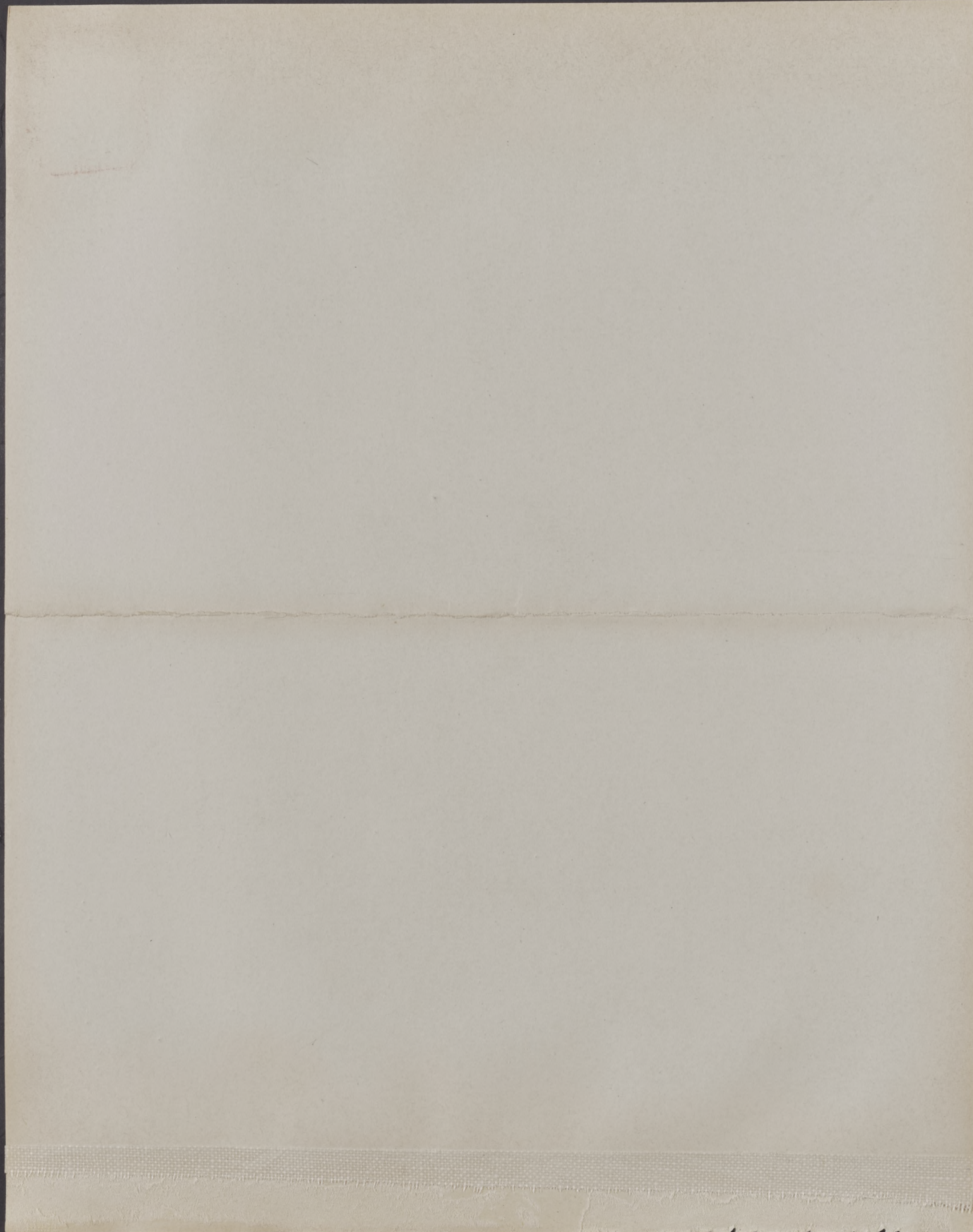


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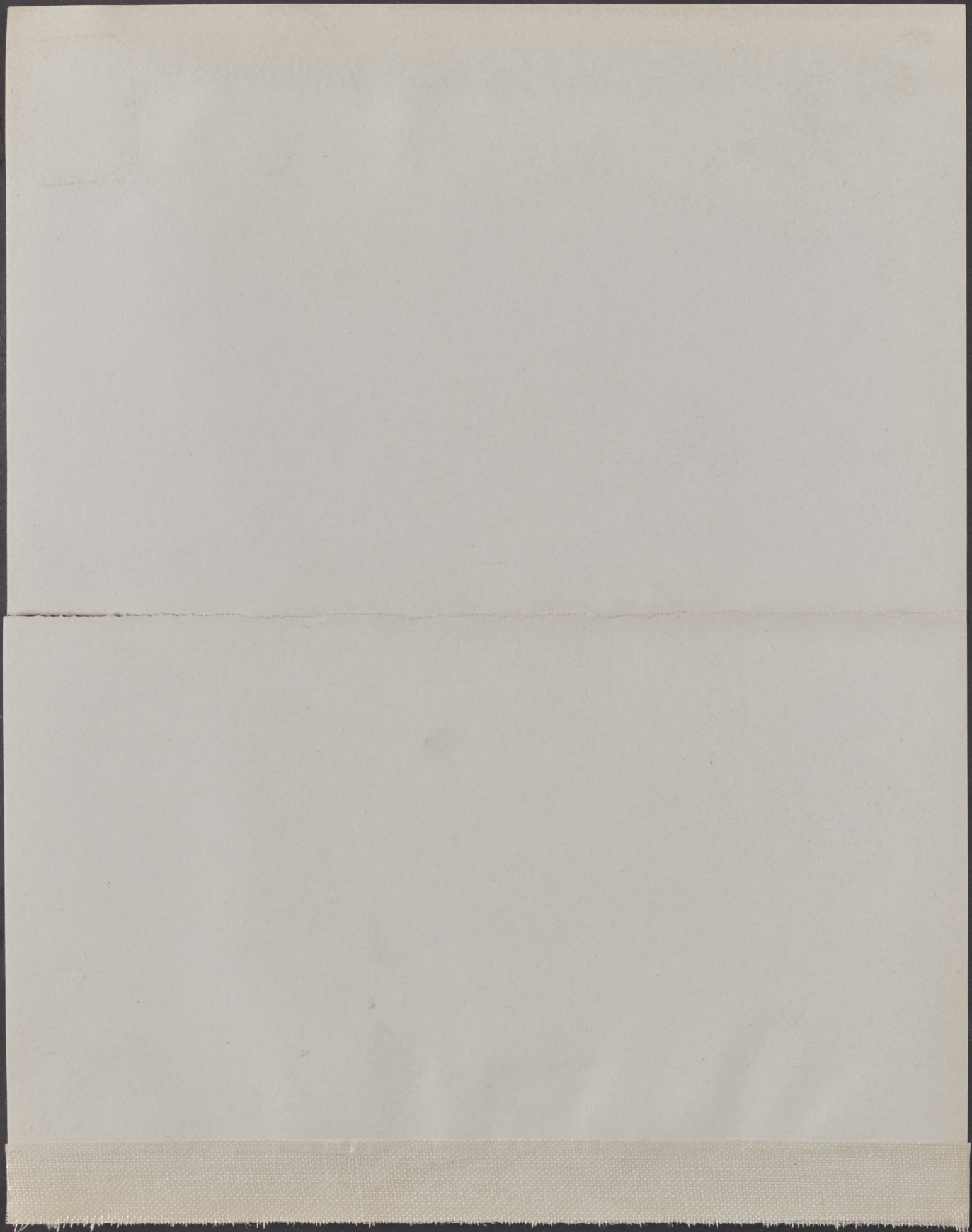


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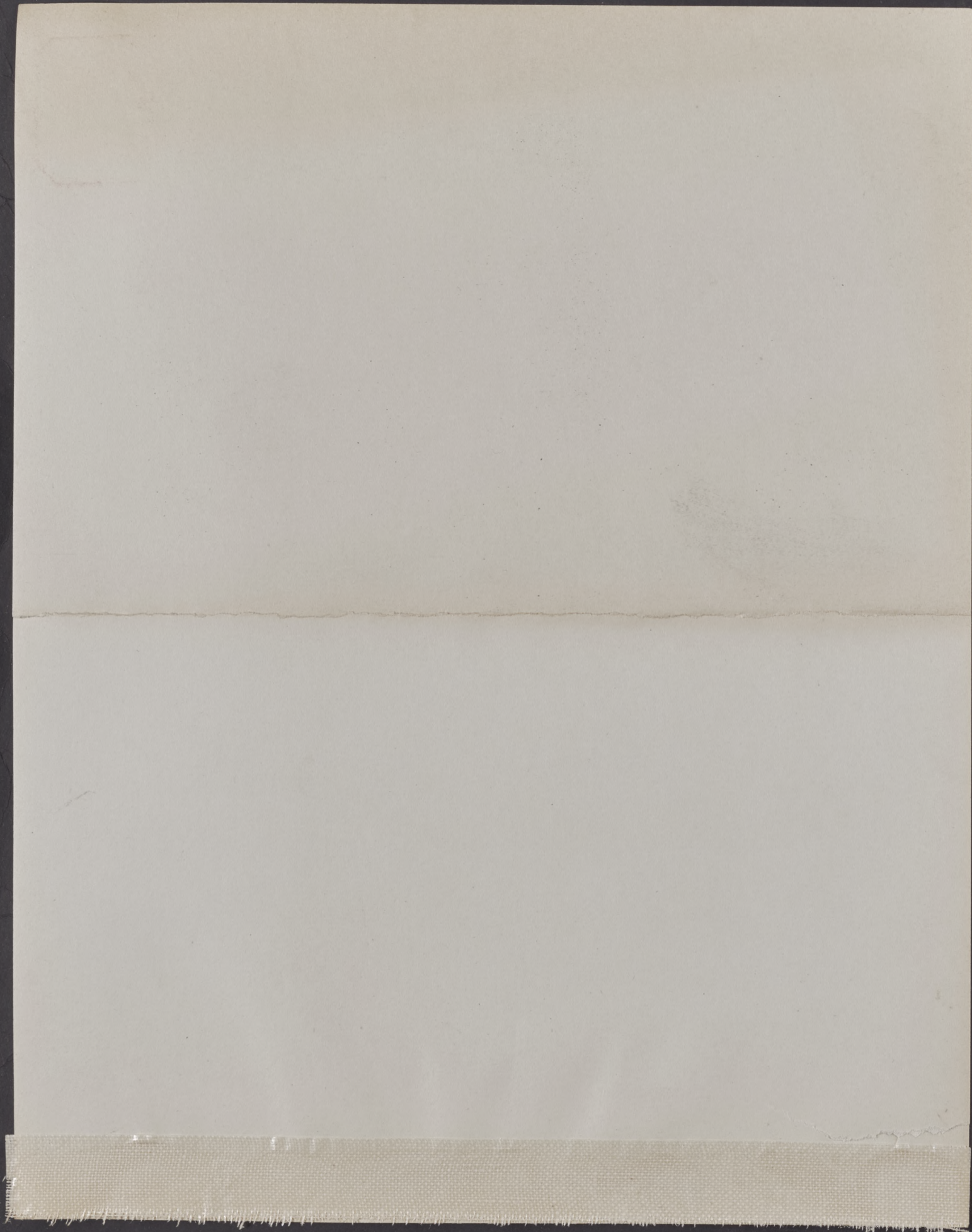


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