New Jersey Court of Errors & Appeals

SARAH BURNS and JOSEPH BURNS, her husband, Plaintiffs below, Defendants in Error, vs. RICHARD ECKERT, Defendant below, Plaintiff in Error.	TORT. On Error to ~~Hudson County Circuit Court.~~ New Jersey Supreme Court

BRIEF FOR DEFENDANTS IN ERROR.

This cause was tried on October 31, 1904, before Hon. Charles W. Parker and a jury, and a verdict rendered for the plaintiffs below. The defendant below removed said cause to the New Jersey Supreme Court by writ of error. Said cause was argued at February term, 1905, of said court before Gummere, C. J., and Justices Fort, Garretson and Pitney, and at the February term of said court, 1906, the judgment under review in this cause was unanimously affirmed.

POINT I.

At the close of the evidence presented by plaintiffs below, defendant made a motion for a non-suit, on the ground that no lack of care had been shown on the part of the defendant or his employee; that there was no proof that

the defendant was guilty of negligence; that the plaintiff, by her acts, contributed to the injury of which she complains. The motion was denied and this refusal is the basis for first assignment of error.

It was admitted that First street runs east and west and Monmouth street north and south. On the southeast corner of First and Monmouth streets is a baker's shop and on the southwest corner, at the time of this accident, was a saloon. Page 9 of the case.

That there is no error in the refusal to nonsuit can readily be seen by reading the testimony of Mrs. Burns (pages 9 to 33 of the Case).

According to her testimony, Mrs. Burns, on the 5th day of December, 1903, was in a baker's shop on the S. E. corner of First and Monmouth Streets, Jersey City; she left the shop and attempted to cross from the southeast to the southwest corner of First and Monmouth street.

On First street, about three doors beyond the last mentioned corner was a butcher's store which she desired to reach in order to buy some meats for supper. She used the southerly crosswalk provided for pedestrians on Monmouth street, walking in a westerly direction. As she was in the act of stepping from the curb to the crosswalk she made a careful observation (page 22, cross examination; "Q. You are quite sure that you looked up Monmouth street? A. I did") and saw nothing in sight except a large covered wagon coming down First street in an easterly direction; she saw this covered van was not going to turn into Monmouth street and proceeded to cross;

while she was walking in a westerly direction on the crosswalk the covered wagon was moving in the opposite direetion on First street, so that it was between her and anything approaching on Monmouth street, from the north. As the rear end of the covered wagon passed her, she for the first time saw defendant's horse and wagon coming from the north on Monmouth street and bearing down upon her at a high rate of speed. The driver was not looking in the direction in which he was driving, but had his face turned sideways and was looking westerly up First street.

She was within a few feet of the sidewalk to which she was going, she screamed and attempted to jump to the same, but did not have time, and was hit and knocked down by the side of the horse or the shaft nearest to the sidewalk to which she was going, thus she made every effort and almost succeeded in clearing the horse.

From these facts it is respectfully insisted that negligence on the part of the driver might reasonably be inferred and that the question was properly left to the jury. If, however, there was error in this, it was cured by the defendant's case. At page 49—the driver testified that he saw Mrs. Burns ten feet away and had time to stop his horse. If he did not do so, he was clearly negligent.

He approached a street crossing at a high and dangerous rate of speed. He was not looking in the direction in which he was going.

According to his own testimony, he saw Mrs. Burns ten feet away, and had time to

stop before reaching her, he did not stop, but ran her down.

A denial of a non-suit is not error, if the defect in the proofs is subsequently supplied by evidence.

Esler vs. Camden S. Ry. Co., vs. (N. J Sup.), 58 Atl. Rep., 113.

In an action for injuries to a horse and wagon from a runaway caused by the frightening of the horse by construction cars on defendant's electric line, held, that any error in refusal of non-suit was cured by defendant's testimony.

Esler vs. Camden S. Ry. Co., (N. J. Sup.), 58 Atl. Rep., 113.

The case of Western Union Tel. Co. vs. Thorn, 64 Fed. Rep., 287, decides that a defect in the plaintiff's case may be cured by evidence in the defendant's case. Also—

D. L. & W. R. Co. vs. Daily, 31, N. J. L., 526.

May vs. N. Hud. Co. Ry. Co., 49 N. J. L., 445.

Vonderhorst Brewing Co. vs. Amr. line, (Md.), 56 Atl. Kep., 833.

The case of Kaufman vs. Bush, 56 Atl. Rep., page 291, is a parallel case in many respects. The decision of the New Jersey Court of Errors and Appeals was delivered by Mr. Justice Garrison, November 16, 1903. The facts briefly stated are as follows: The plaintiff, in full daylight, started to cross a public highway,

upon which the defendant's team was being driven. The point was a public crossing at the junction of two streets, and when the plaintiff was about leaving the sidewalk, the defendant's team, which was approaching the crossing at a high rate of speed, seemed to the witness, Quinn, to be one-half a block away, although, in view of her other testimony, this was an exaggerated estimate, so far as the exact distance was concerned. When the plaintiff had got between four and five feet from the sidewalk which she had just left, she was struck by the fore feet of the defendant's horse.

Mr. Justice Garrison, at the bottom of page 291, says: "From these facts one legitimate inference would be that the plaintiff had began to cross the highway at a public crossing before the defendant's team had engaged in the same attempt, and while it was sufficiently distant to have avoided the collision, but for either the rate of speed, at which it was progressing, or for the lack of sufficient control by the driver over his horse, or from the inattention of the driver to the conditions upon the crossing that he was approaching."

And again, page 292, he says: "If, from this testimony the jury found, as they might, that the plaintiff had reached the crossing first and was using it at a time when the driver of the approaching vehicle ought to have seen her, and could, by exercising proper care over a horse that was under proper control, have either stopped or turned aside so as to avoid running her down, a case of negligence was sufficiently made out. The dangerous character of public crossings, the rule that gives the

person who has commenced to cross a priority of right, and the serious consequences that must flow from the neglect of drivers to approach such crossing circumspectly and in reasonable control of their horses, are all involved in determining the degree of care that would absolve a driver from negligence when, in point of fact, he has run down a pedestrian at a public crossing.

That Mrs. Burns did not contribute, by her own acts, to the injury of which she complained is apparent from the evidence. She made such an observation as a prudent person exercising reasonable care would have made. Before and while she was in the act of stepping from the curb to the cross-walk she observed First street and Monmouth street, and looked in the direction from which the horse and wagon approached that eventually hit her. At this time the same was not within the range of her vision and certainly had not reached a point that would place her in danger. She carefully and prudently used the cross-walk provided for pedestrians. After she had started and was in the act of crossing her view of Monmouth street, to the north, was obstructed by a covered wagon passing her on First street in the opposite direction. As soon as this wagon passed her, she resumed her observation, and suddenly, without any fault on her part or any control over the situation, found herself in a position of imminent and immediate danger by reason of the defendant's driver approaching the crossing at a high rate of speed and without properly observing the existing conditions. Mrs. Burns very sensibly attempted by jumping to reach the sidewalk to which

she was the nearest, (page 12 of the Case) and it is respectfully submitted that there was no contributary negligence on her part, and that the question was properly left to the jury. If, however, she, without fault on her part and through the negligence of the driver, found herself in this position of immediate danger, where it was necessary for her to make an immediate and instant decision to go one way or the other in order to escape, and happened to make, in the confusion and danger of the situation, the wrong decision, she would not be guilty of contributory negligence, but of an error in judgment, for which the law would not hold her responsible.

N. Y. L. E. & W. R. R. Co. vs. Randel, 18 Vr., 144.
Palys vs. Jewett, 5 Stewart, 322.

POINT II.

The second assignment is that the Court committed error in refusing the motion of the defendant below, at the close of all the evidence in the case, to direct a verdict in favor of the defendant and against the plaintiffs, on the ground that it appeared by the clear weight of evidence that this accident happened in the middle of the block; that the duty was upon the plaintiff to look out for approaching wagons, and where no duty was placed upon the defendant except to proceed along there at lawful speed; also because the clear weight of evidence shows that the plaintiff herself was guilty of negligence and that the accident would not have happened without her negli-

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gence. The question of contributory negligence on the part of Mrs. Burns, is, I think, sufficiently considered in Point 1.

The clear weight of evidence is that the accident happened at the street crossing and within a few feet of the side of the street to which Mrs. Burns was going. The testimony of Mrs. Burns as to this is corroborated by all the surrounding circumstances. The accident happened about six o'clock in the afternoon. Her husband would be home for dinner about seven or shortly after; she went first to the baker's store, which was on the southeast corner of Monmouth and First streets (this stands in the record uncontradicted), to buy some bread, she then proceeded in the most direct manner to cross Monmouth street, using the southerly crosswalk to reach a butcher's shop a few doors beyond the southwest corner of Monmouth and First streets, where she desired to purchase some meats for dinner. Being out for this purpose, at this time of the day, it is unreasonable to suppose that she would walk half a block out of her way in order to cross the street.

The testimony of the driver, Gustav Waeder, is extremely contradictory, at page 44 of the case, he says that the accident occurred "in the middle of the block," and at the same time he says that the accident happened about twenty-five feet southerly from First street. At page 53, in answer to a question by the Court, "Where were you when you first saw her?" he answered, "I was on First street, the last crossing." At page 49 he says when he first saw Mrs. Burns she was about ten feet away. According to this testimony the acci-

dent would have happened somewhere between ten and twenty-five feet southerly from the southerly cross-walk on Monmouth street. If this be so, then it could not have happened in the middle of the block, as testified to by the driver and the small boy who was in the wagon with him, because it is a matter of general knowledge that an ordinary city block is from two hundred to two hundred and fifty feet in length, and the testimony of the boy Aughney, at page 60, in answer to a question as to the length of this particular block, is, "I dont think it is any different from any other block." It is readily understood that a miscalculation as to distances can easily be made, but it is respectfully urged that no one could honestly take one hundred or one hundred and twenty-five feet for ten or twenty-five feet, the difference is too great to be due to a mistake in estimation. A careful examination of the driver's testimony will show that he testifies Mrs. Burns was at the same time, on both sides of the horse and in front of it. At page 55, he testifies that he stopped the horse before it had reached Mrs. Burns, and at page 48 his testimony is, that the horse did not go more than two feet after Mrs. Burns was struck. His entire story has the appearance of being unreliable. He had the Aughney boy in the wagon with him according to his own tale for fun, and it seems reasonable to suppose that the boy was engaging his attention, and if he had not been there, it is quite probable the driver would have paid more attention to his horse, and the accident been avoided.

At page 46 of the case, his testimony is as

follows: "She told me it was her own fault and she didn't want to make any trouble for me, any that if I stood for the doctor's expenses it would be all right. This is hardly conceivable. Doctor Sauer testified (page 35 of the Case,) that when he first saw Mrs. Burns some time after the accident, she was still in a semi-comatose condition, half unconscious and very nervous. She was bleeding from a wound under her right eye, a gash, her right arm was helpless. That on examining her he found a fracture of the right collar bone, and rupture of the right eyeball, a depressed fracture of the bony wall of the eye (page 12 of the Case). Mrs. Burns testified that she was in the drug store, when she first knew anything after the accident, and her daughter was the first person she saw (page 17 of the Case), and that she did not know how she got to the drug store. In this condition, it is hardly possible she could have made the statements to which the driver testified.

The testimony of the boy Aughney, is to say the least, peculiar, so anxious was he to testify, that at page 60, he will be found interrupting before the question could be completed. At page 61 his testimony is, that he was in the wagon which was in the middle of the street, that Mrs. Burns was on the sidewalk, and while she was in this unconscious condition he heard her say to the driver, it was her fault. This from the dictates of reason, must seem highly improbable. At the top of page 61 his testimony is, that Mrs, Burns slipped forward into the shaft. The driver's testimony at page 50 is, to the effect, that Mrs. Burns stepped backward into the horse.

It is respectfully submitted, that the clear weight of evidence does not show that the accident happened in the middle of the block, but on the contrary, this was a fair question for the jury to determine, with the weight in favor of its occurrence at the cross-walk.

POINT III.

Error is assigned in the Court's refusal to charge the jury as follows: "If the accident was caused by the covered van obscuring the driver's view, no negligence can be found in defendant."

It is manifest there was no error in this refusal. The request is too general. If the driver's view was obscured, and he conducted himself in an improper manner, such as running his horse over a street crossing in utter disregard of the fact that there were or might be pedestrians attempting to cross the street, he would be, regardless of the obstruction to his view, negligent. This request has no reference to the testimony. It does not appear in the testimony anywheres that the accident was caused by the covered van obscuring the driver's view. On the contrary, the driver himself testifies, as before stated, that he saw Mrs. Burns a sufficient distance away to stop his horse before reaching her. Such a charge, would at least, have been superfluous. Den vs. Wintermute, 1 Gr. 177. And without further citation of authority it is respectfully submitted that the Court committed no error in refusing to charge this request.

POINT IV.

Error is assigned in the Court's alleged refusal to charge the jury as per defendant's first request, as follows: "The plaintiff must establish, by a preponderance of evidence, that the defendant had failed to use the degree of care that a reasonable person would under the circumstances."

This request was substantially and correctly charged. At page 64 of the case, the Court charges as follows; "The first question that must be taken up by you for consideration, in dealing with this case, is whether these plaintiffs have satisfied you by the preponderance of evidence, that the injury was due to negligence on the part of the driver."

And again at page 66 of the case, the Court charges: "Now I have said that the plaintiff must establish on the first instance by weight of evidence, that there was a lack of reasonable care on the part of the driver; that the defendant's driver has failed to use the degree of care that a reasonable person would under the circumstances (in the language of one of the defendants requests to charge). This rule you must apply to whichever set of facts you consider to be the correct one in the case, the occurrence of the accident at the cross-walk or the occurrence of the accident in the middle of the block."

And again on pages 69 aud 70, the Court charges: "Now whichever be the situation in this case, unless the plaintiffs have satisfied you that the driver was lacking in reasonable care, your verdict would be for the defendant. But if the plaintiffs have satisfied, by a pre-

ponderance of evidence, that there was a failure on the part of the defendant's driver in that regard, then your next duty is to take up the further question, whether, notwithstanding that failure of duty the defendant has satisfied you that Mrs. Burns, herself failed to exercise that care which the law required of her.

It is well established law in this State and elsewhere, that "Where the substance of a requested instruction was given, it is no ground of exception that the particular forms of expression requested were not used.

Where the Judge directs the jury in the real matters in controversy, and declines to charge upon a point which is superfluous, this Court will not grant a new trial—Den. vs. Wintermute, 1 Gr. 177.

Bond vs. Bean *et al.* (N. H. Sup.), 57 Atl. Rep., 340, and also Elwell vs. Roper (N. H.), 58 Atl, Rep., 507.
Den. vs. Sinnickson, 4 Hal., 149.

It is respectfully submitted that this point is entirely and correctly covered in the Court's charge and that the defendant's rights have not been prejudiced thereby.

POINT IVa.

The assignments of errors under 4a contains the following: "There is also manifest error in this, to wit: the Court's charge (as a modification of said defendant's first request), viz: The plaintiff must establish, in the first instance, by weight of evidence that there was a lack of reasonable care on the part of the driver, that the defendant's driver had failed to use the

degree that a reasonable person would under the circumstances."

Upon reference to this bill of exceptions, page 75 of the case, it will be observed that no exception was sealed upon which to base this assignment of error.

"Where objections are predicated on defects in an instruction to which no special exception was taken, they cannot be considered on appeal."

Vanderhost Brewing Co. vs. Amrhine, (Md.) 56 Atl. Rep., 833, Sec. 7 of the Syllabus.

Assigned errors not presented to the Circuit Court cannot be reviewed by the Court above (N. J. Court of Errors and Appeals, June 22, 1903). Muth vs. Booye, 55 Atl., 287; also Kuntz vs. R. R. Co., 55 Atl., 915. Phila. & T. R. Co. vs. Neshaminy El. Ry. Co. 55 Atl., 1034. Also Van Alstine vs. Franklin Council No. 41, J. O. U. A. M. (N. J. Errors & Appeals, Nov. 16, 1903), 58 Atl., 818. Conrad vs. Broeker (N. J.) 58 Atl., 1019. Davis vs. Little, 64 N. J. L., 595.

It is therefore respectfully insisted that the Court should not take into consideration this assignment of error. If, however, it should, then it is insisted that there is no error because the Court subsequently gave full, ample and proper instructions, at pages 69 and 70 of the case.

"Error in an instruction is no ground for reversal where the Court subsequently gave full, ample and proper instructions, so that the jury could not have been misled."

Fitzpatrick vs. Union Traction Co.
(Pa. Sup.), 55 Atl. Rep., 1050.

It is also contended that there is no difference between the phrases "Weight of evidence" and "Preponderance of evidence," that could be prejudicial to the defendant's case, in the consideration thereof by the jury. "Weight of evidence" is defined in Bouver's Law Dictionary, Vol. 2, p. 658, as follows: "This phrase is used to signify that the proof on one side of a cause is greater than on the other.

In 3 Greel. Ev., Sec. 29, the following words are used "Weight of Preponderant Evidence"; thus it would seem that "Weight of Evidence" is a more comprehensive phrase than "preponderance of evidence" and includes the latter.

POINT V.

Error is assigned in the Court's alleged refusal to charge the jury, as per defendant's second request, as follows: "If it appeared to the plaintiff that the driver of the wagon was not going to respect what she thought were her rights to cross the street first, she should have waited."

It is respectfully submitted that the evidence does not show that Mrs. Burns was in such a position, as said request contemplates. The Court however, in substance, so charged at page 72. "The statement means this, that if under the circumstances Mrs. Burns had the right of way ahead of the butcher wagon, and notwithstanding that she saw that the butcher wagon was going to run her down,

and by the exercise of reasonable prudence could escape being run down, of course it would be her duty to escape and let the butcher wagon go by.

She couldn't rush blindly into danger just because she thought she had the right of way. And so, if the wagon was in a position and going at a speed which indicated that there was danger to her and she saw it, and took a chance of getting across first, she would be guilty of contributory negligence and your verdict should be for the defendant."

There is no substance to this assignment of error, for the reasons given under Point IV.

POINT Va.

Upon reference to the bill of exceptions, page 75 of the case, it will be observed that no exception is sealed upon which assignment of error (Va), page 81 of the case, can be predicated. And this assignment is not well founded for the reason given under Point IVa.

It is insisted that all the assignments in the assignment of errors in the printed case, pages 79 to 83, termed modifications, are irregular. The Court must either charge or refuse to charge a request properly made.

Franklin vs. Frerhofer, &c., (N. J., Sup. June 13, 1904), 58 Atl., 82.

POINT VI.

The sixth assignment of error is as follows: "There is also manifest error in this, to wit: (The Court's charge as a modification of the defendant's fourth request), viz.: "If this

wagon was in such a position as that, moving towards her, was within such a distance that she ought to have seen it, and to have provided against it in the exercise of reasonable care on her part, then, if she failed in her legal duty, and the accident resulted wholly or in material part of such failure, she would be guilty of what the law calls contributory negligence. and would not be entitled to recover in this case."

In Black's Law and Practice in Accident Cases, page 423, sec. 322, contributory negligence is defined as follows: "Contributory negligence is that conduct of the plaintiff, i. e., the want of ordinary care—which proximately contributes to the cause of the injury." In a note at the bottom of page 424, contributory negligence is defined to be—"Contributory negligence, in contemplation of law is such acts or omissions, on the part of the plaintiff, amounting to a want of ordinary care, as concurring or co-operating with the negligent acts of the defendant, are a proximate cause or occasion of the injury complained of."

The part of the charge objected to clearly means that if Mrs. Burns failed in her legal duty, in the slightest degree, and the accident resulted from such failure on her part, she could not recover. It seems to me that such a statement of the law does no violence to the above definitions and is substantially the same as the language used in a number of New Jersey decisions, viz.: "A plaintiff suing for an injury caused by the negligence of the defendant, will not be entitled to recover, if his own negligence contributed to the injury in such a

way that if he had been guilty of no negligence he would have received no injury.

C. R. R. Co. vs. Moore, 4 Zab. 268, 824.
Telfer vs. N. R. R., 1. Vr. 188.
Ashmore vs. Penna. &c. Co., 4 Dutch 180, 185.
Runyon vs. C. R. R. Co., 4 Zab. 824.

C. R. R. Co. Ads. Van Horn, 9 Vr. 133.
Menger vs. Laur, 26 Vr. 205.
Smith vs. Erwin, 22 Vr. 507.
Blaker vs. Receiver of N. J. Midland Ry. Co., 3 Stew, 240.
P. R. R. Co. vs. Righter, 13 Vr. 180,

The case of C. R. R. Co. vs. Moore, uses the following language: "The negligence of the plaintiff to prevent his recovery, must directly tend to produce the injury, or must be the approximate cause of it."

In the case of Blaker vs. Receiver of N. J. Midland Ry. Co., the second syllabus is as follows: "When a person is killed by collision with a locomotive, if it appears that his carelessness materially contributed to the disaster, his next of kin have no right to damages." (Also see authorities cited in said case).

If plaintiffs's negligence must contribute to the injury in such a way that if she had been guilty of no negligence, she would have received no injury, then in order, for the failure of duty to eonstitute contributory negligence, it must not be remote, but the injury must, in whole or in part, result from sucn failure. It is perfectly clear that if the accident wholly re-

sulted from failure of legal duty, on the part of Mrs. Burns, she could not recover. It is equally clear that if the accident resulted in material part from such failure, she could not recover, and therefore it is respectfully submitted that there is no error in this part of the Court's charge.

It will be observed that the defendant's fourth request to charge is as follows: "The duty was upon the plaintiff before crossing the street to use her powers of observation to observe approaching ~~trains~~ vehicles which are within a distance, if run at lawful speed, to put her in danger" (page 63 of the case). S. 3.

It will also be observed that on page 70 of the case, the Court's charge contains the words of this request verbatim. There was, therefore, no modification of this request, and the sixth assignment of error should fail.

POINT VII.

Error is assigned in the Court's alleged refusal to charge the jury as per defendant's fifth request, as follows: "If the plaintiff saw the wagon coming and took the chance of crossing before it, she cannot recover if injured."

This request is clearly erroneous in law. It is well established law in this State, that Mrs. Burns before attempting to cross the street was only bound to make such observation as would be sufficient to observe approaching vehicles which were within a distance, if run at lawful speed, to put her in danger. This request, therefore, is entirely too broad, and was properly refused, because if the plaintiff

saw the wagon coming at a sufficient distance away so as not to put her in danger, she would be justified in attempting to cross in advance of the approaching wagon.

Kaufman vs. Bush, hereinbefore cited
Newark Passenger Ry. Co. vs. Block,
26 Vr., 605.

The last mentioned case was in the Court of Errors and Appeals, and the opinion was delivered by Mr. Justice Magie at page 612, in speaking of the duty devolving on one using a highway for passage on foot, he says. "It is impossible, in my judgment, to classify these variant circumstances, and to lay down a precise rule as to the degree of care required in each class. In dealing with cases of this sort we must recur to the general rule, which requires one, in exercising his lawful rights in a place where the exercise of like rights by others may put him in peril, to use such precaution and care for his safety as a reasonably prudent man would use under the circumstances.

And again, on page 613, he uses the following language· "But the request before us brings into question the extent to which one crossing the roadway on foot must extend his observation. Its claim is that such observation must be extended to any approaching car, no matter how distant. But this is obviously an exaggerated notion of the duty required. The most prudent man would never suppose himself required to thus to observe. If such a rule of duty were adopted and practiced in a crowded city, the crossing of many streets

would be barred to pedestrians for a great part of the time. The general rule to which we have recurred does not justify this excessive view of the duty required. It will require one crossing the roadway on foot to extend his observation only to the distance within which vehicles proceeding at customary and reasonably safe speed would threaten his safety."

At bottom of page 613 and top of page 614 similar request. "*If by looking the plaintiff could have seen and so avoided an approaching car she can not recover.*"

Speaking of above request. "It is inapplicable to the crossing of a street railway, the cars of which must not exceed such speed as will permit the lawful customary use of the highway by others with reasonable safety."

It is insisted, however, that the Court at page 72 of the case, correctly stated the law in regard to this subject and that no error was committed.

POINT VIII.

Error is assigned, because the Court refused to charge the jury as per defendant's sixth request, as follows: "If plaintiff could have averted the injury by not attempting to cross in front, she contributed to the injury which she received and cannot recover."

It is respectfully submitted that this assignment raises no error, for the reasons advanced under Point VII. First there is no evidence in the case that the plaintiff could have averted the injury by not attempting to cross in front."

And secondly the evidence shows that without fault on her part and by reason of the driver's negligence, she was in a position of immediate danger and bound to make a quick decision. And the Court, page 72, correctly charged that if under those circumstances she made an error of judgment in going the wrong way, the law would not hold her responsible, and she was not guilty of contributory negligence. In the third place, this request would seem to contemplate that the plaintiff remain indefinitely in a stationary position, without taking into consideration the existing conditions, whereas, she was only bound to use such prudence and care as a reasonable person would use under like circumstances.

POINT IX.

Assignment of error (9) on page 82 of the case is subject to the same treatment as assignments (4a) and (5a).

POINT X.

Assignment ten, on page 83 of the case is open to the same criticisms as assignments 4 a, 5 a, and 9.

The objection is to the following language in the Court's charge, "Now, if you find on the whole case, that the plaintiff has shown you that there was negligence on the part of this driver which caused the accident, and that the defendant has failed to satisfy you that there was any contributory negligence on the part of Mrs. Burns, then, and only in that case would it be your duty to return a verdict in favor of these plaintiffs." It is respectfully

submitted that no error was committed by the Court. This form of expression is almost invariably used by the Court in concluding a charge to the jury. The Court has already instructed the jury two or three times, as you will observe upon reading the whole charge, that the plaintiffs must establish in the first instance by a preponderance of evidence that the defendant's driver was negligent, and when he said to the jury, "If you find that the plaintiff has shown you that there was negligence," he had in mind his previous instruction, that is, by a preponderance of evidence, and the jury having listened to the charge, certainly had in mind the Court's previous direction, that the negligence of the driver should be shown to them by a preponderance of the evidence. In other words, this language was used with reference to and in conjunction with, what the Court had already stated, and taking the charge in its entirety, there is no error. There was nothing misleading and the jury was correctly instructed.

POINT XI.

Assignments (3)-(5)-(7)-(8), raise no error. The respective requests upon which they were respectively predicated are objectionable, because each one is a request to charge that a part of a group of circumstances adduced to prove a fact is sufficient to establish the fact. The Court cannot be called upon to charge the jury as the legal effect of a part only of the material facts proved in the cause.

Blackmore vs. Ellis, (N. J. Errors & Appeals) 57 Atl., 1047.

Runy vs. C. R. R., 65 N. J. L., 228.
Traction Co. vs. Chenowith, 61 N. J. L., 554.

POINT XII.

It is respectfully submitted upon the whole case, that no injustice has been done. No error committed.

The general effect of the charge of the Court, rather than a casual expression in it, must govern the interpretation or construction of it.

Kyle vs. Southern E. L. & S. Co., 34 Atl., 323.
McCloskey vs. Bell, &c., 27 Atl., 246.
Fitzpatrick vs. Union Traction Co., 55 Atl., 1050.

Judicial misdirection, which is beneficial to the party seeking a retrial will not avail.

Kirk vs. Rickerson, 17 Vr., 13.

"A misdirection to the jury is no ground for a new trial unless it affects the justice of the case. If justice be done by the verdict, the Court ought not to set it aside.

Princeton Turnpike vs. Gulick, 1 Harr., 161.

Wyckoff vs. Runyon, 4 Vr., 107.

Mechanics' Ins. Co. Ads. Nichols, 1 Harr., 410, 413.

ADDENDA.

Assuming that counsel for defendant (Plaintiff in Error) will use the brief in this Court upon which the case was submitted by him in the Supreme Court, I desire to point out that in said brief the testimony, through inadvertence I am sure has been incorrectly quoted in some places. A striking instance of which is to be fouud on page 4 of said brief, were under the caption, "Distance Mrs. Burns and the cart went after she saw it till it hit her." The following language is used. "While the cart was going the distance of eight to ten feet from her, which distance it was when she first saw it, she went the distance of about five to six feet, P. 19, l. 10-30."

Upon reference to the page cited (page 19 of the printed case), it will be found that Mrs. Burns testified that she was from four to six feet from the nearest curb, the one to which she was going when she first saw the wagon, and not that she went the distance of five or six feet after she saw it. In answer to a question as to how far she went after she saw the wagon she said she did not know (page 19 of the case). The testimony seems to indicate that she made a jump and as she was in the act of doing so the horse and shaft of the wagon collided with her (page 21).

Another misquotation will be found on page 12 of said brief which reads as follows:— "At the above point in her cross-examination, P. 21, l. 33, her attorney, Mr. Cruse, wrongfully broke in with the question, viz." "No, but you looked before you got to the wagon?" "(Thus

putting the words in her mouth, when she answered)".

"A. Yes, I looked; sure I looked." And on the same page, but half of one of her answers is quoted.

It will be seen from the case that there was considerable latitude permitted at the trial, on both sides, and the technical rules were not strictly adhered to. The witness was a woman along in years and both nervous and excitable. (P. 22, l. 20). She clearly did not understand counsel's question, which accounts for my asking a question in the cross-examination. It was done with the best intention and for the purpose of expediting the trial.

The question, however, was not as quoted by Mr. Noonan, but as follows:

"Q. (Mr. Cruse) No, but before you got to the wagon?"

It will be seen that no words were put in the mouth of the witness, She was simply asked if she looked before she got to the wagon. From the preceeding questions and answers on the same page of the case it clearly appears that the witness in answering had in mind her situation after she was on the crosswalk and while the covered van was in the act of passing her.

"Q. When you started to cross Monmouth street did you look up Monmouth street?

"A. I looked up First street; I seen there was nothing around; I could not look Monmouth street, for the covered wagon was in front of me, but I looked up and down; looked this way; there was nothing coming; this wagon

was passing me down and I was passing it up."

Immediately preceeding the question by me is the following:

"Q. Did you look before you passed the van wagon.

"A. No, but I looked after; I could not look before that, for the wagon was here, and I was walking aside of the wagon." (Page 21).

That Mrs. Burns, before attempting to cross the street, looked up Monmouth street in the direction from which the horse and wagon come that eventually ran her down is made very plain by Mr. Mulvaney on cross-examination. (Page 22, l. 10).

"Q. You are quite sure that you looked up Monmouth street?

"A. I did."

Respectfully submitted,

HOWARD R. CRUSE,
Attorney and of Counsel for Plaintiffs
(Defendants in Error).

November Term, 1906.

New Jersey ~~Supreme~~ Court of Errors & Appeals

SARAH BURNS and HUSBAND, Plaintiffs (Def'ts in Error), vs. RICHARD ECKERT, Defendant (Pl'ff in Error).	TORT. On Error to ~~Hudson Circuit Court.~~ Supreme Ct

BRIEF OF THOMAS F. NOONAN,
Att'y and of Counsel for Defendant,
(Pl'ff in Error).

This cause was tried on October 31, 1904, before Hon. Chas. W. Parker and a Jury, and a verdict rendered for the plaintiffs below for $3,500; for Mrs. Burns, $3,000; and for her husband, $500.

The case was for damages for personal injuries to the plaintiff, caused by a collision between her and the defendant's butcher cart, on Monmouth Street, Jersey City, December 5, 1904, about 6 P. M., as she was crossing tha Street from East to West, and the butcher cart was going from North to South. Her story is that she was crossing on the regular crosswalk, at the intersection of Monmouth Street and First Street, at the South crossing, at the tir of the collision. The story of the defendant is, that c lision did not take place at the crosswalk, but quite so distance South of First Street. It is agreed by both s that there was another wagon, a furniture Van, somewhere there at the time. The plaintiff says the Van was goin East along First Street and across Monmouth Street, as s was going West along First Street, and across Monmouth S that as the Van passed her, the cart came along behind t Van, etc. The defence says that the Van was not coming the corner, that it was standing still, on the West side Monmouth Street, some distance South of First Street.

POINT I.—Non-Suit.

See motion for non-suit, refusal, and exception, p. 43; and assignment of error, p. 79, & 88.

The motion for non-suit should have been granted.

(1) Because defendant was not negligent; (2) because Mrs. Burns was guilty of negligence, by which she caused or contributed to her injury, in not looking up Monmouth street to the North before or while crossing it, to see the butcher cart coming from the North that ran into her.

Facts of the Case on Plaintiff's showing.

Mrs. Burns was crossing the south crosswalk of Monmouth street, from east to west, at its intersection with First street, about six P. M., December 5, 1904 (crossing from the southeast corner to the southwest corner), p. 9, l. 10; Cross-Ex. p. 20, l. 28-38.

First street runs east and West. Monmouth street runs north and south across First street (at right angles), and to a point about 50 feet south of First street where it turns, p. 9, l. 20 (it is a straight street to the north, whence came the cart that hit her, so she could see it, etc.)

On the corner she went from, the southeast corner, was a baker's shop; and on the corner towards which she was going, the southwest corner, was a saloon, p. 9, l. 20. There was a butcher shop a few doors up First street, west of Monmouth street, to which she was going, She was walking at an ordinary gait, p. 11, l. 14. She came out of

the baker's, on the southwest corner of Monmouth and First, and was going to the butcher's on First, few doors west of Monmouth street, p. 21, l. 38.

There was some *snow* on the ground, p. 27, l. 37.

There was was an *electric light* on the corner, as she says, plenty of light so she could see everything, p. 11, l. 33.

There were two vehicles passing through that intersection about at that time—(1) a covered wagon, p. 20, l. 35, sometimes called a grocery wagon, p. 9, l. 32, coming *down* First street, as Mrs. Burns was going *up* on First street across Monmouth street p. 9, l. 30-40; sometimes called a van, p. 12, l. 6; Cross-Ex. p. 20, l. 15-18 and l. 36; p. 21, l. 3-7.

(I shall call this covered wagon a *van* hereinafter; and I shall call by the name of *cart*, the butcher's wagon which ran into her, as it is sometimes so called in the testimony).

A.

The Cart ran into her as she and the van passed each other.

The cart of defendant ran into her as she was going west on the south crosswalk of First street and across Monmouth street, just after the van passed her down First street and across Monmouth street, p. 10, l. 12-38; p. 20, l. 14-25; p. 21, l. 3 8.

B.

When she first saw the van.

She first saw the *van* when she *started* to

cross, p. 9, l. 30. She was not on the cross-walk yet, but was going on to it, when she first saw the van, p. 9, l. 34-40; p. 22, l. 35; p. 23, l. 22-33.

The van was not yet on the crossing, it was coming at the corner, so she saw the horses were not going to turn around into Monmouth street, p. 23, l. 1-10, and p. 23, l. 25-40.

C.

When she first saw the cart.

She *first* saw the *cart* (coming from her right) just as the van passed her down, and the cart was then about eight to ten feet from her, p. 10, l. 15-20; p. 12, l. 2-5; p. 18, l. 30; p. 20, l. 17-20; p. 23, l. 7-12; bottom p. 23, top p. 24.

D.

Distance Mrs. Burns and the cart went, after she saw it, till it hit her.

While the cart was going the distance of eight to ten feet from her, which distance it was when she first saw it, she went the distance of about five to six feet, p. 19, l. 10-30.

E.

Speed of Van and of Cart.

The *Cart* was "Coming in big speed, good, fast speed"—p. 10, l. 33; very fast, p. 22, l. 20.

The *Van* was "going at a rate of speed—well, quiet, going nice, and * * * not quite trotting, kind of fast walking," p. 12, l. 5-11.

F.

The Cart went straight ahead, on its right side of the road, and did not veer into her or towards her,—bottom p. 28, top p. 29.

G.

She was hit on the West, or farther side, of the road she was crossing.

She was nearly all the way across the road when run into by the Cart, about 4 feet or less from the West sidewalk—p. 26, l. 4-12. And when she *first saw* the Cart she was about 5 or 6 feet further away from the sidewalk—p. 19, l. 10-28; and the Cart was then 8 to 10 feet from her as above. So that if she stayed where she was when she saw the Cart, she was safe, as it had room to pass between her and the West curb. But she raced to get across ahead of the Cart (which was coming fast, and only 8 to 10 feet from her), because she was going that way, and was nearest to that sidewalk—p. 13, l. 3-8. She says:—"I went where I wanted to go (*or*) I would not be hurt" p. 27 l. 29-30.

H.

She had time enough to recognize both the Cart and the Driver, etc. before they ran into her—p. 10, l. 36; p. 25, l. 18-30. She recognized the driver on account of the wagon (Cart) before it struck her—p. 27, l. 5; because she knew the kind of wagon it was, and knew the driver, p. 27, l. 5-24. And noticed also the size of the driver's companion in the wagon—p. 13, l. 34; and noticed that the

driver had a cap on, and had it down over his ears and face—p. 23, l. 11.

I.

She crossed in front of the cart, and was hit and knocked down by its far shaft, the *right* shaft, the farther shaft from the side she came from—p. 10, l. 31; p. 30, l. 16-21. So that she saw the Cart coming very fast, about 8 to 10 feet from her, when she was about 10 feet from the West sidewalk,—yet she crossed over in front of the Cart towards the West sidewalk because she was going that way—(p. 13, l. 6), because that was the nearer sidewalk p. 13, l. 6; because she went where she wanted to go—(p 27, l. 29); and she "went where she wanted to go (or) wouldn't got hurt" (p. 27, l. 29); although she had time enough to recognize the Cart and the Driver before she was hit, p. 10, l. 36; p. 25, l. 18-30; p. 27, l. 5-24; and the size of the driver's companion, p. 13, l. 34; and how they were dressed and acted, p. 23, l. 11; although there was nothing else in the roadway to threaten, confuse, or interfere with her safety or movements.

J.

Mrs. Burns did not look up Monmouth Street, Whence the Cart Came,

either before she stepped into the roadway, or after doing so, until she heard the cart, and then saw it about 8 or 10 feet from her, and then she continued on to cross in front of it.

This is perhaps the crux of this case. See

her Direct Examination, p. 10, l. 4-11—viz:—

"Q. Before you stepped upon the street did "you or did you not take any observation *of* "Monmouth Street?

"A. Yes, I was crossing Monmouth Street, "certainly it was Monmouth Street I was "crossing, and I seen the wagon coming down "towards me, and then I went to pass it.

"Q. Did you see anything else?

"A. No, nothing.

"Q. Did you look?

"A. I did certainly look."

But note that the question did not ask her about looking *up or down* Monmouth Street, but only if she took any observation *of* Monmouth Street; to which she says she did (because) she was crossing it, and she saw the Van coming down First Street; and saw nothing else, although she did look. But she would see the Van coming down, by merely looking straight ahead, because she was facing it, as she and the Van were going towards each other, in opposite directions, and the van was only across and directly across the street, where she was facing as she went (p. 9 l. 30-40; p. 22, l. 35; p. 23, l. 1-10 and l. 25-40; and when she says she did look and took observation of Monmouth Street and saw the Van, (p. 10, l. 7-10 that is evidently what she meant, namely, that she looked that way, that is, across Monmouth Street, and up First Street, to the Van coming down First Street. But that was *not* looking either to her *right* or to her *left*, as she started to cross That was not looking North on Monmouth Street, whence the cart came that hit her. Such was her conduct just "before stepping upon the street," and while crossing—

p. 10, l. 4-10. See Plaintiff's Cross Examination—p. 21, l. 10—viz:—

"Q. When you *started across* Monmouth Street, did you look *up* Monmouth Street?

"A. I looked *up First* Street; I seen there "was nothing around; I couldn't look Mon- "mouth Street, for the covered wagon was in "front of me, but I looked up and down, looked "this way, there was nothing coming, this "wagon was passing me down and I was pass- "ing it up."

Note that the only direction in which she says she looked was "up First Street," and says that "couldn't look Monmouth Street, for covered wagon was in front of me;" "but I looked up and down;" evidently meaning *up First* Street, and *down Monmouth* Street; *not* up Monmouth Street (the direction whence the cart came) because she was talking about the time when the van was between her and the cart. Note well that the fact of the van being there, was not any excuse for not looking *up* Monmouth Street, when she *started* to cross, (which was the time she was asked about), for then the van was across Monmouth street from her, as she says above, pp. 9, 22, 23, and hence did not obstruct her view to the north; and for not looking to the north then, when starting across the street, she was clearly guilty of contributory negligence, since if she had looked she must see the cart there coming at a fast speed towards her crossing.

Again, see page 21, l. 21-26, viz:—

"Q. I ask you, *at the time you started to "cross* Monmouth street, did you look up Mon- "mouth street to see if anything was coming?"

A. **No, I didn't look up Monmouth "street;** I couldn't see nothing coming at "that, and there was nothing coming at that, "but the wagon was coming down First "street."

Here she flatfootedly admits, as a fact, that she *did not look up* Monmouth street, as she *started* to cross; although she attempts to cloud that *fact* by an *argument* (?) "that there was nothing coming, but the wagon coming down on First street." But that cloud vanishes when we reflect that her statement "that there was nothing coming," cannot count, when she did not look.

Again see p. 21, l. 31–33, viz:—

"Q. Did you look *before you passed* the van "wagon?" i. e., up Monmouth St. (See "Case")

"A. No, but I looked *after*; I couldn't look "before that, for the wagon was here, and I "was walking aside of the wagon."

But she cannot be heard to assert that she could not look *before* she passed the van, for the fact necessarily is that she could look *up* Monmouth street before the van got to her at all, i. e., when it was at the opposite corner, and just as she was stepping down on to the crossing, pp. 9, 22, 23, which was the very time she should have looked both ways on Monmouth street. Besides, if the van obstructed her view *up* Monmouth street, then she was obliged, under the law, under pain of disability to recover here, to wait till it passed her by, so she could look, etc., before proceeding across, Block case, 26 Vr. 612, bottom.

Her Attorney says that she did look up Monmouth St., as per her testimony, p. 22, l. 9, that she is quite sure she did look up Monmouth. But she could not mean here that she looked up Monmouth when she started across, or before the Van passed her, - as shown above on this page

The law is well settled that it was her duty to look both ways, and to wait till she could see, if view obstructed temporarily.

See Newark Passenger Ry. v. Block, Court of E. & A., 26 Vr. 612 (bottom):—"If obstacles "temporarily intervene so as to prevent ob- "servation, prudence dictates delay until such "observation as is requisite has been made." And see 26 Vr. p. 613 (middle), viz.:— "Under this rule she should doubtless have "waited until she could have observed any "west bound car (here, southbound vehicle), "which traveling at customary speed, might "imperil her in crossing," as this cart was, according to all the proof, so traveling as to imperil her in crossing. And see Ib., 26 Vr. 612, viz.:—"In crossing the roadway, a foot pas- "senger must likewise use his powers of ob- "servation to discover approaching vehicles, "and a reasonable judgment to cross without "collision."

See Chief Justice Gummere, in N. Hud. Co., Ry. v. Flanagan, Ct. E. and A., 28 Vr. 698—viz: "The rule is perfectly well settled that a per- "son crossing a street on foot, is bound to "look out for approaching vehicles, and, if "neglecting to do so, he is hurt, he will be "considered to have contributed to his injury "by his own negligence, and will be barred "from recovery from the person who inflicted "it." This was laid down as the law in the case of a nine year old boy.

And see Brady v. Con. Trac. Co, 35 Vr. 374, viz.: "A duty devolved upon the plaintiff "(boy 9½ years old), before crossing, to use

"his powers of observation to observe ap-
"proaching cars within a distance to put him
"in danger;" and *Ib.* p. 375: "Had plaintiff
"performed his duty in the slightest degree,
"he would have perceived the approaching
"car, in time to avoid it. * * * * * *
"That he did not see the car, establishes the
"fact that he did not look, as required even of
"a child."

So also here, if plaintiff had looked up Monmouth before starting across; or had stopped & looked up, after Van passed, & before continuing across, - she must see cart coming

Such was Mrs. Burns' duty to look, both before, and after, the van got in the way of her observation, and the fact that the van did obstruct her view for a time, don't excuse her, because it was palpably plain to her that her view was obstructed; she knew she had not looked up Monmouth street before the van got to her, and hence she should have looked up Monmouth street, *without proceeding ahead*, after the van passed her; and she should have waited until she could see, if her view was temporarily obstructed at any time when about to cross or while crossing.

And her saying that she looked *after* she passed the van, as she puts it, was not sufficient, because she kept going ahead after she passed the van, and even after she saw the cart running towards her, and when it was only eight to ten feet away, the cart coming straight down the street, when she must necessarily be in a safe place if she looked, (and if she did not continue on until she had a chance to see if the way was clear or safe), because, as the cart was going straight down and behind the van, then, before the cart could traverse the crosswalk, on which she was walking, the van

as it passed at right angles,

must proceed far enough east of the west curb of Monmouth street to give the cart space east of the curb so as to traverse the crosswalk, and if Mrs. Burns just halted an instant to look to her right as the van passed her, as she should have done, since she had not looked there-before, then she *must* see the cart coming and could easily avoid it, by stepping back or standing still, until it passed in front of her

At the above point in her cross-examination, p.21,l. 33, her attorney, Mr. Cruse, wrongfully broke in with the question, viz.

"Q. No, but you looked before you got to the wagon;" (thus putting the words in her mouth, when she answered):

"A. Yes, I looked; sure I looked." But even then she didn't say *where* she looked nor in what direction; and what follows on pp. 21 and 22 shows that it was up First street that she meant that she had looked, as e. g., p. 22, l. 30–33, viz:

"*Q. Did you try to see it?* (*the cart that ran her down*).

"*A. I wasn't looking for such a thing at all, otherwise I would not get hurt; I didn't try to see it.*"

I respectfully insist, and most confidently, that this admission by Mrs. Burns demands that she be non-suited; as I insist she should be non-suited on her other testimony, viz: "I looked up First street; I couldn't look up Monmouth street," p. 21, l. 12; and also, "No, I didn't look up Monmouth street," p. 21, l. 23; and again, "*I went where I wanted to go or I wouldn't be hurt,*" p. 27, l. 30.

Further, plaintiff should be non-suitted on her testimony that "if the driver had been looking at me, even if the horse was at a great speed, without he was beyond control, he could have stopped him," p. 31, l. 29; for if the driver could stop his fast going horse, in time, then certainly she could stop her ordinary walking gait on time. She could see the horse and cart much more easily than the driver could see her. The driver of the cart had to watch the speed of the van, so as to clear it all right, that is, if it was any sort of a close shave between his horse and the rear of the van as she says it was; while Mrs. Burns had nothing to do but look out for the cart; and if not a close shave, then she had plenty time and space to look out for the cart coming. He could not turn up on the sidewalk, away from her, but she could easily stay where she was and let him pass her, in safety to her.

She was negligent in continuing across when she passed the van; and also when she heard and saw the cart coming.

On p. 10, l. 25, she says she sprang *back* from the cart and horse, but she evidently meant (or it may be a transcribing mistake), *forward*, as she says on p. 13, l. 2–7. viz: "I tried to go *ahead*, where I was going to get on the sidewalk; I was the nearest to it," And see also p. 18, l. 3[illegible], viz. "Well, I was about two flags; I was nearest to the sidewalk where I ran to."

She don't know how far she did go from the time she saw the wagon till she got struck, but a short distance, about five or six feet, p. 19, l. 10–28.

She heard and saw the cart coming, p. 20, l. 4.

" & tried to go ahead where she "

" was going, to get on the sidewalk "

" the sidewalk she was nearest to "

She Cannot Plead Sudden Emergency as an Excuse.—

For going ahead in front of cart, on the theory that in her peril, when she saw the cart so close to her, she became excited, and did not know what to do or what way to go, because that was the result of her own fault that she was placed in that predicament, if she were so placed, because—

(1) If she had looked when she was about stepping to the roadway from the sidewalk, which was when the van was at the opposite corner to her (p. 9, l. 30-40; p. 22, l. 35; p. 23, l. 1-10 and l. 22-40); she must then have seen the cart coming on the straight street towards her crossing, and then there would be no danger of her being caught in any such emergency; and—

(2) If she looked north on Monmouth street, after the van passed her, and did not continue on without looking until the cart was about upon her, then, too, she would be free from such emergency. And it simply cannot be that she looked just as the van passed her, for it must have passed her when she was only half way across the street, as the van was already upon the crossing, beyond the turning point into Monmouth street, when she was about *starting* to cross over, and the van was almost on a trot, and she was walking at an ordinary gait, hence the van must cross the *whole* street, while she was crossing *half* of it; and therefore she yet had some distance to go to get into the pathway of the cart, since it was so close to its right side, to the west side of the street, that when she passed in front of it,

and was hit by its far shaft, she was probably four feet or less from the west sidewalk.

It is insisted that upon the above facts, as shown by plaintiff's own testimony, and she was the only witness to the accident who testified on her side, and under the law as laid down in this State, that the case presented for her, demands that she should be non-suited, as per motion, p. 43; exception, p. 43; assignment of error, p. 79.

POINT II.—Direction of Verdict.

See motion to direct a verdict, refusal, and exception, p. 62-3; and assignment of Error, p. 80, + 89.

The trial Court should have directed the jury to find a verdict for the defendant. The case made out for the defendant, is altogether different from that made out for the plaintiff.

The defendant's case is, that Mrs. Burns was crossing, not on the crosswalk as she says, but in about the middle of the block, and that she practically ran into, or slipped and fell into the shaft of the butcher cart, her eye striking the end of the shaft. The defendant's case is made out by *two* witnesses to the accident, his driver, Gustav Walder, and a boy thirteen years old, named William Aughney, who was riding with the driver.

While I may admit, for argument's sake only, that there may be some weak points, or dubious points, in the case for the defence, yet I contend strenuously—

(1) That there is not in the entire defence a single circumstance upon which negligence in

the defendant (driver) could possibly be predicated; and

(2) That the plaintiff is proven by the defence to be even more guilty, if possible, of contributory negligence, than was shown against her by her own evidence. So that, no matter which theory of the case be looked at, the theory of the plaintiff, or the theory of the defendant, she was positively disentitled to recover, on the two main grounds (1) because her own negligence brought on her injury (2) because the defendant was not negligent. And the case must be decided on one of those two theories, for neither Court nor jury can consider the cause on any other theory.

Gustav Walder, the driver, says he was not looking up First street, as Mrs. Burns swore he was, p. 45, l. 6. He says the collision occurred in the *middle of the block*, p. 45, l. 16. The boy Aughney, corroborates him as to this, p. 57, l. 6. The driver says he couldn't drive very fast because it was too slippery, ice on the ground, and a hill going up there, p. 46, l. 5; he was an easy-going horse, a baby could drive him, p. 47, l. 31; horse was going on a trot, just as I started to go up that hill I had to slacken up, p. 54, l. 8. And the boy Aughney confirms this testimony—that the horse was going at a slow trot, p. 57, l. 11.

Mrs. Burns said to the driver, right there and then, that it was her own fault—p. 46, l. 32. And the boy heard her say the same thing there and then—p. 58, l. 16.

The driver says that the Van (other wagon) was on Monmouth Street, on his right side, that is, on the West side—p. 45, l. 11; and that he had to turn out into the middle of the road

to pass it—p. 45, l. 35; p. 51, l. 18, On examination by the Court, he said that this Van ("furniture wagon") was about 30 feet from First Street, a little more than half way down the block—p. 51, l. 1-9.

(The explanation of the shortness of this block is that there is a sharp bend in Monmouth Street, just South of First Street, and that the P. R. R. Elevated structure crosses Monmouth Street just below that bend, etc.)

She was crossing, so as to be due to reach the opposite side, in the rear of the Van ("furniture wagon"), it being to her left, not to her right, as a

The driver says Mrs. Burns was coming from the East side and he hollered at her—p. 45, l. 19; and that she was looking in his direction—p. 45, l. 30. Just as she was crossing she looked up and saw me coming—p. 45, l. 34. He says she was about 10 feet away from him, when he saw her—p. 49, l. 16. So that she must have started across almost right in front of the butcher cart (which was then pulled over towards the side she came from, so as to clear the van, furniture wagon, on the other side.) The boy, Aughney, also says he saw her crossing, and he whistled at her, while the driver ("Gus",) hollered at her p. 57, l. 32.

The driver says the horse did not go over two feet, after she was struck; that he had him (already) stopped, and he pulled him aside to the side of her, p. 48, l. 26. Says he did pull his horse to the left so as to clear her—p. 49, l. 19-40; that he did not run her down, that she ran into him; she slipped and came back and the shaft hit her, bottom p. 49 and top p. 50; hit her in the eye—p. 50, l. 25-30; I stopped the horse right in front of the woman, and

just pulled him aside two steps—p. 55, top. The boy says she made a jump or something like that, and she must have slipped, and the shaft hit her in the eye—p. 58, l. 11; she ran into it, she must have slipped; and she fell right into it, the shaft—p. 60, l. 35: She slipped right forward and her eye hit the shaft—p. 61, l, 5.

It is contended that those facts do not show negligence in the driver. They show that the plaintiff was crossing, in an out of the way place, from the driver's left, evidently without looking, and not seeing him, at least until they got very close together, and then that she chanced a race with the horse to get across first and slipped and fell, etc, when he was navigating the best he could, in a careful manner, in that slippery place, to pass that furniture wagon on his right side, to which side his attention was specially attracted, and he did not see her until about ten feet from her, and then that he did the best he could to avoid her; but that she, by her negligence in risking the attempt to cross in front of the horse, which she must have done, since it was the shaft on the far side that hit her in the eye, as she says, and the driver and boy also say, in that slippery street, brought this injury on herself.

Hence the motion to direct a verdict for the defendant should have been granted, as per motion, p. 62. See Exception, p. 63; Assignment of Error, p. 80.

POINT III.

Third Request to Charge, p. 63; Exception 3, p. 75; Assignment of Error 3, p. 80, ~~8~~ 89.

The Judge should have charged this 3rd request. This request was made on the plaintiff's theory of the case, i.e. that as she passed on from behind the van she was run into by the cart. In such case, if the fact was that the van obscured the cart driver's view, and was actually the *cause* of the collision, then that must be an excusable cause, for assuredly, if he could not see her he was not negligent. She had a much better chance to see him and his horse and cart than he had to see her. The Court will observe that this request was predicated,—not, merely upon the driver's view being obscured by the van, but upon the fact that that *was the cause* of the injury.

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POINT IV.

First request to charge, p. 63; exception 4, p. 75; assignment of error 4, p. 80.

The proposition in this 1st request to charge, is, of course, good law. It was not charged. The refusal to charge it is, certainly, reversible error. What may have been intended as a substitute for it, p. 66, l. 21-27, does not comply with this request, because the phrase "weight of evidence" in the charge, does not correspond with the phrase "preponderance of evidence" in the request. "Preponderance" means more than "weight." It means *over*-weight, or *superior* weight.

POINT V.

Second. Request to Charge, p. 63. Exception 5, p. 76. Assignment. of Error 5, p. 81, & 90.

The Law involved in this Request is so well established, that citation would be waste of

time. Not charging as here requested, was prejudicial error. The Judge stated to the jury this request, p. 71, l. 33--39; then stated that he did not know that she was in such a position as that, bottom p. 71; then proceeded and charged as follows, viz: "But the statement "means this, that if under the circumstances "Mrs. Burns had the right of way ahead of "the butcher wagon, and notwithstanding that "she saw that the butcher wagon was going "to run her down, and by the exercise of "reasonable prudence could escape being run "down, of course it would be her duty to es- "cape and let the butcher wagon go by. She "couldn't rush blindly into danger just because "she thought she had the right of way. And "so, if the wagon was in a position and going "at a speed which indicated that there was "danger to her and she saw it, and took a "chance of getting across first, she would be "guilty of contributory negligence, and your "verdict should be for the Defendant."

The Judge did not seal the specific exception to the charge, as it was given in response to this Request, p. 72, l. 1-16, because it was conceived that the charge as given, by way of a modification of the Request, that it was embraced in the Exception to the refusal to charge as requested, because that itself, i. e., the charge as given, was the refusal,—to the extent that there was a refusal, especially as the charge as given, on its very face and in its very words, purports to be the Judge's charge or refusal to charge as here requested. Now, clearly, apart from what the Judge did charge, his refusal to charge as requested, was Error, for which there should be a reversal, etc. But

the error of this refusal to charge as requested, is accentuated, when coupled as it was with the grosser error in the charge as given. The charge as given made it Mrs. Burns' duty to wait for the wagon to pass first, (*only*) when **"she saw that the butcher wagon was going to run her down."** Only then, did the charge make it "*her duty to escape and let the butcher wagon go by.*" That is, proceeded the charge,—"*she could not rush blindly into danger;*" which was quite equivalent to saying that she could with impunity take a chance on danger, or stand in danger, or to *some* negligent extent *go* into danger; so long as she did not *rush blindly* into it. It would be difficult for the learned trial Judge to mistakenly misinform and misinstruct the Jury much worse than this.

POINT VI.

There was manifest Error in the Charge on p. 71, l. 12-21. See Exception signed and sealed, p. 76, l. 20-30. See Error Assigned bottom p 81, top, p. 82. This charge was given apparently as a modification of a request to charge, but Exception to this charge as given was specifically signed and sealed.

This instruction told the Jury that Mrs. Burns "would be guilty of what the law calls Contributory Negligence, and would not be entitled to recover in this case" (only) "if she failed in her legal duty, *and* the accident resulted *wholly or in material part* by such failure." Such was the exact language of the instruction; that is, that the injury must have resulted wholly or materially from her negligence, to disentitle her to recover.

That is not the Law. Neither as to the word "wholly" or the word "materially," is it the law in New Jersey, or in any other Common Law State. As to the word "wholly," it is not the law in any State. And I doubt if it is the law, even as to the word "materially," in any State. The law in New Jersey is laid down by our Court of Errors and Appeals, "unanimously, in *N. J. Exp. Co. V. Nichols*, 4 "Vr. 439, as follows, viz: -"But if the plaintiff's "negligence is established, the comparative "degrees of the negligence of the parties is im- "material, for the reason that it would be im- "possible to say that, without such fault on his "part, the occurrence would have happened. "The injury must be attributable to the defen- "dant's negligence, and to that alone; if occa- "sioned, in *any degree* by the plaintiff's own "negligence, he is without redress. *Barnes v.* "*Cole*, 21 *Wend. 188: Harkfield v. Roper, ib. 615;* "*Simpson v. Hand*, 6 *Whart.* 311; *Hawkins v.* "*Cooper*, 8 *C. & P. 473; Smith v. Smith*, 2 *Pick.* "621, 623; *Wild's adm'r v. The Hudson River* "*R. R. Co., 24 N. Y. 430;*—Unless the act of the "defendant amounted to a wilful trespass or "intentional wrong. *Brownell v. Flagler*, 5 *Hill* "282; *Wynn v. Allard*, 5 *W. & S. 524; Vande-* "*grift v. Rediker, 2 Zab.* 185, 189."

"And again by our highest Court, unanim- "ously, in *Drake v. Mount*, 4 vr. 445, viz:— "The next inquiry will be whether the plaintiff, "on his part, was guilty of negligence or want "of ordinary care, which *in any wise* contribu- "ted to the injury. If he was, he cannot, "recover. The law says that although the "defendant was guilty of gross negligence,

"whereby the plaintiff was injured, yet, if the "plaintiff was guilty of *any* negligence or want "of care which contributed to the injury, he "cannot recover. No matter how gross the "carelessness of the defendant; if the plaintiff "was also careless, he has no lawful cause of "action."

"And see *Beach on Contributory Negligence*, "2nd Ed., par. 34, p. 43, viz:—"The true rule "is that if negligence of the plaintiff contribu- "tes *in any degree* to cause or occasion the ac- "cident, there "can be no recovery." (The "italics are the author's).

Ibid p. 43, par. 34, viz: "The law refuses to "apportion damages in such a case, or to "weigh the wrong of one party over "against the fault of the other, and thus strike "a balance, and, accordingly, when the plain- "tiff's negligence is *in any degree*, however "small, contributory to the injury, he has no "remedy. This is the very essence of the law "of Contributory Negligence."

Ibid, p. 45, par. 35, viz. "The principle "underlying all the decisions seems to be, and "verily it is the only sound basis upon which "they can rest, that whenever the plaintiff's "case shows *any want* of ordinary care under "the circumstances, even the slightest, con- "tributing in *any degree*, even the smallest, as "a proximate cause of the injury for which he "brings his action, his right to recover is there- "by destroyed." And see note, p. 16; p. 23; p. 43; p. 44, of *Beach on Con. Neg.*

POINT VII.

Fifth Request to Charge, p. 63, Exception 7, p. 76. Assignment of Error 7, p. 82.

In the abstract, this proposition may not be sound, because it would estop Mrs. Burns from crossing before the wagon (cart), if she saw it coming, *no matter how far away*. But by every theory of the case, the cart was *near* her' hence, when this request is considered concretely in connection with the essential facts and theories of the case, the proposition in this request was good law, and must mean that if she saw the wagon coming fast and near her, and yet started to cross before it, that then, for taking such chance to cross first, she should not recover; and refusal to so charge, on request, was Error.

POINT VIII.

Sixth Request to Charge, p. 63. Exception 8, p. 77. Assignment of Error, p. 82.

This request to charge was sound. The only vice, if any, and I don't admit that any vice could be imputed to it is, (1) that it implies that Mrs. Burns did attempt to cross in front of the cart; or (2) that the word "*could*," exacts too much care of her. But that implication was proper, because it was an *admitted fact* in the case, on her theory of the case, as well as on defendant's theory of case, that she did attempt to cross in front. See *Supra:*—G, H. and I. 44. 586.

And the use of the word "could," was not

exacting too much care on her part, for it says "could," * * * *by not attempting to cross,*— which was but merely ordinary care.

POINT IX.

Assignment of error, 9, is on a modification in the charge, of propositions embraced in request 5 & 6 to charge. Assignment 9, is treated of above in Point V.

POINT X.

The charge on which this assignment is based, is absolutely erroneous, and should set this verdict aside, unless the absence of a specific exception leaves the assignment baseless. According to this instruction, one of the conditions upon which the jury were told they could find for the plaintiff, was this, namely—"That the *defendant* had failed to satisfy the jury that there was contributory negligence on the part of Mrs. Burns." This impliedly imposed upon the *defendant* the burden of so satisfying the jury. The showing of contributory negligence, does not have to come from the defendant. If it comes in any way, that deprives the plaintiff of recovery.

Very respectfully submitted,

THOMAS F. NOONAN,
Attorney and of Counsel for Defendant
(Plaintiff in Error).

November ~~February~~ Term, 1906.

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Hudson County Circuit Court.

September Term, 1904.

SARAH BURNS ET AL.,
Plaintiffs,

vs.

RICHARD ECKERT,
Defendant.

} Tort.

Tried before Hon. Charles W. Parker, Judge and a Jury.

October 31, 1904.

H. R. Cruse, Esq., for Plaintiff.

John J. Mulvaney, Esq., for Defendant.

WRIT OF ERROR.

NEW JERSEY, SS,:

THE STATE OF NEW JERSEY to our Circuit Court of our County of Hudson, GREETING:

Because in the record and proceedings and also in the giving of judgment in the plaint which was in our said Court between Sarah Burns and Joseph Burns, her husband, plaintiffs, and Richard Eckert, defendant, in an action in tort, manifest error hath intervened as it is said, to the great damage of the said Richard Eckert as by his complaint we are informed.

We being willing that the error, if any there be, should in due manner be corrected and full and

speedy justice done to the parties aforesaid in this behalf, do command you that if judgment be thereupon given, then you cause a transcript of the record of that judgment and all things concerning the same to be brought before our Supreme Court on the fourth day of December next, with this writ; that the record and proceedings aforesaid being inspected we may further cause to be done thereupon what of right and according to the law and custom of the State of New Jersey ought to be done.

WITNESS, WILLIAM S. GUMMERE, ESQUIRE, Chief Justice of our said Supreme Court, at Trenton, the fourteenth day of November, one thousand nine hundred and four.

WM. RIKER, JR., Clerk.

John J. Mulvaney, Attorney.

RETURN TO WRIT OF ERROR.

NEW JERSEY SUPREME COURT.

SARAH BURNS and Husband, vs. RICHARD ECKERT,	In Tort.

The answer of Charles W. Parker, Esq., one of the Judges of the Circuit Court within named, the record and proceedings of the plaint whereof mention is within made, with all things touching the same, I certify to the Justices of our Supreme

Court of the State of New Jersey, at Trenton, at the day and year within contained, in a certain schedule to this writ annexed, as I am commanded.

C. W. PARKER,
Judge.

DECLARATION.

Hudson County Circuit Court of the Sixteenth day of February, Nineteen Hundred and Four.

Hudson County, ss.:

RICHARD ECKERT, the defendant in this suit was summoned to answer unto SARAH BURNS and JOSEPH BURNS, her husband, the plaintiffs therein, in an action of tort, and thereupon the said plaintiffs by Howard R. Cruse, their attorney, complain:

For that whereas, the said defendant, on the fifth day of December, nineteen hundred and three, at the City of Jersey City, in the County of Hudson and State of New Jersey, owned, managed and controlled a certain meat or butcher's wagon and horse, then being driven by said defendant's servant in a Southerly direction through and along a certain public street or highway, known as Monmouth Street, where the same intersects and crosses a certain other public street or highway known as First Street in the City of Jersey City, County of Hudson aforesaid, in the transaction of said defendant's business and it thereby became and was the duty of the said defendant to exercise due and proper care in using and managing said horse and wagon, while being driven and run along said Monmouth Street, where the same in-

tersects and crosses said First Street, so as to avoid colliding with and running into persons lawfully crossing from one side of said Monmouth Street to the other, and to manage and drive said horse and wagon at such a rate of speed as to keep the same within safe and proper control, so as to do no injury to the said plaintiffs.

Yet the said defendant not regarding his duty in that behalf, did not exercise due and proper care in using and managing said horse and wagon while being driven and run along said Monmouth Street, where the same intersects and crosses said First Street, so as to avoid colliding with persons lawfully crossing from one side of said Monmouth Street to the other, and did not drive said horse and wagon at such a rate of speed as to keep the same within safe and proper control so as to do no injury to said plaintiffs, but wholly failed and neglected so to do.

That said horse and wagon while being driven in a Southerly direction through and along said Monmouth Street, where the same intersects and crosses said First Street in the City of Jersey City, County of Hudson aforesaid, on the day and year aforesaid, was so negligently and carelessly driven and managed by said defendant's servant, in charge thereof, that one of said plaintiffs, Sarah Burns, wife of Joseph Burns, without any fault or negligence on her part, and solely through the carelessness and negligence of said defendant's servant, was knocked down and run over by said horse and wagon while she was crossing from the Southeasterly corner to the Southwesterly corner of Monmouth and First Streets, aforesaid, whereby the said plaintiff, Sarah Burns, lost the sight of her right eye, and sustained a broken collar bone, and without any fault or negligence on her part was seriously, painfully and

permanently injured, bruised and wounded in and about her eyes, head, shoulders, back, sides and thighs and she was and is disabled for life, whereby she then and there became sick and sore, lame and disordered, and so remained and continued for a long space of time, to wit, hitherto, and now is and in the future and for the balance of her life will be sick, sore, lame and disordered, during all of which time she, the said Sarah Burns, suffered and endured great pain and agony, and was, still is, and in the future will be hindered and prevented from transacting and performing her necessary affairs and business by her during all that time to be performed and transacted, to wit, at Jersey City, in the County of Hudson, aforesaid, to her damage eighteen thousand dollars.

AND also by means of the premises, the said plaintiff, Joseph Burns, husband of the said Sarah Burns, during all that time, hitherto, lost and was deprived of the company, aid and assistance of the said Sarah Burns, his wife, which he might and otherwise would have had, and the said Sarah Burns, as by reason of her said injuries, became and is permanently disabled from rendering and affording to the said Joseph Burns, in the future, that aid, comfort and assistance in and about his household and domestic affairs, that she otherwise could and would have done and also thereby the said Joseph Burns, lost the services and assistance of his wife, the said Sarah Burns, for a long space of time, to wit, from the day and year aforesaid, up to and until the present time; and thereby also the said Joseph Burns, was obliged to and did devote and consume a large amount of time in attendance upon his said wife, and also by reason of the premises, the said Joseph Burns was obliged and forced to lay out and expend a large sum of money, to wit, the sum of five hundred dollars, in and about endeavoring to cure his said

wife of her said bruises and injuries aforesaid, to wit, at Jersey City, in the County of Hudson, aforesaid, to the damage of the said Joseph Burns, two thousand dollars.

AND, THEREFORE, they, Sarah Burns and Joseph Burns, her husband, the said plaintiffs bring their suit, &c.

HOWARD R. CRUSE,
Attorney for Plaintiffs.

PLEA.

HUDSON COUNTY CIRCUIT COURT.

RICHARD ECKERT, ads. SARAH BURNS and JOSEPH BURNS.	In Tort. Plea.

And the said defendant, by John J. Mulvaney, his attorney, comes and defends the wrong and injury, when, etc., and says that he is not guilty of the said several supposed wrongs and grievances above laid to his charge, or any or either of them, or any part thereof in manner and form as the said plaintiffs have above thereof in their said declaration complained against him. And of this he puts himself upon the country, etc.

JOHN J. MULVANEY,
Att'y. for Defendant.

Plea duly sworn to.

Therefore to try the issue above joined let a jury come before the said Circuit Court, at Jersey City, aforesaid, on the thirty-first day of October, 1904, as yet of the term of September, in the year of our Lord, one thousand nine hundred and four, who neither &c., by whom &c., to recognize, &c., because as well, &c., the same day is given to the parties aforesaid, at which day before the said Circuit Court come the said parties by their attorneys aforesaid, and the jurors of the jury above mentioned also come, to speak the truth of the matters aforesaid, being chosen, tried and sworn, say upon their oath that the said defendant is guilty as the said plaintiffs hath thereof above complained against, and they assess the damages of the plaintiffs on occasion of the premises, at three thousand dollars for Sarah Burns, and five hundred dollars for Joseph Burns, over and above their costs and charges by the said plaintiffs and their suit in this behalf expended.

Therefore, it is considered that the said plaintiffs do recover against the said defendant their damages aforesaid, in manner aforesaid found, and also Thirty-five dollars and seven cents, for their said costs and charges by the said Court now here adjudged, and which said damages, costs and charges in the whole amount to Three thousand five hundred and thirty-five dollars and seven cents ($3535.07).

And the said defendant in mercy, &c.

Judgment entered and signed this thirty-first day of October, 1904.

CHARLES W. PARKER, Judge.

HUDSON COUNTY CIRCUIT COURT.

SARAH BURNS and JOSEPH BURNS,

vs.

RICHARD ECKERT,

In Tort.

Be it remembered that on the thirty-first day of October, nineteen hundred and four, at the Circuit holden at Jersey City, in and for the County of Hudson, before the Honorable Charles W. Parker, Circuit Court Judge, the issue in the above stated cause between the said parties pro ut the pleadings, came on to be tried by a jury for that purpose duly empanelled, and thereupon the said Sarah Burns and Joseph Burns, her husband, plaintiffs, through their counsel, Howard R. Cruse, to maintain the said issue on their part called upon as witnesses the persons named below, who, being duly sworn, testified as follows:

HOWARD R. CRUSE,
For the Plaintiffs.

JOHN J. MULVANEY,
For the Defendant.

This cause was tried at the Hudson Circuit, October 31st, 1904, before Honorable Charles W. Parker, Circuit Court Judge, with a jury.

Mr. Cruse opened the case to the jury on behalf of the plaintiff.

MRS. SARAH BURNS, sworn as a witness on behalf of the plaintiff, testified as follows:

DIRECT EXAMINATION by Mr. Cruse:

I am one of the plaintiffs in this suit. I recollect the 5th day of last December, and about six o'clock in the afternoon of that day I was on the corner of First and Monmouth, going from the baker's to the butcher's, going across the street. I was going uptown. I was going from this side to the other side, from the southeasterly to the southwesterly corner of Monmouth and First streets.

(It is admitted that First Street runs east and west and Monmouth Street runs north and south to a distance about 50 feet south of First Street, when it takes a jog to the southwest. On the southeast corner, of First and Monmouth is a baker's shop, and on the S. W. corner, at the time of this accident, was a saloon.)

Q. (The Court.) What butcher shop were you going to? A. It was an Italian butcher shop, it is about three doors from the corner, it is on First Street, three doors above the southwest corner. I was going to that butcher shop.

Q. When you started to cross the street did you take any notice? A. Yes, sir, I took notice, I seen a wagon coming down, a grocery wagon coming down towards me on First Street.

Q. How were you going, where were you? A. I was going up.

Q. Were you on the cross walk or weren't you? A. Not when I seen the horses and wagon coming down; I was going on the crosswalk, and then I went down until I got to the tail end of the wagon, to the back of the wagon.

Q. When you crossed the street did you go on the crosswalk or didn't you? A. Certainly I was on the crosswalk.

Q. Before you stepped upon the street did you or did you not take any observation of Monmouth street? A. Yes, I was crossing Monmouth street, certainly it was Monmouth street I was crossing and I seen the wagon coming down towards me and then I went to pass it.

Q. Did you see anything else? A. No, nothing.

Q. Did you look? A. I did certainly look.

Q. You were crossing from the southeasterly to the southwesterly corner of Monmouth and First streets, just tell the Court and jury what happened? A. Well, I passed by and this wagon was coming down, and as I passed by this wagon, this other wagon come across the street in full speed and the driver had a cap down on his ears like this and he was looking up this way, (indicating.)

Q. Up which way? A. He was looking up First street, and I was going up First street, he was looking up that way. And the horse coming this way (indicating.) So I put up my hands and hollered, and as I did I made a spring back to the sidewalk, and the horse come over me and I got cut there (indicating) and the shaft of the wagon, some part—I think it was the shaft—hit me here (indicating), and then my collar bone.

Q. Which shaft of the wagon hit you? A. I think it was the shaft nearest to the sidewalk, nearest to the side I was going.

Q. How fast was the horse going? A. Coming in big speed, good, fast speed.

Q. Did you recognize the driver? A. Yes, I know the driver and know the wagon.

Q. Had you ever seen him before? A. Certainly, I was in Mr. Eckert's store from time to time for meat and I seen the driver coming in and out; I used to send the children to get there meats, but

this was a cheaper store and I used to go there.

Q. Did you at that time know Mr. Eckert? A. Yes, sir.

Q. Did you recognize the driver? A. Certainly.

Q. Whom did you recognize the driver as being? A. Mr. Eckert's driver.

Q. Did you recognize the wagon? A. Mr. Eckert's wagon.

Q. Had you ever seen it before? A. Certainly, I seen it many a time.

Q. Where? A. Coming around my door with errands, and delivering messages.

Q. How were you going across that sidewalk, were you walking? A. Yes, walking.

Q. At an ordinary rate of speed? A. Yes, I was walking just to get where I was going, doing my shopping.

Q. Do you know what time of day was this? A. It was around six o'clock, I couldn't say to the minute, but maybe a few minutes before six.

Q. Was it dark or light? A. It was plenty light there, there was light, plenty of light there.

Q. Was there an electric light on that corner? A. Yes.

Q. On which corner? A. It come out that way on the street (indicating, and it stuck out on a pole, an arm.

Q. How far out in the street does that stick? A. Well, I couldn't tell you, it is quite a distance, but I couldn't tell you how long.

Q. Anywhere near the middle of the street? A. Well it wasn't to the middle of the street, but it was plenty of light, I seen everything.

Q. (The Court): Which corner was that light on? A. The baker's corner, the southeast corner.

Q. (The Court): Was the pole near the curb? A. Well, I suppose it was near the curb, I didn't take no notice, but it was near it.

Q. Was it light there, or wasn't it? A. Yes, plen-

ty, there was light enough, quite bright.

Q. How far away from you would you say the horse and wagon was when you first observed it? A. Well it was about 8 or 10 feet, maybe 10, about 8 or 10, the best way I can judge.

Q. The van that was driving past you the other way, down First street, what rate of speed was that going? A. Well, quiet, going nice, and—(interrupted.)

Q. Trotting? A. Well, no; not quite trotting, kind of fast walking.

Q. Was that wagon making any noise? A. Yes, certainly it was.

Q. Did that or did it not attract your attention? A. No, nothing attracted my attention; I was going straight until I seen the horse coming along.

Q. I mean after you had got on the street did that wagon attract your attention or didn't it; did you notice the van? A. Certainly, I noticed the van; it attracted my attention so that I seen it coming down, and I passed up by and there was nothing else around it that I took notice of but the wagon, the covered wagon.

Q. When Eckert's wagon drove into you what injuries did you receive? A. Well, that bone was broken (indicating right cheek bone) it sticks out yet, and my jaw bone was broken, and there was five stitches put here, in the eye, (indicating right eye.) the eye is dislocated from the frame up there. Then my collar bone was broken (indicating right collar bone).

Q. After you fell where were you taken and by whom? A. Well, at the present I didn't know, but then I knew I had been to the drug store.

Q. (The Court): Where were you when you first knew anything? A. I was in the drug store.

Q. Who was there with you? A. Mr. Eckert's driver brought me there.

Q. Did you hear any conversation there? A. Well,

no; I don't remember; after I fell to the street I don't remember anything right.

Q. Before you fell to the street when you say you hollered and attempted to jump, which way did you attempt to jump? A. I tried to go ahead where I was going to get on the sidewalk, I was the nearest to it.

Q. After you came to in the drug store where were you taken? A. I was taken home to my own home.

Q. How long were you there? A. I was there until the next day and the doctor come and said I was so badly injured I had to go to the hospital.

Q. What hospital did they take you to then? A. St. Francis Hospital.

Q. How long were you in St. Francis Hospital? A. I was there one month and a day, I went in on the 6th, and come out on the 7th, but Iwasn't able to come out then. I asked the doctor to let me home; that was the day the plaster of Paris was taken off of me. I was in pain; that part of me had no feeling at all, this part was all pain. (Indicating left side). My arm here was crushed (indicating), across my hips was very sore, my ankle where I fell on the paving stones was cut, and my shoulder was crushed.

Q. Do you suffer any pain now? A. Yes, when it is getting cold I suffer, my eyes pain, my head is sore like, if I stoop down like that, if I stoop down and just be getting up again I am sore, then the pain comes right through my eyes and I get so nervous.

Q. What was the condition of your health before this accident occurred? A. Fine, my health was first rate.

Q. How was your eye sight? A. Fine, I sewed at the machine until eleven o'clock Friday night before I got hurt.

Q. Which eye was it that was put out? A. My

right eye.

Q. Can you see? A. Not a thing; this eye is entirely gone (indicating right eye), and the other ain't so strong.

Q. Joseph Burns is your husband? A. Yes, sir.

Q. How many children have you? A. I have three children living, I am the mother of eleven children and I have three living.

Q. Before you received those injuries were you in the habit of doing your own house work? A. Always, and I took in sewing besides.

Q. How old is your husband? A. He was 79 the 14th of this month.

Q. Were you in the habit of caring for him? A. Certainly, helped him along, I was working.

Q. Since then have you experienced any difficulty in doing your house work? A. Certainly, I can't put buttons on my own children's clothes; I can't do any sewing at all.

Q. Have you been able since you received these injuries to perform your household duties and give your husband the aid, comfort and assistance you gave him before? A. No, sir; I am not able to take care of myself.

Q. Who was the first doctor that saw you? A. Dr. Sauer was the first doctor, he put the stitches in my eye in the drug store.

Q. After you came from the hospital, who attended you? A. Dr. Sauer.

Q. When did Dr. Sauer first see you? A. In the drug store, he was in the drug store when I went in.

Q. How long after you received the injuries? A. Right away, he was in there when I went in with the driver.

Q. Has Dr. Sauer been attending you since you came out of the hospital? A. Yes.

Q. Ever since? A. Yes; whenever I wanted anything it was Dr. Sauer I had, since I left the hos-

pital.

Q. I would like to have the jury see your eye?

(In answer to the question, the witness exhibits here eye to the jury.)

Q. Have you suffered any inconvenience from your arm and shoulder where your collar bone was broken? A. Oh, yes; I can't use it at all sometimes, I can't sweep, my arm hurts, at the collar bone, where the horse must have stepped on it, I can't do anything backwards.

Q. Has it gone down into your hand any? A. Yes; there was a splinter which hurt me considerable these last five or six months; the last week it was around here (indicating), and my hand was swollen; now the swelling has gone back again; I don't feel it; I don't know where it is.

Q. Were all those injuries you have testified to the result of that occurrence? A. Yes, sir; I was in perfect health, nothing wrong with me.

CROSS EXAMINATION BY MR. MULVANEY:

Q. How far away from that place of the accident is this drug store that the driver took you to? A. I don't know; I know this happened at the corner of First and Monmouth, and the druggist is at the corner of Cole and Newark avenue.

Q. That is two blocks away—it is a block from Monmouth to Cole, is it not? A. Yes.

Q. And it is about a block from First street to Newark avenue? A. Well, that is the drug store.

Q. How did he take you to the drug store? A. Well, he helped me, he held me up.

Q. You walked there? A. I must have walked there, for I got there somehow.

Q. Did you walk any place else before you got to that drug store? A. Not that I know.

Q. Didn't you walk to another drug store? A. I don't know.

Q. And they refused to treat you there? A. I

don't know; after I fell to the ground, I can't think.

Q. But you did walk? A. I got there, I must have walked.

Q. You did walk there, didn't you? A. I must have walked there, I suppose.

Q. Don't you know that you did? A. No, I could not say, what happened to me; I know that the driver as I heard brought me there.

Q. You say you heard the driver brought you there? A. I was told after the driver brought me there.

Q. You don't know that he brought you there? A. I think he brought me there.

Q. What made you think so? A. Because I was told he was there with me.

Q. You didn't see him at the drug store? A. I don't remember; I seen him on the wagon before the wagon went over me, but I know who he was.

Q. (The Court): Didn't you say a few minutes ago that you saw the driver at the drug store? A. I said the driver brought me to the drug store.

Q. (The Court): Didn't you say that when you came to in the drug store the driver was there? A. No, which was true, sir.

Q. (The Court): You didn't say that? A. No, I did not, if I did, I made a mistake, I am absent-minded, because I could not say it, if I did I made a mistake, if I said I saw the driver; I remember my daughter as being the first one I remember about seeing.

Q. Then you don't know as a matter of fact that the driver did bring you there, you don't know of your own knowledge that the driver brought you there? A. Well, I don't know who would bring me there.

Q. And you don't know that you walked there? A. I walked there.

Q. What is that? A. I—after I got knocked down

I can't remember anything, before I was knocked to the ground I remember.

Q. Then you don't know that you walked there? A. I don't for I couldn't say I walked there, I don't remember walking there. I remember being there but I don't remember walking there.

Q. You say positively now that you do not remember walking from where you were struck to the drug store two blocks away? A. I couldn't say that I don't remember it, but I don't remember walking there, but of course I memorize that he must have brought me there, and after he knocked me down and walked over me my memory was no more.

Q. You don't know how you got to that drug store? A. No.

Mr. Cruse: He means of your own knowledge, without somebody telling you.

Q. You say now positively, that you do not remember how you got to that drug store? A. Well I can't say I am positive how I got to the drug store.

Q. I ask you if you are positive that you don't remember how you got to the drug store? A. I don't really remember how I got to the drug store.

Q. And the next you know was that you were being doctored in the druk store? A. Yes.

Q. And you saw Dr. Sauer there? A. Yes.

Q. And you did not see the driver there? A. No, I don't remember; I am mixed in it, I couldn't give straight account of what happened to me after the horse and wagon went over me, but before that I remember.

Q. When you left the drug store where did you go? A. I went home.

Q. Where did you live at that time? A. I lived at the corner of York, on York near Monmouth.

Q. That was seven blocks away from the drug store, wasn't it? A. Yes.

Q. There is Railroad Avenue, Wayne Street, Mercer Street, Montgomery Street, York Street, Newark avenue is the first street, that makes six, and one block west from Cole and Monmouth is seven blocks away? A. Yes.

Q. How did you get home? A. I telephoned for my daughter and my daughter and the manager in Mr. Walf's place came up with her, and I got some refreshments at the store, I took it, something they gave me in the drug store, something they gave me, and when my daughter came they wanted to get the ambulance; then they had the stitches was in my eye, I remember that, I realized where I was then, I realized I was in the drug store. Then Miss Landon took my arm and my daughter, and then when I would feel weak I would wait awhile and then went on until I got to the stoop; I walked home with the assistance of the two of them.

Q. Was your jaw bone treated that night? A. No; nothing but the stitches in my eye.

Q. You say when you saw Mr. Eckert's wagon come you hollered? A. Yes.

Q. To whom did you holler? A. I hollered "oh" and I made a run.

Q. How soon after you saw the wagon did you holler? A. I made a holler and made a run at the time.

Q. Just as soon as you saw the wagon? A. As soon as I saw the wagon.

Q. The wagon was then about 10 feet away? A. 8 or 10, I can't exactly measure how far, about that, that is as near as I can give.

Q. He was coming on a fast run, you say? A. He was coming on a fast run.

Q. How far were you from the sidewalk when you jumped? A. Well, I was about two flags, I was nearer to the sidewalk where I ran to, I was nearer the corner.

Q. How far away? A. There is about two flags I

guess I was.

Q. About six feet, would you say? A. I think it is six flags, and I was on the fourth flag.

Q. How many steps did you take? A. I didn't count the steps, I made a run, and I don't know.

Q. How many steps did you take from the time you saw the wagon until the wagon hit you? A. I couldn't tell you.

Q. How far did you go? A. I didn't have far to go.

Q. How far did you go from the time you saw the wagon until it struck you? A. I don't know how far I would go, I couldn't go to where I wanted to, it was a very short distance.

Q. How short a distance? A. I couldn't exactly tell you; I was about from here to there (indicating.)

Q. From the witness stand to the corner of the jury box, about six feet? A. No, I say about here to there, the corner there where that gentleman is standing (indicating.)

Q. That is about six feet, isn't it? A. I don't know; I say on about two flags.

Q. (Mr. Cruse): You mean you were about from here to there (indicating)? A. Yes.

Mr. Cruse: Probably five or six feet.

Q. Is it from you or from the step here? A. From the step I mean.

Mr. Mulvaney: That is about four feet, isn't it.

Mr. Cruse: I should say it was.

Q. You were that far away from the curb at the time you saw the wagon? A. There was four flags passed, because I can go and see the place.

Q. You were that distance away at the time you saw the wagon? A. Yes.

Q. Then you hollered and jumped? A. Yes; I

hollered and ran the quickest way I could do it; I don't know whether I jumped or ran, but I tried to go the quickest way I could.

Q. Did you hear the wagon coming? A. Yes, I did, I saw it coming.

Q. Did you hear it coming before you saw it? A. I saw the horse and the driver; I didn't study about the noise or anything, when I looked I saw the horse and the driver; I heard the noise of the wagon, there was one going down, and there was one coming this way, a covered wagon.

Q. You heard the noise of the covered wagon? A. I couldn't say what wagon.

Q. How far across Monmouth street had that covered wagon gotten when you saw the other wagon? A. I was at the corner, the wagon was coming down this way (indicating); I made to go up First street, the wagon come down First street; as I got to the tail end of the wagon this driver come across the street, across First street, as hard as he could drive, and then when I seen him—(interrupted).

Q. (Mr. Cruse): On Monmouth street, going south on Monmouth street? A. Yes; and then I made a run and as I did I got hit, I got shoved and I got hit here (indicating) and I got thrown down.

Q. You started across from the east side of Monmouth street on the crosswalk? A. Yes.

A. Yes, sir; to get to First street, to get on the other side.

Q. To cross Monmouth street? A. Yes.

Q. You were in the cross walk of First street? A. Yes.

Q. As you started to cross you saw this covered wagon coming down First street? A. Yes, sir.

Q. Was that near the south side of First street where you were, was that wagon near that side? A. It was not, it was coming down.

Q. It was on the right hand side of First street, coming down, wasn't it? A. Yes.

Q. And as you crossed First street this wagon proceeded down First street in an opposite direction to you and had just passed you when you saw this wagon of Mr. Eckert's? A. Yes.

Q. And then you hollered and jumped? A. Hollered or jumped or ran, the quickest way I could anyway.

Q. When you started across Monmouth street did you look up Monmouth street? A. I looked up First street; I seen there was nothing around; I couldn't look Monmouth street, for the covered wagon was in front of me, but I looked up and down, looked this way, there was nothing coming, this wagon was passing me down and I was passing it up.

Q. This covered wagon that was coming down First street wasn't the full width of Monmouth street, was it? A. No.

Q. I ask you at the time you started to cross Monmouth street did you look up Monmouth street to see if anything was coming? A. No, I didn't look up Monmouth street; I couldn't see nothing coming at that, and there was nothing coming at that, but the wagon was coming down First street.

Q. You didn't see the wagon on Monmouth street? A. Not until the covered wagon passed me down.

Q. Did you look before you passed the van wagon? A. No, but I looked after; I couldn't look before that, for the wagon was here, and I was walking aside of the wagon.

Q. (Mr. Cruse): No, but before you got to the wagon? A. Yes; I looked, sure I looked.

Q. Where were you when you looked up Monmouth street? A. I come out of the baker's and I was turning up to go up to the butcher's.

Q. And you looked up Monmouth street? A. I

looked right here and I seen everything but this wagon coming down, and I seen the wagon was coming down straight and I went to go up straight.

Q. Did you see any wagon on Monmouth street? A. No, only the covered wagon on First street; I was on Monmouth street crossing, he was going down.

Q. You are quite sure that you looked up Monmouth street? A. I did.

Q. And did not see this butcher's wagon? A. No, I didn't see the butcher's wagon until after the covered wagon passed me.

Q. Yet that butcher's wagon was coming down Monmouth Street? A. It was coming across over First Street on Monmouth.

Q. You were crossing Monmouth? A. Yes, I was crossing Monmouth and the butcher's wagon was coming down Monmouth crossing First Street.

Q. Very fast? A. Yes, very fast.

Q. And you did not see it? A. No, I didn't see it until the wagon passed me by.

Q. Didn't you see it before it got to the north cross walk of First Street? A. I seen it right as the covered wagon passed me by.

Q. Didn't you see it before you saw the covered wagon? A. No, sir, I did not see it because it wasn't there I don't suppose.

Q. Did you try to see it? A. I wasn't looking for such a thing at all, otherwise I wouldn't get hurt; I didn't try to see it; I seen my way clear as I was going along down, I seen the cross walk clear and the wagon coming down, I seen no danger of anything.

Q. Where was this covered wagon when you first saw it? A. It was down at the crossing.

Q. The middle of the block in First Street? A. No, it was coming that I knew it wasn't turning around, it was coming down straight.

Q. It was right on the crossing, this covered wagon, of First and Monmouth Streets at the time you first saw it, was it? A. No, sir, it was not.

Q. Where was it? A. It was coming on the corner this way, and I seen the horses didn't turn around and I was at this corner facing up and I walked along like this until I got to the end of the wagon about here (illustrating,) and as I got to the end of the wagon I seen this horse coming full force towards me, the same as this (illustrating), but it was further off. I hollered and the driver had a cap down over his ears and his face up towards First Street, and the horse coming this way; and then I made a run, the horse jumped on me and the shaft of the wagon hit me here, (indicating), and threw me to the street, and I don't know what happened after that, I can't give no account, nor I can't give no account yet, I am not capable, I tire in three minutes if I am excited and worried, and I am upset, I am nervous and upset.

Q. Tell us please, where was this covered wagon when you first saw it? A. I said it was at the corner of First and Monmouth, on that side of the street.

Q. It was right at the corner of First and Monmouth when you saw it first? A. Yes, coming down that way.

Q. You waited to see whether it was going to turn around Monmouth, did you? A. I didn't wait, the horses was far enough that I could see it wasn't going to turn around.

Q. Then it was far enough beyond the crossing of First and Monmouth Streets to indicate to you that it was not going to turn around the corner? A. Certainly.

Q. And you then walked across Monmouth Street, and by the time you had passed this

wagon, both of you going in opposite directions, this butcher's wagon came right on top of you? A. Yes.

Q. And you were then only four feet away from the corner of First Street? A. Well, about that.

Q. Didn't this all happen in the middle of the block? A. It happened where I say it happened, it happened where I tell you it happened, right on the cross walk.

Q. Isn't it a fact that it happened right in the middle of the block between First Street and Railroad Avenue? A. Why, no, sir; why how could it happen there.

Q. (The Court.) Well you say it didn't? A. No, sir.

Q. How did you come to go to the butcher's shop on First Street if you live right near Mr. Eckert's? A. I will tell you; it was an Italian store started up; porterhouse steak, round steak or sirloin, you will get for 12 cents a pound; go to Mr. Eckert's he will charge you 12 cents a pound for chuck steak. When I found this place out me and my sister-in-law always used to go there, I would buy as much there for a dollar as I couldn't buy for a dollar and a half in Mr. Eckert's store, and that is how I come to go there.

Q. Aren't there any butcher's shops between Mr. Eckert's store and this store on First Street? A. I don't know about Mr. Eckert's on the corner of Broad and Monmouth.

Q. I ask you if you know of any butcher's shop between Mr. Eckert's and this store on First Street? A. I don't know; that is the store I wanted to go to and that is the store I was going to.

Mr. Cruse: I object to it on the ground that it is immaterial and irrelevant.

A. (Continuing.) No butcher's shops, shops that is.

Q. How often had you seen this driver before? A. Oh, I have seen him often; I would be by the window, I seen go around, pass up and down and in the houses, and in the house where I live, I have seen him different times.

Q. How often? A. I couldn't tell you how often, for I didn't count it up.

Q. How long had he worked for Mr. Eckert? A. That I couldn't tell you either.

Q. How long to your knowledge had he worked for him? A. I went a great deal through the summer, I know I went there, I didn't time it or anything about it, until after the injury happened me, I couldn't tell you that.

Q. You didn't bother to look up by whom he was employed until after the accident, did you? A. No, certainly, I wasn't interested.

Q. How did you know it was Mr. Eckert's wagon struck you? A. Certainly I know it, why wouldn't I know it.

Q. What kind of a wagon was it? A. It was a light wagon, two wheeled wagon.

Q. Did you see it was Mr. Eckert's wagon before it struck you? A. I seen it was his driver, but I didn't look at the number of the wagon, but Mr. Eckert's driver, Mr. Eckert's wagon, certainly I know it.

Q. You recognized the driver? A. Yes

Q. At six o'clock? A. Around six o'clock.

Q. On a winter's day, with an electric light behind him and his head covered with a winter cap and he was looking up First Street away from you?

Mr. Cruse: I object to that question on the ground that it contains a misstatement of facts; the electric light as she has testified was not behind the driver, but in front of him.

The Court: The electric light would be

about alongside of him I should say; I think the evidence doesn't show that the electric light was behind him.

Q. You were struck about four feet away from the southwest corner of First and Monmouth Streets, were you not? A. No, I was struck at that time in that place.

Q. About four feet away from the corner? A. I was not quite four feet away from it; I wasn't near enough to get up on to it, to get safe; that is about all.

Q. This electric light juts out into the street from the southeast corner, the bakeshop? A. Yes, there was light enough, there was good light.

Q. The driver was looking up First Street towards the left? A. He was sideways that way looking up, his face wasn't towards the horse's head, because I seen the horse's head and I seen the driver.

Q. He had a cap that covered his head all but his face? A. There was a cap coming down this way (indicating), I know the fur cap he wore.

Q. It came down and covered his ears and his cheeks, didn't it? A. I don't know how much of his cheeks it covered but I know it was the wagon and the driver.

(Question repeated) A. Not all of his cheeks wasn't covered, I seen part of his face and his ears; his face wasn't fully covered.

Q. The electric light was behind him, wasn't it? A. I couldn't tell you exactly; I know there was light enough.

Q. His face was turned from you? A. His face was up that way (indicating.)

Q. His face was turned away from you? A. His side face was towards me.

Q. His face was turned so he couldn't see you? A. Certainly. he couldn't see me; when I got my

eye up I seen the side of the face.

Q. This winter night, six o'clock, with no light there, an electric light on the other side of the street, you recognized him as Mr. Eckert's driver? A. I recognized him on account of the wagon.

Q. You saw it was Mr. Eckert's wagon before you were struck? A. Yes.

Q. How did you know it was Mr. Eckert's wagon? A. Because I knew it was his wagon.

Q. How? A. Well, I don't know how.

Q. It was an ordinary butcher's wagon, wasn't it? A. The one I seen the most.

Q. Two wheeled cart, wasn't it? A. Yes.

Q. Just like any other butcher's wagon, wasn't it? A. Some of them ain't covered and some of them is.

Q. How did you recognize this as Mr. Eckert's wagon? A. Because it was that little up and down wagon with the seat across it.

Q. Did you ever see any other up and down wagon with a seat across it that didn't belong to Mr. Eckert? A. I did.

Q. How did you recognize this? A. Because I knew it was his and I knew the driver.

Q. Did you see his name on it? A. No, I didn't see the name on it; I got away from it.

Q. You didn't see any name on it? A. I didn't wait to see it; when I saw it I ran; no time to read the name, I went where I wanted to go—I wouldn't be hurt.

Q. Had it been snowing that day or the day before? A. No, it hadn't been snowing that day, but I think there was snow on the ground; there was a little snow I think, I know it was a frosty cold night.

Q. Snow on the ground? A. Yes, I think so.

Q. On the street? A. No, there was none on the street.

Q. Where was the snow? A. I think there was

snow each side of the street, though I didn't judge that either.

Q. Was there snow on the sidewalk? A. No, it was kind of frosty, dry night; it wasn't slippery, it was a dry night.

Q. It was a dry cold? A. Yes.

Q. Dry and icy? A. Dry and cold, yes, no ice.

Q. Was there snow on the cobblestones the pavement? A. I don't know what was on the cobblestones at all.

Q. If there was snow there, you would have seen it wouldn't you? A. I can't remember.

Q. Why can't you remember? A. Because I can't remember; I know it was frosty weather and cold weather, I know there had been snow a few days before, but as to that snow on the street I didn't take notice of it, I couldn't tell you; I remember it wasn't wet, the sidewalks was dry, it wasn't slippery.

Q. It was freezing? A. I couldn't tell you that; I was well wrapped up, I had a fur cape and a woolen hood on me; I didn't feel the cold.

Q. Why did you have that on? A. Because it was too damp.

Q. It was freezing cold, wasn't it? A. I thought it was cold weather.

Q. That is the reason you wore that hood and cape? A. Certainly, it was the time to wear it, I suppose.

Q. Was it icy on the sidewalk where you were? A. No, not that I remember; I think there was snow each side of the street; that I am not positive, but I think so.

Q. There was snow each side of the crosswalk? A. No, each side of the crosswalk; I think it was after being snowing, I think it was shovelled out of the guters on the sides of the street.

Q. Right where this wagon was going, wasn't it? A. No, the wagon was coming down straight

Which wagon do you mean?

Q. The butcher wagon? A. The butcher wagon was coming straight across the street.

Q. Wasn't it running in snow? A. I don't know anything about it.

Q. Was the covered van running in snow? A. I couldn't tell you that, I don't believe it was; there was no snow, I don't believe it was running on snow.

Q. Then your recollection is there was no snow in the street at the time? A. That I didn't study, I couldn't tell, that I didn't study, it was too damp for the snow; I know we had snow a few days before that.

Q. I ask you whether you remember if there was snow there or not? A. I told you all I remember, that I think there was snow on the side, been shovelled on the side of the streets; it was a dry night, I had on my slippers.

Q. Was there snow on First Street and on Monmouth Street away from the crossing? A. I know there was snow piled on the sides of the street, I know, on my own home, when I came down the stoop there was snow.

Q. Was this snow piled on the side of the street near the gutter? A. Certainly, I suppose near the gutter it was piled.

Q. How far away from the curb stone? A. I didn't measure, I don't know, I was not interested in it.

Q. Was it farther away from the curbstone than you were when you jumped? A. Where I jumped there was no snow or frost, but farther back from there; where I jumped was a clear crosswalk, there was no snow there; I was just going up, there was no snow there at all, the crosswalk and the sidewalk, and I was on the crosswalk, and the sidewalk there was no snow that I know of.

Q. You don't know how far the wagon ran after it struck you? A. I don't know anything about it; it ran over my body after that, I don't know where it ran.

Q. You think the wagon ran over your body? A. Well the blows was on me; I have been pretty well trampled on; my collar bone and my arm crushed, my hip hurt, my teeth knocked out my eye dislocated.

Q. You think that came from the trampling of the horse? A. I know it came from the horse and wagon knocked me down.

Q. It was the shaft of the wagon knocked you down? A. The horse and wagon knocked me down; I don't know what part of the wagon.

Q. Didn't you testify in answer to a question of Mr. Cruse that it was the right hand shaft of the wagon that struck you? A. Yes, the horse tackled me first and didn't throw me down until I got hit by the shaft of the wagon; I know it must be that side.

Q. What part of the horse struck you? A. It must be his head or his harness; I made a run like this (illustrating) and as I made the run, as I was about to there (indicating) I got hit here (indicating) and hit there (indicating) and I was thrown down. Now I don't know no more; I can tell it threw me down and I was trampled on.

Q. What struck you first? A. Horse or part of the harness, I don't know which.

Q. Then the shaft struck you? A. The shaft is the last thing struck me, that is the last thing I remember; the horse ran up to me and hit me here (indicating.)

Q. You do remember positively that some part of the horse struck you before the shaft? A. I don't know if it was the collar that was on the horse.

Q. Some part of the horse struck you before the shaft struck you? A. Certainly.

Q. You do remember positively that the shaft struck you? A. I remember very well the last blow I got was on there (indicating.)

Q. You do remember positively that the shaft struck you? A. Yes, the shaft was the last thing struck me.

Q. And that the shaft struck you after the horse or the harness struck you? A. Yes.

Q. Then you remember no more? A. Then I fell to the street, and then everything was ablaze around me, I thought everything was afire.

Q. Did you fall with your head to the south? A. I don't know how I fell or I don't know how I got up, I don't know anything about it.

Q. You don't remember then, of course, saying to the driver on your way to the drug store, that it was your own fault? A. I don't remember anything until I got to the drug store.

Q. You don't remember that you made such a statement to him? A. No, because I don't think I could make any such statement, my memory is too firm before it happened to me, that I couldn't make any such statement like it; but after it happened my memory is not good.

RE-DIRECT EXAMINATION BY MR. CRUSE:

Q. When you first saw this horse, if the driver had been looking at you, would he have had time to have stopped? A. Yes, if the driver had been looking at me, if the horse was at a great speed, without he was beyond control, he could have stopped him.

Q. Was there anybody else in the wagon? A. There was a boy in the wagon not quite as big as himself.

Q. Have you had any trouble from your other eye from the one that was put out, does your other eye bother you?

Mr. Mulvaney: I object to that question.

Her testimony has been to her injuries, I haven't cross examined on the injuries at all.

The Court: If it is something that counsel has overlooked, I think he may well be allowed to ask it. I think it has been already answered. She says she doesn't see very well with the other eye.

Question withdrawn.

RE-CROSS EXAMINATION BY MR. MULVANEY:

Q. The horse was going quite fast, wasn't it? A. Yes, sir.

Q. Not so fast though that it couldn't have been stopped? A. Well, the horse was going fast because—now, I don't understand anything, it was coming full force; I am no judge on it at all.

Q. You said at first in answer to a question by Mr. Cruse, some time ago, the horse was going quite fast? A. Yes.

Q. You say now that the horse was not going so fast but that it could have been stopped? A. I said, if the driver had seen me, perhaps, if the horse wasn't uncontrollable; he might have seen me when I hollered first.

Q. What was your reason for hollering first? A. Because I got scared; I hollered, certainly I hollered, I got scared and I ran; certainly, I hollered because I was frightened. I said the horse was going at a full speed.

Q. But not at such a speed as that he couldn't have been stopped within the eight or ten feet from the time you hollered and jumped? A. Well, I don't know as he could; he wasn't stopped anyway, for he come right over me.

Q. What did you mean when you said he could have been stopped. A. Perhaps if the man's face was to me he could have been stopped.

Q. Your impression now is that if the driver had been looking at you the horse could have been stopped? A. My impression is the driver is supposed to know where he is driving; if there wasn't so much neglect I suppose I would have been safe. I wouldn't like to injure anybody; maybe he wouldn't have injured me if he knew what he was doing; he wasn't capable of taking care of the horse he was driving.

Q. What makes you think that? A. Because I was run over.

Q. You have no other reason for thinking so? A. Not that I know, anything about it; why if I am driving a baby carriage I am supposed to know what I am doing.

Q. You really don't know whether the horse could have been stopped or not at the rate of speed he was going, even if the driver had seen you? A. I never drove a horse in my life; if I did maybe I could answer.

Q. (The Court.) Then you don't think you could answer that question? A. No.

SARAH McGURTEN, sworn as a witness on behalf of the plaintiff, testified as follows:

DIRECT EXAMINATION BY MR. CRUSE:

I am Mrs. Burns' daughter by a former husband; on the 5th of last December I found my mother in Cadmus' drug store, Newark avenue and Cole Street.

Q. What was her condition when you arrived there? A. Well, she was very faint and her eye was covered up; she said Dr. Sauer was about putting stitches in it, I believe.

Q. Did you go home with her? A. Yes, sir; I live in the same house with her.

Q. Before your mother received these injuries

did she perform her household duties and all that sort of thing? A. Perfectly well.

Q. Has she been able to do so since? A. No, sir.

CROSS EXAMINATION BY MR. MULVANEY:

Q. How did you get your mother home that nigt? A. With the assistance of another young lady.

Q. She walked home? A. She walked home.

JOSEPH BURNS, sworn as a witness on behalf of the plaintiff, testified as follows:

DIRECT EXAMINATION BY MR. CRUSE:

I am one of the plaintiffs in this case and the husband of Mrs. Sarah Burns.

Q. Before she received these injuries on December 5, was she in the habit of performing her household duties? A. She was A1 in every respect.

Q. Since then has she been able to do so? A. No, sir, she is not the same woman at all.

Q. Has she been able to give you the same time and attention and comfort and so on, that she did before? A. No, sir, not half nor quarter.

Q. How old are you? A.69 the 14th of this month.

CROSS EXAMINATION BY MR. MULVANEY:

Q. Do you work? A. Yes, sir, I am working for the Erie this last 31 years; I am bargeman in the lighterage department.

FERDINAND SAUER, sworn as a witness on behalf of the plaintiff, testified as follows:

DIRECT EXAMINATION BY MR. CRUSE:

I am a physician and surgeon practicing in Jer-

sey City, and have been practicing here for four years; I am a graduate of the College of Physicians and Surgeons, Baltimore, Maryland. I passed the State examination of New Jersey.

Q. When did you first see the plaintiff, Mrs. Burns, in this case? A. I am not sure about the date, but I know it was two or three weeks before Christmas; around that time; I saw her in the evening around six o'clock, I think it was, around supper time, I am not sure about the time either. She was at Cadmus's drug store. They telephoned to my office and I went right down to the store and found her there.

Q. What was her condition when you first saw her there? A. She was in a kind of semi-comatose condition, that is half unconscious, and she was very nervous. She was bleeding from a wound under her right eye, a gash; her right arm was helpless. On examining her I found a fracture of the right collar bone, and I also found a rupture of the eye ball, the left eye ball was ruptured right in the upper and inner part, and also a fracture, I found a depressed fracture of the boney wall of the eye, that is the orbit.

Q. Which eye was this? A. The right eye, a fracture of the boney part of the orbit, a rupture of the eye ball, and a fracture of the right collar bone.

Q. Did you find any other injuries? A. She had some injuries, some bruises on her arm, didn't amount to anything; she had some bruises to her body too.

Q. Did she seem to be experiencing pain? A. Well, she was hardly able to appreciate the amount of pain; she didn't suffer much pain that evening when I saw her, but she did after we got her at home, you know. That night I put either five or six stitches in the wound, you know, to stop the hemorrhage, and I saw her at home

that night, I set her collar bone. I saw her the next day and I saw that she was was very apt to lose the sight of her eye; so I had her removed to St. Francis Hospital, and up at St. Francis I believe they treated the collar bone fracture and they treated the eye ball; that is all that I know.

Q. (By Mr. Mulvaney.) Not what you believe but what you know yourself? A. I treated her and then after she come from the hospital you know, I have been treating her off and on for pains in the arm and head, and nervousness.

Q. (The Court.) Did you go to the hospital to see her? A. No, I did not.

Q. (The Court.) Then you don't know what they did there of course? A. No, only what the doctors tell me.

Q. What is her present condition? A. Well, she has absolutely lost sight in her right eye, sees absolutely nothing; she has pains in that eye, and she has pains in her well eye off and on; has headache.

Q. Would you say that the absolute loss of sight in the right eye is a permanent loss of eyesight? A. It is permanent, it is absolutely paralyzed, she will never regain any sight there.

Q. Do you say that the other eye is affected by that? A. I wouldn't say it is affected now, but she does have pain in that eye and it looks as if it was going to be affected; it is not affected now.

Q. What is the reasonable probability from a loss of the sight of one eye? A. Well, in a good many cases in time the other eye is affected if the bad eye isn't removed. If the bad eye is removed why the well eye as a rule gets along all right. That is, she has a bad right eye there, the eye is absolutely no good, sightless; now if she would submit to an operation and have that eye removed the other eye would be all right, and if she doesn't have that eye removed in time that

left eye will be affected.

Q. Do the optic nerves meet back of the eye? A. Yes.

Q. Come together? A. Yes, they meet and communicate with one another; consequently we have a condition they call sympathetic opthalmia, that is when one eye is affected, if the nerve is not severed, the bad is not removed, why the well eye is bound to be affected in time.

Q. Does the inflammation go down the optic nerve of the injured eye until it strikes the nerve of the well eye? A. It will, that is the idea.

Q. And then does it follow the optic nerve into the well eye? A. Yes, sir.

Q. What in your opinion is the probability of the injuries she experienced in her head being permanent? A. Well, they would only be secondary to the condition of the eye.

The Court: What injury to the head do you mean?

Mr. Cruse: She claims that the cheek bone was injured to some extent.

A. Well, yes, that is the fracture I spoke about; this is the orbit here; there is a depression there (indicating).

Q. (The Court.) The bone is set there now? A. No, that wasn't set, it is impossible to set that.

Q. (The Court.) I mean to say it has become permanently fixed as far as it could? A. Yes. I suppose she has pain there from the injury to the bone, when the bone was crushed, undoubtedly the nerve was injured.

Q. Will that be permanent or not? A. Oh, it will be permanent to a certain extent, it will finally wear off. But her right arm, and fracture, she will always have trouble from that off and on. She has swelling now, her right hand is swollen now, anybody can see that; in the healing of the

fracture of the collar bone, there may have been a nerve caught in between the pieces, and that is what is making her arm swell and giving her pain in that arm; that may be permanent.

Q. In your judgment would a woman with the injuries she complains of be capable of performing her ordinary household duties? A. No, I should say no.

Q. Do you think she is in a fit condition to do much work? A. No, she isn't at present.

Q. In your judgment would injuries of the kind Mrs. Burns complains of be the natural and proximate result of being run into and knocked down on the street, by a horse and wagon? A. Yes.

Q. What has been the nature of your treatment? A. I only saw her a few days after the accident, you know, as I said, and I stitched up the wound in her eye and gave her solutions to bathe her eye with, gave her directions to have hot applications on her eye and then she went to the hospital. When she came home from the hospital I have been treating her off and on ever since, for pains in her arm, and pains in her head, and pains in her eye, and pains in her face, and occasionally I would give her something for her nerves, to quiet her nerves.

Q. Have you examined her eyes several times? A. I have, yes sir.

Q. What is the amount of your bill? A. I haven't any idea just at present, I haven't the slightest idea what the amount of my bill will be, I haven't looked it up; I made quite a number of calls, been to the house a good many times. I couldn't really tell.

CROSS EXAMINATION BY MR. MULVANEY:

Q. When was the last time you visited Mrs. Burns' house? A. I haven't seen Mrs. Burns now, I guess in two or three weeks. I saw her sometime, I think it is about the first week in October.

Q. Where? A. I saw her at her house. Then she was complaining about a swelling in her arm, her hand swelled.

Q. You think that injury to the arm comes from the manner in which the collar bone is set, do you—I mean the present condition of the arm? A. It might be due to that or it might be due to injury of the nerve, from the injury you know; it might be due to the setting of the collar bone.

Q. The condition of the head would be alleviated to a great extent by the removal of the right eye? A. It might.

Q. Would it probably be? A. Or probably, I would say.

Q. In your opinion the condition of the head is secondary to the injury to the eye? A. I think so, yes, sir.

Q. And the right eye is of no use to her now at all? A. No.

Q. It never will be any use to her? A. It never will be, no, sir.

Q. Do you suppose that the removal of that right eye would have any affect upon her nervous condition generally? A. It would have a whole lot, no doubt about that.

Q. In what way? A. For the good, there is no doubt about that.

The depression, the protruberance in the bone of the orbit of the eye, does that have any resulting condition? A. Well, as I said before it may cause a whole lot of this pain, you know; that is, not the protruberance itself, but the injury; there may have been a nerve injured, you know, in the crushing of that bone, there may have been a nerve injured and that injured nerve may have be the cause of the pain in the face that she complains of.

Q. Would the removal of the eye relieve that?

A. I don't think so.

Q. You were not at the drug store the night she came there at the time she came there? A. No, I was sent for.

Q. Who was with her there when you came? A. Why I don't just remember the drug clerk; I guess there two drug clerks there at the time, and there was a crowd of people in front of the door, a great many people in the store, too.

Q. Do you remember the driver of the wagon being there? A. He came in afterwards, I think; he may have been there, but I think he came in afterwards.

Q. Did you have any talk with him? A. No.

Q. Did you have any talk with him afterwards? A. No.

Q. Why didn't you attempt to set the collar bone that night? A. I told you a few minutes ago that I did set it. I did set it the next day, and I didn't exactly set it that night, but I told her to keep her arm nice and quiet and the next day I set it, really re-set it the next day.

Q. You did nothing about the eye that night except sew the wound? A. Just sewed the wound and kept her washing her eye with antiseptic solutions.

Q. You are not a specialist on eye troubles, are you? A. No, I am not; that is one of the reasons I sent her to the hospital.

JOHN H. DOLAN, sworn as a witness on behalf of the plaintiff, testified as follows:

DIRECT EXAMINATION BY MR. CRUSE:

I am manager of Cadmus' Pharmacy, 229 Newark Avenue., corner of Coles Street; on the evening of December 5, last year I was in that drug store; I saw Mrs. Burns, the plaintiff in this

case, there; I believe the driver, the man that ran her down, was with her, this same man.

Q. Had you ever seen him before? A. Well, I did at times, driving by the store in a wagon.

Q. In whose wagon? A. Eckert's.

Q. You had seen him before driving Eckert's wagon? A. Yes.

Q. Was ther any conversation between you and this driver? A. What do you mean, before or when he brought her in?

Q. When he brought her in? A. Yes; I asked him how she was hurt; he told me that the shaft of his wagon had struck her and knocked her down.

Q. Did he say anything else to you? A. He said that he didn't see her until after she had fell, after he had hit her. I wanted him to wait and have the doctor examine her and see the amount of her injuries, and he said he didn't have time as he had a lot of orders to deliver; so he left a two dollar note there to give to the doctor, to cover the expenses whatever it would be, and said he would come around the following day and pay the rest of the damages.

Q. He left a two dollar note there? A. Yes, he gave me a two dollar note, I gave it to the doctor.

Q. Are you acquainted with the locality where this accident happened, First and Monmouth Streets? A. Yes.

Q. Is that a thickly populated part of the city? A. It is.

Q. Is there much travel there? A. Quite a lot.

Q. Do you know whether there is an electric there or not, on that corner? A. I think there is.

CROSS EXAMINATION BY MR. MULVANEY:

Q. What kind of traffic that you say there is quite a lot of? A. People walking up and down, wagons and most everything.

Q. Passenger traffic and wagon traffic, too? A. Yes.

Q. (By Mr. Cruse.) Are there many children around that neighborhood? A. Yes, there is quite a few.

Q. Did the driver say anything else to you that night except leaving a two dollar bill and saying he would be there the next day? A. Only what I have told you; he said he didn't see her until he knocked her down.

Q. Did he come the next day? A. Yes, he come the following Sunday.

Q. What did he have to say then? A. Why he came in and asked me what the extent of her injuries was; I told him that her eye was knocked out, and that the doctor had sent her to the hospital and to go there and see the doctor.

Q. You didn't tell him anything else? A. No.

Q. Did you say to him it was a pretty serious case? A. I don't remember, I don't think so, I may have.

Q. Did you suggest anything to him about skipping out of town? A. Why no.

Q. Didn't the driver come back that night? A. No, I don't think he did; he didn't wait for the doctor, he said he had a lot of orders to deliver, he didn't want to delay them; so he left that two spot there and went out.

Q. Wasn't he there while the doctor was there? A. The doctor was there when the patient was brought in; the doctor was in the office, and she had to wait probably five or ten minutes before she was taken care of.

Q. Where was the doctor when she came in? A. He was sitting in the office; the doctor was in the store, I think it was around twenty minutes of six, something around that.

Q. You are quite sure about that? A. Yes, sir.

Q. You have been here in court this morning? A. I just came in.

Q. You didn't hear Dr. Sauer? A. No, I didn't hear his testimony, I just came in.

Q. The doctor said he was at his own office when Mrs. Burns was brought there and he had to be telephoned for? A. No, the doctor is probably mistaken, the doctor was in our office.

Q. Then the driver of the wagon was in the store at the time the doctor was ther? A. He came along with the woman, he took the woman in with him; he didn't wait for the doctor to come out, we were busy in there at the time and I wanted him to wait, and he said he couldn't wait, he had several orders to deliver and he didn't want to delay them.

Plaintiff rests.

Mr. Mulvaney: I move for a non-suit in this case, on the ground that no lack of care has been shown on the part of this defendant or his employee; there is no proof that we were guilty of negligence; and that the plaintiff by her act contributed to the injury of which she now complains.

Motion denied.

To which ruling the defendant prays, that an exception may be allowed, and it is allowed and signed and sealed accordingly.
(Signed) C. W. PARKER J. (Seal.)

Mr. Mulvaney then opened the case to the jury on behalf of the defendant.

GUSTAV WAEDER, sworn as a witness on behalf of the defendant, testified as follows:

DIRECT EXAMINATION BY MR. MULVANEY:

I am 21 years old, and not working at all, and have been out of work three months. Before that I worked for Mr. Eckert and had been working for him five years. I was working for him on December 5th last year; I remember the accident to Mrs. Burns.

Q. Tell us how it happened? A. She was coming from Railroad Avenue on Monmouth; I was in the middle of the block coming from 8th Street between 1st and Railroad Avenue, and I was in the middle of the street because there was a furniture wagon on the other side of the street, right where the Republican Club now is, and I had to go in the middle of the street. I saw her coming I had the boy in the wagon with me and we started to holler at her; she didn't pay no attention.

Q. What boy did you have? A. Willie Aughney.

Q. Did he work for Mr. Eckert? A. No, sir.

Q. Did he? A. No, sir.

Q. What was he doing in the wagon? A. He was taking a ride. He lives in the neighborhood of Mr. Eckert's store. I hollered to her when I was about ten feet away from her; started to holler to her and she didn't pay no attention; so when I got close to her I pulled out of her way to let her pass and she slipped off the ice and kind of made a slip and her eye struck the shaft.

Q. (The Court.) Whic way did you pull? A. I pulled to the east just a little bit, towards the left; I couldn't pull to the right because of the wagon.

Q. Was this at the crosswalk on First Street? A. No, sir.

Q. How far from the crosswalk was it? A. In the middle of the block, pretty near about 25 feet,

right between First and Railroad Avenue.

Q. South of the crossing of First Street? A. Yes, sir.

Q. You had gotten past the crossing on First Street, had you? A. Yes, sir.

Q. Had you been looking up First Street? A. No, sir.

Q. Did you see when you crossed First street a covered van coming down First street? A. No, sir.

Q. Was there a covered van anywhere in that neighborhood? A. Well, there was a covered wagon stood on Monmouth Street, on the right hand street going towards Bright Street, that is on the west side.

Q. She was coming from the east side? A. Yes, sir, right in the middle of the block, coming from Railroad Avenue.

Q. Could she have seen your wagon? A. I guess she saw me, I hollered to her.

Q. (The Court.) He says, could she have seen you? A. Yes, sir, she could have seen me.

Q. Did she see your wagon?

The Court: He can't tell that.

A. Yes, sir.

Q. How do you know that?

The Court: He can tell what she did from which the jury might infer that she saw it.

Q. Did she look in the direction from which you were coming? A. She was looking, yes, sir.

Q. Looking at you? A. Yes, sir.

Q. Before or after she left the sidewalk? A. Just as she was crossing she looked up, she saw me coming.

Q. Were you on the right hand side of the street? A. Well, I was on the right hand and I had to turn over in the middle of the road to pass the furniture wagon.

Q. How far from the curb were you when you

struck her? A. Right in the middle of the street.

Q. Any further away than from you to the corner of the jury box? A. Yes, sir; a great deal farther, right in the middle, from here about to the table there (indicating).

Q. How fast was your horse going? A. I couldn't drive him very fast because it was too slippery, ice on the ground; there is kind of a hill going up there too, a horse can't run.

Q. After she was struck what did you do? A. I picked her up, brought her to the drug store, brought her to Wagner's drug store, which is on Newark avenue, between Monmouth and Third.

Q. How far away is that? A. That is two blocks and a half, three blocks almost.

Q. What happened there? A. Well, he told me to take her down to Cadmus' drug store and he would sew it up, that her eye was hurt.

Q. How far away is Cadmus' drug store from Wagner's drug store? A. Well, it is about two blocks.

Q. How did you take her to these places? A. I walked with her; I had my arm in her arm, walking.

Q. What arm did you hold her? A. I was holding her left arm.

Q. And you walked her those five blocks? A. Yes, sir.

Q. During that walk did you have any conversation with her? A. Yes.

Q. What? A. She told me it was her own fault and she didn't want to make any trouble for me, and that if I stood for the doctor's expenses, that it would be all right.

Q. What did you do about that? A. Well, I brought her to Cadmus's and I asked him to fix her up; he said he would; I asked him how much he wanted, and he says, "Two Dollars."

Q. Whom did you see there? A. That man over

there, Mr. Dolan.

Q. Mr. Dolan, the last witness? A. Yes, sir.

Q. She told you it would be all right? A. Yes, sir.

Q. Is that the reason you left the two dollars there? A. I gave him the two dollars.

Q. Did anybody say anything to you about the extent of her injuries at that time? A. Not at that time, but when I came back again about fifteen minutes afterwards, he said he would send for Dr. Sauer.

Q. What brought you back about ten or fifteen minutes after? A. Well, he told me to come back, I said I would come back and find out how she was.

Q. Was she there when you come back the second time? A. Yes, sir.

Q. Was anybody else there besides Mr. Dolan? A. Dr. Sauer.

Q. Did you talk with him about her injuries? A. He was standing there; Mr. Dolan was talking to me about it.

Q. What did Mr. Dolan say? A. Well, he told me the best thing I could do was to get out of the city and came around every week and pay him so much on the doctor's bill.

Q. How long had you been driving this particular horse? A. Five years, four and a half years.

Q. What was the character of the horse, what kind of a horse was he as to controllability? A. Well, he was a easy going horse, a baby could drive him.

Q. What were you doing on Monmouth street at that time? A. Well, I was coming home through Eighth street, going to the store.

Q. Have any orders in your wagon? A. No, sir.

Q. Did you tell Mr. Dolan that you had to hurry away in order to finish delivering your orders? A. No, sir.

Q. What became of the horse and wagon? A. I left it standing at Monmouth street.

Q. In charge of anybody? A. Yes, sir; Mr. Aughney.

Q. Was it light or dark at that time at that point? A. Well, it wasn't dark.

Q. Was there an electric light there at that crossing? A. There is an electric light there at that corner; yes, sir; it shines right on the middle of the block there, you can see the electric light in the middle of the block, it throws enough light down the street.

Q. What time in the day was it? A. Well, it was pretty near six o'clock, about ten minutes to six.

Q. How long had you had the horse out that day? A. Had the horse out all day.

Q. When you picked Mrs. Burns up where was she lying with regard to the position of the wagon, was she to the right or the left hand side of the wagon? She was on theright hand side, right near the horse's head.

Q. Did the wagon run over her? A. No, sir.

Q. Did the horse step on her? A. No, sir.

Q. After she was struck how far did the horse go before you stopped it? A. The horse didn't go no more than two feet; I had him stopped, just pulled him aside over two steps to the side of her.

CROSS EXAMINATION BY MR. CRUSE:

Q. You were driving this horse and wagon? A. Yes, sir.

Q. You are employed by Mr. Eckert in that capacity? A. Yes, sir; I am employed with Mr. Eckert.

Q. You don't work for him now, you say? A. No, sir.

Q. How is it that you don't work for him now?

Mr. Mulvaney: I object, it makes no difference.

The Court: Does it make any difference?

Mr. Cruse: Why not, it may be that he is discharged because of his recklessness in driving.

The Court: That would effect this case.

Q. You say you had a boy in the wagon with you? A. Yes, sir.

Q. How old was this boy? A. I guess about 14, 13 or 14.

Q. Had he been driving around with you that day? A. He was riding with me, he wasn't driving.

Q. I say had he been around with you all day? A. Riding with me.

Q. You just had him in there for fun? A. Yes, just sitting in the wagon, he asked me for a ride.

Q. You saw Mrs. Burns you say when she was about 10 feet away? A. Yes, sir; I saw her.

Q. And you think you were 10 feet away, if you were 10 feet away would you have had time if you had so desired to have pulled your horse to the left so as to have cleared her?

Mr. Mulvaney: I object. I submit there was no duty upon him to pull to the left to clear her, even if he had time.

The Court: I guess that question may be allowed.

A. Yes, I did. I stopped the horse anyway, it did clear her.

Q. And you say that you did clear her? A. I said I stopped the horse in them 10 feet, when I got near her, when she was about 10 feet away from me I hollered to her.

Q. And you stopped? A. Stopped the horse, certainly I stopped the horse.

Q. Within 10 feet? A. Yes, sir.

Q. Then if you stopped the horse within 10 feet how did you come to run into her? A. I didn't run

into her, she ran into me; I pulled out of the way, she come back, she slipped and the shaft hit her.

Q. You say, she was on the right hand side of your horse when you picked her up in the street? A. I said on the left hand side—on the right hand side, yes, sir.

Q. After she got across the street on the right hand side of our horse, she ran into your horse, didn't she? A. She was in front of the horse.

Q. But she was going towards the west, wasn't she going towards the hill? A. She was crossing the street toward the hill.

Q. The right of your horse was the side nearest to the side of the street to which she was going, wasn't it? A. It was for her, after she fell down but she was right in front of the horse when I saw her coming and I just pulled out of the way one side.

Q. She was right in front of the horse when she ran into your horse, was she? A. She just passed the horse.

Q. When she ran into the horse she had just passed the horse? A. She didn't run into the horse.

Q. You said she ran into the horse? A. She was past the horse, she was coming this way; I went to pull this side of her (indicating), she was coming this way; I went to pull this side of her (indicating), and she come back kind of, and the shaft hit her in the eye.

Q. Kind of stepped backward into your horse? A. Yes, sir.

Q. (The Court): Had you passed this furniture wagon at the time this accident occurred? A. Not passed it, no, sir.

Q. (The Court): The furniture wagon was still ahead of you to some extent? A. No, sir; it was standing there.

Q. (The Court): It was standing against the curb, wasn't it? A. Yes, sir.

Q. (The Court) : On the west side of the street? A. West side, yes, sir.

Q. (The Court) : How far from the corner of First street? A. Well, I guess that is about 30 feet; I couldn't say just how many feet.

Q. (The Court) : Was it half way down the block? A. A little more than half way.

Q. (The Court) : More than half way down between First street and Railroad avenue? A. Railroad avenue.

Q. (The Court) : Which way was that furniture wagon headed, was it headed toward First street or headed towards Railroad avenue? A. The horse was headed towards Railroad avenue.

Q. (The Court) : Only one horse? A. Yes, sir.

Q. (The Court): You say that as you came down Monmouth street you pulled over to the left in order to avoid the furniture wagon? A. Right in the middle of the street.

Q. (The Court) : Well you pulled over towards the left into the middle of the street to avoid the furniture wagon? A. Yes, sir.

Q. (The Court) : Was Mrs. Burns then undertaking to cross the street between your wagon and the furniture wagon? A. No, sir; I mean she was right between, the furniture wagon was up a little further about 10 feet from where I was starting to come; I saw the wagon there at the corner and that meant I had to pull out because it was icy in the street.

Q. (The Court) : (Paper shown witness) : This street marked with the letter M, is Monmouth street, and this street marked F, is First street, and this object marked F., is supposed to represent the furniture wagon. Now, as I understand you, you came down where I draw my pencil mark like this? A. Yes, sir.

Q. (The Court) : And you turned over this way in order to get away from the furniture wagon, to-

ward the middle of the street? A. Yes, sir; come down this way; there is about where the woman started to cross (indicating).

Q. (The Court): Where was she starting to cross, here? (indicating). A. On the other side of the street, right over this way (indicating).

Q. (The Court): Draw a line about how she was crossing when you ran into her?

(In answer to the question the witness draws a line on the sketch referred to).

Q. (The Court): Show us where you struck her with reference to the furniture van? A. She was crossing the street there, and there is about where I struck her, coming in the middle of the street from here, (indicating.)

Q. (The Court): You struck her about here, did you (indicating)? A. Yes, sir.

Q. If she had gone on then she would have got to the other side of the street in the rear of the furniture wagon? A. Yes, sir.

Q. (The Court.) She would have gone in the rear of the furniture wagon—here is the horse, there is the rear of the wagon, and she would have gotten for here to there, wouldn't she? (Indicating.) A. Yes, sir.

Q. (The Court.) You would have hit her where this A, is? (Indicating.) A. I hit her, but I wasn't going over straight, I saw the furniture wagon at the crossing; I pulled out in the middle of the street; it was kind of slippery, there is the cart coming this way and there is the two shafts (indicating.)

Q. (The Court.) Then as I understand your testimony there was nothing at all in the street to obstruct Mrs. Burns' view of your wagon as you drove down Monmouth Street, there was nothing in the way? A. Nothing in the way when the shaft struck her.

Q. (The Court.) There was nothing to prevent her seeing you come down the street? A. No, sir.

Q. Could you see her? A. Yes, sir.

Q. (The Court.) Where were you when you first saw her? A. I was on First Street, the last crossing.

Q. (The Court.) You were crossing the crosswalk about First Street? A. Yes, sir, I hollered to her.

Q. (The Court.) When you first saw her? A. Yes, sir, I saw her, she was going over there, I was over First Street, just over First Street.

Q. (The Court.) Then there wasn't any wagon or anything in the way at all? A. Only that one wagon, I had to go in the middle of the street.

Q. (The Court.) Well, that wasn't in the way, was it? A. No, sir.

Q. Was there an electric light on the baker shop corner there? A. I believe there are.

Q. Was it light on this evening? A. It was dark.

Q. Well was the electric light lit? A. Yes, the electric light was lit, the electric lights are always lit.

Q. So that you could see Mrs. Burns plainly? A. But I couldn't see her from the electric light, I saw her, not from the electric light though.

Q. What did you see her from? A. Crossing the street; I could see a woman going across the street, couldn'tI?

Q. It was light enough to see her then crossing the street? A. It was light enough, yes.

Q. You say you were on your way home to supper? A. Yes, sir.

Q. Were you in a hurry to get home? A. No, sir.

Q. Never in a hurry to get home to supper, are you? A. No, sir.

Q. As a matter of fact weren't you cutting up and playing with this boy there in the wagon? A. No, sir.

Q. Wasn't paying any attention to him at all? A. No, sir.

Q. Were you talking to him? A. No, sir.

Q. How fast was your horse going? A. Walking, on a trot, going on a trot; just as I started to come to the hill there I had to slacken him up to go up that hill.

Q. Was it a fast trot or a slow trot? A. Oh, very slow trot, you couldn't trot a horse fast on the icy ground.

Q. Did you try to stop your horse as soon as you called to Mrs. Burns? A. I certainly did stop him, yes, sir.

Q. Did it take you the ten feet to stop your horse? A. No, it didn't take me the ten feet to stop him.

Q. You say that Mrs. Burns was ten feet away when you first saw her? A. Yes, sir.

Q. That your horse was going at a slow trot; now then when did you stop your horse, if you tried to stop him as soon as you saw Mrs. Burns, when did you stop him, before you got to her? A. Yes, sir, I stopped before I got anywheres near her to her.

Q. Stopped your horse? A. Yes, sir.

Q. Then it couldn't have been your horse that she come into at all if you stopped it before you got to her? A. It wasn't the horse that injured her.

Q. What was it? A. Well, it was the shaft of the wagon.

Q. You say you stopped your horse; now in what distance did you do it? A. I don't know what you mean.

Q. (The Court.) How far did the horse go before you could stop him after you started to stop him?

A. Well, I stopped the horse right in front of the woman; I just pulled him aside two steps.

Q. In what distance did you stop your horse, how far did your horse go before you stopped him after you tried to? Can't you understand that question? A. Well, I don't quite understand it yet.

Q. After you attempted to stop your horse how far did your horse go before you succeeded in doing it? A. Well, I stopped him right in front of the woman.

Q. But when you first tried to stop your horse, how far did your horse go before you succeeded in doing it? A. I didn't get—I stopped him right away, for I was going on a slow trot and I stopped him as I was going up that little hill.

Q. Then you didn't attempt to stop your horse when you first saw Mrs. Burns? A. Yes, sir, I did.

Q. And Mrs. Burns was ten feet away and your horse was going at a slow trot? A. Going at a slow trot them ten feet when I saw her.

Q. Did it take you the ten feet to stop your horse? A. No, it didn't take me the ten feet to stop the horse.

Q. Then where did you stop it, before you got to her? A. Yes.

Q. How many feet of the ten did it take you to stop the horse? A. I couldn't say.

Q. How many do you think? A. I couldn't say.

Q. How far this side of Mrs. Burns were you when you stopped the horse? A. She was laying right alongside of the shaft.

Q. When you stopped the horse? A. On the outside, right at the horse's head.

Q. Then you stopped the horse after the horse had hit her? A. It wasn't the horse that hit her, it was the shaft.

Q. After the shaft hit her you stopped the horse? A. The horse was already stopped.

Q. After the shaft hit her? A. Yes, sir, the shaft hit her and she fell down.

Q. You haven't answered my question—how many feet of that ten did it take you to stop that horse in? A. Didn't I just answer you?

Q. Did it take you the whole ten? A. No, it didn't take me the whole ten to stop him.

Q. How many did it? A. I couldn't say.

Q. How many do you think? A. I couldn't say, I won't give you no figure on it.

Q. Did you take half of the distance? A. I couldn't say.

Q. Haven't got the slightest idea? A. No, sir.

Q. You went with Mrs. Burns around to the two drug stores, you say? A. Yes, sir.

Q. You had some conversation ther with Mr Dolan in Cadmus' drug store? A. Yes, sir.

Q. Did you say to Mr. Dolan that you didn't see the woman until you drove into her and that it was your fault? A. No, sir, I didn't say that to Mr. Dolan.

WILLIAM AUGHNEY, sworn as a witness on behalf of the defendant, testified as follows:

DIRECT EXAMINATION BY MR. MULVANEY:

I am 13 years old, my last birthday was July 9, and I was twelve and a half years old last December.

Q. Were you with Mr. Waeder on Mr. Eckert's wagon the time of this accident to Mrs. Burns? A. Yes, sir.

Q. What time of the day was it? A. Something around six o'clock.

Q. What day of the week? A. Saturday.

Q. Do you go to school? A. No, sir.

Q. Why don't you go to school? A. Sick.

Q. Were you going to school then? A. Yes, sir.

Q. Did this accident to Mrs. Burns happen at the crossing of First Street or in the middle of the block? A. Middle of the block.

Q. How far from First Street, how many doors? A. Right in the center of the block.

Q. Were you on the seat with the driver? A. No, sir.

Q. Was it a covered wagon? A. No, sir.

Q. How fast was the horse going? A. On a slow trot.

Q. Had you been in the wagon often before? A. Yes, sir.

Q. What were you doing in the wagon? A. Just taking a little ride.

Q. How long had you been in the wagon that day? A. I was on all day.

Q. Had you been home to dinner? A. Yes, sir.

Q. What time after dinner did you go in the wagon? A. I was on two o'clock.

Q. What time was it this happened? A. Ten minutes to six or six.

Q. Was the wagon away from the store all the time until this accident happened? A. Yes, sir.

Q. Just tell us how this accident happened? A. Well, the lady was crossing and she ran right into the wagon and the shaft hit her, she slipped and her eye hit the shaft.

Q. Did you see her before she was run over? A. Yes, sir, and I kept on whistling and Gus kept on hollering.

Q. About how far away from her were you when you whistled at her? A. Ten feet when we were on First Street just at the crossing.

Q. Just after you crossed First Street you saw her attempting to cross the street and you whistled to her? A. Yes, sir.

Q. Did she look around? A. No, sir.

Q. Did you see her before she attempted to cross the street? A. No, sir.

Q. What did the driver do after you whistled to her? A. Well, he stopped the horse and she was knocked on the right hand side of the wagon, right near the horse's tail.

Q. Did she get past the horse? A. No, sir—why yes she got past the horse but the shaft hit her and she fell on the right hand side.

Q. When she got past the horse was she running past? A. Well, she made a jump or something like that, and she must have slipped, and it hit her in the eye, the shaft did.

Q. Did the driver stop the wagon? A. Yes, sir, he jumped off and she said it was her own fault.

Q. Did you hear her say that? A. Yes, sir.

Q. Did he lift her up, or did she get up herself? A. He lifted her up.

Q. Where was she lying with respect to the wagon? A. Right near the horse's hip, on the right hand side.

Q. Right about the horse's tail? A. Yes, sir.

Q. Did the wagon run over her at all? A. No, sir, it couldn't.

Q. Did the horse step on her at all? A. No, sir.

Q. After he picked her up what did he do? A. I don't konw what he done; he brought her away and I stayed on the wagon and minded the horse and waited until he came back.

Q. Did you have any trouble with the horse? A. No, sir.

Q. Did you drive him at all? A. No, sir.

Q. Had you been driving him that day? A. No, sir.

CROSS EXAMINATION BY MR. CRUSE:

Q. On Saturday afternoon and evening down there where you live, there are more children

around the street around thre than any other time?

Mr. Mulvaney: I haven't asked him where he lived, and this question is directed to where he lives.

Q. In the locality of this accident, corner of First and Monmouth streets, there are more children playing around there on Saturday afternoon and evening than upon other week days?

Mr. Mulvaney: I object, because it makes no difference whether there are more children there or not, we haven't run over any children.

Question withdrawn.

Q. Where do you live? A. 265 Monmouth Street.

Q. Is that near the corner of Monmouth and First Streets? A. No, sir.

Q. How far away from Monmouth and First is it? A. About seven blocks, I live Coleman and Monmouth.

Q. Is your father in business? A. Yes, sir, he is a saloon-keeper, and he keeps between there

Q. Are you around this neighborhood much, Monmouth and First Streets? A. No, sir.

Q. On Saturday afternoons, down town in Jersey City, there are more children on the street than there are other times?

Mr. Mulvaney: I object to that unless it be shown that there are more children around down town there and at that particular corner to the knowledge of this driver and of this defendant.

Question withdrawn.

Q. Where were you on First street when you saw this woman first? A. In the wagon.

Q. Where was the wagon on First street when

you first saw this woman? A. Just crossing First street.

Q. And you say you saw her about ten feet away? A. He did anyhow; he kept on hollering. I says, "What is the matter?" He says "Do you see the lady?" And I kept on whistling and whistling.

Q. Then he saw her before you did? A. Yes, sir.

Q. How far away from the wagon was she when you first saw her? A. I don't know, I couldn't really tell.

Q. How far do you think she was, as far as from here to that table? A. I don't know how far.

Q. Do you think she was as far as as from here to that table from you? A. Yes, sir.

Q. Do you think she was any further than that? A. I don't think so.

Q. You say that the accident happened about in the middle of the block; about how long is the block there, do you know? A. I don't think it is any different from any other block.

Q. You say she— (interrupted). A. Ran into the wagon, that is what I said.

Q. You say that when she was picked up she was on the right hand side of the wagon? A. Yes, sir.

Q. That is, the uptown side, and near the tail of the horse? A. Yes, sir.

Q. Then the horse had driven by her, your friend Waedner had driven the horse by her? A. No, sir; one side.

Q. Did the horse stop just as it got to her? A. Yes, sir. She ran right in it, she must have slipped on something like that (illustrating) and she fell right in it, in the shaft.

Q. And she fell and slipped she slid down Monmouth street toward the tail of the horse? A. Yes, sir.

Q. And you didn't see her slip, did you? A. Yes, sir.

Q. Which way did she slip? A. She slipped towards the right hand of the shaft.

Q. Did she slip forward or did she slip back? A. Slipped right forward and her eye hit the shaft. She was facing up.

Q. And was on the right hand side? A. She was on the left when she went to walk over; she slipped and the shaft caught her and she rolled right off the other side; he picked her up and I ran over there and she said it was her own fault.

Q. That was right there at the wagon, was it? A. On the street she said it was her own fault.

Q. How far away from the wagon? A. She was on the sidewalk, we were in the middle of the block.

Q. She was over on the sidewalk then when she said it? A. Yes, sir.

Q. Where were you? A. I was on the wagon, I jumped off; I had to jump off, didn't I?

Defendant Rests.

JOHN H. DOLAN, recalled as a witness, on behalf of the plaintiff, testified as follows:

DIRECT EXAMINATION BY MR. CRUSE:

Q. Did you ever say to Gus Waeder, the driver, that he had better leave town?

Objected to.

A. Never.

Mr. Mulvaney: He has already testified to that, it is improper rebuttal.

The Court: That is right, he did say that.

Q. Did you ever say to Gus Waeder, the driver, the he would better come in there and give you some money every once in a while to pay the doctor's bill?

Mr. Mulvaney: I object; there is no testimony in the case to that effect.

The Court: The question may be answered.

A. No, I never said anything of the kind to him.
Q. Did you ever say anything to him about the doctor's bill excepting the two dollars? A. That is all I ever said to him.

Plaintiff Rests.

Proofs Closed.

Mr. Mulvaney: I ask a direction of a verdict because it appears here by the clear weight of the evidence of disinterested witnesses that this accident, if it happened at all, happened in the middle of the block, when the duty was upon the plaintiff to look out for approaching wagons, and where no duty at all was placed upon us except to proceed along there at a lawful speed.

The Court: Wasn't there any duty on you either, to look out for the plaintiff at all?

Mr. Mulvaney: No, sir; we were proceeding along that street in the middle of the block. If we were going at a lawful rate of speed we were entitled to proceed along there and the duty was upon her to look out for us.

And also, upon the further ground that the clear weight of the evidence here shows that the plaintiff herself was guilty of negligence and that the accident wouldn't have happened without her negligence.

Motion denied.

To which ruling the defendant prays that

an exception may be allowed, and it is allowed and signed and sealed accordingly.
(Signed) C. W. PARKER J. (Seal.)

Mr. Mulvaney then summed up the case to the jury on behalf of the defendant.

Mr. Cruse summed up for the plaintiff.

Recess.

REQUESTS TO CHARGE.

COUNSEL FOR DEFENDANT REQUESTS THE COURT TO CHARGE THE JURY AS FOLLOWS:

1. The plaintiff must establish by a preponderance of evidence that defendant had failed to use the degree of care that a reasonable person would under the circumstances.

2. If it appeared to the plaintiff that the driver of the wagon was not going to respect what she thought were her rights to cross the street first she should have waited.

3. If the accident was caused by the covered van obscurring the driver's view no negligence can be found in defendant.

4. The duty was upon the plaintiff before crossing the street to use her powers of observation to observe approaching vehicles which are within a distance if run at lawful speed, to put her in danger.

5. If plaintiff saw the wagon coming and took thec hance of crossing before it, she cannot recover if injured.

6. If plaintiff could have averted the injury by

not attempting to cross in front she contributed to the injury which she received, and cannot recover.

7. Where the proof does not show negligence in either party the plaintiff cannont be permitted to recover.

Afternoon Session.

CHARGE TO THE JURY.

(The Court then charged the jury as follows): Gentlemen of the Jury:—

The plaintiff Mrs. Burns, seems to have been quite severely injured by coming in contact with a horse, or the shaft of a wagon belonging to the defendant, Mr. Eckert, and being driven by a man employed by him, on one of the public streets of Jersey City. The plaintiff's claim damages to a large amount and in order to establish their right to damages, it is necessary for them to prove in the instance that there was some negligence on the part of the driver of this wagon causing the injury. Mr. Eckert, as the employer, would be held by the law responsible, for any negligence of the driver whileu occupied in the employer's business of driving the wagon, and the first question that must be taken up by you for your consideration, in dealing with this case, is whether these plaintiffs —for there are two of them, husband and wife— have satisfied you by the preponderance of evidence, that the injury was due to negligence on the part of this driver. The word negligence is a term generally used to indicate some failure of duty, some failure in performing a legal duty, and may properly be so considered in this case, and therefore when we talk of negligence we have to ask, what the legal duty of this driver was in order to ascertain whether that legal duty was vio-

lated or the driver failed in it.

There is a great deal of controversy as to the circumstances under which the accident occurred, the plaintiffs' case as you will remember, basing it upon the claim that it occurred at a street crossing at the southerly crossing of Monmouth street and First street. The claim on the part of the defence is that the collision did not occur there, but that it occurred about half a block farther south, and not on the street crossing at all. And it will make a considerable difference in determining whether or not the defendant was liable in this case, whether you find that the accident did occur at a crossing or whether it occurred at the place where the defendant's witnesses locate it.

Speaking generally, the duty of this driver in driving along Monmouth street, and the duty of the plaintiff in crossing Monmouth street, was to exercise reasonable care, but the phrase reasonable care is a very broad phrase, and the amount of care which should be considered reasonable or unreasonable under a given set of circumstances depends to a very large extent on what those circumstances were, so that what would be reasonable care under one set of circumstances would not be reasonable care under another set of circumstances and the law says that in a case where the question of reasonable care is fairly brought into issue it becomes the province, not of the court, but of the jury to ascertain whether or not reasonable care was exercised, or whether there was a failure to exercise it.

If it should appear upon the plaintiff's case that there was no proof tending to disprove the presumption of reasonable care which exists in every such case in favor of the defendant, it would then be the duty of the Court to direct a non-suit. Or if it appeared at the close of the plaintiffs' case

that the evidence, uncontradicted, showed that Mrs. Burns herself was lacking in reasonable care, then it would be also the duty of the court to direct a non-suit, even if the evidence tended to show a lack of care on the part of the defendant. But where an issue is raised, where the evidence is contradictory on these points, the law takes it out of the power of the Court to decide which of the two contradictory theories is the correct one, and gives it to the jury to decide. And it is for that reason that the court in this case, considering that there was a contradiction on both of these points, declined to non-suit the plaintiff.

Now, that refusal of the court to non-suit, or to direct a verdict is in no sense any adjudication or an expression of any opinion on the part of the Court that the plaintiff is entitled to recover, but simply indicates that in the opinion of the Court some disputed question of fact on those points, must be settled by the jury.

Now, I have said that the plaintiff must establish in the first instance by weight of evidence, that there was a lack of reasonable care on the part of the driver; that the defendant's driver had failed to use the degree of care that a reasonable person would under the circumstances. (In the language of one of the defendant's requests to charge). This rule you must apply to whichever set of facts you consider to be the correct one in the case, the occurrence of the accident at the crosswalk or the occurrence of the accident in the middle of the block.

Of course, the first thing for you to do upon retiring from the court room is to ascertain which of these localities was the right one. It is one or the other and if the Court could be advised by you which locality was the correct one, then this charge could be somewhat shortened; but of course you might find, upon the evidence, and would be

entitled to find either one of them so the Court has to deal with both.

Now, to refer to the crossing. You will remember Mrs. Burns' claim was that she was crossing at the southerly crossing and that she looked up Monmouth street as she was about to step down from the sidewalk into the street, or some such time as that—I don't remember exactly what she said on that subject, but you will, and she saw nothing approaching, nothing within sight. She then started across and about that time this large furniture van, or whatever it may have been, came down First street in the opposite direction, so that it would be between her and anything approaching from the north, and that as she stepped out from behind this furniture van she suddenly and for the first time saw the defendant's wagon and horse bearing down on her at a high rate of speed, the driver not looking, according to her testimony, in the direction that he was driving,but having his fact turned up First street towards the hill; and that she then gave a scream or a shout and attempted to jump for the sidewalk from which she was only a few feet away, but did not have time and was run down. If you take that as being the state of facts, if you take these as being the conditions under which she was injured, the precise rules to be applied vary somewhat from those which would apply in the other case. For example, the law under those circumstances would not call for as great care on the part of the foot passenger crossing at this crosswalk as in the case of a foot passenger crossing the open street in the middle of a block and correspondingly, the law calls for a greater care on the part of the driver of a wagon driving down the street where he will be crossing a crosswalk than if he were in the middle of the block between two crosswalks, because we all understand that the crosswalk is the regular

and ordinary, and we may say specially appropriated place for foot passengers to cross the street, and while they are legally entitled to cross the street at any point whatever the fact that these crosswalks are there especially placed for their use, and known to all requires a greater exercise of care on the part of the drivers of wagons and other vehicles passing through the streets at such point, because the driver must be held to assume that there is a greater likelihood of foot passengers being on the crosswalk, than of a foot passenger crossing at some other place, and so he ought to exercise greater vigilance there than elsewhere, and the foot passenger is entitled therefore to assum that the drivers will exercise greater vigilance and in some measure the amount of care required of them is decreased.

Taking up now this question whether the plaintiff has satisfied you that the driver failed to use the degree of care that a reasonable person would under the circumstances, you have these claims of the plaintiff based upon certain statements in the evidence:

First, that this driver was driving at a high rate of speed over this crossing. Second, that he was not looking where he was going.

Now, the mere fact that he was driving at a high rate of speed, or the mere fact that he didn't happen to be looking at that particular juncture in the direction that he was travelling in, if these be facts, does not establish negligence on the part of the driver, but those two circumstances, from which, with the other evidence in the case, a jury would be entitled in its best judgment to say that there was negligence on the part of the driver. And that is the question before the jury, whether these circumstances, taken in connection with the other evidence, the other circumstances that existed, satisfy the mind of the jury that this

driver was driving in a negligent manner. So much for the claim of the defendant's negligence there.

Now let us take the other situation.

The defendant's claim is that it was in the middle of the block, and the driver himself says that he saw this woman undertaking to cross the street just after he had passed the crossing of First Street, and that he shouted to her, and that the boy shouted to her, and that they shouted several times, and whistled, and that notwithstanding that, notwithstanding the fact apparently that there was a street entirely unobstructed excepting for the presence of the furniture van a little further down, that the driver had undertaken to avoid and gotten into the middle of the street for that purpose, a solitary wagon, driven by this defendant's driver, and a silitary individual, consisting of Mrs. Burns, came together in the middle of a public street.

Now that is somewhat peculiar perhaps that such a thing should have happened. If the driver saw Mrs. Burns of course it was his duty to use reasonable care to avoid running into her. I am not speaking of Mrs. Burns' duty now, because we will come to that later, but we are speaking of the driver's duty and, if he saw her as far off as he says he did, the question arises, how it happened that he came to run into her in the middle of a street where there was plenty of room, and I have no hesitation in saying to you that if you find those could have been the circumstances, then so far as the question of the driver's negligence is concerned, you are entitled to say as a jury, whether or not under those circumstances the plaintiff has satisfied you that the driver failed in that reasonable care which the law required of him.

Now whichever be the situation in this case, unless the plaintiffs have satisfied you that the

driver was lacking in reasonable care, your verdict would be for the defendant. But if the plaintiffs have satisfied you, by a preponderance of evidence, that there was a failure on the part of this driver in that regard, then your next duty is to take up this further question, whether, notwithstanding that failure of duty, the defendant has satisfied you that Mrs. Burns, herself, failed to exercise that care which the law required of her. Because, if both parties to an accident are negligent, then neither can recover under our law, if the negligence of each is a material factor in causing the accident. Our law says, that no matter if this defendant's driver were negligent, still, if Mrs. Burns failed to exerise that prudence which the law required of her, and by reason of that failure she was hit, when, if she had exercised that prudence, she would not have been struck she cannot recover.

You must therefore examine into Mrs. Burns' conduct and say what she ought to have done under the circumstances.

Now, Mrs. Burns was about to cross a public street. She was held to a knowledge that the street was open to the use of wagons and other vehicles; that these were of course of greater or less light, travelling at varying speed, and that if she came into collision with them she was liable to be hurt. The law says it was her duty before crossing the street to use her powers of observation to observe approaching vehicles which were within a distance, if run at lawful speed, to put her in danger. That is the language of one of our leading cases. So it was her duty, let us say, at the crosswalk to use her powers of observation, her eyes and her ears, to look up and down the street and see whether there was any chance of her being run down by anything, which, travelling at a lawful speed, was within such a distance as to endanger her safety.

Now, she says that she didn't see any wagon ex-

cept the furniture van. And therefore one of the questions that must be dealt with by you is whether the evidence shows that at the time this plaintiff started to cross the street that butcher wagon was within such a distance as to me dangerous to the plaintiff if travelling at a lawful rate of speed, for if it was, and she failed to use her powers of observation to discover it, and thereby failed to discover it, she would be held to the same accountability as if she had discovered it, because we cannot blind ourselves to outward facts and then try to hold somebody responsible because we have failed to observe them. And so, if this wagon was in such a position as that, moving towards her, was within such a distance that she ought to have seen it, and to have provided against it in the exercise of reasonable care on her part, then, if she failed in her legal duty, and the accident resulted wholly or in material part by such failure, she would be guilty of what the law calls contributory negligence, and would not be entitled to recover in this case.

Now, that same rule applies to either situation, whether she was on the crosswalk or whether she was crossing in the middle of the block, but as I have told you before, the same degree of care does not necessarily apply to a crossing on a crosswalk, as to the other case, because she would be entitled to assume, as I have also said, that the driver of this wagon or of any other wagon, would exercise greater care on his part in approaching the crosswalk.

There is another point too, on which the defendant requests me to charge, and which may possibly appear in the case, as a situation, and that is, that if it appeared to the plaintiff Mrs. Burns, that the driver of the wagon was not going to respect her rights to cross the street first, she ought to have waited. I don't know whether the evidence shows that she was in such a position as that, but the

statement means this, that if under the circumstances Mrs. Burns had the right of way ahead of the butcher wagon and notwithstanding that she saw that the butcher wagon was going to run her down, and by the exercise of reasonable prudence could escape being run down, of course it would be her duty to escape and let the butcher wagon go by.

She couldn't rush blindly into danger just because she thought she had the right of way. And so, if the wagon was in a position and going at a speed which indicated that there was danger to her and she sa wit, and took a chance of getting across first, she would be guilty of contributory negligence and your verdict should be for the defendant.

On the other hand, there is this very important rule to be observed, and that is, that if Mrs. Burns, without fault on her part, and through the negligence of this driver, found herself in a position of immediate danger, where it was necessary for her to make an immediate and instant decision to go one way or the other in order to escape, and if she happened to make under those circumstances the wrong decision and to have gone the wrong way, she would not be guilty in that case of contributory negligence but merely of an error of judgment for which the law would not hold her responsible.

Of coures, if the proof doesn't show negligence in either party, then the occurrence was necessarily a pure accident, and the plaintiff could not recover for that. Now if you find on the whole case that the plaintiff has shown you that there was negligence on the part of this driver which caused the accident, and that the defendant has failed to satisfy you that there was any contributory negligence on the part of Mrs. Burns, then and only in that case would it be your duty to return a verdict in favor of these plaintiffs. And

in that case it is proper to say that this trial is the trial of what we call two actions rolled into one, the law in that case giving Mrs. Burns the right to sue for her own injury and giving to Mr. Burns the right to join in the same suit any claim he may have for damages resulting to himself by reason of the accident. Such damage for example would be the doctor's bill, for which he, as the husband of Mrs. Burns, would be liable. I mention that, not because you would be entitled to find any damages in this case, but I mean as giving simply a sample of the character of claim peculiar to Mr. Burns. There is no proof as to the doctor's bill, we will come to that later.

If there is a recovery in this case, your duty will be to find a double verdict, one sum, the damages of Mrs. Burns for her own injuries, and a separate sum, naming them both, in favor of Mr. Burns, for whatever his loss may be, caused by the accident.

As to Mrs. Burns, as you see, she has been more or less severely injured. She has lost an eye, she broke her collar bone, she sustained a fracture of some of the bones of the skull near the eye. The accident seems to have been a peculiarly unfortunate one in respect to the permanent loss of one eye. Now, she is entitled to recover for whatever pain and suffering she experienced and for the permanent disfigurement involved in the loss of the eye and in the present position of the broken bones. She is not entitled to recover for any prospective loss of the other eye, from the evidence in this case because the uncontradicted evidence of Dr. Sauer, her own physician, is that, while there is a chance not to say a probability, that that the other eye will be affected, and possibly the eye-sight of the other eye be lost, if she remains in the same condition as to the injured eye that she is in now, he does say and says positively, that if the injured eye should be now removed there would be practically no chance of any injury. Now, it is the duty

of a person injured to take all reasonable means for the recovery of health, and for the treatment of the physical injury, and there is nothing to show that there is anything unreasonable about submitting to an operation and having this injured eye removed, and therefore the defendant could not be chargeable, in case Mrs. Burns refuses as apparently she refused up to this time, to take that operation.

There is some claim also that the right arm is still somewhat affected. Whatever the evidence shows in the nature of permanent disability you are entitled to allow for, and on all these matters the award should be by way of making Mrs. Burns whole so far as money can make her whole for the injury that she has sustained, awarding reasonable compensation for those injuries that would be one verdict.

The other verdict to Mr. Burns should compensate him for the loss of his wife's society, as the law puts it. Mrs. Burns said and he says that she is not able to do nearly as much household work as she was. She is less efficient as his helpmate, and that is the basis of his claim for recovery. Now you must take the evidence on that subject and ascertain what sum of money will reasonably pay him for the injury to himself due to the fact that Mrs. Burns is less able to attend to her family duties than she was before. You must of course consider his age, the reasonable probability of life on his part, and also on her part in dealing with that question.

(The jury then retired to consider of their verdict.)

Defendant Prays Exception.

BILL OF EXCEPTIONS.

HUDSON COUNTY CIRCUIT COURT.

SARAH BURNS and Husband, Plffs. (Defts. in Error), vs. RICHARD ECKERT, Deft. (Plff. in Error).	In Tort. Bill of Exceptions.

And the said defendant, by his attorney, comes now here into Court and prays the following bill of exceptions:

(Exceptions as to (1) Nonsuit and (2) Direction of Verdict, are in their proper places ante.)

(3)

Because the Court refused to charge the jury, as 3rdly requested by defendant's attorney, as follows:

"If the accident was caused by the covered van obscuring the driver's view, no negligence can be found in defendant:

To which refusal the defendant prays that an exception may be allowed and it is allowed and signed and sealed accordingly.
(Signed) C. W. PARKER J. (Seal.)

(4)

Because the Court refused to charge as 1stly requested by defendant's attorney, as follows:

"The plaintiff must establish by a preponderance of evidence, that the defendant had failed to use the degree of care that a reasonable person would, under thec ircumstances."

To which refusal the defendant prays that an exception may be allowed, and it is allowed and signed and sealed accordingly.
(Signed) C. W. PARKER J. (Seal.)

(5)

Because the Court refused to charge the jury as 2ndly requested by defendant's attorney, as follows:

"If it appeared to the plaintiff that the driver of the wagon was not going to respect what she thought were her rights to cross the street first, she should have waited."

To which refusal the defendant prays that an exception may be allowed, and it is allowed and signed and sealed accordingly.
(Signed) C. W. PARKER J. (Seal.)

(6)

The defendant prays an exception to the court's charge (as a modification of the fourth request of defendant's counsel), viz:

"If this wagon was in such a position as that, moving towards her, was within such a distance that she ought to have seen it, and tohave provided against it in the exercise of reasonable care on her part then, if she failed in her legal duty, and the accident resulted wholly or in material part by such failure, she would be guilty of what the law calls contributory negligence and would not be entitled to recover in this case."

Which exception is allowed and signed and sealed accordingly.
(Signed) C. W. PARKER J. (Seal.)

(7)

Because he Court refused to charge the jury as (5thly) requested by defendant's attorney, as follows:

"If plaintiff saw the wagon coming, and took the chance of crossing before it, she cannot recover if injured."

to which refusal the defendant prays that an exception may be allowed, and it is allowed and signed and seale accordingly.

(Signed) C. W. PARKER J. (Seal.)

(8)

Because he Court refused to charge the jury as 6thly requested by defendant's attorney, as follows:

"If plaintiff could have averted the injury by not attempting to cross in front, she contributed to the injury which she received, and cannot recover."

To which refusal the defendant prays that an exception may be allowed, and it is allowed, and signed and sealed accordingly.

(Signed) C. W. PARKER, J. (Seal.)

ORDER DENYING MOTION TO DISMISS WRIT OF ERROR.

NEW JERSEY SUPREME COURT.

SARAH BURNS and Husband,

vs.

RICHARD ECKERT,

Tort.
On Error.

Upon motion of Howard Cruse, attorney of plaintiffs below, defendants in error, made before said Court, at the State House, Trenton, on Tuesday the 21st day of February, 1905, to dismiss the Writ of Error sued out by defendant in said cause, because of the non-prosecution of said Writ of Error.

It is ordered on this 21st day of February, 1905, that said motion be denied, and that said cause be placed on the list of causes in said Supreme Court for this February Term, 1905, on condition that defendant below, Plaintiff in Error, have the "case" in said cause, including the Assignment of Errors, printed and serve the same on Plaintiffs' Attorney on or before the 4th day of March, 1905; and that Plaintiff in Error have his brief "in" before said Supreme Court within thirty days from this date—else Plaintiffs below may enter a rule dismissing said Writ of Error without further motion for such dismissal.

Order granted in Open Court, the 21st day of February, 1905.

JONATHAN DIXON,
Presiding Justice.

Entered February 23, 1905, on motion of
THOS. F. NOONAN,
Att'y and Counsel for Plaintiff in Error.

ASSIGNMENTS OF ERRORS.

NEW JERSEY SUPREME COURT.

SARAH BURNS and Husband,
Plffs. (Defts. in Error),
vs.
RICHARD ECKERT,
Deft. (Plff. in Error).

In Error.
Assignments of Error.

Afterwards to wit:—On the twenty-first day of February, nineteen hundred and five, in this same term before the said New Jersey Supreme Court, at Trenton, comes the said Richard Eckert, by Thos. F. Noonan, and John J. Mulvaney, his attorneys, and says that in the record and proceedings aforesaid, and also in giving judgment aforesaid, there is manifest error in this, to wit:

(A)

That by the record aforesaid, it appears that the said judgment in form aforesaid was for the said Sarah Burns and husband against the said Richard Eckert, whereas by the law of the land, judgment ought to have been given for the said Richard Eckert, and against the said Sarah Burns and husband.

(1)

There is also manifest error in this, to wit, that the said Hudson County Circuit Court refused the motion of the said Richard Eckert, at the close of the evidence presented by the plaintiffs, to non-suit the said plaintiffs, on the ground that no lack of care has been shown on the part of the defendant or his employee; that there is no proof that the defendant was guilty of negligence; that

the plaintiff, by her acts, contributed to the injury of which she complains.

(2)

There is also manifest error in this, to wit, because the said Circuit Court refused the motion of the said defendant below, at the close of all the evidence in the case, to direct a verdict in favor of the defendant against the plaintiffs, on the ground that it appeared by the clear weight of evidence that this accident happened in the middle of the block, that the duty was upon the plaintiff to look out for approaching wagons, and where no duty was placed upon the defendant except to proceed along there at lawful speed; also because the clear weight of evidence shows that the plaintiff herself was guilty of negligence and that the accident would not have happened without her negligence.

(3)

There is also manifest error in this, to wit, Because the Court refused to charge the jury, as per defendant's 3rd request to charge, as follows: "If the accident was caused by the covered van obscuring the driver's view, no negligence can be found in defendant."

(4)

There is also manifest error in this, to wit, Because the Court refused to charge the jury as per defendant's 1st request to charge, as follows: "The plaintiff must establish, by a preponderance of evidence, that the defendant had failed to use the degree of care that a reasonable person would under the circumstances."

(4A)

There is also manifest error in this, to wit: The Court's charge (as a modification of said defend-

ant's 1st request), viz: "The plaintiff must establish, in the first instance, by weight of evidence, that there was a lack of reasonable care on the part of the driver, that the defendant's driver had failed to use the degree that a reasonable person would under the circumstances.

(5)

There is also manifest error in this, to wit: Because the Court refused to charge the jury, as per defendant's 2nd request, as follows: "If it appeared to the plaintiff that the driver of the wagon was not going to respect what she thought were her rights to cross the street first, she should have waited."

(5A)

There is also manifest error in this, to wit: (the Court's charge as a modification of said defendant's 2nd request), viz: "if under the circumstances, Mrs. Burns had the right of way ahead of the butcher wagon, and notwithstanding this, she saw that the butcher wagon was going to run her down, and by the exercise of reasonable prudence could escape being run down, of course it would be her duty to escape and let the butcher wagon go by. She could not rush blindly into danger, just because she thought she had the right of way. And so, if the wagon was in a position and going at a speed which indicated that there was danger to her, and she saw it, and took a chance of getting across first, she would be guilty of contributory negligence, and your verdict should be for the defendant."

(6)

There is also manifest error in this, to wit: (The Court's charge, as a modification of the defendant's fourth request), viz: "If this wagon was in such a position as that, moving towards her,

was within such a distance that she ought to have seen it, and to have provided against it in the exercise of reasonable care on her part, then, if she failed in her legal duty, and the accident resulted wholly or in material part by such failure, she would be guilty of what the law calls contributory negligence and would not be entitled to recover in this case."

(7)

There is also manifest error in this, to wit: Because the Court refused to charge the jury as per defendant's 5th request, as follows: "If plaintiff saw the wagon coming and took the chance of crossing before it, she cannot recover if injured."

(8)

There is also manifest error in this, to wit: Because the Court refused to charge the jury as per defendant's 6th request as follows: "If plaintiff could have averted the injury by not attempting to cross in front, she contributed to the injury which she received, and cannot recover."

(9)

There is also manifest error in this, to wit: (the Court's charge as a modification of defendant's 5th and 6th requests, viz: "If under the circumstances Mrs. Burns had the right of way ahead of the butcher wagon, and notwithstanding that, she saw that the butcher wagon was going to run her down, and by the exercise of reasonable prudence could escape being run down, of course it would be her duty to escape and let the butcher wagon go by. She could not rush blindly into danger just because she thought she had the right of way. And so, if the wagon was in a position and going at a speed, which indicated that there was danger to her, and she saw it, and took a chance of getting across first she would be guilty of contributory

negligence and your verdict should be for the defendant."

(10)

And there is also manifest error in this, to wit: (the Court's charge as a modification of defendant's 1st and 6th requests), viz: "Now, if you find on the whole case, that the plaintiff has shown you that there was negligence on the part of this driver which caused the accident, and that the defendant has failed to satisfy you that there was any contributory negligence on the part of Mrs. Burns, then, and only in that case would it be your duty to return a verdict in favor of these plaintiffs."

THEREFORE, the said Richard Eckert prays the judgment of the said Circuit Court of the County of Hudson aforesaid, by reason of the aforesaid errors, may be reversed, annulled and for nothing holden, and that the said Richard Eckert may be restored to all things which he has lost on the occasion of the said judgment, etc.

JOHN J. MULVANEY,
Att'y. for Deft. (Plff. in Error).

THOMAS F. NOONAN,
Of Counsel for Deft. (Plff. in Error).

Common Joinder in Error, filed.

H. R. CRUSE,
Att'y. of Plffs. (Defts. in Error).

OPINION PER CURIAM:
NEW JERSEY SUPREME COURT.

SARAH BURNS and HUSBAND, vs. RICHARD ECKERT.	Error to Hudson Circuit Court.

For Plaintiff in Error, Thomas F. Noonan.

For Defendants in Error, Howard R. Cruse.

Argued at February Term 1905, before Gummere, C. J., and Justices Fort, Garretson and Pitney.

Per Curiam:

We find no error either in the refusal to nonsuit, or in the refusal to direct a verdict, for the defendant.

The defendant's requests to charge were sufficiently charged, so far as they accorded with the rules which they invoked; and the charge, as delivered, contained no injurious error.

The judgment under review should be affirmed.

JUDGMENT ON AFFIRMANCE ENTERED.

WRIT OF ERROR.

New Jersey, ss.:

(Seal) The State of New Jersey to the Chief Justice and other Justices of our Supreme Court of Judicature, Greeting:

Forasmuch as in the record and proceedings,

and also in the giving of judgment in a certain plaint, which was in our said Supreme Court of Judicature, before you, between Sarah Burns and John Burns, her husband, plaintiffs, and Richard Eckert, defendant, in an action of Tort, manifest error hath intervened, to the great damage of said defendant, as it is said, we be willing that the error, if any there be, should, in due manner, be corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, that if judgment be thereupon given and affirmed, then you distinctly and openly send, under your seal, the record and proceedings aforesaid, with all things touching the same, to our Judges of our Court of Errors and Appeals in the last resort in all causes, at Trenton, on the eighth day of May next, together with this writ, that the record and proceedings aforesaid being inspected, we may cause to be further done thereupon, for correcting that error, what of right, and, according to the law and custom of the State of New Jersey, ought to be done.

Witness, our Chancellor and President Judge of our said Court of Errors and Appeals, at Trenton aforesaid, the nineteenth day of April A. D. Nineteen hundred and six.

S. D. DICKINSON,
Clerk.

THOMAS F. NOONAN,
Attorney.

(Endorsement)—New Jersey Court of Errors and Appeals—Sarah Burns and John Burns, her husband, Plaintiffs, vs. Richard Eckert, Defendant.—WRIT OF ERROR.—Thos. F. Noonan, Atty. for Deft., 586 Newark Ave. Jersey City, N. J.

STIPULATION.

NEW JERSEY COURT OF ERRORS AND APPEALS.

SARAH BURNS, and JOHN BURNS, her husband, Defendants in Error, vs. RICHARD ECKERT. Plaintiff in Error.	In Tort. On Error. Stipulation.

It is hereby stipulated and agreed by and between Thomas F. Noonan, Attorney for Plaintiff in Error, and Howard R. Cruse, Attorney for Defendants in Error, that the said Thomas F. Noonan will notice the argument of the above cause in the next June Term of said Court; and that the said Howard R. Cruse will accept as in proper time, five days before said Term, the said notice of argument, and one printed book as sufficient, also the assigning, filing and serving of Errors as sufficient at said time: provided—if Attorney for Plaintiff in Error cannot be present when said cause is reached for argument in said Court at its June Term, then said cause shall be postponed until the following Term of said Court, unless said parties agree to submit said cause on briefs.

HOWARD R. CRUSE,
Attorney for Deft. in Error.

THOS. F. NOONAN,
Attorney for Plaintiff in Error.

Dated May 25, 1906.

Filed June 7, 1906.

NEW JERSEY COURT OF ERRORS AND APPEALS.

SARAH BURNS and HUSBAND, Plffs. (Defts. in Error), vs. RICHARD ECKERT. Deft. (Plff. in Error.)	In Error. Assignments of Error.

Afterwards to wit: On the first day of June, nineteen hundred and six, in this term before the said New Jersey Court of Errors and Appeals, at Trenton, comes the said Richard Eckert, by Thos. F. Noonan, his attorney, and says that in the record and proceedings aforesaid, and also in giving judgment aforesaid, there is manifest error in this, to wit:

(A)

That by the record aforesaid, it appears that the said judgment in form aforesaid was for the said Sarah Burns and husband against the said Richard Eckert, whereas by the law of the land, judgment ought to have been given for the said Richard Eckert, and against the said Sarah Burns and husband.

(1)

There is also manifest error in this, to wit, that the said Hudson County Circuit Court refused the motion of the said Richard Eckert, at the close of the eveidence presented by the plaintiffs, to nonsuit the said plaintiffs, on the ground that no lack of care has been shown on the part of the defendant or his employee; that there is no proof that the defendant was guilty of negligence; that the plain-

tiff by her acts, contributed to the injury of which she complains.

(2)

There is also manifest error in this, to wit, because the said Circuit Court refused the motion of the said defendant below, at the close of all the evidence in the case, to direct a verdict in favor of the defendant against the plaintiffs, on the ground that it appeared by the clear weight of evidence that this accident happened in the middle of the block, that the duty was upon the plaintiff to look out for approaching wagons, and where no duty was placed upon the defendant except to proceed along there at lawful speed; also because the clear weight of evidence shows that the plaintiff herself was guilty of negligence and that the accident would not have happened without her negligence.

(3)

There is also manifest error in this, to wit, Because the Court refused to charge the jury, as per defendant's 3rd request to charge, as follows: "If the accident was caused by the covered van obscuring the driver's view. no negligence can be found in the Defendant."

(5)

There is also manifest error in this, to wit, Because the Court refused to charge the jury as per defendant's 1st request to charge, as follows: "The plaintiff must establish, by a preponderance of evidence, that the defendant had failed to use the degree of care that a reasonable person would under the circumstances."

(4A)

There is also manifest error in this, to wit: The Court's charge (as a modification of said defendant's 1st request) viz: "The plaintiff must estab-

lish, in the first instance, by weight of evidence, that there was a lack of reasonable care on the part of the driver, that the defendant's driver had failed to use the degree that a reasonable person would under the circumstances."

(5)

There is also manifest error in this, to wit: Because the Court refused to charge the jury, as per defendant's 2nd request, as follows: "If it appeared to the plaintiff that the driver of the wagon was not going to respect what she thought were her rights to cross the street first, she should have waited."

(5A)

There is also manifest error in this, to wit: (the Court's charge as a modification of said defendant's 2nd request), viz: "If under the circumstances, Mrs. Burns had the right of way ahead of the butcher wagon, and notwithstanding this, she saw that the butcher wagon was going to run her down, and by the exercise of reasonable prudence could escape being run down, of course it would be her duty to escape and let the butcher wagon go by. She could not rush blindly into danger, just because she thought she had the right of way. And so, if the wagon was in a position and going at a speed which indicated that there was danger to her, and she saw it and took a chance of getting across first, she would be guilty of contributory negligence, and your verdict should be for the defendant."

(6)

There is also manifest error in this, to wit: (The Court's charge, as a modification of the defendands fourth request), viz: "If this wagon was in such a position as that, moving towards her, was within such a distance that she ought to have seen

it, and to have provided against it in the exercise of reasonable care on her part, then, if she failed in her legal duty, and the accident resulted wholly or in material part by such failure, she would be guilty of what the law calls contributory negligence and would not be entitled to recover in this case."

(7)

There is also manifest error in this, to wit: Because the Court refused to charge the jury as per defendant's 5th request as follows: "If plaintiff saw the wagon coming and took the chance of crossing before it, she cannot recover if injured."

(8)

There is also manifest error in this to wit: Because the Court refused to charge the jury as per defendant's 6th request as follows: "If plaintiff could have averted the injury by not attempting to cross in front, she contributed to the injury which she received, and cannot recover."

(9)

There is also manifest error in this, to wit: (The Court's charge as a modification of defendant's 5th and 6th requests) viz. "If under the circumstances Mrs. Burns had the right of way ahead of the butcher wagon, and notwithstanding that, she saw that the butcher wagon was going to run her down, and by the exercise of reasonable prudence could escape being run down, of course it would be her duty to escape and let the butcher wagon go by. She could not rush blindly into danger just because she thought she had the right of way. And so, if the wagon was in a position and going at a speed, which indicated that there was danger to her, and she saw it, and took a chance of getting across first she would be guilty of contributory negligence and your verdict should be for the defendant."

(10)

And there is also manifest error in this, to wit: (The Court's charge as a modification of defendant's 1st and 6th requests), viz: "Now, if you find on the whole case, that the plaintiff has shown you that there was negligence on the part of this driver which caused the accident, and that the defendant has failed to satisfy you that there was any contributory negligence on the part of Mrs. Burns, then, and only in that case would it be your duty to return a verdict in favor of these plaintiffs."

(11)

There is also manifest error in this, to wit: That the said New Jersey Supreme Court did not reverse the said Hudson County Circuit Court, in the latter's refusal to non-suit the plaintiffs, on the ground set out in the above assignment of error No. 1.

(12)

There is also manifest error in this, to wit: That the said New Jersey Supreme Court did not reverse the said Hudson County Circuit Court in the latter's refusal to direct a verdict in favor of the defendant, against the plaintiffs, on the ground set out in the above assignment of error No. 2.

(13)

There is also manifest error in this, to wit: That the said Supreme Court did not reverse the said Hudson County Circuit Court, in the latter's refusal to charge, as set out in above assignments of error Nos. 3, 4, 5, 7 and 8.

(14)

There is also manifest error in this, to wit: That the said Supreme Court did not reverse the said Hudson County Circuit Court Judge's charge to

the jury, as set out in the above assignments of error Nos. 4-A, 5-A, 6, 9, 10.

(15)

There is also manifest error in this, to wit: That the judgment of the said Supreme Court was given for the said plaintiffs, against the said defendant, whereas by the law of the land, judgment ought to have been given by said Court for the said defendant, against the said plaintiffs.

Wherefore, the said Richard Eckert prays that the judgment aforesaid of the said Circuit Court, and of the said Supreme Court, by reason of the errors aforesaid may be reversed, annulled, and for nothing holden; and that the said Richard Eckert might be restored to all things which he has lost by the occasion of said judgment, etc.

THOS, F. NOONAN,
Atty. & of Counsel for Deft.
(Plff. in Error).

(Endorsement)—Original filed June 7, 1906—Due and legal service hereof acknowledged this 7th day of June, 1906. (Sd.) Howard R. Cruse, Atty. Plffs. (Ds. in E.)

COMMON JOINDER IN ERROR.

HOWARD R. CRUSE,
Atty, &c.